



MINUTES

MERCHANTVILLE JOINT LAND USE BOARD

Tuesday, September 8, 2020, 7:30pm
Public Meeting Held by Zoom Video and/or Teleconference

1. **CALL TO ORDER.** The meeting was called to order at 7:31pm.
2. **OPEN PUBLIC MEETINGS ACT.** Mr. Madden advised of the ways that the meeting was being held in accordance with Open Public Meetings Act.
3. **PLEDGE OF ALLEGIANCE.** Persons in attendance stood for the pledge of allegiance.
4. **ROLL CALL.** Ms. Wuebker took roll call.

<u>Class IV</u>	<u>Class I</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV*</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class III</u>	<u>Class II</u>	<u>Class IV*</u>
Brennan	DeSimone	Fiume	Lammey	Lehman	Licata	Stewart	Uricchio	Woods		
Yes			Yes		Yes		Yes	Yes		

5. OLD BUSINESS

- Approval of Meeting Minutes - Meeting minutes for August 11th aren't available yet for review. Mr. Brennan made a motion to accept the August 25th meeting minutes, which was seconded by Mr. Woods. Members voted as follows:

<u>Class IV</u>	<u>Class I</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV*</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class III</u>	<u>Class II</u>	<u>Class IV*</u>
Brennan	DeSimone	Fiume	Lammey	Lehman	Licata	Stewart	Uricchio	Woods		
Yes			Yes		Abstain		Yes	Yes		

- Approval of Sustainable Jersey Resolution - Mr. Lammey made a motion to approve the resolution, which was seconded by Mr. Woods.

<u>Class IV</u>	<u>Class I</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV*</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class III</u>	<u>Class II</u>	<u>Class IV*</u>
Brennan	DeSimone	Fiume	Lammey	Lehman	Licata	Stewart	Uricchio	Woods		
Yes			Yes		Yes		Yes	Yes		

- Approval of Resolution Memorializing Decision for JLUB #2020-4 Application, William Potts, 19 W Chestnut Avenue (Block 57, Lot 26) - Mr. Uricchio made a motion to approve the resolution, which was seconded by Mr. Woods.

<u>Class IV</u>	<u>Class I</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV*</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class III</u>	<u>Class II</u>	<u>Class IV*</u>
Brennan	DeSimone	Fiume	Lammey	Lehman	Licata	Stewart	Uricchio	Woods		
Yes			Yes		Abstain		Yes	Yes		

- JLUB # 2020-3, Patrick McIlhenny, Jr., 213 Glenwood Avenue (Block 43.03, Lot 7)
This matter involves an oversized shed; the public hearing is being continued, as the Applicant has commissioned a property survey. It will be continued to the October 13th meeting.

6. NEW BUSINESS

- JLUB# 2020-5, Rudolph Tropea Family Trust, 10 Clifton Avenue (Block 30, Lot 8)
Application for Certificate of Non-Conformity as a 2 Family Duplex

Mr. Joseph J. Bennie, the applicant's council addressed the Board. This is an application on behalf of James Tropea. The property has been owned by the family for many years. The mother passed away very recently. The children are all in attendance tonight: James Tropea, Linda Stone, and Deborah Fulginiti. In 1973, Mr. Rudolph Tropea, the father, converted the single family dwelling at 10 Clifton Avenue into a duplex, by adding a second floor entrance to permit access to second floor and also the old maid's quarters on the third floor. The Wells family rented the second floor from 1994 to 2016. When the Wells family moved out, Mr. Jim Helm, who was the tenant on the first floor, approached his clients to inquire whether he could lease the second unit. He was dating the upstairs tenant. His client accommodated the request. Mr. Helm was given permission to occupy both units, to take a door off in the interior stairwell and to remove a partition at the top of the stairwell.

(Board member Lehman entered the Zoom meeting at approximately 7:40pm. Mr. Bennie recapped what he discussed thus far).

When Mr. Helm moved out, the property was vacant. The Tropeas decided to update the property. They hired a contractor who did work without obtaining the necessary permits, to his client's surprise. The Borough halted the job. The intent was for the property to remain as a duplex, with the lease being prima facie evidence of that. Mr. Bennie advised they are before the board for permission to remain as a duplex. It's taxed as a duplex. There are two kitchens in the property, and nothing major was done to abandon this use.

(Board member Stewart entered the Zoom meeting at approximately 7:47pm).

Mr. Tropea, Ms. Stone, and Ms. Fulginiti were sworn in to provide testimony.

