

MINUTES OF A MEETING OF THE ZONING BOARD OF APPEALS OF THE VILLAGE OF MAMARONECK, NEW YORK, HELD ON THURSDAY, MARCH 1, 2012 AT 7:00 P.M. IN THE COURTROOM AT 169 MT. PLEASANT AVENUE, MAMARONECK, NEW YORK.

These are intended to be “Action Minutes” which primarily record the actions voted on by the Zoning Board at the meeting held March 1, 2012. The full public record of this meeting is the audio/video recording made of this meeting and kept in the Zoning Board’s Records.

PRESENT: Gregory Sullivan, Chairman
Barry Weprin, Vice Chairman
Robin Kramer, Secretary
Lawrence Gutterman, Board Member
Dave Neufeld, Board Member
Anna Georgiou, Counsel to Board
Lester Steinman, Counsel to Board
Rob Melillo, Building Inspector
Joe Angiollo, Assistant Building Inspector

Kathleen McSherry, Court Reporter, was present at the meeting to take the stenographic minutes, which will not be transcribed unless specifically requested.

CALL TO ORDER

Chairman Sullivan called to order the Regular Meeting at 7:06 p.m. Chairman Sullivan stated that the two public hearing applications (#1SP-2009 & #5A-2012) are being adjourned due to technicalities in that the applicant did not properly notice their neighbors regarding the public hearing. Chairman Sullivan stated that a former applicant, Mr. & Mrs. Cohen (746 The Parkway #3F-2011) is requesting an extension of 45 days to submit a final landscaping plan to the Zoning Board. Ms. Georgiou stated that the application does not need to be reopened and that the Board may vote on the record.

Mr. Weprin moved to approve the request for an extension of 45 days for the submission of a final landscaping plan, seconded by Ms. Kramer, and carried unanimously.

PUBLIC HEARINGS

1. Application #1SP-2009, STEPHEN SCOLI D/B/A DELISH ENTERPRISES CORP., 901 Mamaroneck Avenue (Section 8, Block 61, Lot 6), to renew a special permit to operate a delicatessen. (C-1 District)

Applicant did not do the mailings. Application adjourned until April 5, 2012 meeting.

2. Application #5A-2012, MAMARONECK REALTY LLC, 751 Old White Plains Road (Section 8, Block 79, Lot 1), for a variance of Article V Section 342-27 to install a required

dumpster enclosure where the front yard setback is zero feet and 25 feet is required and where the combined side yard setback is 8.7 feet where 50 feet is required. (C-1 District)

Applicant did not do the mailings. Application adjourned until April 5, 2012 meeting.

CLOSED APPLICATIONS

Chairman Sullivan stated that the Board would now discuss the closed applications. The Board decided to discuss the SAPOA applications first because Mr. Steinman, counsel to the Board, is attending the meeting for the two SAPOA applications and the Weiss/Henderson/McCrory appeal.

Mr. Steinman stated that there were some litigation issues that arose this afternoon pertaining to the parties in the SAPOA applications that he wished to discuss with the Board in Executive Session.

Mr. Weprin made a motion to enter into executive session to discuss litigation matters, seconded by Ms. Kramer, and carried unanimously.

At 7:09 p.m. the Board convened into Executive Session.

At 7:14 p.m. the Board returned from Executive Session.

Mr. Weprin stated that no votes were taken during Executive Session to discuss pending litigation matters.

1. Application #11-2012, ELEANOR WEISS, LEONARD WEISS, GEORGE HENDERSON, IRENE HENDERSON AND SUZANNE MCCRORY, regarding 818 The Crescent (Section 9, Block 85, Lot 34B), for an appeal of the issuance of a building permit (revision) for seawall reinforcement. (R-15 District). **(Closed 2/2/2012)**

Chairman Sullivan stated that the Board received a communication from the applicant. He stated that the applicant was asked not to forward the correspondence to the Board and did so anyway. Chairman Sullivan feels the Board should not consider the submission after the close of the public hearing because it might set a bad precedent. He stated that he does not want to invite people to act ex parte and that if the Board was to consider the submissions it would have to open a meeting and re-notice.

