

RESOLUTION
Township of Sparta
Zoning Board of Adjustment
In the Matter of Anand Dash and Neill W. Clark
Application Number #9-22
Decided on May 11, 2022
Memorialized on June 8, 2022
Interpretation

WHEREAS, Anand Dash, Esq. and Neill W. Clark, Esq. (hereinafter the "Applicants") have made application to the Sparta Zoning Board of Adjustment for an interpretation pursuant to N.J.S.A. 40:55D-70(b) to determine whether the proposed warehouse met the definition of a warehouse in the Township's Zoning Ordinance for property known as Block 12008, Lot 23, as shown on the Tax Map of the Township of Sparta, owned by Diamond Chip Realty, LLC, located at 33 Demarest Road, in the Economic Development ("ED") Zone District (hereinafter the "Subject Property"); and,

WHEREAS, a public hearing was held on May 11, 2022, after the Board determined it had jurisdiction; and,

WHEREAS, the Board determined it had adequate and appropriate jurisdiction as required under not only the Municipal Land Use Law but specific directives of the New Jersey Department of Community Affairs Bureau of Local Government Services allowing for virtual meetings to be held with all participants appearing through virtual meetings; and,

WHEREAS, the Applicants are attorneys and represented themselves at the public hearing.

NOW THEREFORE, the Zoning Board of Adjustment makes the following findings of fact, based on evidence presented at its public hearing, at which a record was made.

The application before the Board is a request for an interpretation pursuant to N.J.S.A. 40:55D-70(b) that the proposed warehouse use in the Diamond Chip Realty, LLC ("DCR") application did not meet the definition of a warehouse, which is permitted in the ED Zone and the Planning Board should retain jurisdiction, and that the proposed use a trucking terminal, which is a conditional use in the ED Zone. If the trucking terminal conditions are not met, DCR would be required to seek a variance from the conditions of the conditional use.

The underlying matter for which the interpretation was sought is an application filed by DCR, Planning Board Application No. 689. The underlying application was filed with the Planning Board for site plan approval, with no variances, for the development of an 880,000 square foot warehouse facility. The matter was heard on March 2, 2022 and April 6, 2022, at which time the Planning Board heard testimony from the Applicant with regard to the proposed use, input from the Board Professionals, as well as entertained questions from objectors, including Applicants Dash and Neill.

On or about April 4, 2022, the Applicants filed an application for interpretation of Section 18-4.29, the Economic Development District, in which warehouses are permitted uses and trucking terminals are conditional uses, as defined in Section 18-2 of the Comprehensive Land Management Code as follows:

Trucking Terminal - Shall mean a premises which is used for the temporary parking of motor freight vehicles between trips and for the transfer of freight between trucks or between trucks and rail facilities for shipment elsewhere and where the storage of freight or cargo is only temporary.

Warehouse - Shall mean a building used for the temporary storage of goods, materials or merchandise for later or subsequent distribution or delivery elsewhere for purposes of processing or sale.

The Applicants submitted a Letter Brief dated April 4, 2022. Steven P. Gouin, Esq., Giordano, Halleran, & Ciesla, PC, the attorney for the underlying Applicant DCR, submitted a responsive Letter Brief dated May 6, 2022. A subsequent Letter Brief was submitted by the Applicants on May 11, 2022. The Board and its professionals reviewed the application and related submissions, as well as were provided access to the underlying application material, however, transcripts from the Planning Board hearings were not provided.

At the Zoning Board meeting, the Applicants provided a supplemental argument, relying primarily on *DePetro v. Township of Wayne Planning Board*, 842 A.2d 266 (2004) for the premise that the board of adjustment, rather than the planning board, is the proper forum for a request for interpretation of a zoning ordinance with the context of a site plan application. As set forth in N.J.S.A. 40:55D-70, the board of adjustment shall have the power to:

- (b) Hear and decide request for interpretation of a zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance in accordance with this act;

The Applicants cite the *DePetro* case throughout their Letter Briefs and Zoning Board presentation in an attempt to establish that a planning board does not have the power to make determinations with regard to site plan applications and municipal ordinances. However, the fact pattern for the *DePetro* case involved whether the proposed use as a self-storage facility was a commercial or non-commercial use to determine whether it was permitted or prohibited in the business zone. In *DePetro*, unlike the DCR application, the use, self-storage, was not specifically listed as a permitted use in the zone. The proposed warehouse use, in the subject underlying planning board matter, is permitted in the ED zone. The Applicants' position is that the proposed use meets the definition of trucking terminal, not warehouse. Accordingly, the Applicants are requesting that the Zoning Board substitute its interpretation of the proposed use for that of the Planning Board.

Ultimately, in the *DePetro* case, the Court affirmed the Planning Board's decision that the self-storage use was permitted in the zone, and did not remand the case to the Zoning Board for an interpretation.

The powers of the land use boards are statutorily defined in the Municipal Land Use Law. Jurisdiction to hear site plan applications, when the underlying use is permitted, lies with the Planning Board, pursuant to N.J.S.A. 40:55D-25(a)(2) and applications for use variances lie within the jurisdiction

of Zoning Board, pursuant to N.J.S.A. 40:55D-70(d). The Applicants argued that the Planning Board is not empowered with the ability to determine if the use met the definition in the ordinance, as part of the site plan application. A request for an interpretation from the zoning board, of an application currently pending before the planning board, would take away the ability to make determinations regarding the zoning ordinances from the planning board.

