



# **Zoning Board of Adjustment**

April 20, 2011

***Hearing***  
***(Minutes)***

Prepared by:

**Paul Demarest**

Chairman Knee called to order, at 8:03pm, the Regular Monthly Hearing of the Zoning Board of Adjustment for the Borough of Closter, New Jersey, convening Wednesday, April 20, 2011 in the Council Chambers of the Borough Hall. He stated the meeting was being held in compliance with the provisions set forth in the New Jersey Open Public Meetings Act and had been advertised in the Borough's officially-designated newspaper. 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
- Lorin Sonenshine, RA/PP- Vice Chairman
- Steven Freesman, Esq.- Secretary
- Joseph Bianco, RA/PP
- Theodore West, DDS
- Mitchell Monaco
- Antranig Ouzoonian, PE
- Thomas Hennessey- Alternate #1
- Andrew Shyong, DDS- Alternate #3
- Leonard Sinowitz- Zoning Officer
- Alysia Smickley, Esq.- Board Attorney
- Paul Demarest- Board Coordinator

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

- Mark Crisafulli- Alternate #2
- Marie Hartwell- Alternate #4
- Arthur Dolson- Council Liaison
- Jeffrey Morris, PE- Board Engineer



Prior to the meeting, the Board obtained mail correspondence received by the Land Use Department on its behalf. Secretary Freesman read said mailings into the record.



A motion was made by Mr. Bianco and seconded by Vice Chairman Sonenshine, to approve the minutes for the March 16, 2011 Hearing. All eligible members present voted in favor. A motion was made by Mr. Bianco and seconded by Mr. Ouzoonian, to approve the minutes for the April 7, 2011 (Special) Hearing. All eligible members present voted in favor.



Chairman Knee requested 3 volunteers from the Board to serve on the Subcommittee for the April 27, 2011 Work Session. The following were assigned: Mr. Bianco, Dr. West and Mr. Hennessey.

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A motion was made by Vice Chairman Sonenshine and seconded by Mr. Bianco, to approve the 2011 By-Laws Revision. All eligible members present voted in favor.

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Being the latest revised draft of the 2010 Annual Report to the Governing Body was only received by the Board earlier in the day, Chairman Knee tabled a Board vote until the May 18, 2011 Hearing.

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Continuing the discussion on the Board's (Special) Hearing fee policy from the March 16, 2011 Hearing, Chairman Knee said he was against any charge being accrued to the applicant if it is the Board setting a date; Vice Chairman Sonenshine and Mr. Bianco disagreed, saying the Board is accommodating the applicant and the Borough would need to compensate for additional administrative duties. Chairman Knee asked for a summary of the current policy again. Mr. Demarest answered the standard fee is \$1,000.00, which the Board has the authority to waive. He said the Board tends to do such when it, and not the applicant(s), request a date. He noted that if it is waived, an administrative fee of \$100.00 is still charged and its payment is divided between the number of applicants scheduled to appear. The Board decided, without the need for an official vote, that a \$100.00 administrative fee shall be charged per applicant when it wishes to appear at a (Special) Hearing date and the Board has waived the normal \$1,000.00 fee. Ms. Smickley noted that any fee change wished by the Board would need to be requested of the Governing Body so the relevant ordinance can be adjusted. Speaking frankly, Mr. Demarest stated that when the \$100.00 administrative fee was first implemented in 2010, the Borough Administrator gave his approval without feeling the need to bring the issue before the Mayor and Council; he also pointed out that the only wording to change in the fee schedule will be the addition of "per applicant" to the line item. Ms. Smickley replied that may be so, but she instructed to have the Borough Administrator make that determination on the Board's latest request; Mr. Demarest agreed to do so.

