

**Nutley Board of Adjustment
June 16, 2008
Meeting Minutes**

CALL TO ORDER: A meeting of the Nutley Zoning Board of Adjustment was called to order at 7:31:25 by Chairman Scudato. The Pledge of Allegiance was recited.

The "Sunshine Act" notice was read and roll was taken.

PRESENT: Robert Beck, Suzanne Brown, Thomas DaCosta Lobo, John Halligan, Michael Naughton, Ralph Pastore, Diana Petolino, Paul Scudato, Chairman
Diana McGovern, Esq.

ABSENT/EXCUSED: Frank Graziano. Mr. Chagnon is officially resigned from the board.

TERMS: Swearing in of Ms. McGovern extending her term as Board Attorney and Michael Naughton, new alternate member.

DUE DILIGENCE: Ms. McGovern asked Mr. & Mrs. Gravasi if they had proof of notice from the newspaper and a notarized affidavit of service.

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No. 1 METRO PCS NEW YORK, LLC Adjourned to July 21, 2008 (5-2)

Applicant: 293 Chestnut Street Block, Lot, Zone

Application:

Appearances: Constantine Stamos, Esq.

The Chairman said there was a request from a member of the Nutley Fire Department to have a meeting with the attorney; there were some objections to the application. He asked Mr. Stamos to bring the Board up to speed or would he come back another time. Mr. Stamos reminded the Board that the last hearing was adjourned at his request in order to meet with Mr. Wilson. Since May 19, several attempts were made to a schedule meeting. A meeting was confirmed for last Wednesday, but that Tuesday night, Nutley was severely hit by a major storm. Mr. Wilson is away this week. Ultimately, his concerns have not been addressed. Mr. Stamos wanted to address the concerns with his engineer before the Board.

The Chairman said the onus would rest upon the attorney if there were an objection that is not addressed by the attorney's statement and the Board's ruling would have to be satisfied. The members are in the middle. The Chairman does not know what the concern is and he does not believe any of the other board members know either.

Ms. McGovern said she believes Officer Wilson issued a short comment and the engineer has changed some area of the plan to accommodate the comments, so she does not know if the Board members would need other information if they were to hear the proofs that the applicant puts in, which she understands will address the comments of the letter. If that satisfies the Board then . . . Mr. Beck said he understands that Mr. Stamos attempted to meet with Mr.

Wilson, but an Act of God prevented that. He believes it will be beneficial for Mr. Stamos to sit with Mr. Wilson to discuss and attempt to get these issues resolved, so the Board does not have to sit here and hear only Mr. Stamos' testimony but not be able to ascertain if that really answers Mr. Wilson's comments. That is his concern. He noted that the Board approved an adjournment the last time. It would be in his best interest if Mr. Stamos would sit with Mr. Wilson and for the Board to get a report that will, hopefully, say the issues have been resolved. To go ahead tonight, Mr. Beck does not feel he would be satisfied that all the concerns and conditions of Mr. Wilson have been met.

Mr. Stamos said he had two options - request an adjournment to give him the opportunity to meet with Mr. Wilson before next month's meeting or to go ahead tonight since all his witnesses are present they can address the comments as they think they would be addressed. He said they could withhold any action by the Board until such time that he has an opportunity to meet with Mr. Wilson and have a subsequent report issued. He could return with the engineer and further answer any questions Mr. Wilson might have.

Mr. Beck said he would not have any problem with that. The experts could testify and the matter could be carried to the next meeting. Chairman Scudato said he would like written confirmation from Mr. Wilson that his concerns have been addressed. The Chairman then told Mr. Stamos he should continue.

Mr. Pastore asked the chairman what the Board is expected to do at this particular moment on this particular matter. He said that the Board has before them a document that says a township reviewing officer has numerous safety issues. To go forward tonight and addressing those issue, he thinks the Board would be wasting its time.

The Chairman noted Mr. Pastore's objections and asked the Board to vote on whether or not to proceed with the application tonight. Mr. Pastore made a motion to continue the application after Mr. Wilson's review; he said he would then be willing to sit and listen to the applicant's testimony. Mr. Halligan seconded. The matter will be continued to July 21, 2008. Mr. DaCosta Lobo and Mr. Beck voted to go ahead tonight.

Mr. Pastore made a motion to adjourn to July 21; seconded by Mr. Halligan. Approved 5-2 with Mr. DaCosta Lobo and Mr. Beck voting against. Mr. Stamos agreed to waive the time constraints. Further notification is not required.

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No. 2. 7:37:25 QUEST GROUP, LTA (Dismissed 6-1)

Applicant: Michele Papisidero (sworn) 237 Centre Street, Block 131, Lot 16, Zone B-2

Application: to convert 2,382 square feet on the first floor to a one-one bedroom apartment and 302 square feet for a garage for the apartment.

