

Nutley Board of Adjustment
January 26, 2009
Meeting Minutes – Public Session

CALL TO ORDER: A meeting of the Nutley Zoning Board of Adjustment was called to order at 7:40:25 by Chairman Scudato. The Pledge of Allegiance was recited. Roll was called and the “Sunshine Act” notice was read.

PRESENT: Robert Beck, Suzanne Brown, John Halligan, Michael Naughton, Diana Petolino, Paul Scudato, Chairman and Diana McGovern, Board Attorney

ABSENT/EXCUSED: Thomas DaCosta Lobo, Frank Graziano, Ralph Pastore.

REORGANIZATION: The Chairman asked the members to approve the reappointment of Diana McGovern as Board Attorney for the year 2009.

Mr. Beck nominated Chairman Scudato for the Chair position; Mr. Graziano as Vice-chair; and Mr. DaCostaLobo as Secretary. All approved.

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No. 1 7:49:05 – SILAPASWANG Approved 3-2; 1 abstention

Applicant: Mr. & Mrs. Saksid Silapaswang, 118 Lakeside Drive, Block 1803, Lot 14, Zone R-1

Application: Request to erect a six-foot fence along the rear property line.

Appearances: Mr. Silapaswang and Annette Liotti, 31 Cleveland (sworn)

Exhibits: A-1 (photoboard)

Letter of denial was read by Mr. Halligan. Codes of Nutley requires a written letter of consent from the adjoining property owners for a solid fence in the rear yard.

Mr. Silapaswang said that when he applied for this fence originally, it would have been eight feet high on his side and 6 feet on the neighbor’s side. He said it was turned down. He is applying for the fence because his neighbor sprays his plants. He had no alternative but to erect a fence to prevent this from happening anymore.

He referred to the second paragraph of Chapter 240, Article Eight, etc., “ . . . Nutley regulates fences in the rear yard to a maximum height of six feet. A solid type fence requires the written consent of the adjoining property owner or owners.” He said he knew there was no way he would get consent from his neighbor. He presented the Board with a letter in which he was denied the fence. It wasn’t until much later that he went ahead and erected because he was being harassed by his neighbor (the killing of his plants). His neighbor’s yard is also an eyesore. He presented and explained photos which were marked into the record. They were views from the applicant’s backyard into the neighbor’s.

Chairman Scudato asked if the cyclone fence is still in place. It is and it belongs to the neighbor. He has reason to believe that his Japanese maple tree was sprayed with chemicals.

For purposes of the record, Ms. McGovern said the photos to the left of the middle row of photographs shows the chain link fence, which is white and the damaged tree. The leaves fell off and the branch is dead.

The Chairman wanted the applicant to know that this Board does not have jurisdiction over the spraying of the tree. That may be a criminal action, but it is not for this Board to determine. With regard to the debris by the fence – that is something for the Building Dept. to follow up on, if a complaint is made. This Board would have to look at and find a hardship to the applicant's property, not the foliage – a physical problem with the geography. He said the presentation Mr. Silapaswang is making is possibly for someone else to be looking into – not this Board.

He did go to the police, the police investigated and were advised by the neighbor that there is no problem. He has no one to turn to, he has nobody. He and his wife work hard during the day; his property is left vulnerable. The Chairman asked Mr. Silapaswang if he's consulted an attorney. Mr. Silapaswang said that will be his last resort.

The Chairman said the only thing this Board can address is the fence.

Mr. Silapaswang said he can't take it anymore. He's lost another small tree and other plants along that fence. He planted them to obscure the view of the other yard. This fence is important to the applicants. This is their sanctuary. To have someone kill his plants and his trees, it's wrong.

The Chairman said this may be true, but there is no way this Board could address that or verify that. The Chairman said there is an ordinance in the town about fences. He said the applicant had the good side to his own property. Mr. Silapaswang he wanted to make it look the same on both sides. He wants to hide the electrical wiring. He told the Chairman that the fence is eight feet high on his side and six feet on the neighbor's. The Chairman said maximum height allowed is six feet -- if allowed. The fence sits on a two-foot high wall or flower bed. Mr. Tunnell told Mr. Silapaswang that he was satisfied that the height of the fence was six feet. The Chairman disagreed. Mr. Silapaswang asked if there was some compromise that could be reached between him and the Board. The Chairman said the Board would have to listen to the rest of the testimony.

Mr. Silapaswang said he loves his plants and flowers; he planted everything himself. The Chairman suggested the applicant reach out to the town forester and get his opinion as to what is happening to the trees and plants. If there has been foul play, maybe he can identify the spray. The Chairman said he would be happy to reach out to him himself. Maybe the applicant planted these things in the wrong spot, but he doesn't know.

Mr. Silapaswang said he is not going to wait for this to happen again.

