

October 27, 2010

A regular meeting of the Allendale Board of Adjustment was held in the Municipal Building on October 27, 2010. The meeting was called to order at 8:06 p.m. by Ms. Teng, 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. Teng, Ms. Chamberlain, Ms. Hart, Mr. Jones, Mr. Manning, Mr. Redling, and Ms. Weidner. Also present was Mr. Nestor, Board Attorney.

On a motion by Mr. Manning, seconded by Ms. Hart, the minutes of the meeting of September 22, 2010 were approved as submitted. On roll call, all Board members voted in favor.

Ms. Teng announced that pursuant to her conversation with Mayor Barra yesterday, that action on the resolution of memorialization of Allendale Housing, Inc. as well as the Allendale Housing, Inc. site plan application will be carried to the November meeting. They are in the process of finalizing some revisions to the site plan to accommodate the requests that were made by the public and the Board and their attorney's office has agreed to carry both items.

Nathaniel Weinberger variance application – 17 Knollton Rd., Block 507, Lot 8
Nathaniel and Julia Weinberger were sworn.

Mr. Nestor asked if the plans before the Board have been submitted to either John Wittekind or John Yakimik. Mr. Weinberger said they were. They are the same plans submitted in 2009 but the date was changed. He said the plans before the Board were seen by them in March of this year when he went to get his permits.

Mr. Nestor said the applicant's last application was before the Board in March of 2009. The problem he is having is that generally under our Code someone has to look at this plan and advise this Board what, if any variances are required and the Board does not have that. When applicant was before the Board in 2009 these plans were not in front of the Board. Mr. Weinberger said they were not but the only thing different on this plan is the sloped roof and the clipped back of the house which he agreed to and the cantilever which he thought was agreed to. The plans were revised based on his last variance.

Mr. Manning asked if applicant has a letter from John Wittekind saying his application was denied. Mr. Weinberger said he asked him yesterday for a denial and Mr. Wittekind said no denial letter was necessary. He said as far as he is concerned, he held up the resolution that has expired and the resolution has to be renewed or altered. Ms. Weinberger said that Mr. Wittekind advised that everything is going to be okay and the language in the resolution was going to be changed according to the one issue he had with the difference between the plans and what was not in the resolution.

Mr. Nestor said it appears that the plan now before the Board was revised after the original variance was issued. The problem he is having is that if we go back to the old resolution, this Board did not have this plan in front of it and has only the applicant's word that Mr. Wittekind

saw this plan. He added that he talked to Mr. Wittekind today who told him that he thought the Board could just extend the other resolution and that was what this meeting was all about. Mr. Nestor said the problem is that the Board cannot do that without a denial letter from Mr. Wittekind regarding these revised plans.

Mr. Weinberger said this matter has dragged on for quite a while. The delay has cost him quite a bit of money, stress and aggravation. Ms. Tengi said she does not believe the Borough engineer has seen these revised plans or at least has not commented on any deficiencies or requirements.

Mr. Weinberger said these plans were given to the engineer last March of 2010. The engineer saw them and said he needed a runoff report which was given to him two days later and then he said his problem was with cantilevering the second floor. It is 9-3/4 ft. off the property line and since there is no mention of a cantilever in the resolution it can't be granted. Mr. Weinberger said he has the discussion of the cantilever on a CD.

Mr. Nestor said Mr. Weinberger is correct. The engineer did see the plans back in April 2009 and issued a letter that was circulated, but by the time everything came to a head before the Board the year had already expired. He said he and the Board would like to know if the plans before him are the plans that John Wittekind has looked at and that John Yakimik can say he has looked at as well – that this is the plan that they saw back in whatever the day that the letter was issued and is now changed or altered in this regard --. He added that when the Board has that information he believes everyone on the Board will be in a position to render an approval or denial on the application. He suggested that we get Mr. Wittekind and Mr. Yakimik on board and advised Mr. Weinberger that he will not have to give notice again. The matter will be heard at the November hearing and it will be decided and over.

Mr. Jones said he believes Mr. Wittekind is viewing this as the Board's action to extend the original approval and that it is his position that he wants to extend that original denial and these are the revised plans. It sounds like he is expecting the Board to extend the one year and just review the plans again, fine tuning the original resolution as if the year has not expired.

