

August 25, 2010

A regular meeting of the Allendale Board of Adjustment was held in the Municipal Building on August 25, 2010. The meeting was called to order at 8:13 p.m. by Ms. Tengi, Chairperson, who announced that the requirements of the Open Public Meetings Act were met by the required posting and notice to publications.

The following members answered roll call: Ms. Tengi, Ms. Hart, Mr. Jones, Mr. Redling, Ms. Chamberlain and Ms. Weidner. Also present was Mr. Nestor, Board Attorney. Mr. Manning was absent.

On a motion by Ms. Tengi, seconded by Ms. Hart, the minutes of the July 28, 2010 meeting were approved as submitted. On roll call, Mr. Redling abstained. All other members present voted in favor.

Resolution of memorialization was submitted by the Board Attorney with regard to the Michael Carroll variance application. Ms. Chamberlain moved, seconded by Mr. Jones, to approve the resolution as submitted. On roll call, Mr. Redling abstained. All other members present voted in favor.

Resolution of memorialization was submitted by the Board Attorney with regard to the Michael Schmidt variance application. Ms. Chamberlain moved, seconded by Ms. Tengi, to approve the resolution as submitted. On roll call, Mr. Redling and Ms. Weidner abstained. All other members present voted in favor.

Resolution of memorialization was submitted by the Board Attorney with regard to the O'Connor and Nabbie variance application. Ms. Tengi said that in speaking with Mr. Nestor she believes prohibiting any living space on the third floor should be added to the resolution. Mr. Nestor said it was mentioned in the resolution but it was not listed as a condition of approval. The Board agreed that it should be added as a condition of approval. Mr. Jones moved, seconded by Ms. Tengi to approve the resolution as amended. On roll call, Mr. Redling abstained. All other members present voted in favor.

Continuation of David Maniaci variance application

Mr. Maniaci was sworn. Mr. Perconti appeared as attorney for applicant. He said applicant was before the Board on June 23. Subsequent to that he had submitted to Counsel a letter brief and some documentation. At the June meeting the Board heard some testimony from Mr. Evans, the architect and Mr. Maniaci. It was his understanding that this evening there would be a legal determination in regard to what he had submitted. One of the Board members had commented on whether or not there was in fact any safety hazard at that location. On July 9 he wrote to the Fire Inspector granting permission from his clients to inspect the property to determine whether or not that was a condition. He learned from Mr. Wittekind recently that a report of that nature was not prepared.

Mr. Nestor said Mr. Jones was not present at the June meeting but he has listened to the tape and signed a certification so he is willing and able to vote on the application tonight. It is his

understanding that what they are here for this evening is Mr. Maniaci's attempt to have this Board grant him a variance to allow him to maintain the third floor as a living area even though there is a resolution from 1988 that specifically says the third floor is not to be used as living space. That condition was put on a variance that allowed that building to be higher than 35 ft. He said what the Board is not being asked to do is approve whether the height of that building can stay or not. That has already been approved. The only question the Board is being asked to decide tonight is whether or not the factual circumstances that Mr. Maniaci presented at the last meeting justify the Board in granting him a variance which would remove the condition of no living space on the third floor. Another question is whether or not based on the facts heard at the last meeting the Board requires any further evidence presented by the applicant in furtherance of his application.

Mr. Nestor said as he understands the facts, Mr. Maniaci purchased the property in 2003. At that time there was rough plumbing and electric on the third floor but no one was living there. In 2003, he began to upgrade the third floor and it has since been completed without a permit. All the evidential material submitted by Counsel in connection with his brief can be relied upon by the Board unless it feels further corroboration is needed.

Mr. Jones asked whether the Certificate of Occupancy lists any restrictions or variances that are attached to any piece of property. Mr. Nestor said he does not believe it does. Mr. Jones asked what is an Affidavit of Title and would that list any variances that are connected with the property. Mr. Nestor said an Affidavit of Title is given by the seller of the property to the buyer saying that within a certain amount of time he has done nothing to inhibit the title to that property. Mr. Jones asked if a variance would normally be attached to an affidavit of title. Mr. Nestor said he does not do much real estate work but it surely could have been put in by the seller if he wanted to. Mr. Perconti disagreed and said there is case law on that subject. Mr. Jones said he has had a couple of C.O.'s and he does not remember seeing any variance attachments. Mr. Nestor said the Board is not being asked if the applicant has a basis to go after the seller.

