

MINUTES OF THE BOARD OF ADJUSTMENT
May 20, 2009

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

ABSENT: Mr. Burr, Ms. Cockey, and Mr. Franco, 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 Mr. Susswein, the **Minutes of the April 15, 2009** regular meeting were adopted as modified.

On motion by Mr. Fleischer, seconded by Ms. English, the following Resolution memorializing the denial of the application of **Susan & Don Clark, 175 Cooper Avenue** was adopted:

WHEREAS, Susan and Don Clark, as owners, did make an application to the Board of Adjustment of the Township of Montclair for variances in connection with an application to remove the roof of the existing detached garage and construct a new roof on the garage at a taller height, on property designated as Lot 12 in Block 2605 on the Township Tax Map and located in the R-1 One-Family Zone; and

WHEREAS, the applicants requested variances pursuant to NJSA 40:55D-70c to permit a greater accessory structure height than required by **Montclair Code Section 347-46A(1)** and a lesser side yard setback than required from the easterly side property line than required by **Montclair Code Section 347-46A(2)(a)**; and

WHEREAS, the applicants submitted a property survey dated January 25, 1997, and a plot plan, floor plan, and elevations prepared by John Guadagnoli Architect dated November 4, 2008; and

WHEREAS, this matter came on to be heard at a meeting of the Board of Adjustment held on April 15, 2009 at which time it was established that notice was properly published and the property owners within 200 feet of the property in question had been properly served notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The property is an interior lot located in the R-1 One-Family Zone, measuring 70 feet in frontage width and 15,770 square feet in area, and contains a single-family dwelling and a detached garage in the northeasterly corner of the rear yard.

2. The existing detached garage has a conforming height of 15 feet. The applicants propose to remove the roof of the existing detached garage and construct a new roof on the garage at a taller height. The ridgeline would also be reoriented from a front gable to a side gable. A height of 19 feet is proposed to the ridgeline of the new roof. An ornamental cupola is also proposed on the roof, and two dormers are proposed on the front of the roof. A pull-down stairway is proposed to access the second level of the garage and the façade of the garage would also be renovated. A variance is requested in that a maximum height of 15 feet is permitted for accessory structures and a greater height of 19 feet is proposed.

3. The existing garage has a nonconforming side yard setback of 0.95 feet and 1.5 feet from the easterly side property line, as measured to the easterly corners of the garage. As a result of the proposed reorientation of the ridgeline from a front gable to a side gable, the side walls of the garage are made taller under the new roof, which along with the proposed added height, increases the height of the accessory building at the nonconforming easterly side yard setback. A variance is requested in that a minimum side yard setback of 6 feet is required from the easterly side property line and a lesser side yard setback 0.95 feet and 1.5 feet is proposed for the new construction.

4. The Board determined that the requested variances could not be granted. Based on testimony provided, the benefits of the application are limited strictly to the property owners and no public benefit accrues. Any aesthetic benefit could be equally accomplished with a more conforming structure. The applicant failed to prove a hardship or that any of the purposes of the Municipal Land Use Law would be advanced. The application failed to meet the positive criteria necessary for granting the variances.

5. Approval of this application would substantially impair the intent and purpose of the Zoning Ordinance which seeks to limit the size and placement of accessory structures in order to provide adequate light, air and open space.

6. Approval of this application would result in a massive structure virtually on the property line which would cause substantial visual detriment to the adjacent property owner to the east.

WHEREAS, the Board, based upon the foregoing findings, concluded that the applicants did not prove peculiar and exceptional practical difficulties and exceptional and undue hardship and did not prove that the variances could be granted without substantial detriment to the public good and without substantial impairment to the intent and purpose of the Master Plan and the zoning ordinance pursuant to NJSA40:55D-70C(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicants did not prove that the purpose of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and did not prove that the benefits of the deviation would substantially outweigh any detriment and did not prove that the variances could be granted without substantial detriment to the public

good and without substantial impairment to the intent and purpose of the Master Plan and zoning ordinance pursuant to NJSA40:55D-70C(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the application of Susan and Don Clark is hereby denied; and

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

On motion by Mr. Fleischer, seconded by Ms. English, the following Resolution memorializing the denial of the application of **The Salvation Army, 13 Trinity Place** was adopted, Chair Harrison, Ms. Holloway, and Mr. Whipple abstaining:

WHEREAS, The Salvation Army, did make application to the Board of Adjustment of the Township of Montclair to utilize first floor space as a coffee shop on property designated as Lot 6 in Block 2204 on the Township Tax Map and located in the R-4 Three-Story Apartment Zone and the N-C Neighborhood Commercial Zone; and

WHEREAS, the applicant sought variances as follows:

1. A variance pursuant to N.J.S.A. 40:55D-70d(1) to permit a coffee shop which is not a permitted use in accordance with Montclair Code Section 347-66.
2. A variance pursuant to N.J.S.A. 40:55D-70c to permit an awning sign with business identification contrary to Montclair Code Section 347-108.
3. A variance pursuant to N.J.S.A. 40:55D-70c to permit two window glass signs with business identification contrary to Montclair Code Section 347-108.

