

TOWNSHIP OF OCEAN
PLANNING BOARD
REGULAR MEETING
March 5, 2009

Meeting began at 7:30 PM

The meeting of the Ocean Township Planning Board was held on the above date and time; Chairman Anepete presided and called the meeting to order.

Pledge of Allegiance

STATEMENT: Pursuant to the provisions of the New Jersey Open Public Meetings Act, sending copies of the notice of the meeting properly provided adequate notice of the meeting to the Times-Beacon and the Atlantic City Press. Notice was posted on the bulletin board in the Administration Building.

ROLL CALL

Members Present:	Vince Anepete	Richard Reilly	Craig James
	Ralph Avellino	Rita Sweeney	
	Ronald Negra	Dennis Tredy	

Members Absent: James Eckert, Robert Knowles, Gordon VonSchmidt, Lee Eagles

Chairman Anepete asked for a motion to approve the minutes of the February 5, 2009 Regular meeting. Mr. Avellino made a motion to approve the minutes. Mrs. Sweeney seconded the motion. All in favor: (aye) Avellino, Sweeney, Negra, Reilly, Tredy, James, Anepete.

Chairman Anepete asked for a motion to approve the vouchers. Mr. Reilly made a motion to approve the vouchers. Mrs. Sweeney seconded the motion. All in favor: (aye) Reilly, Sweeney, Avellino, Negra, Tredy, James, Anepete.

Chairman Anepete stated that the correspondence is available in the board office for review at any time.

BOARD COMMENTS

Secretary reminded the board of the training seminar on April 4th, 2009.

Mr. Tredy reminded the board that Mr. Knowles had knee surgery this past month and remains at SOCH if anyone wants to contact him.

OLD BUSINESS

Tardibuono, Block 98, Lot 5, Docket No. 04-08-PB, Minor Subdivision CARRIED from February 5, 2009 meeting.

Mr. Anthony Pagano or Novins, York & Pagano, Jacobus & Seems, 202 Main Street, Toms River, NJ approached.

Mr. Pagano: All our evidence is already in. I think over several meetings the testimony has been completed. The only thing that has happened since the last meeting is there were briefs written by our office and council and a quick 30-second summary of those briefs is: It is our position that pursuant to *Loechner vs. Campoli*, these two lots are separate, do not merge as a matter of law so our position is the subdivision must be granted. We also cited the *Bressman* and *Pereira* cases which state that my client as the right to built a comparable home which he will do and that the denial would result in a substantial underutilization of the property by creating one oversized lot. Our position is that we met the positive and negative criteria thereby leaving the only issue as to whether or not you will grant the variance. All the testimony is in, hopefully you've read the briefs, ours and councils and we respectfully request that you make a decision.

Chairman Anepete: Thank you. I'd like to open this up for board discussion or if there are any questions for the attorney.

Mr. Tredy: After reading our attorney's letter on *Loechner vs. Campoli*, it is clearly obvious that he agrees with that portion of the applicant's claim that they should not have been put together and the should be subdivided. We have always worked under the premise that reasonable people can disagree and I want to put it on the record I disagree. The one question that was also brought up in the letter was about the variances to build. I bring this up because of the fact that there was a subdivision involved. The Planning Board was given both the authority to make it a subdivision but also given the ancillary powers of the Zoning Board of Adjustment in so far as granting variances. We haven't really discussed the variances and the way I'd like to bring it to the board's attention is this: If this subdivision is granted, it would be creating two undersized lots. Normally if there was just one undersized lot, and the applicant would go to the construction office, they would be denied a Zoning Permit because it's undersized and it would be sent to the Zoning Board of Adjustment. At the Zoning Board of Adjustment, one of the first things that is required to do is the applicant has to prove both negative and positive criteria according to the rules of the MLUL. In order to do that, the board has certain requirements of the applicant. It seems that none of these things we've asked either. If our board is taking on both sides of the issue, we should look at both sides. On the Zoning Board of Adjustment, one of the first things an applicant is required to do is to prove to the board that they tried to acquire additional property. It becomes a mute point I guess if we're going to say you can have these two undersized lots. Saying they don't have to adhere to that portion of the MLUL, what about the fact that if they come before the Zoning Board of Adjustment, which they would have to do if it was just a single undersized lot, the applicants would be required by that board to show us what are you going to build? Not just the footprint and say we're going to build within the boundaries. They would want to see what was going to be built. Is it going to conform with the neighborhood? I just hear Mr. Pagano mention the word "compatible" and I'm glad you said that, I was looking for that word; I was using "conform". The Zoning Board of Adjustment members would ask is it going to obstruct the light, the air, the view of the neighbors. When someone is asking for a variance, it means they want something and then the board has a right to ask for things back. A variance on building is not an automatic thing; otherwise they wouldn't have to come before the board. This evening, I took a ride down Nautilus Road and just by making slash marks on a piece of paper, I went down the road and came back and counted 31 homes. I doubt if the applicant's attorney would dispute that. Only 5 of those homes on that street were two-story buildings. The other 26 are one-story. The reason I made that comparison and I bring it to this board is this: The applicant's attorney, Mr. York at the last two meetings basically was saying because of *Loechner vs. Campoli*, we're required to give him this subdivision, give him two lots

that are of the style lots that conform to the 1953 subdivision. But yet, at no point did they say they weren't going to build houses in that size or style. I'm saying if we give that subdivision, even though the lots are very narrow, they are also quite deep and the fact that the majority of the homes are single story, I say that it's perfectly within the authority of this board as a condition of approval that the construction on those two lots be of single-story construction. I believe it's absolutely reasonable. I know this board has been trying to outthink the judge in case this is taken to appeal since the beginning when Mr. York started throwing out in a shotgun effect all these cases that he threw at us and as we shot down one by one, he finally rested on Loechner vs. Campoli and our attorney seems to agree with that. Every time the Zoning Board of Adjustment grants a variance, almost every time, there are always conditions. I think that it would be absolutely reasonable considering the entire block has 26 homes that are single-story and only 5 that are more than one-story that a condition of a single story home as a condition of approval would be absolutely appropriate.

