

Township of South Hackensack  
Bergen County, New Jersey  
November 8, 2007 7:30 P.M.  
Regular Meeting  
MINUTES

Gary C. Brugger, Mayor .....Present  
Walter Eckel, Jr., Deputy Mayor .....Present  
James Anzevino .....Present  
Gene Roman.....Present  
Rosina Romano .....Present

Also present:

David V. Nasta, Esq., Municipal Attorney  
Linda LoPiccolo, Municipal Clerk  
11 residents/employees

### Call of Meeting to Order

Mayor Brugger called the Regular Meeting to order at 7:33 p.m. He advised that pursuant to the Open Public Meetings Act adequate notice of the meetings had been provided to *The Record*, *The Herald and News* and by posting a notice on the bulletin board in the clerk's office where notices are customarily posted. Everyone saluted the flag. The municipal clerk called the roll.

### Correspondence & Reports

Brugger motioned; Eckel seconded and the Committee unanimously accepted and placed on file correspondence dated October 18, 2007, Diane T. Carini – Thanking Officer Mea for being kind.

Brugger motioned; Anzevino seconded and the Committee unanimously accepted correspondence dated October 19, 2007 from Captain Thomas J. Padilla, Commanding Officer – Youth Division – Thanks to Lt. Montenegro and Sgt. Garris for participating in Hackensack's 2008 Youth Academy class.

Eckel motioned; Romano seconded and the Committee unanimously accepted and requested that the correspondence dated October 18, 2007 from Alice tenHoeve, 85 Calicooneck Road – Thanking Joe Marrella, Dan Breslin and Angelo Sortino for their compassionate treatment of her when she required emergency medical attention, be placed in the personnel file of each employee.

Brugger motioned; Eckel seconded and the Committee unanimously accepted correspondence dated October 29, 2007 from Robert R. Ceberio, Executive Director,

NJMC – Announce approval of 2008 Municipal Assistance Program (MAP) grant in the amount of \$100,000.

Brugger motioned; Anzevino seconded and the Committee unanimously accepted and approved an Application submitted by Ross Sallemi, 295 Huyler Street to replace the concrete sidewalk & apron, remove soil & grass between curb and sidewalk and install brick pavers.

Brugger motioned; Anzevino seconded and the Committee unanimously accepted correspondence dated November 1, 2007, Sgt. Gerard J. Garris – Petition to change Agar Place to a one-way street, and directed the DPW to take the action as suggested in the correspondence.

Eckel motioned; Brugger seconded and the Committee unanimously accepted and approved correspondence dated November 1, 2007 from Chief Michael D. Frew – Internship Request – Seung Jae Park, and directed the clerk to prepare the necessary resolution for adoption at the next regular meeting.

Brugger motioned; Anzevino seconded and the Committee accepted with regret correspondence dated November 1, 2007 from Susan Chinchar – Letter of resignation as Secretary/Treasurer of the Recreation Commission effective December 31, 2007.

Brugger motioned; Anzevino seconded and the Committee unanimously approved requested dated November 2, 2007 from Linda LoPiccolo, Municipal Clerk to amend the Holiday Schedule for non-contractual employees.

Brugger motioned; Romano seconded and the Committee unanimously accepted the General Correspondence submitted for October 2007.

Brugger motioned; Anzevino seconded and the Committee unanimously accepted the Monthly Department Reports submitted for October 2007.

## Old Business

### 129 Vreeland Avenue/56 Dyer Avenue - Fence

The Committee received and reviewed the report of recommendation from Chief Frew. The Township Attorney advised that the matter should be referred to the Construction Department for appropriate action, and directed the clerk to forward the correspondence to the construction official to take the necessary and appropriate action based upon the report of the police department who indicated that the fence at 56 Dyer Avenue may pose a safety hazard. He should discuss with those who prepared the report which portion of the fence that may pose a hazard. Eckel questioned whether or not the Township should consider amending the current ordinance. Nasta replied that the ordinance permits discretion by the officials and consultation with professionals but the Committee could certainly meet with those officials to discuss possible amendments.