Appearances: John Gizzo, Esq.; Sal Corvino, Architect/Planner (sworn)

The letter of denial was not read into the record.

The Chairman addressed Mr. Gizzo stating that he is aware that Mr. Gizzo had a conversation with Ms. McGovern regarding this application. He stated that there are a number of difficulties with this sitting Board. Some of the members were not members for the first meeting. He had requested that Mr. Gizzo, though Ms. McGovern, list the differences between his application and the prior application. He will ask for a motion and if the Board thinks that the application

is substantially different, then the applicant will be scheduled for the July meeting; if not, the Board will vote accordingly and dismiss it.

Mr. Gizzo said he was before the Board about one year ago to convert the rear portion of the above address into a residential use. The property is in a B-2 zone which requires any residential premises be located on the second floor. He stated that at the initial hearing, the owner testified that she had tried for approximately three years to rent the property for commercial use; but, because of the location and non on-site parking and also little parking on the street, she was unable to do so. The front portion of the premises is rented to two small businesses. There is more than 2300 sq. ft. of commercial space in the rear portion that she has been unable to rent.

The application of a year ago was to convert that particular portion to a studio apartment for the applicant's personal use. Ms. Papasidero is also the owner of the property on Passaic Avenue behind the instant property.

Mr. Gizzo recalled concerns Ms. Brown had regarding ingress and egress, fire safety issues with regard to the windows and the location of those and the bedroom. He stated that Mr. Corvino has since then reviewed the plans, made certain modifications consistent with the Board's concerns raised a year ago, and modified them accordingly. There is a definite distinction between the two.

Mr. Corvino will testify that he has adopted a plan to make that space into a bedroom with egress windows; the bedroom's location was moved from one side to the other; a new staircase is in the plans; and at least two different measures of egress through doors as well as windows. Mr. Gizzo believes that these are substantial changes to the original plan, which would warrant this Board's consideration.

He has researched case law and issues with regard to *res judicata* and it seems to him that this Board has wide discretion as to what it considers to be or not to be *res judicata*. He would submit that one of the criteria for the Board's consideration of the application is that there has been a substantial change. Based on the prior plans and the new plans, there has been a substantial change and he believes that this Board has that ability to make the determination that this is a fairly new application. Mr. Gizzo said he would like the opportunity to address the merits of that. At this point, he asked that Mr. Corvino step up and give testimony as to his new plan.

Mr. Corvino testified that the original first floor was all retail and amount to about 4,600 square feet. The square footage of the rented retail spaces has not changed since the first application. The rear portion of the original application was 2382 square feet. The area above that rear portion was for storage and was unoccupied. Here, he has added stairs to that space which will lead to a proposed bedroom. The other stairway, which leads to the garage and the alley to the outside of the building, has been enclosed. The second floor is about 1192 square feet.

Other changes include two egress windows to the side alley which is about 5½ wide and two egress windows on the second floor that lead to the same alley. The garage portion has not changed. He also eliminated the connection between one of the stores and the apartment. There will be a fire separation between both spaces as required by code. Skylights and an additional window have also been added (the south side).

Mr. Beck stated that there are five elements to be considered for a case to be declared *res judicata*:

- 1) the second application is similar to the first. Mr. Beck said he thinks this is very similar to the first. Whatever is being done to the second floor, *vis-à-vis* a one family, is not really a concern of this Board, because one-families are permitted. So, this is a permitted use on the second floor;
- 2) there must be no substantial change in the application itself or the conditions surrounding the property. The only thing changed is the interior;
- 3) there must be adjudication of the merits in the first case, which there was and the time to appeal ran on that first case;
- 4) the applications must involve the same cause of action – they are similar here;
- 5) in the case of a use variance where the applicant desires to use a parcel of land for a particular use, not permitted in zone, and the application is denied and the applicant subsequently seeks essentially the same use, but comes in with an altered site plan. Mr. Beck deems the applicant's proposal on the interior is equivalent to a changed site plan – it has not been changed to a great degree – and the second application then may be barred by application of *res judicata*.

Mr. Beck does not see where there is any substantial change. The parking was discussed and decided on the merits; as far as the applicant owning the adjacent property – that was brought up, the client never applied for any condition approval for off-site parking. So, all these things were decided on at the last meeting.

Mr. Corvino said there is no altered site plan, because the outside of the building has not been changed. He said, however, he did change the configuration of the apartment. He said although the second floor is something that the Board feels is not under its jurisdiction, it is part of the first floor space because it is one apartment. It is tied in with the lower level and it does make it a different situation in that there is a portion of the apartment at the second level.

Mr. Beck said all that was done then was to enlarge the application from the original. He said the second floor is not what is at issue here, except to the extent that any change only increase the total amount of the residence. The second floor is a permitted use for residential.

