Village of Airmont
Zoning Board of Appeals
Village Hall
Thursday, May 16, 2018

MEMBERS PRESENT: MARTY KIVELL, CHAIRMAN
ARTHUR KATZ
CHARLES PICARELLI
LAURIE DIFRANCESCO
LINDA CARBONE, AD HOC
MATT RYAN, AD HOC

MEMBERS ABSENT: SCOTT MEIER

PRESENT: DAN KRAUSHAAR, DEPUTY VILLAGE ATTORNEY
JODY CROSS, OUTSIDE COUNSEL ZARIN & STEINMATZ
LOUIS ZUMMO, BUILDING INSPECTOR
SUZANNE CARLEY, P&Z CLERK

The meeting was called to order at 8:01 pm by Chairman Kivell which was followed by the pledge of allegiance and roll call. Chairman Kivell appointed ad hoc Matthew Ryan a voting member for the evening.

Charlie Picarelli made a motion to approve the minutes from 3/8/18. Arthur Katz seconded it with a correction to a typo which the clerk will correct. Laurie DiFrancesco abstained as she was not at the last ZBA meeting. All others in favor. Motion carries.

Chairman Kivell asked the Board if they had any other questions. The Chairman read into the record an email dated 4/12/18 from Kim Weppler, current Fire Inspector in Chestnut Ridge and former Fire Inspector at the Village of Airmont to the P&Z Clerk regarding 236 Cherry Lane. Which essentially noted that he inspected the former camp and school for Village fire safety inspections. He indicated that the S.E.D. Fire Safety Report would be filled out by the school administrators. One of the questions was the what the number of students attending were, which he noted at approximately 400 students. He did not recall the number of children that attended the camp. Chairman Kivell also read into the record a second email dated 5/11/18 also sent by Kim Weppler to to the P&Z Clerk. This email in summary stated that "his inspections had no bearing on the overall occupancy capacity of the school or camp as a whole. He never had any conversation with Ian Smith the Building Inspector at the time regarding their occupancy. He also stated he has assumed that the C/O for the camp and school were correct."

For the record Ira Emanuel made it very clear that the previous fire inspections had nothing to do with the current owner. Arthur Katz inquired if there were any fire inspection issues. Lou Zummo noted that there are no fire inspection issues at this time with the current owner.

Laurie DiFrancesco noted that having read through the voluminous file, the review of the PB original decision and the first and second letter before the Planning Board approval, it appears the camp being approved for up to the 167 is well stipulated in every piece of information we have paper and in the Planning Board resolution dated 8/16/2001. She reviewed the C/O's in the file and saw C/O's issued by Ian Smith for heating and pool purposes. She didn't see that there was any C/O or anything else where Ian Smith approved 400 students which is also evident in his letter dated December 1, 2017 paragraph 7 where he stated with each expansion, it applied to the Village and obtained necessary permits or approvals. Upon completion of each building, I granted the appropriate certificate of occupancy." Again Laurie noted that the only C/O's that were in the file were ones on repairs, the heating system and the pool. She also noted that the original plan had two temporary buildings and she didn't see where they were ever changed over to permanent buildings. She has not been on the site to know if they were changed out. Lou Zummo confirmed that they are still modular buildings. Laurie DiFrancesco asked the Building Inspector if the original structure was approved as temporary? Lou Zummo noted that that is what the resolution notes. She noted that she is unsure if the necessary approvals he refers to in paragraph 7 of Ian Smith's letter dated 12/1/17 felt himself an authority a for a Planning & Zoning change without it being necessary.

Arthur Katz also went through the papers and did not see anywhere said there were violations of occupancy he in fact in a sworn statement Ian Smith said everything is ok and he disagrees with Laurie. He also did not see any violations on occupancy from Mr. Smith. Laurie DiFrancesco clarified her statement that is not whether or not to find fault all she was asking is that the original resolution as presented states 167 student but she didn't know if Mr. Smith or anyone other than the school administrator ever really knew exact number of students as most inspections are done when the students aren't there to start with. She did not see violations on occupancy and his sworn statement said all was ok. Laurie DiFranceso noted that because someone makes an error it doesn't make it correct and I believe that is a municipal estoppel. The fact that something goes on in the Village that we know about such as large construction large sites, especially with children involved usually needs PB approval. This site grew and grew and with popularity but there was nothing prohibiting them from going back to PB to get approval for a larger population. There is no letter that she found from Rabbi Fink or any new applicants stating or requesting in an application for an increase of populations was submitted. Nor when the new applicants purchased it and reviewed the files prior to buying did they see any approval for the school. anything before purchasing. The questions is whether or not he thought was approving something not on PB or as the fire inspector said that he assumed all the C/O's were in place because it was not his job it was PB.