## New Business

Regarding 2008 appointments, the clerk advised that Committee should discuss whether or not they would like to make those appointments according to the fair and open method or non-fair and open and would appreciate that information so that she can prepare the necessary documents by the first week in December.

## Ordinances

Second Reading, Public Hearing and Adoption of  
**2007-12**

**AN ORDINANCE AMENDING AND SUUPPLEMENTING CHAPTER 108 OF THE CODE OF THE TOWNSHIP OF SOUTH HACKENSACK ENTITLED "FEES"**

Brugger motioned; Eckel seconded and the Committee unanimously agreed to open the public hearing on Ordinance 2007-12.

Since there were no public comments, Anzevino motioned; Brugger seconded and the Committee unanimously agreed to close the public hearing on Ordinance 2007-12.

Eckel motioned; Brugger seconded to adopt Ordinance 2007-12 and advertise its adoption as prescribed by law. Roll Call Vote: Ayes: Anzevino, Eckel, Roman, Romano, Brugger.

## Resolutions

Consent Resolution No. 2007-11

Offered: Anzevino

Second: Romano

Roll Call Vote: Ayes: Anzevino, Eckel, Roman, Romano, Brugger

Closed Executive Session – Litigation PBA Local 102

Offered: Brugger

Second: Anzevino

All in Favor.

Resolution No. 2007-187 Lighthouse Restaurant and Entertainment Inc.

Offered: Anzevino

Second: Brugger

Roll Call Vote: Ayes: Anzevino, Eckel, Roman, Brugger Abstain: Romano

## Committee Reports

Walter Eckel, Jr. – Reported that he attended a 2-hour program in Hackensack called Hackensack Alliance to Prevent Alcohol Abuse in children. Representatives from Hackensack, Maywood, Rochelle Park and South Hackensack were in attendance, as well as young children with their parents.

Mayor Brugger – Advised that the fire department will hold a “boot drive” fund raiser the day after Thanksgiving, the Annual Tree Lighting will be held on Sunday, December 2<sup>nd</sup>, and Breakfast with Santa will also be held on Sunday, December 2<sup>nd</sup> from 8:30 a.m. to 12 noon. He congratulated Greg Maceri on his election victory.

James Anzevino – Applauded Mayor Brugger as the best Mayor he ever worked with. He thanked him for putting his heart and soul into his term. He congratulated Gregorio Maceri on his election victory and said that he looks forward to working with him next year. Jim objected to the removal of Mike Ward from his current office so that the 2008 Mayor and Deputy Mayor can use it. He wanted input into the decision. Gene replied that he and Rosina decided to have an office in town hall. He is now retired and will work out of that office. Rosina responded that she will coordinate a schedule that the Mayor or Deputy Mayor are available for the residents.

Mayor Brugger – Congratulated Greg Maceri on his election victory. Thanked Sue Chinchar for her service to the Township and wished her the best in the future.

## Public Comments

Dolly Montenegro, 57 Phillips Avenue – Objected to the Township’s decision to refer the fence complaint matter to the construction office for their review and possible action. Mayor Brugger replied that the action taken was after consultation with the Township Attorney and the police department. Nasta responded that the matter was brought to the Committee’s attention. Because it was a safety issue, the police department reviewed the matter and it has now been referred to the building department who has the discretion to address the safety issue. Mrs. Montenegro objected to removing Mike Ward from his office and suggested that the Mayor and Deputy Mayor use the main office to meet and greet residents.

Josephine Acevedo, Vreeland Avenue – Concerned that her mother’s fence concern (56 Dyer Avenue) is being passed around to various departments rather than being properly addressed. Mayor Brugger replied that the matter has been discussed and a report filed and now the matter is with the building department. He could give no time estimates. Anzevino requested that the inspection take place within a week. Nasta advised Acevedo that we operate under ordinances. If the Township acts outside its ordinances, it acts illegally. The Township is following the ordinance properly and has referred it to the appropriate agency that has the appropriate discretion.