Mr. Nestor said he believes that was his understanding when he spoke with Mr. Wittekind today – that we would simply extend that prior variance even though there is some confusion as to what is the proper language that should be in the resolution. Mr. Nestor said he told Mr. Wittekind that the previous resolution has expired. Now the problem is how do we move forward. Do we look at the old plans and have a hearing now based on the old plans or do we look at the new revised plans and have Mr. Wittekind and Mr. Yakimik review them and give us the denial letter and then we move forward. Mr. Nestor said he believes that is how we should proceed. He said the Board has Mr. Wittekind's old letter and the new plans before it. He is leery of moving forward without hearing from Mr. Wittekind and Mr. Yakimik with regard to the new plans.

Mr. Jones said he is interpreting this as a brand new application. The applicant re-noticed and did everything he was supposed to do but the Board does not have a denial letter. Mr. Nestor said he is trying to move forward on this as quickly as possible to make sure the applicant is protected and the Board is protected. He will talk to Mr. Wittekind and Mr. Yakimik about

providing what the Board feels it needs for the next meeting to finalize this. He does not believe it is in anyone's best interest to move forward tonight.

Ms. Hart asked what the procedure is if somebody goes beyond one year. Mr. Nestor said they would resubmit and start the whole process again. He added that he will talk to Mr. Wittekind and Mr. Yakimik before the next meeting in order to have the plans that the Board needs to look at so everybody knows what is going on and to make sure Mr. Wittekind has copies of both the old and new plan so he can review the plans in detail. He said the Board needs him to verify that the plans are the same

Mr. Weinberger said his resolution was memorialized April 22, 2009 and he started the permit process 45-50 days before April 22, 2010. His plan was to start building in May or June.

Mr. Jones said his position is that this is a new application and that is why the applicant has to go through the whole process again. The Board cannot look at this as a 2009 application with an extension and therefore it should have the denial letter citing the deficiencies.

Mr. Nestor said he will speak to Mr. Wittekind and Mr. Yakimik about this matter so the Board has everything in order for next month. He advised Mr. Weinberger to contact him a week or 10 days prior to the next meeting which is scheduled for November 17 to make sure everything is in order. He advised Mr. Weinberger that his previous resolution has expired and is no longer effective and this will be a new application.

Kristen and Brian Boyle variance application – 81 Bonnie Way, Block 303, Lot 4

Colin Quinn was present at attorney for applicants. Also present was Mary Scro, registered architect in the State of New Jersey who has testified before the Board previously and has been accepted as an expert witness.

Mr. Quinn said proofs of mailing were submitted previously. Denial letter dated September 7, 2010 from John Wittekind was marked Exhibit A-1. Application was marked A-2. Survey dated 12/1/05 was marked A-3. Proposed survey was marked A-4. Conceptual plans consisting of 6 pages prepared by Z+ architects was marked A-5. Photographs were marked A-6. Section of tax map showing contiguous properties was marked A-7. Ms. Tengi said she drove by the property today and observed that there is quite a bit of vegetation and tree growth around the house and property.

Mr. Quinn said applicant is seeking four separate variances. Some are for pre-existing non-conforming conditions that exist on the property. There is a front yard setback requirement of 50 ft. This property has 49.8. There is a left side yard requirement of 35.2 ft. The pre-existing setback is 29.8. The proposed construction does not indicate any change to that side yard. There is a minimum lot area requirement of 40,000 s.f. and this property has 31,393 s.f. There is a minimum side yard setback of 35.2 ft. on the right side and there will be an infringement of 3.94 ft. The proposed setback on that side will be 31.26 ft. The applicant is requesting under C2 of the Land use Law that the setback request be considered under that section of the MLUL. Applicant's position is that this particular application will further the intent of the MLUL as adopted by the Municipal master plan and it will substantially outweigh any detriment or

impingement on the ordinance and there is nothing that will be detrimental to the neighborhood or the public.

Ms. Scro said the entire addition is going out the rear except they are adding a front porch. The front porch will be stepped in so the new front porch will be at 50 ft. In the back they are expanding the existing kitchen, expanding the mudroom/laundry room area creating a full mudroom area and a pantry, adding on a new breakfast room and a sunroom. They will be relocating the existing deck pushing it back into the yard. They are keeping within the existing width of the residence. They are not going beyond except for the one side yard on the garage side where they will have a deck. There is a side stoop going up to the existing side door. Page 4 of the photographs shows the side stoop coming up from the driveway to that side door. The dimension to the existing side stoop is 32 ft. It is a very narrow stoop and it is hard to open the door to get in so the new deck that is proposed is 3 ½ ft. wide so there is still room for the railing and there is room to open the door. On the second floor above the garage they are going to add a bonus room for the children. There will be a playroom as well as a bathroom.

