



Zoning Board of Adjustment

October 20, 2010

Hearing
(Minutes)

Prepared by:

Paul Demarest

Chairman Knee called to order, at 8:04pm, the Regular Monthly Hearing of the Zoning Board of Adjustment for the Borough of Closter, New Jersey, being held Wednesday, October 20, 2010 in the Council Chambers of the Borough Hall. He stated the meeting was being held in compliance with the provisions set forth in the Open Public Meetings Act of the State of New Jersey and had been advertised in the Borough's officially-designated newspaper according to law. He advised that the Board adheres to an 11:00pm adjournment and no new matters would be considered after such time.

He invited all persons present to join the Board in reciting the Pledge of Allegiance.

.....

The following Board members and professionals were present at the meeting:

- Robert Knee- Chairman
- Joseph Bianco, RA/PP
- Theodore West, DDS
- Mitchell Monaco
- Jennifer Rothschild, Esq.
- Thomas Hennessey- Alternate #1
- Marie Hartwell- Alternate #4
- Leonard Sinowitz- Zoning Officer
- Arthur Dolson- Council Liaison
- Alysia Smickley, Esq.- *in lieu of Joel Ellis, Esq.- Board Attorney*
- Paul Demarest- Board Coordinator

The following Board members and professionals were absent from the meeting.

- Lorin Sonenshine, RA/PP- Vice Chairman
- Steven Freesman, Esq.- Secretary
- Mark Crisafulli- Alternate #2
- VACANT- Alternate #3
- Joel Ellis, Esq.- Board Attorney
- Kevin Tichacek, PE- Board Engineer

.....

Prior to the meeting, the Board received copies of mail correspondence received by the Land Use Department on its behalf. Chairman Knee read said mailings into the record.

.....

Due to the evening's lackluster attendance, the Board postponed votes on the approval of the minutes for the August 18, 2010 Hearing, the August 30, 2010 (Special) Hearing and the September 15, 2010 Hearing until the November 15, 2010 Hearing.

.....

Being none of the 3 newly-filed Board cases were scheduled to appear before the Subcommittee this month, the October 27, 2010 Work Session was cancelled.



The Board announced that it would convene at the December 6, 2010 (Special) Hearing to consider the 85 Chestnut Avenue (Case #Z-2010-05) and 24 Yale Place (Case #Z-2010-07) applications; Mr. Demarest said he would confirm the applicants' availability. Ms. Smickley noted that neither application would require a super majority for approval being that both are non-Use Variance cases.



Chairman Knee opened the meeting to the public for anyone wishing to comment on matters not related to a case on the evening's agenda. No one wished to be heard.



Item #1

Case #Z-2009-15
9 First Street
(Block 1707/Lot 1)

Applicant(s): James & Glynis Dolan
Representation: Andrew Kohut, Esq.

The applicants are seeking an Interpretation of Zoning Ordinance(s) for the continuation of a 2-family use at the subject property; in the alternative, they would seek a Use Variance.

Andrew Kohut, Esq., Wells, Jaworski & Liebman, LLP, 12 Route 17 North, Paramus, New Jersey, introduced himself. He stated his case is a 2-pronged application with the 1st approach being validation of a non-conforming use under New Jersey Statutes Annotated (NJSA) 40:55D-68; he continued that if the Board determined his clients did not meet the burden of proof for such, a Use Variance would be sought. Chairman Knee asked if the applicant was technically appealing the Zoning Officer's determination, even though the Board application packet filed indicated a request for Interpretation; Ms. Smickley concurred, saying Mr. Sinowitz denied the applicant's request to approve a pre-existing 2-family use at the subject property. Mr. Sinowitz informed that his denial required the applicants to appear before the Board since (as per the New Jersey Municipal Land Use Law of 1975) relief from the administrative officer had not been sought by the person(s) then-owning the property within 1 year of the Ordinance change (enacted December 19, 1940) that made the subject property's use non-conforming. Mr. Kohut said he had an abundance of proofs that verified the 2-family use both pre-existed the inception date of the Borough's Zoning Code (December 19, 1940) and has never been abandoned. Mr. Kohut informed that, as part of the property's history, an affidavit, provided by a recently-deceased neighbor who resided in close proximity to 9 First Street since 1955, could be provided if the Board determined it to be admissible. He believed that though the 85 year-old individual passed away subsequent to the filing of the application, his intent was to testify on his clients' behalf and, although the rules of evidence applied to the Board's proceedings, they are nonetheless relaxed; therefore, he felt the affidavit, in conjunction with the applicant's testimony about discussion with the deceased, could be beneficial. Ms. Smickley agreed that the rules of evidence are relaxed in

