

MINUTES OF THE BOARD OF ADJUSTMENT
April 21, 2010

PRESENT: Chair Harrison, Vice Chair Fleischer, Mr. Burr, Ms. Cockey, Ms. English, Ms. Holloway, and Mr. Whipple; also, Mr. Sullivan, Esq., and Mr. Charreun, Assistant Secretary

ABSENT: Mr. Kenney, Mr. Susswein, and Ms. Kadus, Secretary

Assistant Secretary Charreun called the roll and announced the regular meeting of the Montclair Board of Adjustment. Notice had been given in accordance with the Open Public Meetings Act.

On motion by Mr. Whipple, seconded by Ms. English, the **Minutes of the January 27, 2010** special meeting were adopted, Chair Harrison and Ms. Cockey abstaining. On motion by Mr. Whipple, seconded by Ms. English, the **Minutes of the February 17, 2010** regular meeting were adopted as modified, Ms. Holloway abstaining. Chair Harrison abstained from the adoption on the resolution for the application of **Falad Properties, LLC, et al**, and was recused from participating on f the adoption of the resolution of **David & Carrie Greenbaum** and the scheduling of a special meeting for **Omnipoint Communications, Inc., 153 Park Street**.

On motion by Mr. Whipple, seconded by Ms. English, the following Resolution memorializing the Board's decision on the application of **Falad Properties, LLC, 39-41 North Fullerton Avenue, David A. Faloni, Sr. and Molly Cotton, 30 Forest Street, and Cofal Properties, LLC, 32 Forest Street, 43 North Fullerton Avenue, and 45 North Fullerton Avenue** was adopted, Chair Harrison and Ms. Cockey abstaining:

WHEREAS, FALAD PROPERTIES, LLC, as owner and applicant with respect to property located at 39-41 North Fullerton Avenue (Block 3201, Lot 9), DAVID A. FALONI, SR. AND MOLLY COTTON, as owners and applicants with respect to property located at 30 Forest Street (Block 3201, Lot 26), and COFAL PROPERTIES, LLC, as owner and applicant with respect to properties located at 32 Forest Street (Block 3201, Lot 25), 43 North Fullerton Avenue (Block 3201, Lot 10), and 45 North Fullerton Avenue (Block 3201, Lot 11), (hereinafter collectively "the applicants"), did make application to the Montclair Township Board of Adjustment (hereinafter "the Board") for preliminary and final major subdivision approval, preliminary and final site plan approval, and use and bulk variances in order to create parking areas behind 39-41 North Fullerton Avenue and 43-45 North Fullerton Avenue for the benefit of the apartment buildings located on such properties; and

WHEREAS, the applicants requested relief as follows:

1. A variance pursuant to N.J.S.A. 40:55D-70d(2) and from Montclair Code Section 347-112 in that the residential density of the apartment building and property located at 39-41 North Fullerton Avenue and the apartment buildings and proposed merged properties located at 43-45 North Fullerton Avenue exceed the permitted

residential density and constitute a nonconforming use and the proposed parking areas and site improvements constitute an expansion of the nonconforming use;

2. A variance pursuant to N.J.S.A. 40:55D-70d(1) and from Montclair Code Section 347-61 insofar as proposed accessory driveways and parking spaces are located on adjoining North Fullerton Avenue properties and are to be utilized and shared by those properties;

3. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-18E(1) insofar as the proposed lot depths for the Forest Street properties are less than the prescribed lot depths;

4. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-63 insofar as the proposed impervious surface coverage for 43-45 North Fullerton Avenue exceeds the prescribed impervious surface coverage;

5. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-65 and 58D insofar as the proposed ingress/egress driveway at 43-45 North Fullerton Avenue is located less than 6 feet from principal buildings;

6. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-65 and 58D insofar as the proposed barrier-free parking space is located in a front yard;

7. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-65 and 58D insofar as certain proposed parking spaces are located less than 6 feet from principal buildings;

8. A variance pursuant to N.J.S.A. 40:55D-70c and from Montclair Code Section 347-102A insofar as certain parking spaces are tandem and not directly accessible from aisles; and

9. An exception from Montclair Code Section 281-9I in that the proposed ingress/egress driveway at 43-45 North Fullerton Avenue is less than 18 feet wide; and

WHEREAS, the applicants submitted a Major Subdivision Map prepared by Richard J. Hingos, Inc. dated March 20, 2008, a Partial Topographic Survey prepared by Richard J. Hingos, Inc. dated October 29, 2008, site plans SP1 through SP4 including zoning chart and landscape and lighting plan prepared by Sionas Architecture, P.C. dated April 23, 2009 and revised through January 8, 2010; and drainage report prepared by Petry Engineering, LLC dated October 16, 2009;

WHEREAS, the application came on to be heard at meetings of the Board held on October 21, 2009, December 9, 2009, February 17, 2010, and March 17, 2010, at which time it was established that notice was properly published and that property owners within 200 feet of the subject properties had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony, the exhibits (A-1 through A-25 and O-1), and the questions and comments of members of the public presented at the public hearings and based thereon established the following findings of fact and conclusions of law:

1. The application concerns 5 adjacent properties: 39-41 North Fullerton Avenue, which contains a 5-story brick apartment building with 68 residential apartments; 43 North Fullerton Avenue, which contains a 2 ½-story frame apartment building with 3 residential apartments; 45 North Fullerton Avenue, which contains a 4-story brick apartment building with 26 residential apartments; 30 Forest Street, which contains a two-family dwelling; and 32 Forest Street, which contains a two-family dwelling;

2. The applicants propose to merge 43 North Fullerton Avenue and 45 North Fullerton Avenue into one lot;

3. The North Fullerton Avenue properties are in the OR-3 Garden Apartment and Office Building Zone, and the Forest Street properties are in the R-2 Two-Family Zone for the 170 feet closest to Forest Street and are in the OR-3 Garden Apartment and Office Building Zone for the approximately 85 feet closest to North Fullerton Avenue;