Mr. Gutterman stated that he agrees with the Chairman and that there should not be encouragement of discussion after a meeting is closed. He stated that in this instance it was a reminder to look at the Building Department files and he feels this is a valid request.

Chairman Sullivan noted for the record that all of the information that the Building Department has was received by the Board in one fashion or another. Ms. Kramer stated that she does not think the Board received anything directly from the Building Department. Chairman Sullivan

stated that the Board received it from other ways. Ms. Kramer stated that Ms. McCrory's email says that the Board has a duty to do this.

Ms. Georgiou read from the law and stated that there should be a submission from the Building Department. She clarified that this is about a Building Permit revision done October 4, 2011, not from when this project began. Mr. Steinman stated that there is an issue of due process and that the Board doesn't want to put itself in a position where other parties are not afforded a chance to look and respond to newly submitted materials.

Ms. Kramer asked if there was relevant information in the record that the Board should have looked at. Chairman Sullivan answered the Planning Board resolution and a copy of the Building Permit.

Mr. Melillo distributed a packet to the Board. There was some discussion as to whether the information should be accepted. Mr. Weprin stated that he did not feel it was relevant to this application. Mr. Neufeld stated that when the Board has a closed hearing and it takes in a submission, people may want to comment and this troubling.

Mr. Weprin stated that the Board shouldn't consider it and the Board's decision should be based on what they already have. Ms. Kramer stated that if the Board is considering anything, then the Board should open the hearing again. Mr. Gutterman stated that what the Building Inspector submitted is consistent with everything the Board has seen.

Mr. Gutterman asked if everything was built according to plan. Mr. Melillo stated that it was built exactly to plan and signed by the engineer.

Chairman Sullivan stated for the record that the Board will not consider the applicant's submission made after the hearing was closed.

The Board put off talking about the rest of the application and went on to Application #4I-2011 (Tax Map Change)

2. Application #4I-2011, BENNETT GOLUB & CYNTHIA GOLUB & THE SHORE ACRES PROPERTY OWNERS ASSOCIATION, 700 S. Barry Avenue (Section 4, Block 77, Lot 31), for an appeal of the Village of Mamaroneck Tax Assessor's change of the tax map on page 105. Lot 31 was changed from 12.29 acres to 12.87 acres. (R-10 District)

(Closed 12/1/2011)

Ms. Kramer asked if the Assessor's role could be separated into two duties: 1) Creation of Map and 2) Creation of Assessments. She stated that an argument could be made that the Board might have jurisdiction over the Assessor's duties in the creation of the map.

Mr. Neufeld stated that he prepared some notes on the matter before the meeting and because it was late in the afternoon sent it to Ms. Kramer. As it was late he did not see if Ms. Kramer responded to him. Mr. Neufeld stated that role of the tax assessor is an important one dealing

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with funding, financing and tax assessment. He indicated that as he sees it, jurisdiction would be based on the fact that the reason for the tax map change was to affect zoning. Mr. Neufeld went on to say that there is an appearance of impropriety; the Club conveyed ownership to themselves.

Mr. Neufeld said that the issue is one of impact on zoning and clearly the tax change was made for that reason and the Assessor never came before this Board to indicate otherwise. Mr. Neufeld believes the Board does have some jurisdiction; 1) original jurisdiction, 2) the Board can issue Building Permits, 3) the Board can make interpretations. Mr. Neufeld stated that the Village Assessor is not involved in zoning matters, but in this instance what was done was done with the intent of affecting zoning and also changing what was a prior decision by this Board.

He does not believe the ZBA can get involved in assessment issues. Mr. Neufeld indicated that this is a unique situation and goes to the core of zoning and land use where a tax map is changed using documentation that is purported to be a deed to change a zoning result. He went on to say that he is not comfortable with this situation. The issue is not related to a property assessment but rather only acts that impact zoning directly, he said. The sole reason for changing the tax map was to address the zoning matter and alter a prior determination by this Board, he noted. Mr. Neufeld was concerned because: 1) MB&YC deeded the property to themselves, 2) the certified survey was not consistent with the deed, 3) the property, which was the subject of the deed was not within the metes and bounds, and 4) title to the land that was subject to the subject of the purported deed which was at issue based on comments from the state. Mr. Neufeld concluded by re-stating that he feels the tax map change was done for zoning purposes.

