

Appeal of Zoning Officer Determination and Interpretation
Anton Semprivivo and JSTAR LLC
456 Route 35 North
Block 36, Lot 12
Zone: R-7.5 (Single Family Residential) Zone and the
Beach Cottage Community Overlay Zone
Application No. BA-3181-A-B-12/19

**RESOLUTION OF DENIAL
BRICK TOWNSHIP ZONING BOARD OF ADJUSTMENT
APPLICATION NO. BA-3181-12/19
APRIL 15, 2020**

WHEREAS, Anton Semprivivo and JSTAR LLC (the “Applicants”) have applied to the Brick Township Zoning Board of Adjustment (the “Board”) for an appeal of the Township Zoning Officer’s determination pursuant to N.J.S.A. 40:55D-70a and for an ordinance interpretation pursuant to N.J.S.A. 40:55D-70b, for lands known and designated as Block 36, Lot 12, on the official tax map of the Township of Brick and more specifically known as 456 Route 35 North, Brick, NJ 08723 (the “Property”); and

WHEREAS, a complete application has been filed, the fees as required by Township ordinance have been paid, proof of service and publication of notice as required by law has been furnished and determined to be in proper order, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised; and

WHEREAS, a public hearing was held on February 19, 2020, in the municipal building, at which time testimony and exhibits were presented on behalf of the Applicant and all interested parties having an opportunity to be heard.

NOW, THEREFORE, the Board makes the following findings of fact based on evidence presented at its public hearing at which a record was made:

I. Nature of Application

1. The Applicants purport to appeal a determination of the Township Zoning Officer pursuant to N.J.S.A. 40:55D-70a regarding the alleged issuance of a Zoning Permit permitting the construction of a single-family residential home located on the subject Property. The Board notes that the Applicants stated in Schedule “A” of their application: “This is an Application to Appeal the preliminary determination of the Zoning Officer determination (which may be dated 10/22/19 or 11/22/19 depending on which document is reviewed). As stated the Permit was not issued as the final review and approval has yet to occur.”

2. The Applicants further purport to request relief pursuant to N.J.S.A. 40:55D-70a asserting that the issuance of the Zoning Permit necessarily voids the approvals and relief granted by this Board to RTS IV, LLC (“RTS”) on August 21, 2019 (in which the Board granted Application No. BA-3040-PMS-D-6/17 for density variance relief pursuant to N.J.S.A. 40:55D-70d(5), ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c(1) and c(2) and preliminary major subdivision approval pursuant to N.J.S.A. 40:55D-48.

3. The Applicants also claim to seek an ordinance interpretation pursuant to N.J.S.A. 40:55D-70b. The Applicants, however, have not identified any Ordinance section to be interpreted.

II. The Subject Property

4. The subject Property contains 61,200 square feet (1.405-acres) and is situated along the oceanfront with 100.05 feet of frontage along the easterly side of NJ State Highway 35 northbound within the R-7.5 (Single Family Residential) Zone, as are all adjacent properties, including those across Route 35 to the west. The subject Property is the former site of the Camp Osborn residential development which contained thirty-two (32) dwellings/beach cottages. All but the two (2) most easterly pre-existing homes on the subject Property were completely destroyed

by fire during Superstorm Sandy. The two surviving homes have since been removed, and the subject Property is currently vacant. The adjacent properties to the south are all improved with single family residential uses, while the properties to the north and across Route 35 to the west, which previously contained residential structures that were also completely destroyed during Superstorm Sandy, are currently vacant.