Mr. Corvino asked if parking was put on the adjacent lot, would that change; he said that is a site plan change. Mr. Beck said that was already taken into account at the first hearing.

Ms. McGovern advised Mr. Gizzo of the section that Mr. Beck cited earlier. Mr. Gizzo is familiar with the section and noted that the operative word is, and Mr. Beck said it himself, is “may,” not “must,” but “**may** consider *res judicata*. The Board has discretion here. That has been decreed by the courts that the Board has discretion to make a judgment. It is not for him to say, but for the Board to say. He said that Mr. Beck is of the opinion that this application is substantially similar. He said he feels differently, but it is really the Board's finding. This property has been un-rented and vacant for four years. The question becomes – is this property being rendered by zoning laws, unusable?

Clearly, the question here is whether this commercial space at this particular location can be utilized. The fact that it remains vacant for 4 years speaks of the fact of the difficulty in utilizing this property. The Board has discretion under the case law to make a determination as to whether or not the changes are substantial. Mr. Gizzo submitted, that based on his review of

the minutes of a year ago, and based upon the concerns raised by this Board a year ago, Mr. Corvino has addressed those concerns.

He wants the Board to be mindful of the fact that this building has been unoccupied for a substantial period of time despite the efforts of the applicant to rent it. He addressed the fact of increasing the space. The increase in the proposed space is because at the last meeting a Board member had a safety concern about the location of the bedroom. The new plans have addressed that. He asked that Board to consider all of this and to allow the matter to go forth on its merits.

Mr. Beck pointed out to Mr. Gizzo that the property is not being zoned into inutility. He thinks inutility would be if the property were unable to be used for any purpose. The front of the property is leased, rents are being collected, and the decision was made by the applicant that economically, she thought it was better to rent whatever she rented and not rent the back. That is a decision the applicant made. He said he would have to assume that when Ms. Papisidero purchased the property that she knew what the zoning was, and that it is zoned commercial.

Mr. Gizzo responded by saying that Ms. Papisidero basically sat on this for three years before she made the initial application. It was not as if she went into buying this property with the idea that she was going to ask for a use variance to rezone it to a residential spot in the back. She made efforts to rent it through a realtor, interviewed potential tenants. Everyone that she spoke with had a problem with the parking. She did not come forth and ask for a use variance as soon as she bought the property. She waited three years; she did try to utilize it. He feels that Mr. Beck's argument does not work.

Mr. Beck said it was not an argument – just an observation. He said that the argument Mr. Gizzo is making is that of an economic hardship. He said it was up to the Board to decide that if by expanding the one-family area to the second floor is a substantial change. Mr. Beck said that changes were made to the original plan that the applicant thought was appropriate for safety reasons. Mr. Gizzo said that was a major concern of this Board a year ago. Mr. Beck said he understood that, but said that a decision was made and the thing is if *res judicata* prevails, is that an applicant cannot come in, present a case, have it denied and then say, 'well, there are a lot of things; let's change it around and resubmit it.' It is up to the Board to decide.

Mr. Gizzo agreed and repeated that he knows it is for the Board to determine whether *re judicata* is applicable. He said, and he hopes the Board will agree that this is a discretionary matter with the Board and the Board has wide latitude.

For those members who did not go to law school, Ms. McGovern explained *res judicata*. It is a term in the law; it has evolved in the courts to prevent the same case being brought before the court time after time. In the normal course of things, if someone did not like the decision of a court or a board, they would take an appeal and have a higher court determine whether the decision was a good one or a bad one or remand it back for more information. The law has given this Board the same power, so to speak, as a court's decision, that once this Board makes the decision, it is to be enforced forevermore unless something changes. It *may* be enforced forevermore; it is not something that is an absolute. The Board has the option of saying, "we'll hear this again," or saying, "no, this is the same thing. We are not going to hear it again." She noted that Mr. Beck cited the elements that are required in order for the Board to block the application from being asserted again. Should the Board decide that this application is not

substantially different from the first; the same parties are involved; that it is the Board's opinion that there is no substantial change in the application itself or the conditions surrounding the property; the first case was adjudicated on the merits; and that both applications involve the same cause of action. It is in the Board's discretion to say they will hear it again or they choose not to hear it again because they feel their decision was their decision then and do not want to hear it again for those reasons. Then, if the applicant were to take this to court, the court would look at the way all the other decisions are, if it is a reasonable decision, the court will uphold what the Board has done.

Mr. Gizzo pointed out that an issue raised was whether or not this Board had the opportunity to review the record from the previous application. The minutes are available but the exact transcript, they do not have. There are several new members to this Board and he thought that it would be appropriate that the members have the opportunity to review the actual testimony from the hearing one year ago.

