

METUCHEN ZONING BOARD OF ADJUSTMENT

MINUTES

July 14, 2011

The meeting was called to order at 7:43 p.m. by Pat Lagay, Chairperson, who read the statement in accordance with the Open Public Meetings Act.

ROLL CALL

Present:

Robert Fair, Vice Chairperson
Pat Lagay, Chairperson
Catherine McCartin
Judy Sisko
Byron Sondergard
Daniel Spiegel

Brian Tobin, Alt. I
Jonathan Rabinowitz, Alt. II
Kathy Elliott, Engineer
James Constantine, Planner
Robert Renaud, Attorney
Chris S. Cosenza, Zoning Officer

Late: Suzanne Andrews (7:48 p.m.)

Absent: (none)

NEW BUSINESS

11-923 **Paul & Karen Sherbine** – Applicant is seeking bulk variance approval to enlarge an existing deck in the rear of the property.

23 Tulsa Avenue Block 208, Lot 116 R-2 Zoning District

Ms. Lagay requested Mr. and Mrs. Sherbine to come forward and be sworn in.

Ms. Lagay stated for the record that Ms. Andrews had arrived.

Mr. Sherbine was sworn in by Mr. Renaud.

Ms. Lagay requested Mr. Sherbine to describe the proposal.

Mr. Sherbine stated that the front porch and rear deck were built when the addition was constructed in 1997; however, they might not have been on the plans when presented to the Board (in 1997). Following the meeting, construction plans, which had included the porch and rear deck, were approved.

Ms. Lagay clarified that it had been approved by the Building Inspector, but they never received zoning approval since the survey presented to the Board did not show a porch or rear deck. She asked Mr. Sherbine to describe what it is that he is seeking from the Board.

Mr. Sherbine stated that the current deck in the rear yard area is 7'-6" x 15' and the proposal is

to expand the deck to 15' x 15'. Surrounding the rear yard area is a large garage on the left, the green area (rails to trails) in the rear and a large lot on the right. As far as the neighbors are concerned, no one can see the proposed improvement(s).

Ms. Lagay requested Mr. Sherbine to describe the photographs presented to the Board.

Mr. Sherbine described the photographs which depicted Mr. Sherbine's rear yard and adjoining properties.

Mr. Spiegel questioned the neighbor's roof: are they solar panels and are they encroaching onto Mr. Sherbine's property.

Mr. Sherbine stated that it was a corrugated material.

Ms. Lagay noted that there was a large tree and asked Mr. Sherbine if it would remain.

Mr. Sherbine stated that it would certainly stay.

Mr. Spiegel asked Mr. Sherbine what his intentions were regarding additional landscaping, particularly screening the existing deck.

Mr. Sherbine stated that the stairs would be going down on the house-side of the deck. Surrounding the existing deck, there is a planting bed and shrubbery; he planned to continue that around the expanded deck. Regarding additional screening, he would take a look at additional buffering as desired.

There was a brief discussion regarding the orientation of the steps in relation to the home.

Mr. Renaud requested clarification of the exact dimensions of the deck.

Ms. Sherbine clarified the deck would be 15' by 15'

Mr. Constantine noted that the survey has dimensions of 14'-6"

Ms. Lagay noted that the architectural plans have a dimension of 14'-6" as well.

Mr. Constantine asked Mr. Sherbine if the grill would be moved onto the deck.

Mr. Sherbine stated that he was not sure at this time.

Mr. Constantine noted that the portion of the yard that is proposed to be for the expanded deck is already a usable space for grilling purposes. The area is already actively used by the property owners. With the neighbor's garage and existing tree, the area is well screened.

Ms. Lagay asked Mr. Sherbine of the materials to be used for the deck.

Mr. Sherbine stated that he would utilize wrapped composite material to match the existing deck. It is low-maintenance as it resists mildew; it does not need to be painted every year.

Ms. Lagay questioned the changes in building coverage and open space.