Joanne DeGrosa, 51 Grove Street – Asked if the Township intended to respond to COAH’s letter dated July 27, 2007. Nasta and LoPiccolo replied that the Township will respond timely.

Ray DeRiso questioned if David Nasta had any resolution to the matter recently discussed regarding the residential rental property certificates of occupancy. The enforcement of the new ordinance has stopped and the inspectors are waiting for

direction before proceeding. Nasta replied that he had spoken with Ralph Padovano a while ago but would need to discuss with him further before advising the Committee.

Dolly Montenegro – Questioned if the Township would adopt its own ordinance regulating noise. Eckel responded that the state regulations are in effect and should be enforced by the appropriate agencies.

Lonnie Bedell, 51 Grove Street – Congratulated Gregorio Maceri and the Republican Party. He attended the freeholder meeting and thanked them for the additional \$250,000 funding they awarded to the senior housing project.

### Closed Session

Brugger motioned; Anzevino seconded and the Committee unanimously agreed to go into closed session at 8:45 p.m.

Brugger motioned; Eckel seconded and the Committee unanimously agreed to return to open session at 8:55 p.m.

### Adjournment

Brugger motioned; Anzevino seconded and the Committee unanimously agreed to adjourn the meeting at 8:55 p.m.

Respectfully submitted,

Linda LoPiccolo  
Municipal Clerk

**Consent Resolution No. 2007-11**

WHEREAS, the Township Committee of the Township of South Hackensack, has reviewed the Consent Agenda consisting of various proposed resolutions; and

WHEREAS, the Township Committee of the Township of South Hackensack is/is not desirous of removing a resolution from the consent agenda,

NOW, THEREFORE BE IT RESOLVED by the Township Committee of the Township of South Hackensack that the following resolutions on the Consent Agenda are hereby approved and adopted:

**Resolution No. 2007-177 Requesting Approval of Items of Revenue and Appropriation NJS 40A:4-87 (Chapter 159)**

**Resolution No. 2007-178 Authorize Agreement Roof Replacement Municipal Garage**

**Resolution No. 2007-179 Licenses –November 2007**

**Resolution No. 2007-180 Approve Minutes**

**Resolution No. 2007-181 Authorize Purchase Portable Video Arraignment System**

**Resolution No. 2007-182 Authorizing Settlement in the Matters Under PERC**

**Docket Nos. 2007-068 And 2007-203 and Further Authorizing the Execution of All Documentation Necessary to Effectuate the Same**

**Resolution No. 2007-183 Transfer Appropriations**

**Resolution No. 2007-184 Bills \$1,310,475.34**

**Resolution No. 2007-185 Liquor License Renewal 2007-08**

**Resolution No. 2007-186 Authorizing the Mayor and Township Clerk to Enter Into an Agreement with Seung Jae Park as a Police Intern**

Offered: Anzevino

Second: Romano

Roll Call Vote: Ayes: Anzevino, Eckel, Roman, Romano, Brugger

Date: November 8, 2007

**Resolution No. 2007-177 Requesting Approval of Items of Revenue and Appropriation NJS 40A:4-87 (Chapter 159)**

WHEREAS NJS 40A:4-87 provides that the Director of the Division of Local Government Services may approve the insertion of any special item of revenue in the budget of any county of municipality when such item shall have been made available by law and the amount was not determined at the time of the adoption of the budget; and

WHEREAS the Director may also approve the insertion of an item of appropriation for an equal amount,

NOW, THEREFORE, BE IT RESOLVED, that the Township Committee of the Township of South Hackensack in the County of Bergen, New Jersey, hereby requests

the Director of the Division of Local Government Services to approve the insertion of an item of revenue in the budget of the year 2007 in the sum of \$4,928.50, which is now available from Bergen County Confiscated Funds – Police Mobile Workstation in the amount of \$4,928.50.

BE IT FURTHER RESOLVED, that the like sum of \$4,928.50 is hereby appropriated under the caption Bergen County Confiscated Funds – Police Mobile Workstation; and

BE IT FURTHER RESOLVED that the above is the result of funds from Bergen County Confiscated Funds – Police Mobile Workstation in the amount of \$4,928.50.

