

**BOROUGH OF FAIR LAWN
ZONING BOARD OF ADJUSTMENT
Special Meeting
Of November 8, 2007**

Following are the minutes of the Fair Lawn Zoning Board of Adjustment's Special meeting held on November 8, 2007.

Chairman Scott Levy called the regular meeting to order at 7:15 p.m. and declared that the meeting was being held in accordance with the Open Public Meeting Law.

Roll Call: Present were: Chairman Mr. Scott Levy, Secretary Mr. Joseph Meer, Mr. Todd Newman, Alt. #1 Mr. Benny Salerno, Alt. #2 Mr. Gary Saccinelli, Alt. #3 Mr. Brian Bleacher, Alt. #4 Mr. Marvin Diner

Absent:

Absent were: Mr. Nakshian, Mr. Doug Charipper, Mr. Sy Karas and Ms. Spindel both recused themselves from hearing this application; Mr. John Nakashian was ill. Mr. Doug Chiripper had another meeting to attend. Ms. Ann Peck, Zoning Official and Ms. Karen Kocsis were on vacation.

Also in attendance were: William Soukas, Board Attorney; Cheryl Bergailo, Board Planner; Mr. Paul Azzollini; Board Engineer, Mark Kataryniak; Traffic Engineer and Cathy Bozza, Zoning Board Clerk.

Commercial Old Business:

1. Application #2006-018, Sebastian E. Lentini (McDonald's) 37-01 Broadway, Block 2320, Lots 10-12, Zone b-2/R-1-3 Amendment to approved use/site plan approval requires site plan approval as per RGO Section 125-6

Scott Levy: This is a continuation of application 2006-018 Sebastian E.Lentini. Mr. Levy asks Mr. Soukas to address correspondence regarding the issues at hand.

William Soukas addressed the board at the request of Mr. Steinberg the correspondence of October 22, 2007 regarding the issues pertaining to the August 30, 2007 testimony of Councilmen Edward Trawinski on behalf of the "Objector" or "IHOP", stating its impact on his client's application, deeming it highly improper, clearly prejudicial and arguably unethical. As a result, Mr. Steinberg states it is Applicant's position that the entire hearing process before the Board had been irrevocably tainted. The Councilman's improper advocacy on behalf of Objector has created a conflict of interest for the sitting Board Members.

Mr. Soukas proceeded to explain the position of Mr. Karas in response to Mr. Steinberg's letter, essentially disputing Mr. Steinberg position, indicating there was no conflict by virtue of Mr. Twawinski testimony. Mr. Soukas feels in response to both Mr. Steinberg and Mr. Karas's letters, it is far to remote and speculative to assume Board Members were affected by his testimony. Mr. Twawinski's was a fact witness only and does not feel that the testimony was prejudicial in any way and does not warrant a recuse of Board Members.

Mr. Soukas turns testimony over to Mr. Steinberg.

Mr. Steinberg swears in (Mr. Lentini attorney)

Mr. Steinberg addresses the court stating as a "preliminary comment" that he never received Mr. Karas's letter, noting he could not in fact respond to his letter. Mr. Steinberg proceeds to comment on the three letters marking them Exhibit A7-A8-A9.

A7-letter of Oct. 22, 2007 (Mr. Steinberg's)

A8-Letter of November. (Mr. Soukas's response to letter)

A9-faxed letter of Mr. Jameson Van Eck (assistant to Mr. Steinberg)

Mr. Steinberg: Applauds the Council to the Board for the response to the letters but disagrees with the letter of November 7, from the Board Attorney, Mr. Soukas regarding the testimony of Mr. Edward Twawinsky, deeming it unprejudicial and seeing no potential for conflict by virtue.

Mr. Steinberg then explains after hearing certain details, within the "main thrust of the testimony" of the Councilman, it is applicant's position that the Board has been irrevocably tainted and that the Board must take affirmative action to protect his client's right to a fair and impartial hearing.

Mr. Steinberg then continues explaining the main thrust of the testimony was a "alleged agreement" between the applicant here and the controlling shareholder of the corporation in which owns and operates the IHOP.

Mr. Steinberg takes the Board back to a legal proceeding brought by him in 2006, stating he went to court to adjudicate the rights, if any, of the IHOP in the property dispute. The court did not disagree with the fact that "This board has no power, no jurisdiction, no right to adjudicate rights between adjoining land owners. In his argument, Mr. Steinberg continues to say that in fact he "predicted" that some how or other the issue of the "rights of the parties to each other real estate" which was the testimony of Mr. Twawinski regarding the real estate that there was an agreement by Mr. Lentini in regards to his property with Mr. Alaimo (deceased)

Mr. Levy: Mr. Steinberg when the Board listens and reviews the "rights of ownership" wouldn't the Board in its wisdom know after deliberating and gets all the information, they would know what decision would be made on the application?

Mr. Steinberg: Agrees, and continues back to the letter from Mr. Zoukas. Contested that it stated in the letter it was the "Zoning Board's" response, in which he disagreed. Only with a public or private meeting, can a decision be made, and to his knowledge no public or private meeting had taken place since the letter of October 22. Was fairly surprised, to read that despite his request that this matter be transferred to the Planning Board or the Board Members, Mayor and Mayor's representative and any council person be imported into this board pursuant to Section 69 of the end of the bureau Mr. Steinberg then agrees With Mr. Soukas in reference to the primary cases brought up in the letters, and states neither of the cases on directly on point. But the question is "what the courts have said, about "conflicts of interest". What should this court do concerning "this" conflict of interest. Mr. Steinberg again goes over the two main cases in his letter to which he refers, The Supreme Court stated, "The appearance of a mayor for a private client who objects to the grant of a variance has the likely capacity to" influence" the action of the board, and in any event creates doubt in the public mind as to the impartiality of the board's actions. In a Subsequent case, the Supreme Court remarked that the behavior of the mayor in "Place" could be seen as improper "influence peddling".

