

BOARD OF ADJUSTMENT
BOROUGH OF BERNARDSVILLE
Minutes – April 4, 2022
VIRTUAL ONLINE MEETING

1. **Statement of Adequate Meeting Notice:** Read by Chair Greenebaum at 7:31 pm.
2. **Oath of Office:** Administered by Board Attorney Rago to new member: Stephen Reynolds - Alternate #3 (1/1/22 – 12/31/23) prior to the opening of the meeting.
3. **Roll Call:**

Present – Members Dello Russo, Greenebaum, Kramer, McDowell, Sailliard, Sedlak, Traynor, Slocum and Reynolds.
Absent – Ms. Loeffler.
Board professionals present: Attorney Louis P. Rago, Engineer Robert C. Brightly and Planner John P. Szabo, Jr.
4. **Approval of Minutes:**

Review draft minutes of 3/7/22 meeting.
Upon review, two corrections were noted by Mr. Slocum. A motion to approve the minutes as corrected was made by Mr. McDowell and seconded by Ms. Kramer.
Voice vote:
All eligible members voted in the affirmative.
5. **Communications:**

Chair Greenebaum acknowledged receipt of notice from Borough Clerk Anthony Suriano regarding the 4/4/22 resignation of recently appointed and installed BOA Alternate #4 Kathi Sica.
6. **Old Business:**

A. Continued Application #21-12 JEPSEN – Request for D68 Certificate of Nonconforming Use 161-163 Mount Airy Road; B:119, L:7 & 8; Deemed complete 12/20/21; Hearing commenced 3/7/22; Decision required by 4/19/22; Scheduled to be continued 4/4/22.

Appearing on behalf of the application were attorney David Brady, contract purchaser Mads Jepsen, engineer Ron Kennedy with technical facilitator Chris Fairfield, and current property owner Richard Kenworthy, Jr.

Mr. Brady acknowledged that the hearing left off at the last meeting with questions from the public for Mr. Kenworthy. Upon inquiry, it was established that there were no further questions for him. The five exhibits (lettered V through Z) that were submitted to the Board earlier in the day were marked as group by Mr. Rago as **Exhibit A-2**. The lettered exhibits were individually displayed by Mr. Fairfield and referenced by Mr. Brady. All were from the online archives of the Bernardsville News:

- V – 11/10/27 article that mentions construction of the Alward residence.
- W – 12/27/28 classified ad by Henry Alward, Mason and Contractor, on Mr. Airy Road, with New Year greeting.
- X – 11/18/48 article reporting on a tire fire that occurred at the Alward construction yard on Mt. Airy Road.
- Y – 5/22/69 article reporting on a retirement dinner held for a pair of Alward employees and stating that the business at 161 Mt. Airy Road had been there for more than 40 years.
- Z – 2/18/32 notice of adoption of the Bernardsville zoning ordinance with the ordinance printed in its entirety.

Mr. Brady pointed out that in section 4 of the 1932 zoning ordinance, non-conforming uses within buildings are addressed. He said the ordinance does not regulate non-conforming uses on lots or vacant land. That differs from the 1950 revised zoning ordinance, previously introduced in Exhibit P, which only deals with the use of land, not buildings. It is his position that it was not until 1950 that the outside use of properties came into effect.

Mr. Brady's responses to questions:

(Mark Morrison, 5 Mt. Airy Rd., Basking Ridge) The 1932 ordinance zoned the entire town. From his reading of the zone map, the Alward property was in the Residential B zone.

(Chair Greenebaum) The 1932 ordinance did not discuss what could be done with unimproved land. Responding to Chair Greenebaum's observations of the aerial photo, that there appears to have been an intensification of the nonconforming use on the lot, Mr. Kenworthy said that according to Mr. Kennedy at no time were live trees cut down. Only trees that blew down during huge storms or trees that died were removed.

(Mr. Rago) His position is that in 1932 the structures that were on the property were "grandfathered"/ protected, but in 1950 the land as it was at the time of the zone change became what was protected. (Referring to the 1953 aerial photo on **Exhibit E**, Mr. Rago observed that in the subsequent photos the tree covered area thinned out and trucks consumed more of the lot.) Mr. Brady referenced Mr. Kenworthy's testimony that items were being stored under the trees that are not visible from the photos, for example pipes on raised racks. He also referenced the language in the 1950 zoning ordinance that provides protection for a part of or the entire legally preexisting nonconforming lot. Mr. Kenworthy affirmed that the entirety of the lot, including tract 4, was used for the business.