Matthew Ryan stated that he agreed with Laurie DiFrancesco in regards to the Building Inspectors notice. When he went through the papers in in great detail and the PB resolution stated no more than 167 students at anyone given time which to him is very clear. Over time the school more than doubled and he doesn't believe that that was the overall intent of the resolution. Under your premise you believe that because the Building Inspector did not issue any violations he passively approved the number of students. He noted he doesn't feel it

reasonable to assume that the BI could do so without a site plan and for that reason as well he agrees with Ms. DiFrancesco's points.

Laurie DiFrancesco noted there were two letters from Leonard Jackson Associates discussing the school and the second letter from Leonard Jackson Associates dated 6/18/2001 stated that it intended to eventually have 167 children from nursery school and up and the PB did not approve the site plan until the second letter from Leonard Jackson Associates was provided which denoted the number of students. She noted it was a good letter that provided clarification to the first letter to confirm the number of students prior to approval.

Dan Kraushaar asked who is the engineer on this application? Ira Emanuel stated Leonard Jackson for the prospective plans. Dan asked the applicant's representatives if either of them came across this letter in the documents provided by the Village. Steven Barshov noted that he didn't remember. Dan asked the P&Z clerk if this document was provided as part of the record to the applicant during their FOIL request. The P& Z clerk verified that everything was provided to them that she had in her files which did in fact include this letter. They have copies of everything that the Village has on file.

Arthur Katz noted that the letter from LJA in 2001 for the original testimony of 167 was in 2001 and now its 17 years later. A lot of work has been done by the Building Inspector and Fire Inspector and the state Board of Education so is it all still relevant. He asked it if it relevant to go back to documents from 17 years ago and perhaps a clerical error is here and perhaps paperwork should of have been updated. Not to say the Village wasn't aware of the situation but that the files in the Village should have been updated accordingly. The site has been operating for 17 years without problems and any issues the prior fire inspector found were fixed. So he asks again is it critical to look 17 years ago for today when the Building Inspector at the time would have had to see it and say that everything was fine at that time.

Charlie Picarelli noted for the record that he disagreed with Arthur Katz. Under that 167 student number they could be expanding services to provide more requirements by the State Education, the Sewer Dept. and things change overtime that would put in additional requirements. We have a premise for approval by PB for 167 and that's what they were approved for. Arthur Katz noted that there is no evidence by the State Board of Education that they have found any violation in space requirements. Charlie noted that they increased the population without asking approval from anyone in particular the PB.

Laurie DiFrancesco noted for the record that we are looking at 2001 because if we don't look at what is approved by our PB then everyone can change their site anyway they want over time. As far as approvals, Ian gave one for a swimming pool but when the PB approved this they expected a certain amount of students along with the fire department, the sewer department etc. In fact the sewer department is looking for the decision on this appeal because they need to look at the number sewer units. We can not discard the PB resolution because then anyone's resolution for any site plan could be questioned by age. We don't know that Ian ever checked the PB resolution to consciously check the C/O nor can we assume that he knew about this when he came in as Building Inspector in 2004 or 2005 which was after this PB resolution was approved. We are asking that we correct the situation we are not stopping the school we

are trying to ensure that they have the proper approvals. We are saying it needs to be approved for all the reasons we have a PB so lets stop and fix it.

Steven Barshov – how can you say is there is no intent to harm someone when there is criminal intent for a violation. The CDRC was informed of the number of students and the Village was informed repeatedly. How can you not think the Building Inspector doesn't do his job and doesn't look back at the history is a giant assumption. The school has been operating with that number of children for years and the Village was informed. Regardless if the number came from the fire inspector or the school administrator. The school has existed for 17 years and operated with that number of children and no one denies that fact. There were plenty of inspectors there to issue a violation previously. He noted that they are trying to justify an opinion that has no logical basis.

Jody Cross pointed out that violations are issued when there is a violation of law. Its intent is not to harm people, it is is to ensure it complies with laws that exists. The question before this board is was it correct that the C/O does not permit 400 students. That is all that is before this Board in its limited jurisdiction regardless what the various people within the Village knew. The question is, is there a C/O for what is occurring there or are other approvals needed?

