

**Nutley Board of Adjustment
February 25, 2008
Meeting Minutes**

CALL TO ORDER: A meeting of the Nutley Zoning Board of Adjustment was called to order at 7:33-55 by Chairman Scudato. The Pledge of Allegiance was recited, the "Sunshine Act" notice was read, and roll call was taken.

PRESENT: Robert Beck, Suzanne Brown, Thomas DaCosta Lobo, John Halligan, Ralph Pastore, Diana Petolino, Paul Scudato, Chairman

ABSENT/EXCUSED: James Blanda, Kirk Chagnon, Frank Graziano

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No. 1 7:36:15 RED ROCK REALTY Six-month continuance approved 7-0

Applicant: Block, Lot, Zone

Application: for 120 residential units

Appearances: Thomas DiBiasi, Esq.

The letter of denial was read by Mr. Da Costa Lobo. Codes of Nutley

Mr. DiBiasi addressed the Board giving a short history of this application. It is for 120 residential units, which was approved in 2002-2003. Since that time, an environmental cleanup has been taking place. He has been giving the Board periodic updates on the status of the cleanup. As a result of a lending institution that has a check list for construction financing, he is appearing here every six months for an extension. Palisades Financial was advised that under the Land Use Statute the land use appeals have tolled until the DEP gives a sign off. They are actively working on this application.

To date, \$1,350,000 has been spent n the cleanup and all the soils on the property have been cleaned up to residential standards. They have isolated an underground pocket that emanated from this property, not from the adjoining properties. That was done as a result of testing upgraded properties. The DEP has come up with a protocol to inject the area with a substance the DEP has improved. Three injections have taken place, so far. Another was supposed to be done today. Then they are sampling underground water.

This is the update. Mr. DiBiasi said they were hoping to have signed off before December 2007; it has not been so. DEP has been cooperative. The applicant's team has been using the offices of the assemblymen. This is just to be sure the application is moving along and they have not been lost. He is requesting a six-month extension.

Chairman Scudato said it is his understanding that the clean up remediation onus is upon the applicant or the owner's contractor; and it must meet the DEP standards of the State of New Jersey. Mr. DiBiasi said that is correct. Chairman Scudato said then, that this continuance is not being held up by the DEP, rather it is delayed by the cleanup process.

Mr. DiBiasi said that was correct. It is no fault of the DEP, nor the applicant. Benjamin Moore standing behind them on this under their contract with Red Rock Development. Benjamin Moore has the primary responsibility for cleanup. There were a couple of carve out issues that the applicant has joined in, such as the treatment protocol.

Chairman Scudato asked, after six years of remediation work, he would imagine that the process they are using should be changed or it's not being done properly. He doesn't know which. Or there may be offsite contamination. If that is so, the applicant has an obligation to advise the DEP. Mr. DiBiasi, emphatically represented to the Board that all site issues were looked at and tests were taken and wells were drilled. That took a while. The location they are taking about is on the property; it did not come from upgrade.

The Chairman said when and if the applicant gets final approval, no further action required by the DEP, he should make that known to the Building Department or the Board of Adjustment so it can become a written memorialization of that fact. MR. DiBiasi said he would and that would be a very happy day for him.

Chairman Scudato feels that a six-month continuance is in order, but after that, he would ask for a dismissal without prejudice of the application. He can then proceed with it from there. Mr. DiBiasi said he cannot dismiss the application because the approvals are running with the land. He said he will hold that off for at least the next six months. He said he could not agree to that.

Mr. Beck asked Mr. DiBiasi if he had an environmental consultant on the project. Yes. He asked Mr. DiBiasi if he could have the expert issue a one- or two-page letter setting forth the status of the clean up at the present time. Mr. DiBiasi said to Mr. Beck that if that is something he wants, then he would do it.

The Chairman asked for a list of the contaminants or the single contaminant.

Ms. Petolino asked if the underground pocket is contaminated; does it have to do with ground water? Mr. DiBiasi said it does. Ms. Petolino asked if there was any question about the applicant's ability to clean the site up in conformance with residential standards. Mr. DiBiasi said according to environment - no. It is a matter of money and time and the good news is that Benjamin Moore and his client have the money. Time is another thing. They are all anxious to get moving. Ms. Petolino asked if there was any implication to the applicant being able to do a successful clean up by the fact that the source of the contamination is on the applicant's site. Mr. DiBiasi said that is actually a positive thing; they have it contained. He said the readings are going down which means that the program the DEP has instituted with the consultant is working. At the end of the project, the applicant will be getting a "no further action" letter.

Mr. Pastore said being in the construction business and running into sites that have contaminates on them, where the DEP comes in and monitors what was going on, to set new wells, to monitor this particular process, is a complete and absolute nightmare. There are no ifs, ands, or buts about it; one doesn't know what is going to happen tomorrow. Today it's done, it looks good; the DEP comes in and says that's not bad. You put another shovel in and suddenly you have a worse contaminate than you had before. It is one problem after another. He said to give Mr. DiBiasi and his clients six months, they are cutting off their tails. There is a heck of a problem out there. They will come back again in six months and give the Board all the information it wants, if it wants. For whatever reason the Board would want to know what the contaminates are, is beyond him. Mr. Scudato has a personal interest in knowing. Mr. Pastore said as far as the resolution is concerned, those are his comments and his experiences with the DEP in this type of situation.

Chairman Scudato said he recognizes what Mr. Pastore is saying, and he does have some sympathy. But after six or seven years, he thinks they can clean up Love Canal. Mr. DiBiasi can make the case at that time - six months from now, as far as he is concerned. Of course, the Board members will vote on it.

With no further questions from the Board members, Mr. Beck made a motion that the extension requested be granted for an additional six-month period and that the applicant also furnish the Board with a letter from its environmental consultant as to the present status of the cleanup.

