

ZONING BOARD OF APPEALS

July 9, 2007

MINUTES

The Zoning Board of Appeals for the Town of Philipstown held a work session on Monday, July 9, 2007, at the Philipstown Town Hall, 238 Main Street, Cold Spring, New York. The work session was opened by Vincent Cestone, Chairman, at 7:30 p.m.

PRESENT:	Lenny Lim	-	Member
	Bill Flaherty	-	Member
	Robert Dee	-	Deputy Chairman
	Paula Clair	-	Member
	Adam Rodd	-	Counsel
ABSENT:	Vincent Cestone	-	Chairman
	Kim Shewmaker	-	Secretary

Robert Dee - At tonight's meeting we have two applications for review of completeness. The first one is James Cross. Approach please

Jennifer Reed - Excuse me

Robert Dee - Can you approach and tell us your name please

Jennifer Reed - Hi. My name is Jennifer Reed. I am from Badey and Watson representing James Cross. The property is located, do you want to know about the property?

Robert Dee - Well, I read the application on it. It says 93 Lower Station Road

Jennifer Reed - Yes

Robert Dee - And they are asking for two variances

Jennifer Reed - You all got a copy of the

Robert Dee - Yes

Jennifer Reed - Okay. Yes

Robert Dee - For two variances. The first variance is for an addition over and

extending beyond the first floor of an existing 1 ½ story house

Jennifer Reed - Yes

Robert Dee - And the variance requested for that is 36.2 feet

Jennifer Reed - I'm not sure, let me check

Robert Dee - It is complete. And the other variance is for the construction of a deck.

Jennifer Reed - Yes

Robert Dee - And that is 18.3 feet

Jennifer Reed - Yes

Robert Dee - It is complete. The only thing that I don't see is, the survey doesn't show how far the deck is going to come out from the house.

Jennifer Reed - Well we can put the _____ in there as a condition.

Robert Dee - Okay

Jennifer Reed - You mean out towards this house

Robert Dee - Correct. It shows you the side but it doesn't show you from the house

Jennifer Reed - Okay

Robert Dee - I see the scale is an inch, 10 feet per inch

Jennifer Reed - We will put that on there. I thought that the measurements were actually on there, but I guess they're not. Okay.

Robert Dee - Otherwise it is complete and it can be put on a hearing. I don't think we can do it, August we are not here

Jennifer Reed - Okay so we are good for September

Robert Dee - Right. So it would be September 10th for a public hearing

Jennifer Reed - Okay. I do have a signed plan. I know I do have the plans attached to the thing but did you need the signed copy for the application?

Robert Dee - Yes, we will take it

Adam Rodd - That's a copy right?

Jennifer Reed - No. It is the original

Robert Dee - The next application is Denise Enea.

Ed Enea - I'm Ed. I'm Denise's husband.

Robert Dee - We reviewed your application. You are looking for a variance for a, to expand a two car garage

Ed Enea - That's correct

Robert Dee - Right now you have a carport there

Ed Enea - To the left of the garage we have a carport that is going to be taken down and the garage is going to be expanded by 5 feet.

Robert Dee - So it will not come out as far as the carport

Ed Enea - No. The carport right now is 15. So it will actually be 10 feet less.

Robert Dee - I examined everything, is there any questions from the board?

Ed Enea - Yeah, Mr. Flaherty is the one that might remember that I was here before and your recommendation was to change it from originally a 3 car garage that we were trying to get approved in the same footprint. We decided to keep the center carport open and scale down the size of the garage and that's why we're back.

Robert Dee - This is much simpler

Ed Enea - Yes. I think the last variance we were asking for 18.5 and now we are asking for 5 feet.

Adam Rodd - What side yard setback are you proposing

Ed Enea - Right now we have 27 feet so we are asking, actually we have 27.5 I believe, so actually we asking an 8.5 variance.