this forum and believed the Board must first decide whether or not to use the evidence and then determine how much “weight” it should have in its consideration of the case given there are special circumstances surrounding it. Chairman Knee asked if such admitted evidence could be grounds for an appeal of the Board’s decision by any interested party in the future; Ms. Smickley answered that in this type of legal situation where the signer of an affidavit is deceased, the evidence is usually admitted but not given as much “weight” as if there was testimony attached to it. Mr. Kohut suggested he could present all of his other evidence to the Board and then, if it felt more presentation on the conversations between the witness and signer of the affidavit was necessary, he could admit the affidavit itself; the Board agreed to such an approach. Mr. Kohut pointed out that it is their burden of proof to show the 2-family use was not abandoned based on a preponderance of evidence, not beyond a reasonable doubt as would be required in a criminal proceeding; he continued to say case law provided that he did not have to show that the subject house was used as a 2-family residence every day of every year since prior to December 19, 1940, but rather only prove there was never the overt act or intent to abandon the use.

Glynis Dolan, 30 Walnut Street, applicant and co-owner in fee of the subject property, was sworn in as Witness #1. She testified to residing in the Borough since 1985 with her family and purchased the subject property in 2003 after “shopping around” for some time seeking a legal 2-family residence. Ms. Dolan said the property was marketed to her as a tenant-occupied, multi-family dwelling unit and revealed that, at the time of title transfer, the basement area was outfitted as an apartment, resulting in 3 separate residences (including the 1st and 2nd floors). She reiterated there is no intention to use the basement for habitation; the witness pointed out that all electrical and plumbing fixtures had been removed from the basement following the closing. Ms. Dolan stated the purpose of buying the property was to have her elderly/sickly parents reside there and, at the same time, generate some income. She testified that there are 2 green-painted front doors, 1 of which leads to the 2nd floor unit (7 First Street) and the southern door which accesses 9 First Street, where the witness’ mother lives. The witness stated the 1st floor apartment has a back door that exits to a wooden deck; she further stated both living spaces on both floors are almost identical with separate entrances and exits. Ms. Dolan said the basement is completely separate from the rest of the structure and it contains side and back doors for storage; she continued saying both dwelling units have separate heating/electrical components and hot water heaters. With regards to parking on-site, the witness stated the driveway is elongated with a secondary section. Exhibit #A-1, renderings of the 1st and 2nd floors prepared by the applicants, was presented. The witness testified the 1st floor contains a living/dining area, a kitchen with a breakfast nook, a bathroom, a small hallway and 2 bedrooms. Dr. West stated that the submitted floor plans were missing many lines and Mr. Bianco concurred stating the Subcommittee had requested superior renderings be filed at the September 23, 2009 Work Session. Mr. Kohut acknowledged that there were discussions of professional drawings being prepared but revealed that such was not a condition of perfection by the Subcommittee, but rather a request via a phone conversation by Mr. Demarest several months later. Mr. Bianco said the Subcommittee frequently accepts non-professional plans, however, the filed floor plans do not reasonably indicate locations of windows, kitchens, walls, etc. Mr. Kohut revealed he now had a set of architectural, prepared by a design professional the applicant retained a few years back when she considered constructing an addition to the subject residence; he stated the set contains existing floor plan layouts. Mr. Bianco expressed frustration over why the architectural were not submitted with the Board application to begin with. Chairman Knee felt the Board could utilize the homeowner plans for purposes of an Interpretation, but if a Use Variance were to become necessary, that the architectural should be reviewed by the Board for more detail; Mr. Kohut agreed. Mr. Sinowitz inquired if the existing floor plans depicted in said architectural dated back prior to December 19, 1940; Mr. Kohut