The issue here is the litigation between his client and the Borough of Fairlawn. There is no doubt, in anyone's mind that Mr. Twawinsky was an advocate Mr. Karis's client(he was the former attorney for Mr. Karis's client) referring to the meeting of August 30th, 2007 in which Mr. Twawinsky's "demeanor" during his testimony regarding the "alleged agreement" between the two owners of the properties outside the door in the hall.

Mr. Steinberg adamantly states: "There could not have been more prejudicial testimony brought before the Zoning Board from a city councilman who is one of the people who will vote whether or not any member of the board is reappointed. Mr. Steinberg refers back to Mr. Soukas's letter and finds it amusing, not offensive that Mr. Soukas questions why his objections comes over one and a half months after the public hearing and two weeks before the November 8, 2007 hearing. There are 4 very experienced lawyers in land issues involved in this case. Mr. Soukas, Mr. Karas, Mr. Twawinsky and himself but points out that he is made out to be the "bad" guy because he did not stand up then and scream that the testimony should have been stricken from the records.

Mr. Steinberg: "Should he have been quicker and on his feet, " Yes, but he did know who Mr. Twawinsky was at the time. Did he see this trainwreck coming around the track? No. "There is no way the board members can ignore the fact that a sitting councilman had no business giving testimony. In the ending statement, Mr. Steinberg insists the testimony was arguably unethical and that it is Applicants position that the entire hearing process before the Board was irrevocably tainted and will formally ask" the chair to take whatever steps necessary with the board council to move this case away from the people who were tainted by the testimony." It is impossible for his client to get a fair hearing. Please take vote.

Mr. Soukas asks, "What exactly is the nature of the vote that you want this Board to take?"

Is it to accuse itself entirely by virtue of recent arguments? Is it a more factual vote? whether each board member believes they have a “conflict of interest” to Mr. Twawinsky’s testimony.

Mr. Steinberg: I believe there is a conflict of interest and I believe it is a tainted hearing even though the best efforts have been made by the Board Members to vote without prejudice. Do we continue as a Board or do we recuse ourselves?

Mr. Soukas: Mr. Steinberg, if you believe that the hearing is tainted, wouldn’t it be considered an issue of law that is beyond the curfew of the Board. How can the board say it is a tainted proceeding by virtue of Mr. Twawinsky’s testimony? Isn’t that really the curfew of the court upon your appeal, if there is an appeal?

Mr. Steinberg: Agrees, and believes that it is tainted hearing, and states, there are two ways of testing. “If in asking Board members what they think, and a Board member says, I don’t care what Mr. Twawinsky thinks, I don’t like him anyway and enough of the people agree, then fine, you’re right., it is up to the appeals court to say, “ I don’t care what the board members said, “ It is impossible, given the severity of deviation from good practice for any board member to be subjected to it. Especially if the hearing is in fact, rejected, the issue will be raised and will go to court. Your quest that this board cannot say this is a tainted hearing, I think it could say, in all fairness,” We would rather have planning board members come in and do this hearing, or individual members could say that they don’t want to be part of it. If three people out of six say that they don’t want any part of it, then it goes to the planning board automatically. There are a lot of different ways it can go the only other way would be to do it adminstravily and it would be filed in the courts. The issue is on the table, subject to what Mr. Karas has to say, and I’m sure the Board will deal with however they need to deal with it.

Mr. Blecker: Is it just Mr. Steinberg’s opinion that this Board is tainted? And are we able to determine amongst the board members themselves weather we feel we’re tainted or not and does Mr. Twawinsky’s testimony have such significant bearing on our decision regarding this case.

Mr. Levy: It is Mr. Steinberg’s opinion that this jury is tainted. It is always important to listen to testimony given by the applicants witness and the objectives’s witnesses to take weight in anything that is mentioned during testimony. Is it up to us to decide if it is tainted or not? That’s a question that everyone should know and feel during testimony.of any witness.

Mr. Soukas: It is Mr. Steinberg position that this board is tainted. I don’t necessarily believe that this vote is able to make a determination as to weather or not it has been tainted by the substance of Mr. Twawinsky’s testimony. It is quite possible that Mr. Steinberg may have waived the right to bring the objection at this time, based on the length of time between meetings.

Mr. Levy: The objection was that Mr. Twawinsky was a standing councilman on the board at the time, and whether or not that in itself would raise question amongst the board along with the testimony of Mr. Trawinsky.

Mr. Soukas: In light of the fact, can we be instructed not to base any part of the decision on Mr. Twawinsky's testimony?

