

REVIEW MEMORANDUM

To: Henry Gorohoff, Board Chairman, Absecon City Planning Board

From: Robert L. Reid, AICP, PP, Board Planner

Subject: Review of Approval Process
236 East Absecon Boulevard Mobile Home Park, LLC
Block 173, Lot 1
Project No. ABS 103.01

Date: January 29, 2010

As directed by Henry Gorohoff, Board Chairman, I have reviewed the approvals granted by the Absecon City Zoning Board of Adjustment. This request is in response to the public's request for information which was directed to the Planning Board by Council President Lynn Caterson. It is understood that the public is making this inquiry as the result of the recent clearing of the wooded site of the former trailer park.

PROJECT DESCRIPTION

The applicant, 236 East Absecon Boulevard Mobile Home Park, LLC proposes to replace the pre-existing non-conforming trailer park and construct fourteen (14) double-wide manufactured homes on individual lease lots along with a private road, sanitary sewer lines, water lines, gas lines and electric lines to service the proposed homes. According to the applicant's testimony the fourteen (14) double-wide manufactured homes will have NJ Division of Motor Vehicle Title Certificates and assigned Vehicle Identification Numbers. The pad sites for fourteen (14) double-wide manufactured homes will leased to 14 separate tenants on the site which "will be operated as one manufactured housing rental community."



Aerial Photo of Subject Property Before Tree Clearing.

Source: Bing.com Maps

DOCUMENTS REVIEWED

<u>Drawing/ Item No.</u>		<u>Latest Date</u>
	Town of Belleville v. Parrillo's, Inc.	06/19/80
	Michelotti Realty Co., Inc v. Zoning Board of the Township of Saddle Brook	11/01/83
	Revised MLUL	1984
	Zoning Board Public Notice	11/21/00
	Application for Certificate of Non-Conformity and supporting documents	2000
	Zoning Board Meeting Minutes	11/21/00
	Zoning Board Resolution # 11 -2000	12/12/00
	Zoning Board Public Notice	02/19/02
	Application for Certificate of Non-Conformity and supporting documents	2002
	Zoning Board Minutes of Public Hearing	02/19/02
	Zoning Board Resolution # 1 -2002	03/19/02
	Notice of Hearing by Perskie Nehmad & Perillo	04/03/07
	Correspondence by Remington & Vernick Engineers (Zoning Board Planner)	06/12/07
	Zoning Board Resolution #4-2007.	08/21/07
	Zoning Board Minutes of Public Hearing	06/19/07
	Application for Land Development	05/21/08
	Correspondence by Remington & Vernick Engineers (Zoning Board Planner)	07/31/08
	Zoning Board Public Notice	08/05/08
	Zoning Board Minutes of Public Hearing	08/19/08
	Zoning Board Resolution #2-2008.	09/16/08
1 of 2	Proposed Re-Development Plan	05/04/06
2 of 2	Site Landscaping Plan	05/04/06
2 of 10	Outbounds & Existing Conditions Plan	08/24/07

DOCUMENTS REVIEWED cont.

<u>Drawing/ Item No.</u>		<u>Latest Date</u>
3 of 10	Site & Unit Area Plan	08/24/07
3 of 10	Site & Unit Area Plan	05/04/09
6 of 10	Landscaping and Lighting Plan	05/04/09
	2009 Tax Records on File	
	Historical Records of Absecon's past Land Development Ordinances	

BACKGROUND

In **2000** the property owner received a Certificate of Non-Conformity from the Zoning Board for:

Fifteen (15) mobile homes sites; a two (2) story wood frame building shaped as a ship and used as a retail store on the first floor and one (1) apartment on the second floor; and two (2) residential cottages.

The public notice listed a request for a Certificate of Non Conformity to permit one commercial store, one apartment, and fifteen trailer sites at the property know as Galleon Village.

The following documents were found in the file to support the application for a Certificate of Non-Conformity:

Application for Variances & Grounds for Appeal

List of Attachments

Property Record Card showing transaction dates of 1935 - ABS. Beach Motel & Trailer Park, and 9/26/78 and 9/27/78 -Marion G. White. Notations and diagrams include 2 -14' x 52' irr. – (844 SF) motel units, one – 16' x 52' – (512 SF) office (Ship Design); and one – 16' x 20' (320 SF) cabin.