Mr. Weprin said he understands Mr. Neufeld's points and feels this is a unique situation and he does not feel whatever the Board does will set precedence. Mr. Weprin stated that he agrees with Mr. Neufeld regarding the deed. He went on to say that ultimately, it's about who owns the property and not a zoning matter. If the club owns the property, then they meet the zoning requirements; if the club doesn't own the property then, they don't meet the zoning requirements, Mr. Weprin noted. Mr. Weprin stated the Assessor is saying the club owns the property.

Mr. Weprin clarified that he is not saying that the Board should never look at issues the Assessor decides when they affect zoning. In this case, he said, the issue is also before the Court and related to other actions. The Court is going to rule on this no matter what the ZBA decides, Mr. Weprin said and he is reluctant to take a position on this and would vote for the resolution that was drafted by counsel denying the application. Mr. Weprin concluded by stating that he feels the ZBA should abstain in deciding this because the issue is before the Court.

Ms. Kramer stated that she does not agree that the Board shouldn't do anything because it is before the Courts. It goes back to the jurisdictional issue, she stated. Ms. Kramer believes the Zoning Board does not have jurisdiction. Ms. Kramer stated that her only point was if the Board broke the Assessor's role into two parts.

Discussion of title arose. Ms. Kramer asked if anyone has brought a title action to determine ownership. Mr. Steinman stated that OGS says they own the property and there is a proceeding before the OGS to acquire from them whatever interest they believe they own.

Mr. Neufeld stated that he does not understand why the Assessor did not appear before the Board. Based on the letter the Assessor submitted to the ZBA, the Assessor changed the map based on the deed and this is troubling, Mr. Neufeld indicated. Mr. Neufeld stated that when someone in an administrative capacity does something that is intended to and directly impacts and affects zoning, it falls within the Board's purview.

Mr. Gutterman stated that he was of the view that this Board did not have jurisdiction or authority because in the law there was another means by which the Assessor and the assessment process are held accountable. He stated that the argument Mr. Neufeld raises is interesting when you have this unusual situation where the central issue at hand does affect how the zoning resolution is applied to the area. Mr. Gutterman stated that he is concerned about setting a precedent. He noted that there is something irregular about the assessment and the matter of who owns the land or who ends up owning the land is an important issue and relates to the other SAPOA application.

Mr. Weprin pointed out that normally the Assessor changes the map and no one is aware of the change. Another problem with saying the ZBA has jurisdiction, Mr. Weprin noted, that would imply if someone doesn't challenge it then they are giving up some right. He stated that in most circumstances there is no one in a position to challenge something. If it affects someone, a person won't find out about it until after the period for challenging the act would have occurred, he said. Mr. Weprin felt this situation could potentially lead the Board down a slippery slope.

Mr. Steinman noted that anytime an Assessor makes a determination about someone's property that can impact zoning with respect to what a property owner can do with their land and home. Mr. Steinman also stated that it's the Assessor's determination that is being reviewed as opposed to what happened behind the scenes between the MB&YC and conveying a deed to itself.

Mr. Neufeld stated that he did not agree with Mr. Steinman and noted that Mr. Steinman is characterizing the Assessor's position. However, Mr. Neufeld stated that out of all the hearings that were held the Assessor never appeared before the Board to explain his side. He said that it's very clear from the record that this was done in order to affect zoning. Mr. Neufeld stated that the Assessor's actions may be proper and he is not suggesting that it is or is not. However, what is not proper, Mr. Neufeld said, is when the action is immunized from a review by the Zoning Board. Taking a zoning matter, separating it out, impacting it and then utilizing the deed is troublesome, Mr. Neufeld said. Many things impact zoning in an ancillary way, but in this instance it is a direct impact, Mr. Neufeld noted.

The members reviewed the draft resolution crafted by counsel and made minor changes to them.

A motion to deny the appeal of the Village of Mamaroneck Tax Assessor's change of the tax map on page 105 was made by Mr. Weprin for the reasons stated on the record and recorded in the verbatim transcript, seconded by Mr. Gutterman.