Chairman Scudato noted that all the members had a copy of the minutes from last year's hearing and said they would substantially reflect what the testimony would be. The Chairman wondered why this was not appealed through the court a year ago, after the Board's ruling. He said obviously, the applicant did not feel there was a case to present to the court to overturn this Board's rule.

Mr. Gizzo said that, without revealing his discussions with his client, the determination as made at that time not to file an appeal. However, he knows that subsequent to that, Ms. Papsiderio has tried to re-let that property, again without success. Although the current economic conditions are of no consideration, that has played a major factor on letting the property. The applicant did direct Mr. Corvino to modify the plans. That decision was made after the time to appeal had expired. Clearly, this is a use variance and he thinks that this is a meritorious application then, and is now based on all considerations. He understand that ultimately, it is the decision of the Board, but the applicant did direct Mr. Corvino make those changes consistent with what this Board's concerns were the first time around.

Ms. Petolino said yes, there were changes made to the application, but they seem to be more code-compliant changes, rather than changes that would address zoning issues. In terms of the zoning issues - the applicant is still seeking a use variance to put a residence on the first-floor of a mixed-use building; the parking hasn't changed; and a loading area has not been provided as required by the zoning ordinance -- she doesn't see a substantial difference in this application. It is Ms. Petolino's opinion that it is very much the same.

Mr. Gizzo said the building is such that there is no room for additional parking. Mr. Corvino will discuss the matter of the loading area. Mr. Gizzo noted that the loading area is currently a garage and was never utilized by the present tenants; they have no reason to utilize it and it does not access the tenants' particular space.

Ms. Petolino said she does not feel enough of an attempt has been made to address the parking and loading issues. She pondered whether there could be indoor parking. She thinks that economic hardships are an issue with the applicant. Ultimately, Ms. Petolino does not think there has been a fair attempt to address the zoning issues and problems.

Mr. Gizzo said if expanding the indoor parking were something the Board would consider, he would speak with his client about that. A determination as to whether this could be a reality,

would need to be discussed with Ms. Papisidero and Mr. Corvino. It is highly speculative at this point to say something else can be done to the property. He does not know what that is. A property owner has come before this Board and expressed a true hardship with the utilization of this parcel of land because of its location. The applicant has testified under oath that she has tried to rent this property out. Mr. Gizzo knows that they have to climb the hurdle of *res judicata* first, but, in addressing that question, the applicant's testimony is the only competent testimony that they have in the record. There has been no evidence presented anywhere to contradict that. Given the fact that this Board sits as a *quasi-judicial* body, it must therefore weigh the evidence. It is Mr. Gizzo's opinion there is no evidence that contradicts to what the applicant has testified. The fact that the property has been vacant for four years, speaks for itself.

Before the Chairman would allow Mr. Corvino to testify, he noted that the issue has strayed. He said the Board needs to rule on whether this is a substantially different application from the one heard a year ago. He does not want to get involved in the possible changes – parking, ingress, egress, etc. – if it is a different application, they will rule on that and that's how the Board proposed to hear this case again.

Mr. Beck understands Mr. Gizzo's argument as to economic difficulty. He cited case Chapel vs. Woodbridge Township 60 NJ Super. 146-155, "a more profitable use of the land to the plaintiff and the permitted use is not an appropriate basis for a variance." This has nothing to do with the application right now, but he thinks they are getting far a field when they talk about the economic inutility. If this case is not *res judicata*, then in that case it can be addressed. However, he does not think it is appropriate tonight and has any bearing on the *res judicata* issue. Mr. Gizzo understands that, but he was only addressing Ms. Petolino's arguments and observations.

Mr. Gizzo asked if the Board has considered the fact that there are several new members and that this Board is satisfied that the minutes alone satisfy the requirement. The Chairman said very much so. He said all the Board members received a copy of the minutes. He also noted that he requested the architect come and list the differences specifically between the application a year ago and the current. He said that is the determination that has to be made by the Board – is it substantially different? He is certain that the members have, as he has, taken the time to review the minutes. He said that some of the members have sat on both cases.

Ms. McGovern noted that the first time this matter was heard (June 19, 2007), the following members all sat and listened to the entire case and the testimony presented: Mr. Beck, Ms. Brown, Mr. DaCosta Lobo, Mr. Pastore and Ms. Petolino. That is five Board members, which would constitute a quorum in and of itself. Each of the above named are all present again tonight. Mr. Gizzo thanks Ms. McGovern.

Moving on, the Chairman asked for a motion. Mr. Beck made a motion stating that he thinks this application is *res judicata*. He sees little change from the first application citing the following: it is for a one-family residence on the first floor where it is not permitted; same parties involved; no substantial change – minor changes. There was an adjudication of merits in the first case; the application was denied. Finally, both applications involved a request for a use variance to permit the first floor or a portion thereof to be used for residential premises. For these reasons, Mr. Beck suggested the application be *res judicata*. Ms. Petolino seconded. The *res judicata* was dismissed by a vote of 6-1, with Mr. DaCosta Lobo voting no.

