

August 26, 2015

A regular meeting of the Allendale Board of Adjustment was held in the Municipal Building on August 26, 2015. The meeting was called to order at 8:08 PM by Ms. Tenghi who announced that the requirements of the Open Public Meetings Act were met by the required posting and notice to publications.

The following members answered to roll call: Mr. Jones, Mr. Redling, Ms. Hart, Ms. Chamberlain, Ms. Tenghi, Mr. Manning, and Ms. Weidner. Mr. Robert Maloof presided as the attorney for the Board of Adjustment as Mr. Nestor recused himself because he lives within two hundred feet of the application.

On a motion from Mr. Manning, seconded by Ms. Chamberlain, the minutes from July 22, 2015 were approved.

The application to be heard that evening was a continuation for Michael Walters from 56 Cedar Drive for a special question and interpretation of Zoning Ordinance pursuant to NJSA 40:55D-70b. Mr. Robert Simon, who was the attorney for the applicant, reintroduced himself to the Board. He reminded the Board that the testimony of Mr. Peter Steck was given at the last meeting. Mr. Simon said that Exhibits A-1 and A-2 were given at the last meeting. He gave the Board members Exhibit A-3 August 26, 2015 which was three pages of curriculum vitae for Mr. Steck. Exhibit A-4 August 26, 2015 was a single page that was an aerial photograph of the football field with four felt tip black lines a half an inch long where the mobile lights would probably be installed. This document was secured from the OPRA request of the Northern Highlands Regional High School Board of Education. Mr. Maloof asked who put the writing on the paper and Mr. Simon replied that this was the way they got it from the OPRA request. Mr. Maloof asked what the writing in the corner stated but Mr. Simon did not know. Mr. Steck responded that it said lights approximate placement and the same thing was written on the bottom of the page. Mr. Maloof said it looks like a black piece of paper to him and Mr. Steck marked one of the sheets with blue circles so the Board members could see where the lines were on A-4. They marked this page as A-4a August 26, 2015. Mr. Steck said the circles are where the bleachers would be on either side of the field. Mr. Maloof asked how he came to know that the lines were for the lights and Mr. Steck said because of the legend at the top and the bottom of the page. Mr. Maloof asked didn't he testify last time that the lights would be in the end zones and Mr. Steck said he did not say that at all. Mr. Simon asked Mr. Steck if the lighting structures would be positioned behind the fence and along the football field on the ten to twenty-five yard lines on the home side and located on the five to twenty yard lines on the visitor side and Mr. Steck said yes as that was based on the OPRA request information. Mr. Simon asked if the handwritten placement was approximately where the lights would be located on the field and Mr. Steck agreed.

Mr. Simon passed out Exhibit A-5 August 26, 2015 which Mr. Steck said was the recorded minutes of the Board of Education from Northern Highlands Regional High School signed by James J. Davis who is the Business Administrator and Board Secretary. The minutes are from March 23, 2015 at 8PM. Mr. Steck read for the record a Resolution from the Board of Education that said the Northern Highlands Board of Education accepts with gratitude the portable lights given by the Northern Highlands Sports Association. The lights will become the property of the Northern Highlands Board of Education. There was a roll call vote 9-0 in favor of the lights.

Exhibit A-6 August 26, 2015 was an eight page document from the Board of Education Workshop Meeting Minutes on May 11, 2015. On the second page under number seven and on the fifth line from the bottom Mr. Mellanapee, who is the committee liaison, said that the Sports Association has a golf fund raiser scheduled for later this month and that the lights have been ordered. Exhibit A-7 August 26, 2015 was twenty-six pages of reproduction email correspondence included because it is part of his review of this matter. Exhibit A-8 August 26, 2015 was a one page document that Mr. Steck produced based on his testimony from the last meeting. Since time had elapsed since the July meeting he summarized his testimony that he had already provided. He explained to the Board how the chart of his testimony was set-up so the Board could understand it better.