Steven Barshov – this building inspector has issued a determination contrary to the actions of the prior building inspectors actions for well over a decade and there was no previous violation for violating a C/O. This is a different interpretation on the same set of facts. The previous building inspector did not require an application for an amended site plan and now a new building inspector says one is required for whatever reasons. We all know there is a principle known as administrative stare decisis and this school has the right to rely on its course of action that has been taken over the last 15 years.

With regard to administrative stare decisis Jody Cross noted that she also reviewed the file and has not seen an interpretation from the former Building Inspector that the occupancy is not in violation of the existing C/O. Ira Emanual stated did he not issue a violation which is pretty much a determination. Jody Cross did not necessarily agree and advised that there is prosecutorial discretion and there is also municipal estoppel and whether or not he failed to undertake his duties or not, or thought he was doing the right thing or not to take upon his duties properly, it is the duty of this board and this Village to determine this fresh to determine if it is legal or not.

Steven Barshov stated that this board is going to vote based on the facts and the law and if the Board has any questions they can ask them although we have provided a ton of information. No one was hiding anything or denying anything. The history is clear and there is no doubt in his mind that the previous building inspector did not require the applicant to get a new application or get an amended site plan for the site but now that the Village has a new building inspector everything has been decided to change course.

Dan Kraushaar noted just as we may have changed course so has the applicant from prior counsel. You have acknowledged you will answer any questions we have yet when we asked you went on record stating that you changed your mind. So he asked the applicants

counsel if he would answer this question -what prevents you from applying to Planning Board to seek site approval for the amount of students not only for the future number of students but for the current number of students that are there today?

Steven Barshov stated that they are here appealing the notice of violation for the decision of the Building Inspector. Dan indicated that you are filibustering and not answering the question that you volunteered for me to ask. Steve Barshov stated that whether or not the applicant could, want, is completely irrelevant. As you know any property owner can go to the PB for anything but that is completely irrelevant.

Dan Kraushaar indicated that that is not true if the use isn't allowed then they aren't allowed to apply. Steven Barshov replied that they are not here for what use is allowed. Dan Kraushaar asked again whats preventing you from going to applying to the PB for the number of students that exist now.

Jody Cross pointed out for the record based on the letter from Mr. Smith stating that he was within his authority under §210-72 to decide whether or not a site plan was required. Jody advised the Board to read this section in it's entirety and read it noting the section where its states that the all uses shall be in conformity when required. She also noted that this property had a site plan.

Steven Barshov noted that that was his interpretation that it was in conformity that's why we are here. Jody Cross noted that it was his interpretation when he was no longer building inspector. Steven Barshov disagreed. Jody Cross respectfully stated that she did not know that everyone agree' if he had the discretion to do so and that is why we are here before this Board to decide.

Charlie Picarelli asked Mr. Barshov when you purchased this property did you as the attorney do the due the due diligence of checking what the permitted number of students where to use this property or did you or the property owner assume there was an approval and just continue forward? Steven Barshov stated that he didn't know what was done or not done. He did not represent them in that capacity. He also noted that it didn't matter what the applicant knew or didn't know; the applicant's knowledge is irrelevant. He stated that they are not here to judge the due diligence on the property owner, they are here to determine what the property is entitled to be used for the way it had been for 15 years. What the applicant did or did not know is irrelevant.

Jody Cross addressed that Mr. Picarelli's point goes to the concept of municipal estoppel and to what extent the applicant reviewed the file and knew what was approved and relied upon on what approvals did or did not exist. Mr. Picarelli agreed.

Steven Barshov advised that we are not talking about estoppel. Can't change what these proceedings are. We are here to decide whether or not if this is the building inspector is empowered and was there there a course of action for what is before us. Whether or not this building inspector is empowered to make a different decision a court will deal. So far no, the facts are to the contrary no facts have been shown on any course of conduct for the Building

Inspector that did not require the property owner go in for additional approvals, there were no violations issued and these are the facts.

Jody Cross agreed that what is before this Board in your limited jurisdiction is do the approvals as they exist today and permit what is going on in the property today. If there is an affirmative interpretation in the file that says there is no violation as opposed to making the assumption there is because there is no violation and none could have existed. You have to make that determination. There is no stare decisis because a Building Inspector didn't opt to do a violation unless he gave a reason at the time as to why no violation was issued. Its very limited. The question is does the C/O permit fit the use everyone agrees it is being used for. Everyone agrees the use has been ongoing for a long time. It doesn't mean it was ongoing with the proper approvals, all it means is you need to go and get site plan approval and its an administrative process that needs to get approval for a use contrary to its C/O.