Chairman Anepete: You're quote its reasonable for rational men to agree to disagree. In this case, I don't disagree. I agree with your argument completely. However, it appears that this case has a subdivision shown on the tax map and I agree that the variances aren't necessarily automatically applied to the approval of the subdivision. Does our Engineer have anything to add as far as the land layout and so forth, wetlands there, right-of-way questions, things of that sort that might impact the type of buildings that might be agreed to?

Mr. McVicar: First let's address the wetlands issue. They got the required permits they needed to clear the lots, the entire lot through the state. With regards to the right-of-way, basically the right-of-way remains unchanged. The right-of-way exists for all the lots that are surrounding it. It's a 40 foot right-of-way. We've been in touch with the Township Engineer and that is acceptable to remain a 40 foot right-of-way. As to the issue of the variances, my thought is if you approve the subdivision, you in effect are approving the lot area and the lot width variances for both lots. Steve, correct me if I'm wrong here, with that approval, those variances would go with the subdivision specific to those two lots. However, should the applicant or a future developer of one of these lots want to put a house on there, and then he wants to put a house that exceeds the envelope, he would at that point have to go to the Zoning Board of Adjustment for a variance. That would be the variance that opens the door towards that board reviewing architectural for the building, storm water management facility, and things of that nature.

Mr. Tredy: Wayne I agree that would trigger it. But that is only if the subdivision was granted without conditions. We have the right to put conditions on it.

Mr. McVicar: I'm not even addressing conditions.

Mr. Pagano: If I may, I don't mean to disagree but legally what you said was incorrect in that if the application is granted, keep in mind that right now there is no request for relief for any setbacks or height variances, right now it's clean but for the existing conditions of the property which granted would create a lot size variance, those are the only ones, no set-back relief. So, with or without any conditions, if a builder came in after the fact and wanted to build beyond the building envelope, they would have to go to the Board of Adjustment. If you do make an application to the Board of Adjustment on an undersized lot, and you are going to comply with all the setback requirements, it is not a legal requirement to provide the architectural and I think you have a misunderstanding in that regard. If you go without request for relief from setback or height restrictions, there is no requirement for architectural to be provided.

Mr. McVicar: Just to correct you on that point, the Board of Adjustment considers it a completeness item to provide preliminary architectural on all undersized lots. Actually they stretch it to require it on all lots where variances are required. That would be required preliminary, not the full blown architectural, your typical three or four page set.

Mr. Pagano: I'm talking about the full scale set of architectural.

Mr. Tredy: They are required to show on their survey the exact footprint and the elevations of the construction.

Mr. Pagano: Our representation now is that all construction would be done within the building envelope. Should that change, the builder or owner would be back before the Board of Adjustment.

Mr. Tredy: Mr. Pagano, even when you started your opening statement you used the word "comparable – build something comparable". If 26 out of the 31 homes are single-story, I'd say single-story is comparable.

Mr. Pagano: That's open to interpretation. That's about 20% - 1 in 5 is 20%.

Mr. Tredy: But from the other end it's 75%.

Mr. Pagano: Again that is open to interpretation and we don't know when each home was built. Our position is simply the record is clear, testimony is in. I understand your position and I appreciate your position, but our position is that the law requires that certain elements be met. We've met those elements. We have a legal right to a subdivision, and the only variance relief we are requesting at this point is for existing conditions on the property.

Mr. Reilly: I think one of the reasons we're here tonight is a question that I raised concerning the historical evolution of this property mainly to go back through the tax records and see whether the property had or had not been subdivided or at least we could trace a history of that. From what I understand, there is no clear indication that the property ever was, as far as we can determine, subdivided and I think in my humble opinion, that kind of clarifies in my mind what the property is right now. Along with what Mr. Tredy says, my question to the Chairman and to our attorney is, are we going beyond the question of what we really started with back two or three months ago. The question being whether or not the property could be subdivided or not subdivided. I'm not sure whether we've grown beyond that question with where we are tonight. I get a sense that we're, if you will, eroding into what would normally be considered the purview of the Board of Adjustment and what their prerogatives are dealing with particular property. I'd like some guidance first in the fact that if my assumption is correct that we've had a clarification that the property has been subdivided somehow and secondly that have we sort of grown beyond the basic question of where we started from and therefore crossing into an area that is not in our purview.

Chairman Anepete: We did have our tax research information provided and it shows it as two lots. I think we can argue that that was the case. I thought that was a pretty obvious point.

Mr. Yost: We had a lot of discussion about the Loechner case and I considered providing a copy of the case for the board, but frankly there are a lot of different things that are discussed in there and some of it is confusing. Another one of the reasons I wanted to brief Loechner is we also look at the cases that follow Loechner because there are exceptions to it. That's why we didn't move forward and also Mr. Reilly had raised the question what do the tax records show. We obtained the