III. Prior Approvals

5. On June 5, 2019, after fourteen (14) public hearings, this Board granted RTS density variance relief pursuant to N.J.S.A. 40:55D-70d(5), preliminary major subdivision approval pursuant to N.J.S.A. 40:55D-48, as well as ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c to subdivide the existing +/-61,200 s.f. (1.405 acres) oceanfront property into seven (7) lots for single family residential development with an additional two (2) common lots to be retained by a Homeowner's Association on the subject Property (Application No. BA-3040-PMS-D-6/17). One (1) of the common lots would contain a 25-foot wide crushed shell access road (currently identified as "Cummins Street") extending from NJ State Highway Route 35 northbound. The other proposed common lot was proposed to remain as open space and contain +/-11,201 s.f. and be used as a beach community lot along the oceanfront. The proposed residential lots would vary in lot area from 4,383 s.f. to 8,274 s. f. and have an average lot area of 5,700 s.f. The Board memorialized the June 5, 2019 approval in a Resolution adopted on August 21, 2019.

6. On January 29, 2020, this Board granted RTS final major subdivision approval pursuant to N.J.S.A. 40:55D-50 for the project referenced herein (Application no. BA-3040-FMS-8/19). The Board memorialized the January 29, 2020 approval in a Resolution adopted on February 19, 2020.

IV. The Alleged Zoning Permit

7. On or about November 22, 2019, the Township Zoning Officer signed the Zoning Permit in question. As set forth infra., however, the Zoning Permit was never actually issued. The Zoning Permit application described in pertinent part the proposed work on the subject Property as follows:

New Building, Deck/Porch, Air-Conditioner Condenser Unit, Platform – Constructing a 3,909 sq. ft. two-story single-family dwelling 38.08' to the peak on the Average Adjacent Grade calculation.

8. The Applicants subsequently filed the instant application with this Board seeking an appeal of the Zoning Officer's determination (dated December 2, 2019) pursuant to N.J.S.A. 40:55D-70a and for an interpretation pursuant to N.J.S.A. 40:55D-70b.

V. Relationship Between Zoning Permit and Prior Application

9. The Zoning Permit and the prior subdivision applications are separate matters. The Zoning Permit does not involve any of the lots which were approved in the subdivision application. Rather, it seeks approval based upon the lot as it currently exists. The Zoning Permit and the subdivision therefore exist independent of each other. The assertion in the Zoning Permit is that the proposal complies with all applicable zoning requirements. RTS essentially seeks to have the right to develop the subject Property in accordance with the Zoning Permit or the subdivision approval.

VI. Appeal of the Board's Grant of Density Variance Relief With Preliminary Major Subdivision Approval and Ancillary Variance Relief

10. The Applicants filed an action in lieu of prerogative writs challenging the Board's aforementioned grant of density variance relief along with preliminary major subdivision approval and ancillary variance relief (Docket No. OCN-L-002553-19). That action is currently pending in

the Superior Court-Law Division. The Board's subsequent grant of final major subdivision approval had not yet been challenged at the time of the hearing of the instant matter, but such an appeal is anticipated.

VII. The Applicant's New Complaint Challenging the Decision of the Zoning Officer

11. The Applicants further filed a Verified Complaint on February 14, 2020 For Emergency Order to Show Cause with Temporary Restraints in the Superior Court- Chancery Division, Ocean County (Docket No.: OCN-C23-20). The Complaint specifically seeks the following relief which is relevant to the instant application:

A. That this Court temporarily enjoin and restrain Defendant, the Township of Brick Zoning Officer, (Defendant Township) by way of its employees from issuing any and all Zoning Permits and rescinding any previously issued Zoning Permits on land owned by Defendant, RTS IV, LLC a/k/a JOSEPH R. PRESTIFILIPPO, (Defendant RTS), known as Block 36, Lot 12 until such time as the merit of the Plaintiff's Complaint are decided. (Paragraph A of Request for Relief in Court One of Verified Complaint).

D. That this Court temporarily enjoin and restrain Defendant, Christopher Romano, the Township of Brick Zoning Officer, (Defendant Romano) or employees of the Township of Brick from issuing any and all Zoning Permits and rescind any previously issued Zoning Permits on land owned by Defendant, RTS IV, LLC a/k/a JOSEPH R. PRESTIFILIPPO, (Defendant RTS), known as Block 36, Lot 12 until such time as the merit of the Plaintiff's Complaint are decided. (Paragraph D of Request for Relief in Court One of Verified Complaint).

