

**Zoning Board of Adjustment  
Regular Meeting Minutes  
October 21, 2020**

The Regular meeting of The Borough of Florham Park Board of Adjustment was called to order on Wednesday evening, October 21, 2020 at 6:30p.m. The meeting was conducted by virtual means utilizing the Zoom service in accordance with the "Senator Byron M. Baer Open Public Meetings Act" of 2020 that explicitly permits a public body to conduct a meeting electronically during a state of emergency.

**Members Present:**

Mr. Michael Cannilla, Chairman  
Mr. Jeffrey Noss, Vice Chairman  
Mr. John Novalis  
Mr. Rick Zeien  
Mr. Brian O'Connor  
Mr. Jason Jensen  
Mr. Matthew Engel (1<sup>st</sup> Alt.)  
Mr. Michael Shiviets (2<sup>nd</sup> Alt.)

**Members Absent:**

Mr. Ted Trautman

**Also Present:**

Mr. James Polles, Esq., Board Attorney

**Call to Order:**

Mr. Cannilla, Chairman called the meeting to order at 6:30 p.m.

**Statement of Adequate Notice:**

Mr. Cannilla issued the following statement:

"I hereby announce and state that adequate notice of this meeting was provided by the Secretary of this Board by preparing a notice, specifying the time, date and place of this meeting; posting such notice on the bulletin of the Municipal Building; filing said notice with the Clerk of the Borough, forwarding the notice to the Florham Park Eagle, and forwarding, by mail and fax, the said notice to all persons on the request list, and that said notice will be included in the minutes of this meeting. This action is in accordance with the N.J.S.A. 10:4-6, et sec., "Open Public Meetings Act."

**Approval of Minutes:**

Approval of Minutes from September 16, 2020 Meeting.

Mr. O'Connor made a motion to approve the minutes, second by Mr. Shiviets.

Roll Call: On a roll call vote all members present and eligible voted to approve the minutes.

**Resolution of Approval:**

6. **Marie Mazzocchi**  
28 First Street  
Block 1801, Lot 8

**Application #BOA 20-7**

Applicant is seeking approval for excess building and lot coverage, and a rear yard setback in connection with a front entry portico, decorative alterations to the front elevations, and a rear door wooden stoop.

Mr. O'Connor made a motion to approve the resolution, second by Mr. Shivietz

Roll Call: On a roll call vote all members present and eligible voted to approve the resolution.

**Certification of a Pre-Existing Non-Conforming Use**

7. **Estate of Peter J. Sena, Jr. (Carmella Conca)**  
76 Burnet Road  
Block 1501, Lot 3

**Application #BOA 20-3**

Applicant is seeking a certification that the premises is a valid, pre-existing two family home in the R-15 zone.

John Johnson, Esq. represented the Applicant. He stated that the Board has been sent deeds, back title information, and tax record cards in support of the history of the property. Carmella Conca, Executrix of the estate, was sworn in. The subject property is located at 76 Burnet Road. Mr. Johnson stated that this is a two family home that existed prior to 1954. It is his understanding that the Florham Park Zoning Ordinance was initially adopted in 1954.

Mr. John explained the exhibits previously submitted that illustrate the transfer of the property throughout the years.

Carmella Conca gave a brief history of the home. Her family has been living in the home since 1924. Her mother lived in the home for 92 years and passed away there. Ms. Conca was born in 1949 and lived in the home for the first 22 years of her life. During the time she lived there, her family lived upstairs and her uncle lived on the lower level. Related family members always lived in the two units.

Ms. Conca reiterated that her family has always owned and occupied the home and it has never been abandoned. It has been used has a two family dwelling for all of her life.

Brian O'Connor asked who is in the home now. Ms. Conca replied that her niece lives in the lower level. The upper level has been vacant since last August. He asked if they are looking to rent the upper unit. Ms. Conca stated that they are trying to rent it out. When asked, Ms. Conca confirmed that there are two apartments on the property.

Brian O'Connor asked if the septic system is sized correctly and if it is operational and if there are any issues. Ms. Conca stated that it can handle two families and it is operational.

James Polles questioned the testimony on the Zoning Ordinance. He asked what the Zoning Ordinance was at the time of the adoption of the code.