Before a second could be made, Ms. McGovern asked if the six-month period runs from today or the date the resolution is memorialized. Mr. Beck thinks since it expired on January 31, retroactively, it should run from February 1, 2008. Mr. Pastor thinks it should be from the date the new resolution goes through. Mr. Beck said fine. As far as he is concerned, there is no resolution protecting the applicant at this point. He doesn't know what would happen in the interim, but that is up to the applicant. If the applicant is happy with that, it's fine with him. Chairman Scudato suggested they compromise. Mr. DiBiasi said he understands Mr. Beck's point to have continuity. Perhaps they can relate it back to January 31, but add six months from now, so in effect, they are giving the applicant a seven-month extension, one month already being burned. The Chairman does not have a problem with that.

Mr. Pastore said the only problem he has is giving the six months. The Chairman said this Board has been doing it for six years. Mr. Pastore realizes that. The Chairman asked if it's right or wrong. Mr. DiBiasi said he believes it's right under the Land Use statute. He doesn't think there is any question that the approvals toll. If he didn't have a specific construction lender wanting him to come back, he would not be coming back. Chairman Scudato said the Land Use says that "if a government agency doesn't provide you with the necessary documentation." But in this case, it is not the agency that is holding this up, it is the clean up or the owner. Mr. DiBiasi said they will not argue that issue now, because he thinks . . . The Chairman interjected and said, "but, after six years!" Mr. DiBiasi asked that they look at the good side. He said thank goodness he has two clients that have deep enough pockets that can take a site and spend \$1.35 million dollars to clean the area up for all of us - to residential standards. The Chairman said no doubt, it is a positive.

Mr. Beck amended his motion to be retroactive to January 31, 2008 with seven months to August 1. Mr. Pastore seconded. The application was approved by a vote of 7-0.

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7:49:30 6-20 Homer Street Mr. Thomas DiBiasi reminded the Board that he gave advance notice that he would be requesting to carry the Clover Street application. He does not have experts available this evening to present that case. Ms. McGovern thinks that Mr. DiBiasi misspoke; the application was for Homer Street. She is correct. The Chairman said he was a little confused - the applicant is coming before this Board and not the Planning Board? Mr. DiBiasi said the applicant is before this Board and it is the applicant's intention to come before it for a vote. The Chairman said there was some conversation that it may have been heard by the Planning Board. Mr. DiBiasi said they would have to designed it, if that were the case. Ms. McGovern said the Chairman might be confusing that with the D3 application they discussed earlier. He said she was correct and apologized. Ms. McGovern said the H-3 application was withdrawn without prejudice at the last meeting. Mr. DiBiasi said that had the height variance. That will go before the Planning Board. There were questions as to the motivation of that. It will be cleaned up and brought before the Planning Board. So there is no confusion, H-2 Industries is 19 East Centre Street, block 402, lot 9, was withdrawn without prejudice to go in front of the Planning Board. Mr. DiBiasi said that was correct.

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Mr. Thomas DiBiasi asked that 6 Homer Avenue be carried without need for further notice to the next meeting. Chairman Scrudato said it can be carried to March 24. Mr. DiBiasi was agreeable.

Mr. Beck asked Mr. DiBiasi about Burger King. He wanted to know if his clients obtained final DEP approvals. He said yes. Mr. Beck asked Mr. DiBiasi to send a copy of the letter to Ms. McGovern for the file. Mr. DiBiasi said he would. Construction is underway.

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At the request of the recording secretary, Mr. DaCosta Lobo inquired of Ms. McGovern if the new members had to be sworn in again, because transcript is not on tape. (There was a malfunction with the recorder at the January meeting.) Ms. McGovern said no. There is an application that must be reheard because of the technical malfunction. N.J.S.A. 40:55-D(10)(f) provides that in all applications for land development that a transcript must be supplied. Business matters such as a vote on Executive Officers, which were taken by minutes and are sufficient. It is just applications that pertain to development. Ms. McGovern will set forth the statute in more detail before the application comes again before the Board. The Board members need to understand that it will be a new hearing, as if it was never heard before.

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No. 2 7:53:10 TRAN Denied 6-1

Applicant: Quang Tran (sworn), 77 Kierstead, block 22, lot 27, R-1 zone

Application: request to leave as erect a four foot, 50% open front yard fence.

Appearances: applicant

The letter of denial was read by Mr. Da Costa Lobo. Codes of Nutley prohibits any type of fence in the front yard.

Ms. Brown said it is a nice looking fence, but it is totally blocking the view of the person backing out of the driveway next door creating a safety hazard. Would the applicant consider cutting it back? He erected the fence for his children's safety, but the neighbor is not provided the proper visibility to even see them. Mr. Quan said he spoke with his neighbor about it and was given no indication that the fence blocks his view. He said even when he put up Christmas decorations on the front, he and the neighbor are aware of each other. The neighbor has two trucks - a van that he uses for work and a pickup truck. So when the neighbor sits in his vehicle it is above the fence line. In addition, Mr. Tran's house sits slightly below the neighbor's.

Ms. Petolino noted that Mr. Tran's reason for the fence is a safety issue. She asked if he was not concerned about the children running into the street. Ms. Petolino is not sure what the special safety concerns are that would prompt the Board to permit this fence when normally a front yard fence is not permitted. She asked if there are special dangers or safety issues that are not faced by other properties in the area. Mr. Tran said it's just an extra precaution and the fence looks nice. He feels it enhances his property.

Mr. Beck said even though the neighbor has a van and it's not a problem for him to see, he may have visitors who have regular vehicles. The problem is, as Mr. Brown indicated, if someone cannot see when backing out of that driveway, there maybe a serious problem - perhaps hitting a child going home from school. The applicant would have to consider moving the fence back further from the street. Mr. Tran said the fence is 50% open, so it does not completely block the view. He does not see an obstruction.

