

September 30, 2020

Brief prepared by

Thomas J. Coan/Pro Se
306 Monmouth Avenue
Bradley Beach, NJ 07720
Block 78 Lot 14

Re: Bradley Beach Zoning Board of Adjustment ZBA 20/5

The Applicant has partially constructed a 2.5 story accessory structure having a 1-car garage on the first floor and a residential apartment above requiring Bulk Variances for, height of the detached garage, one internal garage parking space, pool pump & filtration system setback, minimum side yard setback for accessory structure, and maximum impervious coverage. Additional Use Variances required for, living accommodations on three floors and first floor bathroom.

Response to request by Zoning Board of Adjustment Attorney Mark Kitrick

Attorney Kitrick has requested a summary of my position on the following four issues pertaining to the above referenced ZBA application:

1. Recusal of Board Members due to conflicts of interest
2. Recusal of Board Members due to Doctor Patient relationship
3. Presence of Zoning Officer at Zoning Board of Adjustment for expert testimony
4. Potential jurisdictional conflict due to appointment approval of Board Member by Council member / applicant

Item #1: Recusal of Board Members due to conflicts of interest

With regards to the Bradley Beach Zoning Board of Adjustment proceedings regarding the Rear Accessory Apartment at 306 Monmouth Avenue, I ask the Court to provide the following remedies to address the following violations of New Jersey Land Use Law and/or New Jersey State Statutes [site appropriate statutes, sources].

- A. Zoning Board member Deidre Phillips should be removed from participating in this application. She has offered biased and improper testimony that reflects ex parte conversations with the applicant or their parties. [David Smith v The Fair Haven Zoning Board; 335 N.J. Super. 111; Decided November 13, 2000]
- B. Zoning Board Member Dave Critelli be removed from participating in this application. He has offered biased and improper testimony -- entered into the record at the August 20, 2020 ZBA meeting. His testimony suggests

ex parte conversations with the applicant or their parties. Further, Mr. Cretelli verbally attacked my status as an objector based upon the length of my years as a Bradley Beach resident. New Jersey Land Use Law provides clear guidance that such conduct should not be tolerated, e.g. "The board member may have had personal dealings with a petitioner that so color the board member's judgment that he or she is unable to separate that prior unrelated encounter from the land-use issue at hand." This statute further states: "As a practical matter, no one--not a close associate, judge, or jury--can know for certain what motivated a board member to vote in a certain way. Therefore the avoidance of even the appearance of a conflict of interest is required by some ethical codes. [New Jersey Zoning & Land Use Law; 15-1.2 "Quasi-Judicial Nature of Boards" and "Types of Bias & Conflicts of Interest". Bias and Conflicts of Interest in Land-Use Management Decisions; David W. Owens -- January, 1997]

- C. The comments of these two Zoning Board members should be considered to represent "sworn testimony". After these biased comments were offered to the public, the Board Attorney, Mr. Kitrick, stated that "testimony must be sworn." In this case testimony is sworn, as all Zoning Board Members were sworn in and took an oath at the beginning of each year. They are not re-sworn at each Zoning Board of Adjustment meeting, when they put facts, opinions and proofs on the record.

Further Details Supporting T.J. Coan's position on Item #1

1A. Board Member Deidre Phillips' Recusal

I maintain my request that Zoning Board Member Deidre Phillips be removed from participating in this application, as she entered improper testimony onto this record at the June 18, 2020 ZBA meeting. This testimony was clearly in favor of the applicant and indicates that she had ex parte communication with the applicant or their parties. This testimony was also directed to the balance of the Board Members for their consideration and should be stricken from the record. What is most troubling is that this all took place before any testimony or facts had been put on the record by the applicant, or their professionals.

Here is a transcript I prepared, of Ms. Phillips testimony, which can be compared to the video recording of the Zoom meeting.

"You know, I just want to say one thing. You know, it is going to be beautiful. There is one door, two cars go in there and there is one door because they wanted lighting and safety for their daughter to get in. So I guess knowing this structure for myself, they have to have two doors. That is what I want them to know, the rest of the board to know."

[335 N.J. Super. 111] DAVID SMITH, KIMBERLY SMITH,
FRANK CRACOLICI, JESSE Y. HARRIS and MARCELENE HARRIS,

Plaintiffs-Appellants,

v.

THE FAIR HAVEN ZONING BOARD OF
ADJUSTMENT, JOHN M. RIDGEWAY
and DONNA M. RIDGEWAY,

Defendants-Respondents.

Argued October 18, 2000 - Decided November 13, 2000

[335 N.J. Super. 114] Before Judges Baime and Wallace, Jr.