Deed from Katherine L. Keener to Marion G. White dated 9/26/1978 – consideration \$170,000.00.

Property Record Card (dated sometime after 1985). Notations and diagrams include a two story building with first floor 16' x 32" (521 SF) store and a 16' x 32" (521 SF) apartment on the second floor; a cottage building 18' x 50' irreg. (844 SF) with three (3) units; a cottage building 18' x 50' irreg. (844 SF) with (2) units; and a 16' x 20' (320 SF) storage shed.

Property Record Card dated 12/1994 (Beach View Trailer Park) Notations and diagrams include two story building with first floor 16' x 32" (521 SF) store and a 16' x 32" (521 SF) apartment on the second floor; a cottage building 18' x 50' irreg. (844 SF) with three (3) units; a cottage building 18' x 50' irreg. (844 SF) with (2) units; and a 16' x 20' (320 SF) storage shed.

Property Record Card dated 7/29/97 and 9/3/97 – White Palm LLC. Notations and diagrams include thirteen (13) mobile home sites; and former bath house now storage.

In **2002** the property owner received a Certificate of Non-Conformity pursuant to 40:55D-68 from the Zoning Board for:

Fifteen (15) mobile homes sites; a two (2) story wood frame building shaped as a ship and used as a retail store on the first floor and one (1) apartment on the second floor; and two (2) residential cottages.

The documents were found in the file to support the application for a Certificate of Non-Conformity included the documents listed above in the 2000 submission along with a copy of the Zoning Board Resolution # 11 -2000.

The public notice listed a request for a Certificate of Non Conformity to permit one commercial store, one apartment, and fifteen trailer sites at the property know as Galleon Village.

The second request for a Certificate of Non-Conformity was due to the lot numbers being incorrect in the prior application in 2000.

The purpose of requesting a Certificate of Non Conformity is to memorialize the existence of a pre-existing non-conforming use for the record. The former trailer park existed in one form or another prior to the adoption of Absecon's Developmental Ordinance.

The supporting documents submitted with the application includes tax records from 1997 that list thirteen (13) mobile home sites. Resolution# 11 of 2000 states the letter provided by Mrs. Keener stated that there was approximately thirty (30) trailers and cabins in or about 1928. In the latter 1940's the number of cabins and trailers were reduced to seventeen (17). The minutes of the hearing of November 21, 2000 refer to a document signed by the previous owner, Mrs. Keener, whose husband purchased the property in 1926. This document was not found in the file. According to the minutes of the meeting Mrs. Keener's letter stated that there were 15 trailers on-site in 1995. That number is questionable because there are no records of certificates of occupancy for any of the uses at the site on file with the Construction Office. The resolution and minutes do not offer a record of testimony to support the justification or provide the actual status of the condition of the non-conforming uses. Were the uses legal pre-existing operating units with Certificates of Occupancy at the time of the 2000 decision by the Zoning Board? The additional questions that need to be answered are: how many actual trailers were there on the site in 2000; what was the condition of the buildings and trailers; how many were habitable; how many sewer connections were actually paid for by the owner; how many trailers were actually occupied; if not occupied, how long were they vacant, unused or inhabitable; what evidence was presented to the Zoning Board to prove there was 15 mobile home sites and that the applicant was entitled to 15 mobile home sites; and did anyone from the Zoning Board and / or the Construction Office research the City records to validate that there were 15 mobile home sites? These questions should have been asked and answered at the time the Zoning Board heard the original application. The 15 mobile home sites were the basis of the applicant's argument that the proposed 14 manufactured homes are less intense. The fact that there were actually 15 legal pre-existing non-conforming mobile home sites at the site at the time of the 2000 application is questionable.

The origination of development to this site dates back to **1926** when the building in shape of a ship was the real estate sales office for the Neptune Gardens subdivision.