Ms. Petolino said the survey shows a substantial yard; it looks like it's fenced in. Is there any reason why the children can't play in the yard. They do play there; but after school, they like to play in the front, when there are others outside.

Mr. Halligan asked Mr. Tran if he himself erected the fence or was it done by a contractor. Mr. Tran said it was a contractor. Mr. Halligan asked if the contractor was unaware of the need for a variance. Mr. Tran supposes it was his own fault, but he thought that the contractor took care of all the permits. He said he found out when he went to town hall, the contractor had the fence drawn in toward the neighbor on the right. There is no fence there on his driveway. The fence is on the other side of the house.

Chairman Scudato feels that the fence is detracting from the safety of the applicant's children. It is very possible from someone walking up the street to be blocked from the view of someone coming out of the driveway next door. In addition to that, when he or the contractor filed a plan for a fence on the property, which totally encloses the rear yard, he either did not show the front yard fence to the building department or it was an afterthought. He does not see the hardship to the property; he sees it more as a danger to the children. The three- and a four-year old should be in the backyard behind the six-foot fence. They should not be in the front yard anyway without parental supervision.

Mr. Pastore sees no necessity for it. There is no reason for this particular fence. If the Board is going to grant something like this, everyone in the town will say they want a fence across the front of their houses. There is no reason for it. The applicant has a tremendous backyard where the children can play. He feels it is a detriment to anyone walking down the street with a vehicle coming out of the driveway. Even if it is 50% open, he cannot see this fence being there.

Mr. Halligan said the fence is 50% open, it extends outward . . . he questioned the distance from the sidewalk. Mr. Tran said it is about two-three feet off the sidewalk. There is a retaining wall two feet from the sidewalk. There is enough visibility for anyone walking by and any vehicle coming out of the driveway. Mr. Halligan did not get the impression that it was a safety hazard or that it was encroaching on the sidewalk. He feels that it is setback far enough and the fact that it is 50% open is not a safety hazard.

Ms. Petolino said whether or not he sees it as a safety issue, she submits that so far the hardship has not been demonstrated.

The Chairman said the Board is obligated to have a hardship - not to the applicant - to the property. He said they cannot seem to find one here. None of the members wants to see any child put in danger, that is not the case at all, but there is no hardship to the property. The front yard fence just doesn't make sense to him especially with a large, fully-enclosed backyard.

Mr. Tran asked the Board for its tolerance on this issue. He doesn't know whether or not his contractor followed the correct procedure from the beginning, whether or not the Board would have approved it at that time. The fact remains that it was done. He's lived in this house for 20 years and the renovations have been a nightmare from day one. Everything was done; he satisfied all the ordinances and regulations. Then suddenly, out of the blue, he received a letter that he cannot keep his fence, which he thought was legal. He is here to try to settle this issue so he can enjoy his home without any more frustration.

The Chairman said the obligation is not to the contractor; it is the property owner's. Mr. Tran understands that, but he didn't know it at the time. This doesn't not comply with the ordinance.

There is no hardship that the Board can find for installing that fence. It is not easy for this Board to say no or yes on something like this.

With no further questions from the Board members, Mr. Pastore made a motion to deny this variance saying there is no hardship to the property. Seconded by Ms. Petolino. Mr. Halligan voted against the denial saying that he doesn't feel the fence is a detriment to the property or a safety issue. It is not a detriment to the neighborhood. Mr. Tran noted that the fence has been in place since 2004. He said the inspector was there to give final approval and nothing was ever said about the fence. Chairman Scudato said if time were the determining factor, it also could work against him when he tries to sell his home. If a plot plan doesn't show the front yard fence or it has not been approved by a variance, he would then have to come before the Board for that variance. Time works for and also against. Continuing the poll, the variance was denied by a vote of 6-1.

Mr. Tran asked if that meant he had to take it down. Ms. McGovern said his other alternative would be to take it an appeal to the Superior Court. He has the right to appeal the decision of this Board. Within 45 days of the date this resolution is memorialized, (most likely on March 25, 2008) it will be published in the newspaper and 45 days from the date that it is published, Mr. Tran would have to file what is called a complaint in the prerogative writ in the Law Division, Superior Court of New Jersey in Essex County.

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No. 3 8:11:00 MARINO Denied 6-1

Applicant: Nicholas Marino, 5756 Stanford Court, Totowa

Application: Request to leave-as-erect, 12 dormers at 510 Franklin Avenue, Block 252, Lot 12, Zone B-3

Appearances: Darren DiBiasi, Esq., Nicholas Marino (sworn)

The letter of denial was read by Mr. Da Costa Lobo. Denied because the property is located in a B-3 district. Alterations have been made to the original, approved application memorialized on March 15, 2004 for the renovation of the premises into a mixed-use building. The 12 dormers that have been erected were done so without Board approval. Board approval must be obtained to leave the 12 dormers as erect.

Mr. DiBiasi introduced himself to the Board. The Chairman noted that Ms. McGovern would like to make a statement for the record. This application was heard at the last meeting on January 14. However, after the meeting concluded, we learned that the recording device did not record the meeting. Having no transcript that could be provided, which is a requirement under the statute, we have no choice but to re-hear this matter. Notices were sent. Municipal Land Use, N.J.S.A. 40: 55D-10 requires that the municipal agency (this Board) shall hold a hearing on each application for development, adoption, revision, or amendment of the Master Plan for each application for approval of an outdoor advertising sign or land development. That statute further requires under Section F, that the municipal agency shall provide for the verbatim recording of the proceedings by a stenographer, mechanical, or electronic means and the municipal agency shall furnish the transcript or duplicate recording in lieu thereof on request to any interested party at their expense.