WHEREAS, the applicant submitted a site plan, Sheets 1 and 2 dated December 14, 2004 revised through March 3, 2009 prepared by Bertin Engineering Associates, Inc.; floor plans and elevations, Sheets A-1 and A-2 dated February 17, 2009 prepared by Jack Higgins, Architect, Inc. and a revised rendering of the proposed awning and window signs submitted April 9, 2009; and

WHEREAS, this matter came on to be heard at a meeting of the Board of Adjustment held on April 15, 2009, at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is a corner lot with frontage on Trinity Place and Myrtle Avenue and contains 43,703 square feet and is improved with a two story building. The property is split zoned, with the majority of the property including the

building located in the R-4 Three Story Apartment Zone, and the northerly side of the property including the surface parking lot located in the N-C Neighborhood Commercial Zone.

2. By resolution adopted April 20, 2005 the Board granted The Salvation Army a use variance, bulk variances and site plan approval to construct a new building and related site improvements to be utilized for religious and social service programs.

3. The applicant seeks to utilize a 29 foot 8 inch by 26 foot 2 inch area previously designated as a "multi purpose" room as a coffee shop including a serving area with counters and thirty seats. Hours of operation would be 7:00 a.m. to 3:00 p.m. Monday through Friday with the exception of an occasional special event. The application also includes an awning and window signs identifying "The Coffee Booth".

4. The application states the intended use is "a walk-in fair trade coffee shop". The coffee sold would be "fair trade" which provides disadvantaged farmers and workers in the developed world with a more equitable business practice. In addition to the sale of coffee, breakfast and lunch foods would be prepared at the facility and sold to customers which were not necessarily "fair trade".

5. The applicant argued that the proposed coffee shop use is "inherently beneficial" and promotes the applicant's involvement in community outreach and community service programs. The Board rejected this contention and found the proposed use would, for the most part, function as any other coffee shop and the fact that coffee sold was "fair trade" does not render the use "inherently beneficial".

6. The applicant's Planner argued the property is particularly suited for the proposed use and the application advanced the purposes of the Municipal Land Use Law constituting appropriate municipal action which promotes the general welfare (-2a) and provides sufficient space in an appropriate location for the proposed use (-2g). The Board found the applicant failed to present sufficient evidence to prove any of the purposes of the Municipal Land Use Law would be advanced by granting this application. Moreover, the property is not particularly suited for the proposed use and would result in the introduction of a substantial commercial activity in an area zoned residential.

7. Based upon the Board's particular knowledge of local conditions, approval of this application would cause substantial detriment to the public good by introducing a substantial commercial use with considerable noise and activity inappropriate in a residential zone.

8. Approval of this application is contrary to the intent and purpose of the Master Plan and Zoning Ordinance which seeks to limit commercial uses such as this in residential zones.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant failed to prove the requisite special reasons for the granting of this application, and failed to prove by a preponderance of the evidence that the proposed relief could

be granted without substantial detriment to the public good, and would not substantially impair the intent and purpose of the zone plan and zoning ordinance;

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

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant did not prove that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and failed to prove that the benefits of the deviation would substantially outweigh any detriment and failed to prove that the variances could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of 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 The Salvation Army for variances to permit a coffee shop and associated signs is hereby denied.

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

The continuation of the application of **Joseph & Holly Christovao, 22 Macopin Avenue** was adjourned to the June 17, 2009 regular meeting of the Board, at the applicants' request. No further notice would be given. The Board was granted an extension of time on the application. The continuation of the application of **Steve Marshall, 200 Claremont Avenue** was adjourned to the June 17, 2009 regular meeting of the Board, at the applicant's request. No further notice would be given. The Board was granted an extension of time on the application.

Chair Harrison called the application of **Zeus Realty Corp., 120 Watchung Avenue**. The application consists of 4 parts: a Request for Certification under N.J.S.A. 40:55D-68; an Appeal of Decision of Administrative Officer under N.J.S.A. 40:55D-70a; a Request for Decision on Special Questions under N.J.S.A. 40:55D-70b; and a Request for Direct Issuance of Permit under N.J.S.A. 40:55D-35. Stephen Aspero, Esq. appeared as attorney for the applicant and described the application.