Ms. Scro said the existing front of the house will stay the same and the addition will be out the back and the entire exterior will be renovated.

Ms. Tengi asked if the increased square footage added to the home will increase the side yard setback requirements. Ms. Scro said it will. She said the side yard setbacks are in keeping with the neighborhood. All of the homes on that side of the street have their driveways on the right and a wider setback on that side and a smaller setback on the left side of the house. The neighbor to the north has a 24 ft. setback and there are adjacent homes that have smaller side yard setbacks than what applicant is proposing. The photos show that there is existing vegetation between the homes.

Ms. Scro said the proposed project will not compromise or invade the privacy or safety of the surrounding neighbors and she believes the front porch will add to the appeal from the street and it adds to safety. It is in keeping with the scale and the aesthetics of the adjacent homes. The FAR is still well below what they are allowed which is 20.7% and they are at 14%. Ms. Scro said to the residence to the north it is 59 ft. between the houses and to the south it is 65 ft. between the residences. She believes this application suits and furthers the goals and objectives of the master plan and zoning ordinances of the Borough.

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

Mr. Nestor said applicant is seeking a C2 variance which is not a hardship variance but what they have to do is show that what they are doing advances the purposes of the Municipal Land Use Act. It can't be just for the benefit of the home. It also has to enhance the neighborhood. He asked in what way does it do that to satisfy the C2 request. Mr. Quinn said the specific section of the MLUL, NJSA 40:55-2 Subsection I indicates that one of the goals is to promote a desirable visual environment through creative development techniques and good civic design and arrangement and this type of project accomplishes that goal. He cited a case where a side yard variance was appropriate under this section of the MLUL.

Ms. Scro said the design of this plan creates a cohesive whole for the residence. The entire residence will be updated. The placement of the addition will not be obvious. She believes this is the best plan to provide an updated aesthetically pleasing residence for this neighborhood. She does not see any substantial detriment to the public good as a result of the proposal and it will not impair the intent of the zone plan or zoning ordinance.

Mr. Jones asked if the applicant has discussed any kind of additional screening. One of the plans shows low Chinese yew bushes on the right side that seem to be about 5 ft. tall. As the mass of the house goes up on that side over the existing structure of the existing garage he suggested adding some screening such as one or two deciduous trees. Mr. Quinn said that is an excellent suggestion. It will provide privacy and a demarcation from two separate living spaces. He said the applicants are amenable to the suggestion and it suits their purposes. Ms. Scro suggested that mid-garage they might take one or two shrubs out and put in a deciduous tree and at the end of the shrubs put a second tree.

Ms. Hart moved to approve the application. She believes it will improve and enhance the neighborhood. She said most of the variances sought are not changing – the front yard, the lot area and the side yard setback. She likes the fact that they are stepping back the parts they are adding, especially for the front, so there is not a major change to the house, and if anything, they are adding more character to the front portion and the roof line of the garage. She does not find any substantial detriment to the zone plan or the zoning ordinance. Mr. Jones seconded the motion and said the application will advance the zoning ordinances and the benefits of this minor deviation outweigh any detriments. He said the applicant has agreed to place one or two appropriate sized deciduous trees for screening between the two structures on the side most affected by this application. He added that the purposes of the Municipal Land Use Law have been advanced by this application.

On roll call, Mr. Redling voted no. All other Board members voted in favor.

Continuation of David Maniaci variance application

Joseph Perconti was present as attorney for applicant. He said this matter was heard at the September 21st meeting. Prior to that he placed some testimony on the record from Mr. Evans, an architect, to explain what was existing. He believes at some time there may have been a misinterpretation that Mr. Maniaci had intentionally done something disregarding the resolution. Subsequent to that he had filed a letter brief with the Board citing the Aldrich case. Mr. Perconti said he spoke with Ms. Mattiace, the Borough Tax Assessor, and he had proposed to the Board after the 21st meeting in a letter dated September 29 in the hope of reaching an amicable resolution, that Mr. Maniaci would bring taxes current to any assessment for that particular room or master bedroom, and agree to all of the other terms and conditions that existed in the resolution. He said that has been presented to Mr. Nestor as well as Mr. Wittekind. He said he would argue that the Aldrich case does give collectively some room to apply the reasoning for keeping Mr. Maniaci's master bedroom, bringing those taxes current, working with Mr. Wittekind to insure that any safety concerns, sprinkler systems or anything of that nature might be a possible way to resolve the case.