tax records; I don't think they helped us either way. I'm satisfied based on the evidence in the record and stated in the brief obviously, it's not my role to tell the board how to vote and I wouldn't presume to do it. My role is to give you legal advice. Based upon what I've seen on the Loechner argument and also the evidence in front of the board, I think the applicant has a very good argument under Loechner. I don't see anything that I would at this point be able to brief that would be of assistance to the board in defending a denial of a subdivision. Now that being said, you have to understand at the time Loechner was decided by the State Supreme Court; procedurally they would have granted the subdivision and sent the application over to the Board of Adjustment to determine the variances. That is not the law anymore. The procedural law, this board sits and will do both. So in a sense, they are sitting as a Board of Adjustment and they have jurisdiction to determine a variance of this type when it's connected to a subdivision. And also, Loechner does say that once you determine that they are entitled to a subdivision because there was never a merger of the two properties that does not end the analysis, you still have jurisdiction to make a determination as to whether or not to grant the variance. So that does bring the board back to a determination of the things that were predominately discussed in my first brief which is let's take a look at this property, the uniqueness, the size of it, let's take a look at the neighborhood, and make a determination if it fits the criteria of the positive and negative criteria Mr. Pagano discussed. All of these cases, it's amazing when you really look at them, they are very fact specific and they don't operate automatically. They are sometimes difficult to comply. I represent to you that the applicant could be ultimately determined to be entitled to both variances but that does not mean that reasonable conditions might not be placed upon it, in my humble opinion. Again, they would have to be reasonable. You would then have two subdivided lots that were undersized and again I think what any court is going to look at is the character of the neighborhood and we had a lot of discussion about that at a couple of these meetings. Should we be looking at 200 feet, should we be looking within 500 feet, but how many other properties are like this? That's the proper area that the board should be considering and beyond that, I think that I go beyond the bounds of what my role is as Planning Board Attorney. That's what you should be looking at. If I think it's getting off-track, I'll try to jump in because I know this is a difficult application and I respect and recognize the fact that a couple of the board members in my perception, I've been Board Attorney for eight (8) years now, don't like the application and I'm also satisfied that they're all professionals in terms that they understand their role as quasi-judicial body and even if they don't necessarily like the application, they would do the right thing and judge the evidence according to the law. That's where I see it. We've discussed Loechner to death, but I don't want to board to think because we've got the Loechner situation, that's the end of it. Not necessarily. I think the board still has to consider the negative and the positive criteria and the applicant may very well be entitled to that variance under that part. The board may determine that factually they have some kind of reasonable condition they want to impose on the grant of that variance given the considerations and concerns of the board. But they have to make sense and they have to be factually specific to these two properties.

Mr. Reilly: It doesn't preclude them from maybe having to go to the Board of Adjustment.

Mr. Yost: That is possible.

Mr. Reilly: That was my point earlier.

Mr. Yost: It's absolutely possible that if they decide to build something that requires another variance that Mr. Tredy will see them in front of the Board of Adjustment.

Mr. Tredy: Mr. Yost, you heard my argument. In your opinion, would that be considered a reasonable request or reasonable condition of approval?

Chairman Anepete: Are you looking for assurances that his client would agree to putting in a building that is one-story perhaps?

Mr. Tredy: That's what I said, yes.

Mr. Pagano: The only representation that I can make is that there would be no request for height relief.

Chairman Anepete: Is your client here?

Mr. Pagano: One of my clients is here.

Chairman Anepete: Could you confer if they would make that concession..

Mr. Pagano: There is no application before the board for any height relief. They are not going to exceed the height requirements.

Mr. Yost: Wayne, what's the height restriction?

Mr. McVicar: 35 feet. Now, let me just say that typically when an application gets to the Board of Adjustment, if someone comes into the construction office and has an undersized lot with an existing house on it and a house meets the required setbacks and they want to put on a second story, they'll give them the building permit to do that. If, however, the house is an existing variance condition of non-conformity, and they want to put the second story on, it goes to the Zoning Board of Adjustment. To put a height restriction here, it kind of makes it tougher from the Zoning Board of Adjustment the way you would look at a particular lot. I just wanted the board to keep that in mind as well.

Chairman Anepete: The magic word here was comparable to the other houses in the neighborhood. It doesn't appear to me that the board thinks that 35 feet is comparable to the vast majority of the neighborhood.

Mr. Reilly: Let's say they do do that, (i.e., single-story); could they then come back to the Board of Adjustment and ask for a variance to do a second story?

Chairman Anepete: There is no variance required because it was legally in the height requirement.

Mr. Yost: You can't get a restriction from one board and then go in front of another board for relief.

Mr. Pagano: What my client would be willing to do is have a deed restriction whereby the construction on this property would never exceed the height requirements of the township. So basically barring any future builder from even attempting to get over 35 feet.

Mr. Tredy: When you bring up height requirements that throws another thing into the mix. If the property doesn't meet the current flood zone, height of 6 foot, before you can even build, you have to build up the property so that the ground floor or first floor level meets 6 foot. So really from the street level you're way more than 34 feet.

Mr. Pagano: Now were getting into too many variables. My client would agree to that deed restriction so to ensure you're going to have some conformity.

Mr. Tredy: I still stand by my position that if the majority, 75%, of the houses on that street are single-story, it would be considered reasonable to require that the variance be given with the condition that the construction be of single-story. That's my position.

Mr. Avellino: I go back to square one. We determined that these properties were never combined. Now we have two non-conforming lots. Being a past member from the Board of Adjustment, when somebody came to build on a lot that was non-conforming, he was asked if he was able to purchase land adjacent to it. In this case, there is no question as it's owned by the same person. Now we have two non-conforming lots that need a variance. We have the power to grant or not to grant the variance.

Mr. Yost: You have jurisdictional power to grant a variance or deny a variance or grant a variance with conditions. You have the power to do that.

Mr. Avellino: We can deny or accept the variance. If we accept the variance, they have two lots that are non-conforming.

Mr. Yost: I think there seems to be a consensus that we're looking at two lots.

Mr. Avellino: If we deny the variance, then they can't use the lots as they exist without a variance. Now where do we go from there?

Mr. Tredy: Under conditions, they could build. It seems like it would be something that someone would agree to.

Mr. Avellino: Back about 15 years ago, there was a gentlemen in Sands Point Harbor who wanted to build a house between two Tony Pearl houses. It went up 35 feet. It didn't fly.

Chairman Anepete: It didn't fit the neighborhood and was incomparable.

Mr. Tredy: And the 35 feet doesn't fit that neighborhood.

Mr. Avellino: We're talking about non-conforming. It did not hold any water. They did that in a lot of towns in this area. It seems to me that it's very cut and dry that they have two lots that are non-conforming; they have to go for a variance whether we grant it or the Board of Adjustment grants it.

Mr. Yost: In effect, you're sitting as a Board of Adjustment. Once you get past the subdivision issue, you are in effect sitting as a Board of Adjustment.

Mr. Negra: Why is that Mr. Yost?