In **1930** Absecon City adopted its first ordinance limiting and restricting buildings and structures and the extent of their use. There was only two districts, a Residence Zone and a Unrestricted Zone. The subject property was in the Unrestricted Zone, thus permitting Tourist Camps and anything else a landowner wished to develop. According to the information printed on the back of the post card below there was thirty (30) bungalows (cabins). The site was called the "Absecon Beach Camp For Tourists". The building in the shape of a ship referenced in the Certificates of Non Conformity above, and the former unheated seasonal cabins are shown in the post card photo from the early **1930's** below.



In **1946** Absecon City adopted its second ordinance limiting and restricting buildings and structures and the extent of their use. There was only two districts, a Residence District and a Business District. The subject property was in the Business District. There was no list of permitted commercial uses, however the ordinance did state that *"No Tourist Cabin or Trailer Camp shall be erected or used on New Jersey Avenue or on Absecon-Atlantic City Blvd. and White Horse Pike between Illinois Avenue and Mill Road"*, thus permitting a trailer park at the subject property.

The individual unheated seasonal tourist cabins slowly gave way to seasonal trailers. In the late 1940's there was about seventeen (17) cabins and trailers. The individual tourist cabins were eventually removed and the site evolved into a more permanent year-round trailer park.

In **1951** the 1946 ordinance was amended to expand the prohibition of Tourist Cabins or Trailer Camps to New York Road.

In **1952** the 1946 ordinance was amended to expand the Business District to permit motels. The prohibition of Tourist Cabins or Trailer Camps to New York Road then no longer included New York Road.

In **1955** the 1946 ordinance was amended to expand the Business District to permit motels on any part of the Absecon-Atlantic City Blvd. and White Horse Pike. The prohibition of Tourist Cabins or Trailer Camps was then limited to New Jersey Avenue.

In **1964** the Planning Board adopted the Master Plan and proposed a comprehensive Zoning Ordinance. The Zoning Map in the Zoning Ordinance indicated the subject property was in the C2 Highway Commercial District. Permitted uses included: motels, hotels; eating, drinking establishments; boat sales; lumber and building material sales; clinic; and bus and railway terminal. The list of permitted uses did not include tourist cabins and trailers.

The Absecon City Zoning Ordinance from **1971** shows the subject property in the Highway Commercial District with a list of permitted commercial uses that did not include tourist cabins and trailers. The 1971 Zoning Ordinance updated in **1974** in accordance with NJSA 40:55-30 to NJSA 40:55-51. The subject property was in the H-COMM Highway Commercial District which did not permit tourist cabins and trailers. The current Developmental Ordinance was adopted on June 10, **1993** in accordance with the New Jersey Municipal Land Use Law, Chapter 291, Laws of 1975. The current zoning is Highway Commercial and does not permit Trailer Parks. Since **1964 (46 years)** the current Trailer Park use at the subject property has been contrary to Absecon's Master Plan and Zoning Ordinance. The Trailer Park is a grandfathered non-conforming use as memorialized by the Certificate of Non Conformity issued by the Zoning Board in **2000** and corrected in **2002**.

The Trailer Park can continue to operate and be maintained as a trailer park indefinitely as a grandfathered use provided the use remains at the same size and level of the intensity of use and any upgrade or replacement is in-kind. Any expansion of the pre-existing non-conforming use would require relief to be sought in accordance with NJSA 40:55D-70d of the Municipal Land Use law.

SITE INVENTORY

On January 21, 2010, the subject property was visited to become familiar with the existing conditions on site as well as the surrounding uses. The subject property consists of a former trailer park now under demolition and site clearing. The surrounding area consists of existing single family homes to the north, a motel to the east, a six lane divided state highway to the south and a public street and stormwater drainage basin to the west. The subject property is approximately 2.4 acres of land located in the Highway Commercial District.

The Certificate of Non Conformity did not describe the sizes of the buildings and trailers. This information was researched by reviewing documents, plans and records in the Planning and Zoning Office, Tax Office and the Construction Office.

To help determine the actual intensity of the pre-existing non-conforming uses at the subject property, the public records were researched.

The Construction Office does not have any record of Certificates of Occupancy on file for any of the uses at the site prior to the Zoning Board's granting of the Certificate of Non-Conformity in 2000.

Based on the above information, the floor area of the pre-existing non-conforming trailers and buildings was approximately **8,153 SF***.

The estimated total impervious site coverage was approximately **10,000 SF***.

