MEMORANDUM

FROM: MICHAEL B. STEIB, ESQ.

TO: COLTS NECK ZONING BOARD OF ADJUSTMENT

DATE: OCTOBER 8, 2020

RE: NOTICE OF APPEAL FLANCBAUM, ET.AL.

On August 27, 2020 Robert C. Shea, Esq. submitted a transmittal letter to:

"Colts Neck Township Zoning Board of Adjustment
Ms. Ruth Leininger, Zoning Board of Adjustment Secretary
124 Cedar Drive
Colts Neck, New Jersey 07722"

The letter states that Mr. Shea represents Morris Flancbaum, Glen Dailey and Doug Zagha with respect to a Colts Neck Planning Board application of "Colts Neck Community Church Application NO. 7393". The letter encloses an "application", Escrow Replenishment Agreement, checklist, W-9 form and four checks for application and escrow fees.

The application submitted is entitled "Variance Application". Numbered paragraph 1 of the application, designed to identify the applicant, states "see attached Schedule A" which Schedule states that Flancbaum, Dailey and Zagha are each "the owner" of 249 Route 537, Block 33 Lot 21 in Colts Neck Township. Numbered paragraph 3 states that request is made for "Appeal – 40:55D-70A Interpretation 40:55D-70B See attached Schedule "B".

Schedule B articulates the argument that, since Section 102-11.B. of the Ordinance regarding Planning Board review of Conditional Use applications requires the Board to:

> "review" certain aspects of the application (number of employees, number of users and requirements for similar uses), and
>
> "give consideration to" all reasonable elements which would affect the public health, welfare, safety, comfort and convenience such as:
>
> > Effect on adjacent properties,
> >
> > Buffer area,

Proposed use(s)

Character of the area,

Vehicular traffic patterns and access,

Pedestrian ways,

Landscaping,

Lighting,

Signs,

Noise,

Dust,

Drainage,

Sewage treatment,

Parking,

Potable water supply,

Screening,

Wetlands,

Utilities,

The need by Township residents,

Structure location and orientation.

that all of the above items to be "reviewed" or "considered" constitute "conditional use standards". Therefore, it concludes that if there is any deviation from an ordinance provision for which relief is required, which provision is related to any of the foregoing "conditional use standards", the relief required to be sought and obtained is a conditional use variance pursuant to N.J.S.A. 40:55D-70.d(3). Such relief can only be given by a Zoning Board of Adjustment or a Unified Planning Board that has authority to exercise the powers of a Zoning Board of Adjustment.

Schedule B further states that the application of Colts Neck Community Church requires the following relief from Ordinance provisions:

Variances

102-84H2	Two signs (freestanding and façade) where only one is permitted.
102-84H2	Freestanding sign with area of 15 sq. ft. where 12 sq. ft. is the maximum permitted.
102-84H2	Façade sign area in excess of 12 sq. Ft.

Design Standard Waivers

102-69B	Detention basin within 300 ft. riparian buffer.
102-69B	Entire 300 ft. riparian buffer not preserved within a conservation easement.
102-90A	A 20 ft. buffer is provided along a residential property where 30 ft. is required.
102-119A2	14 off-street parking stalls in a row without a landscape island where 10 stalls in a row is the maximum permitted.

Schedule B asserts that each of the above deviations in some way affects one or more of the items required to be "reviewed" or "given consideration" by the Board under Section 102-11.B. ("Conditional Use Standards"). Therefore, each requires conditional use variance approval. Since the Colts Neck Planning Board is neither a zoning board of adjustment or a unified planning board with authority to exercise all of the powers of a zoning board of adjustment it does not have the jurisdiction to grant the required relief.

PROCEDURAL ISSUES:

WHO DETERMINES JURISDICTION?

According to the Cox Treatise (2020 ed.) Section 16-4.1 p.326 "It would appear that the power to make the initial determination on jurisdiction lies exclusively with the Board of Adjustment pursuant either to its authority to review zoning determinations made by administrative officers pursuant to N.J.S.A. 40:55D-70.a. or to interpret the zoning ordinance pursuant to N.J.S.A. 40:55D-70.b."