Mr. Halligan asked how tall the physical fence is. It is six feet high. The fence has been there for about 2½ months. He's lived in the house for about 26 years. Mr. Halligan said he is trying to illustrate the reasoning for the fence – although he appreciates that it is not a hardship to the property. How long has he been dealing with the rear neighbor? About 15 years. Mr. Halligan asked Mr. Silapaswang if he feels he's made attempts to rectify the situation? Mr. Silapaswang said there is no way he and his neighbor can rectify this. He did try to no avail. Mr. Halligan asked if any other neighbors complained about the fence? No.

The Chairman asked if anyone wanted to be heard either in favor of or against the fence. Ms. Liotti approached the podium. Ms. Liotti said the fence that Mr. Silapaswang is talking about is

not six feet; it's about 10 or 11 feet tall. The good side facing the applicant's house. The Chairman said the members have viewed the fence. Ms. Liotti said, "hmm." She claimed that Mr. Silapaswang testimony that the plants and trees were sprayed or had anything thrown on them. There is aluminum siding placed neatly in the back of her yard. There is no mess.

The Chairman said there is an ordinance in Nutley saying that property owners must maintain their property in a reasonably decent fashion. Mr. Scudato was at the front of Ms. Liotti's property, but did not go in the back. He said the front and side of the property is maintained under those conditions.

Mr. Silapaswang made one final plea to the members to approve this fence.

With no further questions from the Board members and no one in the audience to speak either for or against the application, Chairman Scudato asked for a motion. Mr. Halligan made a motion to approve this application (leave as erect) stating the he does not feel the fence is a detriment to the property; it is an attractive fence and the physical fence itself is six feet. Ms. Brown seconded the motion. The variance was approved by a vote of 3-2. Mr. Naughton and Chairman voted against it and Ms. Petolino abstained.

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No. 2 - 8:20:35 BISCARI Approved 6-0

Applicant: John Biscari (sworn), 90 Mount Vernon, Block 7906, Lot 20, Zone R-1

Application: Request to build an addition having a side yard setback of 4.30 feet.

Appearances: Virginia Larzleer, fiancée (sworn)

Letter of denial was read by Mr. Halligan. Codes of Nutley requires a minimum side yard setback of six feet.

Mr. Biscari said he is not changing the footprint of the house. It is still as it was since 1949. He said his neighbor said it is no problem; everyone wants a beautiful home. Mr. Biscari said he is not doing it for that reason. He needs this; he has a prosthesis and is in need of another. He has to walk up and down 13 steps every day to get to his bedroom and the main level. He's plan is to extend the garage out to have enough room to build a handicap bathroom and a bedroom. He would rather do this work than have to move.

Looking for a hardship, the Chairman noted that this house was built prior to the existing building codes. He is having a 1000 gallon drywell added.

With no further questions from the Board members and no comments from anyone in the audience, Mr. Naughton made a motion to approve the variance stating that the impact is not de minimis that the that footprint does stay within the building lines. Seconded by Ms. Brown. The variance was approved by a vote of 6-0.

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No. 3 - 8:26:15 OMNI COMMUNICATIONS - Use Variance Approved 6-0

Applicant: Omnipoint Wireless Antennas, 304 Hillside Avenue, Block 2001, Lot 2, Zone R-1

Application: To install three antennas on the roof of the existing apartment building.

Appearances: James K. Pryor, Esq.; Bob Leavell, Radio Frequency Expert; Mark Niedle, FCC Compliance Expert; Bryan Riser, Engineer; Timothy Kronk, Planner (sworn). Lou Costello and

Lynn Costello, 15 St. Pauls Place; Ted Kornas, 660 Franklin Ave.; Andrew Garruto, 7St. Paul's Place.

Exhibits: A1, A2, A3-5

Letter of denial was read by Mr. Halligan. Codes of Nutley prohibits cellular communications equipment in an R-1 District and limits the height of a telecommunications tower to 100 feet.

James Pryor, Attorney for Omni Communications addressed the members. His clients are looking to install a cellular communications facility at the above address. Mr. Pryor asked to make a clarification to Mr. Spiezio's letter - his clients are looking to install three pairs of antennas. He stated that this Board has had other wireless applications presented and approved for this same site. His clients proposal is similar in nature, but it is an entirely different network with a different customer base. This is an excellent location which would serve the needs of Omnipoint Communication by providing coverage and fill a coverage gap, while at the same time having virtually negligible impact on the public.

His explained his witnesses purposes:

1. Bob Leavell, Radio Frequency Expert will testify as to why the site is needed; how the system operates; and with the use of an exhibit, illustrate how this site will integrate into the existing network and the fact that there is a gap;
2. Mark Niedle, FCC Compliance expert's testimony would be brief. It would be that this facility would comply with any and all respects with federal regulations and state regulations regarding radio signal emissions;
3. Bryan Reiser, Engineer, will testify as to the basic engineering elements since they are proposing rooftop antennas on the building and equipment inside the building at ground level. He will give the Board assurance that this site will meet all of the necessary engineering standards; and
4. Timothy Kronk, Planner, will testify as to the legal criteria that are required and how this application from a planning standpoint satisfy the criteria that have been established by the courts in matters involving antenna installations.

