

MINUTES OF MEETING OF THE BOROUGH OF
OCEAN GATE LAND USE BOARD HELD ON APRIL 25, 2017

** Note – This meeting was recorded at the Municipal Building under “Ocean Gate Court “

OPENED WITH PLEDGE OF ALLEGIANCE AND MOMENT OF SILENCE

ATTENDANCE:

THE FOLLOWING WERE PRESENT: BUTOW, COX, DISTEFANO, FRY, HANUSEY, HOLSHUE, MIHALKOVITZ, AND CHERNEGO. MRS. SHEPPARD AND MAYOR KENNEDY, WERE ABSENT. ATTORNEY DINA VICARI WAS PRESENT AS WAS BOARD ENGINEER JOHN MALLON. ZONING OFFICER PAUL BUTOW WAS SWORN IN AS A CLASS II MEMBER OF THE BOARD. HIS TERM WAS TO EXPIRE ON 12/31/17.

STATEMENT OF COMPLIANCE WITH THE OPEN PUBLIC MEETINGS ACT AND STATEMENT THAT A QUORUM WAS PRESENT WERE MADE BY CHAIRMAN FRY. ON A MOTION BY HOLSHUE SECONDED BY HANUSEY, THE MINUTES OF THE MEETING HELD JANUARY 24, 2017 WERE APPROVED ON “YES” VOTES FROM COX FRY, HANUSEY, HOLSHUE, MIHALKOVITZ, AND CHERNEGO. (NO MEETINGS HAD BEEN HELD IN FEBRUARY OR MARCH, 2017).

THERE WAS NO CORRESPONDENCE, NOR WAS THERE OLD BUSINESS.

THE FOLLOWING APPLICATION WAS PRESENTED BY THE APPLICANTS’ ATTORNEY, JOHN MENSCHING:

APPLICATION BY KIMANH NGUYEN AND CESAR PERALTA, Variance application for premises at: 350 E. RIVIERA, BLOCK 51, LOT 13.

BOARD ATTORNEY VICARI STATED THAT THIS APPLICATION MIGHT BE CONSIDERED TO REQUIRE APPROVAL OF A USE VARIANCE, WHICH WOULD MEAN THAT COUNCILMAN COX COULD NOT PARTICIPATE. A BACKGROUND NEEDED TO BE ESTABLISHED AS TO HOW LONG THE EXISTING NON-CONFORMITY CREATED BY THE PRESENCE OF A SECOND DWELLING (GARAGE APARTMENT) ON THE PROPERTY, HAD EXISTED THERE.

JASON MARCIANO, P.E., OF THE FIRM OF EAST COAST ENGINEERING, TOMS RIVER, NJ, CAME FORWARD AND WAS SWORN AS WERE ALL WITNESSES. HIS ENGINEERING AND PLANNING CREDENTIALS WERE ACCEPTED BY THE BOARD, AS WAS HIS FAMILIARITY WITH THE LAWS PERTAINING TO LAND USE. HE STATED THAT HE HAD EXAMINED AERIAL MAPS AND DEPARTMENT OF ENVIRONMENTAL PROTECTION MAPS OF THE AREA. THE EXISTENCE OF A SECOND STRUCTURE ON THE PROPERTY WAS SHOWN AT LEAST AS FAR IN THE PAST AS 1970. AN AERIAL MAP DATED 1956 SHOWED A SECOND STRUCTURE, AS DID A MAP DATED 1930, ALTHOUGH MR. MARCIANO COULD NOT DETERMINE THE EXACT NATURE OF THE SECOND STRUCTURE ON THE 1930 MAP.

MESSRS. MARCIANO, FRY, HOLSHUE, AND COX SOUGHT TO ESTABLISH THE SOURCES OF THE VERIFIABLE INFORMATION ABOUT THE SITE. THE INFORMATION FROM 1930 AND 1970 CAME FROM THE DEP WEBSITE WETLANDS INFORMATION. THE INFORMATION FROM 1956 CAME FROM THE WEBSITE HISTORICALAERIALS.COM.