Adam Rodd - The construction is what

Ed Enea - A wood framed garage

Adam Rodd – Okay. And how far will it be from the sideyard

Ed Enea - When it is finished it will be 21,.5

Adam Rodd - 21 feet 6 inches

Ed Enea – yes. originally that was a 15 foot setback but somewhere in the 1990's they changed the zoning from R-40 to R-80

Robert Dee - I understand. It is complete. Any questions? No. Set it down for a public hearing

Ed Enea - Is the next meeting 2 weeks from now?

Robert Dee - The next meeting is in 2 weeks but I don't think we will have it published in the paper

Ed Enea - And you are shut down for August

Robert Dee - Right

Ed Enea - I've got to get the attachments to the building site

Lenny Lim - We can't get it into the paper. We put it in now and it will be in the next issue and it will only be 1 week.

Ed Enea - I've done this already from July through November of last year so I was hoping to fast track it this time

Robert Dee - It has to be published

Bill Flaherty - It has to be 10 days notice

Lenny Lim - So it would go in next Monday's paper and it will only be one week

Ed Enea - It is two Mondays from now

Lenny Lim - We can't get it in the paper. It has to be noticed

Bill Flaherty - Unfortunately it is only a weekly paper

Ed Enea - Oh, you only notice it in this local paper

Bill Flaherty - That's right. It's our official paper. And we need vacations.

Ed Enea - You deserve vacations

Robert Dee - It will be put down for September 10th

Ed Enea - Okay. thank you

Robert Dee - Next is a public hearing continuation of Nancy Carlucci. This is an appeal for a pool.

Mr. Carlucci - Yes sir

Robert Dee - And we asked at the last meeting to review the last appeal that you made in October 1996.

Mr. Carlucci - Yes and since that time I have had a chance to speak with my grandmother and I think what I've gathered was because I believe Mr. Lim you said you were on the board at that time and did not recall what happened.

Lenny Lim - After reviewing the records we find that there were two applications denied. 1991 and 1196

Mr. Carlucci - Right. I think that's what I was just about to say. The initial application in 1991 was denied and I think she came back in 1995 to try and get it and I think it went through the review for completion but I don't know that it went

Lenny Lim - Everything I read, yes it did. It went through the process. The problem was that at the time or _____ asked what circumstances have changed since the last application and nothing has changed. Not a thing. And that is why the board denied the appeal. Absolutely no circumstances had changed since 1991.

Mr. Carlucci - I wanted to also, I know that someone requested that we pull the copy of the survey that was prepared in connection with the filing of the initial application to show that if in fact, that it was in fact planned to be built in a location where the setbacks were showing that it would have fit as originally designed and it was just an error in the digging of the hole that was there. So I have copies for the members of the board. It actually shows that the pool was going to be constructed in the rear with actually 16 feet from the back property line and 15 feet from the right property line where there is the current problem.

Paula Clair – What _____ (cannot hear her)

Initially at the time when the building inspector came out to do the inspection for the certificate of occupancy, the concrete was poured, it was in

And you didn't realize

Like I said, the contractor was there. It was at the time a family friend and the pool had been dug. They assumed he was digging in the right spot in accordance with the drawing that was submitted at the time. And no one assumed that there was any problems whatsoever. The inspector came out and said there is a problem. You are 3.8 feet too close to the back property line where you only have I believe 11 feet 4 inches between the pool and the property line you need 15 feet and on the right side you are at 8 feet from the property line and you need to be at 15 feet from the property line. That was like I said

Lenny Lim - I have a question

Nancy Carlucci - I mean that was a horrendous thing I mean the people that are going to put in the pool is easy. He only measured this way that way and that way and if there was a problem, you can't because that isn't the right side there or that is one thing. I mean instead of just saying oh well you can't have it because, but when there is a thing that there was room. The man made a stupid thing, I don't know what he did

Lenny Lim - I am going back to the 1991 minutes of the meeting, and I am going to use your words, I don't know if the guy is straight up but when it came to dig the ground for the pool, I guess they followed plans that they should know where to dig. My husband wasn't home at the time and when they came and did dig, they got the whole thing dug in one day and by the time my husband realized that it was wrong the pool was already dug. Now that was just the digging itself

Mr. Carlucci - That actually, if I can interject there, that was actually a statement made by Mrs. Carlucci, my mother at the time. It couldn't have been her because my grandfather was dead at the time. My mother attending I believe that hearing with my grandmother and I think she was referring to her husband not being there, my father.