(Mr. Karas swears in.) Council to the Objective of IHOP

Mr. Karas: I just want to address the letter in response of Mr. Steinberg's on Nov. 1st, 2007. He did have confirmation that it was received by Mr. Steinberg's office, why he did not receive it he cannot explain. The first thing I want to address has to do with comments of Mr. Steinberg concerning the board and the jurisdiction of the board to consider the materials issues that have been presented. The ingress/egress of the two properties. Second, asking the board to ignore the directing of Judge . Mr. Lentini had filed a application looking to take the jurisdiction away from this Board because of the issue involving the two driveways between the two properties. The court rejected the application and remanded it back to this Board on June 23, 2006. "Quotes decision from the court". Mr. Steinberg is asking the board to ignore a directive from the secured board. This board does not that authority anymore. It is the mandate of the court to consider the issues that is on the siteplan. Mr. Twawinsky was called as a fact witness in this case. Mr. Trawinsky had relevant knowledge regarding an agreement between Mr. Lentini and Mr. Alaimo. The testimony of Mr. Twawinsky's factuality detailed what transpired between the two parties and the "revisions" to the site plan after the conversation. The agreement lends itself to what the approved site plan provided. It is factuality evidential as to the interpretational of the site plan. The issue is whether or not the site plan provided a two way directional access between the IHOP and McDonald's property. McDonald's argues now, that was not the intent and that's not what the site plan stated. Should the Board consider the testimony? Absolutely, it is relevant and material. Is it prejudice? 100%...when you call witnesses to testify, you call them because of the effect they are going to have in your case. Evidence will benefit your case and acts to the prejudice of the other side. Mr. Steinberg's letter never argues that the evidence is unduly prejudicial. Mr. Steinberg is now asking the Board to throw the evidence out because it is tainted. Was evidence properly presented to the Board? Yes. There is no taint. Mr. Lentini is just sorted by the mere fact that Mr. Twawinsky is a sitting councilman. When he presented the evidence, when he acted a council to IHOP, he did not know he was going to be councilman to the Borough of Fairlawn. He was acting as a factual witness to what transpired back in 2002. The fact is if Mr. Steinberg did not make objections in Court, he loses the opportunity to object, if not done in a timely manner. There is no basis for any of the members to withdraw, all evidence was properly presented. There is no basis for withdrawal. We must continue – it should continue.

Mr. Levy: Mr. Steinberg, do you have a response?

Mr. Steinberg: I will be very brief. With the decision of the Judge and the Superior Court, there was never an argument made at that time that there was an agreement made between the two landlords. It is true that the Judge said; He had no reason to believe that the Board would treat this matter in an unfair manner or would not do the job, but I feel it is impossible for the Board to do the job. "What do I do now?" Do I bring witnesses to say that the meeting never took place? What does the Board do? Is it going to adjudicate whether there was such an agreement. This Board cannot do that. This Board is not accord. That is why the testimony is irrelevant and incompetent.

Mr. Levy: Evidence is brought to the Board and the Board always weights testimony given to it. You are basing whether or not this Board was tainted that night on the testimony of an agreement Mr. Twawinsky stated he had with Mr. Latini and Mr. Aliamo based on hearsay. There were other items discussed by Mr. Trawinsky that are relevant to the site plan and his understanding of that.

Mr. Karis: May I interrupt? You mention "hearsay" It is not hearsay. There are hearsay rules that apply. Under hearsay rule #804-b4 stated by a person that has died. That is a person that is considered unavailable. The prior statement of a person that is under unavailable can come into evidence. There is not a prohibition under the "hearsay rules" to omit testimony like that. What Mr. Trawinsky testified to is not impermissible hearsay under New Jersey evidence rules. Please do not think that because someone is not available to testify, that testimony is not admissible.

Mr. Levy: I stand corrected, and I understand that, as Chairman of the Board and a layman when it comes to the Law. Both you and Mr. Steinberg have the right to also make the closing statement argument as it comes up.

Mr. Levy: Mr. Steinberg, Mr. Trawinsky in the beginning came up and noted before his testimony that he was a councilman. You in your own words stated his experience as a Land Issue Attorney. I know you're an experienced Land Issue Attorney. It plays with my mind that Mr. Trawinsky would put his standing as a witness in jeopardy based on him being a councilman before this Board. At the time, you had extensively cross examined him, asking him extensive questions about the site plan and the alleged meeting between him and his client. I also recall him mentioning he was given permission from his client to discuss matters that are normally Attorney/Client privilege. You did not object to him standing as a councilmember when he brought it up. That not coming up then, surprises me knowing your standing and experience. You mention the conflict of interest and that the hearing is tainted, because of his standing as a council. It has always been the right of the Board, to listen to everything presented to the case. Listen to the witnesses, objections, testimony and then given the weight based on the closing arguments by the applicant and the objector as to what the board should be basing their approval or disapproval on. My feeling is that we have nothing tainted here. Evidence still needs to be presented. This Board can make a decision based on all testimony and not based on one fact witness discussions. Council, do you have anything to add?

Mr. Soukas: No, I think I have already made my decision known, I feel it's the right thing

to proceed.

Mr. Blecker: Was there any violation of any Law procedure by having Mr. Trawinsky testify?

Mr. Soukas: There is nothing on quote in terms of case law that would say that what Mr. Trawinsky did was inappropriate.

Mr Blecker: So that it wasn't?

Mr. Soukas: Mr. Steinberg has made the argument to the contrary, but it is my opinion that Mr. Twawinsky's testimony has not prejudiced this Board and created a conflict of interest.

Mr. Levy: With that, I call the Board. The Board knows my feelings, that this Board has always looked at the evidence in applications such as this. I have listened to witnesses and evidence regarding those witnesses and have made the decision solely on those items, listening to both objectives and their applicants attorneys during the proceeding and our own attorneys as to what we can do and what we can't. I don't believe we need to recuse ourselves nor dismiss ourselves from this application.

Mr. Newman: I think Mr. Steinberg makes some very good points about the appropriateness of Mr. Trawinsky's presence here as a councilman. I also agree that probably what he was testifying about is not in prevue of this Board. I think the members of the Board are intelligent enough to weigh what needs to be weighed, know what we're allowed to consider, know where our prevue lies.

Mr. Salerno: I wasn't present during Mr. Trawinsky's testimony. I will catch up with the minutes and I will let you know. I do not anticipate it as having any effect on me personally.

Mr. Sacchinelli: I don't feel I was tainted by Mr. Trawinsky's testimony.

Mr. Meer: I take exception to being told that we sit here and that we're prejudiced and that the testimony swayed the Board. I've been on the Board the longest of any tenue here. I look at the merits of the applications, both good and bad, and I make a judgement. It's very cut and dry. I don't feel this board was prejudiced by anything. We look at everything in a fair and just manner, and I strongly disagree that this Board was tainted in any way.

Mr. Blecker: I feel this Board is confident enough to base it's decision on all facts presented by however the witnesses present it, and handle this case responsibly.