Mr. Neufeld asked how his submission should be made part of the record and asked if it should it be given to the Board secretary. Chairman Sullivan deferred to counsel since he had never handled a dissent before. Mr. Steinman asked if the Board wanted Mr. Neufeld's dissent included in the minutes; Mr. Weprin indicated that it should be made part of the minutes. No one disagreed and Mr. Neufeld stated that he wished to file his dissent for the record.

Ayes: Sullivan, Kramer, Weprin, Gutterman

Nays: Neufeld (See attached dissent)

Dave Neufeld – Dissention

A series of appeals before this Board the gravamen of which concerns the proposed development of property by Mamaroneck Beach and Yacht Club (“MBYC”) to which certain adjacent property owners and an association (Bennet Golub, Cynthia R. Golub and the Shore Acres Property Owners Associations, referred to collectively as “Adjacent Owners”) have objected because, inter alia, the proposed development is based upon area calculations that exceed the property owned by MBYC.

When MBYC purchased the real property which is the subject of these proceedings, the deed from the prior unaffiliated owner contained a metes and bounds description of the realty which was consistent with a certified survey. This description was also reflected in the tax lots for the property. Last year this Board granted an appeal of the Adjacent Owners on the grounds that the proposed development by MBYC was not zoning compliant, as it was based upon land area outside of its property and the tax lots related thereto.

Subsequently, MBYC requested that the tax assessor change the tax lot to include certain additional property within it, which was neither within the metes and bounds description of the property of the original deed, or within the subject of the certified survey. The writing used by MBYC to obtain the change of tax map was a purported “deed” in which MBYC was both the grantor and the grantee. The tax assessor made the requested change to the tax map and the Adjacent Owners have appealed to the Board from the same.

MBYC’s assertion that the “deed” from itself to itself was a correction deed to correct a “cloud on title” is erroneous. If something needed to be “corrected”, as MBYC asserted, then a correction could not be accomplished by the same party (MBYC) simply signing a deed to itself - such a writing neither constitutes a transfer nor conveyance of property. Moreover, MBYC’s claim that there was a cloud on its title is not remedied by such a writing as it could transfer nothing more to itself than it already owned, thus not impacting the “cloud” to which it made reference. Certainly title cannot be corrected by conveying property to itself let alone ignoring the certified survey which did not include the property or the meets and bounds description which did not include the same. Such a purported transfer appears facially invalid or, at best, highly questionable.

It is uncontroverted that the impact of the change of tax lot was intended to impact the zoning of the property, and in particular the prior determination of this Board that found that its proposed development was not zoning complaint. However, MBNY urges that the Board does not have jurisdiction to consider an appeal from the tax assessor. It is well recognized that the tax assessor’s primary role and objective is to insure that real property is properly assessed for tax purposes, to maintain a tax map for such purposes and to collect revenues. While such a role is vital and important for purposes of providing funding for municipal budgets, in the instant cases, the purpose, motivation and impact of the change in the tax map had nothing to do with tax assessment or revenue collection measures; instead it was intended to impact the application of zoning ordinances to MBYC’s proposed development which this Board had determined was not zoning compliant based.

Additionally, and of concern, is that the writing relied upon and used for the change of tax map was facially defective, inconsistent with the certified survey, and inconsistent with the description in the prior deed from which MBYC claims title.

Unfortunately, we were not provided with any other reasons for the actions of the tax assessor, as the tax assessor elected not to appear at the hearings thereby resulting in appropriate presumptions and inferences.

With regard to jurisdiction, the authorities provided by MBYC are comprised of guidances and opinion letters concerning assessment and revenue matters related to the Assessor. They do not address zoning matters or the Assessor's involvement with zoning matters. The jurisdiction of the Board of Appeals is both appellate and original as determined by state and local law (including matters related to variances, special permits, issuance of building permits, interpretations, maps). While no case on point has been provided regarding jurisdiction of an appeal from a Tax Assessor's change of the tax map, certain important land use factors weigh in favor of the Board having jurisdiction of this matter. The Village Assessor is not charged with zoning duties, and yet in the instant case the Tax Assessor's action was undertaken to cause a zoning determination to be modified based on a facially defective purported "deed." Having done so, it is difficult to accept that the consequences of such action are not directly related to the integrity of the zoning code and should be free from the Board's jurisdiction. To urge otherwise could serve to undermine the Board's function and role and to encourage others to circumvent the same. Moreover, although it was correctly urged that the Board of Appeals cannot determine property disputes which should be resolved by the Supreme Court, the use of the purported "deed" actually seeks to accomplish such result extra-judicially and in contravention of a prior decision of the Board.