After hearing arguments from both the Applicants and the Attorney for the underlying Applicant, as well as advice from its professionals, the Board made a determination that jurisdiction was to remain with the Planning Board and that it would not review the underlying factual testimony to interpret whether the proposed use was a warehouse or a trucking terminal.

NOW THEREFORE, the Zoning Board of Adjustment makes the following conclusions of law, based on the foregoing findings of fact.

The application before the Board is a request for “b” interpretation whether the proposed use before the Planning Board is a warehouse or a trucking terminal, per the definition in the Township’s Ordinance.

The Municipal Land Use Law at N.J.S.A. 40:55D-70(b) provides that the Board of Adjustment has the power to hear and decide requests for interpretations of the zoning map or Ordinance or for decisions upon other special questions upon which the Board is authorized to pass by any zoning or official map Ordinance in accordance with the law. This power is uniquely given to Boards of Adjustment by the Municipal Land Use Law and no other entity has the authority to make these types of determinations. In making its decision, it is the Board’s responsibility to carefully analyze the section of the local ordinance which is being reviewed in comparison to the facts which are presented. The Board is responsible for specifically indicating the basis of its decision and how it applies to the individual set of facts so that in the future, the decision can be applied to other like situations.

In the underlying application, the Applicant submitted a site plan application for a warehouse use. The Planning Board accepted jurisdiction of the matter and began the public hearings. The Planning Board has the power, under N.J.S.A. 40:55D-25 to review a site plan, which is defined in N.J.S.A. 40:55D-7 as follows:

"Site plan" means a development plan of one or more lots on which is shown (1) the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting, screening devices, and (3) any other information that may be reasonably required in order to make an informed determination pursuant to an ordinance requiring review and approval of site plans by the planning board adopted pursuant to article 6 of this act. (N.J.S.A. 40:55D-37 et. Seq.)


While the Applicants argue that the authority to make the initial interpretation lies exclusively with the Board of Adjustment, the Planning Board has accepted jurisdiction of this application and has the reviewing authority to determine “whether the development plan conforms with the zoning ordinance and the applicable provisions of the site plan ordinance.” Cox & Koenig, New Jersey Zoning and Land Use Administration, Section 23-10, p. 491 (Gann, 2021). The zoning board is not granted the power to review a decision or substitute its judgment for that of the planning board. N.J.S.A 40:55D-70(b). The Applicants have requested that the Zoning Board review the factual basis for the application that was pending before the Planning Board. However, “Boards of Adjustment and Planning Boards have always had to interpret the meaning of the zoning ordinance in connection with and incident to application for other relief (e.g. subdivision, site plan or zoning variance applications made to a board having jurisdiction).” Cox, 574. The Planning Board is clearly empowered to review site plan applications where the underlying use is permitted. Cox 491.

It is well within the Planning Board's purview to make the determination as to whether a site plan application meets the requirements of the Zoning Ordinance. This concept and procedure are well established, as a matter of law, in the practice of Land Use and Zoning in New Jersey.

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment that the application of Neill Clark and Anand Dash for Block 12008, Lot 23, as shown on the Tax Map of the Township of Sparta, located at 33 Demarest Road, in the Economic Development Zone, requesting a "b" interpretation is determined to be as follows:

1. The Zoning Board of Adjustment does not have the legal authority under the Municipal Land Use Law to review a matter pending before the Planning Board.
2. The Zoning Board of Adjustment shall make no factual findings with regard to the request for an interpretation of the Zoning Ordinance pursuant to N.J.S.A. 40:55D-70(b).
3. The underlying application filed by Diamond Chip Realty LLC, Planning Board Application No. 689, shall remain under the jurisdiction of the Planning Board.

The undersigned secretary certifies the within resolution was adopted by this Board on May 11, 2022, and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on June 8, 2022.


George Parker, Chairman

I certify that the above Resolution is a true copy of a Resolution adopted by the Board of Adjustment on June 8, 2022.


Diana Katzenstein, Secretary

Dated: 6/9/2022

Prepared by: Alyse Landano Hubbard, Esq.

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VOTE FOR MOTION

Motion Introduced By: Chairman Parker

Motion Seconded By: Vice Chairman Laury

ROLL CALL	YES	NO	ABSTAIN	ABSENT
Dr. George Parker – Chairman	X			
Kenneth P. Laury – Vice Chairman	X			
Michael Jozefczyk	X			
Michael Sylvester	X			
Richard LaRuffa	X			
Michael Leondi	X			
John Finkeldie	X			
LeeAnne Pitzer				
Kelly McClurkin				

VOTE FOR MEMORIALIZATION

Motion Introduced By: Vice Chairman Laury

Motion Seconded By: Mr. Jozefczyk

ROLL CALL	YES	NO	ABSTAIN	ABSENT
Dr. George Parker – Chairman	X			
Kenneth P. Laury – Vice Chairman	X			
Michael Jozefczyk	X			
Michael Sylvester	X			
Richard LaRuffa				X
Michael Leondi	X			
John Finkeldie	X			
LeeAnne Pitzer				
Kelly McClurkin				