A SECOND WITNESS, MANUEL FERREIRA, OF 349 E. BAYVIEW AVENUE, WAS CALLED BY MR. MENSCHING. HE STATED THAT HE HAD LIVED IN OCEAN GATE FOR 30 YEARS (PERMANENTLY SINCE 1987) AT THE LOCATION ACROSS THE STREET, 348 E. BAYVIEW AVENUE. HE WAS NOW LIVING IN THE GARAGE APARTMENT LOCATED ON THE PROPERTY, WHICH WAS THE SUBJECT PROPERTY OF THE CURRENT APPLICATION, KNOWN AS 349 E. BAYVIEW AVENUE, BUT ALSO AS 350 E. RIVIERA. HE HAD BEEN A SUMMER RESIDENT OF OCEAN GATE SINCE 1978 AND HAD PURCHASED HIS HOME IN 1993. THE PROPERTY IN QUESTION HAD AT A PREVIOUS TIME BEEN OWNED BY EVA

SCHMIDT AND HER SON, RONALD SCHMIDT. MR. FERREIRA KNEW OF THE EXISTENCE OF THE SECOND STRUCTURE AT LEAST FOR THE TIME HE HAD BEEN IN OCEAN GATE.

ZONING OFFICER BUTOW HAD RECUSED HIMSELF FROM VOTING ON THIS APPLICATION SO THAT HE COULD GIVE TESTIMONY. MR. BUTOW STATED THAT HE DID NOT CONSIDER IT RELEVANT AS TO WHETHER THE TWO-FAMILY USE HAD EXISTED BEFORE THE PASSAGE OF THE 1977 LAND USE ORDINANCE. HE NOTED THAT THE BOROUGH HAD ISSUED RENTAL CERTIFICATES OF OCCUPANCY FOR THE GARAGE APARTMENT, AND THE BOROUGH ACCEPTED THAT THERE WERE TWO EXISTING DWELLINGS ON THE SITE. MR. BUTOW'S POSITION WAS THAT, IF THE GARAGE APARTMENT WERE TORN DOWN, THE PROPERTY, WITH JUST ONE DWELLING UNIT, WOULD BE CONFORMING TO THE ZONING ORDINANCE. IF A NEW PRIMARY DWELLING WERE TO BE CONSTRUCTED, THE SECONDARY BUILDING COULD REMAIN, BUT FOR USE AS A GARAGE, ONLY. THE EXISTENCE OF TWO DWELLING UNITS ON THE PROPERTY WAS A NON-CONFORMITY REGARDLESS OF THE LENGTH OF EXISTENCE.

MR. FRY STATED THAT THE PAST USE OF THE SECOND STRUCTURE SHOULD BE ESTABLISHED FOR THE RECORD

BOARD ENGINEER MALLON STATED THAT THE BOARD COULD MAKE A DETERMINATION THAT THE EXISTING GARAGE APARTMENT WAS A PRE-EXISTING NONCONFORMITY. THE CONDITIONS ON THE PROPERTY WERE DEPICTED ON JASON MARCIANO'S EXHIBIT, WHICH WAS A LARGER VERSION OF THE PLOT PLAN. THE EXHIBIT WAS MARKED A-1 AND WAS RETAINED BY THE BOARD ATTORNEY.

MR. BUTOW STATED THAT THIS PROPERTY DID NOT QUALIFY AS A SUPERSTORM SANDY DAMAGED SITE, AND THEREFORE, THE APPLICANTS COULD NOT AVAIL THEMSELVES OF THE LOOSENING OF REGULATIONS BY THE STATE DUE TO THE STORM. THE BOARD ATTORNEY AND ENGINEER NOTED THAT A DIFFERENT INTERPRETATION MIGHT BE APPLIED IN THE CASE OF A USE VARIANCE.

ATTORNEY MENSCHING STATED THAT THE APPLICANTS WISHED TO HAVE THE GARAGE APARTMENT RENTAL USE CONTINUED, BUT WITH NO CHANGES PROPOSED FOR THAT BUILDING. THE APPLICANTS COULD NOT AFFORD TO REMOVE THE SECONDARY BUILDING FOR MONETARY REASONS. THE PRIMARY DWELLING WOULD BE REBUILT AND WOULD BE BROUGHT INTO CONFORMANCE WITH FEMA REGULATIONS AND THE CURRENT BUILDING CODE. THIS WOULD BE AN IMPROVEMENT TO THE NEIGHBORHOOD.

MR. BUTOW STATED THAT HE HAD MET WITH THE APPLICANTS AND GONE OVER THE SITUATION WITH THE APPLICANTS AT LENGTH AT THE POINT THEY HAD PURCHASED THE PROPERTY.