Mr. Jones asked why no permits were obtained in 2003 for any of the work done in his home, especially when plumbing and electrical work was done. Mr. Maniaci said, "It was all there. When I said I finished it, I did the finishes. There was carpeting. I took carpeting out and put hardwood in. There was plywood. I tiled it. I installed pictures. The rough plumbing was up and capped. Everything was up and sheet-rocked. I just did the finishes. When you start the work you get the permit and this work was all in." Mr. Maniaci said he learned after the fact that the prior owner got stopped because there was an issue with the prior Building Inspector in 1988 when he built the house because he built it too high. Mr. Maniaci said he was totally unaware of all this when he bought the house. He said he lived on Schuyler and because he had four children he needed a larger house. The house was listed as having a third floor master suite. He is basically asking for permission to continue to live there.

Ms. Tengi said she has no doubt that Mr. Maniaci was misled about the use of the third floor and she is totally sympathetic. However, she is struggling with the fact that the Borough has an ordinance that is open to the public that prohibits a third floor. She also feels the applicant should have checked with the Building Department to see if a permit was needed for that

construction. Had a permit been requested the applicant would not be in this situation. She feels the applicant may have a legitimate case against the real estate agent and the seller; however, that is not the concern of the Board.

Mr. Jones asked if the certificate of occupancy or the affidavit of title lists variances attached to the property. Mr. Nestor said he would not think either one of them does but he is not sure. He said he has never seen one in a C.O. in the limited work he has done in this area. Ms. Tenghi agreed. Ms. Chamberlain commented that a title search would have revealed that those conditions existed. Mr. Nestor said there is no statutory requirement that a zoning board require the applicant to file a deed attaching such a resolution or that the resolution itself be filed. The title company searching the records would not search municipal records to see if there was a variance and he believes title insurance specifically excludes those types of resolutions and variances. Ms. Tenghi said sometimes there is a disclosure from a seller that references it and anyone who purchases property has a right to go to a town hall to look through the records.

Mr. Nestor asked if the owner has been taxed as having a finished third floor over the years. The owner said he has. Mr. Perconti said in his brief, Exhibit D was the tax card indicating the finished attic and Exhibit E is the revised, and there is handwriting by the Borough Assessor that indicated after the inspection what it should be and that was effective 1-8-10. The difference in the two tax cards is the removal of the finished attic. Mr. Perconti said the tax card is based upon square footage of which the taxes are assessed. If it is assessed as a finished room it would not say if there was a restriction. On the subsequent tax assessment card (Exhibit E) that has been corrected and this was generated as a result of the tax appeal. They had removed the fact that they had a finished attic so when Mr. Maniaci testifies that he was taxed as such, that is correct since there would not have been a restriction placed upon these tax cards.

Mr. Nestor said he is looking at a tax card that is dated 11-17-09 (Exhibit E) and he does not see anything that says finished attic. Mr. Perconti said on the bottom in the handwriting of the assessor it says that is what it should be on June of 2010. Mr. Perconti said that is the additional testimony that he would have elicited in the course of this hearing if we proceed. Ms. Tenghi said before 2010, in 2009 applicant was not being taxed for a finished third floor. Mr. Perconti said that is incorrect. He will bring in the assessor to testify.

Mr. Nestor said the proffer is that if the Tax Assessor is brought here to testify that the tax records will show that for everything that is up there on the third floor, applicant has been taxed on from 2003 until the present date. Mr. Perconti said that is correct. He would have to assume if there was rough plumbing or electric on that third floor, it certainly should have been restricted and not be used for living space. He would like to make a record for his client if this is going to be appealed so he would not ask for a vote today. He would like the opportunity to present evidence that this would not pose a safety hazard or a threat to emergency personnel.

Mr. Nestor said he believes that the tax information would be something the Board would want to look at. He added that the Aldrich case referred to by Mr. Perconti is important and is on point. He said he would like to carry the application to provide that additional information. He will also ask the Fire Inspector to testify with regard to the safety of the third floor. Mr. Jones

commented that the 1988 resolution states that the third floor is not for any residential use and will be utilized for storage only.

Ms. Chamberlain asked if Mr. Perconti is saying that since 2003 this third floor was taxed as an extra bedroom. Mr. Perconti said that is his understanding of what the assessor said. Mr. Nestor asked if anyone from the town ever went up there from 2003 until this reassessment in early 2010. Ms. Tenghi said the testimony was that the reason the tax assessor came in was because they were appealing the taxes.