Mr. Tropea stated he purchased the property from his family. The house is probably over 100 years old. Mr. Bennie showed a power point presentation on the shared zoom screen, which was prepared by Mr. Tropea. Mr. Bennie showed pictures of the rehab of the property – before and after pictures, while Mr. Tropea described them. He advised that they put in new windows, painted, new flooring, new kitchen, painted exterior stairway. One of the pictures showed the area where the wall was previously located with sheet rock and 4x4s, but is now open. He stated the third floor bedrooms were known as the 'maids' quarters.' The last tenants and all prior tenants used the third floor.

One of the pictures was of the contractor's electrical plan that indicated two separate circuit breakers. One for downstairs and one for upstairs. He stated the property was already separately metered and was knob and tube. They upgraded the electricity. All utilities were separate. The lease agreement with Jim Helm, specifically paragraph 31, was shown, which indicated that he needed to restore the entranceway. Mr. Helm didn't put it back since Mr. Tropea was rehabbing the property and he would do as part of rehab. Two new separate water heaters were put in. Today, when they went to the property, he found the water heaters missing. Someone broke into the property and stole the water heaters. Nothing else was missing. One of the slides was a copy of PSE&G utility bill from July 2020 showing 2 separate bills.

His contractor was Joe Wright. He was under the impression in the contract that he signed that the contractor was going to pull all the necessary permits, and then one day during the construction, he saw a sticker on the door of a violation. The contractor said he dropped the ball. He didn't submit E & O certificates. Mr. Tropea fired the contractor because of the lack of permits issue and he was also not happy with the work quality. The intent is to get someone who is legitimate to complete the work.

It was never his intent to abandon the use as a duplex. This was all going on while his mother was sick in hospice. There was a discussion about the tenants over the years. Mr. Helm moved into the first floor unit in 2013.

The slideshow presentation was entered into evidence. Mr. Madden advised of the exhibit numbers for same A1-A5.

Ms. Fuliginiti testified that when her parents purchased the home in the 70s they purchased it with the intent of creating a duplex – they took out the main staircase. The outside stairs were added in 1973. They did that so they could put in a bathroom in the downstairs apartment. The property was always a duplex. When she got married she lived in the downstairs apartment in 1974. They lived there for 3 years. Her sister Mary also lived there for a few years. When no family members were living there, they rented the both units. The upstairs was always rented out; they never changed the footprint of the property. The third floor always had 3 bedrooms. Mr. Tropea said there was only 1 bedroom on the second floor, with living room, kitchen, and dining room, and three bedrooms on the third floor.

The zoning application for the duplex, dated May 2, 1973, was identified as exhibit A6. Mr. Bennie advised that it would be a hardship to return it to a single family dwelling with the work that was done in the 70s and that letting tenant lease both units is not tantamount to an abandonment of the use.

Board members asked questions. Mr. Tropea testified that the wall that was taken down was not structural. He doesn't have PSE&G records showing separate utility bills before the wall was removed because in tenants' names, but when it was changed over to his name when vacant, you can see the two separate units on there. There are two separate meters on the property. Part of the work that the contractor did without permits was electrical, but it didn't show a new meter or new meter socket and the panel wasn't being removed or replaced.

Ms. Wuebker said it was her understanding that one of the electrical panels was moved upstairs. The contractor told her that originally it was in the basement. In order for the second floor tenant to access the electrical it was moved upstairs as a safety measure. Mr. Tropea confirmed a new panel was installed between the second and third level hallway.

The hearing was opened to the public for comments or questions.

Mr. Marvin Gaskill, 102 East Chestnut Avenue, was sworn in. He lives next to the property. He submitted a certification. His understanding is that the zoning variance in 1973 was for the second floor only, but the testimony so far is that it always included the third floor. Only 659 square feet of the second floor was shown in the 1973 document, but floor plans submitted now show 1195 square feet. He wanted to know if there was an expansion of use on record. Mr. Madden advised no use variance was granted in 1973. It is the applicant's position that this use pre-dated the adoption of the ordinance that prohibited duplexes in the district. A permit was issued, not variance.

Mr. Bennie stated Mr. Tropea Sr. is no longer with us to testify about what happened at that time. In looking at the form, he thinks it was the area that was being upgraded to make a duplex, and was not inclusive because it didn't show the garage or the basement, etc.

Mr. Gaskill raises concerns whether a fire escape is needed for the third floor. It's his understanding that a steel fire escape to the third floor is required by the fire code. There was a discussion of whether the Construction Office will be reviewing this. It is Ms. Wuebker's understanding that the fire department and our code enforcement office inspects rental properties every 3 years or if there is a

new tenant. However, the Construction Office does not get involved unless it's new construction. Mr. Gaskill is concerned there is not enough fenestration for the units to ensure open air and light, particularly on the northside of the structure. He thinks the window sizes should be increased to meet standards. He wants to know if historic preservation will be reviewing this. He wants to know how these deficiencies will be corrected as part of this use variance.