Mr. Diner: To repeat what Mr. Blecker just said, I sit here with an open mind regarding witnesses testimony and will do so without prejudice.

Mr Levy: Mr. Steinberg, your objections in your letters have been noted and on record.

Mr. Levy: Mr. Karis, you are up and I believe you have brought a witness?

(Mr. Levy swears in the witness) Ms. Alimo(daughter of John Alimo)

Mr. Karas: Can you tell me what your position is with the IHOP in FairLawn.

Witness: I am the president and General Manager of the IHOP. The business was started in the early 60's by my father.

Mr. Karis: Who is your father?

Witness: John Alimo, he was owner and operator, in the francaise business. He had managers under him and once I became of age, he started to groom me to take over the business and I worked as General Manager until the time of his passing.

Mr. Karas: You were the General Manager beginning when?

Witness: Starting in 2002

Mr. Karas: You worked in the restaurant before that. You have always been involved in the restaurant business. Beginning in 2002, you then became General Manager. Correct? At that point in time what was your responsibility?

Witness: All the daily operations of the entire business, food costs, labor costs, dealing with customers, employees, cooking the food, bringing it to the table. Pretty much everything.

Mr.Karis: You indicated your Father passed away. When did he pass away?

Witness: He passed away in 2005.Before passing he started to groom me more on a lot of other things, such as signing contracts, etc.

Mr. Karis: I want you to focus now on the summertime of July of 2005. Just describe to me the on-site conditions of the restaurant including the parking lot adjacent to the IHOP Site.

Witness: They started construction on their driveway.

Mr. Karis: When did they do that construction?

Witness: It was in the summer, maybe July or August.

Mr. Karis: right around the time of his diagnosis?

Witness: Yes.

Mr. Karis: What occurred with that construction?

Witness: They blocked off the ingress/egress

Mr. Karis: How did they block it off?

Witness: With multiple things. Concrete poles, dumpsters, cars, etc

Mr. Karis: Did you have conversation with anybody from McDonald's, including Mr. Lentini and his son regarding the blocking of the egress?

Mr. Steinberg: Mr. Chairman, I object to this line of questions.

Mr. Karis: Why? On what basis?

Mr. Steinberg: I don't have to discuss my objections with you.

Mr. Karis: You sure do if you have an objection. State your objections. So I could address it.

Mr. Steinberg: Not relevant to a site plan application.

Mr. Levy: In the discussion Ms. Alimio is talking about the various play stuff is not relevant to the site plan?

Mr. Steinberg: In 05, in connection to the construction, absolutely not.

Mr. Levy: Council, you getting the history as to what is going on?

Mr. Levy: Objection is noted.

Mr. Karis: Ms. Alimo, can you recall the first conversation you had with any representative of McDonald's, about the barriers that went up?

Witness: Mr Darren Lentini and I had a conversation outside the back door about the construction and how I was very worried about the ingress/egress being blocked off. He assured me that everything would get back to normal. That there would be full flow from both lots once all construction was completed.

Mr. Karas: What other conversations did you have?

Witness: We probably talked to them every other day. Most of the time we would talk between the two properties or he would come over to the office. We talked about working together as neighbors. It was our agreement to cut off the ingress/egress so that they could accomplish their construction and have little problems in doing so. It was a hardship to our business, my Father and I decided to everything in our power to help them because they were our neighbors. Under the understanding that after, the barriers would come down and things would be back to normal. I was constantly reassured that the barriers would come down because I noticed a decline in my business.

Mr. Levy: Council, Can I stop you a second. We understand during the construction the Barriers were disrupting the ingress/egress. Conversations were made stating the barriers would be removed. Can we get to the point? We understand that, what is the next point?

Mr. Karis: Before these barriers were installed, do you remember any motor vehicle accidents having occurred at that driveway or around that driveway? Aware of any pedestrians being hit or injured as motor vehicles attempted to go into the IHOP driveway?

Witness: No.

Mr. Karis: Has the construction affected the IHOP business?

Witness: Yes, my sales are down anywhere from 2 to 6% .

Mr. Karas: that's all the questions I have.

Recess:

Mr. Levy takes attendance.

Mr. Steinberg cross examines witness.

Mr. Steinberg: Ms. Alimo, you indicated that you have never seen the site plan, correct?

Witness: correct.

Mr. Steinberg: You say your business is off 2% to 4%? Are you speaking fiscal year or calendar year?

Witness: Calender year.

Mr. Steinberg: The construction took place in 2005?
How long would you say the work lasted? 2-3 months?

Witness: Yes.

Mr. Steinberg: Do you have figures from those months? Comparing them from the 2004 weeks, to the year 2005 and the year of 2006?
Didn't a new IHOP open up on Rt. 46? Can you tell us what the trend is nationwide on sales in the restaurant industry?

Witness: Slowing down nationwide.

Mr. Steinberg: Did anyone from McDonald's come on to your property to close the driveway? Or did they close it on the McDonald's side? If I understood your conversations with Darren Lentini, he told you he would get the driveway opened as quickly as possible. Correct?

Witness: Yes, that he would honor the agreement between my Father and him.

Mr. Steinberg: What agreement was that?

Witness: They would open up the driveway between the two properties and everything would return to normal.

Mr. Steinberg: That agreement was between Mr. Lentini and your father?
And that agreement took place when?

Witness: As long as I knew they were talking, there was never really a problem.

(Mr. Steinberg ends the cross examination)

Mr. Levy: (Opens up questions to the public) No one steps forward.
Mr. Levy closes the portion to the public

Mr. Steinberg:(asks witness) Are you aware of a directional arrow painted on your side of the driveway.

Witness: Yes

Mr. Steinberg: Which direction is it painted towards?

Witness: Towards McDonald's.

