

CHATHAM BOROUGH PLANNING BOARD

July 11, 2007

7:30 p.m.

Chairman H.H. Montague called the Chatham Borough Planning Board meeting of July 11, 2007 to order at 7:30 p.m. in the Council Chambers, Chatham Municipal Building. Mr. Montague announced that all legal notices have been posted for this meeting.

Members Present: Chairman H.H. Montague, John Hague, David Gerridge, Alison Pignatello, Alan Pfeil, James Mitchell, Bill Jankowski, Councilman Bruce Harris, Mayor Richard Plambeck.

Charles W. Foster, Esq., attorney for the Board, was present.

Members Absent: Thomas Sennett

Mr. Sennett is absent tonight because he recused himself from the Ogden Church application. He had a conflict of interest.

Ogden Memorial Presbyterian Church – Jurisdiction – Site Plan

Mr. Montague noted that a question of jurisdiction has been raised about this application. At this point, it still is not clear whether the Planning Board should hear this case, or the Zoning Board of Adjustment. The Planning Board listened to Ogden Church's site plan presentation at their last meeting on June 6th. The parking situation had also been discussed at that meeting. The applicant had requested a continuation to tonight's meeting. The jurisdiction question will be discussed tonight.

Mr. Montague stated that in their application, Ogden Church is proposing new parking arrangements. Mr. Montague pointed out that there is the actual Ogden Church congregation as well as three other entities using the church complex:

- 1) The Mother's Morning Out program
- 2) A pre-school care center
- 3) The Montessori School

Mr. Montague said the Planning Board is looking for more information on these three programs to help them decide which board should hear this application.

Mark Knoll, Esq., attorney for Ogden Memorial Church, came forward.

Mr. Knoll referred the Board to his letter dated July 3, 2007. He reminded the Board that the application before them tonight is on behalf of Ogden Church. It is not being made on behalf of the Montessori School or the Work Family Connection. The proposed plans are to alleviate traffic flow issues and parking problems at the church. The number of parking spaces is calculated for the needs of the church based on these factors:

- 1) The church will be losing parking on Elmwood Ave. after the Borough expands and connects the drainage on that street.
- 2) Currently the church doesn't have the correct number of parking spaces in relationship to the number of seats in the sanctuary.
- 3) Regardless of who their tenants are, Ogden Church would still be before the Board with these very same plans presented tonight.

Mr. Knoll said he understood that issues have been raised about whether the Montessori School is a conforming use for the property. He stated that the school is a "for-profit" institution. The school was given a certificate of occupancy before they moved into the church facilities. The Borough Zoning Officer signed off on them coming in. The school has spent considerable sums renovating the church property in reliance upon that grant of approval by the Zoning Officer and the certificate of occupancy; however, Mr. Knoll said he will leave it to the Montessori to address whether they are a property permitted use within that particular zone. Mr. Knoll felt the issues could be bifurcated in this case.

Mr. Knoll felt the issue before the Planning Board was whether or not Ogden church is permitted to have a parking lot put in place and new driveways as accessory uses to their property permitted use in the R-1 zone. There is no question before this Board that the church is a proper use in the R-1 zone. There are no questions before this Board that a parking lot and a driveway is an accessory use to the permitted principal use in the R-1 zone. The issue of whether or not the Montessori School is there is a "side issue". Mr. Knoll felt this particular issue should be addressed; however, it does not need to be addressed in this forum at this time. He felt the issue could be bifurcated. He believed there was no reason why it could not be bifurcated. Mr. Knoll reported that he and his law associates have done research to find a case, a statute, a provision in the MLUL, a provision in the Borough ordinances that suggest this Board lacks jurisdiction simply because there could be one part of the property being a non-conforming use. If such a citation exists, Mr. Knoll said he would like to see it. It will definitely help clarify this situation.

Mr. Knoll believed that the church's application stands or fails on its own merits. The issue of whether or not the Montessori School should be there can be addressed at another time. If someone believes that the school is violating a zoning ordinance, there are channels where that can be addressed. The school can address that issue.

Mr. Knoll stressed that what is being proposed in this application only pertains to the church's needs. The church needs the proposed driveways and new parking, since the current parking on Elmwood Ave. will be eliminated. The church has always needed more and better parking on the property.