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Mr. Bianco reiterated that the Board should set up another (Special) hearing date as soon as possible to resolve any residential, non-use variance applications on its agenda; he felt the Board could not allow the caseload to keep growing. Vice Chairman Sonenshine and Dr. West disagreed, saying the Board, mostly comprised of volunteers, should not have to attend more meetings because applicants cancel their scheduled appearances at the last minute. Ms. Smickley explained that an applicant's request to postpone halts the time in which the Board must act on the case. Mr. Sinowitz asked when the Board could dismiss a case with or without prejudice due to delays. Ms. Smickley answered that if an applicant consents to an adjournment by the Board, then the time limitation, in which the Board must determine the case, is delayed; she added that if the applicant does not consent, the Board must hear the case within the allotted time or else, she believed, the application is automatically denied. David Watkins, Esq., 285 Closter Dock Road, Closter, New Jersey, (sitting in the audience) interjected and explained that if an applicant were not to consent, the case is automatically denied by the Board. He said if that were to be appealed to the Superior Court of New Jersey- Bergen County Law Division, the judge would surely remand the case back to the Board; thus, he said for an applicant not to

consent is pointless and costly. Mr. Demarest pointed out that the majority of current cases on the Board agenda are due to enforcement by the Borough, meaning those applicants have no incentive to being heard sooner rather than later. The Board asked Mr. Demarest to see if he can muster together any cases for the tentatively-scheduled June 2, 2011 (Special) Hearing; he agreed and said he would have confirmation in time for the May 18, 2011 Hearing.



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.

Jesse Rosenblum, 65 Knickerbocker Road, speaking of the Board's heavy caseload, suggested that any applicant, not represented by counsel, should move ahead of those cases that have postponed; essentially, he said that would equate to homeowner applicants not having to wait behind those cases being presented by attorneys. The Board said it would take his idea into consideration.



### **Item #1**

Case #Z-2010-07  
24 Yale Place  
(Block 2004/Lot 7)

Applicant(s):  
Representation:

Estate of Rudi & Gertrude Mitschke  
David Watkins, Esq.

The applicant is appealing the determination of the Zoning Officer as to whether or not the subject property and 25 Yale Place (known as Block 2004/Lot 6 and located on the same side of the street even though it has an odd number as its address) are either legally-merged or separate lots; NOTE #1: the applicant's objective is to construct a new single-family house on the subject lot; NOTE #2: it is the position of the Zoning Officer that, due to a lack of documentation on the merger question, the Board has jurisdiction on the application; NOTE #3: the applicant argues the subject property was purchased by the deceased from the Borough in 1951 as a separate/buildable lot and that a merging of the 2 adjacent parcels of land was never the intention of either the grantor or grantee.

David Watkins, Esq., 285 Closter Dock Road, Closter, New Jersey, introduced himself. He said the subject case is quite unusual and the 1<sup>st</sup> of its kind that he has presented to the Board on the issue of merger in his 33-year career. He said it is Mr. Sinowitz' position that the subject lot (24 Yale Place) and 25 Yale Place could be considered merged and, thus, 24 Yale Place could not be developed. He said *Loechner v. Campoli* may be mentioned later in the proceedings, which he felt is inapplicable to his client's case. Exhibit #A-1, a chronology packet of all activity on 24 Yale Place and 25 Yale Place dating from 1950 to 2011, was presented. Exhibit #A-2, a colorized version of a pre-filed site plan by Hubschman Engineering dated September 2, 2009 and last revised August 3, 2010, was presented. He said there is currently a house situated on 25 Yale Place that was constructed by the applicant and received a certificate of occupancy in 1951; he said, soon thereafter, the Borough noticed the public that it was selling 4 lots on Yale Place, 1 of which was 24 Yale Place. He said the public notice specifically listed that 2 of those properties cannot be built on (none of them being 24 Yale Place). He explained Rudi and Gertrude Mitschke purchased 24 Yale Place, an 8,943 sf parcel of land, in 1951 when the Borough's

minimum lot size requirement was 6,000 sf in District #2 (Residential); therefore, he the perception was that the subject property is a separate/buildable lot. Mr. Watkins referenced *NJSA 40:55D-55* and summarized that if a lot is conveyed which is contiguous to another, and both owned by different entities, the municipality would have 2 years to deem it an illegal subdivision; he added that if it does not do so, the 2 lots would be deemed separate/buildable lots. He continued saying that when Rudi Mitschke died, his wife, Gertrude, sold 25 Yale Place to their son, Frederick, in 1990, while retaining ownership of 24 Yale Place; he pointed out the conveyance occurred 21 years ago, 19 years after which the Borough could have deemed it an illegal subdivision. Mr. Watkins noted that had his client done any development at 24 Yale Place, such as a tennis court or swimming pool, the argument for non-merger would not be possible (he informed that the only "improvements" made to the subject lot are 2 curb cut originally installed by the Borough).