Consent Agenda Resolution No. 2007-11  
Date: November 8, 2007

<b>Resolution No. 2007-178 Authorize Agreement Roof Replacement Municipal Garage</b>
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WHEREAS on October 30, 2007, the Township received bids for the replacement of the municipal garage roof located at 77 Franklin Street, South Hackensack; and

WHEREAS the bid results are as follows:

	<u>VMG Group</u>	<u>Arch Concept</u>
Replace Roofing System	\$ 31,856	\$40,725
Aluminum Cap	5,750	3,450
Remove Chimney	1,500	300
Repair Roof Deck	<u>2,750</u>	<u>1,100</u>
Total Bid Price	\$41,856	\$45,575

WHEREAS on October 31, 2007, Boswell McClave Engineering recommended that the project be awarded to VMG Group for the amount of \$41,856, subject to the review and approval of the municipal attorney

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of South Hackensack, County of Bergen, New Jersey that the Mayor and Clerk be and are hereby authorized and directed to execute an Agreement for the replacement of the municipal garage roof with VMG Group, 27 E. 33<sup>rd</sup> Street, Paterson, NJ for the total bid price of \$41,856.00

BE IT FURTHER RESOLVED that the award of contract is subject to the approval of the municipal attorney's review and submission by the contractor of any and all documents as required by the bid specification.

Consent Agenda Resolution No. 2007-11  
Date: November 8, 2007

**Resolution No. 2007-179 Licenses –November 2007**

WHEREAS, the following have made applications and paid a fee for various licenses, and

WHEREAS, the Township Committee has no exception to the issuance of these licenses,

NOW, THEREFORE, BE IT RESOLVED, by the Township Committee of the Township of South Hackensack that the following licenses by and are hereby approved unless noted and with conditions as noted.

General Licenses:

Received	Business Name	License No.	Fee
10/12/07	Anne Mac Donald	3619	\$5.00
10/12/07	Us Supplies	3620	\$50.00
10/16/07	Giovanni Maisano	3621	\$5.00
10/16/07	William Mann	3622	\$5.00

Consent Agenda Resolution No. 2007-11

Date: November 8, 2007

**Resolution No. 2007-180 Approve Minutes**

BE IT RESOLVED by the Township Committee of the Township of South Hackensack, County of Bergen, New Jersey that the following minutes be and are hereby approved as submitted.

September 6, 2007  
September 13, 2007

Consent Resolution No. 2007-11

Date: November 8, 2007

**Resolution No. 2007-181 Authorize Purchase Portable Video Arraignment System**

WHEREAS the South Hackensack Municipal Court has requested that the Township purchase a video arraignment system, and

WHEREAS this system will permit the arraignment of prisoners via a teleconference system eliminating the need to transport prisoners to and from the county jail; and

WHEREAS by eliminating the transportation of prisoners for such purpose decreases security risks thereby increasing the safety level for police and court personnel; and

WHEREAS the Township Committee is desirous of purchasing this equipment; and

WHEREAS funds are available from the New Jersey Meadowlands Commission in a 2007 Municipal Assistance Grant (MAP),

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of South Hackensack, County of Bergen, New Jersey the purchasing agent be and is hereby authorized and directed to make the following purchase:

1. Tele-Measurements, Inc., Distance Learning Group, 145 Main Avenue, Clifton, NJ 07014. NJ State Contract A50954. Proposal # 15173
2. Amount not to exceed \$12,389.57

Consent Agenda Resolution No. 2007-11

Date: November 8, 2007

<b>Resolution No. 2007-182 Authorizing Settlement in the Matters Under PERC Docket Nos. 2007-068 And 2007-203 and Further Authorizing the Execution of All Documentation Necessary to Effectuate the Same</b>
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WHEREAS, the Township is currently party to two matters filed with the Public Employment Relations Commission under the above referenced docket numbers; and

WHEREAS, the grieving party has heretofore agreed to withdrawal of the charge under Docket No. 2007-203; and

WHEREAS, the Township Committee has reviewed and approved the attached schedule, made a part hereof, and agrees that a resolution of the charges under Docket No. 2007-068 in accordance with the calculations set forth therein is in the best interest of the township

NOW THEREFORE BE IT RESOLVED, by the Township Committee of the Township of South Hackensack that the mayor, municipal clerk and township attorney be and are hereby authorized to take all steps necessary to effectuate the settlement of the above matters in accordance with the financial schedules set forth and attached hereto; and

BE IT FURTHER RESOLVED, that the expenditure of all funds necessary and proper to effectuate said settlement as attached hereto are hereby authorized.