Mr. Knoll recalled that Chairman Montague had wanted to know when these institutions came to the property, the use, and their function. Mr. Knoll believed these were side issues. He believed the jurisdictional issue could be addressed tonight. Should the

Planning Board decide that it has jurisdiction, Mr. Knoll will bring in the applicant's engineers. He felt something should be put in place before the new school year began, before traffic problems hit Elmwood Ave. again. The most expeditiously way to do this is to have Ogden Church's plans considered on its own merits.

Mr. Knoll asked if Mr. Foster or Mr. Montague had any questions.

Mr. Montague brought up the bifurcation issue. He pointed out the Borough ordinance states that when the parking issue is addressed, it must be addressed for all of the **uses**. Mr. Montague brought up the question of whether these organizations will use and benefit from the proposed parking. He brought up a question of whether the existence of these organizations will intensify the parking. Mr. Montague felt Mr. Knoll should address those questions.

Mr. Knoll said the number of parking spaces being approved would not satisfy the required number of spaces for the church alone. The applicant would need 48 parking spaces to comply with the ordinance's requirements for the number of spaces in the pews. Regardless of the additional use of the property, considered on its own merits, the parking could not intensify beyond the needs of the church itself. The church itself requires 48 spaces. The plans are proposing something like 44 parking spaces. Mr. Knoll said that there is no intensification of use by building 44 parking spaces regardless of who is using the property. The fact that there is a tenant or not a tenant doesn't matter. The church would need the parking spaces for the church's own use.

Mr. Knoll stated that the driveways and parking lots that are being proposed, do not amount to an intensification of the current use. Currently, that particular area is at capacity. It's not going any farther. Not one additional child will be enrolled in The Montessori School because it's reached its capacity.

Mr. Montague asked what about the pre-school program.

Mr. Knoll didn't know if that program had reached capacity or not.

Mr. Knoll reiterated that as far as Montessori School was concerned, its use will not intensify if any additional parking spaces were built. That school has reached its maximum enrollment. Mr. Knoll believed that building of parking lots and driveways are accessory uses to principal uses. These items are not necessarily intensifications.

Mr. Montague then asked Mr. Knoll to state what the capacity numbers were for the 3 organizations using the church complex.

Mr. Knoll stated that the use for the Montessori School will not intensify. Regarding the Work Family Connection, Mr. Knoll did not believe the number of students will increase or decrease according to the number of parking spaces or the existence of a driveway. The enrollment number is driven by the needs of the parents who use that program.

Mr. Montague quoted from Section 165-14, paragraph H, of the LDO: “Where a permitted use of land includes different specific activities with different specific parking requirements, the total number required parking spaces shall be obtained by *individually computing the parking requirements for each different activity and adding the resulting numbers together.*”

Mr. Knoll pointed out that the church is only asking for 44 spaces. Using the lesser of the two multiples, the church won't be able to build enough spaces unless they tear up their front yard.

Mr. Montague clarified that the Board isn't arguing whether or not 44 spaces are good or bad. The Board has to establish what is pursuant according to the ordinance.

Mr. Knoll felt that the presence or absence of the Montessori School doesn't mean that the Planning Board can't hear the application. Mr. Knoll will try and get the correct calculations.

Mr. Montague stressed that the Board has to acknowledge what uses are going on in the church complex. After that is done, a decision will be made whether the Planning Board hears the application or the Zoning Board of Adjustment.

Mr. Knoll didn't think the Planning Board had to look at the uses. He felt the Board should look at what variances are required.

Mr. Hague noted that a report has just been distributed to Board members giving the sequence of certificates of occupancy for the church. He pointed out that Summit Day Care Center received a certificate of occupancy as early as July 23, 1985. Mr. Hague believed there have been changes in the ordinance for daycare centers since that date in time. There is another certificate of occupancy from about 3 years ago concerning some modifications and improvements for the educational use. If the present use is not lawful or a nonconforming use based on changes of the ordinance over time, the certificate was incorrectly issued. A case entitled Perillo brings up the point of whether that particular use will intensify as the result of changes or improvements made to the lot. Mr. Hague felt that in Ogden Church's case, because the parking and traffic flow is being enhanced, an enhancement of the school population could result.