Mr. Nestor said with the Board's approval and with Counsel's consent to waive any timing issue he may have with the 120 days, this will be carried until next month.

Kevin and Marie Woessner variance application – 6 George St., Block 1604, Lot 22.

Kevin Woessner and Michael Kelly from Boswell Engineering were sworn. Mr. Kelly said he is a licensed engineer in the State of New Jersey. He serves as the Municipal Engineer for the Township of Mahwah and the Village of Ridgefield Park. He also serves as the Planning and Zoning Board Engineer for those two municipalities. He serves as the Planning and Zoning Board Engineer for the Borough of Hawthorne. He serves as the special engineer for the Planning and Zoning Board in the Township of Wyckoff.

Mr. Woessner said he is present for a hardship variance for a swimming pool that is beyond the front setback.

Mr. Nestor said the plans consist of two sheets both dated 7-9-10 with a revision date of 8-3-10. (Marked Exhibit A-1).

Mr. Kelly said the Woessner property is a corner lot on the corner of George St. and Hillside Ave. It is in the A residential zone. The lot is undersized. The lot area is 17,615 sq. ft. and required area is 20,000 sq. ft. The property complies with all the other bulk requirements. The proposed pool meets the required rear yard setback and also the setback to structures. The Code requires that the pool be set back 10 ft. from any existing structures. It is 10 ft. from the house and it is also 10 ft. from the existing shed. Based on the proposed layout there is a requirement in the Code which refers to the maximum pool area in a rear yard. The maximum permitted is 50%. The way the lot is laid out the portion of the pool that is in the rear yard is only about 2.75%. In accordance with Article 270-32B of the Code it states that a swimming pool shall be constructed behind the front set back line. The front set back requirement for a dwelling is 35 ft. The pool is going to be 39 ft. from the right of way; however, it is his understanding that when you talk about setback it is behind the front façade of the building. Since this lot fronts on two streets it would be considered to have two front yards.

Mr. Nestor said looking at the drawing applicant is 39.3 ft. off the property line from Hillside and either that or more off the front property line on George St. Mr. Kelly said it is over 50 ft. from George St. Mr. Nestor said he does not see how applicant is in violation because of that. Mr. Kelly said the code does say beyond the required front setback line. It does not say beyond the front facade but that is why applicant was denied by the Zoning Official.

Mr. Kelly said it is his interpretation that what the Zoning Official is saying is that you can't have a pool beyond the front façade of the building. If this was not a corner lot the applicant would not be here.

Mr. Nestor said he needs the measurement from the top corner where the fence is located out to the property line. Mr. Kelly said it is 7 ft. Mr. Nestor said the Borough ordinance prohibits a 6 ft. fence any closer than 15 ft. from the property line. Mr. Kelly said if you measure from the road it is 22 ft. The right of way is 15 ft. in from the curb. The fence was put up 2 years ago and he received a permit for the fence. Ms. Chamberlain said the Zoning Official must have measured from the street.

Mr. Kelly said when he first looked at potential locations for the pool and when he first approached the Zoning Official and discussed locations he said a variance would be needed for it to be in the north yard. They looked at the south yard but there was not enough area there. It would be a little tight to put the pool on the east side. The other issue is there is a huge double tree and another large tree on the property and they do not want to remove those trees. The Code states that for a rear yard you can have a pool set back 10 ft. but for a side yard the pool should be set back 20 ft. They feel the fence provides a very good buffer and they wanted to be away from the neighbor's property and that is why they chose the proposed location.

Mr. Nestor asked how they propose to gain entry to build the pool. Mr. Kelly said they will come in off George St. There will be no construction vehicles accessing the property off Hillside Avenue. Mr. Nestor asked if there is any prohibition from an engineering point of view to moving the 6 ft. fence on Hillside 15 ft. off the property line. Mr. Kelly said he did not think so but from a practical standpoint it is an expense for Mr. Woessner who did get the necessary permits to install the fence.

Mr. Nestor asked Mr. Woessner about the possibility of moving the fence. Mr. Woessner said it would be an additional hardship because it would make his rear yard even smaller. There is a whole area of yard bordering Hillside Ave. that he does not get to use. He thought the fence was in compliance when it was installed. A friend of his who is a contractor installed the fence. He remembers that he had Mr. Wittekind come to the property when he was talking about what he wanted to do because at the time it was a whole master plan with the pool and the fence. He remembers Mr. Wittekind telling him to make sure he is off the corner of George and Hillside and he thought he said it was 15 ft. from the curb and they made it an even greater distance. They actually drove a car on George St. to see if there was any kind of visual obstruction for children walking to school.