Lenny Lim - In 1991

Mr. Carlucci - Yes

Lenny Lim - But at that time you found out the mistake and it was just a whole in the ground. It hasn't been poured yet. From what I am reading it says he came back and realized the hole was wrong.

Mr. Carlucci - I don't know whether that was correct. That statement was made by my mother not Nancy. She was here.

Lenny Lim - There is no way we can find out if it was just a hole or if they already poured the concrete in. Because when you say you realize there was a mistake as soon as the hole was dug, not when the concrete was poured, just

the hole dug.

Mr. Carlucci - I don't think as far as she knows that she didn't know there was an issue until they went to her and said we can't give you a certificate of occupancy.

Lenny Lim - Who's pool is it

Mr. Carlucci - It's her pool

Lenny Lim - But your mother was answering the questions

Mr. Carlucci - My mother was here with her

Robert Dee - Let me ask you a question. The last 16 years, this has been going on for 16 years

Mr. Carlucci - Well here's what happened

Robert Dee - Wait a second

Mr. Carlucci - I'm sorry go ahead

Robert Dee - Have you received any violation notices? Have you received any fines? Have you paid any fines?

Mr. Carlucci - No

Robert Dee - So for 16 years you have been using the pool with no regress, with no problems

Mr. Carlucci - Well that's what I explained the last time, you can go back and check the minutes, my grandmother assumed that everything was fine. My father told her that everything was fine. This didn't come to our attention until there was a summons issued by the Philipstown Town Court that was served on Harold Carlucci, who has been dead for 17 years, so we got the summons and I called the building inspector and said what is going on here? He said there is no certificate of occupancy for the pool. I went and looked at the building department file and lo and behold there was no certificate of occupancy for the pool. So I spoke to the building inspector and asked what can we do to try and address this situation. We came before the Judge and we said we are going to submit an application to the zoning board for a variance.

Robert Dee - This is the third time. You've been here three times and nothing has changed. I am trying to understand. I mean we have to go by the law, the code, and I am just trying to understand. It's been 16 years. You're in the same spot as you were in 1991. Same pool. Same place.

Mr. Carlucci - Yes. The pool is, yes, the pool is in the same spot. It can't move.

Nancy Carlucci - If you can just come out and look at it you would understand when I said how can you move concrete? I mean it was not like a thing, you dig, you plant tomatoes oh you move that over. There wasn't anything we could do.

Paula Clair - I am going to ask a question to the board, I am a new member so this may not be a viable option but it is just a question. Is there any possibility that you could purchase some land from your neighbor?

Mr. Carlucci - We couldn't and I have explored that opportunity. The biggest issue is the side yard with the 8 feet which is the house of my parents. If they were able to acquire some land over there, it would make the neighboring property in violation of the code. We tried. It isn't viable. Nothing has changed as far as the code is concerned over the last 16 or 17 years that would have changed the lot line setbacks and things like that. We are just in a situation where moving it is impossible and difficult. Filling it in, a financial expense and as I said a family friend at the time thought they were doing good and they did

Robert Dee - I understand. But we have to follow the Code

Mr. Carlucci - I understand the Code. I also understand the Code also provide for variances.

Adam Rodd - Can you speak to the issue of whether the pool in its location has resulted in an undesirable change in the character of the neighborhood or had any impacts on neighboring properties?

Mr. Carlucci - To my understanding there has been no negative impact to the neighborhood over the last 16 or 17 years. I am not aware of a single complaint by the neighbor to the rear, where we are looking for the 3 foot and there have been multiple owners there over the past 16 or 17 years.