Mr. Knoll pointed out that the Perillo case did involve two uses on a property, with one conforming use and a non-conforming use. Mr. Knoll said the Rosenbloom application that he had noted in his letter was more relevant to Ogden's application. In the Rosenbloom application, proposed changes are made to the conforming use. Mr. Knoll felt the question was not whether the Montessori School is conforming or not, it's a matter of whether or not it should be located at the church.

Mr. Hague brought up if the proposed improvements will result in a more efficient and greater use, then the use will be intensified. Mr. Hague suggested Mr. Knoll provide proofs that the school use will not be intensified.

Mr. Knoll reiterated his main point that the issue of whether or not the school is conforming or non-conforming is a separate issue that can be bifurcated from the central question of whether the church is permitted to have its own parking lot and driveway put in on its property. He felt that action could be accomplished without doing any harm to the notion of having the presence of the school tested by the zoning ordinance. He pointed out that the church needs the parking lots and the driveways put in place. Mr. Knoll said he was dismayed that the jurisdictional issue was brought up the very day that he brought in his engineers for the first meeting. Mr. Knoll stated that he had sent out weeks in advance a letter explaining why this site plan should be approved. It would've been helpful for him to be aware of this objection prior to coming to that meeting.

Mr. Knoll pointed out that these proposed improvements are an expensive proposition for the church. The church feels that it's something they have to do to satisfy the concerns of their neighbors and to ensure the church pursues its mission in Chatham Borough.

Mr. Knoll said that if the Planning Board believes that it does not have jurisdiction, they should just take a vote and proceed as necessary.

Mr. Montague said the Board members need information to assure themselves that they are the correct entity to hear this case. If it turns out that the Montessori School and its use is in violation with the ordinance, and a "D" variance is needed, and the case must go to the Board of Adjustment.

Mr. Knoll felt the question of whether or not the Montessori School should be at that site, does not require a presentation of facts. It's a pure question of law. The church will stipulate that the certificate of occupancy was granted on such and such date. A stipulation can be made regarding the amount of money they paid for the improvements as a result of the certificate of occupancy. This Board could then determine whether or not they have jurisdiction.

Councilman Harris pointed out that one matter that is not on the record is what did the Borough think when they issued those certificates of occupancy. For the past two years, the Borough Council has been under the impression that the Montessori School is a non-profit organization. Councilman Harris said he didn't know what was in the various applications for certificates of occupancy that came to the Construction Office. When the Borough Attorney looked into this issue two years ago, Mr. Lloyd went onto the State's website and found out that Montessori School was listed as a non-profit entity. It wasn't until a few days ago when Councilman Harris ordered the certificate of incorporation from the State that he found out that Montessori was a for-profit school.

Mr. Knoll said that in October, 2006, Ogden Church was asked to provide to the Borough Tax Assessor evidence of its non-profit status for all the entities which use the church building. The church then provided this information. The church also provided its taxpayer identification number for the Montessori School.

Councilman Harris pointed out that the Borough Tax Assessor is not present tonight to testify on these actions. Councilman Harris felt the real issue is whether or not the certificates of occupancy were properly issued for a permitted use, or whether the Montessori School is a non-conforming use.

Mr. Knoll said the applicant can stipulate that the certificate of occupancy was issued and that Montessori School is a for-profit use.

Councilman Harris and Mr. Montague indicated that these particular points don't solve the problem.

Mr. Knoll asked what information was then needed.

Mr. Montague noted that it is now known that the Montessori School is a for profit use. The applicant is now submitting a site plan. If a "D" variance is needed, that can only be granted by the Board of Adjustment.

Mr. Knoll asked if the Board would then not be of the opinion that the issue of the site plan improvements for the accessory use for the church as the principal use in the R-1 zone can be bifurcated from the issue of whether the Montessori School is properly there or not.

Mr. Montague felt that the Board is not convinced yet. He felt that the Board at this time did not have enough information to agree that it can be bifurcated.

Mrs. Pignatello felt Mr. Knoll is asking the Board to look at this application "in a vacuum". She recalled that Mr. Knoll has informed the Board that the church needs all these spaces. Mr. Knoll had brought up the question of what would happen if Ogden Church didn't have all these tenants. Mrs. Pignatello pointed out that the church has tenants. The Board has to consider the whole situation to see which Board's jurisdiction is triggered.