Because the Board had no transcript or possibility of providing a transcript on this application, in discussing the matter with the Chairman, it was Ms. McGovern's recommendation as counsel to the Board that the matter be noticed to the community, which done (she told Mr. DiBiasi that she did see it in the paper, she also has the affidavit of service to the landowners within the 200-foot radius). This application is being heard as if it was never heard before. So, Ms. McGovern said

the Board members are instructed to ask whatever questions they asked at the last hearing and any new questions as they see fit. Counsel for the applicant understands that he has to put this application in from beginning to end, as if it was never heard before because if a review in court should be presented with this application, any references to what testimony took place in January are going to be confusing and not acceptable. So, therefore, based upon statute requirements, the hearing is being heard as if it was never heard before.

The Chairman said that is the mechanics of what took place. He said as soon as he was advised by Ms. McGovern, Mr. DiBiasi's office was notified that a transcript was not available. He said the applicant had some choices and he opted for a totally new application on the subject.

Mr. DiBiasi said the application did provide some background as to this application and he is certain all the members are familiar with it. He gave a brief background of the application and where the project presently stands. In March 2004, this Board granted site plan approval to the applicant to construct a mixed-use project on the site. This is the old Franklin movie theater. The construction is near completion. A stop work order was issued after a review of the work revealed that 12 roof dormers were constructed by the applicant. These dormers are inconsistent with the original resolution approved by this Board.

According to the resolution, the top floor cannot be used for any purposes and must be maintained as open space. Most importantly, it may not be used as living space. As the dormers are presently existing, light and air does get into the top floor. Mr. DiBiasi said he does suppose that this does allow for the possibility of illegal apartments on that floor. The Resolution allows for 16 apartments based on the available parking on the site.

There are two ways to accommodate the Board's concerns. As to the Resolution, and the applicant's testimony to be provided, the applicant has, in no way, no intention to utilize this space for illegal purposes. There will be no illegal apartments on that top floor. The building department has the authority to enforce the resolution and guarantee, by virtue of penalty, that no illegal apartments are located there.

Mr. DiBiasi said he has instructed the applicant, in anticipation of some concerns the Board may have, to re-evaluate the plans and perhaps modify the plans, to guarantee that light and air cannot penetrate the dormers. This will effectively make the top floor un-inhabitable. If the Board does agree, these dormers will then be effectively cosmetic and decorative.

Mr. DiBiasi said the dormers do not create any additional variances. He agrees they should have been reviewed by the Board when this application was originally presented and should not have been constructed. However, they are there, they are inconsistent with the resolution. The applicant wants to provide the Board with some comfort that the space will not be illegally used and will be maintained in a way that is consistent with the way the Board intended it.

Mr. DiBiasi's client, Mr. Marino is with him tonight and he can testify about the project and provide the Board with background on how the dormers were constructed, the modifications he intends to make to the dormers or just simply field questions from the Board. Chairman Scudato thinks it may be more effective to have Mr. Marino enlighten the Board.

Mr. Marino, lead by Mr. DiBiasi, said he constructed the dormers even though they were not proposed in the original plan approved by this Board. He does apologize to the Board for that mistake. He is aware that under no circumstances, that top floor may be used for additional apartments. The resolution allows for 16 apartments on site. He is aware that if there were apartments constructed on the top floor, they would be illegal.

Mr. Marino does understand how the Board can think that the light and air the dormers allow in could conceivably allow that space to be used for additional apartments. He said that it is not his intention to use the space in that way. He said that he can guarantee the Board that no light or air will penetrate the dormers. His architect has recommended applying permanently a rigid, one-inch thick Styrofoam to the interior side of the window, preventing any light and air to enter the space.

Mr. DiBiasi asked Mr. Marino to again guarantee to the Board that he will not be using the top floor as residential space. Mr. Marino said he has absolutely no intention of making that livable space. The dormers are just to enhance the look of the building. Mr. DiBiasi offered Mr. Marino to the members for questions.

The Chairman said he doesn't understand the permanency of Styrofoam.

Ms. Petolino asked if any of the mechanical systems, electrical, plumbing, HVAC, etc., were brought up to the attic level. Mr. Marino said there is no water, electricity, HVAC systems, and no sanitary pipes up there. There is elevator service that goes up there. He had hoped to build a deck over the offices for the tenants' use. Ms. Petolino said the resolution stated that no decks or balconies are permitted. Mr. Marino said it is not constructed yet.

Ms. Brown doesn't understand why the building department sent this matter to this Board when it is violating a building code issue. There is more than a 15% opening on those walls and is not far enough away from the property line to allow for that. So, by increasing the openings, he is increasing the hazards. He has no fire shutters or any kind of protection on those. She said he has created egress windows on the top floor and they serve no purpose if no one is going to live there.

Mr. DiBiasi said he was not aware of that and he does agree if that is the case, then that is something they would have to address with the building department. He said that they are here tonight, specifically, for the dormers because they are inconsistent with the resolution. That is why they are seeking site plan approval.

Ms. Petolino asked Mr. Marino if he was aware that the original variance that was granted, did not have dormers on it. He affirmed. She asked what prompted him to go ahead and do this without coming back to the Board for a variance. He replied that they are only cosmetic. Ms. Petolino asked why he would go forward with this construction . . . if he had no plan for this floor, why did he go to the expense of building dormers, putting windows in them, making them look attractive, when that floor was never going to be used for anything, and why, knowing what the variance required, why did he go forward without coming back to the Board? Ms. Petolino is trying to get an idea of what prompted Mr. Marino. Mr. Marino said he did not think he needed any kind of approval; he only did it to improve the look of the roof. Ms. Petolino asked if he didn't have to submit the revised plans to the building department. He went back after it was built, because he got a stop order. So he just went ahead and built it without going to the building department and the building department stopped him.

Mr. Pastore asked Mr. Marino if the drawings showed the elevator going to the top floor. Mr. Marino said yes and it did show a stop on that floor.