On appeal from Superior Court of New
Jersey, Law Division, Monmouth County.

This much conceded, we do not believe that board members should engage in ex parte discussions with interested parties concerning the merit or lack of merit of a particular application during a visit to the site. Some conversation may be necessary. However, discussions should be limited to those that enable the board members to view the condition or conditions at issue at the site. Interested parties should confine their arguments to the hearings conducted by the board. Such arguments should not be advanced ex parte in the guise of assisting board members in their inspection of the site. A board's decisions should be made on the basis of the evidence presented at its formal hearings. This ensures due process. It is also essential for proper appellate review.

Our examination of the record discloses that this policy was not followed with exactitude in this case. For example, on one occasion, an objector forcefully expressed his view to a Board member who was inspecting the site that the Ridgeways' application should not be granted. However, that Board member did not vote on the Ridgeways' application. Other discussions between Board members and interested parties can fairly be described as innocuous. We are satisfied that none of the parties was prejudiced.

1B. Board Member David Critelli's Recusal

In addition I request that Zoning Board Member Dave Critelli be removed from participating in this application, as he entered improper testimony into the record at the August 20, 2020 ZBA meeting. His testimony is clearly biased and improper in a [1] Quasi-Judicial proceeding. No testimony or proofs had been put on the record at his juncture of the meeting and Board Member praised the

applicant in this Use Variance application. By stating that, "We have somebody who is trying to improve a community, improve the town." While cross-examining the objector by asking "How long has Mr. Coan been in town?" I find this negative and irrelevant question to show clear bias on the part of Board Member Critteli.

Here is a transcript I prepared, of Mr. Critelli's testimony, which can be compared to the video recording of the Zoom meeting:

"This is Dave Critelli, I am sitting here listening to all these conversations and I am just a little bit confused as to why this is going on for the period of time it is going. Where we have somebody who is trying to improve a community, improve the town. Who has been a longstanding member of this town and we are lambasting them for I don't know what reason? Can I ask a question? How long has Mr. Coan been in town?"

I would have utilized the legal transcript offered to me by Richard Stone, but it was not forthcoming in time for this brief.

New Jersey Zoning and Land Use Administration 15-1.2. Quasi-Judicial Nature of boards. Decisions over the years have required boards to act more and more in keeping with the traditional concept of a judicial body. Thus, for example, the board can ground its decisions only on evidence produced at the hearing and in the record; viewing of the premises and the use of any information obtained by such viewing is permitted only if the parties or their attorneys have an opportunity to be present, and any observations resulting therefrom are read into the record.

David W. Owens: Types of Bias and Conflicts of Interest

Personal interest on other than financial grounds also can be a type of objectionable bias. The board member may have had personal dealings with a petitioner that so color the board member's judgment that he or she is unable to separate that prior unrelated encounter from the land-use issue at hand. Or, in a more typical occurrence, a board member may have taken a strong public position on a proposed development, which later is presented to the board for an objective decision based on the record developed at an adjudicatory hearing. In these situations, questions arise as to the impartiality of the decision maker. Further, the potential personal interest may not even involve the particular board member. At times it is the board member's association with an interested party that raises a potential problem. A close relative or business partner's involvement in a matter coming before the board is not uncommon, especially in small towns.

Another type of bias involves the fairness of the process itself. With some land-use decisions, such as special- or conditional-use permits, variances, and permit appeals, all of the requirements of a fair hearing must be met. If a board of adjustment member discusses a matter coming before the board informally with one of the parties, there is the possibility that the board member will then reach a

decision based in part on information that was not presented at the hearing and was therefore not subject to cross-examination or rebuttal. Although this outside communication may be difficult for board members to avoid, it does taint the fairness of the hearing process and is improper. Finally, it should be remembered that the concern is not only with *actual* conflicts but with the *appearance* of impropriety as well. In most cases, members of the public do not know government officials personally and have no way of independently verifying their integrity. As a practical matter, no one--not a close associate, judge, or jury--can know for certain what motivated a board member to vote in a certain way. Therefore the avoidance of even the appearance of a conflict of interest is required by some ethical codes.

In all of these diverse types of cases--bribery, financial conflicts, personal bias, associations with interested parties, an unfair hearing process, and the appearance of conflicts--the common thread is protecting the public interest in the fairness and integrity of land-use decisions. Public confidence in government depends on the integrity of its decisions, and the avoidance of bias and conflicts of interest in these various forms is no doubt a factor in establishing that confidence.