4. The applicants seek to create a formal parking area at the rear of 39-41 North Fullerton Avenue, which has an informal parking area at the present time, for the benefit of the apartment building on that property, which was constructed more than 75 years ago before the widespread use of automobiles;

5. The applicants seek subdivision approval, site plan approval, and variances to subdivide the two Forest Street properties and attach the rear portions of those properties – those portions located in the OR-3 Zone – to the rear of the 39-41 North Fullerton Avenue property – which is also located in the OR-3 Zone – and to create the new parking area on the new rear portion of 39-41 North Fullerton Avenue, as shown on the subdivision map and site plans; the new parking area is to contain 21 parking spaces along with driveways, aisles, and other improvements as set forth on the site plans;

6. In addition, the applicants seek site plan approval and variances to redesign the existing parking area at 43-45 North Fullerton Avenue, as shown on the site plans; the redesigned parking area is to contain 22 parking spaces with driveways, aisles, and other improvements as set forth on the site plans;

7. The applicants propose a total of 43 parking spaces for 39-41 North Fullerton Avenue and 43-45 North Fullerton Avenue, bringing the properties more into conformity with the on-site parking requirements of the New Jersey State Residential Site Improvement Standards (N.J.A.C. 5:21-1 et seq.), which require more than 170 on-site parking spaces for the properties;

8. The application follows a re-zoning, adopted by the Montclair Township Council on June 21, 2005, of the rear portions of twelve Forest Street properties, including the rear portions of the two Forest Street properties that are part of the application, from the R-2 Zone to the OR-3 Zone, in order to encourage the provision of more on-site accessory parking for the apartment and office uses fronting on North Fullerton Avenue between Bloomfield Avenue and Claremont Avenue; Ordinance 05-32 (Exhibit A-1) includes two maps depicting this re-zoning, and the application follows the new zone line;

9. The Montclair Township Council's explanatory resolution (Exhibit A-2) adopted on June 21, 2005 recites that "off-street parking needs have grown significantly" and that the new zone line "facilitates applications to the Planning Board and Board of Adjustment designed to help satisfy the need and demand for on-site parking without the necessity for public investment...";

10. The Superior Court's decision in the matter of O'Shea v. Township of Montclair (Exhibit A-12) affirmed the Montclair Township Council's re-zoning;

11. The existing apartment buildings at 39-41 North Fullerton Avenue and 45 North Fullerton Avenue are permitted multi-family residential buildings, but they exceed the permitted residential density because they were constructed under the standards of a denser R-5 Zone that no longer exists, and therefore they constitute a nonconforming use;

12. The required lot depth for the proposed Forest Street properties is as follows: "Where the existing street pattern has been established and there is no opportunity for interior block subdivision, the depth of all newly created lots shall be in keeping with the established lot depth" (Montclair Code Section 347-18E(1));

13. The established lot depth in the first block of Forest Street between Glenridge Avenue and Claremont Avenue varies from 139 feet to 256 feet (Exhibit A-1);

14. The proposed lot depths for the proposed Forest Street properties are 170 feet, in accordance with the re-zoning maps attached to the re-zoning ordinance (Exhibit A-1);

15. The required impervious surface coverage for 43-45 North Fullerton Avenue is a maximum of 70% of lot area;

16. The proposed impervious surface coverage for 43-45 North Fullerton Avenue, with the more complete use of the rear yard for parking, is 73.1%;

17. The proposed ingress/egress driveway at 43-45 North Fullerton Avenue has been significantly improved by eliminating existing parking spaces within the driveway and by widening the driveway from the existing minimum of approximately 10 feet width to a proposed minimum 16 ½ feet width;

18. Under N.J.S.A. 40:55D-70d, there are special reasons and purposes of zoning in support of the variance for expansion of a nonconforming use and the variance for shared use of accessory driveways and parking spaces (respectively, the section d(2) and section d(1) variances): the application and project promote the appropriate use of land and the general welfare – the rear portions of the properties are particularly suited for parking in accordance with the amended site plans; in addition, the project conforms to the purpose and boundary of the re-zoning established by the Montclair Township Council, helps to satisfy an obvious need for on-site parking that is clearly in the public interest, and brings the properties more into conformity with the on-site parking requirements of the New Jersey State Residential Site Improvement Standards and the Montclair Township zoning ordinance (N.J.S.A. 40:55D-2a); the project provides sufficient space at an appropriate location for on-site parking that meets the needs of Montclair Township residents residing in the subject apartment buildings (N.J.S.A. 40:55D-2g); the project encourages coordination of public and private initiatives shaping land use with a view towards lessening the cost thereof and towards the more efficient use of land (N.J.S.A. 40:55D-2m); these purposes of zoning are the same purposes of zoning highlighted by the Township Council in its explanatory resolution (Exhibit A-2);

19. These same purposes of zoning (N.J.S.A. 40:55D-2a, g, and m) also support, under N.J.S.A. 40:55D-70c(2), the variances for lot depth, impervious surface coverage, and driveway and parking space location (distance from buildings and front yard) and parking space style (tandem): those bulk variances are integral to and necessary for the overall project and were envisioned and/or foreseeable by the Montclair Township Council when it legislated the re-zoning of the properties; also, under N.J.S.A. 40:55D-70c(1), the variances for impervious surface coverage and driveway and parking space location and style are necessitated by the large apartment buildings and structures lawfully existing on the properties, and, in the case of the location of the barrier free parking space, the steepness and exceptional topography of the property, which conditions of the land uniquely affect the properties and cause peculiar and exceptional practical difficulties and/or exceptional and undue hardship, and which justify variance relief;