Ms. Petolino said the drawings that the variance was approved on, only shows the apartment plan; it does not show the top floor. She doesn't know how the Board would have known the elevator went all the way up. Mr. DiBiasi asked what the plans she refers to are dated. They were submitted March 2005.

Mr. Pastore said his concern is when the applicant originally went to the building department for the permit, those particular plans show the elevator going to the top floor, and that it has a particular stop for that particular floor. So, the building department gave him a permit knowing the elevator went to that floor.

Mr. Halligan asked, in addition to the elevator, what other type of access does he have for the fourth floor. He has a set of stairs that goes to the roof. Mr. Halligan asked if there was an open area on the roof or is it all enclosed. Mr. Marino said he was thinking about constructing the deck and it would be on top of the offices, which is the front of the building. Mr. Halligan said Mr. Marino claimed the dormers were a mistake, but then said they were design for aesthetic purposes. He asked how Mr. Marino came to the decision to erect the dormers. Mr. Marino said it was while the carpenters were doing the construction of the apartments, he decided that he would add the dormers. He said the stop order came six or seven months later. Mr. Halligan asked if Mr. Marino could estimate the cost of the dormers. Ms. Petolino asked if that was relevant to this hearing. The Chairman said it is not; financial costs of the project in very rare instances can play a part in the Board's decision. Mr. Halligan understood. He said he posed the question considering the fact that it is altruistic and aesthetic, he was wondering how much . . . The Chairman said he understood, that to spend this kind of money without an approval is foolish.

Mr. Beck asked Mr. Marino if, at any time, he had plumbing extending to the top floor. Mr. Marino said there were some pipes, but they were mostly for vents and then they were removed. Mr. Beck addressed Mr. DiBiasi regarding his comment during his background that site plan was approved by the Board. He thinks simultaneously there were other variances granted; is that not so? Mr. DiBiasi said that was correct, his understanding was that those variances were granted at the first meeting and then they came back several months later for site plan. Mr. Beck said he assumes that someone came then with a conceptual plan of what the building would look like. Mr. DiBiasi said he does suspect so.

Mr. Beck thinks there is a variance involved here. There certainly is a deviation from the plans as approved by the Board for which variances have been granted. The reason for the deviation from the plans seems to be a unilateral decision made by the applicant - for whatever reason. This will now be a hardship for the applicant because it will cost him a substantial amount of money if he is to comply with the plans that were originally submitted to the Board. However, financial hardship is not a reason for this Board to approve that. This is not all that different from the preceding case where the applicant came up and said "my fence is up. It looks good. Why can't I have it?" The reason is there is great concern at a later date, someone may come back to this Board, whether it be the current applicant or a new applicant, to request a variance for units on the fourth floor, saying they have the windows, the light, the air etc., ... this is not what this Board envisioned at the time the original variance was granted. That would require another variance for parking - at the very least.

Mr. DiBiasi did not disagree with that analysis and feels that ultimately that is perhaps how the Board is going to decide this case. He asked the Board to look at the application and the dormers in the context of the original application and perhaps if these dormers were on the original application, the Board would have turned the application down. He understands that that may have been a determining factor. If that is their position, then most likely they will not go forth with this application.

Mr. DiBiasi did disagree with one part of the argument. If a new applicant does come before the Board, obviously this Board can unanimously reject that application for additional variances. He is not sure that application would be as straightforward and as innocuous as suggested.

Everyone knows that parking variance in Nutley is not a simple variance. That is a normal obstacle for any application. If an applicant did come here for eight apartments that could demand 10 new parking spaces, he believes that would be a straightforward rejection by the Board.

Mr. Beck is not trying to change Mr. DiBiasi's mind and he doesn't not necessarily have his mind made up on how he is going to vote on this application. Applicants come here for parking for various reasons saying it is not detrimental to the neighborhood, etc.; the problem is, there are all done by variance and if this Board continues to give variances that should not be given, then of course you do have a negative effect on the area.

Mr. DiBiasi understood that, but made a further distinction between this application and the prior application. That is an instance where the nature of the fence demanded a variance. In this instance, the dormers, *per se* do not demand the variance, it is the fact that they deviate from the original resolution. If those dormers were on the original application, they would not have aggravated any of the existing variances and they would not have created any new variances. He can see that it is ground on which to deny the application, but there is a distinction between his application and other applicants who ask to leave as erect structures or accessory uses that need a variance. Mr. Beck said the key word is 'if,' if they were on the prior application, maybe it would not have been a problem. He doesn't know. He is saying that they weren't on the plans and this isn't necessarily a case where someone comes before the Board and says "the surveyor made a mistake, I am an inch over, I have to move and I have to take down the whole building." This is something that was done by the applicant, knowingly, not relying on anyone else, not relying on an architect, an engineer, or any other professional; it was done for altruistic reasons to make the building look better and improve the neighborhood and make it aesthetically pleasing. Fine, but it still comes down to that is the applicant's reason and now it's time to see what the Board thinks of his reason. It deviates and he disagrees with Mr. DiBiasi to some extent that anyone can go in and get a variance for plans submitted and then just unilaterally change them and say the test should be, was my change for the better. It may well be better, but the problem is you will have chaos if every applicant would take plans and make unilateral changes to them.

Mr. DiBiasi said he does not disagree with that, but that is in part why he is here tonight. Applicants are not allowed to make unilateral changes, and in the event that they do, the applicants have to return to this Board and explain why those changes were made. The reasons may or may not justify the changes, but they are not done, without at least the Board's review subsequently.