Marked into evidence were:

- A-1 Legal Memoranda, dated May 20, 2009, prepared by Richard J. Szemiot, Counsel for NJ Gasoline-Convenience-Automotive Association
- A-2 400 letter-certifications in support of the application (Identification only)

Mr. Sullivan stated that A-2 would be marked for identification only and that the Board cannot consider it as evidence unless the individuals named on A-2 are present for cross-examination. He stated that any members of the public that are present would be given an opportunity to give testimony at a later part of the hearing. Nicholas Zacharias, owner of the subject property, was sworn. Mr. Aspero stated that he would only question Mr. Zacharias on Exhibit A-2. Mr. Zacharias stated that he drafted the letter in support of application used in Exhibit A-2 and either he personally arranged to obtain the signatures or had his employees obtain the signatures. He also described the composition of the support letters described on a tabulation sheet included as part of A-2. Mr. Aspero stated that the applicant has requested that the Board Chair and the Board Attorney recuse themselves from the application. A discussion ensued between Mr. Aspero, Mr. Sullivan, and Chair Harrison. Chair Harrison stated that he could hear the application fairly. He stated that in 1987 he voted against an application for the subject property that was unanimously denied by the Board and that when the application was required to come back before the Board in 1989 as a result of the former Chair's conflict of interest, he voted in favor of the application although the variance was denied. Also in 1989, he voted in favor of a use variance and a bulk variance for an application to construct a canopy on the subject property, although the Board did not approve the bulk variance. Mr. Sullivan stated that the fact that he represented the Board in successfully defending against a lawsuit brought by the applicant following the denial of an application in 1989 does not preclude him from providing legal advice to the Board at this time. Mr. Zacharias stated that in 1994 he filed application for an Appeal of Administrative Decision concerning an Enterprise Rent-a-Car facility at 113 Grove Street, and that the application was dismissed by the Board prior to being heard due to what he believed was an administrative fee that had not been paid. He reiterated his request that the Board Chair and the Board Attorney recuse themselves. The Board Chair stated that the dismissal of the application by the Board in 1994 was legally required and did not reflect any bias against Mr. Zacharias. The Board Chair and Board Attorney did not recuse themselves.

Mr. Aspero stated that there are no other witnesses and that the Board should now consider the legal memorandum with several attachments that has already been submitted to the Board for the application. Mr. Sullivan addressed the Board and provided an explanation the 4 parts of the application. The Board had questions for Mr. Sullivan and Mr. Aspero. Chair Harrison called for any public comments. None was offered. Mr. Aspero summarized the application. He conceded that the request to direct the issuance of a permit pursuant to N.J.S.A. 40:55D-35, was improper and withdrew the request. Additionally, despite filing the request for certification pursuant to N.J.S.A. 40:55D-68, the applicant conceded because the property was granted its first use variance in 1931 to allow the filling station use, the applicant does not believe that the filling station use is a statutory non-conforming use and does not believe that, as a matter of law, the Board is legally able to issue a D-68 Certificate that the present filling station use is a statutory nonconforming use.

The Board discussed the application. Motor vehicle and gasoline service stations are not permitted uses in the N-C Neighborhood Commercial Zone. The Board agreed with the applicant that the use was created by variance in 1931 and is not a nonconforming use as defined in N.J.S.A. 40:55D-5 since it was not a lawful use prior to

the adoption of an amendment to the Zoning Ordinance which fails to conform to the Zoning Ordinance by reason of such adoption. Consequently, the applicant is not entitled to a certification pursuant to N.J.S.A. 40:55D-68. By virtue of the 1931 use variance, the Board determined that the existing use of the property is not a permitted use and is not a nonconforming use as defined by N.J.S.A. 40:55D-5. The applicant's use of the property is limited to the parameters set forth in the various use variance approvals previously granted by the Board. Although there is no prohibition to mixed uses in the N-C Neighborhood Commercial Zone, none of the previously approved use variances authorized a retail convenience store in association with the approved motor vehicle service station; the introduction of a retail convenience store to the site requires a variance pursuant to N.J.S.A. 40:55D-70d.