Lenny Lim - I see in the original application there was _____

Mr. Carlucci - If I can explain. This is a survey of the property. My grandmother's house is here. This is the swimming pool and this is the survey that was submitted at the time when we made application. Application for the building permit. This is my grandmother's house here. This is my mother and father's property. This is a piece of property by a neighbor, there was I believe a complaint made by the property owner back in 1991 who lived here.

Paula Clair - Does that person still live there

Mr. Carlucci - No. They've passed away for a long period of time now. But the

variance like I said is a variance that we are looking for with respect to this lot line and this lot line and having nothing to do with them.

Robert Dee - Can you give us a little bit of history about the area

Mr. Carlucci - My grandmother moved up here in 1969. This neighbor owned this lot over here. My grandmother purchased this piece of property. At the time this lot was an unbuildable lot. This neighbor sold this piece of property to my grandfather for whatever, this was probably 75 x 100. Zoning changed. After 5 or 10 years my grandfather owned this, zoning changed and they were able to put a house here. That neighbor, good bad or other held a grudge. And when the opportunity came up when the public notice was sent out, that's why they filed a complaint. Again, it didn't affect them whatsoever with respect to lot lines, again as far as I know there have not been any complaints filed. There were never any notices that were issued or this would have been addressed if we knew at the time. I understand that those things were denied in 1995 but as I said

Lenny Lim - And 1991

Mr. Carlucci - Well 1991 and then 1995. My grandmother, my father screwed my grandmother. Said everything was taken care of, don't worry about it, there is no way to sugar coat it. And now she is possibly paying a price

Bill Flaherty - What are the reasons, during the course of my reading the minutes of the meetings in 1991 and 1995, several people were opposed. Any way since that time those people have moved away, sold the properties, they were complaining about water run off and also septic _____

Mr. Carlucci - I don't know if you know the area in Continental Village, Valley Lane runs, Brookside Drive comes in here and Valley Lane runs all the way up here and comes back out on Sprout Brook Road. This is Sprout Brook Road. There was a stream that ran off from Aqueduct Road down through these properties. There were pipes put in because Valley Lane was a private road. The Town probably 10 years ago changed the drainage at the point, but there was run off in that area. There is water problems throughout Valley Lane to this day. The people that were here before the Eneas shortly before, their actually have their daughter, their daughter-in-law and son bought a house up on Valley Lane right in back of my house which is on Sprout Brook Road; every spring when the water thaws and the water comes down and it doesn't pick up drainage on Sprout Brook, it runs off of Aqueduct down all along the back of Valley Lane. Runs out across Brookside Drive and then goes into the brook over there which is Canopus Hollow and travels down to Continental Village.

Bill Flaherty - The problem still exists today with the water run off. Is there a septic problem?

Mr. Carlucci - No septic problems.

Bill Flaherty - That's been mitigated?

Mr. Carlucci - it was somewhat mitigated by the Town putting drainage in on Sprout Brook Road, taking some of the water run off. But to this day, I mean if you asked every neighbor along Valley Lane and Sprout Brook on my side, because I get the water in my backyard also. If anyone would have had a septic problem, it would have been her. It would have been her and there hasn't been any issue. I would love to know, and I haven't seen the minutes, I would love to know who other than, and I believe if it is noted in there the DiSilvas

Bill Flaherty - Yes

Mr. Carlucci - DiSilva is the property owner that lived here. Diamond is DeSilva's daughter who lives, would not have even gotten noticed of the public hearing. So that is why it may appear as multiple complaints when in fact DiSilva owned the property here and as I said they no longer, alive.

Bill Flaherty - And you also appealed to the _____

Mr. Carlucci - Since the time that we were here, I actually went and looked at the records and yes it is my understanding that there was an appeal

Bill Flaherty - The ZBA's decision was upheld by the court

Mr. Carlucci - Yes. And it was upheld and I think again it was prior to the 1995 hearing when they came back again and tried to request an additional hearing after the ZBA appeal was upheld

Bill Flaherty - So this matter has been in effect, going back to 1991, 17 years old. And one of the CO's denied back in _____. And one of those COs specifically said you could not use the pool unless you had the CO. And you have been using the pool obviously for 17 years.