20. The variances do not cause any substantial detriment to the public good:

21. The proposed parking areas help satisfy the demonstrated need for and the code requirements for on-site parking; they substantially improve the existing conditions: the parking is better organized with a conventional configuration; the parking is properly paved and drained; the parking space sizes and the parking space aisles are code-compliant; the parking space setbacks from property lines are code compliant; the site circulation, as re-configured, is safe and efficient; there is a new pedestrian walkway leading to 39-41 North Fullerton Avenue; the parking is fully screened with solid wood fencing and extensive plantings; the site lighting is below the screening and will not spill onto surrounding properties;

22. The parking plan utilizes existing ingress and egress to and from North Fullerton Avenue, which has been widened and which avoids any ingress or egress through the R-2 Zone;

23. The parking is situated below the grade of North Fullerton Avenue and above the grade of Forest Street, helping to shield it from both roadways;

24. The refuse area for 39-41 North Fullerton Avenue has been moved out of a front yard and will be replaced with a new lawn area;

25. The tandem parking spaces have been reduced in number and limited to one area;

26. The barrier-free parking space has been placed at the most convenient location for a disabled person – at level grade and near the public sidewalk; there is currently no barrier-free parking space;

27. Whereas the impervious surface coverage has increased at 43-45 North Fullerton Avenue, it has decreased at 39-41 North Fullerton Avenue compared to the previous site plan because some impervious areas have been removed; the average impervious surface coverage between the two properties is 70.3%, slightly in excess of 70%;

28. The variances do not cause any substantial impairment of the intent and purpose of the zone plan or zoning ordinance:

29. The application and project are consistent with the 2006 Master Plan Reexamination Report; that Report acknowledges the re-zoning established by the Montclair Township Council in furtherance of the application; moreover, that re-zoning (Exhibit A-1) specifically acknowledged as provided by law an inconsistency with the underlying Master Plan but determined as provided by law that there was sound and rational basis and purposes of zoning in support of the re-zoning (Exhibit A-2);

30. The project is consistent with the zoning ordinance; it follows the re-zoning amendment to the zoning ordinance established by the Montclair Township Council, and it brings the properties more into conformity with the on-site parking requirements of the zoning ordinance;

31. The underlying uses – residential apartments and accessory parking – are permitted uses; with respect to the accessory parking, the project helps to alleviate a tenant parking shortage, and it helps to ease the demand for the limited number of permit parking spaces on North Fullerton Avenue;

32. The project does not involve any new building or any addition to any building; many projects propose new buildings or additions to buildings but require a variance for not providing sufficient on-site parking; here, the project does not propose any new building or any addition to any building but requires variance relief to provide more on-site parking to become more code compliant with respect to on-site parking;

33. With regard to expansion of a nonconforming use, the expansion is minor, related to accessory parking only, and allows the apartment buildings to modernize; the application and parking as proposed bring the apartment buildings more into conformity with both density and on-site parking requirements;

34. With regard to shared accessory driveways and parking spaces, the zoning ordinance provides for the OR-3 Zone that “a parking facility accessory to one use may be used for parking accessory to other uses expressly permitted in the OR-3 Zone” (Montclair Code Section 347-61B); here, the uses are residential uses and are expressly permitted in the OR-3 Zone; the shared accessory driveways are logical and reasonable for 39-41 North Fullerton Avenue, given that the footprint of the existing apartment building on the property prevents accessory driveways to and from North Fullerton Avenue from being on the same lot as the apartment building;

35. With regard to the proposed lot depths, the proposed lot depths – 170 feet – are the exact lot depths set forth on the maps depicting the re-zoning (Exhibit A-1);

36. With regard to the proposed driveway and parking space setbacks, the lesser setbacks are necessitated by structures lawfully existing and existing conditions on the property and represent minor departures from the zoning ordinance;

37. The requested variances are implicit in the Montclair Township Council’s re-zoning;

38. The “enhanced quality of proof” announced in *Medici v. BPR Co.*, 107 N.J. 1 (1987), does not apply to the application and project because they do not involve a new use that is omitted from or prohibited in the zone; as stated above, the uses in question are residential apartments and accessory parking, and those uses are explicitly permitted uses in the OR-3 Zone; see also *Burbridge v. Mine Hill Tp.*, 117 N.J. 376, 398 (1990) (“*Medici*’s enhanced-proof requirement focused on variances for new uses rather than on expansions of existing uses.”); and *Grubbs v. Slothower*, 389 N.J. Super. 377, 388 (“Density variances for permitted uses in the zone should not trigger the application of *Medici*’s more stringent standard...”); moreover, the application follows and is consistent with the Montclair Township Council’s deliberate re-zoning amendment to the zoning ordinance to encourage the application and project, and thus in approving the subject application the Board is acting in harmony with the Governing Body and is not usurping legislative authority;

39. In the case of the bulk variances founded upon purposes of zoning, the benefits thereof substantially outweigh any detriment;

40. The exception for driveway width is justified because the portion of the proposed ingress/egress driveway that narrows to 16 ½ feet width is necessitated by the apartment buildings lawfully existing, is a significant improvement over the portion of the existing driveway that narrows to approximately 10 feet, and is functional and adequate for the proposed parking areas; the literal enforcement of the driveway width

standard in the site plan ordinance is impracticable or will exact undue hardship given the characteristics of the property, and the exception is reasonable and within the general purpose and intent of the site plan ordinance;

41. Based upon the Board's particular knowledge of local conditions, the within application is not inconsistent with the character of the neighborhood and will not adversely impact the public good.