Contrary to the majority decision, I do not see the basis of concern that accepting jurisdiction of this matter might hinder the Assessor from carrying out his or her duties or cause others to appeal from the actions of the Assessor. Not only is that speculative, but it was never advanced by the Assessor. The issue here is not related to property assessment, but rather to the acts that directly impact zoning. Here the record is clear that (1) the primary if not sole reason for, and the impact of the change in the tax map was to address a zoning matter and alter a prior determination of the Board, (2) the writing used to accomplish the tax map was a purported "deed" from MBYC to itself, (3) the certified survey was not consistent with the purported "deed," (4) the property which was the subject of the deed was not within the metes and bounds description of the deed from which MBYC acquired title, and (5) title to the land that was the subject of the purported "deed" was at issue.

Respectfully Submitted,
s/ David S. J. Neufeld

3. Application #6I-2011, BENNETT GOLUB & CYNTHIA GOLUB & THE SHORE ACRES PROPERTY OWNERS ASSOCIATION, 700 S. Barry Avenue (Section 4, Block 77, Lot 31), for an appeal of the Building Inspector's refusal to revoke the three related building permits issued to the Mamaroneck Beach and Yacht Club on January 14, 2011 despite the Zoning Board of Appeals' determination on May 5, 2011 that the Club's site plan approved by the Planning Board on December 9, 2010 is not zoning compliant. (R-10 District)

(Closed 12/1/2011)

Ms. Kramer stated that since the Board determined the basis for issuing the permit was wrong, the permit should be revoked. Mr. Neufeld stated that he had concerns with the language of the draft resolution pertaining to references to litigation and stipulation. Mr. Steinman stated that he would take that part out of the resolution.

Mr. Neufeld noted that if the Board votes no on an application for a variance for something that has already been built, there is an enforcement procedure that should be followed up on.

Ms. Kramer did not feel it is necessary to reference the Article 78 and feels it is irrelevant. Mr. Steinman said he would remove that from the resolution. He also said he would remove the OGS portion. Mr. Neufeld noted that this should be an interpretation and findings.

A motion to approve the appeal of the Building Inspector's refusal to revoke the three related building permits issued to the Mamaroneck Beach and Yacht Club on January 14, 2011 despite the Zoning Board of Appeals' determination on May 5, 2011 that the Club's site plan approved by the Planning Board on December 9, 2010 is not zoning compliant was made by Ms. Kramer for the reasons stated on the record and recorded in the verbatim transcript, seconded by Mr. Neufeld.

Ayes: Sullivan, Kramer, Weprin, Neufeld, Gutterman

Nays: None

4. Application #6A-2012, MESARA REALTY, INC., 448 Mamaroneck Avenue (Section 9, Block 18, Lot 11B), where two restaurants (Smash Burger and Cherrytree Yogurt) proposed to be operated in a commercial building violate Article VIII Section 342-56 (restaurant seating) which requires 1 parking space for each three seats plus 1 parking space for each two employees. The applicant proposes zero parking spaces and 32 parking spaces are required for the use. (C-2 District) **(Closed 2/2/2012)**

The Board discussed some changes to the draft resolution which was presented to the Board by counsel. Mr. Neufeld stated that under special permit requirements, the Board can address parking. He stated that his concern is that the village has established an ordinance that provides a methodology. He noted that this is a variance from paying for parking. He also stated that an area and use variance don't relate to parking, and feels it's more a special permit.

Mr. Steinman stated that there are hybrids that don't fall into one category and it has been determined that as long as an application does not change the use, it is an area variance. Mr. Weprin agreed. Mr. Steinman went on to say that the fundamental question is that there is a numerical obligation to provide parking and the applicant can't meet that number. The fact that there is another option, the applicant won't get to it until the Board denies the variance. Ms. Kramer did not agree.