Mr. Carlucci - As I said. I don't know what happened between the time of that and when it said in 1995. Right wrong indifferent in 1995 when they came back here for this other appeal, she understood that a CO had been issued. And again, because she was lied to by my father.

Bill Flaherty - And when the variance was denied a remedy was given to you as a result of that to show that we have, you have to fill in the pool as a result of that decision. And you have to fill out the pool in within 90 days of our decision. But what in affect was denied and just ignored the Court and it went on as due business and use the pool over 17 years.

Mr. Carlucci - I understand the point that you are making and again I have probably repeated myself a couple of times and I am sorry to be repetitive

Bill Flaherty - There is only one remedy really. You could fill the pool in

Mr. Carlucci - The problem with filling the pool in, you can get a ton of dirt in and pack it in and the pool is gone and you plant grass. But that is a financial burden that my grandmother cannot shoulder.

Nancy Carlucci - Can I just say one thing? The mother, Mr. and Mrs. DiSilva had passed away. They were very angry because of the zoning change. But that is not our fault. I bought the property that is coming from where I live so my two boys could play ball, you know and not hit anybody's yard or window. So they bought the property, the man Mr. DiSilva bought it for \$200 and sold it to me for \$5,100. I did buy that for it. But since then Mr. DiSilva's son has moved there,

Mr. Carlucci - Across the street

Nancy Carlucci - The children play together and she just, Mr. DiSilva, Joseph DiSilva, the son and the wife just recently found out from our last thing here that this, that the complaint that was made then even by the daughter Donna apologized. If she is summoned here now she would admit it that it was just her mother and father were angry because we were able to build it. But if you need them

Robert Dee - We understand. I think everybody has a pretty clear picture of what's going on here. Any more questions?

Mr. Carlucci - I am open for any suggestions.

Bill Flaherty - When the decision was made by the ZBA, it wasn't arbitrary or capricious

Mr. Carlucci - The legal mumble jumble essentially

Bill Flaherty - But I am trying to determine from the minutes that I had read the rationale behind the denying of the variance at that time. I don't know what that was but it wasn't arbitrary or capricious. The Court upheld that decision. I seem to think, maybe I am reading something _____, but I think to a degree the board the decision was prompted by the fact that you had two people here against the variance at that time and I think that weighed heavily perhaps on the decision of the ZBA. With me, I am speaking for myself, that sometimes has an effect on how I act on a matter because that is important that the overall community has a say in certain decisions. I think it would have weighed on my way of thinking at

any rate and I think perhaps that is the rationale that was used.

Mr. Carlucci - Well again

Bill Flaherty - You are asking us to appeal a decision that was upheld in Court. Now can we legally do that without presenting new evidence in fact

Mr. Carlucci - I think there is new evidence that can be presented. Back in 1991 when the application was first heard, two things. First as you said there were three complaints. That all arises out of a single property owner. I can have, legally if I had eight people living the house and each of those members of my one piece of property that received notice of a public hearing, that is eight complaints maybe. Does it weigh heavily if it were 8 property owners scattered around the location, I think that is one difference. A change since then from now is the removal of any complaints with respect to the installation of the swimming pool. There hasn't been any complaints since Mr. and Mrs. DiSilva had passed away. They are no longer here. And if there were issues I am sure, the home is a person's most valuable asset if there was something that was impacting it whatsoever, the police would be called, the town would called, politicians would be called, somebody would do something to prevent somebody from taking away their property rights or damaging what a lot of people consider their most valuable asset aside from their health and their family. And I think that is a significant change condition. And I think that every single one of the neighbors in this community would come in here and say we have absolutely no issues with the swimming pool as it currently exists and in fact stand up and say we think you should give it to them. And I think that is a significant change.