answered that there are no records of any construction being done at the subject site. Ms. Dolan continued her testimony and stated the 2nd floor apartment “mirrors” the 1st floor with the sole difference being a slightly less floor space since it does not have a breakfast nook; also, she said the upper floor unit has a small attic pull-down for additional storage space. Mr. Bianco asked about the existence of 3 dwelling units at the time of the applicant’s purchase of the property; Ms. Dolan stated there was “something” that resembled an apartment in the basement, however, after the closing in 1984, a tenant had a fecal explosion which resulted in a major insurance claim for the applicant. She said the outcome was that the entire basement area was “gutted” and has remained unfinished to this day. Mr. Bianco asked how many utility meters there were; the witness said there are 2 for electric, gas and water. Ms. Rothschild asked if there was tenancy currently on the 2nd floor; the witness answered there was. Mr. Monaco asked if relatives of the applicant still resided on the 1st floor; Ms. Dolan said her mother does.

Chairman Knee opened the meeting to the public for questioning of Witness #1 only.

Jesse Rosenblum, 65 Knickerbocker Road, asked if, at the time of closing, the applicant’s attorney questioned Borough officials on the legality of the property’s use as a 2-family; Ms. Dolan stated that since she would be paying taxes as a multi-family property, she believed the use had been sanctioned by the Borough as such. Mr. Kohut informed that he had not yet passed the bar examination when Ms. Dolan purchased the subject property.

Brian Beddoe, 36 Maple Avenue, was sworn in as Witness #2. He stated he has lived in the Borough for 56 years, including at 430 Closter Dock Road as a child, which he believed to be a distance of 500 to 1,000 feet from the subject site. He testified to knowing the prior owners of 9 First Street (Mr. and Mrs. Joseph Novack) being he got haircuts from Mr. Novack via a basement entrance (from 1959 until 1965). Mr. Beddoe said the Novacks maintained the property as a 2-family, testifying he realized 2 families lived in the house (along with other neighboring homes in the area); also he said he has not noticed a change to the subject site since his childhood years except for the fact that today there is a wooden deck in the backyard plus the “disappearance” of a brook that previously ran through the side yard. He stated the Novacks’ basement consisted of simply a tile floor and barber chair. Ms. Rothschild asked when the witness purchased 36 Maple Avenue; Mr. Beddoe said he bought his residence in 1989 and that his first home in the Borough was an apartment downtown following his wedding.

Chairman Knee opened the meeting to the public for questioning of Witness #2 only. No one wished to be heard.

Steven Lydon, PP, Burgis Associates, 25 Westwood Avenue, Westwood, New Jersey, was sworn in as Witness #3. Exhibit #A-2, a title search report dated October 18, 2010, was presented. After reviewing its title history, the witness said the property’s tax block/lot #'s have varied throughout the years and that as a corner lot at High Street and First Street, its address is 7/9 First Street. He testified that, in 1932, the property was sold by Ralsamond and Lucy Mattocks to Charles and Martha Huntemann, at which time, the property’s Block # was 131 and the Lot #'s were 2 and 3. He further stated that, in 1939, the Huntemanns acquired a parcel of land measuring 105’ x 15’ from the Borough, known as Lot #1. Mr. Lydon continued to say that Joseph and Theresa Novack bought the combined properties (now known as Block #131/Lot #1) in 1955, owning until 1989, when they sold to both Mr. and Mrs. Christopher Rutigliano and Mr. and Mrs. Timothy Feulner.