Bias and Conflicts of Interest in Land-Use Management Decisions; David W. Owens -- January, 1997

1C. Board Member Comments Represent "Sworn Testimony"

Additionally there was a question of whether or not, what the board member entered onto the record was in fact testimony? At this point in the meeting no testimony or applicant record of proofs had begun and this testimony by not one but two board members had entered their bias and opinions onto the meeting record. Board Attorney Kitrick had stated, "testimony must be sworn." In this case testimony is sworn, as all Zoning Board Members were sworn in and took an oath. They are not re-sworn at each ZBA meeting, when they put facts, opinions and proofs on the record. It is done once annually.

Item #2: Recusal of Board Members due to Doctor Patient relationship

Should a Board member recuse themselves from hearing an application if they have a doctor - patient relationship with the applicant?

I request that any Zoning Board Member who is a patient of the applicant, Dr. Harold Cotler please recuse themselves from this proceeding. If the Board Attorney would poll them separately in closed session, I feel that would be appropriate. This request based upon the Supreme Court case Vincent Piscitelli v. City of Garfield Zoning Board of Adjustment. The case is fully on point as a Zoning Board of Adjustment proceeding with a Medical Doctors as the Applicants.

Vincent Piscitelli v. City of Garfield Zoning Board of Adjustment (A-68-17) (079900) Argued November 28, 2018 -- Decided March 27, 2019 ALBIN, J., writing for the Court. Planning and zoning board members are barred from hearing cases when a personal interest "might reasonably be expected to impair [their] objectivity or independence of judgment." N.J.S.A. 40A:9-22.5(d); see also N.J.S.A. 40:55D-69; N.J.S.A. 40:55D-23(b). That ethical commandment is at the heart of this appeal, which involves an application filed by members of the Conte family to develop three lots in the City of Garfield. The issue raised is whether any members of the Garfield Zoning Board of Adjustment had a disqualifying conflict of interest because of the involvement of certain Conte family members in the Zoning Board proceedings.

The Court further holds that if a Zoning Board member or his or her immediate family member had a meaningful patient-physician relationship with Dr. Kenneth, Dr. Daniel, or Dr. Daniel III during or before the Board proceedings, that Board member had a disqualifying conflict of interest because of the special nature of the patient-physician relationship. The determination of whether the patient-physician relationship is meaningful will be fact specific in each case. Stressing that the potential disclosure of highly intimate and personal health-care information raises legitimate privacy concerns, the Court provides guidance on the precautions that must be taken to protect against the unnecessary release of a patient's health-care information and remands to the trial court to explore this issue within the constraints set forth in the opinion.

Every reasonable precaution must be taken to protect against the unnecessary release of a patient's health care

information. Certain sensible approaches should be kept in mind. A Zoning Board member who recognizes the applicant as one with whom he or she has a meaningful patient - physician relationship can simply disqualify himself or herself from the case, with nothing more being said. One would expect, in most cases, a Zoning Board member to know whether that type of meaningful relationship exists, after some explanation by the zoning board attorney. If in doubt, the member can consult with the board attorney and speak in hypothetical terms to gain an understanding whether recusal is appropriate. Erring on the side of disqualification when the board member has had a patient-physician relationship with the applicant is the most prudent course. The challenge will be in those cases where a board member, or the member's immediate family, has had a patient-physician relationship that the member may not consider meaningful, but where an objector could conclude that the relationship is one that "might reasonably be expected to impair [the member's] objectivity or independence of judgment." See N.J.S.A. 40A:9-22.5(d). In such cases, the board member should not be required to disclose anything more than that he or she, or a family member, was at one time a patient of the applicant or objector or someone with a property interest at stake in the outcome of the proceedings. Then, if the issue is contested in an action in lieu of prerogative writs, any disclosures should be heard in camera and ex parte before a Law Division judge. Only if the judge concludes that disclosure is necessary should some form of disclosure be mandated, and then only to the extent reasonably necessary, minimizing the invasion of privacy into such sensitive matters. A board member should not be required to reveal the precise nature of a medical condition or other intimate details of treatment. Any potential disclosure must be balanced against the sanctity of the privacy of the patient's health information. Because the trial court determined that any inquiry into a meaningful patient-physician relationship between a Board member and Dr. Kenneth, Dr. Daniel, or Dr. Daniel III was irrelevant, it struck interrogatories that, if answered, may have revealed such a relationship. We conclude that the trial court erred in barring any inquiry into the subject matter. Dr. Kenneth and Dr. Daniel had practiced medicine in Garfield for many decades. That one or both, or Dr. Daniel III, may have had a meaningful patient-physician relationship with a Board member or with the member's immediate family is not a far-fetched assumption. Because the Appellate Division affirmed the Law

Division judge, we remand to the trial court to explore this issue within the constraints set forth in this opinion.