John Johnson stated that in 2018, he represented another neighbor on 70 Burnet Road in front of this Board for the same request. His recollection is that the Board Planner at that time said that the Zoning Ordinance was adopted in 1954. He also said that there was no code prior to 1954. This home was built in 1924, prior to the ordinance that designates this area as a zone for only single family homes in 1954,

James Polles commented that he is relying on testimony from a previous hearing.

Mike Cannilla added that our Planner Katherine Sarmad reviewed the application and noted that the Zoning Ordinance was either amended or instituted in 1953 or 1954. There may or may not have been

zoning at that time but we know it changed in 1953. This would mean that the home was brought into non-conformity at that time. There was another zoning amendment done in 1983 so we know that the property did not match the R-15 zoning at least that far back.

Mike Cannilla surmised that we do not really know for sure if there was zoning prior to 1953 that permitted two family homes or if there was no zoning at all.

Katherine Sarmad agreed and said that in summary we know that it was brought into non-conformity in 1953. She said the exhibits are helpful in that they show the history of the home through the years. There are no definite requirements for this type of request. She questioned the other structures on the property from aerial photos and what they are used for.

Frank Conca, was sworn in. He replied that one is a two car detached garage and one is a single car garage with an apartment in the rear.

John Novalis asked if this is a third apartment on the property. Frank Conca replied yes. It was verified that there are two in the home and this apartment is the third.

Katherine Sarmad asked how long the apartment has been there and if it has been inspected.

Frank Conca said he doesn't when they were constructed. He noted that the garage apartment has been there almost 50 years. Frank Conca stated that it was inspected.

Mike Cannilla thought that this was only two apartments in the application. That is what they just said. He asked again how many apartments are on the property.

Frank Conca said there are two apartments in the existing structure that we are going for the certification. He said there are two in the home and one in the garage apartment. The garage apartment has been used as an independent apartment since 1971 but we are not seeking any approval for that apartment.

John Johnson said that the application tonight is for the home itself. The garages are not part of this application.

When asked, Mr. Conca confirmed that there is a tenant in the garage apartment. He added that they will remove the tenant if the Board wants.

Mike Cannilla stated that there are two primary uses on the property where only one is permitted. This would be a variance. Only one accessory building is permitted and there are two on this property.

Katherine Sarmad said that garage apartments are not permitted in the R-15 zone. She asked James Polles what the boundaries are in this case because this could open up many non-compliant issues on the site. She asked what the jurisdiction of the Board is.

James Polles clarified the jurisdiction of the Board. Ancillary issues have been unpacked during this testimony. However, they are only seeking a certification of a pre-existing, non-conforming use for the principal dwelling as a two family. That is the main issue. It is not the purview of this Board to rule on bulk structure requirements. That enforcement is by the town if they choose to.

John Johnson said they agreed to remove the tenant that is in the rear garage apartment. The question was raised if they would remove the structure, or only the tenant. They stated that they have been in contact with the tenant and have made him aware that he may need to vacate. They want to keep the garage.

John Johnson said that NJ law is very clear in that it is inequitable to strip away a person's lawfully asserted property rights retroactively and that is what we are here for. All we are asking for is a certification that it is a pre-existing non-conforming structure. We agree to a condition to vacate the apartment over the garage.

James Polles again clarified that the notice is only to certify a pre-existing, non-conforming structure. There were no submissions for any other nonconformities. It is up to the Borough staff to utilize enforcement issues.

Jeff Noss said the third apartment is not part of this application and should not be a condition of approving or not approving this application. It is not germane to the application. We could refer to the zoning officer because it could be re-occupied in the future.

Mike Cannilla said that it is the prerogative of the applicant to remove the apartment. If it is not removed, it will be a non-conforming condition.

Jeff Noss agreed that it is only a violation at this time if it did not exist before 1954.

James Polles stated the hearing is limited to the two family home. The apartment was not included in the notice. John Johnson stated that his client is willing to remove both the tenant and the apartment unit.

Rick Zeien said he offered to remedy this a few times. Why can't it be a condition?

James Polles replied that if the agreement to remove the apartment can be included but not as a condition.

The meeting was opened to the public.

Bobby Rezai, 80 Burnet Road. He said he was born and raised in Florham Park. He bought the home in 2011 and built his house in 2014. It is a single family home. This property has three structures, and the garage is right next to his property. The property is not kept up. The garage has broken windows and there are rats. He wanted to improve his home and the area. He did not want to be near a multi-family. He did not know this when I bought the home. It was his understanding that this was a single family zone. How can this be a multi-family?