The Chairman advised Mr. Pryor that there are only six voting members available tonight and he is entitled to seven. Mr. Pryor opted to go ahead saying he thinks they have a good application.

Mr. Leavell began by answering questions that Mr. Pryor had.

Mr. Costello, from the public expressed his concerns regarding the antenna at this location and had some questions for the expert.

Mrs. Costello also expressed her concerns about the location of the antenna and questioned the expert.

Ted Kornas approached and listed a number of questions and concerns he had and hoped that the experts would answer when they came forward to testify. One concern was that he only just today received notification through the mail.

Andrew Garruto said he has the same objections and concerns as the previous objectors. He said how radio frequency signals are measured. It is measured by DB's.

Mr. Neidel began his testimony by first answering questions from Mr. Pryor's questions. Mrs. Costello had questions for this witness.

Mr. Reiser approached the podium and began his testimony as to the engineering aspect of the project.

Omnipoint concluded its presentation with the testimony of the final expert witness, the planner, Mr. Kronk.

Mr. Pryor summarized the testimony saying Mr. Kronk made a compelling case for the application, highlighting a few important points:

- Mr. Kronk mentioned that one of the sectors is in the B1 zone; that is an element that should be taken into consideration;
- A number of issues were discussed; some of those have been pre-empted. The applicant has demonstrated compliance with all of the applicable standards that regulate a facility of this nature. For any residents with concerns, this facility is absolutely, strictly regulated by the Federal Communications Commission. Not only does the applicant have to comply with those standards, it wants to comply.
- From a visual standpoint, Mr. Kronk testified that these antennas are not any kind of *substantial* detriment and that is the legal standard that applies here. A compelling case is made in by the fact that AT&T Wireless was previously approved.

With no further questions from the Board members or the public, Mr. Beck made a motion to grant this application for the following reasons:

1. The criteria set forth by the FCC relative to emissions has been complied with. That is something that is pre-empted by the Federal government, so therefore, by the testimony of the expert reflecting that the emissions are less than the maximum emissions that satisfies that criteria.
2. As far as site plan, he believes that testimony has been that the only way this site will be affected is visually – nothing else – no parking, no traffic, nothing else, so he believes site plan should be granted.
3. Testimony also reflects that this building is particularly suited for the proposed use. Even though it is a non-conforming building as to height and use, the height is there and has been there for many years to compel the applicant to seek to erect a monopole on a different location, which would be capricious on the part of this Board.
4. The height variance – it's a pre-existing height and the only additional would be another 13 feet for the antennas which will cause some visual clutter. However, when the benefits of the antennas is weighed against the negative visual effects which are minimal, the general welfare definitely outweighs the negative aspects of the visual clutter.
5. Testimony established that there is a gap in service and that this proposed application would remedy to a great degree that gap in service. This also fulfills one of the requirements under case law.
6. The operation will be monitored from the applicant's site on a 24-hour basis, so if there are problems with the transmission, they will be aware of it.
7. The applicant indicated there will not be any on-site generators and that any backup requirements will be by means of batteries located in the basement with their equipment.

8. Also as a condition, the resolution should provide that the equipment will be secured in a proper manner so that access can only be granted to designated and authorized parties.
9. Another condition be that any escrows due to the municipality must in fact be paid to the municipality prior to the issuance of any building permit or construction permit. All construction will be in accordance with local building codes.

Seconded by Ms. Brown. Approved 6-0.

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BUSINESS: 10:13:40

The Chairman advised the members that there is a Planning Board meeting on March 4, 2009 at Parks and Rec. Ms. McGovern said this is different than the joint meeting. It is a public meeting and they want this Board knew about the meeting. Ms. McGovern suggested that if any member has questions or concerns, it is recommended they attend. Mr. Beck thought it was important to note that any comments made by a member be not offered as a Board concern unless it is first presented to this Board, discussed and presented by either the Chairman or Ms. McGovern.

The Chairman noted that he went to the building dept. and asked for a recap of the 2008 variances - granted and denied - because they will have an annual joint meeting and will need that information at that time, as they have for each of those joint meetings.

Ms. Petolino asked if the town can pass an ordinance on limiting the number of antenna on one building. Ms. McGovern suggested that this is something that should be taken up with the Planning Board with the Master Plan.

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MEMORIALIZATIONS/MINUTES:

131 Conover Avenue - approved.

October 20, 2008 and November 17, 2008. Approved.

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LITIGATION:

Ms. McGovern's comments regarding Marino were made on the disc and are not for public use.

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ADJOURNMENT: 10:23:00

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Respectfully submitted,

Marie L. Goworek

Recording Secretary - ZBA