Mr. Constantine noted that the changes are not in the public realm, the changes are all in the rear yard area.

Ms. Lagay opened the hearing to the public for questions.

There being none, Ms. Lagay closed the public portion and requested the Board to discuss the application.

Mr. Renaud reviewed the Engineer's memo with respect to the porch and (original) deck not receiving zoning approval. After a brief discussion, for whatever reason, building permits were issued for the porch and rear deck. It is what it is and he opined that it was not something the Board had to be address.

Mr. Constantine questioned if there would be any additional lighting in the rear yard area.

Mr. Sherbine stated no.

Ms. Lagay asked Mr. Sherbine if there were any drainage issues.

Mr. Sherbine stated no.

Ms. Lagay opened the hearing to the public for comments.

There being none, Ms. Lagay closed the public portion and requested the Board to comment.

A motion was made to approve the application as presented to the Board by Ms. McCartin, seconded by Ms. Sisko. Roll call vote taken. Motion carried unanimously.

10-891 **Constantine Papanicolaou / Metuchen Inn** – Applicant is seeking to amend site plan and use variance approval to include outdoor dining on an existing patio, to maintain a pre-fabricated garbage shed, maintain existing light fixtures and to maintain the existing parking lot in lieu of repaving it.

424 Middlesex Avenue Block 104, Lots 24 & 23.03 R-1 Zoning District

Fred Dubowsky, applicant's attorney, introduced himself to the Board and stated he represents both the owner of the property, Mr. Dorf, and the business owner, Mr. Papanicolaou. Tom Baio, AIA, is the architect. The main issue at hand is the outdoor seating.

Mr. Baio was sworn in by Mr. Renaud.

Ms. Lagay stated that the Board is well aware of Mr. Baio's qualifications so he can be certified as an expert witness.

Mr. Baio stated that the applicant originally came in a year ago for an addition, which included the expanded kitchen, handicap bathrooms and other improvements as well as exterior improvements. Most of the improvements have been completed.

Mr. Spiegel interjected what it is that the applicant believes is not complete.

Mr. Baio stated that the restaurant has received a TCO: Temporary Certificate of Occupancy. What the applicant has asked the architect to address are the issues of the repaving of the parking lot, driveway apron, construction of the garbage shed and landscaping with respect to drainage.

Mr. Spiegel questioned if the landscaping was considered to be complete because according to the naked eye, it appeared to be deficient. It is understood that the application has changed several times, so it is important to understand further what exactly is complete and not complete.

Mr. Baio expressed that he believed landscaping was considered to be complete.

Mr. Spiegel noted that the air conditioner units were exposed and not buffered in any way.

Mr. Baio reiterated that he believed landscaping was considered to be complete, per the applicant. Originally, it was proposed to construct a 12' x 12' wood shed for garbage collection. During construction, however, he was asked by the applicant to consider an alternative because of cost and garbage. Restaurant waste would otherwise spill and cause staining and odors on the wood floor.

(continued) Instead, a pre-fabricated plastic structure was proposed. It was intended to be used for temporary purposes (in order to obtain a TCO) but it is now proposed to maintain it as a permanent structure. He is asking the Board to consider amending the site plan to allow the plastic structure to remain. It is smaller, shorter, more durable and far more sanitary and he does not feel it represents any negative impact in its current state.

Ms. Lagay asked Mr. Baio if the structure is adequate for garbage collection. She noted that there were exterior cans as well.

Mr. Baio stated that the foodstuffs go into the garbage structure.

Mr. Papanicolaou began to add to Mr. Baio's testimony but Mr. Renaud requested that only one witness speak at a time.

Mr. Baio continued and began to discuss the parking lot repaving but deferred to the applicant to testify to that topic.

Mr. Dubowsky stated that they would begin with lighting.

Mr. Baio discussed the valet service and that most diners do not drive into the parking lot, so it is presumed that lighting is not necessary in the parking lot. With that said, there are two (2) historical post lamps that are not lit but are proposed to remain as they represent a historical connection to the restaurant. He does not believe they do not function correctly.