Consent Agenda Resolution No. 2007-11

Date: November 8, 2007

<b>Resolution No. 2007-183 Transfer Appropriations</b>
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WHEREAS, title 40A: 4-58 of the New Jersey Statutes provides that should it become necessary during the last two months of the fiscal year to spend for any of the purposes specified in the budget an amount in excess of the respective sums appropriated therefore,

and there shall be an excess in any appropriation over and above the amount claimed to be necessary to fulfill the purpose of such appropriation, the Township Committee may by resolution setting forth the facts (adopted by not less than 2/3 vote of the full membership thereof), transfer the amount of such excess of those appropriations deemed to be insufficient.

NOW, THEREFORE, BE IT RESOLVED, by the Township Committee of the Township of South Hackensack that the Township Treasurer be and is hereby authorized to make the following transfers in the 2007 Budget Appropriations.

	FROM	TO
<u>OPERATIONS - WITHIN "CAP"</u>		
FINANCIAL ADMIN S&W	581.63	
ENGINEERING O.E.	2,000.00	
CODE ENFORCEMENT S&W	683.13	
EMPLOYEE GROUP INSURANCE	11000.00	
FIRE PREVENTION S&W	968.20	
RECREATION S&W	1943.12	
TELEPHONE	10000.00	
SOCIAL SECURITY	7625.92	
TAX COLLECTION S&W		201.00
CODE ENFORCEMENT O/E		500.00
LIABILITY INSURANCE		400.73
POLICE O.E.		1500.00
DISPATCHER S&W		11000.00
EMERGENCY MANAGEMENT S&W		2138.00
SOLID WASTE COLLECTION		7210.00
BOARD OF HEALTH S&W		352.00
SANITARY LANDFILL O/E		11500.27
<u>TOTAL</u>	<u>34802.00</u>	<u>34802.00</u>

Consent Agenda Resolution No. 2007-11

Dated: November 8, 2007

**Resolution No. 2007-184 Bills \$1,310,475.34**

**Resolution No. 2007-185 Liquor License Renewal 2007-08**

WHEREAS, the licenses listed below have made application to the Township Committee of the Township of South Hackensack, in the County of Bergen, for the renewal of their 2007-08 Retail licenses; and

WHEREAS, all requirements applicable to the case of the original application have been complied with; and

WHEREAS, no objections have been filed with the Township Clerk

NOW, THEREFORE, BE IT RESOLVED, by the Township Committee of the Township of South Hackensack, County of Bergen, New Jersey, that the retail licenses as listed below are renewed for the year 2007-08 effective July 1, 2007, and under special conditions as noted:

0259-33-011-004	Lighthouse Restaurant Services, Inc.	\$1,488.00
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Consent Agenda Resolution No. 2007-11

Date: November 8, 2007

**Resolution No. 2007-186 Authorizing the Mayor and Township Clerk to Enter Into an Agreement with Seung Jae Park as a Police Intern**

Whereas Seung Jae Park attends Montclair State University and has requested an internship with the police department,

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of South Hackensack that the Mayor and Township Clerk are hereby authorized to enter into an agreement with Seung Jae Park as a police intern at no cost to the township and in a form acceptable to the township attorney.