John Johnson stated that it is on the property record tax cards that were submitted for 76 Burnet that this is a two family home. He does not know what was told to Mr. Rezai.

Jeff Noss asked what happens when this two family home is sold. Are we certifying the use? What happens when it changes ownership? Does the use continue?

Katherine said that we are certify the use on the site. If approved, it can continue to be used as a two-family home.

James Polles said that the Board cannot consider what may or could happen. It is only to judge the proofs by the applicant on what existed on this site at the time the Zoning Ordinance was adopted.

Mike Shivietz asked if this is defined in the Florham park zoning ordinance. Katherine Sarmad said that only multi-family and single family are defined.

Katherine Sarmad said that the ownership of this home has stayed within the same family. The certification would be to say that the use of a two family home was not abandoned. It would permit the use to continue in the future. We are not judging the application on the intensity. This is two separate units only. We must remove ourselves from who occupied the units because it has no bearing. It just happened that the same family occupied the units.

Don Fenyk, 8 Carrigan Lane. He has concerns about the continued use as a two family. He asked if it would survive a sale. Can it be sold as a two-family? There has been Inaccurate information given on the septic system. He stated that the system has failed and it was condemned by the Board of Health. He has had problems with the seepage and overflow. This has been monitored by the Board of Health.

James Polles said that they are seeking affirmation that it has been a two family use. Yes, the certification would permit continuance of that use.

Mr. Cannilla said he is disappointed because it has been testified to that the septic system is functional and works properly.

James Polles agreed that the property must have an appropriately sized and serviceable septic system as it pertains to the two family structure. The Borough Engineer and the Health Department should approve this. That can be a condition.

Frank Conca was sworn in. John Johnson asked him what the condition of the existing septic system is.

Frank Conca stated that they are aware that the system is in failure mode. They met with the Florham Park Board of Health in February 2019. The Board of Health recommended that the system be plugged and the tanks be pumped on a regular basis. In March 2019 the plugs were installed. Both tanks are pumped regularly to maintain a healthy situation.

In May 2019 the Borough passed an ordinance to budget funds to install a sewer connection on our street so we have not repaired or replaced the system. The septic system was installed in 1988. In June 2020, Florham Park made an application to the DEP for a permit for a sewer design. We pump the tanks every 2-3 weeks at extreme cost to us in order to keep it operational until the sewers come in.

He testified that if and when the sewer system is installed we will tie in to it. It was a direct request by the Health Department to pump the tank on a regular basis. We will do so until the sewer system installed.

Mike Cannilla stated we do not have a date of when this sewer will be installed so there is no end date to this situation. If this is a condemned system, this is an issue.

John Johnson said there are concerns over a condemnation of the septic. He asked Mr. Conca if he has ever been told that the septic system is condemned. Frank Conca replied no.

Jeff Noss asked how this was discovered.

Frank Conca said that his neighbor, Don Fenyk, notified the Health Department. He did what the Health Department wanted which was to prevent any effluent from raising above the ground by pumping the system. It has not shown any evidence of surface effluent coming up since then. He does not think that the Health Department has been back to check it.

Frank Conca said in March 2019, the Health Department witnessed the plugging of the system.

Jeff Noss commented that the sewer connection may not happened for a few years. He asked if they have something that says that it functions okay. It is not clear if it is fully functional and adequate. This sounds like a stop gap measure.

Frank Conca said that he does not have an expert analysis but they pump regularly. No has said to me that this will not work.

John Novalis stated that if the system is pumped monthly, it is not functioning the way a normal system works. We need more than this in order to move forward. It is no longer a septic system. It is plugged. It is just a holding tank. If it is not pumped it will leak into the house or above the ground.

Don Fenyk said it is no longer a septic system because it is plugged. There are no renters in the top apartment and that is a concern.

Frank Conca said that they have a contract with a septic service. They always come. The garage rental unit has its own tank and it was installed in 1988. Both are pumped.

Mike Cannilla said we have no control on this. It goes with the property. We now have a condition of a non-functioning septic system. Two holding tanks is not a sanitary system. This property can be sold tomorrow and we would have approved a continuation of a two family residence with a non-functioning septic system. We don't know when sanitary sewer system will be installed.

James Polles said that it is appropriate to have a condition of being subject to Engineering and Health Department approval. This is aside from the pre-existing non-conforming use.