Ms. Tengi asked if the permit was closed out. Mr. Woessner said he not think it was necessary for a fence and shed. Mr. Nestor asked if anyone from the town has seen the finished product. Mr. Woessner said Mr. Wittekind saw it on this proposal. Ms. Tengi said that does not mean he closed out the permit. Mr. Kelly said the right of way for Hillside Ave. is a 55 ft. right of way. Most times the right of way line is about 10 ft. back from the curb. In this case it is 15 ft. back from the curb.

Mr. Kelly said because they are creating an additional impervious area, they are going to direct that area to a below grade detention system. In addition there is a roof leader off the northeast corner that will be directed to the detention system.

The meeting was opened to the public for comments and there being none, the meeting was closed to the public.

Ms. Tengi said she is not happy about the fence but if applicant was issued a permit and it was closed, and if the Code Official made an error, that is one thing. If it has not been closed yet that is a different issue.

Mr. Jones suggested some sort of buffer between applicant's property and lot 21. Mr. Woessner said there are some large trees there for screening and he spoke to the neighbor who said all she would like to have is a gate from her yard to his yard to use the pool. Four photographs of the property were submitted and marked A-2, A-3, A-4 and A-5.

Ms. Hart asked if the Board needs to resolve the fence issue. Mr. Nestor said he believes the variance application could be amended to not only add the pool but to allow the fence and the Board's choices would be to approve, deny both or approve with the condition that the fence be moved. He added that the problem with the fence is that although the permit was issued, it was not closed out. Mr. Woessner said he got the permit for the fence and the shed at the same time. He did not think there was anything else required.

Ms. Hart asked if the applicant would still want the pool in the same area if the Board said he had to move the fence. Mr. Woessner said it is really the only spot that makes sense for the pool and it would be unfortunate if he had to lose any more of his usable yard.

Mr. Jones pointed out that the location of the fence does promote safety and the general welfare. He noticed when the fence was installed that it did provide a much larger area for students walking between the two schools. The applicant could have put a 4 ft. fence on the property line and that would not have promoted the general welfare and safety of pedestrians. Mr. Jones said he prefers having the fence off the property line.

Ms. Chamberlain said the application can be amended to include a variance for the fence. Mr. Kelly said the advertisement included the phrase "any or other variances or waivers that the Board may deem necessary."

Mr. Kelly said in addition this is a corner lot and Hillside Avenue is a heavily traveled road and the 6 ft. fence provides more privacy for his yard. Ms. Chamberlain said the fence is 7 ft. off the lot line and 22 ft. from the curb. Mr. Nestor said that can be considered but the zoning ordinance does read that the fence should be 15 ft. from the lot line. Ms. Weidner suggested putting some vegetation on the outside such as arborvitae or some sort of landscaping.

Mr. Nestor said the application will be amended to include the fence.

Mr. Jones moved that whereas by reason of the shape of this property and the fact that it is a corner lot this creates an extraordinary situation in terms of having the pool follow the specific ordinance that provides for the pool to be in the rear yard on a corner property. In this particular case the pool's best location would fall into that side yard which is predominantly the larger part of the property. He believes that the 6 ft. fence should also be approved given the fact that Hillside Avenue has been widened and it is a heavily traveled roadway, and the location of the fence promotes the general welfare and safety of pedestrians. He moved to approve with one condition that some landscaping be added on the north side of the fence along Hillside Avenue to minimize the impact of the fence. He feels that moving the fence would create an undue hardship on the property owner and he moved to approve the application as amended.

Mr. Nestor asked if there will be any timing as to when the plantings will have to be done. He asked when applicant plans to start the pool construction. Mr. Kelly said it will probably be at least a month from the date of approval and before the ground freezes. They would prefer to do it in the fall. Ms. Chamberlain suggested that the plantings should be done before completion of the pool. The motion by Mr. Jones was seconded by Ms. Hart.

On roll call, Ms. Tengi voted in favor of the pool but not the fence. Mr. Nestor said that is technically a no vote. All other Board members present voted in favor.

Ms. Tengi asked Mr. Nestor if the Fell House has to come before the Board of Adjustment in order to designate it as a historic structure. Mr. Nestor said a change in use must come to the Zoning Board and he will research the matter.

On a motion by Ms. Hart, seconded by Ms. Weidner, the meeting adjourned at 9:25 p.m.

Respectfully submitted,

Barbara Knapp