Consent Agenda Resolution No. 2007-11

Date: November 8, 2007

**Resolution No. 2007-187**

WHEREAS, the TOWNSHIP OF SOUTH HACKENSACK. (Hereinafter "Township") and Lighthouse Restaurant and Entertainment Inc. (hereinafter "Owner") seek revisions to the existing Court Order entered in the matter of Lighthouse et al v. Township of South Hackensack in May 4, 2005, Superior Court of New Jersey, Law Division, Bergen County (Docket Number BER-L-12173-04) which shall forfeit an surrender the rights of "Owners" to operate a topless and nude entertainment business and revert to a primary use as a restaurant; and,



These changes are conditioned upon the sale of the premises under the attached agreement between the parties above, the approval of the reactivation of the forfeited liquor license and the approved transfer to the purchasers.

### **Precis and Factual Situation**

- The premises are under lease of the real property in question.
- There was a pre-existing non-conforming use, known as Molfeta's. The primary use was a restaurant with entertainment as a subsidiary and secondary use, which was formerly a Greek Restaurant with a band and an occasional Belly Dancer as entertainment.
- Because of the Court Order which arose as a settlement from a civil rights challenge to our zoning and entertainment ordinances, the order allowed:
  - The immediate issuance of a required certificate of zoning compliance for a restaurant with entertainment, the renewal of all licenses, and the issuance of entertainment licenses
  - The operation of the business permitting topless or nude entertainment, and even a discontinuation of the restaurant use entirely, and a total topless or nude operation
  - A bar to criminal prosecution for said operation and activities
  - The right of the owner to pocket the liquor license and allow patrons to bring their own beer, wine or champagne (sic) for on premises consumption
  - Parking under the Court Order was valet on site and offsite, with the offsite areas being North of Rt. 46, and the offsite parking shall be at least 40 off-site valet parking spaces in addition to the on-site parking
  - Uniformed Security Guards must be present in the parking areas on site and offsite and after closing Court Order

- Signs permitted on the one existing free standing sign and no signs displayed on or in the building

Last year, I was successful in the challenge they brought to our new entertainment ordinance I drafted. Judge Harris ruled that the operation was contrary to the prior finding by Judge Walsh of a constitutional violation and the consent order. He found that they had no First Amendment Protections to their operation since the claimed protected speech was false and untrue.

As a result, we entered into a settlement which awarded us \$40,000.00 for costs, required them to remove the offending signs, and immediately reactivate the liquor license and allow only topless dancing and not totally nude entertainment with BYOB.

The owners fully complied, but failed to renew the pocket license in a timely manner. As a result, the agreement provided that the license would be forfeited to the Township. While that occurred, the owners appealed to the NJ State Division of Alcoholic Beverage Control. After discussions with the applicant, we agreed to allow the NJABC to allow us to conduct a reactivation and renewal hearing, which has not yet occurred. If we give approval, under the contract of sale the license could be transferred.

In discussing the transfer of the license and the proposed sale, we have negotiated and agreed to modify the prior consent order and subsequent agreement as follows:

#### **Consent Order**

Part of paragraph "C", all of "E", "F", "G", "H", "I", and "K" will be eliminated. In effect, there will be a surrender by the owner of the rights to nude and topless dancing, the right to operate the primary use as an entertainment facility, and the right to operate BYOB. In return, we will not require valet parking, offsite parking, private security guards in the parking lots, and will allow one new sign of ten (10) square feet on the building.

#### **Recent Agreement and Liquor License**

After a hearing and compliance with all laws, we not continue to demand and hold the license as forfeited as a result of their failure to take timely action on the license. The owner shall be permitted to reactivate the license at the place of business only. Thereafter, in accordance with the

terms of the contract, a satisfactory police background check and investigation, and a hearing on the transfer for person to person, the license can be transferred as part of the sale.

### **Property and Building Status**

By the surrender of the rights above, the property will be recognized by the Township as a pre-existing non-conforming use and non-conforming structure. The parking will revert from off-site valet to the previous seventeen (17) parking spaces on-site that existed. In effect, it will be the use, operation and conditions previously at Molfeta's.

### **Payment**

The owner shall pay to the Township the sum of twelve thousand and five hundred dollars (\$12,500.00) in consideration of the mutual covenants, promises and releases herein.

