

MINUTES
Of the Township of West Milford
Zoning Board of Adjustment

March 28, 2006
Regular Meeting

7:46 p.m.

Linda Lutz, Principal Planner/Board Secretary, opened the meeting with the reading of the legal notice.

1. Pledge

Mr. Brady asked all attendees to join him in the recitation of the Pledge of Allegiance.

2. Roll Call

Present: Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady.
Stephen Glatt, Board Attorney; Richard McFadden, Township Engineer;
Linda Lutz, Board Planner and Secretary.

Absent: Joseph Giannini, Thomas Lemanowicz, Ed Spirko and Michael Ramaglia

Mr. Brady, Board Chairman indicated that there is a five-member Board for this evening. He then gave an overview of Board procedures.

3. Memorializations

Resolution 2-2006

High Crest Lake Lodge, Inc.

Site Plan #0120-0096AB, extension of time, which was approved.

Eligible to vote: Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady.

All voted yes on the memorialization.

The Board Attorney indicated that the memorializations for the following Resolutions would be prepared in time for the April meeting.

Resolution 6-2006

Robert DiBella, Applicant

and

Resolution 7-2006

Thomas Oppelaar, Applicant

Resolution 8-2006

Annual Report

Eligible to vote: Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady.

All voted yes on the memorialization.

4. Applications

Case called at 7:51 p.m.

Charles Aikey	Complete	02-13-06
Amended Final Subdivision, Section 1	Deadline	03-30-06
#0420-1950C		
Block 9501; Lot 19.02		

144 Wesley Drive; R-3 Zone
Request for amended final subdivision approval.

Sworn witness: Charles Aikey, Applicant, 144 Wesley Drive, West Milford, NJ

The Applicant appeared without an attorney. He stated he is requesting the amendment owing to issues that have come up between the Highlands Council, the DEP and him. Mr. Brady indicated that it is his understanding from speaking with the Township Engineer that the proposed changes do not impact the Board's original approval. He stated the Board does not need to get into a detailed explanation. Mr. Glatt asked for a record, indicating that Mr. Aikey has stated there is a need for some changes because of the DEP. Mr. Aikey stated it is not necessarily certain at this time that changes will be necessary. There needs to be clarification on what the MUA is doing at this location. Mr. McFadden clarified that the amendment comprises breaking the subdivision into two phases, the first phase to include the storm drainage improvements and two lots coming off Leslie and Wesley Drives and the cul-de-sac. Mr. Aikey stated he had no problems with the Planning staff report of March 16, 2006.

Motion by Mr. Jurkovic to grant approval of amended subdivision, Section I so as to reflect that the plat will be done in two phases, rather than one phase as originally approved, and subject to the conditions outlined in the March 16, 2006 Planning Department report.

Second by Mr. McQuaid.

Roll call vote:

Yes: Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady

No: none

Motion carried.

Case ended at 7:56 p.m.

Case called at 7:56 p.m.

David Mulligan Complete 12-15-05

Use Variance #0540-0723 Deadline 05-14-06

Bulk Variance #0530-0725

Block 3604; Lot 1

31-33 Ringwood Lane; LC Zone

Request for use variance relief from the MLUL C.40:55D-70d(2) for the expansion of a pre-existing, non-conforming use and,

Request for bulk variance relief for buffer to street and buffer to side line to enable the addition to a single-family dwelling.

Testimony was taken at the February 28, 2006 public hearing. Seven members who were present to hear testimony were Ada Erik, Daniel Jurkovic, Thomas Lemanowicz, Arthur McQuaid, Ed Spirko, Francis Hannan and Robert Brady.

Therefore, five members eligible to vote on this application this evening are Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady.

Mr. Barbarula, Esq., continued his appearance on behalf of the Applicant.

Previously sworn witness: David Mulligan, Applicant.

Newly sworn witness: Kenneth Ochab, P.P., AICP

List of exhibits presented: A-5, unsealed copy of a survey by Rigg Associates, dated April 15, 1999
A-6, Original Tax Bill, showing the property was, at one time, two lots
A-7, 4 photos, mounted on a board, taken by Mr. Ochab on February 25, 2006

A-8, 2 photos, mounted on a board, taken by Mr. Ochab on February 25, 2006

Mr. Ochab gave his credentials and the Board accepted him as an expert witness in planning.