Mr. Avellino: We either approve it or deny it.

Mr. Yost: When you have a subdivision with a C variance attached with it, the Land Use Law says, it was done I think for economy because under the old law, you ended up having to go back and forth between two boards and I guess for reasons of common sense and economy, the legislature

decided that when you have this type of situation, the Planning Board would have jurisdiction to determine the variances of the same application.

Mr. Avellino: If we start talk about height, etc., we are conceding that we approve of using an undersized property as a buildable lot.

Chairman Anepete: To clarify your argument as I see it, what you're saying is in fact that they are not really looking to subdivide. Their argument is that these are two separate lots and they are asking for variances to build undersized lots. I don't know if we should be granting a subdivision because the argument is they are already subdivided.

Mr. Yost: The applicant is saying it was consolidated improperly through something the tax office did and under the Loechner case they are entitled to be put back in the original place they were which was as subdivided lots. There's a statement in which I quoted in one of my briefs in the Cox book where the commentator, Cox says, "We wish that the legislature would clarify some law on subdivisions" because evidentially it is very difficult sledding. I can assure the board you have jurisdiction to determine both of these things. We've discussed Loechner. I think we're past Loechner. As far as I can see, and what I can see the board struggling with, but I think you do have jurisdiction to discuss variances. Now if you agree with that, you've got two undersized lots and the issue becomes do they get the variance for width and area. If the property is zoned into utility, you back into a situation where an aggressive lawyer on behalf of the land owner would argue that what you've done here is you've zoned the property into inutility. You can't do anything with it and that's unfair so buy it from me for fair market value. Now that's an extreme circumstance where that type of thing would happen, so the probability in weighing everything is that an Appellate Court or an Assignment Judge would look at this and say they are entitled to a variance but I think that Mr. Tredy does have a point that you can be entitled to a variance with some reasonable condition and the people can disagree about what that is. You may decide that none is appropriate. You may decide that representation that they will stay within the height restriction is fine. But that is an issue to discuss and I would say the board would have jurisdiction over that issue and could take that position that we will give you those variances but we're concerned about it conforming with the rest of the neighborhood. What a judge would do in this circumstance if the applicant decided to take that up, I don't know, but the law is they are suppose to give deference to the expertise of the local community, the board members. But it has to be a real legitimate reason and the judge would have to be satisfied of that. This is not an easy case. These are some difficult facts. I think we should be past the subdivision issue. I'll do the best I can to try to keep it as clear as possible.

Mr. McVicar: Two questions for Steve. One is if it's recognized that it's two lots, is the instrument to protect that a subdivision map that's filed and secondly if it is two lots, can that subdivision be approved without variances. You're approving two undersized lots with variances but these variances in place such that any development of either lot would require that the application go before the Zoning Board as an undersized lot with variances.

Mr. York: I think that kind of undoes the Loechner case. The Loechner case is saying that when you have a subdivision that predates the change in the law in 1953, it's still a good lot. By granting the subdivision, we rectify the consolidation that was done at some point in the last 50 years and we don't have evidence as to how that happened. But what they have is a map, 1953 subdivision that was filed and put into evidence. They testified that the map was filed and that it was filed pursuant to the Map Filing Law at the time. They've cited the Loechner case. We don't know of anything that would cause that to be consolidated since that time.

Mr. McVicar: If these were let's say in the stretch where we have these lots all similar size, and you had one lot which was developed back then but remained vacant. Now the owner of that lot, let's just say it's one of these two here, wanted to put a house on it, he would have to go to the Zoning Board of Adjustment and get for an undersized lot for lot width and he needed any variances for setbacks he'd have to get those as well. So even though the lot existed then, now it would be recognized as an undersized lot.

Mr. York: You're saying why is it different because we have two lots?

Mr. Tredy: That was my question too. That's how I started out. We're going to create two lots according to Loechner, but yet on the same street, there are quite a few other single lots that are undeveloped and your statement about it being zoned into inutility doesn't apply here because the lot currently is large enough to meet the zoning. They could build a house. So that comes out of the mix. Even if we follow the Loechner case which it seems you agree with, Wayne brings up the same argument that I had. Now you have two lots that are undersized why aren't we looking at those variances the same way the Zoning Board of Adjustment would. I know one of the reasons is that this board generally doesn't get those kinds of variances; they just look at subdivisions, etc.. where the Zoning Board of Adjustment has that expertise where they know the right questions to ask and I'm trying to bring them with my expertise on the Zoning Board.

Mr. York: I think I stated that it is an appropriate inquiry to determine if they've met the conditions for a variance.

Mr. Reilly: That answers my question from earlier whether we were crossing over. I asked it deliberately to get a clarification.

Chairman Anepete: As I see it, we're here to see if there are two existing lots. If we recognize that, then the variance question should be separate. I think it should be a separate issue.

Mr. Tredy: After struggling with this for three months now, trying to come up with a fair and equitable response because those lots are there and someone should be allowed to do something with them, but I still think that as a board we have the right to place reasonable conditions. Those conditions in this particular case because they are narrow lots and they are classified undersized by the new zoning, but yet there are many houses that are on similar lots which was the argument of the applicant and which I agree there are lots of them that are similar but all of those similar lots have single-story houses on them. So if you start putting a McMansion on these two lots which obviously they are going to build on almost immediately, and try to sell off, the mere fact that they are coming in and I would assume going to get the subdivision, I'll use the term I've heard a number of times, they are actually weaving straw into gold by taking a lot that let's say you can only build one house on. Now they get the subdivision they can build two houses, but I think they should be restricted in the type of construction. I don't think it's unreasonable. It would fit the neighborhood.

Mr. Negra: Isn't that the purview of the other board versus what we're talking about? Mr. Reilly asked a question before and I believe Steve the way you answered it was yes it could be under the purview of this board.

Mr. Yost: Once we get past the subdivision issue, in effect, you could put on a hat as if you are the Board of Adjustment.