Mr. Levy: The arrow was a two way directional arrow?

Witness: Yes.
(End of 1st witness testimony)

Mr. Levy swears in John Desch(Licensed Professional Engineer) Gives extensive background history to the Board.

Mr.Karis: Can you tell me what materials you have reviewed regarding this present application.

Witness: My involvement in this case is very recent. I was provided information from Mr. Houseamorf (traffic expert) who could not be here this evening but together we have reviewed many of the documentation, including the resolutions of approvals for the McDonald's site, approval for the drivethru, reports from the Municipal Engineer that had been prepared for this application, the gate and the signing. Reports from Mr. Fears addressing his studies, his count, regarding the amount of cars that were coming thru the properties, parking that was taking place, the amount of pedestrians that would travel between the two sites. The site plan that I've reviewed addresses the gate. The one way gate.

Mr. Karis: Based on your review of the materials, you had an opportunity to analyze the conditions on site. What conditions existed currently on site and what conditions existed previously, any relevant resolutions pertaining to this.

Witness: This has been a long standing, free access between the two properties. It has always been a two way driveway. Vehicles traveling in an East bound direction could use the jughandle, through the traffic light, enter the driveway of McDonald's lot which gave access the the IHOP. There is circulation now from Rt. 4 within the IHOP in the northern Direction, one way from Rt. 4 for those who are traveling in a West bound direction.

Mr. Karis: Did you have a chance to review the site plan that had been approved by the FairLawn Zoning Board?

Witness: Yes, I did.

Mr. Karis: Based on your review of the site plan what were the traffic patterns are between the two properties?

Witness: The drivethru site plan showed that there was two way access.

Mr. Steinberg: Objects, asks that the question be stricken. The question was, what did the site plan indicate? The site plan speaks for itself, There is a resolution of this Board and there is a letter from the attorney for the applicant at that time.

This witness can testify to what he observed and his expert testimony as to what he observed and he could testify as to his expert opinion with regard to the engineering aspects of the site plan. He cannot testify. He is not an expert as to what the site plan shows. The site plan speaks for itself.

Mr. Karis: He is an expert traffic engineer who has the ability to review the site plan and can interpret site plans based on the information given. He has every right to testify.

Mr. Soukas: Mr. Chairman, I believe that the witness has been qualified as a expert witness, he is a Traffic Engineer and I believe that his testimony with respect to his interpretation as far as the site plans is appropriate, especially in light of the testimony that has already been taken from other witnesses in this instance.

Mr. Levy: I'll allow his testimony. Mr. Steinberg, you're objection has been noted.

Mr. Karis: Mr. Desch, Can you give your opinion as to what is reflected in the site plan?

Witness: My opinion is:"It clearly has been used as a two way passage way between the ..

Mr. Steinberg: Objection! This is the second time he said:"It has been used" How can he testify to the history.

Mr. Levy: I'll allow that. (directs his questioning to Mr. Karis) He is testifying to the drawing of the siteplan?

Mr. Karis: I want him to testify as to his opinion on the site plan that was approved. What is reflected in the siteplan and what the intent was of the site plan.

Mr. Levy: What are his observations and knowledge of printed siteplans that were designed and approved.

Mr. Levy: Let him stick to that, instead of answering “what has always been”.

Mr. Karis: He is allowed to give his expert opinion based on his review of the prior resolutions and history of what had transpired on site. An expert does not have to have personal knowledge. My question is:” What is his opinion based on his review of the siteplan.”

Mr. Karis: Sir, you had an opportunity to look at an approved siteplan for McDonald’s, is that correct?

Witness: I believe I did. I have several siteplans here. I was really reviewing the Engineer from Bulsol Engineering who was the Board’s Engineer who went through a very detailed description to the Board as to the fact that this was a two directional ingress/egress driveway that connects the driveways.

Mr. Karis: Based upon your review of that siteplan, as to what that siteplan provided as far as the driveway between the two properties, what is your opinion?

Witness: Yes, a two directional, ingress/egress driveway that connects the subject’s properties. There was at no time any type of directional signing that would prohibit the movement either way through the passage way. There would have had to been a “Do Not Enter” sign placed on the McDonald’s side to prohibit traffic flow into the IHOP. That was never part of the approved site plan.

Mr. Steinberg: Which exhibit is the approved site plan?

(Mr. Levy takes a 5 minute recess to locate the approved siteplan.)

Court resumes (Mr. Meer takes attendance)

Mr. Karis: I have my copy of the approved site plan.

Mr. Levy: Can you show Mr. Steinberg your copy please.

Mr. Steinberg: I don’t know if this is the approved one. I don’t see the signature of the chairman or anyone on the Board. I don’t see any official notification showing that this is the approved siteplan. I don’t want to hold this hearing up, so it clearly looks like it is consistent with the plans of the approved one.

Mr. Karis: Sir, You've had a chance to look at the approved siteplan, can you give me your opinion based upon your review of this plan, as to what the driveway in between the two properties allows for.

Witness: This passageway provides for a two directional ingress/egress between the McDonald's site and the IHOP site. I base that upon the fact that they give a Stop line across only one half of the passageway. There is a line down the center that separates the two directions which you can see painted on the ground. More importantly, if it was supposed to be a one- way driveway, there would have been a requirement or the board would have demanded that on the back end where they put a new "Stop" sign they would have had to put a "DoNot Enter" sign to prohibit vehicles from coming into the IHOP. Clearly, there is no such sign.

Mr. Karis: What about the curbage that's reflected in the arrow in the driveway? Does that indicate whether that is a one-directional or two directional?

Witness: It doesn't suggest that it's one way or the other. If there was an intent to make this driveway one way, there would have been a curb impeding movement inbound.

Mr. Karis: The fact that you don't have that curbage, does that mean that it was always two way? Would that be your opinion?