Ms. Wuebker explained that the Board must first determine whether the applicant is entitled to a certificate of non-conformity – meaning is there a valid legal non-conforming use and has that use not been abandoned? If the Board finds the applicant is not entitled to a certificate of non-conformity, then the applicant will be asking the Board to evaluate a use variance application for duplex. Then Board may require additional information, like a survey and site plan, to evaluate and may require certain conditions. At this point, the focus is on the certificate of non-conformity analysis. She thinks Mr. Gaskill's third floor questions are valid because the concern is whether there has been an illegal expansion of the non-conforming use over time into the third floor. When were those bedrooms created? This matter would not go to the historic preservation commission.

There was a discussion that the floor plans in the application are the same floor plans that have been submitted to the rental inspection office to show layout and size of the rooms.

Mr. Gaskill wants the certification he prepared to be entered into evidence. Mr. Bennie received it and was at first concerned that Mr. Gaskill was not going to appear to testify. However, there is no longer that concern. Mr. Madden advised when he became aware of the certification, all the Board members were instructed not to open it. Mr. Madden entered it as exhibit G-1 and instructed Board members to review it during a 5 minute recess.

(At 8:35pm, there was a 5 minute recess for the Board members to review the certification. The Board reconvened at 8:40pm).

Mr. Bennie cross-examined Mr. Gaskill. He has a 5 unit multi-family building next to the property. He had personal knowledge of the use of the third floor of the property because he had contact with the tenant on the third floor, Michelle, due to a prior tree incident. He purchased his property in 2002. He didn't get to know Michelle until 2013 when he had the incident with the tree. Since testimony tonight seems to indicate that the third floor has always been used, that point is moot in his certification.

Mr. Steve Morrone, who lives at 7 Clifton Avenue, was sworn in. He lives directly across the street from the subject property. Prior to Mr. Helm renting the property, there has been issues with non-owner occupied rental property. He realizes that the Tropea family went through a lot with death in family. However, he is concerned that there was so much work being done on the property that the owners weren't even aware that there weren't permits in place. It's obvious when permits are in place because they'd be in the window. How the property was being kept during that time was an issue. The lease just says 10 Clifton Avenue, it doesn't say unit 1 and unit 2. Common sense says that once remove the wall and turn it into single family residence, it eliminates any previous permissions they had as a duplex.

Toni Novak, lives at 11 Clifton Avenue, was sworn in. She has lived there for 38 years. The tenants have been good over the years, but the maintenance of the property has not been good. There has been various times that it has looked like an eyesore on the block. With regard to lease, feels that it should not be within the power of tenant to turn it back into a non-conforming use once wall removed. A research of the fire department records should indicate that the third floor is not legal bedrooms.

Mr. Tropea says that his mother was elderly and not in good health; he took the property over and his intent is to improve the property.

The public portion of the hearing was closed.

Ms. Fulginiti said it's their intent to improve the property for Merchantville. The siblings put in almost \$100K into the property. It would be a great hardship to them to have to convert it back to single family. She clarified that only Mr. Tropea owns it now. She and her sister are no longer owners. The township benefits because they pay more in taxes as a duplex. No stairwell was removed by Mr. Helm. Need to crouch to get to second floor from inside; its narrow. Her mom was kind-hearted 90 year old who wanted to do something nice for her tenants, by allowed Mr. Helm to remove the wall so he could have access to his girlfriend who lived upstairs, rather than go outside.

Ms. Stone stated that they realized their mother wasn't able to maintain the property properly as she got older. Her brother took the lead; they were all part of the trust. They all love Merchantville and they only want the best for this property, the neighbors, and the town. They want the Board to know that they care and they want the chance to be able to prove themselves.

A Board member asked Mr. Madden whether the removal of a barrier in a duplex reverts it back to a single family dwelling. Does there need to be a certain minimum amount of time? He doesn't feel that the intent was there.

Mr. Madden advised that is the threshold question for the Board. The first part of the test is whether the use was legal when the ordinance that prohibited it was adopted. Here, the applicant has submitted evidence in the form of an occupancy permit from 1973 to establish it was legal. It's the Applicant's burden to prove it was legal. The next question is has the use been continuous? Here, the testimony is that it was not. There was a brief period of time where it was used as a single family. But that doesn't necessarily carry the day. The issue is abandonment. Was this use abandoned? Was there an overt act or failure to act which carries a significant implication that the owner neither claims nor retains any interest in that duplex, and there is an intention to abandon. The Board has to look at the facts. The case law says that an overt act points towards abandonment, unless the use was intended to be 'transitory.' He looked up definition of transitory, which means brief duration or temporary. Does that lease constitute an intent to abandon it? He didn't see any case law exactly on point.