Robert Dee - Is there anybody in the audience who wishes to speak on this?

Bill Flaherty - My question is, do we have the authority to over rule the Court's decision?

Adam Rodd - Well, yeah. The Appellate Division decision was rendered in 1994. And the Appellate Division decision was based on its application of what is called the practical difficulties test. Subsequent to 1994 the court of appeals indicated that they weren't going to use what has been commonly referred to as the practical difficulties test instead they said what should govern is the balancing test set forth in the town law. So there is a somewhat different legal standard that came into play after the Appellate Division rendered its decision in 1994. So what I suggest as one option to the board if you want to consider it is in order to reopen the application, the board would have to vote to do so unanimously. And I think the board can do that based upon a change in the law, the applicable standard. Which simply means that you are then giving the applicant the opportunity to make their case under the current standard. In other words, you are giving them the opportunity to ask again based upon that change in circumstances.

Lenny Lim - We always said that a neighbor has the right to complain or go against an application we take it into consideration but it is not one of the five major points.

Adam Rodd - That's of course true. The zoning decisions are not popularity contests. It is based upon its application of the balancing test set forth in the town law. So even if 1,000 neighbors are opposed to a particular variance, it might be perfectly appropriate for the board to grant the variance despite that opposition. And vice versa. If there is no opposition it might be perfectly appropriate for the board to deny a variance based upon its application of the five factors.

Paula Clair - I want to ask a question. Had the builder put that pool in the place that it was planned for, would that have been

Mr. Carlucci - This is a copy of the survey that was submitted with the building permit application. It would have been legal.

Paula Clair - Okay

Mr. Carlucci - I'm sorry, I don't know your name, but I think that this is an issue that you address during the last hearing.

Paula Clair - It seems to me that _____ that she couldn't have agreed to, if she had known that it was a mistake, she would have

Robert Dee - But she went on using it for 17 years

Lenny Lim - 17 years ago when they made the mistake, they just had a hole in the ground. I am going by the words of the applicant. The hole was dug, the concrete wasn't poured, you came out and saw the hole was in the wrong spot

Paula Clair - it said the hole was dug but it didn't say whether the concrete was poured or not

Mr. Carlucci - But you are taking testimony from someone that wasn't the applicant at the time. It was the daughter in law.

Lenny Lim - But she doesn't remember either though.

Mr. Carlucci - I think that another thing at this point we are looking at a different stand. My understanding of the arguments that were made to the Appellate board back at the time was this practical difficulty and I think, fortunately I am an attorney and I can kind of understand some of the things that the board said. Basically I think what they were saying at the time was we don't really care that it

is impractical for you to move the pool or fill it in, this is what it is tough. Now I think the standard is more so lets look at a balancing. Lets look at the pros and the cons of this structure in place that is not in compliance with where the building code says it needs to be. And I think that if you look at the balancing of the equities there is nothing, I don't want to say there is nothing, there is nothing that I can see that would demonstrate that leaving this pool where it is, there is a problem or an issue or poses or causes or creates any burden for anyone else. At the time the complaint was filed there were people who came in here and opposed that. But as I said before, there hasn't been any issues as far as I know by any of the neighbors either directly adjacent to or up the road or down the road that would demonstrate to this town that this is an issue of the pool installed where it is. And I understand. I have an appreciation for the law, that is why I went into law. I have appreciation for property rights and complying with regulations and statutes and I know that they are there for a purpose. People don't just waste their time writing all the rules and the laws that we do. And I understand and I can appreciate that it wasn't followed but that's why I think variances are part of the planning board's power to provide relief to property owners when you have situations where the black letter says it needs to be 15 feet all around. But if we allowed it to go 7 feet or 8 feet, what is the real damage and what is the real harm? I think it adds a value to the community. It is a swimming pool and it certainly enhances property values in the neighborhood. I think it has done good things for people and I don't think there are any issues. And I could be looking at this from purely obviously this side of the fence and I am not looking at _____. But I don't know if I have heard anything in the couple of years, a couple of months actually that I have looked at this that would show that there is an issue.