Mr. Steck said the first part was about the legal issues and the powers the Board of Adjustment have under 40-16. The second row was about the process of review which is what they are doing right now. Mr. Simon spoke about the legal issues and then Mr. Steck gave his testimony as a planner. Then the Board will have a chance to review with their attorney and make a decision. Mr. Steck also discussed that under the Town Ordinance of 270A8 is intended to have the same meaning as the Municipal Land Use Law. In the third row his summary of the question before the Board was explained. If the Board of Education puts the lights on the field is it subject to site plan review before a Board and does the provisions of the Zoning Ordinance apply to those lights especially when it deals with height. The fourth row is why the applicant is here this evening, the history of the lights on the field, the impact that would be the same as the permanent lights, and the Board of Education should appear before the Planning Board or Board of Adjustment.

Mr. Maloof interrupted and asked Mr. Simon if this could be summarized and not read as the Board members were all present at the last meeting. Mr. Simon said it was important to give the Board a summary and Mr. Maloof encouraged Mr. Steck to do it in summary form and to move more quickly. Mr. Maloof said that the testimony was already heard and Mr. Simon said that it was a month ago and he wanted to make sure the Board was reminded of what was discussed.

Item five was about the characteristics of the lights. Item six was about the definitions especially of development and the word temporary which usually means using something like usage of a trailer for just a year. Row seven was about the site plan review under the Ordinance which defines lighting as a consideration especially when it comes to height, direction, and intensity. Row eight was on the Zoning Ordinance and use of land which is where schools are permitted in

the Zone under 270-49d, but the uses are subject to some Board approval. Mr. Steck specifically mentioned the thirty-five foot height limitations and impacts from the lights, as the activities will now go later into the evenings which could go under a D-1 variance. The final row was on the summary of his findings which included this being a development, the lights should be considered structures, there should be a site plan review due to the height of the lights, and he feels that the Board of Education is trying to circumvent the denial back in 1995. Mr. Steck finished his testimony and Mr. Maloof asked if there were anymore witnesses. Mr. Simon replied no.

Mr. Maloof said he wanted to give the Board some advice as to whether to proceed with the cross examination or whether to proceed beyond this point. Mr. Simon argued that the public should be heard as the witness has testified and the public should have the right to ask questions. The Board should hear the public, hear what the legal advice is, and then the Board should deliberate. The public has been noticed and the public has the right to cross examine the witness. Ms. Tengi stated that when they have an application it is procedure to open the meeting up to the public, but she did not believe that this was an application. Mr. Simon said that is an application under the MLUL section 70b and under the Town Ordinance 40-16. Mr. Simon reiterated that it is a public hearing. Mr. Maloof disagreed stating that it is a request for interpretation and that it does not require a public hearing. Mr. Simon said the public was noticed and therefore it should be a public hearing. Mr. Maloof said what he had to tell the Board might make the process irrelevant. Mr. Simon responded that legally the Board should allow the public to testify as the applicant presented information and the Board and the public should have the right to cross examine the witness. Mr. Maloof replied that should only happen when there is an application for development in front of the Board. Mr. Simon exclaimed that his client did fill out an application form. Mr. Maloof commented that he didn't think Mr. Walters had standing. Mr. Simon declared that they went through an entire hearing last month and now Mr. Maloof says that his client doesn't have any standing. Mr. Maloof stated that he said this last month too and it is stated in the minutes. Mr. Simon said that Mr. Walters does have standing as he was allowed to proceed. Mr. Maloof said the Board decided to go forward, but that was contrary to his original thinking and it is confirmed now since he read the minutes and had done additional research on the matter to see whether the Board had jurisdiction to go any further with the merits of the application.