*The estimates above are not intended to be exact numbers. They're for the purpose of providing a sense of the estimated size and intensity of the prior use at the subject property that was the subject of the Certificate of Non Conformity, the interpretation, and the site plan approval granted by the Zoning Board.

INTERPRETATION & USE VARIANCE

On June 19, 2007, 236 East Absecon Boulevard Mobile Home Park, LLC, was heard relative to an application submitted to the Zoning Board for an interpretation pursuant to NJSA 40:55D -70b and alternatively a "d" use variance pursuant to NJSA 40:55D -70d.

The applicant requested a favorable interpretation to allow the continuation of a lawfully existing development consisting of Fifteen (15) mobile homes sites, a two (2) story wood frame building shaped as a ship and used as a retail store on the first floor and one (1) apartment on the second floor, and two (2) residential cottages. The interpretation requested that the Zoning Board determine that the previously issued Certificates of Non Conformity permit the applicant to redevelop the site with a new manufactured housing community to consist of fourteen (14) manufactured housing units, together with accessory site improvements. According to the Notice of Hearing, the total number of residential units would be reduced from 16 to 14 units and the commercial use would be eliminated. Alternatively the applicant requested a "d" use variance to allow the proposed redevelopment of the manufactured housing community in place of the existing improvements.

The Zoning Board Planner's review letter to the Zoning Board dated June 12, 2007 recommended that a "d" variance (or use variance) relief be required pursuant to NJSA 40:55D-70d in order for the applicant to construct a manufactured housing community. The following is taken from the Zoning Board Planner's review letter:

III. Zoning Interpretation:

Pursuant to §224-68 of the Ordinance, a manufactured housing community is not permitted within the HC zone district. Based on our review of Resolution #11 of 2000 and Resolution# 1 of 2002 of the Absecon Zoning Board of Adjustment, it appears that a Certificate of Non conformity was issued by the Board to permit the operation of fifteen (15) mobile homes, one (1) two-story wood-framed building used as a retail store on the first floor and an apartment on the second floor, and two (2) cottages used for transient motel rentals at the subject properties, namely Block173, Lots 1, 2, 3, 4, 5, 6, 7 ,8 and 12. Based upon the issued Certificate of Non conformity, the Applicant concludes that variance relief is not required pursuant to N.J.S.A.40:55D-70d, as that provision relates to an expansion or enlargement of an on conforming use, whereas the proposed development is said to bring the properties into closer conformance with the Ordinance. The Applicant seeks an interpretation of the Ordinance to this affect.

Based on our review of published court decisions regarding nonconforming uses and structures, it has been found in various Cases that the total destruction of a non conforming use, whether by design or accident, terminates the use (Cox 11-4, New Jersey Zoning and Land Use Administration, GANN, 2007). Because the Applicant proposes to demolish and abandon all existing structures and improvements at the subject properties, the proposed development clearly constitutes the total destruction of the existing nonconforming use. As such, it is recommended that variance relief be required pursuant to N.J.S.A.40:55D-70d in order for the Applicant to construct a manufactured housing community.

Use Variance:

In accordance with our interpretation of the Ordinance, the Applicant's proposal to demolish all existing structures at the subject property terminates the existing nonconforming use. Pursuant to §224-68 of the Ordinance, a manufactured housing community is not permitted within the HC zone district. Therefore, the Applicant is requesting use variance relief, whereas a use variance requires five affirmative votes among the members of the Board.

In order for the Board to grant a "d" variance, the Applicant must demonstrate, to the Board's satisfaction, that 'special reasons' exist in support of such action; this is known as the Positive Criteria. Said "special reasons" are broadly defined as "advancing the purposes of zoning or curing an undue hardship on the Applicant", as subsequently described. The Applicant must also demonstrate that the public good and the purposes of the City's zoning plan will not be harmed by granting the variance; this is known as the Negative Criteria. Both the Positive Criteria and the Negative Criteria must be satisfied in order for the Board to grant the requested variance.