F. That this Court temporarily rescind and suspend any construction and/or Zoning Permits that have already been issued to Defendant, RTS, by any of the Defendants or are being processed during the pendency of this action. (Paragraph F of Request for Relief in Court One of Verified Complaint).

VIII. The Applicants and RTS

12. The Applicants are adjacent property owners (Block 36, Lot 11) to the subject Property. Robert C. Shea, Esq., entered his appearance and stated that the Applicants were seeking to appeal the Township Zoning Officer's "preliminary" issuance of a Zoning Permit dated either October 22, 2019 or November 22, 2019 for the construction of a single-family home on the subject Property.

13. An appearance was also entered by John J. Jackson, Esq., who stated that he was representing RTS. Mr. Jackson stated that he did not receive notice of the instant application. He explained that the Board secretary informed him of this matter two weeks ago. Mr. Jackson, however, stipulated that he was not challenging the Board's jurisdiction to hear the instant application. He further advised that the Applicants were also seeking an interpretation of the Zoning Ordinance. The Board does not find it necessary to address the notice issue because Mr. Jackson stipulated that RTS was not contesting jurisdiction.

IX. Applicants' Presentation and Argument

14. Mr. Shea stipulated that the aforementioned relief sought by the Applicants in Superior Court was the same exact relief that the Applicants were seeking before this Board in the instant application. He asserted that the Verified Complaint was filed in order to exhaust all of the Applicants' administrative remedies. Mr. Shea further asserted that the Applicants were concerned about other Zoning Permits pertaining to the subject Property that may have been issued without

their knowledge as well as any Zoning Permits which might be issued in the future for the subject Property.

15. Mr. Shea explained that the Applicants therefore sought relief from the Superior Court to restrain the Zoning Officer from issuing Zoning Permits in the future and to also rescind any Zoning Permits that had previously been issued for the subject Property. Mr. Shea then stated that the Township Zoning Officer had previously issued an e-mail dated November 27, 2019 (on which Mr. Shea was copied) stating that the Zoning Permit in question had not been issued because the Township Division of Inspections had yet to complete its review of the matter. Mr. Shea stated that the Applicants filed the instant application because they were unclear as to what was meant by the Division of Inspections review. He added that the instant application was also filed to make sure there were “no holes” in the Zoning Permit application and that all necessary outside approvals were obtained.

16. Mr. Jackson then stated that Judge Francis Hodgson, P.J. Ch., ultimately vacated the original Order granting the Applicants temporary restraints. He explained that Judge Hodgson vacated the previous Order because the Applicants had not shown a likelihood of success on the merits. Mr. Jackson added that Judge Hodgson noted that numerous lawsuits were pending before Judge Ford in Ocean County Superior Court, Law Division, regarding the prior approvals previously granted by this Board to RTS.

17. Mr. Jackson then stated that pursuant to Section 40-2.1b, Cox and Koenig, New Jersey Zoning and Land Use Administration (GANN 2018), the Applicants were required to avail themselves of all administrative remedies prior to filing an action in Superior Court to contest the action of the Township Zoning Officer. Mr. Jackson asserted that the Applicants’ Verified Complaint filed in the Chancery Division was another litigation tactic used to delay RTS’s ability

to develop the subject Property. He further stated RTS was concerned that it would be prejudiced in the event this Board determined it did not have jurisdiction to hear the Applicants' appeal.

18. Mr. Shea responded by stating that the Verified Complaint included different parties than those set forth in the pending litigation now before Judge Ford. He also stated that the Verified Complaint was e-mailed to all parties involved in the instant application.

19. Mr. Shea also stated that the application was also seeking revocation of the prior approvals granted to RTS in August 2019 as a result of the Township Zoning Officer issuing a Zoning Permit for the subject Property. This was not a request for relief included in the Verified Complaint. Mr. Shea conceded, however, that he could not provide case law or a statute in support of this request for relief.