WHEREAS, the Board, based upon the foregoing, concluded that the applicant proved the requisite special reasons for granting the variances arising under N.J.S.A. 40:55-70d(1) and d(2) and proved by a preponderance of the evidence that the same can be granted without substantial detriment to the public good, and will not substantially impair the intent and purpose of the zone plan and zoning ordinance;

WHEREAS, the Board, based on the foregoing, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and that the variances arising under N.J.S.A. 40:55D-70c(1) can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(1); and

WHEREAS, the Board, based on the foregoing, concluded with respect to the variances arising under N.J.S.A. 40:55D-70c(2) that the applicant proved that the purposes of the Municipal Land Use Law are advanced by a deviation from the zoning ordinance requirements, and that the benefits of the deviation substantially outweigh any detriment, and will not cause substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(2).

NOW, THEREFORE, BE IT RESOLVED, by the Board of Adjustment of the Township of Montclair, that the within application of FALAD PROPERTIES, LLC, DAVID A. FALONI, SR. AND MOLLY COTTON, and COFAL PROPERTIES, LLC, for preliminary and final major subdivision approval, preliminary and final site plan approval, use and bulk variances, and an exception be and is hereby approved and granted, subject to the following conditions:

1. 39-41 North Fullerton Avenue shall be reduced from 68 units to 67 units as soon as one studio apartment becomes vacant and no later than 8 months from the date of this resolution;
2. The applicants' engineer shall submit to the Board's engineer for his approval amended stormwater calculations in accordance with the approved site plans;
3. The stormwater overflow pipe shall be re-routed along the driveway of 30 Forest Street in order to save the large tree between 32 Forest Street and 30 Forest Street;

4. The applicants shall comply with any outstanding items set forth in the Board engineer's report dated January 30, 2010; and

5. The residential tenant users of the parking spaces approved by this resolution shall be limited to the residential tenants of 39-41 and 43-45 North Fullerton Avenue.

NOW, THEREFORE, BE IT FURTHER RESOLVED, that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Whipple, seconded by Ms. Holloway, the following Resolution memorializing the Board's decision on the application of **David & Carrie Greenbaum, 91 Lloyd Road, regarding 99 Lloyd Road**, was adopted, Chair Harrison and Ms. English abstaining:

WHEREAS, Mr. and Mrs. David Greenbaum, owners of property situated at 91 Lloyd Road, Township of Montclair, filed an appeal with the Board of Adjustment of the Township of Montclair pursuant to N.J.S.A. 40:55D-70a, 72a and Montclair Code Sections 202-18A, 202-36 which allows any interested party affected by any decision of an administrative officer to appeal to the Board of Adjustment with respect to that decision; and

WHEREAS, the appeal challenges the issuance of a Construction Permit issued to premises at 99 Lloyd Road on September 17, 2009; and

WHEREAS, the appeal, having been filed on October 6, 2009, was filed timely; and

WHEREAS, the appeal challenges the issuance of the aforesaid Construction Permit (No. 09-1378) on the grounds that the same permitted continuation of construction on an accessory structure (a garage) located on adjacent premises known as 99 Lloyd Road in a manner substantially inconsistent with certain drawings and representations which had been made when the former owners of 99 Lloyd Road, Mr. and Mrs. Michael Strahan, sought and received variance relief from the Board of Adjustment of the Township of Montclair which variance was memorialized by a Resolution adopted by the Board of Adjustment on December 11, 2002; and

WHEREAS, the appeal came on to be heard at a meeting of the Board of Adjustment held on March 17, 2010 at which time, the Appellants, David and Carrie Greenbaum, were represented by Martin Newmark, Esq. of the firm of Broderick, Newmark & Grather and the present owner of, 99 Lloyd Road, Jean Strahan, was represented by Steven Greenberg, Esq.; and

WHEREAS, the Board carefully reviewed the testimony presented as well as the evidence submitted and from the foregoing finds as follows:

1. By resolution adopted on December 11, 2002 the Board of Adjustment granted a variance to the owners of 99 Lloyd Road to allow off-street parking for more than four vehicles contrary to Montclair Code Section 347-31A in connection with the construction of an attached garage addition for eight (8) vehicles.

2. Architectural plans prepared by Sionas Architecture, P.C. were submitted by the Strahans as part of their Application. The architectural plans included, among other things, an elevation of the side of the garage facing the Appellants' (Greenbaums) adjacent premises at 91 Lloyd Road. The elevation was marked as an exhibit in these proceedings as A-6.

3. As reflected in the transcript of the hearing before the Board of Adjustment conducted on November 20, 2002, the Strahans, their attorney and their Professionals made several statements and representations to the Board of Adjustment and the Public (including the Greenbaums who were present) regarding the design of the proposed addition. For example:

(a) The Strahans' attorney in his opening statement informed the Board that "...much of the new addition is going to be built into this slope, including the garage ..." (T7-4 to 7-6).

(b) Strahans' attorney also stated in his opening that, "all cars are not (sic) going to be enclosed in this garage, which in turn is enclosed in the slope of the land..." (T10-9 to 10-11).

(c) The Strahans' architect, Paul Sionas, testified that, "the addition is designed to be in keeping with the house, so it's the same brick, the same window patters, the same stone, keystones over the windows, and there are several parapet walls on the existing wall, there are several balusters, excuse me, three foot high balusters on the existing porches and over the existing porch roof, and we're proposing to -- to match that at the top of this existing garage." (T17-22 to 18-5). Sionas continued, "so again this is showing the addition will be strictly underground ..." (T18-19 to 18-20)

(d) Greenbaum, as an interested neighbor questioned the maximum height and was assured by Mr. Sionas that the maximum height would be 27-1/2 feet at its highest point. (T24-5 to 24-10).

(e) Michael Strahan testified that it was his hope to bring the house back to its past grandeur and, "...improve everything". (T28-10 to 28-15).