Mr. Ochab discussed the photos. They were submitted to show the nature of make-up of the Subject Property and views of neighboring properties, including the two-and-one-half-story house being built on Lot 2. He indicated that Lot 2 is also in the LC zone, despite being used residentially.

Mr. Ochab discussed Exhibits A-5 and A-6, indicating that together they showed that, at some prior time, the Subject Property was two lots.

Mr. Ochab discussed the photos marked as Exhibit A-8. He stated these photos show the residential nature of the area.

With respect to the Highlands Act, Mr. Ochab stated that this project would, in all likelihood, be exempt. If it were to be developed in conformance with commercial zoning, however, it probably would not be exempt. A Highlands permit would be difficult to obtain, he stated.

Mr. Ochab discussed the balancing test for the use variance. He discussed the positive criteria.

1. The property can accommodate the addition.
2. The expansion is in conformance with the character of neighborhood.
3. The likelihood of the lot being developed as lake commercial is remote, owing to the Highlands Act, and difficult access because of elevation changes between the property and Greenwood Lake Turnpike.

Based on the three issues cited above, he believes that the use is particularly suited for the property.

Mr. Ochab continued that there is no substantial detriment to the surrounding neighborhood because there is a new house being built next door, the setbacks are being maintained and there are no impacts to properties across Ringwood Lane or across Belcher's Creek. In terms of the zone plan, there is no substantial impairment. He stated there must have been a similar use variance approval to permit the construction of the new house on Lot 2. He suggested that the Township review the zoning scheme for the area.

With respect to the bulk variances, he stated that the subject criteria are related to a commercial use and that it is questionable whether they are applicable to the situation at hand.

Mr. Barbarula discussed the difference between a raw-land use variance versus an expansion of a pre-existing, non-conforming use variance. He asked Mr. Ochab if it is appropriate to impose the LC zone buffer requirements or would residential buffers be more appropriate. Mr. Ochab responded that buffers are intended to separate incompatible uses. The buffer is not necessary in this case of the residential uses. The spacing of the uses in this area is appropriate for the residential uses.

Mr. Jurkovic expressed a concern that the house closest to Belcher's Creek might have at once been a boathouse that has since been illegally converted into a dwelling. His concern was that someone could benefit from an illegal conversion.

Mr. Mulligan stated that he never performed a conversion. When he purchased the property, in 1999, both subject structures were houses.

Ms. Erik stated that she grew up in the area and recalled that, in 1958-1963 or so, one could boat up to the structure by Belcher's Creek and buy bait, but the owner also lived in the structure. She stated it was never a boathouse.

The matter was opened to the public. No one wished to be heard.

Motion by Ms. Erik to close the public portion.

Second by Arthur McQuaid.

On voice vote, all were in favor.

Motion carried.

In summation, Mr. Barbarula stated this property somehow became one lot. The bulk variances requested are pertinent to commercial development. To assess them in terms of a commercial development in the LC zone, they seem big. To view them in terms of the facts on the ground, however, they are not substantial. The project meets the intent of the Master Plan and municipal land use. There are positive aspects. At some point the municipality approved the house on adjacent Lot 2. Further, other residential uses in the area have been permitted to expand. He stated this is Smart Growth and consistent with the Highlands Act. This is a lot with two dwelling units pre-existing. It needs to be updated to be in conformance with current life styles and standards. The purposes and benefits are far outweighed by any detriments because, as Mr. Ochab stated, there is no negative aspect.

Motion by Mr. Jurkovic to approve the use variance and the bulk variances to enable the addition. He concurred with the testimony of Mr. Ochab. Despite being in a commercial zone, the uses in the area are primarily residential. There is a lot of improvement taking place in the area and the improvements being made to this property are an enhancement to the area.

Second by Ms Erik.

Roll call vote:

Yes: Ada Erik, Daniel Jurkovic, Arthur McQuaid, Francis Hannan and Robert Brady.

No: None

Motion carried.

Case ended at 8:29 p.m.

Case called at 8:29 p.m.