### **History and Legal Analysis**

The property in question, located at 370 Route 46, South Hackensack, New Jersey, and more commonly known as Block 1.02 at Lot 1.02 on the Tax Map of the Township of South Hackensack, is leased by Lighthouse Restaurant Services, Inc.

The property is in the "M" district mixed zone which permits "Hotels" as a permitted use (Ord. 208-8.A.1) and "Eating and Drinking Places" as a permitted use (Ord. 208-8.a.(3)) The property had previously been operated as Molfeta's, a Greek Restaurant (principal use) with provided occasional entertainment for dinners and patrons (accessory use). With that facility and operation, the use (Ord. 208-15) and building (Ord. 208-1) acquired a pre-existing nonconforming use status and nonconforming building status. This means that the operation was lawful and existing prior to the adoption or revision of any ordinances and thus may continue but not be expanded in scope of use or the footprint of the building or structure, without a variance. An accessory use (Ord. 208-10) is one which is subsidiary and ancillary to the primary use and cannot stand alone. Then and now there are but seventeen (17) parking spaces for the facility.

Had this not been a pre-existing non-conforming use and required compliance with the zoning requirements, the off-street parking required pursuant to Section 208-8.B.(1) of the Zoning Ordinances of the Township of South Hackensack is follows:

- 1 space per 2 employees
- 1 space for each room
- 1 space per 4 seats in restaurant

In November of 1972, the property was the subject of an application made by the then property owner to the Board of Adjustment. Said applicant sought approval to use the premises for the erection of a diner-restaurant and variances from the side and front yard set back requirements of the zoning ordinances. As a condition of said approval, the parking lot was to be used exclusively by the tenant of the diner-restaurant.

On November 6, 1972, variances were granted by the Board of Adjustment for the premises known as Lot 1 in Block 1B and located on Route 46 near Phillips Avenue for the erection of a "Diner-Restaurant" then owned by "New Star, Inc." and operation of two (2) businesses on one (1) lot.

Thereafter, an application was filed on or about April 2, 1991 by the then owner of Lot: 1 Block 1.02, seeking subdivision approval to divide the property into two (2) tracts in order to separate the existing uses (i.e. diner/restaurant and hotel/restaurant). As stated in the application was the fact that:

[T]he sole purpose of the subdivision is to allow the existing diner/tenant to purchase property upon which the diner was located and to continue to use the property for the diner and to continue to use the balance of the property as presently exists....

In April of 1991, the property was the subject of a minor subdivision application, with lot area variances for both lots, side yards variances for both lots and a lot width variance for the diner-restaurant lot, so that the property owner could separate the diner-restaurant use from the motel/restaurant use in order to sell the diner-restaurant property to the tenant as a new owner.

The Planning Board, in approving the minor subdivision and variance application, conditioned said approval on the continuation of the prior approval which restricted the parking of the diner-restaurant to be for the exclusive use of the patrons of the diner-restaurant and imposed a condition that no overnight parking was to be permitted. As was testified to the Board at that time, the motel-restaurant was prohibited from parking its vehicles on the parking lot for the diner-restaurant and "rely on parking attendants to park the cars elsewhere."

As a condition of said approval, the Planning Board required:

That there be made no further expansion of any of the structures or improvements that would impact on the then current and proposed nonconformity and, therefore, require further variances from the zoning ordinances.

As such, the nonconforming uses and nonconforming structures were permitted to remain but with the existing parking restrictions. Said parking restrictions and tenants obligations to seek municipal approval for additional parking were confirmed in the lease between the property owner, Bernard Properties Co., LLC and S.K.M. Corp., Inc., t/a Molfetas "46," dated August 1, 1997. Said lease describes the premises as:

A certain building consisting of dining and kitchen area, known as the restaurant building, and the adjoining parking area in front of said building consisting of 29 parking spaces;...

and specifically provides in the 41st paragraph thereof that:

Tenant shall have the right to gravel the grass area to the rear of the Congress Inn Motel and to use the same for parking of customers' vehicles, provided that such parking shall be exclusively valet parking and that customers or anyone other than those performing valet parking functions shall not be permitted in that area. Tenant shall furnish Landlord with evidence of insurance which shall include claims pertaining to such parking activities in the amount otherwise provided in Paragraph 8th above, prior to commencing such parking arrangements and shall indemnify and hold Landlord harmless from any and all claims for personal injury and property damage relating to or arising from parking of such vehicles. Tenant shall be responsible to obtain access to said area from the adjoining property owner and obtain all required municipal or other governmental approvals concerning such parking use and shall furnish Landlord with written evidence of same prior to any such creation of a parking area. (emphasis added)

The New Jersey State Legislature has delegated authority to municipalities to control the location, zone and set conditions for the operation and existence of restaurant facilities. The authority has also been conferred to license and regulate certain businesses conducted within their boundaries. N.J.S.A. 40:52-1; see *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221, 228-30 (1992). The businesses enumerated in N.J.S.A. 40:52-1 that may be subject to such licensing and regulation are ones that must "be regulated to avoid injury to the public." *Salomon v. City of Jersey City*, 12 N.J. 379, 391 (1953).

Such businesses include places of public entertainment. N.J.S.A. 40:52-1 provides in pertinent part:

The governing body may make, amend, repeal and enforce ordinances to license and regulate:

(f) Theatres, cinema and show houses, opera houses, concert halls, dance halls, pool or billiard parlors, bowling alleys, exhibition grounds, and all other places of public amusement, circuses and traveling or other shows, plays, dances, exhibitions, concerts, theatrical performances, and all street parades in connection therewith[.]

Thus, a municipality unquestionably has the authority to license and regulate a public place of entertainment. However, the issuance of a license to a regulated business does not authorize a use of land that is not permitted under the zoning ordinance. The regulation of land uses under the MLUL and the licensing and regulation of businesses under N.J.S.A. 40:52-1 constitute two separate spheres of municipal regulation. A particular use of land may be permitted only by the governing body's adoption of a zoning ordinance in accordance with the MLUL or by a board of adjustment's grant of a use variance in accordance with N.J.S.A. 40:55D-70(d). If a business enumerated in N.J.S.A. 40:52-1 is a permitted use in a zoning district, the municipality also may subject that business to licensing and regulation. But the grant of a license cannot authorize a use that is not permitted either by the zoning ordinance or a use variance. Therefore, a governing body should not issue a license for a business activity that is not permitted under the MLUL. See Koslow v. Munc. Council of Twp. of Wayne, 52 N.J. 441, 450 (1968); Cronin v. Twp. Comm. of Chesterfield Twp., 239 N.J. Super. 611, 618-19 (App. Div. 1990).

Authorization for operation of a restaurant by a license and not a zoning permit is similar to the argument the Supreme Court rejected in Town of Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980). In that case, a restaurant on the subject property was a pre-existing non-conforming use. Id. at 312. The property owner renovated the restaurant and began operating a discotheque, which resulted in the municipality where the business was located filing charges in municipal court for a violation of the zoning ordinance. Ibid. The property owner defended on the ground that the authorized use of the property for a restaurant extended to its use as a discotheque because its business operation still involved service of food to patrons. Id. at 313. In rejecting this argument, the Court stated:

[D]efendant's conversion of the premises from a restaurant to a discotheque resulted in a substantial, and therefore impermissible, change. The entire character of the business

has been altered. What was once a restaurant is now a dancehall. Measured by the zoning ordinance the general welfare of the neighborhood has been demonstrably affected adversely by the conversion of defendant's business. [Id. at 318.]

A similar decision is found in Heagen v. Borough of Allendale, 42 N.J. Super. 472, 480-83 (App. Div. 1956).

The re-affirmance, revitalization, non-abandonment and existence of the pre-existing non-conforming use as a restaurant with an accessory entertainment use, the site plan and the non-conforming structure are recognized by the parties under this agreement. N.J.S.A. 40:55D-68; Belmar v. 201 16<sup>th</sup> Avenue Belmar, 309 N.J. Super. 663, 674 (Law Div. 1997)