20. The Applicant then produced its Engineer, Sean Delany, P.E. to provide expert testimony. Mr. Jackson questioned the relevance of Mr. Delany's testimony. The Board determined it would hear Mr. Delany's testimony and give same its appropriate weight.

21. Mr. Delany then testified that prior to construction of the single-family home referenced in the Zoning Permit, a building permittee would be required to obtain all outside agency approvals. He stated that he found no other outside agency approvals in the Zoning Officer's file other than two CAFRA permits. Mr. Shea then entered the Township Zoning Permit Application and Checklist into evidence (Exhibit A-2). Mr. Shea stated it would be prudent for the Zoning Officer to check that all outside agency approvals had been obtained prior to the issuance of the Zoning Permit. Mr. Shea then admitted that the CAFRA permits were not relevant to the issuance of the Zoning Permit because they did not address compliance with ordinance requirements. He could not cite a statute or ordinance that the Zoning Officer erroneously enforced. Mr. Shea then stated that the Zoning Permit Application checklist was equivalent to an

Ordinance and that the checklist set forth the requirement for a Zoning Permit applicant to obtain all outside agency approvals prior to the issuance of the Zoning Permit.

22. The Board observed that Mr. Shea appeared to be conflating the requirements for the issuance of a Zoning Permit (which is codified by ordinance) and the issuance of a Building Permit (which is governed by the State Uniform Construction Code). Mr. Shea then stated that an applicant can only obtain building permit if a Zoning Permit has been issued and a map has been filed. He opined that a map may only be filed upon an applicant securing all outside agency approvals. The Board then reviewed Exhibit A-2 and noted that the Checklist did not require that all outside agency approvals be obtained prior to the issuance of the Zoning Permit. Mr. Shea then stated that if RTS wanted to file its map, it must eventually obtain all outside agency approvals. Mr. Shea then admitted the Zoning Permit in question pertained only to the proposed construction of a single-family home and a filed map was not required in order to obtain the Zoning Permit.

23. Mr. Delany testified that the Zoning Permit issued by the Township Zoning Officer was substantially similar to proposed Lot 12.07 which was approved in the RTS subdivision application and on the CAFRA permit application submitted by RTS to NJDEP. On multiple occasions, however, Mr. Shea and Mr. Delany failed to identify a section of the Ordinance which the Zoning Officer failed to properly enforce. Mr. Shea asserted that it was the Township Zoning Officer's job to take the "extra step" to ensure all outside approvals had been obtained by RTS prior to the issuance of the Zoning Permit. He added that it was the Zoning Officer's obligation to protect the Township residents.

24. Mr. Shea then asked Mr. Delany to testify as to the duties of the Township Zoning Officer in regard to the Zoning Permit in question. Mr. Jackson objected and questioned whether Mr. Delany possessed the expertise to provide any such analysis. Mr. Delany stated that he had

no personal knowledge as to the issuance of construction permits pertaining to the subject Property. Mr. Delany then testified that he could not identify any section of the Township Zoning Ordinance which the Township Zoning Officer failed to properly enforce. Mr. Jackson reiterated his objection to the relevance of Mr. Delany's testimony.

25. Christopher Romano, Township Zoning Officer, testified that a Zoning Permit application submitted to the Township would be simultaneously reviewed by the Township Zoning Department, Engineering Department and Division of Assessments. He explained that a Township Zoning Permit only certifies that all zoning and land use ordinance requirements have been satisfied. He then added that a Zoning Permit alone would not permit an applicant to begin construction of a project. He then reiterated that his exclusive role in evaluating a zoning permit application is to determine compliance with zoning and land use requirements. He confirmed that the Zoning Permit in question had not yet been issued.

26. Mr. Shea then asserted that the instant application was premature and that the Applicants were not prepared to move forward at this time. He refused, however, to withdraw the application without prejudice. Mr. Shea rather sought to amend the application at an unknown future date when the Zoning Permit in question might be issued. He then requested that the application be carried. Mr. Jackson objected arguing that Mr. Shea knew all along that the Zoning Permit in question had yet to be issued.