Mr. Reilly: Do we start putting restrictions on or do we ask them what are their requests. Right now writing in, we're deciding what the variances should be and putting an answer to that. Shouldn't that be coming from the applicant?

Mr. Tredy: If they had brought in testimony yes. But they didn't.

Mr. Reilly: But that goes back to my earlier question. They came in with a question of subdivision and either unintentionally or however we gravitated, we seemed to have crossed that bridge and now we've crossed into the variance piece. My question is should we be creating the variances, answering the question, or should that question be thrown back to the applicant?

Mr. Tredy: They already stated the only thing they are willing to do is meet the height requirements.

Mr. Pagano: I'm going to go a step further and further bolster my inutility argument if necessary. I just spoke with my client and we would agree to a further deed restriction on the two lots whereby all construction would meet with all setback requirements at all times.

Mr. Tredy: That was already stated at the last hearing.

Mr. Pagano: If it were granted, and we stated this earlier, someone in theory could come before the Board of Adjustment and ask for variance relief from the setback requirements. We're eliminating that so as to further conform with the neighborhood that could never happen. We would agree to a further condition, a further deed restriction, whereby, all construction would be within the legal building envelope.

Mr. Avellino: If we start filling in these restrictions, what we're doing is allowing two undersized lots to be developed. We either should say yes you can, or no you can't.

Mr. Reilly: That's back to my earlier question. Are we just sitting here to make a determination of whether the lots should be subdivided or not but then we sort of got past that question without a vote and then gravitated into what I'm calling designing what can be built there.

Mr. Avellino: We've already decided that the lots are separate.

Mr. Reilly: We haven't voted on it, but let's just say consensus.

Mr. Avellino: If we agree to that, then we have two undersized lots. Either we allow them to build on them, forget about the restrictions, either we allow them to build on it or not build on it.

Mr. Tredy: That's what the applicant wants us to decide and I say we have the authority to put restrictions. In other words, the board is going to vote for the subdivision. That is my feeling. Steve, the only way to unconsolidate the lots from what I gather is through an approval of this board through a subdivision. They can't go back and go to the Assessor.

Mr. Yost: Procedurally they are where they should be.

Mr. Reilly: I think we have established that and informally crossed that bridge. I think we're fussing about where to go beyond that.

Mr. Avellino: We've already conceded that the lots are separate, undersized lots with variances. Once we start to designate what they can build on there, we're telling them we'll let you build as long as you do what we want you to do. We shouldn't be doing that. Either you allow them to build or you don't allow them to build.

Mr. Tredy: What I think you missed is when Mr. Yost said is if we approve the subdivision, we are approving the variances that goes with it right?

Mr. Yost: Not necessarily. Here is conceptually the way I see it. There appears to be a consensus, everybody seems to recognize, it's been briefed by council to the applicant and myself, we've look at the law, we've looked at the evidence and we think, what I would characterize as a directed verdict if it were a jury situation, we recognize that under the law they are entitled to this. The Loechner case specifically says even when you do that, it doesn't mean its automatic that you grant a subdivision and you grant the variances with it. It means that when you're done with the subdivision, then you can go to the analysis of the variances. Under your analysis you may find that they are entitled to or they are not or whether they are entitled with some reasonable condition. If they can't do anything with the lot that creates the other problem I eluded to potentially. Obviously you can't have a situation where the applicant can't use the property.

Mr. Reilly: Do we sit here and in essence manufacture what the variance should be or is that question thrown back to the applicant to come back to us and say here are the variances.

Mr. York: I think it can go either way. It can be a suggestion, the board can ask, like you have been doing. The board has asked would you consider this, the applicant has said here is what we're willing to do. That is the dialogue and at some point you determine if there is any more movement or if anyone has a bright idea and then you determine what to do.

Mr. Reilly: We're kind of doing it on the fly right now. My question is could this be done by dissecting this. Could the board vote tonight on agreeing that the two properties can be subdivided and then put an "and" they are required to come back at the next meeting with what their variance request would be and we could then review.

Mr. Yost: I think they can certainly do that with the consent of the applicant. However, without having had the opportunity to brief procedurally, I think the applicant probably does not have to agree to do that and can insist on a vote.

Mr. Reilly: I'm saying a vote being taken on part one which is the subdivision and postponing a decision on part two giving the applicant a chance to review what they would want to do and then come back to this board with what they feel the variances are that they need and then give us an opportunity to agree or expand rather than tonight we're sitting here kind of doing it on the fly.

Mr. Tredy: They already told us about the variances, we know what they want.

Mr. Reilly: Are there only two variances?

Mr. Pagano: And they are existing conditions. That's it. They are the existing conditions of the property. There is no other relief that is being requested.

Mr. Tredy: They are only existing conditions because the board seems to be willing to subdivide.

Mr. Pagano: Our position is that the board legally has to subdivide.

Mr. Yost: I think what the board is looking for is some kind of an architectural representation.

Mr. Tredy: I can tell you this. The architectural representations are a part of; I know the Zoning Board requires them. I don't see why if this board has the ancillary powers of the Zoning Board of Adjustment then we can't ask for them. But our attorney may disagree.

Mr. Yost: What is the applicant's position Mr. Pagano? Would the applicant be willing to allow the board to vote on the subdivision issue tonight and agree to work to provide some type of plans and come back for a hearing on the variances or does the applicant insist on a vote tonight?

Mr. Pagano: Respectfully, I disagree that the plans are necessary in that the application is made to the Planning Board and our position is if the subdivision is granted and we now have two lots, the existing conditions on those lots require the variances, so there is no additional relief that is requested and should the board opt to deny that variance relief it will be our position that you in effect zoned those properties into inutility because those are existing conditions. We've made representations that there will never be any excess setback construction, nor any height restriction construction. So anything that would be constructed as it's been represented here tonight would have to be within that building envelope. So legally, what we've stated before the board is all construction will be legal. The only non-conformity so to speak would be the existing conditions of the property. The area and the width of the two lots. Over which if the subdivision is legal and granted, the applicant has no control, he can't change the topography of the property.