The Zoning Board Planner's review letter continues with details on Variance Justification regarding the obligation of the applicant to demonstrate the advancement of the purposes of zoning (the Positive Criteria) and demonstrate that such variance is without substantial detriment to the public good, will not substantially impair the intent and purpose of the City's zone plan and zoning ordinance, and that any deviation from the zoning ordinance will be substantially outweighed by the benefits derived therefrom. (the Negative Criteria). According to the meeting minutes, the Zoning Board Planner voiced concern to the Zoning Board in response to the applicant's testimony as follows: *"In the testimony, it was argued that that the proposed development would bring this property into more conformance with the zoning regulations, however, the zoning is HC so it could be argued that by removing the commercial unit on the property, that it would bring it further away from conformity"*. There was no response to the comment made by the Zoning Board Planner from the applicant or the Zoning Board in the meeting minutes. The minutes entry was followed by a five minute break notation and then the Zoning Board moved to public comment.

According to the minutes of the meeting, the Zoning Board voiced concern about the *"density or intensity"*. The applicant's attorney responded with a statement that *"your ordinance says that double-wide trailers are allowed. I respectfully submit that that coverage is not relative tonight. It might be relative to site plan issues, but we will be back for that."* The minutes do state the applicant's attorney read something from the ordinance, but did not state what. Then ends the applicant's attorney's response with: *"The certificate of non-conformity covers all that."*

None of the above is correct in my opinion. The Zoning Board while deliberating whether they should grant a favorable interpretation that the proposed fourteen (14) double-wide manufactured homes should be considered a continuation of the grandfathered use – or - that the proposed development required a use variance due to the expansion, must consider the proposed expanded intensity of the site. The expansion in use is measured numerous ways: Increased site coverage; number of increased bedrooms; increase in population of the property; increased water demand; increased sewage generation; increased floor area of buildings; increased mass of buildings; reduction in open space; and the reduction in natural vegetation and buffers. The certificate of non-conformity is to memorialize the existence of a pre-existing non-conforming trailer park use for the record. (Tax records and the existing conditions survey provided by the applicant indicate approximately 8,153 SF of gross floor of buildings and trailers) It does not allow for the expansion of the trailer park to approximately 29,152 gross floor area (See SITE PLAN below).

According to the Zoning Board Resolution # 4- 2007, and the minutes of the meeting, there was no testimony offered by a professional planner in regards to the Positive Criteria and the Negative Criteria as required for the Zoning Board to consider the use variance.

The said Resolution states that the applicant and the applicant's professional planner stated that *"the site was blighted and the structures and trailers located thereon are obsolete and dilapidated condition. The witnesses testified that applicant proposes to reduce the density of the site from 15 mobile home pads, 4 additional residential units within the site's existing structures and 1 commercial unit to a total of 14 mobile homes."*

It should be noted that the owner could have replaced the trailers that were obsolete and in dilapidated condition with newer in-kind trailers as a grandfathered use without the approval of any Board if they desired to clean up the existing site.

According to the Zoning Board Resolution # 4- 2007, the applicant's attorney argued that the applicant's proposal was not an enlargement of the non-conforming use which would require a use variance in accordance with 40:55D -70d. Instead he argued that the proposed use of 14 mobile homes was substantially similar to the use that existed at the time the Certificates of Non Conformity were issued. The Zoning Board concluded that the applicant was correct in that regard and relied upon case law citing Belleville v. Parrillo's in which the NJ Supreme Court held that a Board's analysis in connection with questions of this sort is **qualitative not quantitative requiring the Board to " focus on the quality, character and intensity of the use viewed in their totality and with regard to the overall effect on the neighborhood and zoning plan."**

Reading the case cited by the applicant's attorney, the statement **"qualitative not quantitative requiring the Board to focus on the quality, character and intensity of the use viewed in their totality and with regard to the overall effect on the neighborhood and zoning plan."** was taken out of context and the case cited is not relative to the application and the case actually supports the requirement for a "d" Use Variance.

