

MINUTES OF THE MONTCLAIR BOARD OF ADJUSTMENT
December 10, 1997

PRESENT: Chair Harrison, Vice Chapman, Mmes. O'Connell, Freundlich, Messrs. Church, Fleischer, Tobin; also Michael Sullivan, Esq., and Ms. Kadus.

ABSENT: Ms. Holden, Mr. Williams, and Mr. Zichelli

Ms. Kadus called the roll and announced it to be a regular meeting of the Montclair Board of Adjustment for which notice had been given in accordance with the Open Public Meetings Act.

On motion by Mr. Church, seconded by Ms. O'Connell, the **Minutes of the November 12, 1997** were adopted, Mr. Chapman abstaining.

On motion by Mr. Church, seconded by Ms. O'Connell, the following **Memorializing Resolution of Omnipoint Communications, Inc., 5 Roosevelt Place** was adopted, Mr. Chapman abstaining:

WHEREAS, Omnipoint Communications, Inc., did make application to the Board of Adjustment of the Township of Montclair for approval to install six wireless telecommunication antennae and accessory equipment cabinet on the roof of the existing building on property designated at Lot 12 in Block 3106 on the Township tax map and located in the OR-4 and R-4 Zones; and

WHEREAS, the applicant sought variances pursuant to *N.J.S.A. 40:55D-70d* as follows:

1. The proposed telecommunication antennae are not a permitted use pursuant to Montclair Code Section 224-66.

2. The height of the proposed antennae is approximately 73 feet which exceeds the maximum building height of 42 feet by more than 10%.

WHEREAS, the applicant submitted a site plan prepared by Lapatka Associates, Engineers, dated July 22, 1997 and elevations and details prepared by Robert P. Juengart, architect, dated July 18, 1997; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on November 12, 1997, 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; and

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

1. The proposed antennae will improve cellular communication service to the applicant's subscribers which provides an important communications link in emergency

situations and has been recognized in case law as an "inherently beneficial" use. Nynex Mob. Comm. Co. v. Hazlet Tp., 276 N.J. Super. 598 (App. Div. 1994); Kingwood v. Board of Adjustment, 272 N.J. Super. 498, (Law Div. 1993); New Brunswick v. Old Bridge, 270 N.J. Super. 122 (Law. Div. 1993).

2. The proposed antennae will comply with all applicable State and Federal regulations for radiation transmission levels of cellular antennae.

3. The Board determined the height of the six antennae three feet above the penthouse or chimney represented an unreasonable visual intrusion the necessity of which was not supported by the testimony presented by the applicant.

4. By reducing the height of the proposed antennae by three feet, the antennae would not be seen from most vantage points and the application would not cause substantial detriment to the public good.

5. The proposed telecommunications antennae constitute a technological advance not contemplated or addressed by the existing zoning law, and the proposal is not inconsistent with the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved the requisite special reasons for the granting of this application and applied the balancing test contained in Sica v. Bd. of Adjustment of Tp. of Wall, 127 N.J. 152 (1992) and found the grant of the variance would not cause substantial detriment to the public good, and would not substantially impair the intent and purpose of the zone plan and zoning ordinance;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Adjustment of the Township of Montclair, that the within application of Omnipoint Communications, Inc. is hereby approved subject to the following conditions:

1. The height of the antennae shall not exceed the top of the penthouse or chimney to which it is attached.

2. The antennae shall be painted a color to match the structure to which it is attached.

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. Chapman, seconded by Mr. Church, the following **Schedule of 1998 Meetings** was adopted:

January 21	April 15	July 15	October 21
February 18	May 20	August 19	November 4
March 18	June 17	September 16	December 9

Ms. Freundlich and Messrs. Tobin and Fleischer joined the meeting.

Mr. Sullivan reported that the Board's approval of the B'Nai Keshet application was upheld by the Appellate Division, and he distributed copies of the written judgment to the Board.

Chair Harrison called for the application of **Jane Haburay and Anthony Herrling, 97 Central Avenue**. Michael Kates, Esq. appeared as attorney for the appellants. David Owen, Esq. appeared as attorney for the subject property owners, Ms. Goss and Mr. Conroy.

Mr. Kates explained his clients' application appealing the zoning administrative officer's decision to allow construction of a residential addition 6 feet from the northerly property line of a flag lot. The appellants' claim that the setback should have been 25 feet because the yard was actually a rear yard, not a side yard.

Mr. Michael Petry, engineer and planner, was sworn. He indicated that he had researched the files and made site inspections in preparation for his testimony.

Marked into evidence was:

A-1 Photo board

He described the neighborhood, flag lot and the proposal by Ms. Goss and Mr. Conroy to construct an addition linking their dwelling with their accessory garage. He noted that the flag lot had been created through a minor subdivision in 1986, and no variances for setbacks were required by the Township or approved at that time.

Marked into evidence was:

A-2 McCumsey report, dated December 9, 1997

Mr. Petry described the flag shaped lot and its orientation to Central Avenue. He said that in his opinion, the northerly yard was actually a rear yard, and that the zoning ordinance did not give specific requirements for odd shaped lots. He noted that it was up to the Board's discretion to determine the yard orientation when the lot was not regularly shaped. The "pole" portion of the flag lot was the front yard, he explained, making the northerly yard opposite it the rear yard.