That discussion notes that in Northgate Condo. v. Planning Board, 214, N.J. 120, 123-124 (2013) the jurisdictional decision was presented to, and argued to, the

Planning Board. However, in that case there apparently was no appeal or request for interpretation filed with the zoning board.

MAY THE PLANNING BOARD APPLICATION OF COLTS NECK COMMUNITY CHURCH PROCEED WHILE THE ZONING BOARD APPEAL CHALLENGING THE PLANNING BOARD'S JURISDICTION IS PENDING?

N.J.S.A. 40:55D-75 provides that "An appeal to the board of adjustment shall stay all proceedings in furtherance of the action in respect to which the decision appealed from was made . . ." The only exception is where ". . . the officer from whose action the appeal is taken certifies to the board of adjustment . . . that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed other than by order of the Superior Court . . ."

In this case Flancbaum et. al. has appealed the Zoning Officer's decision that the application of Colts Neck Community Church does not require a conditional use variance and, therefore, the planning board has jurisdiction to hear the application. That appeal has been properly made to the zoning board of adjustment pursuant to the statute. Based upon the statute the proceeding before the planning board must be stayed pending the outcome of the appeal to the zoning board of adjustment unless the Zoning Officer files the required certification of imminent peril to life or property. No such certification has been filed as of this writing nor is one anticipated.

Based on the foregoing the planning board application should be stayed pending the outcome of the appeal to the zoning board of adjustment.

IS A CONDITIONAL USE VARIANCE REQUIRED?

N.J.S.A. 40:55D-67a. states that "A zoning ordinance may provide for conditional uses to be granted by the planning board according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and extent .. ."

N.J.S.A. 40:55D-70.d.(3) provides that the Zoning Board of Adjustment may, in particular cases for special reasons, grant approval to permit:" (3) deviation from a specification or standard pursuant to N.J.S.A. 40:55D-67 pertaining solely to a conditional use."

A conditional use is basically a permitted use in the zone, provided all conditions are met. Therefore, if the conditions are satisfied, the applicant is not seeking a variance from the terms of the ordinance. The essence of the conditional use concept is that every site within the district which is able to meet the objective standards for

suitability is entitled to qualify for that use. If the planning board finds compliance with the specified standards of the ordinance for the specific proposed conditional use, it will be required to approve the application.

The planning board, when acting on a conditional use application, has ancillary jurisdiction to grant variances as to any zoning bulk requirement generally applicable to all uses in the zone. Thus, it may grant "C-1" and "C-2" variances in connection with a conditional use application. Similarly, the planning board may grant waivers from design standards applicable under the ordinance to all uses in the zone.

In Lincoln Heights v. Cranford Pl. Bd., 314 N.J. Super. 366, 376-377 (Law Div. 1998) aff'd 321 N.J. Super. 355 (App. Div.) the court found that where an applicant sought waivers only from requirements affecting such matters as signage, lighting, parking lot stall size and landscaping, which standards were applicable under the ordinance to all uses , they were not specific conditional use standards so the planning board had jurisdiction to waive them.

In the present case the three variances noted above deviate from the provisions of Section 102-84H2, which is expressly contained within Ordinance ARTICLE VIII, "Zoning Requirements". They are applicable to all properties within the A-1 Zone District. Thus, they do not pertain solely to a conditional use.

Similarly, the four design standard waivers noted above deviate from the provisions of Sections 102-69B, 102-90A and 102-119A2 which are expressly contained within Ordinance ARTICLE VII, "Design Requirements Common to All Districts", ARTICLE IX, "Design Requirements" and ARTICLE XI, "Design Requirements". They are applicable to all properties within the A-1 Zone District. Thus, they do not pertain solely to a conditional use.

As noted in Lincoln Heights, supra. at p.375 ". . . an applicant who deviates from a conditional use standard must seek relief from the Board of Adjustment, which has exclusive jurisdiction to grant variances permitting a "deviation from a specification or standard . . . *pertaining solely to a conditional use*". Thus, the standard must apply solely to the conditional and not to other uses in the zone district.