(f) Strahans' Engineer, Michael Petry, testified that the existing stone wall that runs along the property line separating the Strahans' property from the Greenbaum property would remain. (T34-5 to 34-15).

(g) Peter Steck, the Strahans' expert Planner testified that "...we [will] try to do everything we try to do aesthetically pleasing." (T45-22 to 45-23).

4. As reflected in the transcript of the hearing, Board Member Gallardo commented when the matter was being discussed prior to the vote, "I think it was a very thoughtful design. (indiscernible) to Strahans themselves in the way they designed the garage." (T52-15 to 52-17).

5. Similarly, the Board Chairman during the discussion that preceded the vote commented that, "...I think the design is clear that there will be no detriment to the public (indiscernible) tremendous enhancement of the property ..." (T54-19 to 54-21).

6. The Resolution adopted by the Board on December 11, 2002 substantiates the Appellants' claim that the representations and evidence presented by the Strahans as quoted above was not only designed to but did, in fact, influence the Board to act favorably on the Strahans' Application for variance relief from the terms of Montclair Code Section 347-31B allowing for substantially more off-street parking on their property than is permitted.

7. The Resolution took note of the elevations prepared by Sionas Architecture and concluded, among other things, that:

6. The proposed 8-vehicle garage would be constructed partially into the hillside significantly reducing any visual impact that the new garage may have on the adjacent properties.

8. The adjacent Greenbaum property at 91 Lloyd Road is the most visually impacted by the new garage.

9. On January 29, 2004, after having requested and been given an extension on their variance, the Strahans were issued a Construction Permit for the addition approved by the Board of Adjustment in 2002 by the Construction Official. Among the drawings submitted to the Construction Official and upon which the January 29, 2004 Permit was issued was an elevation marked as an exhibit in these proceedings as A-7.

10. Comparing A-6, the elevation which was presented to the Board of Adjustment in 2002 with A-7, the elevation which was presented to the Construction Official resulting in the issuance a Construction Permit in 2004 reveals that same are significantly and materially different and that the differences all have the effect of negatively impacting the adjacent land owners, the Greenbaums. By way of example:

- a. The 2004 submission omits four windows shown on the 2002 submission.
- b. The 2004 submission omits an articulated pointed brick façade intended to match the main house as shown in the 2002 submission.
- c. The 2004 submission omits a white painted console bracketed crown cornice shown in the 2002 submission.

d. The 2004 submission omits a white painted balustrade shown in the 2002 submission.

e. The 2004 submission omits seven (7) vertical pier pilasters intended for fenestration and articulation as shown in the 2002 submission.

f. The building height without the balustrade exceeds 29 feet. The balustrade was replaced with a metal fence bringing the current elevation to in excess of 32 feet exceeding the 2002 elevation, which was represented to be a maximum of 27-1/2 feet, by 4-1/2 feet.

g. A doorway has been placed on the northern most wall at ground level in the 2004 submission which was not shown in the 2002 submission.

h. The grading of the façade as reflected in the 2002 submission shows significantly less wall exposure than does the grading in the 2004 submission.

11. All of the deviations between the 2002 plans which were approved by the Board and the 2004 plans which were submitted to the Construction Official were material and significant. The elevations and representations made to the Board at the 2002 hearing were material to the Board's decision making.

12. It is significant that the building plan submitted in 2004 is 4-1/2 feet higher than the plans shown in 2002, the windows that were shown in 2002 helped break down the scale of the property and, although the garage was built into the hillside, it was not nearly as covered by earth as was represented by the Applicant at the hearing in 2002.

13. Given the change in massing of the building and the change in the visual presentation, the permit that was issued in 2004 should not have been issued.

14. Following the issuance of the Construction Permit in 2004 construction commenced but stalled thereafter for several years. By correspondence dated September 16, 2008, the Township Attorney on behalf of the Construction Office notified the property owner that in accordance with New Jersey Uniform Construction Code, the permit issued in 2004 had expired and was no longer valid.

15. In September 2009 Ms. Strahan requested that the Construction Official issue a new permit to allow for the completion of the structure. The request was not based upon the 2002 drawings approved by the Board but was, again, based on the 2004 drawings previously approved by the Construction Official. The Construction Official should have refused to issue the permit for the same reason that he should have denied the request of the permit in 2004; the plans were significantly and materially different than those approved by this Board in 2002.

16. It should be noted that the Greenbaums did not sit idly by when it first became apparent in 2005 that the construction that was proceeding twelve feet from

their common boundary was not consistent with the exhibits, testimony or representations which had been made in support of the variance granted in 2002.

17. On September 1, 2005 David Greenbaum wrote a letter to Mayor Remsen and Township Manager Hartnett complaining that the construction on the adjacent property was inconsistent with the Zoning Board's 2002 Approval. He stated:

"We believe that the substantial breach between the plans as presented and approved to what has actually been constructed to date, although incomplete, constitutes a material departure from the plans and elevations (façade) approved at the time of the Variance."

Numerous communications by the Greenbaums to various Township Officials followed; however, the Township did not revoke the 2004 permit.

18. As indicated, the Appellants' claim is based upon their argument that the plans upon which the September 2009 permit was issued significantly and materially differed from the plans that were approved by the Board in 2002. As set forth above, the Board finds from the evidence that the Appellants' claim in that regard has been clearly established by the evidence that was presented by the Appellants at the hearing.

19. Ms. Strahan, through counsel, argues that the deviations between the 2002 drawings and the 2004 drawings are not significant or material (which argument we have rejected) and that in any event, the deviations were legally immaterial because the December 11, 2002 Resolution did not expressly condition the variance which was granted on faithful compliance with the drawings which had been submitted, the representations that had been made or the testimony of the Applicants' witnesses at the hearing.