Mr. James Westfall, 95 Central Avenue, questioned the witness.

Mr. Owen introduced Mr. Michael Tobia, professional planner, who was sworn.

Marked into evidence were the following:

- P-1 Memorandum from K. Kadus to Planning Board, dated May 12, 1986
- P-2 Memorandum from K. Kadus to Board of Adjustment, dated December 5, 1997
- P-3 Colored map of subject property on board
- P-4 Photo board
- P-5 Page 67 from The New Illustrated Book of Development Definitions, by Moskowitz and Lindbloom, 1993
- P-6 Excerpt from Subdivision of Land Ordinance
- P-7 Page 301 from the New Illustrated Book of Development Definitions, by Moskowitz and Lindbloom, 1993
- P-8 Photo of house showing former porch

Mr. Tobia described the site, the construction of the new addition, and the positioning of the yards. In his opinion, the yard in question was a side yard. He noted several definitions from the Montclair ordinance as well as a planning publication which supported his position. He stated that front yard is clearly determined by a reading of the Montclair zoning ordinance definition of front yard. Logically following from that determination, the rear yard is opposite this yard and the remaining yards are side yards.

Mr. Richard Seltzer, Assistant Township Attorney, introduced Ms. Karen Kadus, Township Planner, who was sworn. She reviewed the points contained in her December 5 memorandum to the Board explaining why the yard in question was a side yard. She noted that no variance was required for a deficient setback in 1986 because the yard orientation remained the same after the minor subdivision. It was always a side yard, and remained a side yard, therefore not requiring a variance for a pre-existing deficiency. She also recalled one "flag lot" that was close to the property in question as far as shape, and described the yard orientation of that lot.

Mr. Jay Westfall, 95 Central Avenue, was sworn. He supported the determination that the yard was a side yard.

Mr. Kates, Mr. Owen and Mr. Seltzer all gave summations.

The Board discussed the matter. On motion by Mr. Church, seconded by Mr. Fleischer, the Board upheld the determination of the zoning administrative officer that the subject yard was a side yard. A resolution memorializing this determination will be adopted at the January meeting.

The Board took a short recess.

Upon reconvening, Chair Harrison called for the application of **Harry Hahn, 145 Walnut Street**. Grant Gille, Esq., appeared as attorney for the applicant who was seeking a front yard parking variance. Marked into evidence were:

- A-1 Revised site plan prepared on the property survey, colored
- A-2 Property survey with seal, dated September 24, 1997
- A-3 Letter from Surveyor dated December 8 clarifying setbacks
- A-4 16 photographs

Mr. Harry Hahn, owner and applicant, was sworn. He stated that he purchased the one family dwelling in November and completely renovated the house. He removed the front porch and replaced it with a smaller landing and staircase. He wished to create a paved parking area for one vehicle in front of the dwelling. He noted that there were 19 feet between the house and the sidewalk to allow for one car.

The 6.8 foot side yard setback of the house prohibited him from creating a rear yard parking area, he said. He also noted that there was no potential for utilizing a neighbor's property to gain access to his rear yard. His revised plan showed a greater side yard setback than originally planned, therefore eliminating the need for the side yard setback deficiency variance.

He noted that he would install shrubbery on the northerly side of the parking area, but his neighbor did not want him to do this. His proposal does not result in the removal of any street trees, he said.

The Board discussed the application.

On motion by Mr. Church, seconded by Mr. Tobin, the application was denied. A resolution memorializing this denial will be adopted at the January meeting.

The Chair called for the application of **Paul Rotunda, 83 Park Street**. Joseph Castiglia, Esq. appeared as attorney for the applicant who wished to renovate the basement of his mixed use building for office space without providing the required number of on-site parking spaces.

Dr. Paul Rotunda, applicant and owner, was sworn. He described the use of the building as dental office on the first floor and residential apartment above. He noted that the basement was used for storage only. A total of 12 parking spaces are provided on the site, although one is not usable because it blocks two others.

He stated that the basement would be used by a professional such as an architect or accountant, not by a medical practitioner. He said that he has 3 employees in his dental office.

Dr. Rotunda said that based on his observations, the parking area functions well in conjunction with the parking area adjacent to it, and the addition of a professional office in the basement should not disrupt the site or be detrimental to the neighborhood.

The Board discussed the application. On motion by Ms. Freundlich, seconded by Mr. Chapman, the application was approved, subject to the following conditions:

1. Parking space #5 shall be striped.
2. The use of the basement shall be for a non-medical office.
3. If the applicant loses the right to use the driveway on the adjoining property, he shall return to the Board of Adjustment for review.

A resolution memorializing this approval will be adopted at the January meeting.

Due to the lateness of the hour, the Board carried the application of **LaSelva, 29 Watchung Plaza**, to January 21 at 7:30 p.m., first on the agenda.

The meeting was adjourned at 11: 40 p.m.