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No. 3 8:25:55 BALLESTER Approved 7-0

Applicant: Allan Ballester (sworn), 100 New Street, Block 5900, Lot 28, Zone R-1

Application: permit to build a 4'x20' addition to the non-conforming garage with a rear yard setback of approximately 1.55 feet and a mean height of approximately 10 feet.

Appearances: Self

Mr. DaCosta Lobo read the letter of denial. Codes of Nutley states that no detached accessory building shall be located nearer than three feet or half the height of such building up to a distance of six feet, whichever is greater, to a rear lot line; prohibits the enlargement of a nonconforming structure when the enlargement increases the nonconformity of the non conforming features.

The exterior of the garage will be finished to match the house.

With no questions from anyone in the audience, a motion was made by Ms. Brown to approve the application citing that it is an undersized lot; it is an existing structure; the setback issue is not being increased; the garage will be expanded four feet in the same line with the garage and the total length of the garage which is 10 feet; seconded by Mr. Halligan. Approved 7-0.

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No. 4 8:30:40 DAVINO (Approved 7-0)

Applicant: Anthony Davino (sworn), 6 Cedar Lane

Application: request to erect a second story addition with a side yard setback of approximately 2.91 feet on a 40'X170' nonconforming lot at 110 Crestwood Avenue, Block 8902, Lot, 24, Zone R-1

Appearances: self

The letter of denial was read by Mr. DaCosta Lobo. Codes of Nutley requires a minimum side yard setback of not less than 80% of the required minimum set forth for a second story addition.

Mr. Davino agreed to respond to questions from the members. Ms. Petolino said normally, the short side yard set back would be a concern for her, citing privacy issues and the nearness of the neighbor's houses. However, in this case, the neighbor has a driveway adjacent to that side of his yard. In that case, that issue is not a major issue as far as she is concerned. In response to Ms. Petolino's question, Mr. Davino said his house is a cape and he wants to convert it to a center hall colonial by making it 2½ stories. He cited several houses on the street that have been converted.

Referring to the plans, the Chairman asked about what appears to be a balcony at the rear of the building. Mr. Davino said the architect advised him that he believes the applicant may have a two-foot balcony off the second floor. The Chairman said it was not cited by the building inspector, but he doesn't think it's legal and a variance would be required. Mr. Davino said that is a non-issue and it could easily be removed.

Mr. Pastore asked then if it were to be removed, what would come of the doors leading to it. Mr. Davino said they would be regular windows there instead. All the siding will be replaced with stone and shingles in the front.

With no one in the audience either in favor of or against the application, Chairman Scrudato asked for a motion. A motion was made by Mr. Pastore to grant the variance stating that the lot is non-conforming lot (40 foot front); there are other houses in the area that are similar so it wont be standing out; it will enhance the neighborhood. If the building department approves the balcony and it is within code, it would be acceptable to this Board; seconded by Mr. DaCosta Lobo. Approved 7-0.

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No. 5 8:39:50 TRAMA (Approved 5-2)

Applicant: Pierina Trama, 60 Ernest Street, Block 108, Lot 3, Zone R-2

Application: permit to install a second driveway

Appearances: Anthony Trama (son) (sworn)

The letter of denial was read by Mr. DaCosta Lobo. Codes of Nutley prohibits a property from having more than one driveway.

Mr. Trama said the idea of having an additional driveway is to accommodate the tenants as well as his parents (there are four cars on the premises). The Chairman said the second driveway already exists on the left side of the property. Mr. Trama said there is macadam, but no curb cut. The Chairman said then, that the applicant is asking the Board to approve something that already exists. Mr. Trama asked if it is permitted to make the curb cut and a driveway. The Chairman said it is not - at least not without a variance.

Mr. Pastore asked how wide the applicant wanted to make the driveway. Mr. Trama said the existing macadam is about 10 feet wide - from the property line to the edge of the grass. This is the area the applicant would like to make a second driveway. The asphalt would be replaced with new, the sidewalk would be repaired, and the curb cut made to make for an easy transition.

Mr. Pastore said the applicant is really asking for a curb cut. Mr. Trama said the asphalt has been there for years, but never a curb cut. Ms. Petolino asked how wide the legal driveway is. Mr. Trama was not sure, but said two cars can be accommodated. He guesses it to be about 20 feet. Ms. Petolino asked if it would work to widen the driveway on the other side rather than to make another driveway. He said that would consume most of the lawn. It would not be aesthetically pleasing. Mr. DaCosta Lobo asked if Ms. Petolino was suggesting widening the driveway in front of the house, so that a car would pull up in front of it. Ms. Petolino said it already is. Mr. DaCosta Lobo said that is the garage. Ms. Petolino said the macadam goes about a foot across in front of the house.