Item #3: Presence of Zoning Officer at Zoning Board of Adjustment for expert testimony

Should the Bradley Beach Zoning Officer, George Waterman, be available for expert testimony at for Zoning Board Case #ZB20/5?

I am requesting to have the Zoning Officer appear in this proceeding to serve as an expert witness who can testify regarding issues and observation relative to the plans submitted with regard to consistency, completeness, and his interpretation regarding the construction that has taken place, as it relates to the ordinances.

New Jersey Zoning and Land Use Administration; 2-8.1:

It is the Zoning officer to whom an application for a zoning permit is made and by whom such permits are issued. Where there is any doubt in the officer's mind as to permissibility, the zoning officer should consult the attorney for the board of adjustment as to whether there has been a construction or interpretation of the ordinance by the board. The municipal attorney may also be consulted. Regardless, application of the old adage "to doubt is to deny," is generally helpful in situations where the officer is not completely satisfied that a particular project or use meets all requirements of the ordinance.

The practice of a Zoning Officer testifying as a witness before the Zoning Board of Adjustment is not a foreign one and is referenced in New Jersey Zoning & Land Use Administration.

New Jersey Zoning and Land Use Administration; 2-8.2:

Relationship with municipal agencies. Although the Zoning Officer usually has a working relationship with the planning board and zoning board of adjustment in that the Zoning Officer often appears before the boards as a witness, it should be emphasized that the boards are quasi-judicial bodies and are not involved with the enforcement of the ordinance. The enforcement of the ordinance falls to the Zoning Officer, construction official, municipal attorney and governing body.

Item #4: Potential jurisdictional conflict due to appointment approval of Board Member by Council member / applicant

Is there a perceived political conflict between a Zoning Board Member and applicant, if that member was appointed to the board by the Mayor and approved by a former Borough Councilman, who is now the applicant?

I believe there is no conflict on this issue, as the Bradley Beach Borough Ordinance does not require Council approval or confirmation of Mayoral appointments.

Borough Ordinance excerpt describing Board member appointment process:

60-14 Established; composition; terms; alternate members; vacancies.
[Amended 11-14-1978]

A Zoning Board of Adjustment is hereby established pursuant to N.J.S.A. 40:55D-69 et seq., consisting of seven residents of the Borough of Bradley Beach appointed by the Mayor to serve for terms of four years from January 1 of the year of their appointment. The terms of the members first appointed shall be so determined that to the greatest practicable extent the expiration of such terms shall be distributed evenly over the first four years after their appointment; provided that the initial term of no member shall exceed four years. Thereafter the term of each member shall be for four years. Nothing in this chapter shall, however, be construed to affect the term of any present member of the Zoning Board of Adjustment, all of whom shall continue in office until the completion of the term for which they were appointed.

New Jersey State Statute [NJSA 40:55D-69] cited in Bradley Beach Borough Ordinance:

As stated above the ordinance was crafted by the borough pursuant to NJSA 40:55D-69.

TITLE 40 - MUNICIPALITIES AND COUNTIES

40:55D

40:55D-69 - Zoning board of adjustment

40:55D-69 Zoning board of adjustment.

56. Zoning board of adjustment. Upon the adoption of a zoning ordinance, the governing body shall create, by ordinance, a zoning board of adjustment unless the municipality is eligible for, and exercises, the option provided by subsection c. of section 16 of P.L.1975, c.291 (C.40:55D-25).

[Please note: I did not raise this issue as an objector. If this is an attempt to change the venue for the hearing of this case, I have no objection if it makes the applicant more comfortable. I am happy to present my objector case in front of an impartial, quasi-judicial body in any Monmouth County community.]

ADDITIONAL ITEM: Importance of Site Inspection for Board Members and the public

Given the unique circumstances of this application – e.g. Construction has already been conducted that is inconsistent with the original submitted plans – I believe it is important for the public and the members of the Board to see the exact operational nature of this non-conforming structure.

A site inspection of this building should be conducted in order to inform the public and the Board members as to the construction status of this building. Various elements of construction have already been completed and the public and the Board members should see the work done and the operation of the unit for living and parking. (I made this request at the June 18, 2020 ZBA Meeting, but have not yet received a response from the ZBA Attorney)

Thank you for your consideration of my requests to assure that the public is properly informed and that the Zoning Board of Adjustment performs its review of this application appropriately as a quasi-judicial entity.

Sincerely,
Thomas "T.J." Coan
Bradley Beach Public Citizen
732) 539-3320 Cell