Michael Hubschman, PE, Hubschman Engineering, PA, 263(A) South Washington Avenue, Bergenfield, New Jersey, was sworn in as Witness #1. The witness summated the 12 parts to Exhibit #A-1: 1.) deed dated September 20, 1950 for 25 Yale Place from Borough to Rudi & Gertrude Mitschke; 2.) public notice from Borough to liquidate 4 separate lots on Yale Place (including 24 Yale Place formerly known as Block #148/Lot #'s 24-27); 3.) deed dated September 7, 1951 for 24 Yale Place from Borough to Rudi & Gertrude Mitschke; 4.) undated tax map depicting 24 Yale Place and 25 Yale Place (formerly known as Block #148/Lot #'s 20-23); 5.) current tax map depicting 24 Yale Place and 25 Yale Place; 6.) Borough's Limiting Schedule approved December 19, 1940; 7.) Borough's Limiting Schedule approved April 14, 1954; 8.) Borough's Limiting Schedule approved December 28, 1955; 9.) Borough's Limiting Schedule approved December 14, 2005; 10.) photographs of current conditions of 24 Yale Place and 25 Yale Place; 11.) court documents pertaining to dismissed lawsuit by Nancy Many and Janet Ridenhour (granddaughters) against Gertrude Mitschke (grandmother) over payment of outstanding mortgage on 25 Yale Place; 12.) deed dated March 1, 1990 for 25 Yale Place from Gertrude Mitschke to Frederick Mitschke. Mr. Hubschman testified that since 1990, the Borough has prepared separate tax bills for 24 Yale Place and 25 Yale Place because they have been owned by different parties with separate mailing addresses. Exhibit #'s A-3, a 2010 tax bill for 25 Yale Place and A-4, a 2010 tax bill for 24 Yale Place, were presented. Mr. Watkins referenced *Simeone v. Zoning Board of Adjustment* and explained the court ruled the Board was estopped from applying the principle of merger and of claiming self-created hardship because the municipality had failed, on 2 separate occasions, to invalidate the transfer of the lot in question, under *NJSA 40:55D-55*, when it was held in common conveyance; continuing to show the similarities between his client's case and *Simeone*, Mr. Watkins stated that, in *Simeone*, the property owners never owned any lot contiguous to the lot in question and no common ownership had occurred with either lot since 1983. Vice Chairman Sonenshine asked the witness' opinion as to why Rudi and Gertrude Mitschke would buy 24 Yale Place and never develop it after so many years; Mr. Hubschman believed their intention was to provide their son, Frederick, with land to 1 day build his own house on. Mr. Bianco asked if 24 Yale Place was purchased by the Mitschkes at a public auction; Mr. Watkins answered that, based on the public notice from 1951, the parcel went out to public bid. Mr. Bianco asked if it was known how 24 Yale Place and 25 Yale Place's tax bills were written between 1951 and 1990; Mr. Watkins replied he did not but felt such a question was irrelevant because what matters is that presently both tax bills are in separate names and case law says that if a municipality is currently taxing a parcel as 2 separate lots, then it is so back to the previous conveyance. Mr. Bianco pointed out that in most zoning issues, tax history has proven not to hold much weight; Mr. Watkins agreed but said the issue of merger is not like, for example, 2-family use ratification. Mr. Sinowitz asked if this matter was more a case of law than zoning; Mr. Watkins responded that the Borough does