Comments from the members of the public (all of whom were sworn prior to providing testimony):

Roy Crego, 12 Mt. Airy Rd., Basking Ridge: At the prior hearing he asked applicant if they had any photos of the intersection of Mt. Airy and Oak. He submitted a 1911 photo of the Wright family house that stood on the corner of Mt. Airy Rd. and Pill Hill Rd until 1934. The photo was previously provided by Mr. Mottola to the applicant's and Board's attorneys. It was displayed and marked by Mr. Rago as Exhibit O-1. His purpose was in pointing out that the intersection was not wide open. He stated his opposition to the continued commercial use of the site unless there are some guarantees that in the future there will be more trees, less water runoff and less trucks. The site is visible from four different rooms of his home which stands across the street. He agrees with the 1979 aerial photo that shows more trees on the Pill Hill side of the property. He remembers more trees on the lot from his youth when he frequently walked past the site. He would like to see more of a setback and trees planted on the Pill Hill side to restore the historic

look of the property before the owner expanded the gravel lot and fence. He wishes to see a reduction in stormwater runoff and asked that the Board require more trees be planted to achieve this. The paved area should be smaller to limit the number of trucks that can be parked there and the rental of parts of the property to other contracts should be restricted. Trucks frequently entering and exiting the site may create a traffic hazard with the increase in traffic since Alward's heyday. (Mr. Brady responded that his client is not appearing before the Board for a site plan development application for which the Board can impose reasonable restrictions.)

Mark Morrison, 5 Mt. Airy Rd., Basking Ridge: He asked if the Board would consider a delay in deciding the application until the public had a chance to see lease agreements and/or hear from other companies that are or have leased space on the lot, to provide testimony on the continuous use of the site. There seems to be a lack of evidence as to what's happened on the lot over the last 20 years. He is in agreement with Mr. Crego that a more natural setting at the fence along Pill Hill Rd. (Mr. Brady responded that Mr. Kenworthy has provided un-contradicted testimony on the matter. Non-continuity of use does constitute abandonment of the use.)

Johanna Wissinger, representing the Bernardsville Environmental Commission (EC): She wanted the public to know that the EC does not take part in applications such as this in which there is ongoing involvement by the NJ Department of Environmental Protection.

After a short break to confer with his client, Mr. Brady provided closing comments. He restated the nature of the application and what currently exists on the site. Referenced the 1932 and 1950 zoning ordinances as two pertinent points in establishing the history of the preexisting nonconforming use. The Board should be able to draw a reasonable conclusion as to the veracity of the legally existing status of the business from the documents and testimony presented, which he retouched upon for the Board. Abandonment of a nonconforming use required some objective and subjective actions, i.e. some physical change plus a demonstrated intent to abandon. Based on evidence provided the offices have existing since the house was erected. Additional tracts of land were added to the original for the successful operation of the business. With the last tract being added in 1946 prior to the 1950 revised zoning ordinance. There has been no intent or action abandon the use on this site. The Jepsons will acquire the site only after the environmental cleanup has occurred and their business requires a much lighter use of the site. Should they want to make changes to the site, they will have to come back to the Board for approvals. At which time, the Board can impose conditions on the use of the site if deemed appropriate at the time.

Deliberative comments by the Board included:

Chair Greenebaum: He believes, based on the aerial photographs presented showing the increase of impervious surface and where trucks are parked, that there has been an intensification of the use over the years. He also expressed concern over the rentals of space to businesses different from the original. He didn't think the removal of trees was regulated in the Borough more than 15 years ago. He understands that this is not a site plan application and the applicant has demonstrated that the property has been used as a construction yard for at least 100 years.

Vice Chair Traynor: As no contradictory testimony as presented, he did not find there to be an intensification of the use. The use of the site as a contractor's yard encompassed the entire site. He did not find the property rentals relevant to the continued use of the property. Additionally, over all the years of operation, there was nothing from the town that said there was an intensification of the use, especially based on the apparent loss or removal of trees.

Mr. Rago opined that he did not believe either the site rentals or abandonment are at issue but that it was up to the Board to decide whether there had been an intensification of the use upon the site. He said there is case law on both sides of the argument. While this is not a site plan application,

there is some benefit in knowing that the site is being cleaned up under DEP supervision and that based on Mr. Jepsen's testimony, the site will be further cleaned up and dressed up when his company takes ownership of the property. The heavy construction aspect of the use will also reduce to a lighter type of construction.