Joseph Hajbura Complete 12-23-05

De Minimis Exception Deadline 04-25-06

Bulk Variance #0530-0728

Block 1207; Lot 14

Carmel Road; R-2 Zone

Request for *de minimis* exception from the Residential Site Improvement Standards N.J.A.C. 5:21-3.1 for pavement, drainage infrastructure and graded areas and,

Request for bulk variance relief for lot area and relief from the MLUL C.40:55D-35 requirement that no permit for the erection of any building or structure shall be issued unless the lot abuts a public street giving access to such proposed building or structure, to enable the construction of a new home.

Robert A. Jones, Esq., appeared on behalf of the Applicant.

Sworn witnesses: Joseph Hajbura, Applicant, 28 Elinora Drive, Wanaque, NJ

Greg Gloor, L.S., 153 Lakeview Ave., Ringwood, NJ

List of exhibits presented: A-1, buy/sell letter to J. and Luba Darmohraj (Block 1207; Lot 12)
A-2, buy/sell letter to Peter Darmohraj (Block 1207; Lot 13)
A-3, letter from Mr. Jones to Mr. Peter Darmohraj

A-4, Notice of Tax Valuation for Block 1207; Lot 14

Mr. Hajbura stated he wishes to build a home. Mr. Jones stated there is one variance necessary.

Mr. Jones stated that he wrote to the adjoining property owners attempting to buy additional land or sell the subject lot to adjacent owners. The owners of Block 1207; Lot 13 and 12 (an uncle and a nephew) together were willing to sell their lots to Mr. Hajbura as a unit. Mr. Jones indicated that, at his client's direction, he offered \$4,000 for the two lots (as stated in Exhibit A-3). Mr. Hajbura stated the counter-offer was \$8,000, which he declined.

Mr. Jurkovic asked if there is case law that may provide guidelines for this type of situation – whether the price is appropriate. Mr. Glatt asked if the Applicant or Mr. Jones knows what the fair market value is for lots 12 and 13.

In response to questioning from the Board, Mr. Jones stated that the purchase of the lots would not eliminate the variances, but would lessen them.

Exhibit A-4 shows the land assessment value is \$6,300. Mr. Jurkovic asked what the tax equalization ratio would be (so as to determine market value). Guesses were being made as to the market value based on the known land assessment. Mr. Glatt stated that if Mr. Hajbura were trying to sell his lot to the adjoining owners, the fair market value would be as if the lot were conforming. He stated perhaps we need more testimony. Mr. Jurkovic asked if it would be possible to get the assessed value of lots 12 and 13, apply the tax equalization ratio and then Mr. Hajbura would have solid testimony to present to the Board. The Board can then determine if the \$4,000 offer was reasonable.

Mr. Glatt stated, if the Board approves this application, making a finding of fact that the \$4,000 was a fair market offer, and they refused to sell at fair market value, those property owners could be found to have a self-created hardship should they make an application for variance relief.

Mr. Jones stated he would continue with his proofs and come back to the Board with additional testimony regarding the value issue.

Mr. Jones asked the Applicant to discuss the *de minimis* exception. They indicated they have no problem with complying with Mr. McFadden's January 12, 2006. Mr. Jones stated that to comply with the RSIS, would be cost prohibitive and not particularly beneficial to the public. Mr. Hajbura agreed.

Mr. Jones indicated that he would not call Mr. Gloor.

Mrs. Lutz asked for testimony regarding the § 35 variance (MLUL 40:55D-35). Mr. Hajbura stated emergency vehicles could traverse. She offered that the Fire Marshal stated no objection, which is an indication to the Board that emergency vehicles can gain access to the site.

Mr. McFadden stated if the Board were to grant approval, he would need to see a proposed profile of the road, cross-section and grading along the road.

The matter was opened to the public on the testimony provided to date. Mr. Glatt stated that the next time the matter is heard, it will be re-opened to the public, solely on the issue of valuation. No one wished to be heard.

Motion by Ms. Erik to close the public portion.

Second by Mr. McQuaid.

On voice vote, all were in favor.

Motion carried.

Applicant gave to the Board an additional 30 days in which to hear the application, making the Board's deadline May 25, 2006.

Motion by Mr. Hannan to carry the application to the April 25, 2006 meeting.

Second by Mr. Jurkovic.

On voice vote, all were in favor.

Motion carried.

Mr. Brady announced that no further notice or advertising is necessary.

Case ended at 8:57 p.m.

8:57 p.m. to 9:26 p.m. Break.

Case called at 9:26 p.m.