Witness: Again, as I stated in my testimony, in my opinion, this clearly has been and has always been a two-way driveway.

Mr. Karis: Are you aware of the traffic studies having been done recently between the McDonald's and IHOP site?

Witness: When you say traffic studies are you talking about the reports done by Mr. Peters or we also have the reports from the board's engineer. Count information?

Mr. Karis: Let's go through the count information.

Mr. Steinberg: Objects. The count information was done by an expert who is not here.

Mr. Karis: Work of experts are permitted in court who are not here based upon tests results that they observed. Reports are done all the time to improve traffic. Fact counts to consider.

Mr. Steinberg: Mr. Chairman, the credibility of counts are not supported by the person that did the count or supervised the people doing the count.

Mr. Soukas: What kind of information are we talking about? Mr. Karis.
(Mr. Karis gives question to be answered to Mr. Desch)

Mr. Desch: Counts were done by Mr. Peters that provided information about the vehicles that past through the passageway that parked in the McDonald's site, the number of pedestrians that past through the IHOP site. The amount of customers that also parked at the McDonald's site and walked through to the IHOP. He did an in depth study. He provided that information in a report. Mr. Simof did a count and it is the same information that Mr. Peters had. These are two experts that took count of cars and came up with the same conclusions.

Mr. Karis: In your opinion, in regards to engineering aspects of traffic ruling, do experts rely upon facts that have been done with these studies?

Witness: Yes, that type of information is relied upon by experts.

Mr. Steinberg: I object to any testimony to any counts that were not performed by him or under his supervision. If he wants to comment on the counts that my expert has that were prepared, I don't have a problem with that.

Mr. Levy: What about commenting on his knowledge of the reports provided by Mr. Simnoff and his opinion on those numbers?

Mr. Steinberg: I just said: I object.

Mr. Levy: You object to his opinion on the readings of Mr. Simnof reports? Why?

Mr. Steinberg: Because Mr. Simnoff reports have not been verified by the board. This gentleman did not conduct this count, nor were they conducted under his supervision.

Mr. Levy: I understand your objection. Mr. Simnoff is not here to testify nor was anybody there underneath him that he supervised, but my question here: I have the objectors's witness here. Mr. Deush did review Mr. Fears reports and has an opinion based on that. He did not do those counts, nor did he supervise those.

Mr. Steinberg: I vouch for the counts, because they were done on my behalf. That's different from a person I'm not vouching for and I'm not vouching for him.

Mr. Karis: Evidence rules aren't allowed to come into court because an attorney vouches for a person.

Mr. Levy: I'm not going to allow that argument. My question is Mr. Desch is making a opinion on a report, not making a statements that that report is accurate or not accurate.

Mr. Soukas: Mr. Karis, You mention the rules of evidence. What rules are you talking about in this particular instance?

Mr. Karis: There are evidence rules as it pertains to experts. What experts are permitted to rely upon (refers to prior cases). Experts rely on information and testing that is done and can use the studies to comment on tests results.

Mr. Levy: Mr. Steinberg does not have the person who wrote this report to answer questions on the procedure of his report. I have no problem having Mr. Desch making comments on this report but any questions regarding the time of day, where he sat, how he sat, type of day, cannot be used. My concern is that Mr. Steinberg won't have the person here who did that report to answer any type questions such as that. Unless you can bring him in (directs question to Mr. Steinberg)

Mr. Kataryniak(traffic engineer) Point of clarification, Mr. Desch made reference to my report. Through the course of these proceeding, I made several reports. Please clarify for the record what report are you referring to?

Mr. Desch: The report that I was referring to was prepared and dated April 3, 2006. This is the most recent report on my file. As to the areas that I referred to before regarding the two directional ingress/egress, that phrase has carried through every one of his reports, including the fact that he made the opinion in one of the reports”That since the cross access has been present for a considerable period of time, the applicant who now wants to close that, needs to address that issue. What do you expect these people to do? How will it impact the local neighborhood traffic? Give us some insight on that.

Mr. Steinberg: That is the problem of Mr. Desch coming in late in the game. I had objected in the past to those particular observations in the Board expert's reports for the very reason that I am objecting to this gentleman testifying to something he did not observe over the last 20 years.

Mr. Karis: Most experts don't stand around for 20 years. They rely on information that is provided by the expertise of professionals.

Mr. Desch, are you aware of any traffic accidents that happened around the area in the past 5 years?

Mr. Desch, Yes, Mr Simnoff referred to an accident involving.....

Mr. Steinberg: Same objections.

Mr. Levy: He did have conversation with Mr Simnoff about the activity that occurred within the area. He is not testifying as to numbers, but to what Mr Simnoff observed.

Mr. Steinberg: This gentleman wants to testify about what Mr. Simnoff told him or showed him.

Mr Karis: It dosen't matter, nobody has personal knowledge as to what happened. He is testifying as a expert based upon information provided.

Mr. Levy: Mr. Desch, did you get any reports, accidents reports related to this site.

Mr. Desch: No, sir.

Mr. Levy: So this is all based on your discussion with Mr. Simnoff? Based upon his reports or accident report?

Mr. Desch: I believe it was based upon his hearing testimony. Where Mr. Fears described a single accident involving a pedestrian, the pedestrian being a guard that was standing there to prevent vehicles from coming through and a vehicle must have had contact with him that was sufficient enough to warrant a police report. That is the only accident that was discussed.

Mr. Levy: In Mr. Simnoff's supervision of this file that he gave you, That was in the file that he gave you?

Mr. Desch: There is no police report in my file. This was his explaining to me that there was a reference to a single motor vehicle accident involving a pedestrian.

Mr. Karis: Are there any other accidents involving pedestrians being hit or injured besides the incident to the security guard?

Mr. Desch: Not that I'm aware of.