Mr. Simon said for the record that he never received a phone call, email, or anything in writing to express the fact that Mr. Maloof was going to tell the Board that his client didn't have standing or that this application should not proceed. Mr. Maloof said he arrived here two days before the application had been listed as a public hearing and notices had been sent out. These questions were addressed by the Board's regular Counsel. Mr. Simon responded that there has been a month between the meetings. If a citizen makes an application and the Board of Adjustment allows it to proceed which it should under the case law, under the statute, and under your Ordinance and an applicant is in the second month of these proceedings, the hearings

should be allowed to continue. Mr. Simon declared that he called to make sure there was Counsel for the night and to make sure there was a quorum and this is the first time Mr. Maloof is saying all of this. Mr. Maloof interrupted and said that they spoke before the meeting and Mr. Simon added that it was in the parking lot. He said on behalf of his client he felt they should be able to proceed with the public hearing as they commenced it at the last meeting.

Mr. Maloof said what he suggests to the Board may make continuing the proceedings irrelevant if they adopt his reasons on the issue of jurisdiction. He didn't feel that his client had standing to bring this application in front of the Board. There is no adversary position as a result of this application taking place. It is not an application under the MLUL as there is no application for development in front of the Board. The testimony of the client is based on supposed facts and an imagined application that has not yet been submitted to the Board. Mr. Simon argued that they discussed this at length at the last meeting and the Board ruled that the application could proceed. The Board declined to hear the res judicata and collateral estoppel arguments but agreed to consider the 70b interpretive question. That is why they spent the time and money to prepare for tonight. At no time did Mr. Maloof notify my office and say that he was thinking of advising the Board against something that the Board already decided to do. Mr. Maloof said that the Board decided to go forward, but based on the testimony heard so far, it is basically planning testimony as if an application for development had been filed. Mr. Simon argued that there is no requirement under 70b for an application for development and no requirement for an adversary to proceed under 70b or 40-16 under the Town's Ordinance. Mr. Maloof stated that he begged to differ because he had not stated any cases at the last meeting that were relevant to this one. He said this was very one sided without an application for development and no jurisdiction for the Board to act in a vacuum. Mr. Simon disagreed as the lights have been ordered and the schematics and specifications were included in the testimony. Mr. Maloof said there was no application saying it was going to be that way and if the Board rules on this application it could affect the Board of Education and any other developer in this town on this particular issue. Mr. Simon said that anyone could bring a 70b application forward and Mr. Maloof disagreed. Mr. Simon argued that the Board of Education had been noticed twice and chose not to participate. Mr. Maloof said that Mr. Steck's testimony is based on what is anticipated and based on documents received by the OPRA request to the Board of Education, but the Board doesn't know what the application will contain. He is a good planner and gave excellent testimony but on an imaginary application. Mr. Simon said it a real application. If the Board of Education decides to tweak it, that is up to them to decide. It is unfair for my client as he has rights under the MLUL. His client's money was accepted, the regular attorney for the Board said we could proceed, the public once again showed up for the meeting and can't question the witness, and now you are saying without contacting me that you have done more research and don't want to proceed. Mr. Maloof said that it is unfair to question a witness when there is no application. Mr. Simon reiterated that they don't need an application for development. Mr. Maloof said that Mr. Simon had cited no case that allows a non-adversary case to go forward. There was some discussion between the two attorneys on cases which were discussed before. Mr. Simon said that your

position is that the public needs to wait for the lights to be put in before they are allowed to go before the Board and Mr. Maloof said that the Board should wait until it happens before it takes action. He continued that if they are installed they will have to make an application and go through the Code Official or the Boards. Mr. Simon asked what happens if there is no application. Mr. Maloof answered that maybe an injunction could be obtained by the town. Mr. Simon asked if they were allowed to file a 70b application if they see something objectionable and Mr. Maloof said yes when something is there. Mr. Maloof stressed that there should be an application for development.

Members of the public said they didn't think there would be an application which is why this 70b application was being done. Mr. Redling told everyone they were out of order and Ms. Tengi brought the meeting back to the Board. Mr. Maclachlan shouted out that he is a neighbor within two hundred feet and was noticed and by not letting him speak at a public hearing was affecting his rights under Cunningham vs. the Department of Civil Service. He felt his property rights were being impacted.