Ms. Petolino asked to have some points clarified. In the case of "leave-as-erect" cases -- in the past the Board has been told that the members should consider the case as though whatever was erected did not exist. Is that the correct approach to this? Ms. McGovern said yes, in the sense that typically the Board is faced with the dilemma when something has been done that would have required a variance. She thinks that the point Mr. DiBiasi is trying to make is that the presence of the dormers, by itself, would not necessarily have raised the issue of a variance. It would not have been an additional variance. There was no height increase or increase in the living space. However, there is some indication in the resolution for use variance that no decks or balconies are permitted. In terms of the testimony by the applicant that he wanted to put in a deck, that is a problem, because that would require a variance. The Board members know that they look at all the evidence before deciding an application and they make that as a condition. They have had applicants come before the Board requesting that conditions be lifted or changed to some degree. It is too gray an area for her to say, yes that it is a hard and fast line that the members have to look at.

Ms. Petolino said that this was a use variance for a non-conforming use. MS. McGovern said that is correct. Mr. Petolino's understanding is that for a non-conforming use, any type of construction has to go before the Zoning Board. Ms. McGovern said only if it is increasing the non-conforming use. She said the testimony of the applicant is that he is not planning to use that space for anything at this point. The applicant's argument is that it's a cosmetic change only. That is the Board's decision. Ms. Petolino said then that is debatable and the idea that it needs a variance is a borderline issue.

Ms. McGovern said other than Mr. Pastore, the members that are sitting here tonight did not hear the original application, but she will refer them to the resolution that was prepared. This is a new board and they are being asked to make this as a judgment call to either change the condition or change the plans as the previous Board had done in granting the use variance.

The Chairman said they should not be falling back on the decision of the prior application. This is a brand new matter. The Chairman asked if the applicant was indicating that he did not know he needed additional variance for the installation of these dormers. Mr. Marino replied that that was correct. He asked Mr. Marino does for a living. Mr. Marino is in the heating and air-conditioning business. In response to the Chairman's question, Mr. Marino said he was a little familiar with resolutions, codes, variances, applications, etc.

The Chairman asked Mr. Marino if it was his testimony that there is no rough plumbing or electrical service to the top floor. Yes. Did he then state that any services that were up there, electrical, plumbing, or anything else, were removed? Mr. Marino concurred. The Chairman said then, that there were utility services on that floor. He asked Mr. Marino why he would spend the money to do that. Mr. Marino said the vents were not running the right way, so the plumbing inspector had to tell them what to do.

On the matter of the elevator, the Chairman asked what the applicant plans to use the fourth floor for. Mr. Marino said he is not going to use it for anything. So, he went through all that cost, expense and trouble to install an elevator that goes to the floor that will not be used. The Chairman is having a problem rectifying the applicant's testimony with regard to the plumbing, electrical service, and the elevator. Mr. Marino said the only thing that is correct is that the elevator does go to that floor. It was done that way with the intention, from the beginning, to construct a deck over the offices for the tenants' pleasure. The Chairman asked if the deck was originally denied. Mr. Marino said he never sought a variance for the deck. Ms. Petolino said that was a condition. The Chairman said, then, that he misunderstood.

He asked how the applicant would block the light and air at the dormer windows. He said it is not shown on his plan; in fact, the plan is not to scale. Mr. Marino said the architect suggested a rigid, one-inch thick Styrofoam insulation applied with glue and silicon on the interior side of the glass. The Chairman said, in his mind, that could be removed in five minutes. He does not see this as a permanent solution to blocking light and air.

Mr. Pastore addressed Ms. McGovern. The dormers do not really require a variance. Ms. McGovern said they did not on the original set of plans. Mr. Pastore asked then, why the Board is hearing this case? This should have been sent back to the building department; the building department should have said the dormers are not on the drawings, take them down. Ms. McGovern said they did and the applicant requested . . . Mr. Pastore asked then, why throw it in the lap of the Zoning Board. Ms. McGovern said the applicant asked that he be given the opportunity to come to this Board to ask that the condition be changed, the condition being that the Board will approve the previous plans with these new plans.

Mr. Pastore said that they should have had a complete set of drawings of what went up there. Ms. McGovern told Mr. Pastore that she has her file from the original variance hearing and she knows, from being on this Board for a long time, that the members don't always get full sets of plans. They get what the code official deems appropriate. Mr. Pastore said they complain about this all the time. The plans they have are the same ones they worked from when this plan first came before the Board.

Mr. Pastore said this is a situation where they have dormers up for aesthetic purposes. If they were on the original set of plans, they may have passed anyway ... he doesn't know. Ms. McGovern said neither does the code official, which is why the code official is not at liberty to grant the applicant the right to do this. Mr. Pastore said that was correct and understandable, but the dormers are not on the drawing, the code official puts a stop to it. That is where it should have stopped. It was the code official's decision, strictly up to him, to make the ruling on these particular drawings. Instead of coming back here and saying let's open up this whole can of worms all over again and start from day one.

The Chairman said part of the problem is that the Board did not have a recording of the meeting . . . Mr. Pastore said there was no recording at the last meeting when the dormer situation came up (the Chairman said it was denied). It had nothing to do with the original resolution. The Chairman said Mr. Pastore is absolutely right. Mr. Pastore said going back to the original resolution, no one really knows if it would have passed or if it would have been denied because there were dormers on the fourth floor. That is an unknown. In reality, if the Board is saying take the dormers down, they are taking this complete resolution away from the applicant and saying take the building down, because it didn't pass. Ms. McGovern said they aren't. They are just making a decision as to whether they believe what the applicant is requesting should be added as a condition to the plans that were previously approved. There are other alternatives. Mr. Pastore said that particular Board gave a variance on the drawings that were available at that time, is that correct. Ms. McGovern said she believes, and she does not want to start testifying here, there were color renderings; there are things the applicant did introduce. The applicant has the burden of proving today that this condition should be accepted by the Board.

