

**Nutley Board of Adjustment**  
**May 18, 2009**  
**Meeting Minutes – Public Session**

**CALL TO ORDER:** A meeting of the Nutley Zoning Board of Adjustment was called to order at 7:42:24 p.m. by Chairman Scrudato. The Pledge of Allegiance was recited. Roll was called and the “Sunshine Act” notice was read.

**PRESENT:** Robert Beck, Suzanne Brown, Thomas DaCosta Lobo, John Halligan, Ralph Pastore, Michael Naughton, Thomas O’Brien, Paul Scrudato, Chairman and Diana McGovern, Board Attorney

**ABSENT/EXCUSED:** Frank Graziano, Diana Petolino

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**No. 1 APPROVED 7-1**

**Applicant:** 57 East Centre Street

**Application:** Request for an extension for one year from August 31, 2009 to August 31, 2010.

**Appearances:** Thomas DiBiasi, Esq.

Before Mr. DiBiasi addressed the members, Mr. Scrudato advised him that this board could or could not rule on any request he may have unless he noticed the people within 200 feet. Mr. DiBiasi said he believes for the kind of relief he is requesting, notice is not necessary. He noted that he is doing what he has done for the last several years – asking the Board to, as a courtesy, issue a resolution extending the land use permits that the Board has now extended by resolution to August 31, 2009. The lender, Palisades Financial, understands the governor’s signature and the legislation, but still wants that annual document, until this closes from the Board for their checklist. He fund in this economic time, rather than fighting with the lender, he would rather do what the lender wants him to do, even though he has argued that it is irrelevant, with the government’s legislation. He is here this evening to see if the Board would grant another one-year extension from August 31, 2009 to 2010. He reminded the board that last year he brought to scientists to testify that the cleanup has been on-going since the year 2000. The Board gave final site plan approval in 2003. It was noted that as of last year, Benjamin Moore (the responsible party for the clean up) spent just under \$1,000,000.00. Last year the experts were optimistic that they would be in the ground by now; their optimism was misplaced. Additional water samples were taken each quarter. Last quarter showed a little spike in one of the underground areas that is of concern. They can’t seem to get the levels down to an acceptable level for ground water. The DEP has been informed that they will not drill wells, they are not looking for drinking water. The DEP will not cap the site or put a deed restriction on. DEP is not prepared to do that now. Benjamin Moore has agreed to expend another \$210,000 for objecting a compound with DEP believes will finally break up the pool and get whatever underground water is there to acceptable levels. DEP said if this doesn’t work, they then would consider the tradition method of capping the site and put a deed restriction on stating that the water would not be used for drinking.

The Township of Nutley has cooperated and has given the applicant a letter telling the DEP that Nutley does have city water and that it would be servicing this property. Assemblyman Fred

Scalara has been cooperating also, by making sure that when the tests get to the DEP, they are looked at in a timely fashion.

Mr. Naughton asked how much longer for the PILOT program to run its course; how much more time of monitoring required until the DEP says whether or not the applicant needs to go with capping. Mr. DiBiasi said there will be two injections – one to start any day (\$105,000); the after 30 - 45 days the second will take place. Three months later will be that start of at least four quarterly tests.

Mr. Scudato said he understands that in many cases the cleanup process, the last two percent of the cleanup would cost more than the previous 98%. It can sometimes be longer and is more difficult than the previous 98%. He reminded Mr. DiBiasi that he testified that no one is going to drink the water. Chairman Scudato said that it is not uncommon to have wells drilled for irrigation to water lawns. He doesn't know what the impact will be. He asked Mr. DiBiasi if there was correspondence from the DEP that could be made a part of the record. Mr. DiBiasi said he would get the latest test results. There is no formal document. Decisions to go ahead were made orally.

The Chairman noted that the neighbors within 200 feet had not been notified of tonight's meeting to continue this application for another year from August. Ms. McGovern said this application has been extended from year to year since 2003 (the beginning of 2004) without notice. It has always been based on the statute 40:55(d)-21 tolls the time period. Nutley's ordinance requires that a variance be acted on, once approved by the Board of Adjustment within one year. As an operation of law, that time is tolled, if there is a legal action instituted, a directive or an order issued by a state agency (the DEP). This Board has extended the time each year. Last was different. The Governor was ready to, and did, sign a statute that was going to make coming back before this Board for an extension, unnecessary. Mr. DiBiasi concurred. Ms. McGovern said that Mr. DiBiasi is just being overly cautious. Again he agreed, but noted that he has a lender who is mandating that this be done.

Ms. Brown stated that she would prefer that the extension period begin a year from today, rather than from August.