Mr. Knoll stated that the church is not asking for a use variance under any circumstances. He believed a use variance is not needed for an accessory use for a parking lot for the principal use of the church.

Mr. Hague reminded Mr. Knoll to separate the parking that is being replaced and the improved circulation from the use of that parking and circulation by the school. He reviewed the Shinn case with Mr. Knoll and how it related to the Ogden application. Mr. Hague recommended some arguments Mr. Knoll could make with regard to the Montessori School and the proposed parking.

Mr. Knoll noted that an estoppel argument could be made; however, it was a question of which forum should hear this argument. He wasn't sure if the Planning Board could determine whether this use is proper or not under Section D.

Mr. Hague said that the Board has the ability to decide if a “D” variance is not needed because of certain reasons. These reasons could be incorporated in a finding that would go into a resolution. Another alternative is for the church to go before the Zoning Board of Adjustment to seek an interpretation, since the Board of Adjustment has the right to interpret the ordinance. Mr. Hague said, as a Planning Board, member he would be willing to listen to some facts on the intensification question.

Mr. Knoll felt that regardless of the addition of the parking and the new driveway, the school use would not intensify. Perhaps he could bring a witness who would testify that no additional students would be enrolled in the school because of the existence of the parking or driveway.

Mr. Foster said his opinion was that the Planning Board does not have jurisdiction over this matter because the applicant and Montessori must secure a use variance under Section D for the school use. Mr. Foster stated that as far as he currently knew, the school use is inextricably intertwined with the church use on the premises. He understood there are separate entities operating inside the church. Mr. Foster believed that the real concern is for what goes on outside the building. The reason that Ogden had to create this plan and come before the Board was because outside problems, such as traffic flow, driveways, etc. resulting from activities of the church itself, Montessori, and other groups.

Mr. Foster believed that the school use is not a permitted use because it is a “for profit” organization.

Thirdly, Mr. Foster stated that the Borough, because of the issuance of the certificate of occupancy, has the standing to turn around and say that this Montessori is an improper use because of the application of the legal doctrine of equitable estoppel. There is a good possibility that is a valid argument for preventing any turnaround on the part of the Borough to try to stop this use.

Mr. Foster believed that the proposed site plan for driveways, parking areas, and traffic flow, as a practical matter, have not been prepared and presented solely for the benefit of the church. These proposals are for the benefit of the school and the other children’s uses as well. Mr. Foster noted that traffic problems and a disorganized drop-off and pick-up system has been going on for a long time at the site. If the Montessori School wasn’t on the site, he didn’t think these very elaborate plans would be proposed to solve these problems.

Mr. Foster said the proposals in the site plan, if approved, would result in a substantial intensification or expansion of the school use. If the Board decides that the Montessori School is not an accessory use to the church, the Board would then have to determine whether the plans would constitute a substantial intensification of the school use. If there is an intensification of use, and if the Board decided the proposed parking, driveways, would create a substantial increase, the application would then have to go before the Board of Adjustment.

Mr. Foster and Mr. Knoll discussed a 2003 law suit entitled Concelise v. Seaside.

Mr. Knoll brought up the intensification issue. He reminded the Board that not one additional student will be going to the Montessori School as a result of the proposed parking lots and driveways. The use is “tapped out”. Mr. Knoll said he will look into the legal cases brought up involving an addition of parking or a driveway intensifies a use. Mr. Knoll, however, believed the church’s application can be considered on its own merits for its own needs. The church needs at least 48 parking spaces for the number of pews it has. The church is seeking only 44 parking spaces. A “C” variance is needed to accommodate that arrangement. Another “C” variance is needed to accommodate the setbacks.

Mr. Knoll felt it was not the church’s place right now to ask for a “use” variance for the Montessori School. He believed it was up to the church where it wants to proceed from here. Mr. Knoll asked that the application be carried. He will check with Mr. Montague and Mr. Foster to see when the application could be heard again. Mr. Knoll stressed that Ogden Church is seriously trying to get something accomplished with this application. The church is trying to solve the problems that have been raised by their neighbors. The church also wants to make sure the proposed plans work well with projects being done by the Borough.

Mr. Montague agreed to a continuance of this application.