The Chairman said this was especially so in light of the fact that there is no transcript of the Board's denial. Mr. Pastore said that denial has nothing to do with the original resolution. Mrs. McGovern said Mr. Pastore is referring to the Resolution of 2004 when the site plan was approved and before that when the use variance was granted. The Chairman said then that he understood. Mr. Pastore said he recalls that the biggest thing then was the parking. Mrs. McGovern said there is a reference in the resolution that there be no balconies and no decks. She did say there were several sets of plans that went back and forth before the Board. Mr. Pastore thinks the building department put this board between a rock and a hard place.

Mr. Halligan said Ms. McGovern made point earlier that the Board got this again because it is contingent upon the fact that the first application was approved. These dormers, clearly, substantially alter the application, that intent. Ms. McGovern said that is something for the Board to consider. Mr. Pastore said then that they dissolve the first resolution. Ms. McGovern said that wasn't so. This is why they are not going back and hearing the entire application. The applicant has been granted a use variance; they granted the site plan; the only thing the applicant was not granted was the use of dormers. And that is for the Board to decide today.

Mr. DiBiasi said if this was handled properly, as it should have been, that Mr. Marino decided at the beginning of construction that he wanted to incorporate dormers on the top floor, he should have at that point submitted a formal application to the Board and asked for an amended site

plan. That application would most likely been heard by a Board consisting of some different members from the original application. So, it is within this Board's jurisdiction to review that application. He is sure that what is frustrating everyone is that this application is being conducted backwards. The applicant is asking for an amendment after the fact when this should have been done preliminarily and it was not. He asks that the Board evaluate this application in the context of the original application. If the dormers were on the original application, it would not have needed an additional variance; they would not have aggravated any existing variances. The Board may determine that, by themselves, the dormers are not needed for the building and they create the possibility of illegal apartments, for that reason the Board would not vote in favor of the application. It is within reason to look at this application in the original context. For the record again, he said the dormers are decorative and cosmetic. The applicant testified to the Board under oath that this space will not be used illegally. They also have the building department's enforcement mechanisms to guarantee that the space is not used illegally.

Mr. DiBiasi said if a new applicant should come before this Board and requests that, because these dormers exist it makes sense to use this space (it is there regardless of the application) for additional apartments, then the Board would strike down that application for a variety of reasons. Looking at the dormers in the context of the original application, the question he feels is how the Board would have voted on the original application. Would the Board vote against it because of the original dormers or would the Board have taken the applicant's word that the space will not be used illegally. The Chairman said a good number of the members that are sitting now did not hear the original application. Mr. DiBiasi said he understands that, but it would be the same situation if the application had been addressed properly a year and a half ago while construction was taking place. The Board that would have heard the amended site plan would be different from the Board that originally approved the application. What is confusing here is that it is being done backwards; the applicant is here after the fact.

Mr. Beck said this Board and any Board is not necessarily bound by the record in prior instances. The record is not available; what is available is a resolution. So, therefore, he thinks that the question is both these resolutions indicate that the variance and site plan being granted is a shown on the preliminary plans dated September 4, 2002. Those plans are incorporated in the resolution with specificity, sometimes, pages, numbers, etc., so you don't have a situation like we have now where someone says, *I think I'll make a change, I think I'm making a change for a good reason*. It's not for this Board to go back and rehear the prior application. This Board is only looking at the resolutions, at the requested change, which is a variation from what was granted by that resolution. Basically this is a new application. It's not so different than if a variance is granted and five years later someone comes in says they would like to do something different.

Mr. DiBiasi said again how the light and air would be blocked and that floor would be rendered uninhabitable. The building department can enforce that. Mr. Pastore said between him, Mr. DiBiasi, and the Board members the light situation is a sham. To put pieces of Styrofoam on the windows that could be scraped off in two minutes . . . he told Mr. DiBiasi to stop; stop trying to make this Board . . . this isn't a bunch of ridiculous people sitting up here. They understand what is going on and they all understand that that particular area can become apartments or offices. They know that. He said the last time the applicant was here, the electrical service was up there, all the plumbing was up there, everything was there. Mr. Marino said that is not so. Mr. Pastore said that is what he told the Board. He denied it; there is no electric and no water. The Chairman said was there, but it no longer is.

Mr. Pastore said that it can be put back and apartments or offices could be put in the space very easily. He told him not to come here and say, *ok we put Styrofoam in the windows and now we blocked the light*. Mr. Marino said this was a recommendation and suggestion of the architect.

Could Mr. Pastore recommend something else? Mr. Pastore said he has arguments with architects all the time.

The Chairman asked Mr. Marino when he started to install the dormers. Mr. Marino said it was in 2005. The stop order wasn't because of the dormers. There were other issues. The Chairman read an October 13, 2006 letter into the record addressed to Bill Spiezio from Thomas DiBiasi, Esq., saying that his office *will file a land use application with the Board of Adjustment seeking permission to change the roofline; his client will continue work as per site plan approved by the Board of Adjustment.* The Chairman said that Mr. DiBiasi's office was aware that there was work being done on the roof. Mr. DiBiasi agreed. He said that, procedurally, he could remind the Board, his office did submit an application in response to the building department's concern. The application was originally on the agenda, possibly last March or April. It was carried for a couple of months (maybe until June). There was an administrative oversight and it was dropped from the agenda. The issue came to his office again and he resubmitted an application. The Chairman said that the work continued, though. Mr. DiBiasi said he believes the work did continue. This letter was marked at Exhibit B-1.

The Chairman agreed with Mr. Pastore that a lot of people have put this Board in a very difficult position up here, rubberstamping these dormers. Even if the dormers are bricked over, skylights could be installed to get light and air into the building. To go to the expense, design, and cost of putting in an elevator to the top floor, when it could only be used for storage as he sees it, it does not make much sense to him. Someone down the line can apply for apartments or office space.

Mr. Da Costa Lobo is not clear on what if any plumbing, heating, cooling, or electrical facilities are present on that top floor. Mr. Marino said there is nothing. What was there was removed, and that was strictly vents. Mr. DaCosta Lobo said there was never anything else installed and nothing else to be removed. Mr. Marino said that was correct.