MS. VICARI AND MR. MALLON AGREED THAT MR. BUTOW'S POINTS WERE WELL TAKEN. THEY REVIEWED THE POSSIBLE DETERMINATIONS, WHICH THE BOARD COULD MAKE, WHILE AGREEING THAT ANY ECONOMIC IMPACT ON THE APPLICANTS COULD NOT BE CONSIDERED. AESTHETICIS AND THE IMPACT ON OPEN SPACE/LIGHT/AIR IN THE AREA COULD BE CONSIDERED.

THE POSSIBLE ACTIONS THE BOARD COULD TAKE WERE AS FOLLOWS:

1. ISSUE A CERTIFICATION OF NON-CONFORMITY, ALLOWING THE 2 DWELLINGS TO REMAIN;
2. APPROVE A USE VARIANCE
3. APPROVE THE VARIANCE, BUT REQUIRE REMOVAL OF THE SECONDARY APARTMENT;
4. NOT ADDRESS THE SECONDARY DWELLING AT ALL; HOWEVER, IF REMOVED, THE SECONDARY UNIT COULD NEVER BE REBUILT WITHOUT AN APPLICATION TO THE BOARD.

MS, VICARI SUGGESTED THAT THE APPLICANTS AND THEIR PROFESSIONALS MIGHT NEED MORE TIME TO RESEARCH THE HISTORY OF THE PROPERTY. ATTORNEY MENSCHING ASKED THAT THE BOARD PUT ANY INFORMATION THE BOARD MEMBERS HAD ON THE RECORD. COMMENTS FROM THE BOARD WERE AS FOLLOWS:

1. MR. COX STATED THAT HE KNEW OF THE EXISTENCE OF THE SECOND BUILDING SINCE 1967, BUT HE HAD NO KNOWLEDGE OF ITS USE.

2. MR. HANUSEY HAD NO SPECIFIC MEMORY OF THE HISTORY OF THE PROPERTY.
3. MR. FRY VERIFIED THE EXISTENCE OF THE BUILDING SINCE 1965, BUT ALSO DID NOT KNOW HOW IT HAD BEEN USED.
4. MR. CHERNEGO FELT CERTAIN OF THE EXISTENCE OF THE BUILDING, BUT ALSO HAD NO KNOWLEDGE OF USE.

MR. MALLON AND MS. VICARI NOTED THAT THE NOTICES HAD NOT INCLUDED A REFERENCE TO A USE VARIANCE, ALTHOUGH THE EXISTENCE OF THE SECOND DWELLING HAD BEEN NOTED. AFTER SOME DISCUSSION, IT WAS MOVED BY DISTEFANO AND SECONDED BY CHERNEGO TO ISSUE A CERTIFICATION OF AN EXISTING NON-CONFORMITY. THE VOTE WAS AS FOLLOWS: "YES" DISTEFANO, FRY, HANUSEY, MIHALKOVITZ, CHERNEGO. (MESSRS. BUTOW, COX, AND HOLSHUE DID NOT PARTICIPATE IN THE VOTE).

MESSRS. MALLON, MARCIANO, AND MENSCHING DISCUSSED BOARD ENGINEER MALLON'S REVIEW LETTER, DATED DECEMBER 15, 2016.

MR. MARCIANO STATED THAT THERE WOULD BE NO NEGATIVE DRAINAGE ISSUES RESULTING FROM THE NEW CONSTRUCTION. THE PROPERTY WAS NOT IN A "V" FLOOD ZONE, BUT INSTEAD WAS IN THE "A8" ZONE; HOWEVER, IT MUST BE BUILT AS THOUGH IT WERE IN A "V" ZONE. A CAFRA PERMIT HAD BEEN ISSUED ON 2/3/17. THIS WAS MARKED AS A-2 BY MS. VICARI. THE PERMIT HAD BEEN SENT TO THE OCEAN COUNTY CLERK'S OFFICE. IN ADDITION, ATTORNEY MENSCHING ADVISED THAT A DEED HAD BEEN SENT TO THE OCEAN COUNTY CLERK'S OFFICE FOR RECORDING IN ORDER THAT SUBSEQUENT PURCHASERS OF THE PROPERTY WOULD BE AWARE OF APPROVALS AND CONDITIONS ISSUED FOR THIS PROPERTY. MR. MARCIANO NOTED THAT ITEMS 6 AND 7 IN THE REVIEW LETTER WERE AGREED TO. THESE HAD TO DO WITH THE PROPOSED DECK, WHICH MUST MEET FLOOD HAZARD REQUIREMENTS, AND THE REQUIREMENT THAT THE APPLICANT MUST REPAIR THE BOARDWALK, IF IT WERE DAMAGED BY THE CONSTRUCTION AT THIS SITE.