In Supreme Court of New Jersey the Belleville v. Parrillo's case (decided on June 19, 1983) involved a restaurant use that was remodeled into a disco use in 1980 without the owner securing approval from the Zoning Board. (There was no physical expansion of the building(s) as proposed by the applicant of the Trailer Park.) The Municipal Court stopped the use from continuing. The decision was appealed in Superior Court, Appellate Division. The Superior Court overturned the Municipal Court decision by reviewing separately each activity that took place in the restaurant use and a disco use, such as, each use included dancing, each use served food. The Municipality filed an appeal with the Supreme Court of New Jersey. The Supreme Court of New Jersey disagreed with the Superior Court decision because the Superior Court should have reviewed the totality of the proposed changed use. The following is a quote from the Supreme Court decision:

“The analysis was thus quantitative rather than, as it should have been, qualitative. Put differently, the focus in cases such as this must be on the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan.”

Paragraph 17 on page 8 and 9 in Zoning Board Resolution # 4- 2007 the applicant's attorney went on to say....*“Although the total ground area to be occupied under the proposed 14 mobile home pad plan is substantially and quantitatively greater than the percent coverage circumstance, the qualitative impact is significantly less and substantially upgraded.”*

The case law cited by the applicant's attorney Belleville v. Parrillo's states the following regarding subject of a substantial enlargement: ***“Where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the enlargement or change.”***

For more detailed explanation of the case law quoted in this report, it is suggested the Planning Board members also review the opinion of the Planning Board Attorney.

SITE PLAN

On August 19, 2008 the Zoning Board approved a Site Plan with numerous bulk variances without first granting a use variance for a fourteen (14) manufactured homes.

The fourteen (14) double wide manufactured homes included a covered porch and a car port or optional three season room (**2,108 SF each**) for a total of **29,512 SF**** in gross floor area proposed at the site. This was a 14% increase in gross floor area as compared with the Site Plan submitted to accompany the application for interpretation and/or use variance in 2007.

This is approximately a **362 %** increase in gross floor area of the pre-existing non-conforming use.

The pre-existing non-conforming trailers / residential units range in size from **281 SF** to **660 SF**. The **2,108 SF** proposed manufactured homes represents approximately **750 %** to **319 %** increase in individual unit sizes.

Also, the impervious site coverage was increased from approximately 10,000 SF to 48,210 SF, an increase of approximately **480%**.

** The Site Plan submitted to the Zoning Board in 2007 to accompany the application for interpretation and/or use variance depicted 25,888 SF in gross floor area with the distance between buildings of 22' rather than the 10' proposed with the 2008 Site Plan.

The pre-existing non-conforming units ranging sizes of **280 SF** to **660 SF** as listed in Table 1 above, or the pre-existing non-conforming cottage divided up into 3 units according to the Tax Records resulting in **281 SF** units, it is reasonable to expect that these units were one bedroom units or one room efficiencies. The **2,108 SF** units proposed each will have 3 bedrooms. The anticipated population of the site could easily increase to three times the population of the smaller pre-existing non-conforming units.

The actual increase in building mass should be a consideration in measuring the increase in the intensity of the proposed expansion. It is estimated that the average height of the pre-existing nonconforming structures and trailers were about 11 feet and the proposed manufactured homes with sloped roofs at about 14 feet in average height. This would estimate the existing building mass at **114,142 CF** (11' x 8,153 SF), and the proposed building mass at **413,168 CF** (14' x 29,512 SF). This would be an increase of approximately **362 %** in building mass on the site.

The estimates above are not intended to be exact numbers. They're for the purpose of providing a sense of the estimated size and intensity of the prior use for comparison to proposed expansion. With the great separation in numbers by comparison, even if they are slightly off, the proposed expansion is huge.

The level of the proposed expansion of the pre-existing non-conforming use clearly needed a "d" Variance (or use variance) pursuant to NJSA 40:55D-70d as recommended by the Zoning Board Planner in his correspondence of June 12, 2007 and the case law cited by the applicant.