Kristen Goldberg	Complete	01-12-06
Bulk Variance #0530-0705	Deadline	05-12-06

Block 7506; Lot 1

10 Compass Avenue; LR Zone

Request for bulk variance relief for side yard setback, front yard setbacks and maximum lot coverage to enable the addition to single-family home.

John Barbarula, Esq., appeared on behalf of the Applicant.

Sworn witnesses: Kristen Goldberg, Applicant, 10 Compass Ave., West Milford, NJ
Claud Ballester, P.E., 1811 Union Valley Road, West Milford, NJ

Ms. Goldberg explained she needs to put an addition on to her home to accommodate her disabled mother, fostering her independence to the extent possible.

Mr. Ballester was sworn and he gave his credentials. The Board accepted him as an expert witness in engineering.

Mr. Ballester discussed the lot, explaining its size, shape, and that it has two front yards. He detailed the requested bulk variances. He stated the addition will not affect the septic or well in terms of use or location.

Mr. McFadden indicated he needs a plan showing the sight triangle easement.

Mr. Jurkovic asked if this is a proposal for a two-family house. Discussion ensued regarding the ease with which the addition, once built, could be illegally transformed into a two-family house. Ms. Goldberg stated that is not her intention. The Board stated that it must be concerned with future owners, as land use issues remain long after she might be gone from the house. Mr. Jurkovic also stated his concern regarding the excessive coverage request.

Mr. Barbarula stated that she would stipulate, in a letter from Mr. Barbarula, to removing the second kitchen and she would submit revised variance plans showing a reduction in size. They will attempt to have the architectural drawings re-drawn in time for the next hearing. They will mark up one architectural plan, showing the changes and submit revised variance plans. They understood that the revised plans must be submitted by April 14, 2006.

Applicant gave to the Board additional time in which to hear the application, making the Board's deadline May 31, 2006.

Motion by Ms. Erik to carry the application to the April 25, 2006 meeting.

Second by Mr. Hannan.

On voice vote, all were in favor.

Motion carried.

Mr. Brady announced that no further notice or advertising is necessary.

Case ended at 9:50 p.m.

5. Minutes

Motion by Ms. Erik to approve the minutes of the February 28, 2006 meeting.

Second by Mr. Hannan.

On voice vote, all were in favor.

Motion carried.

6. Communications

9:51 p.m.

Memorandum from Richard S. Kunze, Township Administrator, and Fred Semrau, Township Attorney, dated March 2, 2006 re: Consolidation of Township resources in order to minimize legal expenses in connection with various litigation.

[Mr. McFadden left the meeting shortly before 9:52 p.m.]

Mr. Brady read into the record the memorandum. He stated that, at this time, he does not have enough information to make a decision but that he would be willing to meet, as requested in the memo. He stated, however, that he has serious reservations about dealing with a lawyer who is not familiar with the Board representing the Board in Court.

Mr. Hannan expressed a concern that this suggested approach will politicize litigation in regard to matters for both Boards. Ms. Erik stated that she had attended the Council meeting at which this was discussed. She opined that what was discussed at the Council meeting is not accurately reflected in the subject memo. She stated that the Council was discussing budget issues and it was stated that the Planning Board has gone well over its legal budget in its litigation with Mr. O'Shea. It was stated at the Council meeting that, since the Council and the School Board have settled, the Council needs to rein in legal spending. She stated the Council did not specifically mention the Zoning Board of Adjustment, but it asked that Mr. Semrau speak with Mr. Kienz [the Planning Board Attorney] to see if they can put this matter to rest – to stop the spending.

Mr. McQuaid offered that perhaps we could sue the people who file frivolous lawsuits and recoup the approximately \$50,000 spent to defend ourselves. Mr. Hannan added that the individual lost and continues to appeal. He reiterated his concern that the process with respect to litigation will become politicized and will go before the Council, where it does not belong.

Mr. Brady added that, because of the uniqueness of the Zoning Board of Adjustment, the Board is entitled to its own representation. He also stated that Mr. Glatt's contract stipulates that he is to handle the Board's litigation.

Mr. Glatt pointed out that the discussion may be premature because, before it can be said that a matter will be turned over to the Council, the nature of the matter must be known to ascertain whether there is a conflict of interest, whether other Departments are involved, etc. The Court will never let one attorney represent more than one interest. In fact, the Court would, in all likelihood, disqualify the attorney attempting to represent multiple interests.