Ira Emanuel does that mean every property owner must go to the Building inspector on a regular basis and say I need a letter. Jody responded that only if you are going to rely on the fact as proof you are trying to rely on the fact that there is no violation. The question remains is there a C/O for a certain use and occupancy. The answer is no. Jody Cross indicated to the applicant's attorney that they are trying to rely on fact that since there there was no violation it was permitted. Ira noted that the building inspector said at the 5/9/17 CDRC meeting that the C/O should not have an occupancy number on it but Jody noted it does when its referenced and required with a PB approval and tied to a resolution.

Laurie DiFrancesco made a motion to vote on the application for an appeal from Central UTA of Monsey for an interpretation from the Building Inspector/Code Enforcement Officer's determination for a violation dated August 5, 2017 that the owner/representative admitted at the May 9, 2017 Community Design Review Committee (CDRC) meeting to operating a school for 200 to 300 students. 236 Cherry Lane does not have a Certificate of Occupancy to operate a school for 200 to 300 students. She made a motion to support the determination of our current Building Inspector. Charlie Picarelli seconded the motion. Chairman Kivell asked for any discussion on the motion.

Laurie DiFrancesco asked for clarification – the motion is for 200 to 300 students but am hearing 400 at the meetings. The violation and appearance was read into the record and the C/O and or use of §210-148 a-c and §210–149 A-C with regard to occupancy and/or use and how its determined. Dan Kraushaar noted that regardless of 400+ students the Building Inspector determined that there is no C/O for 200-300 and they have purportedly been using the facility as per the 5-9-17 CDRC meeting. Dan asked the building inspector if there were there any other means of observing the number of students. Lou Zummo responded that no there were never any students on site when he was there.

<u>Roll Call Vote:</u>
DiFrancesco -Yes, votes in support of current Building Inspector that 236 Cherry Lane is in violation of an approved PB resolution. I do so knowing that the school is a benefit for the students, the Village has not done anything to stop the use of the school but because the PB has not approved the site for the amount I guess its a municipal estoppel. Because Ian Smith didn't

reference that he reviewed without having knowledge of him being there and could or could not have in his letter, I have no comfort in his C/O's for his additional requirements that may be indicative for the sewer, water, safety of the students. She did want to note that the SED has approved the site every year and is has confirmed that so she knows the children are safe. We do have a PB and there is a reason we use it to support the best quality for our area.

Picarelli – Yes, I also support the current Building Inspector based on the reasons in Ms. DiFranceso's comments and also from the records. We have laws, permits and applications and someone always points the finger when something goes wrong. The applicants own admission that 200-300 students are there allows us to go back to check our records to ensure safety for the children. The file must be checked, and the site checked for the quantity of students on behalf of the applicant. It is an embarrassment for the Village but just because you expand doesn't mean its legal or right without the appropriate approvals.

Ryan- Yes, I also vote in favor of the Building Inspector's determination I simply go back to the original PB resolution that had a hard number of 167 as well as the correspondence from Leonard Jackson dated 6/2001 indicating 167 students. The applicants attorneys also stated that in one PB resolution it did not impose a hard cap and an undetermined enrollment might be possible I do not see anything reflecting that. It was clear in the PB resolution the number was 167. I don't think that anyone ever intended the school to expand to be more than double. I support our building inspectors determination.

Katz – No, Disagreed with supporting the Building Inspector's determination. He does not believe it's a dormant situation where a number was issued and no one checked. He thinks that there there was an active review of it over the years with fire and building inspector reviews. He saw that nothing was overlooked by the Village. If the prior Building Inspector supported it and it was ok we relied upon it. This is something that was issued over 17 years ago. It's an active situation with a growing school and he does not think a violation should have been ordered here. He would like to see that the paperwork is brought up to date. He noted that Mr. Smith at the time made the decision that it was fine, the new inspector does not and I don't know why we should take one over the other but he could not support the current building inspector on this matter.

Chairman Kivell – Refrained from voting.

Motion -Three members in support of the Building Inspector's determination. One member not in support of the Building Inspector's determination. Therefore the original motion carried in support of the Building Inspectors interpretation.

<u>New Business</u>
The P&Z Clerk reminded the ZBA about the upcoming training opportunities and would register anyone of them upon request.

Laurie DiFrancesco made a motion to adjourn the meeting at 9:10pm. Matthew Ryan seconded the motion. All in favor. Motion carried and meeting adjourned.