As for the "C" variances granted by the Zoning Board, the following is offered:

ZONING SCHEDULE

ORD. SECTION	HC ZONE	PERMITTED OR REQUIRED	EXISTING CONDITIONS	PROPOSED	VARIANCES GRANTED BY ZONING BOARD.
224-69 E	MIN. FRONT YARD SETBACK - WHP	35'	13.1' NEAREST COTTAGE 12.2' SHIP BUILDING 30.5' NEAREST TRAILER	5', 11.87' & 16' FOR TRAILERS, BUILDINGS REMOVED	5', 11.87' & 16' FOR TRAILERS, BUILDINGS REMOVED
224-69 E	MIN. FRONT YARD SETBACK - REED RD.	35'	1.5' NEAREST COTTAGE 45.7' SECOND COTTAGE	5.67' TO 31' FOR TRAILERS, BUILDINGS REMOVED	5.67' TO 31' FOR TRAILERS, BUILDINGS REMOVED
224-69 F	MIN. SIDE YARD SETBACK	35'	-0.97' TO 7.1' TRAILERS	16'	16'
224-69 G	MIN. REAR YARD SETBACK	30'	14.3' TO 25.1' TRAILERS	22' TO 36' TRAILERS	22' TO 36' TRAILERS
224-69 J	MIN. DIST. BETWEEN BUILDINGS	35'	10'+/- TO 50'+/-	10'	10'
224-71	LANDSCAPING				
224-129 C 2 a	Canopy Trees	2 trees per unit min 12' high (30 total)	Numerous large caliper trees	8.53 trees per unit min 12' high (128 total)	NA
224-129 C 2 b	Shrubs	20 per unit (300 total)	none	6.8 per unit (102 total)	No**
224-129 C 4	BUFFERS	20' wide	none	Less than 20'	No**

** Note: In Resolution #2-2008, the Zoning Board granted relief from bulk and area requirements of the Highway Commercial District. The applicant should comply with or seek relief from the landscaping requirements listed above.

According to paragraph 19 of the findings of fact in Resolution # 2-2008, the applicant's engineer/planner testified that that *"the purpose of the Act were advanced in connection with granting the requested variances because dangerous White Horse Pike access points are being eliminated; controlled access and through the site is being initiated ; a non-existent stormwater management circumstance is being eliminated and stormwater management system is being constructed; all new pads site will be served with new utility and access infrastructure.* The applicant's engineer/planner *"also argued that an overall better visual environment was being created.* The applicant's engineer/planner finally opined: *...that no negative impact on the Master Plan, Zoning Ordinance of the general welfare would be realized."*

The Zoning Board granted numerous bulk variances as noted above. Nine (9) of the double-wide manufactured homes were granted front yard setback variances; three (3) were granted side yard variances; one (1) was granted a rear yard variance; and all fourteen (14) were granted distance between building variances. Also a variance was granted to allow a fence along the east property line in lieu of a buffer. The need for at least 28 variances demonstrates that the development proposed is over-sized for the site.

The manufactured homes are proposed only 5' and 16' from a six lane divided State Highway. The closest trailer was over 30' away and was separated by large trees. With the greater intensity on the site closer to the State highway site configuration is more dangerous. Because the site also having access to a local street and is a low intensity use, the existing site access could have improved without the granting of the 28 variances. The stormwater management facilities are only required because of the imperious coverage is increased approximately 480%. The existing low intensity use does not require stormwater management facilities. New stormwater management facilities and new utilities could be provided to the site without the granting of the 28 variances. As for a better visual environment being created, the site once had heavy natural vegetation that included trees ranging from 16" up to 38" in diameter. This heavy natural vegetation screened the Trailer Park from view and somewhat protected the trailers from the traffic on the State highway and screened the Trailer Park from the neighbors. The development proposal will now have a row of double-wide manufactured homes 10' apart screened by newly planted 1 ½" to 3" caliber vegetation. During the 2005 Re-examination of the Master Plan the current HC District was to remain unchanged.

It should be noted that the Zoning Board is not obligated to approve or deny the land development proposal as submitted. They have the ability to require modifications that bring the application more into conformance with the Absecon Developmental Ordinance and reduce or eliminate any or all negative impact on the zone plan and zoning ordinance. This could be achieved by not approving any of the variance relief requested, or by requiring modifications to the development proposal. Greater setbacks from the six lane divided highway....retaining of natural vegetation...enhancing the natural vegetation with additional plantings to create a physical separation from the adjoining dissimilar uses....reducing the number of units....all could have been considered.

All of the up-graded site improvements and improved visual environment that was described by the applicant's engineer/planner could be accomplished with the proposal of a conforming use with conforming setbacks.