The Board determined that the replacement of the service bays with a convenience store would require a variance pursuant to N.J.S.A. 40:55D-70d since the gasoline service station use would remain. The Board determined it was not appropriate or necessary to respond to the applicant's request for a decision on special questions relating to mixed uses on the property since the Board's determination that a use variance is required would remain irrespective of how the Board ruled on those questions. The Board determined the use of the subject property created by variance is distinct from both a permitted use as well as a nonconforming use as defined in N.J.S.A. 40:55D-5. The grant of a variance does not make such a use or structure conforming, it still does not conform to the zone's requirements, but it is permitted subject to the conditions and limitations attached to the approval. Pursuant to the Montclair Township Zoning Ordinance, it is clear the introduction of a retail convenience store at the subject property would require application to the Board of Adjustment for a variance pursuant to N.J.S.A. 40:55D-70d since the gasoline service station would remain. The Board found the applicant failed to present sufficient evidence to establish the introduction of a retail convenience store at this location would not require a variance pursuant to N.J.S.A. 40:55D-70d.

The Board determined that the Township Attorney's October 20, 2008 conclusion that the introduction of a retail convenience store at the subject property requires a use variance is correct. The Board concluded that the applicant (1) was not entitled to a certification under N.J.S.A. 40:55D-68 and (2) did not present sufficient evidence to overturn the determination by the Township Attorney dated October 20, 2008 or (3) establish through a request for a decision on special questions that the introduction of a retail convenience store on the property would not require application to the Board of Adjustment for a variance pursuant to N.J.S.A. 40:55D-70d. On motion by Mr. Whipple, seconded by Mr. Fleischer, the application of Zeus Realty Corp. was denied and dismissed in its entirety, Ms. Holloway abstaining.

The Board took a short recess

Chair Harrison called the application of **Chris Noble, 245 Midland Avenue**. Chris Noble was sworn and described the application for a front yard setback less than required in connection with a proposed roof over an existing uncovered front porch on his single-family dwelling. A roof supported by columns is proposed to cover an existing uncovered front porch that is the full width of the dwelling. Based on information he

obtained from the previous owners of the property, a roof had existed over the uncovered front porch several years ago and was demolished. The front wall of the house also has a door at the second level that would have provided access to a balcony atop the previous roof. The second floor door would be modified to a window in the current plan. The average front yard setback of the 4 nearest dwellings, 2 on either side of the subject property, is 64.5 feet, which is the required front yard setback for the property. The proposed covered front porch would have a front setback of 50 feet, as measured from the southerly front corner of front porch and a variance is requested. The proposed construction would meet all other zoning requirements. The Board questioned Mr. Noble. He estimated that the previous roof on the porch was removed sometime in the late 1970s. No questions or comments were offered from the public. The Board discussed the application and determined that the requested variance could be granted. The dwelling located at 239 Midland Avenue is located approximately 100 feet from the front property line which is not a characteristic front setback on Midland Avenue and skews the front setback requirement for the subject property. If not for the unusually large setback of the dwelling at 239 Midland Avenue, the applicant's proposal would conform to the zoning requirements. The proposed roof over the existing uncovered front porch conforms to all other zoning requirements and is in keeping with character of the dwellings in the neighborhood. On motion by Mr. Fleischer, seconded by Ms. English the application was approved.

Chair Harrison called the application of **Frank Vilardi, 123 Gordonhurst Avenue**. The applicant and Chris Blake, Architect, were sworn. Mr. Vilardi described the application for a variance to permit a third story in connection with the construction of a dormer addition in the roof at the rear of his single-family dwelling. Mr. Blake also described the application. The property contains a 2½-story, single-family dwelling. A dormer addition is proposed in the roof at the third floor at the rear of the dwelling. The ordinance permits within a half story, dormers that do not exceed 50 percent of the width of the façade. For the subject property, approximately 14.25 feet of dormer width would be permitted in the roof at the rear of the dwelling without a variance and the proposed dormer addition measures 19 feet in width. The proposed dormer would allow for the creation of a guest bedroom on the third floor and the expansion of an existing third floor powder room into a bathroom. The dwelling has existing smaller dormers on the front and sides of the dwelling's hip roof that are in compliance with the ordinance. The existing dwelling has a conforming height of 34.5 feet measured to the ridgeline of the existing roof and the proposed dormer would match the ridgeline height of the dwelling. The Board questioned the applicant and Mr. Blake. No questions or comments were offered from the public. The Board discussed the application and determined that the variance requested could be approved as submitted. The proposed dormer can not be reduced in size any further and still provide the reasonable utility of the interior plan. The dwelling would remain in keeping with the size, scale, and character of the existing dwellings in the neighborhood. The overall height of the dwelling would not be increased; and the proposed dormer addition would not be visible from the street or have a negative impact on nearby properties. On motion by Mr. Fleischer, seconded by Ms. Holloway the application was approved.

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