Based on the foregoing it is submitted that, since the sections relied upon by Flancbaum et. al. are all standards that apply generally to all uses in the zone, they cannot be conditional use standards and no conditional use variance is required. Any variance or waiver would be a "C" variance or design waiver within the authority of the Planning Board to grant ancillary to its approval of the conditional use.

It is noted that Flancbaum et. al. has not taken a position that the conditional use Ordinance is invalid and that, therefore, neither Board (Planning or Zoning) has the authority to grant conditional use relief. In Jackson Holdings, LLC v. Jackson

Tp. Planning Board, 414, N.J. Super. 342 (App. Div. 2010) the municipal ordinance for the RG-2 zone permitted higher density residential development as a conditional use for properties served by a public sewer system if:

1. It would not create traffic hazards or adversely affect traffic patterns established by surrounding development; and

2. It would be consistent with the intent and purpose of the Master Plan and Pinelands Comprehensive Management Plan.

The Ordinance contained no definite specifications or standards to guide the planning board in its evaluation of those conditions. Nevertheless, the planning board found a failure to comply with the traffic provisions and denied the application. The trial court questioned the validity of the Ordinance, but did not address it and overturned the decision of the planning board on the basis that there was insufficient evidence in the record to support its findings of traffic hazards and adverse impact on traffic patterns.

On appeal the Appellate Division found that pursuant to N.J.S.A. 40:55D-67 "A zoning ordinance may provide for conditional uses to be granted by the planning board according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and extent."

The MLUL defines "conditional use" to mean "a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use contained in the zoning ordinance." N.J.S.A. 40:55D-3.

The MLUL authorization constitutes a legislative recognition that certain types of uses, while generally desirable, are not suitable for every location within the district, and that it is sometimes difficult to deal with the special problems inherent in such uses through the zoning ordinance. PRB enter. Inc. v. S. Brunswick Planning Bd., 105 N.J. 1,8 (1987) However, it is impermissible for a governing body to delegate its zoning power to the planning board by authorizing the board to approve conditional uses without providing clear and ascertainable standards to guide the exercise of the Board's discretion.

In Jackson Holdings the Court found that "If a governing body adopts a zoning ordinance that purports to authorize a planning board to approve conditional uses without providing the required "definite specifications and standards" to guide the board's discretion the ordinance is "void" and therefore does not confer authority upon the board to approve a use of land thereunder.

In this case the Colts Neck Ordinance Section 102-84.B.(4) provides that churches are permitted in the A-1 District ". . . only as a conditional use after application to,

review by and approval of the approving authority. See Section 102-11." Section 102-84.B.(4) includes no definite specifications and standards required to be met by a church seeking conditional use approval. Similarly, Section 102-11 contains no definite specifications and standards, only generalized categories for review. As in the Jackson Holdings case the Colts Neck Ordinance contains general descriptions of categories to be reviewed with no benchmarks to guide the planning board in its review or to provide the developer with information to know their limit or extent.

Further review of the Colts Neck Development regulations reveals that Section 102-84.E.(2) does provide definite specifications and standards that apply solely to churches. More particularly, that Section states that "Churches shall have a minimum lot area of five acres meeting the following minimum requirements: lot frontage and width, 300 feet: lot depth, 300 feet; each side yard, 75 feet; front yard setback, 100 feet; rear yard setback, 100 feet. Maximum building coverage shall not exceed 10%." The foregoing are definite specifications and standards that are clear and articulate and constitute enforceable conditional use standards for churches.

Based on the foregoing it would appear that Section 102-11 lacks the statutorily required definite specifications and standards to establish enforceable conditional use standards relating to churches in the A-1 zone district. The Ordinance in that context is of questionable validity and would likely result in a determination that it is void and unenforceable.

Based on the foregoing, and in the absence of other authority to the contrary, it is my opinion that if the applicant complies with the foregoing specifications and standards set forth in Section 102-84.E.(2) no conditional use variance is required and the Planning Board does have the authority (jurisdiction) to hear and decide the application for conditional use and site plan approval.

Respectfully Submitted,

Michael B. Steib