Mr. Karis: Based upon the traffic patterns or based upon your expertise, do you see any interference with the movement in both directions of the driveway with the drive-thru.

Mr. Desch: No. This site plan clearly shows the only conflict point would be those vehicles entering into the McDonald's site through the passageway, they would have the right of way, because there is a Stop Sign located at the Drive-up window aisle. The people coming through the Drive up would stop first.

Mr. Karas: Based upon what you reviewed you don't see any problem with the design of the drive-thru in relation to the driveway. Correct?

Mr. Desch: That's correct.

Mr. Karis: that's all the questions I have.

(Mr. Steinberg stands to cross-examine)

Mr. Steinberg: Mr. Desch, When were you detained by the objector in this case? How many times have you visited the site?

Mr. Desch: Once.

Mr. Steinberg: When?

Mr. Desch: Today.

Mr. Steinberg: What time?

Mr. Desch responds 7:30 pm. Traffic patterns are discussed back and forth between Mr. Steinberg and Mr. Desch. Mr. Steinberg continues to question him, asking him if the

traffic patterns are consistent or inconsistent with the entry onto the IHOP property from the property of McDonald's?

Mr. Karis objects, stating he does not understand the question, and Mr. Desch also states he does not understand the question.

Mr. Steinberg again states that he would like to go back to the basics and explain again the pattern of traffic flow through the eyes of Mr. Desch when he observed it for himself.

Mr. Desch again explains there are two driveways. A driveway to the east is a in-bound driveway. Either side of the driveway aisle there is parking that is angled, because of the narrow width of the area. As you proceed, to the rear of the site, you can make a left hand turn toward the McDonalds and exit through the McDonalds or you could make a right hand turn and go into a second area in which it is adjacent to the detached building, which also has limited parking.

Mr. Steinberg then asks: How wide is the driveway on the IHOP property after you go through the area of the driveway up to the property line.

Mr. Desch answers, approximately 18ft. according to the site plan of the IHOP Property.

Mr. Steinberg asks if he measured that tonight?

Mr. Desch explains that it is on the site plan and shows Mr. Steinberg the site plan in which the measurement shows 17.6ft to be exact.

Mr. Steinberg then brings up a car shown in the driveway that is facing towards McDonalds and questions Mr. Desch? As you proceed into the IHOP property, does the 17.6FT continue or does it narrow?

Mr. Desch then states, he believes it continues up to the point where you need to make the left turn to head north because you cannot continue into the main body of the parking adjacent to the IHOP because that is a oneway in the opposite direction.

Mr. Desch again shows Mr. Steinberg the site plan again to explain the pattern.

Mr. Steinberg asks who prepared the site plan and when?

Mr. Desch explains he does not see a date on the plan, to which Mr. Steinberg answers that he does not even know if this condition that is shown on the plan is the same condition that appears today.

Mr. Desch states that it appears to be the same. This is still the way the driveway is from Route 4.

Mr. Steinberg wants to focus on the area between the two buildings on the IHOP property, and questions him again on the width of 17.6ft driveway. In his opinion, if you were preparing a two way driveway today with "heavy-low speed traffic", how wide

would you make it today? Before Mr. Desch responds to the question, Mr. Steinberg then interjects and asks why he considers it low-speed traffic, had he observed it?

Mr. Desch answers he has driven through it. You have to make right angle turns. You cannot make a right hand turn from the IHOP to go the McDonald's at anything faster than 5miles an hour.

Mr. Steinberg then states you could go faster than 5miles an hour if you are going from the McDonald's lot into the IHOP lot, to which Mr. Desch agrees.

Mr. Steinberg then states that it is based on "Assumption" only, that it is low-speed traffic?

Mr. Desch then explains he cannot observe it now because it is closed, but that he knows for the past twenty years it has been operating with low-speed traffic without any accidents.

Mr. Steinberg then asks him if he had gone to the police department to see what the accident incidences were.

Mr. Desch then replies that he did not, that he relied on Mr. Simnoff assumption that there were no accidents.

Mr. Steinberg then asks Mr. Desch, You make your assumption, based on Mr. Simnoff assumption?

Mr. Desch that corrects his wording and states that he drew his conclusion based on Mr. Simnoff's experience, because of his involvement for years that up to this point there has been no accidents recorded.

Mr. Steinberg then questions the curbing to the north side of the driveway.

Mr. Desch then explains again on the north side of the two-way passageway, had they intended that it was only for outbound traffic, they would have mimicked the type of radius that you see on the southern side. A smooth curb.

Mr. Steinberg: If you were devising and designing a two- way driveway for that property, would you have done it exactly the way as proposed on the site?

Mr. Desch: Given the constraints that it has with the limited space available, it is consistent with the policy of geometric designs for highways extremes which is the bible, so to speak for Highway Engineers, in which it provides for an 18ft wideway. I would suggest you have more, but you can absolutely have an 18ft. driveway.

End of Mr. Steinberg's Cross Examination.

Mr. Karis questions Mr. Desch on a car that is situated between the two buildings at the rear portion of the IHOP side. The car is in the driveway which you indicated was 17.6ft. wide. The car situated there, is it situated in the middle of the road? Or which part of the driveway is it on?

Mr. Desch replies that it is on the correct side, the north side as if you are exiting. Certainly proving that there is sufficient room for two vehicles adjacent to each other.

Mr. Karis brings attention to a gate that the applicant is planning to put on the property and asks Mr. Desch his opinion on this. Would that be a hinderance or unsafe condition if it was installed?

Mr. Desch replies that in his opinion it would be a very unsafe condition because it would prohibit a fire apparatus, or an ambulance to get fast entry onto the site. More importantly, if there were a power failure, how would people get out of the IHOP? They would be trapped. Should they break the gate? It dosen't make sense.

End of questioning and testimony.