Finally, he stated, the site was sold to Mr. and Mrs. Ding-Chen Fu in 1995, who, in turn, transferred title to the applicant and her husband in 2003. Exhibit #A-3, property tax records acquired from the Bergen County Board of Taxation, was presented. Mr. Lydon stated the 1939 tax card indicated the subject property to be a “framed dwelling” and “2-F”, the latter label confirming, the witness felt, that it is a 2-family use; the witness said the 1940 and 1942 tax cards had “2-F” notations as well. Mr. Lydon revealed that, in actuality, the Borough’s 1st Ordinance was established in 1923, not 1940; said Ordinance, he said, only created zoning districts and their limited use parameters and not a schedule of limitations for bulk standards. Exhibit #A-4, a copy of the Borough’s Ordinance #87 approved April 12, 1923, was presented. The witness believed the subject house was built in 1915 and, therefore, pre-dates the 1923 Ordinance. He continued saying that only a few minor adjustments were made to said Ordinance until December 19, 1940, when the Borough adopted Ordinance #192, which created a limiting schedule for the 1st time (requiring a minimum lot size in District #2 of 6,000 sf and 9,000 sf for 1-families and 2-families, respectively); he mentioned that the Limiting Schedule also mandated a 60’ street frontage for this particular site, which it met. The witness testified that said Ordinance differed from another that was adopted in 1955 because it did not link a property’s use to the bulk requirements (the only limitation was lot size). In 1954, the witness continued, the Code was altered by increasing the minimum lot size for 2-family residences in District #2 to 10,000 sf, but the change did not link the 2-family nature to the building setback requirements (such occurred in 1955 when the maximum # of permitted dwelling units was made subject to both Article V of said Ordinance and all bulk standards in District #2). Mr. Lydon reminded the Board that the subject house had already been in existence for nearly 4 decades by the time the last of the previously-mentioned Ordinances had been adopted by the Borough. Based on such facts, as well as there not having been any modifications/expansions made to the house, the witness believed the subject property and its use are protected as a non-conformity since the house was built originally as a 2-family residence. Exhibit #A-5, a series of photos by Mr. Lydon depicting the subject property, was presented. Exhibit #A-6, a land use map prepared by the witness’ firm and portraying the subject neighborhood, was presented. Mr. Lydon said the latter exhibit revealed there to be 10 2-family properties in the area, based on his observations from the public right-of-way. He also felt that, as per *S & S v. Zoning Board for Stratford*, there has been no action on part of the owner to terminate or abandon the property’s use. The witness further pointed out that tax records as recent as 2006 show the property as a 2-family. Exhibit #A-7, a series of property tax cards for the years 1968, 1991, 2000 and 2006, was presented. The witness stated the true way to prove there has been a termination of the 2-family use would be through evidence of construction and there is none; he felt to, say, convert the current use to a 1-family residence would be “foolish” in terms of logic and economics and the most beneficial way to do so would be for the owner to sell the 2-family house and buy a 1-family. Ms. Rothschild asked how the witness, according to his testimony, knew the house was built in 1915; Mr. Kohut said the 1991 tax card indicates “year built” to be 1915. Mr. Lydon stated that date is probably not exact but rather an estimate based on some firsthand knowledge or testimony (the applicant’s title search ended at 1932). Mr. Bianco asked if the property meets all present-day bulk requirements; the witness said it doesn’t comply with the front and side yard setback minimums. Mr. Bianco asked for the square footage of each apartment unit; Mr. Lydon did not know. Mr. Bianco asked if there was adequate off-street parking; the witness said there is a driveway that runs along the side of the house near the street intersection and along First Street, where there is a smaller parking area that can fit 3 vehicles. Mr. Bianco asked if the witness had been inside the structure and viewed any fire separation between the upper and lower level dwelling units (a concern that he felt could arise during a Residential Certificate of Continued Occupancy <RCCO> inspection); Mr. Lydon said he did not, but that only new construction would be required to have fire separation (the existing walls