27. The Board then heard the Applicants' argument regarding the 70b interpretation. Mr. Shea, however, could not identify a section of the Township Ordinance to be interpreted. He stated that the Applicants' arguments for the interpretation were "intertwined" with the Applicant's 70a testimony. Mr. Jackson stated the Applicants had failed to provide an Ordinance section to be interpreted.

28. There were no other members of the public expressing an interest in this application.

NOW, THEREFORE, the Board makes the following conclusions of law based upon the foregoing findings of fact:

I. Appeal Pursuant to N.J.S.A. 40:55D-70a

A. Relief Sought In 70a Appeal

1. The Applicants have filed what purports to be an appeal of a determination of the Zoning Officer pursuant to N.J.S.A. 40:55D-70a asserting that a “preliminary” Zoning Permit for the construction of a single-family residential home was erroneously issued. Under the Municipal Land Use Law, pursuant to N.J.S.A. 40:55D-70a, a zoning board of adjustment has the exclusive jurisdiction to:

[h]ear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance.

2. Part of the Applicants’ purported appeal also requests that the Board revoke its prior grant of preliminary major subdivision approval, density variance relief and ancillary bulk variance relief.

B. Jurisdiction to Consider the Request to Reverse Zoning Officer’s Action Issuing Zoning Permit.

3. The Board begins by acknowledging that this application has created a procedural morass which must be directly addressed and resolved.

1. Exhaustion of Administrative Remedies

4. The Applicants have candidly admitted that the instant application and the Chancery Division Verified Complaint were both filed at virtually the same time and seek the exact same relief. The Applicants assert that this was necessary in order to exhaust all administrative remedies. The Applicants, however, have fundamentally misconstrued this legal requirement. “Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted”. R. 4:69-5. “The exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts.” Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975). Therefore, there is “a strong presumption favoring the requirement of exhaustion of remedies.” Id. Nonetheless, the requirement of exhaustion is not absolute and “[e]xceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision.” Gripenburg v. Tp. of Ocean, 220 N.J. 239, 261 (2015) (citing N.J. Civil Serv. Ass’n v. State, 88 N.J. 605, 613, (1982) (citing Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 561 (1979)).

5. In Independent Realty v. North Bergen, 376 N.J. Super. 295 (App. Div. 2005), the Plaintiff filed a Declaratory Judgment action which sought a determination that a change in the Township’s zoning ordinance did not vitiate its prior site plan approval and that it was entitled to the issuance of building permits consistent with that approval. The Appellate Division upheld the Law Division’s dismissal of the action holding: “the trial judge here acted well within her discretion in determining plaintiff must **first** exhaust its right to seek such an interpretation from

the local Board of Adjustment”. (emphasis added). Id. at 303. The issue of exhaustion is vested exclusively with the court. Id. at 304, citing Nolan v. Fitzpatrick, 9 N.J. 477, 484-85 (1952).

6. The Applicants in the instant matter fundamentally misconstrue the exhaustion of administrative remedies requirement. The doctrine requires that an administrative agency first take an action prior to the filing of a Complaint in the Superior Court. This allows a court to have a record to review. The doctrine does not in any way require a party to file the same action in Superior Court simultaneous with one at a local agency seeking the exact same relief. Further, the determination as to whether the exhaustion requirement may be waived is vested exclusively with the courts.

7. The Board finds that the Applicants’ decision to file an application for an appeal pursuant to N.J.S.A. 40:55D-70a as well as an interpretation pursuant to N.J.S.A. 40:55D-70b was not necessary to exhaust administrative remedies because it was filed almost simultaneously with the Verified Complaint in Superior Court-Chancery Division. Exhaustion of administrative remedies would have required the instant application be decided before the Verified Complaint was filed.