not have the right to say, 21 years later, that 24 Yale Place and 25 Yale Place are merged because they only are given 2 years, by statute, to deem it an illegal subdivision. Mr. Bianco asked if the witness had an existing survey of 24 Yale Place without the proposed 1-family residence shown; the witness said he did not. Mr. Bianco asked what man-made structures are located on the subject lot; Mr. Hubschman said there is nothing other than possibly a walkway. Mr. Bianco revealed he visited the site, viewed a rock garden and came to the conclusion that 24 Yale Place has been used for open space enjoyment by the occupants of the residence at 25 Yale Place. Both Mr. Watkins and Ms. Smickley agreed the law is clear in that the threshold is there must be structures on-site for the lots to be considered merged. Ms. Smickley clarified that 24 Yale Place is currently in the name of the Mitschke Estate; Mr. Watkins concurred and explained the Estate's beneficiaries are Frederick Mitschke's 2 daughters, who also own 25 Yale Place through their father's inheritance, and his 2 sisters. Mr. Ouzoonian asked why there would be curb cuts installed on an empty lot; Mr. Watkins replied the Borough puts them in whenever there is a road improvement and separate lots are created in order to allow for ingress/egress.

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

Jesse Rosenblum, 65 Knickerbocker Road, asked why the subject lot of the case is 24 Yale Place, an empty lot, when 25 Yale Place is the lot with a house on it. Mr. Watkins replied that to demonstrate non-merger, he has to show what is on both lots. Mr. Rosenblum asked if there were 2 public notices from 1951 because he remembered, when reviewing the Board file, 24 Yale Place being restricted from development; Mr. Watkins said he was mistaken. Mr. Rosenblum asked what the meaning was of the following as written in Exhibit #A-1/Part 12: "This conveyance is made subject to an easement in the premises..."; Mr. Watkins responded that Gertrude Mitschke was given a life estate when her son, Frederick, received 25 Yale Place because part of the litigation (Exhibit#A-1/Part 11) dealt with the payoff of the mortgage when she was still alive and residing in the house.

Leonard Albanese, 19 Yale Place, Closter, New Jersey, was sworn in as Witness #2. He testified to living across the street from the subject lot for 57 years and was very familiar with the Mitschke family. He believed Rudi Mitschke bought 24 Yale Place so that 1 of his children could build a home there sometime in the future; he felt the reason no construction took place was that the offspring eventually moved away from the area when they became adults. He revealed that Frederick eventually divorced his wife and moved back in with his mother at 25 Yale Place when Rudi died at a young age.

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

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

Mr. Watkins waived his summation.

## **Outcome**

Chairman Knee asked for a legal opinion as to how the Board should view the case. Ms. Smickley advised that on the simple case of merger, she agreed with counsel that *Loechner v. Campoli* does not apply to the application and *Simeone v. Zoning Board of Adjustment* does;

she said, thus, the Borough is out of time to claim the merger because the 2 properties have been in different ownership for greater than 2 years (if dealing with a recorded deed) or 6 years (if dealing with an unrecorded deed). A motion was made by Mr. Bianco and seconded by Vice Chairman Sonenshine, to uphold the appeal of the Zoning Officer's determination. Mr. Bianco asked for clarity as to what the applicant's options are after the issue of merger is decided; Ms. Smickley said that if the new construction at 24 Yale Place were to require variances, the applicant would need to return to the Board. Secretary Freesman asked that an approval be conditioned upon the applicant having the memorialized resolution recorded with the Bergen County Clerk's Office so there would not be any title issues later on if the property is sold; Mr. Bianco and Vice Chairman Sonenshine agreed to the condition being added to the motion. The motion passed (**7-0: YES**- Ouzoonian/ Monaco/ West/ Bianco/ Freesman/ Sonenshine/Knee).



A motion was made by Mr. Bianco and seconded by Vice Chairman Sonenshine, to memorialize the Resolution for 85-87 Chestnut Avenue (Case #Z-2010-05). All eligible members present voted in favor. A motion was made by Mr. Bianco and seconded by Dr. Shyong, to memorialize the Resolution for 49 Colgate Street (Case #Z-2011-01). All eligible members present voted in favor. A motion was made by Mr. Bianco and seconded by Dr. West, to memorialize the Resolution for 8 Wainwright Court (Case #Z-2011-04). All eligible members present voted in favor.



There being no further items to discuss, a motion to adjourn the meeting was made by Mr. Bianco and seconded by Vice Chairman Sonenshine. All members present voted in favor. The meeting adjourned at 9:20pm.