Mr. Nestor summarized that the Board members heard testimony from Mr. Maniaci previously and he believes his testimony was that he was unaware, either having been misled or not, about the feasibility of using the third floor as living space. The building had been approved in the prior resolution to be the height that it is at. No matter what the board does today or in the future that is not going to change. The height is going to stay the same. The only issue is whether he can live up there and maintain that space. In 2003 he believes the testimony was that he built it without permits. From 2003 to the current date he believes Mr. Maniaci has not been taxed on that property as it has been built. He feels sure he was taxed as a 3 story structure but not with living quarters on the third floor.

Mr. Nestor said the Board has the alternative of denying the application and simply letting Mr. Maniaci go forward with the enforcement officer. Another choice would be to try to resolve this matter. Counsel has indicated that there is a case called Aldrich and there is some leeway because it indicates that the Board should look with sympathy at the entire situation in this case. The Board on the other hand could take Mr. Maniaci's testimony and say to continue to live up there. Counsel's letter on which he was copied does say there was an agreement to have a retroactive tax adjustment of \$22,506.26. He added that if that is the way the Board wants to go it probably should consider other items as well. He has spoken to Mr. Wittekind about this and presently there is a concern that the third floor may not be up to code, especially since the work was done by the applicant himself and there are no permits. The Board does not know whether it complied with the code in 2003. It was Mr. Wittekind's suggestion that Mr. Maniaci would have to comply with all the requirements of the code but right now we don't know what code it would be and right now we don't know if it is compliant at all. He said there would have to be compliance to bring it up to code especially for safety reasons. He does not know if it will have to be sprinklered. He does not know what the requirements are but he would think as part of the settlement the Board might want to consider that it be brought up to code.

Mr. Nestor said the Board also has to have some kind of time line to require that this does not get out of hand. It was Mr. Wittekind's suggestion that approximately 6 months would be sufficient time to have it inspected and brought up to code. He suggested that if the Board is willing to think about settling the matter that we use that 6 month time frame for bringing it up to code. The Board can also decide if the payment of the back taxes is to come immediately and to be refunded if after 6 months it is not brought up to code. Then the applicant will be back before the Board or the Board can simply deny the application if in 6 months it is not brought up to code. He said he would suspect that part of the agreement to resolve the matter would be that there be no appeal from this proceeding and he does know that there is another proceeding in the County regarding the permit situation. He does not know that the Board has any right to impede on that but he thinks the Board should consider something along the line that we make no determination of how the resolution of this case would affect that County proceeding.

Mr. Perconti said applicant would agree to bring everything to current code and they agree to the time line. Mr. Maniaci will post the \$22,506.26 and it will be held in escrow pending completion of the work within 6 months.

Mr. Perconti said the back taxes will be posted in 30 days. Mr. Manning asked what work will have to be done to bring it up to code. Mr. Nestor said he does not know what is there. The

architect or the subcode official for plumbing and electrical would have to look at it. Mr. Perconti said applicant will do whatever is necessary. On the third floor there is just the master bedroom, bathroom and 2 closets. The bathroom has a tub, shower and toilet. There is no exterior exit from the 3rd floor and there is no sprinkler system.

Mr. Perconti said he assumes that some day Mr. Maniaci may want to sell his house and he wants to be in compliance. If there is no code that exists in Allendale for the 3rd floor, there are certainly State codes with regard to firematics and emergency type personnel. In conjunction with whatever Mr. Wittekind would present, applicant would agree to comply with those State codes as well.

Mr. Nestor said he assumes that bringing it up to code means the applicant would obtain a C.O. for the third floor. If it cannot be issued applicant will be back before the Board in 6 months.

Mr. Jones said this Board has the ability or power to deny an application but he could not find anywhere how it can enforce collection of taxes, code official approval or a C.O. and he assumes we are talking about 2010 codes and not 2003 codes. He also questioned where the amount of \$22,506 came from. Mr. Nestor said it came from the Tax Assessor and it was for taxes from 2004 through 2010.

Mr. Perconti said the jurisdiction for the variance lies with this Board. It can make very specific findings. He believes there are very substantial facts to this case that would not apply to anybody else who came here. In addition, part of the zoning criteria provides that taxes need to be paid. He does not think the Board is overstepping its bounds.