Lenny Lim - I don't see any circumstances that have changed since the last time

Mr. Carlucci - I think the change again is the fact that there is no complaints. That those people moved.

Lenny Lim - That is not part of the five things that we have to figure on. When we do a variance, there are five things. Neighbors complaints are taken into consideration but they are not one of the five things we answer to. And you keep harping on that. In the 17 years you have been using the pool but 17 years ago I'm sure it was a lot cheaper and easier to remedy this easement. You just let it go. You tried a second application and that was turned down and you still have been using the pool since 1995

Mr. Carlucci - But again, I am looking for options. I'm here. I'm open to anything. If there were a practical solution to this,

Robert Dee - (can't hear the question)

Adam Rodd – yes

Robert Dee And when does that need to be opened

Adam Rodd - Basically it is giving them, technically, hold on for one second. Do you need to flip it?

David Brower - No. It's still going

Adam Rodd - Okay. As you know, Zoning Boards cannot repeatedly hear the same application over and over again. Basically if an applicant is denied the remedy is to bring a proceeding to get it annulled. They can't simply bring the same application before the Board just for the sake of it. The board can entertain a request to rehear an application if there is a change in circumstances. For example if the applicant were to propose a different plan or an amended plan. In other words a slightly different applicant the board can decide to rehear it under those circumstances. There is also an option of the board deciding to rehear based on a change in the law. And the standard that was applied in 1994 at the time of the Appellate Division decision is different. The court of appeals indicated the year after in 1995 that they weren't going to apply the practical difficulties test it was going to be a balancing test.

David Brower - Let me flip the tape.

(Turning Tape Over)

David Brower - Okay.

Adam Rodd - So what the board can do is they can vote, and again it has to be unanimously to rehear the application. Which doesn't mean that you are going to grant the application at the end of the day or deny it. It simply gives them the opportunity to present their application to you at this point in time despite the fact that it was denied previously.

Bill Flaherty - Well aren't we essentially doing that at this point in time?

Adam Rodd - Well there is a dialogue but the legal formality is I would recommend to the board to the extent that you are interested in this application or to rehear it, there needs to be a motion made by a board member, I make a motion that we rehear this application based upon a change of circumstances, that is a change in the legal standard. And that simply, and that has to be unanimous. If it is not, than that would give the board the opportunity to rehear the application. If it is the same application, if there isn't a change in circumstances, the board doesn't have to do that.

Robert Dee But you are saying there is a change in the law.

Adam Rodd - It was.

Robert Dee - So we would have to look at that and know what that is

Adam Rodd - I can represent to you that in 1995 the court of appeals in a case I think it was the matter of Osgood specifically said that the practical difficulties test was not the test that the zoning boards were to apply, it was going to be this balancing test under the town law.

Bill Flaherty - Well I would like to make a motion that we rehear the applicants in accordance with

Adam Rodd - In accordance with the current standard. Again it is not indicating that you are going to vote one way or the other it is simply giving the applicant the opportunity to present their case to you at this point in time under the new standard.

Bill Flaherty - I make a motion

Lenny Lim - If I abstain from this vote, is that an unanimous decision?

Adam Rodd - Why would you abstain?

Lenny Lim - I want to research

Adam Rodd - Okay. Well what we can do and I understand it is putting the board members on the spot, is we could give you time to look at the minutes and to revisit this particular issue at the next meeting which would be the last Monday of this month.

Mr. Carlucci - Is it possible to have it pushed off because I am actually going to be out of town on the

Adam Rodd - It would then be in September.

Robert Dee They've been waiting 17 years so I guess a couple more weeks

Mr. Carlucci - Again this is something I would like to

(EVERYONE Talking at once...not audible)

Robert Dee then we will put it on for the first meeting in September

Bill Flaherty - I have made a note to take action

Adam Rodd - Well did you want time to vote on this?