would have to be “opened up” to search for fire separation). He did say, based on the age of the home, that there probably are chases throughout and that balloon framing was used for its construction. Exhibit #A-8, a portion of an architectural set prepared by Eric Baker Architecture dated both May 30, 2006 and June 6, 2006, was presented. Mr. Bianco asked if the witness could answer whether or not said exhibit, the proposals of which were never followed through with by the applicant, show the perimeter of the basement to be concurrent with the 1st floor; Mr. Lydon said they do with the exception of the entry foyer on the west side. Chairman Knee asked the reasoning behind Mr. Bianco’s question; he answered that the foundation of a house does not usually change and if the home went “straight up like that”, it would then prove it was originally-constructed that way. Mr. Lydon said it did not appear that, other than the deck, the home has been extended. Mr. Sinowitz said it could be argued that the 2-family use was abandoned and diverted to a 3-family use; Mr. Kohut replied that, as per *Poulathas v. Zoning Board for Atlantic City*, the expansion of an illegal non-conforming use is not deemed to be abandonment. Mr. Sinowitz said he was in possession of a later revision of Exhibit #A-8, dated January 30, 2008 and submitted to him for Zoning Officer review, which indicated the property’s existing use as 3-family and its proposed use as 2-family; he also stated a site plan by Hubschman Engineering, PA dated August 2, 2007 and filed with his office, showed the property to be converted from a 3- to 2-family use. Mr. Monaco questioned if the house’s current layout is the way it was originally-constructed since he felt a “bump out” for the vestibule (access to the 2nd floor) could have been added later on to accommodate the main entrance. Mr. Bianco said the only way to know the answer is to go into the house’s basement and view the foundation walls; he explained that, during this time period (circa 1915), rubble walls consisting of fieldstone and cement (not cinderblock or concrete block/poured) would have been used. He asked if any photographs of the home’s interior were available; Mr. Kohut answered no. Mr. Bianco asked if *Sanborn* maps were found for the property; Mr. Lydon said such research was not needed since they already had a wealth of evidence in the applicant’s favor.

Chairman Knee opened the meeting to the public for questioning of Witness #3 only.

Jesse Rosenblum, 65 Knickerbocker Road, asked if the property’s tax records indicate the home’s exterior to have 3-coat plaster; the witness said they do not. Mr. Rosenblum questioned whether or not there were any openings in the foundation walls to allow for coal delivery; Mr. Lydon stated he did not look for such.

At this time, Chairman Knee decided it would be helpful to have counsel present the affidavit. Mr. Kohut revealed that the signers of the affidavit swore to both residing at 595 High Street since 1954 and believing the subject property (located across the street from theirs) to be a 2-family since at least 1940. Mr. Bianco asked when and at what age did Mr. Bartholf die; Mr. Kohut said he was in his eighties when he died last month (he pointed out only he would have testified on the applicant’s behalf, not his wife). Mr. Bianco asked if said exhibit is hearsay; Ms. Smickley said it technically is an exception to hearsay since the signer, who would have testified, is deceased. The Board accepted the document into evidence. Exhibit #A-9, an affidavit prepared by Howard and Lillian Bartholf dated April 9, 2009, was presented.

Mr. Kohut summated.

Chairman Knee opened the meeting to the public for general comments only. No one wished to be heard.

Outcome

A motion was made by Mr. Bianco and seconded by Dr. West, to approve the application via the Interpretation request as a pre-existing, non-conforming 2-family use with the following condition: originally-filed floor plans prepared by applicant are to be replaced in the Board's application file by Exhibit #A-8 (the latter of which is to be revised having all rooms labeled) since it provides greater detail. Mr. Kohut stated he would provide the Land Use Office with a revised Exhibit #A-8 (specifically the basement, 1st and 2nd floor plans) prior to a Board vote on any Resolution (tentatively-scheduled for November 15, 2010). The motion passed (7-0: YES-Hartwell/ Hennessey/ Rothschild/ Monaco/ West/ Bianco/ Knee).



There being no further items to discuss, a motion to adjourn the meeting was made by Mr. Bianco and seconded by Ms. Rothschild. All members present voted in favor. The hearing adjourned at 10:50pm.