Mr. Pastore addressed Mr. DiBiasi, saying that the last time around, this gentleman, under oath, told the Board that there was electrical and mechanical brought to that particular floor. Mr. DiBiasi said, to the best of his recollection . . . Mr. Pastore said there is no way of anyone backing him up because the machine was broken. Mr. Marino said he never said that because there was never anything up there. Mr. Pastore said he asked Mr. Marino specifically, where did the electrical terminate and Mr. Marino said on the fourth floor. Mr. Marino said it was terminated on the third floor at the apartments. There is no electric whatsoever. Mr. Pastore said he must have been hallucinating that night. Mr. DiBiasi said that night did not exist according to the record. Mr. Pastore said again, it is only his word. The Chairman said it was Mr. Pastore's recollection and it is important.

The Chairman asked Mr. DiBiasi if he had any further comments. Mr. DiBiasi said yes, but at the end. The Chairman asked if there was anyone in the audience who wanted to be heard regarding the application. There were none. The Chairman said the Board members have to reach a decision and he said he knew it would not be easy.

Mr. DiBiasi summed up. He reminded the Board that the applicant is specifically asking the Board to amend the site plan that was approved in March 2004. The amendment includes 12 roof dormers. The applicant should have come before this Board back in 2005 prior to this work being done and ask for the Board's approval. Obviously, that did not happen. They are here because it has been determined by the building department that the dormers were constructed, admittedly, inconsistent with the resolution. There is no plumbing, heating, electrical, and no air on the top floor. Presently there is no way to construct any apartments up there. The applicant is open to bricking the windows as a condition and they should accept the applicant's testimony that he is

not going to use this space illegally. It is a difficult assumption that an applicant here under oath would be lying to this Board and making these representations.

Furthermore, in the event that he is lying under oath to the Board, Mr. DiBiasi said the building department could enforce the top floor, which exists regardless of the dormers. There is empty space that can be converted, it exists, it was approved originally by the Board. He can guarantee that there are no utilities on that floor. There are no apartments. The applicant would have to proceed illegally and act inconsistently with his testimony given under oath and he will be penalized severely by this town and by this Board. These are cosmetic, they are decorative. He apologized that they did not come before this Board prior to the construction, but he does ask that the Board look at these dormers in context with the original application and see if they make sense cosmetically.

Mr. Marino added that it was his mistake to do the dormers. He did not think that he would need Board approval. He thought it would be all right to build dormers. All his buildings are unique; they stand out. They are very nice buildings. And that is what he intended to do here.

The Chairman said it is not going to be an easy decision by the Board members. He asked that the members give a brief reason why they vote either in favor of or against the application.

With no further questions from the Board members, Mr. Beck made a motion to deny the site plan amendment be denied for the following reasons: the changes do not comply with the plans as approved by this Board in both site plan and variances hearings. There is no showing of hardship; the hardship is self-created by the applicant. He believes it will cause a detriment to the area. This is not what was approved by the Board. Ms. Brown seconded.

Ms. Brown said the application did not demonstrate any hardship. Personally, she has issues with this being building code issues and it shouldn't even be here. It is not a benefit to the public good; it is actually a detriment and it will be a detriment in the future to whatever could happen here. Ms. Brown voted yes for the denial.

Mr. DaCosta Lobo voted no. He said they have an applicant, who under oath has expounded what he thinks is a rational basis for the deviation. He does not think that considerations that are typically used in granting or denying variances are necessarily the standards they should be using here and to the extent that the space could in the future be used for apartments and a request like that would come before this Board and if that Board at the time should decide the conditions are such that apartments like that would be approved then that would be their business at that time. But to foreclose that now, to use that as a basis for denying the application, he thinks is improper.

Mr. Halligan said his concern is more for unintended usage of the space and illegal apartments or office space. He thinks as the situation stands, that is easily doable, now, and in the future. He voted yes.

Mr. Pastore voted yes for the reason that the work was done in non-conformance to the original set of drawings that was approved by the building department and the Board.

Mr. Beck voted yes.

Ms. Petolino voted yes because, in looking at the original application, she does not feel that she would have approved the addition of the dormers seeing no purpose to the stated use of the building and also for the fact that it was done without conformance to either building code or the

variance.

Chairman Scrudato also voted yes saying for the reasons stated above. Also, he sees a great deal of inconsistency with the testimony as stated here tonight. He advised Mr. Marino that his application was denied.

The application was denied by a vote of 6-1.

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BUSINESS: Ms. McGovern had one resolution for the reorganization appointing Mr. Scrudato chairman; Mr. Graziano, vice chairman; Mr. DaCosta Lobo, secretary; Ms. McGovern, attorney; and Marie Goworek, recording secretary. Approved.

Minutes for July 9, 2007 and July 16, 2007 meeting were sent to the members for approval. Present at the July 9 meeting were Mr. Beck, Ms. Brown, Mr. Chagnon, Mr. DaCosta Lobo, and Mr. Pastore. Those present at the July 16 meeting were Mr. Beck, Mr. Blanda, Ms. Brown, Mr. DaCosta Lobo, Mr. Graziano, and Ms. Petolino. The August 20 minutes will be resubmitted as Ms. McGovern only remembers reviewing the above two sets. The minutes were accepted.

The January minutes are limited to the memorializations of the resolutions and the recording of the election. She asked for an approval of those minutes. Accepted by all.

An invoice in the amount of \$150 from Linda Pasternack, who sat in for the recording secretary at the November 19, 2007 meeting. Approved.

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LITIGATION: Ms. McGovern had no issues to be discussed off the record.

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ADJOURNMENT (Public Session): 9:25:40.

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Respectfully submitted,

Marie L. Goworek

Marie L. Goworek
Recording Secretary