Mr. Yost: Most respectfully, if the applicant were to take that position, I would have to advise the board because I don't want the board to feel in any way legally intimidated. It is the position of the board that the properties were not being zoned into inutility because they can still construct a house, maybe not the type of house that they want to, but they would still be able to construct a house.

Mr. Pagano: That's just our legal opinion.

Mr. Yost: I understand, but I wanted to....

Mr. Avellino: What happens when you have a lot next to another lot and invariably the Board of Adjustment would ask if an applicant tried to acquire that lot. If the person says yes, but they don't want to sell it, that changes the story. But this is owned by one person. There is no question whether you have to acquire that lot. He owned the lot.

Mr. Yost: You're talking about the fact scenario that is governed by Dallmeyer vs. Lacey Township. This is really a different situation because the evolution of the problem is completely different. So it's analyzed differently. The Dallmeyer case stands for if you have an isolated single lot, they have to try to buy the next door lot in order to put the two together and make them conforming. The problem kind of evolves differently. I understand conceptually. This is why I say to you when the Cox book talks about subdivisions being a difficult concept, it is. So, these things are very factually sensitive so if you change one fact you can end up in a completely different spot.

Mr. Reilly: So what you're saying is the case that you've quoted is really the one that, in essence, is guiding us in the direction we're going.

Mr. Yost: Yes and I think what the board should be looking at are if they find that this applicant has two subdivided undersized lots that require the two variances we were discussing, do they meet the criteria – the positive and negative criteria for “C” variances – two bulk variances or do they not meet it, or could they meet it with some condition. That’s what I really think is the analysis.

Mr. Tredy: Just an observation of the board, I see some members in favor of granting everything, some members in favor of denying everything and I see some members who are willing to compromise. I’m placing myself in the compromising area.

Chairman Anepete: This is a perfect time for a consensus of the board then.

Mr. Reilly: What are you talking about the compromise?

Mr. Tredy: The compromise would be to grant the variance with the conditions that I mentioned as to requiring single-story construction. That would be the compromise as far as I’m concerned.

Chairman Anepete: Something that would be compatible with the rest of the houses in the neighborhood. Let’s here from everybody.

Mr. Tredy: Another thing I would like to bring up the board members is I know it’s difficult sometimes to say no to somebody, but that’s our job.

Chairman Anepete: My position is yes and no, yes to the subdivision because I don’t think we can stop it and no to the variances. I think they have to come back and show us what they plan to build there to get the variances approved, at least an architectural rendering.

Mr. Tredy: But right now they are claiming there are no variances if we approve the subdivision.

Chairman Anepete: I understand what they are saying, I’m telling you what I intend to do right now.

Mr. Tredy: So the way to get around that legally is to say yes we agree “under these conditions”. It works fine with the Board of Adjustment.

Mr. Reilly: Mr. Chairman, what are we gaining by having them come back beyond what..

Chairman Anepete: They don’t have to come back; they can tell us tonight if they intend to comply.

Mr. Reilly: I think Mr. Pagano has given us his two stipulations.

Chairman Anepete: It doesn’t mean it’s his final position.

Mr. Tredy: Those two stipulations are automatic anyway. He didn’t give us anything, that’s the standard building.

Mr. Pagano: It inhibits future development of this property that would require any additional variance relief. Again, keep in mind that our testimony as to the variances is already in. The variances are simply lot area and lot width. There is no other variance relief that’s being requested.

Mr. Avellino: Those two variances you mentioned are large variances. The zoning was changed...

Mr. Pagano: We have nothing more to provide by coming back as it relates to the variances.

Mr. Avellino: In other words if we don't agree with your request for variances, then forget about it, you combine two lots backs and you build a house.

Mr. Tredy: In your statement, I brought this up before; you said that they wanted to build comparable structured houses. In your opinion, what would be comparable given the fact that I told you statistically 75% of the houses are single story? Give me your argument on that.

Mr. Pagano: It would be my opinion that 75 and 25 is not an overwhelming majority whereby you can say the neighborhood is one way or another especially when you don't know when the two families were built. Were the two families built this year, is the neighborhood now changing? Is somebody in that neighborhood going to knock down a single family and build a conforming two-story? The neighborhood can change over time and if 25% of those homes now are two-stories, as time progresses, over time that may become 35, 45 and 55%. Right now you're saying and I believe you that it's 75/25. It's not as though there are none. If you came in and said there is not a single two-story home, conformity would be no two story homes.

Mr. Tredy: Could I say something that Mr. York kept bringing up about his 200' area. There is not a single two-story within the 200 foot area.

Mr. Avellino: Can you meet the minimum square footage with a one story house?

Mr. Tredy: It's only 400 feet unless they've changed it.

Mr. Reilly: I would also like you to restate what stipulations.

Mr. Pagano: My client would agree to a deed restriction wherein no circumstance could any development on either of these lots be constructed outside of the scope of the existing setback requirements. So all construction would have to be within the building envelope. Likewise, we could agree to a deed restriction whereby there could never be construction beyond the height requirement of 35 feet. So under no circumstance could any future builder, developer, owner, ever come before the Board of Adjustment seeking that relief.

Mr. Reilly: So therefore, there would be no need for any other variances to build on either one of those properties.

Mr. Pagano: Correct other than the lot size. That gets me back to coming back, we would have nothing to add because the variance relief, testimony is already in and it's simply the size of the property.

Chairman Anepete: Can we have a consensus of the board? I'd like to hear your opinion on where you are at right now if we were to take a vote, where you think your tendency would be.

Mr. James: I'm in favor of the subdivision, I'm skeptical on the variances.

Chairman Anepete: So you are the same as me right now, yes to the subdivision and no to the variances.

Mr. James: Yes.

Mr. Reilly: I would agree with the subdivision, I'm in favor of the variances.

Mr. Tredy: I would say yes to the subdivision, no to the variances, or approve the variances with conditions. Would you do that too (speaking to Mr. James).