20. The Board rejects the Strahans' arguments for several reasons:

A. The presentation which was made by the Strahans in support of their variance application in 2002 was intended to persuade the Board that the oversized garage that they were asking the Board approve (so as to permit Mr. Strahan to hide his car collection, thus justifying the variance) would be aesthetically pleasing, was going to be built substantially into the side of a hill at a height not to exceed 27-1/2 feet with brick work and fenestration consistent with the style of the house and that, therefore, the adjacent property owners (Greenbaums) would not be detrimentally impacted by the action that he was asking the Board to take. It is clear that the presentation persuaded at least some Board Members to act favorably on the application.

B. The Strahans presented their case before the Zoning Board in 2002 in the course of which they represented to the Board and the public that if the variance were granted, they were going to construct the garage that they were requesting permission to build in a specific and particular way. It was inequitable and inappropriate that the Strahans presented a materially different plan to the Construction Official when they needed permission to go forward in 2009 after their 2004 permit had expired. Having

taken a position in 2002 with respect to the aesthetic treatment of the façade facing the Greenbaums, Ms. Strahan should not be heard at this time to claim that she is entitled to complete the garage in a manner inconsistent with those plans.

C. This case does not present the issue of whether the permit that was issued in 2004 could have been lawfully revoked. The Board finds that permit should not have been issued and that the Township determined that by 2008 it had expired.

D. Nor did the absence of an express condition in the Resolution that was adopted by the Board in 2002 in respect to the manner in which the garage would be built justify the issuance of the Construction Permit in 2009. The Resolution clearly indicates that the Board considered the drawings and finding No. 6 addresses the limited visual impact that the garage would have on the neighbor if the garage was built as was represented to the Board. The Board's conclusions were premised on those findings; the Board did take into consideration the representations that were made as well as the evidence that was submitted to show how the garage would be built. A review of the record and the evidence that was presented to the Board persuades us that although an express condition requiring that the garage be built in conformity with the evidence was not included in the Board's memorializing Resolution, the intent that the plans must be strictly adhered to is evident from the record.

NOW, THEREFORE, BE IT RESOLVED, based upon the foregoing, the Board of Adjustment does hereby sustain the Appeal and declare that the permit under review, namely Construction Permit No. 090-1378 issued September 17, 2009 having been improvidently granted is hereby declared null and void.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the Appellants, the owner of 99 Lloyd Road, Township Manager, Township Council and Township Clerk.

Chair Harrison remained recused. James Pryor, Esq., was present on behalf of **Omnipoint Communications, Inc., 153 Park Street**, and Terry Thornton, Esq., 160 Park Street, objector to the application was also present. After some brief discussion, Mr. Sullivan stated that the application would be continued at a special meeting on June 30, 2010 at 7:30 pm. No further notice would be given. The Board was granted an extension of time.

Chair Harrison rejoined the Board and stated that the application of 86 Valley Road Associates would start once Mr. Fleischer arrived at the meeting. The application of **Mr. & Mrs. Edward Sim, 84 Myrtle Avenue** was called. Catherin Sim and George Held, Architect, were sworn. Mr. Held described the application. Variances are requested associated with a proposed one-story addition to the dwelling and for the proposed location of central air conditioning units. A one story addition is proposed at the rear of the dwelling that will contain a new kitchen and eating area. A small existing rear porch is being re-roofed and extended to tie in to the addition. The maximum permitted principal building coverage in the R-0(a) Zone is 20 percent of the lot area. The existing principal building coverage on the property is 17.28 percent. The proposed

addition increases the principal building coverage to 21.4 percent and a variance is requested. Three (3) central air conditioning units, including 2 that are being relocated from the existing rear wall of the dwelling, are proposed on the easterly side wall of the addition. The minimum side yard setback requirement for central air conditioning units, as accessory structures in the R-0(a) Zone, is 12 feet. The central air conditioning units would be 8.33 feet from the easterly side property line, and a variance is requested.

Marked into evidence was:

- A-1 Sheet 1 of the plans with color added
- A-2 Photograph of the property
- A-3 Photograph of the property
- A-4 Photograph of the property
- A-5 Photograph of the property

The Board questioned the applicant and Mr. Held. Mr. Held answered several questions about the location of the conditioning units. Chair Harrison called for questions or comments from the public. Jackie Kral, 82 Myrtle Avenue, was sworn. She asked several questions and stated that her main concern is about storm water runoff. The Board discussed the application. The Board unanimously determined that the variance requested for exceeding the maximum permitted principal building coverage could be granted. The proposed deviation is minor. The odd shape and relative narrowness of the lot in the R-0(a) Zone, results in the property lacking lot area, which contributes to the proposed nonconformity and poses a hardship for the applicants. The majority Board also determined that the variance requested for a side yard setback less than required for 3 central air conditioning units could be granted. The easterly side yard of the subject property abuts the rear yard of a larger corner property, on which the dwelling is positioned further to the west up on higher grade fronting on South Mountain Avenue. The rear yard of the adjoining corner lot is utilized as a driveway in the area where the proposed central air conditioning units are proposed. The existing hedges along westerly side property line of the subject property also shield the view of the central air conditioning units.

On motion by Mr. Whipple, seconded by Ms. Cockey, the variance requested for exceeding the maximum permitted principal building coverage was unanimously approved, subject to the following condition:

1. A drywell must be constructed and maintained on the property at a location that is no closer to the easterly side property line than the easterly edge of the proposed addition. Roof leaders from the proposed addition shall be connected to drywell to manage the additional storm water produced by the addition.

On motion by Mr. Whipple, seconded by Ms. Cockey, the variance requested for a side yard setback less than required for 3 central air conditioning units, was also approved, subject to the following condition below, with Chair Harrison and Ms. English voting against the motion:

2. The existing hedges located along the westerly side property line in the area where central air conditioning units are proposed shall be maintained in their current location and size as shown in the photographs submitted as exhibits A-2 through A-5.