The Chairman said parking in the area is at a premium. If this Board were to continue to give two curb cuts, two driveways, etc., no one would be able to park on the street at any time, anywhere. The new driveway would be in front of the side steps. The chairman has a problem with a second driveway, but said that is his problem.

Mr. Halligan asked how long the house has been a two family. Mr. Trama said for as long as his parents have owned it, about 40 years. Mr. Pastore wondered where these cars have been parking all along.

With no one in the audience either in favor of or against the application, Chairman Scrudato asked for a motion. A motion was made by Mr. Halligan to grant the variance for the

application for the following reasons: it is an R-2 zone; the house is a permitted two family (if two families are permitted, they have to permit for adequate parking taking into consideration that people of have multiple cars these days); the curb cut is only a minimal 10 feet; it would aesthetically improve what is there now; seconded by Mr. Pastore. Approved 5-2 with Ms. Petolino and Chairman Scrudato voting in the negative.

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No. 6 8:51:03 CARRINO Approved 4-3

Applicant: John Carrino (sworn), 44 Sylvan Place, Block 4901, Lot 10, Zone R-1A

Application: permit to install a solid six-foot fence between dwellings

Appearances: John Cerza, Esq., Gwen Canfield, 47 Sylvan Place; Heinz Schneider, 254 Whelan Avenue; William Bowes, 47 Sylvan Place

Exhibits: A-1 photos

The letter of denial was read by Mr. DaCosta Lobo. Codes of Nutley prohibits the construction of a solid type fence.

Mr. Cerza submitted photos to the Board for their perusal. The photos show that the yard has three sides, two of which are fenced. His client is here for a side yard variance. Neighbors have approved the fence that has since been installed. One neighbor, Mrs. Canfield initially gave here approval for another fence; his client relied upon that, went forward, and purchased a non-returnable fence. Ms. Canfield now has a problem with the fence. Mr. Cerza said Ms. Canfield approached his client, Mr. Carrino to voice her displeasure with the fence that was installed on the other side of the yard. Mr. Carrino relied, again, on Ms. Canfield's approval to have fence moved further up the driveway. Within days, Ms. Canfield wrote a letter to Mr. Carrino objecting the fence.

The Chairman asked Mr. Carrino if he bought a fence without first having a permit. Mr. Carrino said he did have a permit for a six-foot solid all the way around. He said he went to town hall with a copy of the survey, showed where he wanted to install the fence and was issued the permit. The Chairman asked, then, why was Mr. Carrino here. He responded that it was because Ms. Canfield objected. The Chairman said Ms. Canfield cannot tell the building department what to do. Mr. Carrino said the building department turned around and rejected the permit. He had the neighbor's verbal permission, but nothing in writing. He did get written consent of the other neighbors while Ms. Canfield was away on vacation. When she returned, he advised her of the events and she responded that it was fine - with a condition - he should bring it back to the edge of the house. He advised the town that he had approval, but the next day, Ms. Canfield changed her mind.

The Chairman said a side yard fence cannot be installed without a permit; a solid fence requires a variance. Ms. McGovern noted that Mr. Carrino erected the fence along the property line where he was given written permission.

Ms. Petolino asked if there was any reason why the fence has to go beyond the rear of the structure. He said he was bringing it to the top of the driveway. He said Ms. Canfield told him if the fence were brought to the end of the applicant's house, she would give her permission. Ms. Petolino said it was not brought to the back of the house, but rather to the middle of the addition. He said he is flexible.

Mr. Halligan asked about the fence at the front. Mr. Carrino said it is a four-foot white picket with two gates. He plans to put the subject fence as close to the wall as he can.

There was more discussion regarding the neighbor's change of mind. Ms. Petolino asked if the applicant has approached the neighbor again before tonight to try to reconcile the issues. Mr. Carrino said that Ms. Canfield would not agree unless it was a four-foot fence. Ms. Petolino asked Mr. Carrino if he considering landscaping in lieu of the fence. He said he did. He would be willing to plant trees on Ms. Canfield's side of the fence to hide the fence. He said if he cannot get the variance for the fence, he will do it all the way up – is there an ordinance that restricts 10-foot arborvitaes. Ms. Petolino said there was not; the applicant could put landscaping wherever he would want.