Mr. Halligan said it sounds like the final testing will be beyond that August date – maybe a year and a half; 21 months. Mr. DiBiasi said Mr. Halligan is correct. Mr. Halligan said considering all things, he was going to suggest extending it for two years. Ms. McGovern said there are two things working against that – Nutley's ordinance says one year (the statute can supersede anything the ordinance says); and Mr. DiBiasi requested a one-year extension of time. Mr. DiBiasi said they are comfortable with a one-year extension. He did ask Ms. Brown if she would reconsider her stand on running the extension from this day. Ms. Brown stood her ground.

With no further questions from the Board members and no one else in the audience having questions or comments, Ms. Brown made a motion to approve the application for an extension of time stating that the time starts as of this date; seconded by Mr. Beck. Approved 7-0.

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In the matter of application (Franklin Theater), the Chairman said it has been about six months since an agreement was reached by the parties. It is sitting in the courts waiting for action by someone. Mr. DiBiasi said he had conflicts with other matters and was unable to put this on the calendar. It is on the calendar for the June meeting including notifications. Mr. Marino will be in attendance. The chairman said if not, then he will ask this Board to consider dismissal for lack of prosecution. Mr. DiBiasi said that the agreement has been fully executed.

Mr. Beck reminded Mr. DiBiasi that he should provide the Ms. McGovern with a copy of the proposed deed so she may review it before the next hearing.

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**No. 2 - KERWICK Approved 6-1**

**Applicant:** Ms. Brooke Kerwick, 408 Walnut Street, Block 1601, Lot 12, Zone R-1

**Application:** to erect a six-foot solid-type fence along the side lot line of a corner property.

**Appearances:** Brooke and Jeffrey Kerwick (sworn)

**Letter of denial** was read by Mr. DaCosta Lobo. Codes of Nutley prohibits any front yard fences; states that a corner property has two front yards.

The Kerwicks live on the corner of a very busy intersection. They have a 16-month old daughter and a Labrador retriever. They would like to install a fence for their protection. A lower fence would not keep the dog inside the yard; she could very easily hurdle a three-footer. Ms. Brown asked Ms. Kerwick if she would consider a five foot fence -four foot solid with a one-foot lattice. Ms. Kerwick said she absolutely would.

The Chairman stated that the Board has to look at the hardship to the property and not to the individuals or property owners. He agreed that the hardship in this case would be that this is a corner lot. The proposed fence would be the front yard area of the neighbor who wrote a letter to the Board. He noted that there are no other fences on Roosevelt and certainly not on any corners. The neighbor did not have a problem with the fence, but the chairman said that a hundred years from now, when the neighbor has moved out, that fence will still be permitted to be there. He is having difficulty with that. He said the couple's daughter will grow and probably be taken to one of the many beautiful parks in Nutley.

The chairman asked if the Kerwicks would consider moving the fence back some to get it off the front yard of the next-door neighbor. Ms. Kerwick said there is not that much space now - only about 25 feet. Mr. Scudato the fence would be 10 feet from the property line and 10 feet from the neighbor's front property line. The fence has a right to be there forever once a variance is granted.

Mr. DaCostaLobo noted that they are talking about a 10-foot setback, as proposed, from Roosevelt. He thinks the sidewalk ends at the neighbor's house. Ms. Kerwick said that was correct. There is no sidewalk in front of the fence to landscape. Ms. Kerwick said that she was planning to do that. Ms. Brown asked Ms. Kerwick if she was considering landscaping as part of the project, on the street side as well as in the inside. Ms. Kerwick replied, "absolutely." The plantings would be at the 10-foot line.

The Chairman said to the edge of the home, there is 8.36 feet; would the applicants consider moving it back any of that. Ms. Kerwick said, obviously they would prefer not to, but if that's the only way to get a fence . . .

Mr. Naughton said when he first looked at the application, he wondered how the solid six-foot fence would look. He said the fact that the applicants didn't propose to put the fence on the property line, made him think they were considerate of the statues. He thinks a hedgerow will soften the appearance of the fence. He noted that he appreciates their consideration. He further stated that it is his opinion that 10 feet would be adequate and still be able to accommodate plantings.

Mr. Halligan agreed with Mr. Naughton to leave it where it is. The chain link fence belongs to the neighbor and that is staying.

With no further questions from the Board members and no comments from anyone in the audience, Ms. Brown made a motion to approve the variance with these conditions: a five-foot total height (four-foot solid/one-foot lattice); landscaping on the street side. This is a corner property with two front yards. Seconded by Mr. Beck. The variance was approved by a vote of 6-1. Chairman Scrudato voted against the application.

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**BUSINESS: None**

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**MEMORIALIZATIONS/MINUTES:** 18 Entwistle Avenue; 138 Spatz Avenue; 199-205 Franklin Avenue; 147 Prospect Street; 31 Race Street. Approved.

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**LITIGATION:** The Board went into closed session to discuss matters in litigation.

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**ADJOURNMENT:** Public session adjourned at 8:17 p.m.

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Respectfully submitted,

*Marie L. Goworek*

Recording Secretary - ZBA