Mr. Fleischer arrived at the meeting and Chair Harrison called the application of **86 Valley Road Associates, LLC, 86 Valley Road**. Calvin Trevenen, Esq. appeared as attorney for the applicant and described the application to permit a personal training business to occupy a portion of the second floor of the building in the OR-3 Zone. Dr. Christopher Karydes was sworn. He is part owner of the subject property and has his medical practice at the property. He described the existing uses in the building and stated that they have been renting 6 parking spaces in the large parking lot at 94 Valley Road as required by the previous Planning Board approval. There have been no issues with a shortage of on-site parking for the existing uses or the personal training business that has been in the building for a several months. No questions were offered from the Board or the public.

John Harin was sworn and stated that he is the owner of the personal training business proposed to occupy a portion of the second floor of the building. He stated that the business has been at the location for several months. He was not aware that it was not a permitted use. He is a certified personal trainer and the business provides personal training in a private setting. There is one other personal trainer employed at the business for about 30 hours per week. There is no other staff. The business relocated from Verona to Montclair since most of the clients are Montclair residents. The hours are Monday through Saturday from 6 am to 12 pm and then for another 2 hours in the early evening. The busiest times are on Monday, Wednesday, and Thursday between 9 and 10 am. It is rare to have both trainers at the facility at the same time. At most, each trainer could have up to 2 clients at the facility at the same time, as one training session is ending and another is beginning. The Board questioned Mr Harin. He described the interior layout of the facility and how the business operates on a daily basis.

Peter Steck, Professional Planner, was sworn and stated his qualifications.

Marked into evidence was:

A-1 Planner's Exhibit, prepared by Peter Steck, PP

Mr. Steck described the variances requested. A variance is requested pursuant to N.J.S.A. 40:55D-70d(1) to permit a personal training business which is not a permitted use in the OR-3 Zone. A variance is also requested pursuant to N.J.S.A. 40:55D-70c to permit less than the required number of parking spaces. The subject property consists of 9,200 square feet of lot area and has frontage on Valley Road, Mountainview Place and Bell Street. The property is improved with an irregularly shaped two story building with gross floor area of 2,381 square feet on the first floor and 2,494 square feet on the second floor. The building was originally constructed to house the Montclair Volunteer Ambulance Unit and was subsequently modified through site plan and variance

approval for office use in accordance with a resolution adopted by the Montclair Planning Board on April 17, 2006. The site is particularly suited for the proposed use and approval of this application advances the purposes of the Municipal Land Use Law contained in N.J.S.A. 40:55D-1, specifically encouraging appropriate use of land which promotes the general welfare and provides sufficient space in an appropriate location for the proposed use. In accordance with the 2006 Planning Board approval, the applicant received a variance to permit 14 parking spaces, including one tandem space, where a minimum of 26 on-site parking spaces was required. The personal training business constitutes a personal service with a parking calculation of one space per 200 square feet as opposed to general office which is one space per 250 square feet. As a result, the off-street parking requirement increases by two spaces. Based upon the limited nature of the proposed use, approval of this application is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance.

The Board questioned Mr. Steck. No questions or comments were offered from the public. The Board discussed the application and concluded that the variances could be granted. Although a personal training business is not permitted by the ordinance, it is likely the omission of this use from the zoning ordinance was inadvertent rather than deliberate and the use is compatible with other uses in the zone. Based upon the testimony and conditions imposed below, the parking demand of this use will not exceed the demand for general office use. On motion by Mr. Burr, seconded by Ms. English, the application was approved subject to the following conditions:

1. This approval is limited to a personal training business with not more than two employees on site at any one time with not more than two clients per employee.
2. No additional signs shall be permitted.
3. All conditions of prior approvals not inconsistent herewith, shall remain in full force and effect.
4. The applicant shall be responsible for payment of all escrow charges incurred in connection with the review of this matter.

Chair Harrison called the application of **Brett & Dorene Jackson, 60 Hawthorne Place**. Brett Jackson was sworn and described the application. A second floor addition is proposed over the existing two-car attached garage on the easterly side of the property. Variances are requested for the front and rear setbacks of the proposed addition. The second floor addition measures 22 feet in width by 28 feet 2 inches in length, and would expand an existing bedroom and create a study, a walk-in closet, and a bathroom. The required front setback for the new construction on the property is 45 feet 7 inches, which is based on the average front setback of the 3 nearest dwellings, 2 to the right and 1 to the left, which is on the corner of Hawthorne Place and South Fullerton Avenue. The existing dwelling has a nonconforming front yard setback of 45 feet as measured to the area of the dwelling where the addition is proposed. The required rear yard setback for new construction on the property is 30 feet, which is 30 percent of the 100-foot lot depth. The existing dwelling has a nonconforming rear yard

setback of 27 feet as measured to the area of the dwelling where the addition is proposed. The proposed second floor addition would be aligned with the walls of the first floor below directly below it, and would follow the existing nonconforming front and rear setbacks, which requires variances.

The Board questioned the applicant. There were no questions or comments from the public. The Board discussed the application determined that the requested variances could be granted. The proposed second floor addition is aligned with the walls of the existing dwelling and would not expand the footprint of the dwelling. The lot dimensions and placement of the existing dwelling significantly limit the ability of the applicant to construct conforming additions to the dwelling. On motion by Mr. Fleischer, seconded by Ms. Cockey the application was approved.