Mr. Jones asked Mr. Maloof for his opinion again. Mr. Maloof said that there is no application before the Board. He felt Mr. Walters did not fit within the word applicant. The Board is being asked to render an advisory opinion and the right to interpret ordinances should be in absence of an actual controversy. Our Board is limited in its powers and what is being requested goes beyond the boundaries of our Board to make an interpretation. No case has been cited by Counsel of anyone making a pre-emptive strike with an intent to have a ruling that has judicial impact on any future applicant. It will be a waste of the Board's time to act in this manner. There were two questions and the Board ruled out the first one on res judicata and collateral estoppel because there was no application from the Board of Education in front of the Board. The second question is basically whether or not the Board of Education would need to seek relief. The cases he had read about 70b applications were if a chicken coop was an accessory building and whether a warehouse was acceptable in the business zone. In the Petro case, a company wanted to put a warehouse in the business zone and the Planning Board permitted the use. Someone challenged this and the Appellate Division said the Planning Board didn't have the authority to determine that as it was up to the Zoning Board. Neither case is comparable to us to help us determine jurisdiction. Mr. Steck's testimony was fine but he is anticipating what might happen. These lights could be an accessory use. How Ordinances should be interpreted with no application in front of the Board is not a good enough reason to proceed.

Mr. Simon said the MLUL gives applicants the right to 70b applications and the Board jurisdiction to interpret questions. The lights are going to be installed. This action is called ripe for a decision. Mr. Walters has a right to present an application before the Board. A public hearing should not be stopped half-way through proceedings. Mr. Maloof decided to advise the Board midway through the process as to whether the Board has jurisdiction or not after the Board decided to hear the case. The Courts would rather this type of case be heard locally first. Mr. Maloof interrupted and said that you could have brought this to the Superior Court first and Mr.

Simon said they could do either. Mr. Maloof said he didn't feel there was any real question for interpretation. Mr. Simon said that Mr. Steck's Exhibit 8 has examples along with the testimony they presented. Mr. Maloof said no application has been filed.

Mr. Jones told the Board that at the last meeting he was asking if the Board had jurisdiction as the Board usually has an application to look at in front of them. Mr. Jones continued with the fact that at the last meeting another Board member said that she thought they did have the right to interpret, but he wasn't sure what they were being asked to interpret. The Board doesn't have the right to compel someone to make an application and that this Board may not be the right Board for this matter. Ms. Tengi added that it also may not be the right time. Mr. Jones asked how to make a motion and Ms. Tengi said that the motion should say that the Board doesn't have jurisdiction.

Mr. Maclachlan from Cedar Drive interrupted and told the Board that he objected for being prevented from speaking as he was noticed. He believed that Mr. Maloof was wrong and that the Board agreed to hear the matter. A 70b application gives the Board the right to interpret and a citizen can come before the Board and have an Ordinance interpreted.

Mr. Jones stated that he is not an attorney and therefore has to rely on the legal advice of the Board's attorney. He added that he felt that the Board did not have jurisdiction based on the information given and on the advice of legal counsel. Mr. Jones declared that the matter should go no further. Ms. Tengi apologized to Mr. Simon for not getting a courtesy call in advance as she knew that he had done a lot in preparation on this case and was very thorough. She agreed with Mr. Jones that the Board did not have jurisdiction on the matter and that they would have their day in the future when an application is presented.

On a motion from Mr. Jones, seconded by Ms. Tengi the Board voted 4-3 in favor of not having jurisdiction on the matter and to discontinue hearing the application based on legal advice from the Board attorney. Mr. Jones, Ms. Tengi, Ms. Hart, Mr. Manning voted in favor of the motion. Mr. Redling, Ms. Chamberlain, and Ms. Weidner voted against the motion.

On a motion from Ms. Tengi, seconded by Mr. Manning, the meeting was adjourned at 9:30PM.

Respectfully submitted,

Diane Knispel