Mr. Jurkovic stated that perhaps the discussion is going beyond the request in the memo. He suggested that the Board decide whether it wishes to discuss the matter with the Township Administrator and Attorney. Mr. McQuaid suggested that the meeting include the Mayor as well. Mr. Glatt asked if Mr. Kienz will be attending the meeting.

Mrs. Lutz reported on the Planning Board's position, as it was discussed at its meeting of March 23. She said the Planning Board directed Mr. Kienz to contact the Township

Attorney to find out more information and then report to the Planning Board. Mr. Jurkovic suggested that perhaps this Board should do the same. Mr. Brady countered that this Board could still agree to a meeting, but it should set the terms of the meeting (meaning potential attendees, in accordance with Mr. McQuaid's suggestion). Mr. Jurkovic stated that anything that is tentatively decided at the proposed meeting would have to be presented to the full Board for a vote.

Mr. McQuaid opined that agreeing to meet would exhibit a spirit of cooperation with the Council. Mr. Hannan stated that it would behoove the Board to meet because the Council is ultimately fiscally responsible.

Mr. Brady stated that the Board needs to get more information. The Board needs to construct a letter to the Administrator stating that it will meet with him, the Mayor, attorney and Council representative, but whatever is decided on in the meeting would have to come to the Board for a vote. He also would like Mr. Glatt to speak to the Township Attorney and report to the Board. He stated he needs as much information as possible before making a decision. Mr. McQuaid again suggested the Mayor attend, stating that the reason we elected a Mayor is to have a Mayor who can make decisions. Mr. Brady agreed, stating he would like someone at the meeting who can make a decision on the spot. Mr. McQuaid stated this memo gets deep in that it references procedures and policies. He questioned if the establishment of same could be accomplished. Mr. Jurkovic stated that this may be one of those ideas that, on its face, might be a good one, but to implement it is tough to handle. Mr. McQuaid stated that is why he would like the Mayor at the meeting.

Mr. Hannan asked if this idea violates statutes. He understands the set up in the MLUL is to create autonomy for the Zoning Board of Adjustment. Mr. Glatt stated that, if the autonomy of the Board is compromised, then there may be an issue. He again stated that the attorneys must be cognizant of conflicts of interest and that this approach, if taken, would have to be addressed on a case-by-case basis. Mr. Jurkovic stated that it is possible for someone to involve the Board in some sort of OPRA litigation that could consume Mr. Glatt's time, precluding him from devoting time to his normal Board of Adjustment duties. Mr. Glatt stated that there is nothing prohibiting the Board from recommending that Special Counsel be retained. It would not necessarily have to be the Township Attorney who is appointed. That is one of the issues that needs to be ascertained: are they saying the Township Attorney would automatically step in, or would a special attorney be asked to handle the matter? If there were to be a proposed settlement, any attorney, whether it is him or a Special Counsel, would not have the authority to settle without coming to the client – the Board of Adjustment – and advising what the proposed settlement is. The Board then would vote on the proposal.

Mr. Brady opined that he finds it abhorrent that the Council would consider forming a special way to handle Town Hall business to appease a gadfly. Mr. McQuaid stated we have to face reality, that Mr. Kunze is merely following the directive of the Council, and so he is put in a difficult position. That is why, Mr. McQuaid stated, the spirit of cooperation is necessary. Mr. Jurkovic agreed, stating the Board will not lose its autonomy by talking to people and entering into a dialogue.

Motion by Mr. McQuaid to have the Chairman and the Vice Chairman meet with the Mayor, the Township Attorney and the Township Administrator.

Second by Ms. Erik.

On voice vote, all were in favor.

Motion carried.

10:09 p.m.

7. Miscellaneous Items

On behalf of the Township Administrator, Mrs. Lutz reminded members to submit their Financial Disclosure Forms, if they have not already done so. Mr. Hannan apprised the

Board that they can be filed on-line. Information regarding on-line filing is available on the form itself.

8. Adjournment

10:11 p.m.

Motion by Ms. Erik to adjourn.

Second by Mr. McQuaid.

On voice vote, all were in favor.

Motion carried.

Respectfully submitted,

Linda M. Lutz, P.P.
Zoning Board of Adjustment Secretary