MR. MARCIANO NOTED THAT BOTH SIDE SETBACKS WOULD BE BROUGHT INTO CONFORMITY WITH THE NEW CONSTRUCTION THE FIRST FLOOR LIVING SPACE WOULD COMPRISE 1144 S/F. MR. MALLON STATED THAT THE LOCATION OF THE REAR STEPS WOULD REQUIRE A VARIANCE. MR. MARCIANO STATED THAT THIS WOULD BE EXCLUDED FROM CONSIDERATION UNDER CURRENT REGULATIONS, BUT MR. BUTOW DISAGREED.

ATTORNEY MENSCHING ASKED MR. MARCIANO TO ADDRESS HOW THE NEW CONSTRUCTION WOULD COMPARE WITH THE SURROUNDING AREA. MR. MARCIANO NOTED THAT MULTI-LEVEL HOMES AND DECKS WERE COMMON IN THE AREA. THE ADJACENT PROPERTIES WERE ONE-STORY HOMES. THERE WAS NO AVAILABLE VACANT LAND, WHICH COULD HAVE BEEN PURCHASED BY THE APPLICANTS.

PHOTOGRAPHS OF THE AREA TAKEN BY EAST COAST ENGINEERING WERE REVIEWED. A HOME SHOWN ON THE BOTTOM OF PAGE 5 HAD BEEN THE SUBJECT OF A VARIANCE APPROVAL IN 2014-15. THERE WERE MANY UNDERSIZED LOTS IN THE AREA. THERE HAD BEEN NO PREVIOUS VARIANCE APPLICATIONS MADE FOR THE SUBJECT PROPERTY. MR. MARCIANO STATED THAT THERE WOULD BE NO NEGATIVE IMPACT ON THE AESTHETICS OF THE AREA OR ON THE PUBLIC GOOD, AND THE NEW CONSTRUCTION WOULD, IN FACT, FURTHER COMPLIANCE WITH THE MUNICIPAL LAND USE LAW AS TO SAFETY AND AESTHETICS. THE BUILDING HEIGHT HAD BEEN SHOWN AT 39'. HOWEVER, THIS INCLUDED 5' FOR THE REQUIRED ELEVATION, SO THAT THE HEIGHT OF THE BUILDING WAS APPROXIMATELY 35', WHICH WAS PERMISSIBLE.

MESSRS. BUTOW AND COX DISCUSSED THE NEED FOR THERE TO BE 2 SEPARATE SEWER AND 2 SEPARATE WATER LINES TO SERVE THE NEW BUILDING AND THE SECONDARY STRUCTURE. MR. CHERNEGO ASKED IF DRAINAGE FROM THE HOME WOULD HAVE AN IMPACT ON THE BOARDWALK, AND MR. MARCIANO STATED IT WOULD NOT.

THE PUBLIC PORTION OF THIS APPLICATION WAS OPENED AND CLOSED WITHOUT FURTHER PUBLIC COMMENT.

MS. VICARI WENT OVER THE POINTS TO BE INCLUDED IN THE BOARD'S RESOLUTION.

IT WAS MOVED BY HANUSEY AND SECONDED BY CHERNEGO TO APPROVE THE VARIANCE, INCLUDING PERMISSION FOR THE SECOND DWELLING TO REMAIN. THE VOTE WAS AS FOLLOWS: **"YES" DISTEFANO, FRY, HANUSEY, MIHALKOVITZ, CHERNEGO. THE MOTION THUS PASSED.**

CHAIRMAN FRY STATED THAT HE HAD COPIES OF THE PRELIMINARY DRAWINGS AS SUBMITTED BY THE BOROUGH OF OCEAN GATE FOR A CAFRA PERMIT. THIS HAD BEEN SENT TO THE BOARD AS A COURTESY. THEY WERE MADE AVAILABLE FOR ANY MEMBER TO REVIEW.

HANUSEY AND CHERNEGO MOVED TO OPEN THE MEETING FOR GENERAL COMMENT. NO ONE CAME FORWARD, AND IT WAS SIMILARLY MOVED TO CLOSE THE PUBLIC PORTION. BOTH MOTIONS PASSED BY VOICE VOTE.

THERE WAS A MOTION TO ADJOURN BY CHERNEGO, WITH SECOND BY HANUSEY AND THIS PASSED UNANIMOUSLY.

RESPECTFULLY SUBMITTED,

JEANNE P. TELLER, BOARD SECRETARY