Chair Harrison called the application of **Mitchell MacGregor, 14 Cross Street**. Mitchell MacGregor and John Guadagnoli, Architect, were sworn. Mr. Guadagnoli described the application. The subject property is located in the R-2 Two-Family Zone, measures 36 feet in width by 100 feet in depth, and contains a single family dwelling. Additions are proposed that require variances; some of the work has already been started. The roof and attic level of the dwelling as it existed previously have been removed and reframed at a taller height and include a gable dormer at the front and rear as shown on the plans. The front and side walls of the existing dwelling have nonconforming setbacks. The main wall of the dwelling has a front setback of 13.42 feet where 25 feet is required. The side yard setbacks of the dwelling where the increase in building height is proposed are 4.48 feet on the west, and 9 feet on the east, where 6 feet and 10 feet are required. The increase in height on the front and side walls along these nonconforming setbacks for the new attic level requires variances for a front yard setback of less than 25 feet and for side yard setbacks of less than 10 feet and 6 feet. The 15.5-foot width of the dormers proposed on the front and the rear of the dwelling exceeds the maximum allowance that would permit the dormers to be approximately 11 feet wide. As a result, the new attic level is considered a full third story rather than a half story and requires a variance in that a maximum of 2.5 stories is permitted. The existing dwelling on the site has nonconforming principal structure coverage of 26.24 percent, where a maximum of 25 percent is permitted. An existing one-story section of the dwelling measuring 4 feet 6 inches by 10 feet 2 inches on the east side of the dwelling is to be removed. A two-story addition measuring 13 feet 1 inch by 15 feet 2 inches is proposed at the rear of the dwelling. A rear landing and steps measuring 35 square feet is also proposed. The two-story addition and landing with steps at the rear increases the principal structure coverage to 30.44 percent, and requires a variance.

The Board questioned the applicant and Mr. Guadagnoli. Mr. MacGregor stated that the previous roof was in terrible condition and had failed structurally once renovation had started on the roof and attic level. There were no questions or comments from the public. The Board discussed the application. The Board determined that the variance requested to exceed 2.5 stories associated with the width of the dormers that exceed the maximum width permitted could not be approved. The dormers as constructed are too large and created an attic level of the dwelling that is out of scale with the dwellings the neighborhood. The Board also determined that the variances

requested for the front and side yard setbacks and for the principal structure coverage can be approved. The narrowness and shallow depth of the lot and the placement of the existing dwelling on the property significantly limit the ability of the applicant to comply with these zoning requirements. On motion by Mr. Whipple, seconded by Ms. English that the variance requested to exceed 2.5 stories was denied, and the variances requested for the front and side yard setbacks and for the principal structure coverage was approved, subject to the following conditions:

1. The principal structure lot coverage is not to exceed 31 percent of the lot area.
2. The existing footprint of the dwelling is limited to 2.5 stories, and the proposed addition at the rear is limited to 2 stories as depicted on the plan.

Chair Harrison called the application of **129 Grove LLC, 129 Grove Street**. Grant Gille, Esq. appeared as attorney for the applicant and described the application to permit office use, including medical office use, on a portion of the first floor of the building in the N-C Zone. Andrew Mitchell was sworn. He stated that he is part owner of the subject property. Prior to 1980, the building was utilized as a bank and subsequently converted to office and medical office use. In 2000, the first floor which had been used entirely for medical office use underwent alteration whereby a 1,075 square foot area was converted to a beauty salon which will be vacating the premises. The basement and first floor area, exclusive of the former beauty salon area, are currently occupied by medical office uses. The second floor contains a realtor's office and massage therapist. This application seeks to convert the former beauty salon on the first floor to office use, including medical office use, without any exterior modifications to the building or site. The applicant agreed to secure permit parking for two cars in the event this area was utilized for medical office use which would adequately address the increased parking demand. No questions were offered from the Board or the public.

Roger DeNiscia, Professional Planner, was sworn and stated his qualifications.

Marked into evidence was:

- A-1 Photographs of the subject property and the neighborhood
- A-2 Photographs of the subject property and the neighborhood
- A-3 Photographs of the subject property and the neighborhood

Mr. DeNiscia described the variances requested. A variance is requested pursuant to N.J.S.A. 40:55D-70d(1) to permit office use, including medical office use, which is not a permitted use on the first floor of the building in the N-C Zone. A variance is also requested pursuant to N.J.S.A. 40:55D-70c to permit less than the required number of parking spaces in the event the area is used for medical office use. The subject property consists of approximately 3,900 square feet of lot area and is located on the easterly side of Grove Street between Walnut and Oxford Streets and is improved with a two story building. The proposed site is particularly suited for the office including medical office use since the building was designed as a non-retail commercial

building with a long standing history of use as office and medical offices. The building does not contain at grade access at the front and possesses other physical characteristics which render the building unsuitable for retail use on the first floor. Approval of this application advances the purposes of the Municipal Land Use Law contained in N.J.S.A. 40:55D-1, specifically encouraging appropriate use of land which promotes the general welfare and provides sufficient space in an appropriate location for the proposed use. The site does not contain any approved on-site parking and none can be added given the physical constraints of the property. In the event the 1,075 square foot area formerly occupied by the beauty salon is used as a medical office, the amount of on-site parking required would increase by two parking spaces necessitating a variance.

The Board questioned Mr. DeNiscia. No questions or comments were offered from the public. The Board discussed the application. Based upon the unique characteristics of this building and the limited nature and scope of the proposed used, approval of this application is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. Based upon the Board's particular knowledge of local conditions, including the existence of a number of compatible uses in the area, the application is not inconsistent with the character of the neighborhood and will not adversely impact the public good. On motion by Mr. Burr, seconded by Ms. English, the application was approved subject to the following conditions:

1. In the event the area which is the subject of this application is utilized for medical office use, the applicant shall secure parking permits for two cars.
2. All signs shall conform to the requirements of the Zoning Ordinance.
3. The applicant shall be responsible for payment of all escrow charges incurred in connection with the review of this matter.

On motion by Mr. Whipple, seconded by Ms. English the meeting was adjourned.