John Johnson replied that they will agree to have that condition. He also said that they will remove the garage rental tenant but keep the structure. They will also remove the kitchen and the bath in that unit.

He said that they will continue to have the tanks pumped on a regular basis subject to approval and continued approval by the Borough approval for health reasons.

Mike Cannilla noted that there can be no intensification of the structure such as an addition in the future if this is approved, unless there is another application that is approved to do so.

Mr. Johnson agreed that it is not his client's intention to expand the use at all.

Jeff Noss asked why they are seeking this certification.

John Johnson replied that they want confirmation that the structure is legal. If they sell it someday, it is a legal two family home within the Borough.

Katherine Sarmad said that New Jersey Law protects property owners that predate zoning. History can get lost. It is not problematic to grant this. The Zoning Officer could easily not provide a C/O for this. It is a layer of protection for them.

Jeff Noss asked if the certification will survive a sale of the property. It could easily be converted into a rental by a developer. There could be problems with excess vehicles and noise.

Katherine Sarmad replied that it will survive a property transfer as it exists today.

Jeff Noss commented that the Master Plan does not permit this type of use. What if this is denied? Would it change the use now?

Katherine Sarmad stated that no.

James Polles stated that property owners do have rights. He said that future consideration is not appropriate for this Board if it is denied.

It was clarified that the request involves what the use was prior to the zoning ordinance adoption. That is what we are certifying.

James Polles also said that consideration of the Master Plan should not be apportioned to this.

Matt Engel said it could be subject to upgrading the septic and abandoning the rear apartment garage. The septic could be subject to approval by the engineer and the health department.

Mike Shivietz asked how they will evict the tenant.

John Johnson said that they have spoken to him and he has agreed to it.

John Novalis verified that if this gets denied, they will continue to use it as a two family until they sell it.

Katherine Sarmad said that the burden of proof for the Board is not to be concerned with the future implications. It is only to certify that the use existed prior to zoning.

James Polles the client could have gotten this from the Zoning Official within the 12 months of the enactment of the zoning ordinance. That did not happen and now they must put the proofs on that the use existed prior to zoning, and that is it. They are here because they can be.

Mike Cannilla agreed that certifying the use is our only decision. At some point, the home will be sold and it could be a problem if they do not have this certification. That is the reason that they are requesting this document. They have the right to be here as long as they are not doing anything different than they were for the last 50 years.

James Polles added that even a refinance could be difficult without this document.

Jeff Noss clarified that if approved that would give them the right to a two family home in Florham Park where it is not permitted. He feels that should be considered.

James Polles said that case law has shown that future considerations are not appropriate and must not impact this analysis for this Board. That is his legal advice that the Board should consider.

Rick Zeien clarified that the only thing we are considering is that if they owned the house prior to 1954 and it was used as a two family. If you believe them, then you are voting no for a different reason. If you believe them, we should vote yes because that is the only thing they are asking for.

John Novalis thought that a yes vote could turn into a true two-family for the next owner. James Polles replied that it has been used the entire time as a two-family at least before and ever since the code was adopted in 1953-54 according to their testimony.

Jeff Noss said that implications should be considered such as the Master Plan does not permit two family home and there is a reason for that. An opportunity to end this exclusion with the ownership of this family is a valid reason to vote no.

Matt Engel verified that the septic upgrade and the garage tenant removal can be conditions of the positive resolution. Mike Cannilla said upon an affirmative action of this Board that is his understanding as well.

James Polls replied that the resolution can be prepared and the language could be worked out between him and the applicant attorney. The Board will have the opportunity for review of the resolution. The third apartment has only come to the attention of the Board tonight and was not noticed for, which puts the Board in a precarious situation.

There were no further comments. Mr. Cannilla called for a motion.

Mr. Zeien made a motion to approve the application, subject to the conditions that the septic system upgrade is overseen by the Health Department, the abandonment of the third apartment, and any intensification of the use to be subject to Board approval, second by Mr. Engel.

Roll Call: Zeien, yes; Engel, yes; Cannilla, yes; Noss, no; Novalis, no; O'Connor, no; Jensen, no.

Yes: 3

No: 4

Denied.

On a motion duly made and seconded the meeting was adjourned at 9:15p.m.

Marlene Rawson  
Board Secretary

October 21, 2020