Lenny Lim - He made a motion. What's your motion?

Bill Flaherty - That we rehear it. From a legal standpoint I am concerned that we do this.

Lenny Lim - It was denied twice

Bill Flaherty - I realize that.

Lenny Lim - Does the rest of the board want to hear this?

(I can't hear the conversation between the board members)

Robert Dee I would have to abstain from it because I would like to see the law in front of me. I want to push this off until the next meeting.

Adam Rodd - If the board wants time to think about that, I would recommend that the board be given the opportunity to do that.

Lenny Lim - But he made a motion

Bill Flaherty - I can legally withdraw the motion.

Adam Rodd - As a purely pragmatic matter, I suggested a motion based upon certain considerations. The board members indicated that they wanted time to consider those considerations in a meaningful way. So with that said my recommendation is that the motion simply be tabled for a decision until the next meeting at which time the board could revisit it at that time. I think that is the prudent course to take. I don't want to put you guys on the spot

Mr. Carlucci - Is it possible that I could ask the members of the board that between now and when the motion is actually voted on, I know you all need time to think, is there any information, any affidavits, is there any thing you would like to hear or like to see that may help you in evaluating the facts as they are now, in order to make an informed decision?

Lenny Lim - I was down there for a site visit and it was really quick. I want to spend a little more time down there.

Bill Flaherty - I would like to see the new additional information to support your position. Now I haven't seen that. If I had seen that, I would probably be inclined to

Mr. Carlucci - Which position? The position that

Bill Flaherty - In order for us to make an informed decision, for you to show good faith as an example that you have _____. Move the pool. Something of that nature. You don't have many options here. You have one option essentially and that's for us to approve the variance.

Mr. Carlucci - I appreciate it and I absolutely understand. I know Mr. Lim that you referenced the five factors that you are considering in balancing, and I know and I think I know a couple of them off hand as far as benefits the community, detriment to the community. To the extent that there are affidavits that could be submitted to the board from members in the community attesting and swearing to the fact that in fact that this improvement is a benefit to the community and is in fact

Lenny Lim - It doesn't hurt. It doesn't mean it helps. But it can't hurt.

Bill Flaherty - You have a dilemma. You can't sell that house

Mr. Carlucci - Absolutely

Bill Flaherty - And we want to be reasonable in every respect

Robert Dee - But we need more time

Bill Flaherty - This has been pending for 17 years. Action should have been taken prior to this time. And that is probably a little bit disconcerting to me.

Mr. Carlucci - There's not.

Bill Flaherty - Your intention I assume is perhaps to get this issue taken care of, sell the house, and

Mr. Carlucci - It's not. It's not

Robert Dee - Let's table this until September 10th. And then we will at that time everybody will be informed and looked at the laws, we will be a little more informed. It has been 17 years.

Mr. Carlucci - Any submissions that I would like to make, do I submit that to you

Adam Rodd - To the building department

Mr. Carlucci - To the building department. And that will make its way, submit it in multiple copies

Adam Rodd – yep

Mr. Carlucci - Thank you. Thank you very much for your time.

Nancy Carlucci - Guys, I know we are making it very difficult for you. But do the best you can and we will try like I said to get the affidavits that you would like to have and its not that it will help but it can't hurt.

Robert Dee - Thank you

Nancy Carlucci - Thank you very much

Robert Dee - Now we can't do Spica and Risi

Adam Rodd - That's been adjourned until September.

Robert Dee - No old business and no new business

Adam Rodd - Just make a motion to close the meeting

Mr. Carlucci - I make a motion

Bill Flaherty - Second

Mr. Carlucci - All in favor

All Board Members - aye

NOTE: These Minutes were prepared for the Zoning Board of Appeals and are subject to review, comment, emendation and approval thereupon.

DATE APPROVED: 9/10/07

Respectfully submitted,



Kim Shewmaker
Secretary