2. Jurisdiction of the Board to Simultaneously Hear the Same Matter Which Is the Subject of the Verified Complaint

8. In rejecting the Applicants’ argument that they were somehow required to simultaneously seek the exact same relief from both this Board and the Superior Court, the Board is now compelled to determine whether it has any jurisdiction to consider this matter at all. To be clear, the Board is specifically addressing the portion of the application which seeks to reverse the alleged issuance of Zoning Permits by the Zoning Officer.

9. The New Jersey Courts have had occasion to address jurisdiction in similar land use situations. In Cicchine v. Tp. of Woodbridge, 413 N.J. Super. 393, 400 (Law Div. 2010), the Court explicitly held that local land use boards are “divested of jurisdiction” once a Complaint is filed.

10. In Orloski v. Planning Bd. of Borough of Ship Bottom, 226 N.J. Super. 666, 669-670 (Law Div.), aff’d, 234 N.J. Super. 1 (App. Div. 1989), Judge Serpentelli similarly held:

“Generally speaking once an Applicant has received a decision of the Board and appealed and in lieu of prerogative writs, the Board is divested of jurisdiction absent a remand.” In re Plainfield-Union Water Co., 14 N.J. 296, 302-03 (1954); Kramer v. Bd. of Adjust. Sea Girt, 80 N.J. Super. 454, 462-63 (Law Div. 1963), aff’d on other grounds, 45 N.J. 268 (1965); Morton v. Mayor & Council of Tp. of Clark, 102 N.J. Super. 84, 98-99 (Law Div. 1968), aff’d, 108 N.J. Super. 74 (App. Div. 1969); cf. Whispering Woods v. Middleton Tp., 220 N.J. Super. 161, 169-72 (Law Div. 1987).

11. Counsel for RTS argued that this Board retained jurisdiction to consider the entire appeal/interpretation application. This argument had two main elements. The first was equitable in nature. Counsel argued that the Applicants had created the jurisdictional issue themselves by filing the Verified Complaint and the instant application simultaneously. He asserted that this resulted in prejudice to RTS. Counsel then argued that the Cicchine decision was from the Law Division and that Orloski was partially reversed by the Appellate Division and that neither were binding and should not apply to the instant application. The Board cannot agree with either of these arguments.

12. The Board certainly understands RTS’s frustration concerning the procedural errors made by the Applicants. The Applicants should have either filed the Verified Complaint or the instant application-not both simultaneously. The Board’s recognition of RTS’s frustration,

however, does not change the law. It is also beyond this Board's jurisdiction to indulge in an analysis resolving RTS's claim that the instant application is merely a litigation tactic. The Board cannot agree that general notions of fairness can overcome the clear state of the law.

13. The Board also rejects RTS's argument concerning the case law. Its position with regard to Orloski is simply incorrect. Counsel asserted that Orloski had been partially reversed on appeal and therefore should not be relied upon by this Board. The Appellate Division, however, held: [w]e affirm substantially for the reasons ably expressed by Judge Serpentelli in his written opinion reported at 226 N.J. Super. 666, 545 A.2d 261 (Law Div. 1988), as stated on pages 668 to 676, 545 A.2d 261". Orloski supra, 234 N.J. Super. at 1. The aforementioned quote from Judge Serpentelli's Law Division opinion is found at pages 669-670. The Appellate Division therefore explicitly agreed and affirmed that portion of Judge Serpentelli's decision. The Board finds that the former Assignment Judge of the Ocean County vicinage, the Appellate Division as well as a Law Division case from Middlesex County all come to the same conclusion that a land use board is divested of jurisdiction once a Complaint is filed. Contrary to RTS's argument, the Appellate Division decision is precedential and is binding on all land use boards. RTS's argument to the contrary is therefore unavailing.

14. It is undisputed that the Applicants filed a Verified Complaint which is still pending. It is equally undisputed that the Verified Complaint and the instant application both seek the revocation of all permits issued by the Zoning Officer. Based upon the foregoing, the Board finds that it has been divested of jurisdiction to consider this issue.