Mr. McDowell asked if it mattered how much of the site is in use at any particular time if the entire property is designated for the same use.

Mr. Szabo felt that the concepts of intensification and expansion were being confused, whereas the latter would be an enlargement of the use beyond the boundaries of the property. There was discussion with Mr. Rago in which it was recognized that intensification and expansion can go hand in hand within the boundaries of a site. Mr. Brady interjected that whether it's storage of construction materials or parking of construction of vehicles, it all part of the same use within the confines of the property. By 1946 all four of the tracts were under Alward's ownership and protection of the nonconforming use for the entire parcel is specifically stated in the 1950 zoning ordinance.

Mr. Slocum suggested that based on the testimony, there may have been a creeping expansion of the use on the related to the slow reduction in the number of trees on tract 4, whether due to storms, sickness, death, etc. He asked what type of site improvements would require Board approval in the future.

Mr. Reynolds couldn't see why the entire property wouldn't be considered the same use whether all or part of it was being used at any given time. He did not believe there were any restrictions prohibiting the use of the entire property to greater or lesser extents.

Ms. Kramer asked if there would be an opportunity to stipulate improvements on the site, to which the Chair explained that would only be the case with a site plan application and not the application that's now before the Board.

A motion to approve the application and grant the certification of legally pre-existing nonconforming use status as a construction yard with residential office buildings was made by Mr. Traynor and seconded by Mr. Slocum.

Roll call vote:

All in favor: Members Greenebaum, Kramer, McDowell, Sailliard, Traynor and Slocum.
Those opposed: None. Those abstaining: Mr. Sedlak.

B. Review of draft thank you resolutions for former members Ed English and Tom Carton:

Chair Greenebaum read the resolution for Mr. English on the record. A motion to adopt the resolution as read was made by Mr. McDowell and seconded by Mr. Sailliard.

Voice vote:

All members voted in the affirmative.

Chair Greenebaum read the resolution for Mr. Carton on the record. A motion to adopt the resolution as read was made by Mr. McDowell and seconded by Mr. Slocum.

Voice vote:

All members voted in the affirmative.

Mr. Mottola will have the resolutions professionally printed on a single decorative sheets of paper and then notify members when they can go to the police dispatch lobby to sign them.

7. New Business: Review of 4/4/22 Bills List with Vouchers

Upon review, a motion to pay the listed invoices, in the amount of **\$4,587.50**, was made by Mr. McDowell and seconded by Mr. Slocum.

Roll call vote:

All members voted in the affirmative except Mr. Sedlak who abstained.

8. Pending Applications: The Chair noted the following application and its status:

Application #21-13 SELLERS - Conditional Use Variance for Detached Caretakers Cottage at 140 Post Kennel Road, B: 27, L: 1, Zone: R-1; Received 12/3/21; Deemed complete 2/17/22; Scheduled to be heard 4/18/22.

9. Comments from Members: Chair Greenebaum reminded members of the need to complete their 2022 Financial Disclosure Statements by the April 30 deadline.

10. Comments from Staff: Per Mr. Slocum's inquiry, Mr. reported that according to Council member Chad McQueen, the Borough is working on trying to accommodate hybrid public meetings where attendees can join either virtually or in person.

11. Executive Session: Matters of Ongoing Litigations re NJAW appeal of water tank denial:

At the Chair's request, a motion to close the public meeting and reconvene in executive session was made at 9:50 pm by Mr. McDowell and seconded by Mr. Slocum.

Roll call vote: All members voted in the affirmative.

It is anticipated that the matters discussed in closed session may be disclosed to the public upon determination of the Board that the public interest will no longer be served by such confidentiality.

A motion to close the executive session and reopen the meeting to the public was made at 10:08 pm by Ms. Kramer and seconded by Mr. Slocum.

Voice vote: All members voted in the affirmative.

12. Adjournment:

Motion to adjourn: Mr. McDowell.

Second: Mr. Slocum.

Chair Greenebaum adjourned the meeting at 11:15 pm.

Respectfully submitted,



Frank Mottola,
Planning & Zoning Boards
Administrative Officer

Keywords: Oath-Sica-resignation-Jepsen-Brady-Alward-161-Mount-Airy-resolutions.