Mr. Bennie says the Motley case says need to have an intent to abandon. Here, the lease shows just the opposite. He discusses the cases mentioned by Mr. Gaskill and doesn't feel they are applicable. They involve when property torn down. Here, 2 separate units; 2 separate kitchens; 2 separate utilities – only for convenience for the tenant because the upstairs and the downstairs tenants were partners.

A Board member asked to reread the lease provision. Mr. Madden read it again. "It is understood that it will be tenant's responsibility to restore the entranceway that was opened up to the original condition of a two unit apartment at the sole expense of the tenant subject to the inspection and approval of the landlord." A Board member asked if there is a distinction in the apartment units from an address standpoint. Mr. Tropea advised it's 10 A & 10B and two mailboxes. He asked if the rental inspection forms call out separate units even when the wall was down. Mr. Tropea advised yes. He paid 2 separate rental fees.

Ms. Wuebker put up the most recent rental record on the shared Zoom screen, which was from 2018. It says “unit #1” and “all floors.” A Board member pointed out that it also says “number of apartments: 2.”

Ms. Novak asked if record said anything about the third floor. Ms. Wuebker stated it doesn’t, but the floor plans attached were the same as what was provided in past rental paperwork that shows third floor; it doesn’t show wall being removed. If Board decides to issue a certificate of non-conforming use, the next question is the scope of the non-conforming use. She’d like to do more research in tax records and talk to the Fire Department if an illegal expansion is in question at all. Mr. Madden advised that it would be in the purview of the Fire Department anyway.

A Board member states that even after the wall was down, the records are showing 2 units on the form. They did register 2 units and pay 2 rental fees for one tenant, Mr. Helm. Ms. Wuebker put up the Tax Assessors Field Card on the Zoom screen. The number of bedrooms says 4 total. That is why she thinks it may require further research because that is different than what floor plans are showing, which is showing 7 bedrooms.

Mr. Madden asked if she is suggesting we hit pause. Ms. Wuebker said she thinks the Board can rule on the abandonment issue, but if certificate of conformity granted, the scope of intensity of the non-conforming use needs to be pinned down. Whether there are 4 bedrooms or 7 bedrooms is a big difference. There was a discussion back and forth of what the floor plans show, versus what the Tax Assessor’s field card shows, versus testimony being provided. Ms. Wuebker says she is willing to do further research if Board desires. Mr. Madden recapped the applicant’s position is that the preexisting non-conforming use encompassed all 3 floors and neither the tax assessor nor fire department are here to testify.

There was further discussion of some of the labels and the scale of the floor plans being incorrect. Mr. Tropea testified the 6’5” x 10 room on the third floor is a utility room and not a bedroom. One of the bedrooms shown on first floor is a sun room. No closet. Therefore, Unit A is a one-bedroom apartment on the first floor. Unit B is a 3-bedroom apartment consisting of the second and third floors of the building, with one bedroom on the second floor and two bedrooms on the third floor, which is consistent with field card. 4 bedrooms total.

Mr. Madden restated the legal instructions for the Board’s review of the application.

It is Board member Licata’s opinion that the lease provision demonstrates that the owner intended to remain as a duplex even though there was an interim period where it was not used that way for the convenience of the then tenant. His opinion should not be construed in any way to say that the current work on the property is legitimate, nor excuse doing work without the proper permits in place. There is no excuse for that. It should’ve been done.

Mr. Bennie says it’s a very expensive lesson learned for his client. The illness in the family did cause some of that. The intent is to proceed properly.

Mr. Uricchio does not think there was an intent to abandon. He makes a motion to grant the applicant’s request for a certificate of non-conformity as a duplex. The motion was seconded by Mr. Licata. Mr. Brennan asked that it be conditioned upon the 4 bedrooms (1 on first floor, 1 on second floor and 2 on the 3rd floor), in addition to regular conditions placed. The voting on the application was as follows:

<u>Class IV</u>	<u>Class I</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV*</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class IV</u>	<u>Class III</u>	<u>Class II</u>	<u>Class IV*</u>
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Brennan	DeSimone	Fiume	Lammey	Lehman	Licata	Stewart	Uricchio	Woods		
Yes			Yes	Yes	Yes		Yes	Yes		

(Ms. Stewart wasn't eligible to vote)

7. Professional Comments

Mr. Madden advised that R-19-80 is tabled.

8. Board Comments

Mr. Brennan thanked Mr. Madden for his assistance.

9. Adjournment

Mr. Woods moved to adjourn, which was seconded by Mr. Uricchio. All members present voted in favor. The meeting ended at approximately 9:45pm.