Mr. Knoll reviewed with Mr. Montague the information that the Board still needed to hear:

- 1) The existing use
- 2) The number of children using the property
- 3) Any growth that may happen

Mayor Plambeck reminded Mr. Knoll that according to the ordinance, the number of staff members is what controls the number of parking spaces. Mr. Knoll agreed, stating that he would provide new calculations on the number of spaces that would clarify the nature of the “C” variance being sought. Regarding the intensity issue, Mr. Knoll will circulate a memorandum on his thoughts on this situation. He will send out the memorandum well in advance of the next hearing.

Mayor Plambeck commented that improving the traffic in that particular area by having a viable drop-off and pick-up program for the school is a key issue that needs to be addressed.

Councilman Harris reminded the church that parking on landscaped areas is not permitted. He has driven by the church and has noticed it has been happening.

Mr. Knoll said he will remind church members again not to park that way. He asked if the Reverend Dale Dealtrey, pastor of Ogden Church, could make a statement.

Reverend Dealtrey stated that she has been pastor of Ogden Church for 13 years. She indicated she would like to respond to Councilman Harris's remarks about the church's tax assessment matter. Reverend Dealtrey testified that in October, 2006 she had sent to the Tax Assessor a letter with all of the tax identification numbers and tax status for the church, for the Mothers' Morning Out program, for the Work Family Connection, and the Montessori School.

Councilman Harris clarified that he wasn't challenging the existence of this information. He was just recommending that it should be presented to the Board. He said the Board could find these documents in the tax assessor's office.

Reverend Dealtrey said she has continued to remind groups about not parking on the landscaped areas. She is sorry this illegal parking has occurred recently.

Shaw Application – Memorialization

Hilary P. Sunyak, Esq., attorney for the applicant, was present.

Mr. Montague noted that all Board members and the Shaws have copies of this resolution.

At Mayor Plambeck's suggestion, Mr. Foster reviewed the key revisions that he had made to the resolution.

Ms. Sunyak said she will make sure that the Borough Tax Assessor approves of the new lots numbers of this subdivision. A condition will be inserted in the resolution that the Borough Tax Assessor's numbers are the final ones.

Mr. Foster brought up that Mr. Shaw had testified that there will be a separation of the joint driveway between the existing house and the house on the lot to the north. This separation is shown on Sheet 3. Sheet 3 shows that right from the street there would be two separate paved driveways on the correct side of the property line.

Mayor Plambeck made a motion to approve the resolution as submitted by Mr. Foster, seconded by Mr. Gerridge.

Councilman Harris referred the Board and Mr. Foster to paragraph 4, condition B. This condition had to do with the license agreement with the Borough for the retaining wall. Councilman Harris felt the language was too specific. He pointed out that the Planning Board cannot bind the Borough Council as to the requirement for a license agreement. Mr. Foster revised the language accordingly.

There were no comments from the public.

Mayor Plambeck made a motion to approve the amended resolution memorializing the subdivision of Block 114, lot 5, also known as 99 Hillside Ave. Mr. Gerridge seconded the motion.

Mr. Hague suggested two votes be taken. One vote will be taken to approve the application. A second vote will be for the approval of the resolution.

Mrs. Pignatello excused herself from voting, since she was not present at the hearing and did not listen to the tape. Mr. Mitchell and Mr. Pfeil indicated that they were not eligible to vote either.

Councilman Harris stated that he had listened to the tape of the Shaw hearing and was eligible to vote.

A roll call vote was taken to approve the application.

Mr. Hague - yes
Mr. Gerridge - yes
Mr. Jankowski - yes
Councilman Harris - yes
Mayor Plambeck - yes
Chrmn. Montague - yes

Another roll call vote was taken to approve the resolution as amended:

Mr. Hague - yes
Mr. Gerridge - yes
Mr. Jankowski - yes
Councilman Harris - yes
Mayor Plambeck - yes
Chrmn. Montague - yes

At 9:05 p.m. a break was taken in the meeting.

At 9:12 p.m. the meeting resumed.

Meeting minutes

The minutes of March 14, 2007 were approved as amended.

The minutes of April 11, 2007 were approved as amended.

B-2 and B-3 Side Yard Ordinances

Councilman Harris reported that he went through the tax records and **obtained** the lot widths for the B-2 and B-3 zones. He has written a memorandum on this issue and the changes that he has proposed.