Mr. Nestor said the Board can condition the granting of the variance subject to the conditions as agreed upon and if they are not met within a specified period of time the variance is denied. If the variance is denied, applicant is in the same position as he is in right now.

Mr. Redling asked if the Board should be hearing this because he is in arrears in taxes. Mr. Nestor said he has had this bedroom upstairs and he has not been taxed appropriately. Mr. Nestor said the application as it originally came in indicated that the applicant was duped; that he was innocent and cannot be held accountable. Mr. Redling said he believes this was a self imposed hardship. He might have been "buyer beware" in the beginning but when he finished the room without permits he caused his own hardship. This whole thing started when he went for a tax appeal because his taxes were too high. Now he is going to have to pay more taxes to be able to stay there. He is concerned about the precedent that says you can build it and if you are found out and pay your back taxes you will be okay.

Ms. Tengi said she agrees with Mr. Redling in many ways. She is not sure that the case cited by Counsel is on point. She believes that applicant was misled about potentially expanding the third floor when he purchased the property. She does believe the applicant should have been on notice since 2003 when he should have gotten a permit. However, what is the solution? If the Board denies the application, what kind of position does this leave the applicant in? As a Board member she believes it is necessary to think of different alternatives for our residents to benefit not only the community but to benefit their living environment. She believes that every

applicant that comes before the Board has a unique situation. She does not believe a precedent is set in any variance that the Board grants or denies, but she does think the Board has to look for some kind of solution. If the Board denies the applicant, is it going to require him to rip down that third floor or are we going to let it go and then not give him a C.O. Ms. Tenghi said there are safety issues with the third floor living space so she would not want to see the Board grant it without some limitations and some conditions. She said the Board is here for the community and the people in the community as well. She believes we need to come up with a solution that benefits both.

Mr. Nestor said the Board can do a number of things. They can grant the variance with the condition that he is allowed to keep the third floor in the manner that it presently exists as long as he pays the taxes and satisfies the Code Official within 6 months and gets that C.O. within 6 months. If that does not happen the application is denied. Mr. Redling suggested adding the wording to be in compliance with the County and State requirements. Mr. Nestor agreed and added that he does not believe the applicant can get a C.O. if he does not comply with all of the State requirements as well. According to Mr. Wittekind, it is necessary to satisfy the Uniform Construction Code in the State of New Jersey.

Mr. Redling asked if there would be County requirements for third floors since he is sure there are towns within the County that allow third floors.

Ms. Chamberlain said she agrees with Mr. Redling's point that this is a self imposed hardship because he did not get the permits as required back in 2003. She does believe the town benefits by coming to some resolution and allowing the use of the third floor as a bedroom. She was present when the original resolution was approved and the Board said the construction could stand but the third floor can't be used as living space. She knows people do things without getting permits and this was a major renovation on the third floor but she believes it would serve the Board well to be pragmatic and agree to the variance with conditions.

Ms. Weidner asked if there should be some kind of penalties for not having a permit. Mr. Perconti said an enforcement violation has been served on Mr. Maniaci that is currently pending before the County.

Mr. Perconti said the applicant filed a tax appeal. When the Tax Assessor went in to evaluate the square footage of the property they found there was not a match. Mr. Maniaci contacted Mr. Wittekind who said to come down and file for a permit. The permit as it was applied for was to construct and it was an effort to bring what is already existing into compliance.

Ms. Tenghi said she is in favor of a compromise to work something out. Mr. Jones said he is also in favor of finding a solution. He agrees this was self-inflicted but the applicant has done everything he can to mitigate any kind of problem that could be foreseen.

Mr. Jones moved to approve the use of the third floor bedroom and bathroom pursuant to the stipulations of the Board. Ms. Chamberlain seconded the motion and added that all Municipal and State regulations must be complied with in regard to both the building and safety issues.

Mr. Nestor said Municipal, County and State safety rules, regulations and codes must be complied with in order to bring about the granting of a Certificate of Occupancy.

Ms. Tengi said this is a unique situation and the decision rendered by this Board is particular to this application only.

Mr. Perconti said he will draft a resolution and send it to the Board because applicant has to agree that there are prior conditions that he is willing to agree to and pass along to future buyers. He will re-record the deed with all of the exceptions made a part and parcel.

On roll call, Mr. Redling voted no. All other Board members voted in favor.

On a motion by Mr. Manning, seconded by Ms. Tengi, the meeting adjourned at 10:10 p.m.

Respectfully submitted,

Barbara Knapp