The Chairman asked if there was anyone in the audience either in favor of or against this application. Ms. Canfield approached the podium and was sworn in. Ms. Canfield told the members that the information Mr. Carrino gave is not correct. She said when the fence was going up, she did ask Mr. Carrino if he had a permit for it and asked if he knew that the law said that the fence had to stop at the back of the house. She said he confirmed that he did have a permit. She called town hall the following Monday and inquired as to whether he did have a permit. She was advised that Mr. Carrino was not issued a permit. Later that day, Ms. Canfield said she received a phone call advising her that Mr. Carrino did indeed have a permit. It was then that Ms. Canfield objected to the fence. She said she was not informed by the applicant that the fence was to be six feet. She assumed that the fence would be no higher than four feet – a height she has no objection to; however, she does object to the higher, solid fence.

Ms. Petolino asked if she had a preference as to the four-foot fence – solid, open, etc. Did she have a particular objection to a solid fence? Ms. Canfield said she did not know if she had a right to an objection to a solid fence, but she does prefer an open fence. Her objection is only as to the height of the fence.

Mr. Halligan asked Ms. Canfield if she initially agreed verbally to the fence. She said she did agree to a fence. Mr. Halligan asked if specifics were discussed and she said they absolutely were not.

The Chairman asked Ms. Canfield if the applicant moved the fence to the rear corner, would that be more to her liking.

Mr. Pastore asked if Mr. Carrino was moving the fence to the back of the house at the request of Ms. Canfield and he said he is.

Ms. Petolino asked Ms. Canfield if she had a copy of the letter she sent to the town hall objecting to the fence (Exhibit O-1).

Mr. DaCosta Lobo asked Mr. Carrino if he disputes his neighbor's assertion that they did not discuss specifics of the fence. Mr. Carrino said he mentioned that he was installing a solid fence, but does not recall if the height was discussed. He said that Ms. Canfield said in her letter that a six-foot open fence would be acceptable; so height was not really an issue. He said it was not until the fence was going up when Ms. Canfield saw it and asked that it be moved back.

Mr. Halligan said since there was a six-foot fence around the property, it would be pretty safe to make an assumption that a six-foot fence would replace the existing.

The Chairman asked why Mr. Carrino wants a solid fence. Mr. Carrino said there were a few reasons: 1) the neighbor does not have a dog, but her daughter brings hers when she visits; he wants to keep it consistent (he has two thirds of a solid six foot fence around the property); he has three children. The Chairman said if the yard was totally enclosed with a solid fence, he is not only protecting his children -- he is also putting them into a possible danger that no one could see to get back there to help them. Mr. Carrino contradicted Mr. Scudato. He said there are four-foot, fifty percent open gates at the front.

Mr. Halligan asked Ms. Canfield, since she claimed that her yard was small, if Mr. Carrino were to move the fence two feet into his yard and put plantings on her side of the fence, would she be ok with that. She does not know. Mr. Halligan said considering that she did agree to the fence . . . Ms. Canfield said she did not agree to the fence . . . Mr. Halligan said she may not have specifically agreed to a six foot fence, but she also did not specifically not agree to a six-foot fence. Granted, there was some confusion . . . Ms. Canfield said there was no confusion. It never occurred to her that anyone could put up a six-foot fence because it is against code. Mr. Halligan thinks a compromise is in order and said that Mr. Carrino is willing to move the fence back to the end of the house. If he has to move it back further, then he cannot put up his four-foot picket to make it even with the house. He is willing to plant bushes or whatever.

Mr. Schneider objects to the fence because he objects to a gated community. It seems like everyone in Nutley wants to have his or her own gated houses. He claims there is a terrible monster - a solid fence over 8 feet tall on Darling Avenue. He asked the Board if they are for fences or an open community where the neighbors like each other and like what they are doing, rather than commit themselves to a gated house. He is confused about the fence being erected with no permission. Was it a mistake - the applicant was issued a permit. He said there is a two-foot stone wall at the back of the building and a six-foot fence on top of that. He said the Board has the future of Nutley on their minds - the way it looks, the way it will look. He said we all know what happened in the past - the houses that have been permitted to be built - it's terrible. He's lived in Nutley for 52 years and said it seems like all the new home owners want a gated house. He asked if this was right. He asked the members to ponder this question.

Mr. Halligan addressed Ms. Canfield and noted that a compromise was not finalized. He asked if she would consider the fence. She said she supposed so, but in principle, she is opposed. There is an ordinance not allowing it. She said if that is the compromise the Board thinks is acceptable, then she will go along with it (the shrubs on her side of the fence to obscure as much of the fence as possible). It is also acceptable to the applicant and she added that he is willing to move it from the driveway to the end of the house. It will be moved an additional foot or two onto his property. He will also maintain the bushes by trimming them.

Mr. Bowes is concerned about the on-going maintenance of the shrubbery. Is it locked into the owner of the applicant's property - Mr. Carrino or perhaps a new owner down the line somewhere. He thinks a better solution would be to allow Mr. Carrino to put it on the property line, but convert it to a four-foot solid fence. That would keep the dog out and protect Mr. Carrino's children. The four-foot fence is more appropriate.