**C. Request to Revoke the August 21, 2019 Approval
Granted by this Board to RTS**

15. The Applicants' appeal pursuant to N.J.S.A. 40:55D-70a also requests this Board revoke its prior approval granting density variance relief, preliminary major subdivision approval, and ancillary bulk variance relief to RTS in a Resolution memorialized August 21, 2019. This issue was not addressed in the previously referenced Verified Complaint and this Board, therefore, has jurisdiction to reconsider the issue.

1. Testimony from Applicants' Engineer

16. The Applicants presented testimony from their Engineer, Sean Delany, P.E. Mr. Delany is a licensed professional engineer in the State of New Jersey and would certainly be accepted as an expert witness in that capacity. This application, however, purportedly seeks an appeal pursuant to N.J.S.A. 40:55D-70a and an interpretation pursuant to N.J.S.A. 40:55D-70b. Neither of these requests concern engineering issues. Mr. Delany honestly testified that he had no expertise in how a zoning officer would perform his or her duties. He also failed to identify any section of the Township Ordinance which he believed was improperly administered or enforced by the Zoning Officer. The interpretation of a zoning ordinance is also a legal matter (although no ordinance to interpret has been identified). The Board, therefore, does not find that Mr. Delany offered any expert testimony concerning the issues associated with this application. The Board, therefore, does not give any weight to this testimony.

**2. The Board's Jurisdiction to Revoke a Prior Approval as Part of an
Application Seeking an Appeal and an Ordinance Interpretation**

17. The Applicants have argued that the submission of an application seeking a zoning permit necessarily results in the revocation of this Board's prior approval granting density variance relief along with preliminary major subdivision approval and ancillary bulk variance relief. Once

again, this Board's jurisdiction is limited to whether there was an error made by an administrative officer in the enforcement of a zoning ordinance. See N.J.S.A. 40:55D-70a. The Applicants' representatives were asked continually throughout the hearing to identify the zoning ordinance which the Zoning Officer had enforced or not enforced in error. The Applicants' representatives were unable to do so. Counsel for the Applicants only asserted that the Zoning Officer was required to go the "extra step".

18. The Board is uncertain what the "extra step" means. What is clear, however, is that the Applicants could not cite any section of the Township Ordinance which the Zoning Officer erroneously enforced or failed to enforce. The Board therefore denies this portion of the application.

19. The Board also finds that it lacks the jurisdiction to grant the relief sought by the Applicants even if it determined the Zoning Officer to be in error. Revocation of a prior approval granted to a different Applicant is not a proper remedy pursuant to N.J.S.A. 40:55D-70a. Such relief would have to be the subject of a different application and would require notice to all interested parties. See, Garofalo v. Burlington Tp., 212 N.J. Super. 458 (Law Div. 1985). The Board therefore finds it lacks any jurisdiction to revoke its prior approval as part of the instant application and denies that portion of the application.

D. The Applicants' Arguments Concerning the Zoning Permit Checklist

20. The Applicants also argued that the Zoning Permit checklist required that all outside agency approvals be secured and that this requirement was the same as an Ordinance requirement. The legal issue of whether the Zoning Permit checklist is the same as an Ordinance requirement need not be adjudicated here. The Board examined the checklist very closely and did not find any requirement concerning outside agency approvals. Such outside agency approvals do

not impact the purpose of the Zoning Permit which is to determine if a proposal complies with all zoning and land use ordinance requirements. The Applicants' argument concerning the checklist is therefore without merit and is rejected.

21. The Applicants also spent considerable time discussing the CAFRA permit application. RTS also sought to introduce the CAFRA permit application. The Board, however, finds the CAFRA permit application to be irrelevant. The CAFRA permit has nothing to do with the enforcement of a zoning or land use ordinance. The application was also submitted in conjunction with the previous RTS subdivision approval. Once again, that was a separate approval which has nothing to do with a 70a appeal or 70b interpretation.