Mr. James: With conditions.

Mr. Tredy: The conditions would be the construction of a single story dwelling. That is the condition.

Chairman Anepete: We don't want to go 35 feet in the air if there nothing is compatible in the neighborhood, blocking other people's views and we just don't think it's the nature of that community.

Mr. Avellino: I go yes to the subdivision, and I'll say this – if you start to throw in conditions to the subdivisions on a non-conforming lot, you are conceding that they are allowed to build on it. To me that's defeating the purpose of the zoning and I agree with the subdivision. As far as the variances, I say if it's non-conforming, then I suggest that you go for a variance either with us, or with the Board of Adjustment, one or the other.

Mr. Pagano: That's what's happening. This is not a bifurcated application. That's what we're here for.

Mr. Avellino: I'm saying you have the subdivision but you have to have the variance to go along with it the subdivision.

Mr. Pagano: So in essence and there may be some confusion, because this is not a bifurcated application, you either have to vote in favor of the application, or against the application. And it seems like some of you are 50/50.

Mr. Reilly: Are you saying that by voting for the dissection of the property, that if you are voting in favor of that, you're also unintentionally voting in favor of the.....

Mr. Pagano: I want that to be clear.

Mr. Reilly: I don't think that's clear.

Mr. Yost: I can tell you that Loechner doesn't say that. You can separate those. It doesn't mean that you can't grant the variance or grant the variance with conditions. I'm just saying that because you subdivide you don't automatically get the variances. And Mr. Pagano agrees with that. I think we should continue with the consensus. We're sitting like the old Land Use Board Mr. Avellino, so if we say no to the variances, Mr. Pagano can't take his application over to the Board of Adjustment. It's going to get called here.

Mrs. Sweeney: I would agree with the subdivision, I'm not too sure about the variance because I have seen homes build in Skippers Cove that are taller than the other homes and it looks terrible.

Chairman Anepete: They're not compatible with the neighborhood is what you're saying.

Mrs. Sweeney: No they are not.

Mr. Negra: I agree with Mrs. Sweeney as well. I would vote for the subdivision, the variances I have questions about.

Mr. Tredy: Being that we went through the consensus now we have a three-way thing going here. Would you approve the variances but with the condition I had brought up.

Chairman Anepete: Mr. Pagano, hearing what you think the board is going to do, when we actually do make a motion, is there any further position you'd like to take on condition limitations on what you are building?

Mr. Pagano: With all due respect, I think that we have made our case. We believe that the law requires that there be a subdivision and again, there seems to be maybe some confusion regarding the variances. While the board does have the authority to grant or request reasonable conditions, the variances that are requested are existing conditions as if the subdivision were granted. So there is no additional relief that is being requested, but for the existing conditions of the land.

Mr. Avellino: In other words, you want the whole basket, not half a basket.

Mr. Pagano: I think there were additional concessions that were made with regard to future development of this property and I think those are fair in that if you take a neighboring property, the property right next door, there is absolutely nothing that this board would be able to do if that person assuming it's a conforming lot, they want to put on a second story, no one can do anything about that. It's legal within this zone.

Chairman Anepete: A conforming lot though.

Mr. Reilly: But these are non-conforming lots.

Mrs. Sweeney: When you say single-story home. How high is that?

Mr. Tredy: The construction office knows the difference in footage and I'm not going to try to put any numbers on it. A single-story home can only have a certain pitch, etc.. and it's definitely not 35 feet.

Mrs. Sweeney: But if you had a cathedral ceiling, it goes up there.

Mr. Tredy: No that doesn't change the roof line.

Mr. Reilly: What we're talking about Rita is once you approve up to 35 feet you are in essence approving a two-story building. It's more than a cape or a ranch.

Mr. Tredy: When Mr. Pagano comes back, if he doesn't have anything else to add, with your permission, seeing that there's everyone is confused, I would like to make the first motion and that motion would be to approve the subdivision portion of the application but under the condition that construction that takes place on the two newly subdivided, undersized lots conform with the construction regulations as to a single-story dwelling. Then we'll see what the vote is and we'll go from there.

Mr. Pagano: I think that is a meaningless exercise as that my client cannot agree to that condition. It's a meaningless exercise whether the board approves it or disapproves it. My client hasn't agreed to that restriction.

Mr. Tredy: The board has the authority to make determinations with or without your client's approval and one of them if my motion carries, that would be the decision of the board.

Mr. Avellino: Why are we approving a subdivision when it was never subdivided?

Mr. Tredy: Because that is the way it works, once it's changed, they have to come to us... Mr. Yost explained it.

Mr. Avellino: They were never consolidated correct?

Mr. Reilly: I think earlier we kind of agreed that the two lots can be subdivided for a variety of reasons.

Mr. Yost: Mainly being the fact that based upon the evidence that has been presented and representations as to what the law is, the property never should have been consolidated, so by granting the subdivision, we are just righting something that should have never happened. But then you go to the issue of the variances. I think you're motion, Mr. Tredy, you're offering for discussion at least you would grant the subdivision and the variance subject to the conditions that any construction be restricted to a single-story, if I understand you.

Mr. Tredy: Correct. Mr. Chairman, I would offer that motion as our attorney just stated and I previously stated as a motion.

Chairman Anepete: Is there a second?

Mr. James: Second.

Chairman Anepete: Would anyone like to speak for or against the motion? I'd like to say up front that you're granting the variances as part of the motion. That restriction doesn't prevent the variances from being granted because as he said his client would not accept that. I'm suggesting that we make a motion that separates the two. The variances are considered separately from the motion to approve the subdivision.

Mr. Tredy: I would check that out with our attorney to see if that is a proper procedure.

Mr. Yost: Conceptually that might be a cleaner way to do it if the board wanted to take a motion first as to the subdivision and then frame a motion as to the variances. I don't think that's a problem.

Mr. Reilly: Before we get that far Mr. Yost, let's say that the variances described by Mr. Tredy were approved, where does that take this board with the applicant.