Mr. Levy asks the Board if anyone has questions. None.

Mr. Levy opens up questions to the General Public. No one
Mr. Levy closes this portion.

Mr. Karis asks Mr. Levy if he may submit one more piece of evidence, and the portions that he is moving before the Board are marked as 07. Mr. Fears testimony from Oct 28, 2002. On pg. 47, line9, thru pg. 49, line 5. This goes under Evidence rule 613-B And photo 803-A1. It is considered prior inconsistence testimony. I've asked Mr. Kears about his prior testimony and explain the opportunity to comment on it as required. In regards to prior inconsistence statements. I will provide the Board with a copy of his testimony.

Mr. Steinberg objects to the introduction being brought into evidence based on the grounds that Mr. Karis had the witness here for 5 hours and had the opportunity to cross-examine Mr. Fears to whatever was contained in the testimony.

Mr. Levy asks Mr. Karis if he had asked Mr. Fears about the testimony engaged prior to this application, prior proceedings?

Mr. Karis answers Mr. Levy, telling him that he presented Mr. Fears with the transcripts when he testified at the last hearing. I allowed him to read from his own testimony You have to give the witness the opportunity to comment on their prior inconsistence statement. He took a look at it and he commented on it. Mr. Steinberg certainly had the opportunity to perform a redirect of his client in regards to his testimony. I showed him the lines of his testimony that I am looking to add as subsequent evidence at this time.

Mr. Charripper asks Mr. Karis if he read the portions of the transcripts for the record?

Mr. Karis responds yes, and that he read them to him so that they were read into the record.

Mr. Charripper asks Mr. Steinberg if he has any other questions. Mr. Steinberg responds no.

Mr. Karis brings up the letter dated November 1, 2007 that Mr. Steinberg states he did not receive and tells the Board that he will send another copy to his office regarding the issues being brought up tonight. With that, Mr. Karis closes the presentation. It will be the last witness called and with the marking of the latest documents, to rest the evidence. Marked 01 thru 08 and I will use those documents in this exhibit.

Mr. Steinberg has a request. There was a letter that was sent to Mr. Levy by ***** Engineering, dated May 8, 2007. The witness, Mr. Peters testified in respect to this. He feels this should be marked as A10. This is a letter in response to Mr. Levy from Mr. Fears in response to Mr. Levy's request that was made in April/ May. He would like it Marked into evidence.

Mr. Karis objects and states he does not recall Mr. Fears testifying to any letter that was sent to the Board.

Mr. Steinberg tells Mr. Karis that he testified to Traffic Counts.

Mr. Levy tells Mr. Karis that Mr. Fears testified to the fact that he had been there and had taken counts. He submitted them to me on May 8. And he testified to them.

Mr. Karis does not recall testimony subsequent to the question of whether or not he did any counts but I would testify to the actual counts that were performed or gave an opinion as to the counts. Absent that testimony, that document A10 does not go into evidence. Mr. Karis proceeds to state "certain rules of evidence".

Mr. Steinberg goes on to say that he has heard more citations to the rules of evidence than he has have heard in his entire career and states that the Board is not bound by the strict rules of evidence. Mr. Steinberg then continues to state that the Board made a ruling tonight to go forward with the hearing. "We have one Board member who has not read the transcript to the prior hearing. I would like to hear the August 30th transcripts. We have ordered it. I will withhold this letter until I read the transcript and make sure that he (Mr. Fears) testified to this, otherwise he will be back to testify.

Mr. Karis objects and states they have closed their presentation, and because they have forgot to put in something inially dosen't give them the right to reopen their case and try to fill the gaps at this point.

Mr. Levy explains that he doesn't think Mr. Steinberg is trying to fill the gaps but he is responding to the questions that was given to the witness.

Mr. Karis says that was back in April and Mr. Steinberg had every opportunity to voice his opinion.

Mr. Steinberg says at the next meeting he will move to reopen his case and then we will see if the Board grants his motion.

Mr. Karis asks if it is the last witness.

Mr. Steinberg says he is not sure about that. Based on what the Board did tonight, by saying you want to hear all testimony and make your minds up. My motion was to terminate these hearing and bring a replacement Board in, my motion was denied. I will not hold myself to any promise to the Board that Mr. Fears will be my last witness.

Mr. Levy questions Mr. Karis if he plans to bring in any more evidence from what Mr. Simnoff had done?

Mr. Karis replies that he doesn't anticipate anything further because he feels there is sufficient evidence already.

Mr. Levy replies that a few of the Board members have not received transcripts from August 30th along with Mr. Steinberg who also states that he also has not received those transcripts either.

Mr. Steinberg addresses Mr. Levy and explains that he believes that 7 Board Members attended the meeting in March of 2006, April of 2007, August 30, 2007, and tonight, and if this is so, and everything is up to date, then the only thing he needs to do is to get the August 30th transcript and get it over to Mr. Salerno so that he can be on the same page with everyone else.

There is some confusion between Mr. Steinberg and the Chairman understanding each other on the eligible voting members.

Mr. Steinberg explains to the chairman that of the 7 voting members, this was the panel that we had. The vice-chairman has missed a minimum of two, maybe 3 of the last meetings. I don't have transcripts other than April 23, and are waiting for August 30th.

Mr. Levy moves to carry the meeting to November 19, a regular meeting to determine the next date for the hearing. Mr. Steinberg says he cannot be here for that date but that he would have representation here to have all the dates they could be available.

Minutes

1. Mr. ** made a motion to ** the minutes for the ** 2007 meeting and M*** seconded the motion.

VOTE: All Present - AYE

Adjourn

Mr.Levy made a motion to adjourn this meeting and Mr. **** seconded the motion.

TIME: ***** P.M.

VOTE: All Present - AYE.

Respectfully submitted,

Cathy Bozza
Zoning Board Clerk