22. The Applicants further argued that the failure of RTS to satisfy all conditions of its prior subdivision approval was relevant to the instant application. Once again, the Applicants have conflated two separate matters. The RTS Zoning Permit application does not seek to develop the subject Property in accordance with its prior subdivision approval. It is an independent application which seeks development of a single-family home on an existing lot. RTS further asserts that the proposed single-family home complies with all zoning and land use ordinances. Satisfaction of the conditions of the prior approvals is therefore irrelevant to the instant application and the Board rejects same.

23. The Applicants argument regarding failure to file a map fails for the same reason. RTS is not required to file a Map in order to develop an existing lot with a single-family home. The Board therefore also rejects this argument.

II. Interpretation Pursuant to N.J.S.A. 40:55D-70b.

24. The Applicants have also sought an interpretation pursuant to N.J.S.A. 40:55D-70b. A zoning board of adjustment is vested with the exclusive jurisdiction to:

[h]ear and decide requests for interpretation of the Zoning Map or Ordinance or for decisions upon other special questions upon which such Board is authorized to pass by any Zoning or Official Map Ordinance, in accordance with this act.

25. The Applicants' representatives were asked to identify which sections of the Township's Ordinances they were seeking this Board to interpret. Counsel for the Applicants could only respond that the request for the interpretation was somehow merged with the 70a appeal. The Board is therefore left without any ordinance to interpret. The Board therefore concludes that there is nothing for it adjudicate and does not render any interpretations.

III. Conclusion

26. At the conclusion of the hearing, Counsel for the Applicants requested that this application be carried to an unknown date until such time that the Zoning Officer formally issued the Zoning Permit. The Board rejects this request for multiple reasons.

27. First, the issuance of the Zoning Permit is irrelevant with regard to the fact that the Verified Complaint has divested the Board of jurisdiction to consider an appeal pursuant to N.J.S.A. 40:55D-70a on the exact issue which is pending before the Superior Court.

28. Second, the issuance of the Zoning Permit is irrelevant with regard to the fact that the Board lacks jurisdiction through this application to revoke a prior approval granted to a different party.

29. Third, delaying this application does not change the fact that the Applicants cannot identify any Ordinance which the Zoning Officer incorrectly enforced or did not enforce.

30. Fourth, the future possible issuance of a Zoning Permit has nothing to do with the interpretation of an ordinance. The Applicants have failed to identify any ordinance for which they seek an interpretation.

31. Fifth, the Applicants always knew the Zoning Permit had not yet been issued. The Verified Complaint referred to it as “preliminary”. The instant application also referred to it as “preliminary”. The application also attached an e-mail from the Zoning Officer which confirmed that the Zoning Permit had not yet been issued. The Applicants made a decision to proceed and then refused to withdraw the application without prejudice.

32. Based upon the foregoing, the Board denies the Applicants’ request to carry the hearing to some unknown date waiting for an event it was aware did not happen and which may never happen.

33. Based upon the foregoing, the Board denies the application seeking an appeal pursuant to N.J.S.A. 40:55D-70a and cannot issue any interpretation pursuant to N.J.S.A. 40:55D-70b because the Applicants failed to identify any such Ordinance to interpret.

NOW, THEREFORE, BE IT RESOLVED by the Brick Township Zoning Board of Adjustment that the application of Anton Semprivivo and JSTAR, LLC for lands known and designated as Block 36, Lot 12, as depicted on the Tax Map of the Township of and more specifically located at 456 Route 35 North, as depicted on the Tax Map of the Township of Brick, is determined as follows:

- A. In accordance with the Municipal Land Use Law under N.J.S.A. 40:55D-70(a), the appeal of the alleged determination of the Zoning Officer as set forth in the instant application is hereby denied.
- B. In accordance with the Municipal Land Use Law under N.J.S.A. 40:55D-70(b), the Board cannot issue an interpretation of any section of the Township’s Ordinance because no section has been identified.

The application is subject to the following conditions:

1. Payment of all fees, costs, escrows due or to become due. Any monies are to be paid within twenty (20) days of said request by the Board Secretary.