Mr. Montague asked Councilman Harris if his proposal was to rationalize and make all the side yard measurements the same. Councilman Harris answered yes. He would like the side yards in the B-2 and B-3 zones to be the same as the side yards in the B-1 zone. It would involve only an increase from 5 feet to 10 feet.

Mr. Montague said he will review Councilman Harris's report and calculations.

Councilman Harris said that in the Mayor's office there are a series of recent photos taken of the buildings along that section of Main Street. This photo display could be used when the Board discusses this matter again.

Mr. Montague noted that this topic will be revisited at the next meeting.

Old/New Business

Mr. Montague said he will have the Checklist for **Complete Applications** ready for discussion at the next meeting.

Mayor Plambeck reported that the side yard setback ordinance was adopted by the Borough Council last Monday night.

Mayor Plambeck reported on the recent streetscape activities. New street lighting is being installed, starting on the south side of Hillside Ave.

Mayor Plambeck discussed a seminar he had attended with the Borough Administrator. They learned new facts that may affect any applications for cellular antennas on power line towers. New forestry limitations regulate what can be planted around a tower base. Any screening of these bases now has to be done along the edges of the right-of-way.

Mr. Gerridge reported that he had made revisions on his stormwater ordinance draft. He had sent a copy of the latest revision to Mr. Hague. He noted that Mr. Hague had some questions on land disturbance. Mr. Gerridge said after he has received feedback from Mr. Sennett and Mr. Hague, he will set up a meeting with the Construction Officials and the Borough Engineer to review this ordinance. Decisions will have to be made on how to implement and enforce it. Councilman Harris added that the Borough Council recently reviewed with the Borough Engineer a new list of drainage problems in the Borough.

Mr. Montague asked what work the Borough is planning to do on Elmwood Ave. Has Ogden Church been informed of what will be happening?

Mayor Plambeck answered that Mr. DeNave, the Borough Engineer, is working on this project. It will be a multi-year project.

Mr. Montague confirmed with Mayor Plambeck that the Borough's improvement plans for Elmwood Ave. will not be ready when Ogden Church returns to the Board.

Mr. Montague noted that Ogden Church has not yet reached an understanding with the Historic Preservation Commission (HPC) concerning their site plan.

Councilman Harris believed Ogden Church will be meeting with the HPC at their July 17th meeting.

Mr. Foster reported that he has received a copy of the Board of Adjustment's recently approved rules and regulations. He has made a first draft of what would be appropriate for the Planning Board. He has forwarded this draft to Mr. Sennett for his review. Mr. Sennett will give Mr. Foster any comments he may have.

Mr. Montague reported on the Board of Adjustment meeting held on August 22, 2007.

Councilman Harris asked Mr. Jankowski to check the certificate of occupancies for Ogden Church to indicate whether the Montessori School was a non-profit or a for-profit organization and whether that question was even asked.

Mr. Jankowski recalled that question had been asked. The answer given was that it was a non-profit.

Councilman Harris asked if Mr. Jankowski could have the written proof ready for the next hearing.

Mr. Montague suggested that the necessary tax documents be obtained from the Borough Tax Assessor to establish the tax status.

Mr. Hague said he would like to see the applications which correspond to the certificates of occupancy and zoning reviews done back in 1985.

On other matters, Councilman Harris brought up the list of LDO revisions that he and Mr. Montague felt was needed. Mr. Montague said that topic will be reviewed next week.

Councilman Harris asked Mr. Foster about the Shailja litigation.

Mr. Foster reported the issues in question are the driveway onto Hedges Ave. and the soil contamination. He has received a letter from Mr. Dolen, Shailja's traffic expert. Mr. Foster has forwarded that letter on to Gordon Meth, the Board's traffic expert. Mr. Foster has communicated with the new owners of the property and they have indicated they will do everything possible to clean up the soil. Mr. Foster felt that no construction will begin until this law suit is settled. A pre-trial conference has taken place today by telephone. Attorney Alan Siegel represented the Planning Board. Mr. Foster will contact Mr. Siegel and ask him for a status letter. Mr. Foster will also ask him when the Board can meet with him in executive session.

At 10:00 p.m. the meeting adjourned.

Respectfully submitted:

Elizabeth Holler
Recording Secretary