Ms. Kramer indicated that she would vote yes because the applicant has paid money for parking as opposed to other applicants who request a variance without making payments.

On motion of Mr. Weprin, seconded by Mr. Gutterman, the Application as submitted for a parking variance of 32 spaces is approved.

Ayes: Sullivan, Kramer, Weprin, Neufeld, Gutterman
Nays: None

5. Application #3SP-2012, SMASH PARTNERS MAMARONECK, LLC., 448 Mamaroneck Avenue (Section 9, Block 18, Lot 11B), for a special permit to open and operate a Smash Burger restaurant. (C-2 District) **(Closed 2/2/2012)**

The Board discussed the merits of the case.

On motion of Mr. Weprin, seconded by Ms. Kramer, the Application as submitted for a special permit is approved with a three year term.

Ayes: Sullivan, Kramer, Weprin, Neufeld, Gutterman
Nays: None

6. Application #11-2012, ELEANOR WEISS, LEONARD WEISS, GEORGE HENDERSON, IRENE HENDERSON AND SUZANNE MCCRORY, regarding 818 The Crescent (Section 9, Block 85, Lot 34B), for an appeal of the issuance of a building permit (revision) for seawall reinforcement. (R-15 District) **(Closed 2/2/2012)**

The Board returned to this matter after concluding all others. Chairman Sullivan asked if the Board could have counsel prepare a draft resolution for consideration. Ms. Georgiou noted that the 62 days will be up before the next meeting in April if a decision isn't made tonight. She reminded the Board that going beyond the 62 days makes it an automatic denial. She asked Ms. Powers to contact the applicants to gain their approval for the Board going beyond the 62 days.

Ms. Georgiou stated that the interpretation is based on the October 4, 2011 building permit revision and the applicant raises several issues.

Mr. Steinman stated that this is an appeal for the building permit issued for the seawall renovations in October 2011.

Ms. Georgiou reviewed with the Board the merits of the application. She listed the issues being raised by the applicant in this application:

1. With respect to Chapter 240 for seawall stabilization work, a structures permit was required by HCZM.
2. A site development plan permit was required pursuant to Chapter 186.
3. Site plan was required pursuant to Zoning Code 342-75(b).
4. Pursuant to the Zoning Code, there were lot coverage requirements that were not met and also setback requirements, specifically for the deadmen that were put in to stabilize the seawall.

Mr. Gutterman stated that he is not accustomed to regarding deadmen or related underground structures, particularly retaining walls or site features such as this encroaching on a yard or lot coverage requirement. He said he finds the deadman argument questionable. He said he also finds the argument with respect to 342-75(B) questionable.

Ms. Kramer stated that she knows the applicant indicated to the Board that the grade was changed and the deadmen would not have been underground without the grade change. She went on to say that if changing the grade was permitted and the Ottinger's were allowed to change the grade, then they were allowed to put the deadmen underground.

Ms. Kramer stated that making something that is underground an element of lot coverage makes it a real problem to say it affects yard or any dimensional requirements above ground. Mr. Weprin agreed with Ms. Kramer.

With respect to Mr. Gutterman's point about open land, Ms. Kramer said she agrees with Mr. Gutterman in that open land is open land.

Mr. Steinman noted that there are still the Chapter 186 issues. He reminded the Board that the flood ordinance (Chapter 186) stated that determinations by the Building Inspector can be appealed to the Planning Board, not the ZBA. He stated that this Board doesn't have jurisdiction to interpret Chapter 186. As for Chapter 240, Mr. Steinman stated that the structures permit is clearly within the purview of the HCZM. He said that this Board is not compelled to address this issue in this case because the Ottinger's did not have to go to the HCZM for the 2011 iteration of the building permit.

It was determined that counsel will draft a resolution for the Board's review.

MINUTES

Ms. Kramer stated that she was still reviewing the minutes from the February 2, 2012 meeting.

ADJOURN

On motion of Mr. Sullivan, seconded by Ms. Kramer, the meeting was adjourned at 8:11 p.m.

Ayes: Sullivan, Kramer, Weprin, Gutterman, Neufeld
Nays: None

ROBIN KRAMER
Secretary

Prepared by:
Ann P. Powers