AFFORDABLE HOUSING

The Zoning Board Planner in his review correspondence to the Zoning Board, dated July 31, 2008 offered the following:

“As part of the material and testimony previously submitted for Application #4-2007, which ultimately resulted in the Board’s favorable interpretation, the applicant referenced the Affordable Housing Act of 1983 pertaining to the manufactured homes. In making this reference, the applicant has implied that the proposed development will include an affordable housing component pursuant to §244-194 of the ordinance.

In order for the City to receive affordable housing credits from the New Jersey Council on Affordable Housing (COAH) for the proposed development, the applicant shall establish the necessary affordability controls and deed restrictions in a manner that is acceptable to COAH. All documentation to this effect shall be furnished the City Solicitor for review.”

In response to the above recommendation from the Zoning Board Planner, the Board’s attorney provided an opinion that *“notwithstanding the fact that the manufactured housing is a favored, permitted housing alternative pursuant to NJSA 40:55D-100, which statute is otherwise entitled “Affordable Housing Act of 1983”, this within application as “affordable housing” is not housing which must be dedicated pursuant to other procedures relating to COAH. The use of the word “affordable” in both statutes is distinct to each statute.”*

What actually occurred was the applicant derived the benefit of using the “Affordable Housing Act of 1983” to assist with securing a favorable interpretation from the Zoning Board in 2007 and then was not required to provide any affordable housing units as part of the Site Plan approval in 2008.

Municipalities are not required to participate in the COAH program or provide affordable housing, but each municipality has constitutional obligation to provide for a realistic opportunity for the development of affordable housing with its framework of its land use regulations. The current proposal being considered to abolish COAH will not remove Absecon’s constitutional obligation.

NJSA 40:55D-100 (Affordable Housing Act of 1983)

The applicant cited NJSA 40:55D-100 (Affordable Housing Act of 1983) as justification for the Zoning Board to render a favorable interpretation to except the manufactured housing as a pre-existing non-conforming residential use in the Highway Commercial District.

Paragraph 12, page 6 of resolution #4-2007 states “The New Jersey Legislature has determined that it is in the public interest to promote the use of manufactured housing in New Jersey.”

The applicant has taken the quote from the Statute out of context. The purpose of the Affordable Housing Act of 1983 was to insure that municipalities did not discriminate when came to the use of manufactured housing in their land development ordinances. Manufactured housing is permitted in all single family residential zoning districts. The Act and Statute does not automatically allow for manufactured housing in commercial zones. The Act and Statute can not be used in lieu of the use variance process pursuant to NJSA 40:55D-70d.

The mere mention of the Act during a presentation does not eliminate the heavy burden of the applicant to demonstrate the required proofs to justify the granting of a “d” Variance (or use variance).

BOARD JURISDICTION

The findings of fact in paragraph 5 on page 4 of Resolution #4-2007 incorrectly cites outdated case law for the Zoning Board to retain jurisdiction to review the site plan application without the requirement of a "d" variance as an ancillary power of the Zoning Board. The cited case, Michelotti Realty Co., Inc. v. Zoning Board of Adjustment of the Township of Saddle Brook was decided Nov. 1, 1983. In 1984 the Municipal Land Use Law was amended by Assembly No. 1169. More specifically, NJSA 40:55D-76b now the zoning board only has the authority to review site plans when there is a "d" variance (or use variance) involved in the application.

On June 19, 2007 the Zoning Board made the interpretation that a "d" Variance was not required. With the Zoning Board considering the proposed use was a permitted use, the Zoning Board no longer had jurisdiction to review the subsequent site plan and "c" variances.

If the Zoning Board's interpretation is accepted as correct, the site plan should have been referred to the Planning Board for review.

CONCLUSION

It is my professional opinion that the of the number of mobile home pad sites in the Certificate of Non-Conformity is questionable; the favorable interpretation of the Zoning Board was incorrect for the reasons above, and that the Zoning Board's approval of the site plan and numerous bulk variances are questionable at best. It is suggested that representatives from the Planning Board meet with representatives of the City and Zoning Board to jointly review the Zoning Board's review process of this application. It is hoped that with joint cooperation the future review process of applications, especially when it comes to continuation and / or alterations of nonconforming uses, our municipal master plan, and zone plan can be more carefully considered.

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