Mr. Yost: The applicant is granted the variances subject to the condition and the applicant either accepts the board's decision or the applicant has 45 days from the date of the Resolution of approval subject to conditions within which to file a prograde rit action which is in effect an appeal with the law division.

Mr. Pagano: As it relates to the motion with the conditions, since the applicant hasn't agreed to that and I understand you want to make that motion, but then I respectfully request that the board vote on the application that has actually been made because that is not a concession that the applicant is willing to make. So we're entitled to a determination as to the application without the conditions. You can vote to deny it, but we need a denial.

Mr. Tredy: We don't have to do that.

Mr. Pagano: You have to vote on the application.

Mr. Tredy: And we can add conditions

Chairman Anepete: There is a motion on the floor right now.

Mr. Yost: I think it can be done either way quite frankly. I think the court would be smart enough to interpret it as a grant of the variances subject to the conditions in effect a denial of the application as presented.

Mr. Pagano: If that would be put on the record that would be fine.

Mr. Yost: That's probably the way I would characterize it in the Resolution.

Mr. Tredy: Mr. Yost, tell me how to phrase it if we're going to split it up.

Mr. Yost: The Chairman suggested and I think conceptually there is nothing wrong with it if the board were to entertain a motion to grant the subdivision.

Mr. Tredy: I withdraw the current motion on the floor.

Chairman Anepete: Second withdraws?

Mr. James: Yes.

Mr. Tredy made a motion to approve the subdivision portion of the application without variances. Mr. James seconded the motion.

Chairman Anepete asked for any discussion on the motion. Seeing none.

Roll Call: (ayes) Tredy, James, Avellino, Negra, Reilly, Sweeney, Anepete.

Mr. Tredy made a motion to approve the variances requested in the application under the condition that as a condition of approval that the construction on the two newly subdivided lots be restricted to a single-story dwelling. Mr. James seconded the motion.

Chairman asked for discussion. Chairman stated that the reason why we wanted a single story dwelling for the record because we think it will be compatible with what exists in the neighborhood and anything beyond that would be incompatible and change the nature of the neighborhood. Any other comments?

Mr. Negra asked for clarification. What we're saying is that if someone down the street that owns a vacant lot comes in and wants to build a two-story home, we're setting precedent here saying that.....

Mr. Tredy: We never set precedent.

Chairman Anepete: No we're not saying that. The first could be a properly sized conforming lot.

Mr. Negra: We're saying conforming to the neighborhood.

Chairman Anepete: No conforming means its proper size, they don't need variances, and as long as it was within these limits they could build a house.

Mr. Reilly: I think what Mr. Negra is questioning more conforming because of what was pointed out earlier 25% of the homes are two-story. You could state whether that was conforming or not.

Chairman Anepete: I'm not sure conforming – compatibility is the word. Being compatible with the neighborhood.

Mr. Reilly: Comparable and compatible are two different words.

Mr. Tredy: I will add compatible to the reason why I made the motion.

Chairman Anepete asked for any other comments. Seeing none, asked for a roll call.

Roll Call: (ayes) Tredy, James, Anepete. (No's) Avellino, Negra, Reilly Sweeney.

Secretary tallied the votes.

Chairman Anepete: No votes have it, motion denied.

Mr. Tredy: So what we're saying now is that they can just build anything.

Chairman Anepete: Well we haven't said anything because they haven't gotten their variances approved yet.

Mr. Avellino: They've subdivided. They got that. Now they have to find out how they can build on the property. Either they get the variances or they combine the property and build a house.

Mr. Pagano: Once again I'd like to make representation in light of the fact that that motion was defeated, that the applicant is willing to have the deed restrictions aforementioned regarding the setbacks and height variances. If the board was so inclined the motion could be made to approve the variances with those conditions.

Mr. Reilly: I think we should take that up as a motion and see what the board thinks.

Mr. Tredy: I disagree because we're being led around by the attorney.

Mr. Reilly: No, I discussed this before. I will make a motion that we adopt the conditions as proposed by the applicant. Mr. Negra seconded the motion.

Chairman Anepete asked for any discussion from the board on the motion. Chairman Anepete added as long as he puts in something less than 35 feet and not beyond the setbacks, etc.. and the lot size percentages.

Mr. Reilly: I think that puts a reasonable amount of constraint on what can be built there.

Mr. Tredy: It only puts a reasonable amount of restraint on the future people, not on the applicant himself.

Mr. Reilly: It puts a restriction on the property because its deed restricted so that whether it's built tomorrow or five years from now, I would assume that restriction carries and therefore, whether it's a one-story or two-story, it is not in total out of character with the whole that we're talking about. If it's a two-story, it has to represent 25% of the community.

Mr. Avellino asked for clarification on the motion.

Mr. Reilly said his motion is to adopt the deed restrictions as presented by the applicant and those deed restrictions would carry forward any subsequent building.

Mr. Avellino: In other words they would have to abide by the.....

Mr. Reilly: By the restrictions that were just presented. They could put two-story; it doesn't mean that they will.

Mr. McVicar: So you would be approving the variances as outlaid before, with conditions as stated by the applicant.

Chairman Anepete: Exactly and I would like you to before we take the vote, agree to those conditions.

Mr. Pagano: I've went over that, but we'd agree to that.

Mr. Yost: I've got it in my notes.

Chairman Anepete asked for any other comments before a vote is taken.

Mr. Avellino: I don't think we should agree on any other than consolidating the property.

Chairman Anepete asked for a roll call on the motion.

Roll Call: (ayes) Reilly, Negra, Sweeney, Anepete. (no's) Avellino, Tredy, James.

NEW BUSINESS

PUBLIC COMMENT

Seeing None.

Chairman Anepete asked for a motion to adjourn. Motion to adjourn was made by Mr. Avellino and seconded by Mrs. Sweeney. All in favor: Aye.

Meeting ended at 9:00 PM.

Respectfully submitted,

Beth O'Connor, Secretary