Mr. Pastore thinks Mr. Carrino is jumping through hoops to satisfy the neighbors. He noted that Mr. Carrino is being extremely cooperative; he moved the fence back, he is willing to move the

fence onto his property and lose a couple of feet of his own property; he is willing to put up shrubbery on the other side and now they are being asked who is going to maintain the shrubbery!? This is getting a bit ridiculous here. There is an individual here who is bending over backwards to enhance his property and to protect his children. He said if they went through the town and took down all the fences, there would be a problem. There are people with animals, there are people that have to maintain where their children are going to be. It is something the ordinance gives the townspeople a place to put a fence. There are certain restrictions as to fences, and that is what they are trying to do here.

With no further questions from either the board of the public, Chairman Scudato asked for a motion. Motion was made by Mr. Pastore to grant the variance for the reasons he mentioned above. The fence will be moved into the applicant's yard, and shrubbery, approved by both parties, will be planted on the other side. Mr. Halligan seconded. Approved by the members 4-3. Ms. Brown, Ms. Petolino and Chairman Scudato voted in the negative. Ms. Petolino stated she believed the time for the applicant to be flexible and compromising was before the applicant came before the Board, when his neighbor wrote about her objections. She believes the neighbor offered a couple of compromises that could have easily agreed upon and the problem would not have brought them here tonight. She does not believe enough was done to satisfy the applicant and the zoning ordinance expressly requires the neighbor's approval.

Chairman Scudato said the variance was granted with the conditions so stated.

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No. 7 9:38:40 GAVASI Approved 7-0

Applicant: Ronald and Anila Gavasi (sworn), 115 Kierstead Ave., Block 8105, Lot 8, Zone R-1

Application: to erect a second story addition/dormer on the irregular 58'x53' lot

Appearances: Applicants

The letter of denial was read by Mr. DaCosta Lobo. Codes of Nutley requires a minimum rear yard set back of 30 feet.

The applicant cannot find his verification of affidavit of service, but he said he swears he did have it. Ms. McGovern gave him another form and had it notarized. Answering the Chairman's question, Mr. Gavazi said he notified his neighbors by hand. Mrs. Gavazi said she rang doorbells and that all the neighbors were home between 8:00 and 9:00 on June 5. Mr. Gavazi did give Ms. McGovern a copy of the notice from the newspaper. They claim that Julie Viola said they were all set.

Mr. Gavazi said the house is a cape and he would like to add a dormer to the back of the house to make the space more comfortable for his 6'3" son. The applicant himself is 6'2". He does not need to add electric because the outlets are already there; no plumbing is required. He is the contractor and he can do this himself.

Chairman Scudato commented that the lot is an undersized, irregular shape.

With no questions from the Board members and no one in the audience to speak either in favor of or against the application, Mr. Halligan made a motion to grant the variance; seconded by Mr. DaCosta Lobo. The members approved the application by a vote of 7-0.

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MEMORIALIZATIONS/MINUTES: Ms. McGovern read the memorializations from the previous meeting which were approved by the following members: Chairman Scudato, Mr. DaCosta Lobo, Mr. Pastore, Mr. Halligan, Ms. Brown, Mr. Beck and Ms. Petolino. Rusignuolo, 252 Centre Street; Sanabria, 191 Kingsland Street; Caputo, 106 Ridge Road; Cozzolino, 45 San Antonio Ave.; Riddle, 15 Daily Street; LaCorte, 16 Friedland Road. All in favor.

The resolution done in the name of Anthony and Marisa Pigninelli, 15 Howe Avenue, was approved by Mr. Scudato, Mr. DaCosta Lobo, Mr. Pastore and Mr. Beck. Mr. Halligan and Ms. Petolino voted against it last month and Ms. Brown had recused herself. All in favor.

Mienkiewicz, 11 White Terrace - approved by Mr. DaCosta Lobo, Mr. Pastore, Mr. Halligan, Ms. Brown and Mr. Beck. All in favor.

DeLuca, 13 White Terrace - approved by Mr. DaCosta Lobo, Mr. Pastore, Mr. Halligan, Ms. Brown and Mr. Beck. All in favor.

There were no minutes to be approved.

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BUSINESS: Pennoni invoices - 6-20 Homer (application for subdivision which was pulled) \$120 and \$280. Ms. McGovern reviewed them and they appear to be reasonable, necessary, and appropriate. The money will be taken from the account of the applicant. Approved.

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LITIGATION: Ms. McGovern needed to discuss litigated matters with the members.

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ADJOURNMENT: Public session was closed at 9:52:07 p.m.

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Respectfully submitted,

Marie L. Goworek

Marie L. Goworek
Recording Secretary