Mr. Constantine asked Mr. Baio if he considered lower, bollard lighting.

Mr. Baio stated no but it is an option; however, it may be considered an intensification of lighting which may not be desirable. He believes bollard lighting would not function as intended since vehicles are parked all along the perimeter of the parking lot. He believes lighting is sufficient at the site.

Mr. Dubowsky shifted the discussion to the accessory structure.

Mr. Baio stated that the structure is not principal to the use of the restaurant. It is in fairly dilapidated condition but represents no structural hazards.

Ms. Lagay asked Mr. Baio if the windows had been fixed.

Mr. Baio believed they had been fixed but if there were any broken glass, they would certainly be fixed.

Mr. Dubowsky stated that the windows were fixed. He began to talk about the concrete driveway apron which keeps breaking in half. He believes it is just a crack and it still functions okay.

Mr. Baio stated that it was of his opinion that it did not have to be replaced for a third time, the crack is not deep.

Ms. Lagay pointed out that the resolution stated that the driveway entry may need DOT approval.

Ms. Elliott clarified that DOT approval was not needed as it is minor replacement of an existing driveway. It is not a new access point.

Mr. Fair questioned if it has been replaced twice, why is it cracking again?

Mr. Baio reiterated that it may be from the delivery trucks but it was predominately a hairline crack.

Mr. Constantine stated that it was previously recommended to consider pavers on the inside edge of the apron where the broken parts of the driveway kick up onto the sidewalk. He was not sure if DOT would sanction otherwise attractive material(s) but it could possibly help deal with the cracking of the apron and broken portion of the parking lot. It would also provide a much nicer streetscape.

Ms. Lagay questioned if the pavers would be located beyond the driveway apron.

Mr. Constantine stated that it could be the driveway apron itself.

Mr. Tobin stated he had trouble reconciling the issue of the hairline cracking. He believed it is a sub base problem and money should not be spent on repaving or replacing the apron or parking lot until the sub base is addressed.

Mr. Baio agreed with Mr. Tobin and continued by addressing the Planner's memo. He believed there was a typo with respect to the building coverage. He was not sure if the accessory building was sanded prior to painting but stated the applicant will address the issue. Regarding trash and recycling, Mr. Baio stated that any outdoor refuse/recycling containers could and should be moved so they cannot be seen. He discussed the benefits of utilizing the plastic shed being more sanitary. Regarding buffering and screening, Mr. Baio concurred that the A/C condenser units should be shielded with fencing up to 6'-0" in height and landscaping to alleviate visual and sound nuisance concerns.

Ms. Elliott clarified for Ms. Lagay that the drainage swale was constructed and approved along

with the reconstruction of the sidewalk along Middlesex Avenue.

Mr. Baio continued and discussed outdoor dining, which is an integral element of most high-end restaurant operations. He would like to have the option of shifting some seating outdoors and not exceeding the allowable seating capacity of 123 seats. The plans show seating for 36 people, which would maximize the use of the outdoor patio.

Mr. Spiegel questioned the architectural proposal of the outdoor patio. The current proposal does not show buffering around the proposed patio. The buffering was part of the negotiation to permit outdoor dining which the applicant withdrew at the 2010 hearing. The Board did not deny the outdoor dining.

Mr. Baio proposed to buffer the outdoor dining area with arbor vitae that would grow in and serve as buffering.

Mr. Spiegel stated his concern does not offer structural barriers between the parking area and outdoor dining. The landscaping itself is not sufficient. There are no berms or brick walls. All elements that would have limited the detriments have been rescinded.

There was a discussion regarding the Board's frustration with the respect to the outdoor dining being withdrawn at the 2010 hearing. The Board liked the outdoor patio proposal as presented in the 2010 hearing as it had many high-quality elements.

Mr. Spiegel wanted the applicant to understand that the architectural features of the 2010 application for outdoor dining would need to be brought back.

There was a long discussion regarding the old plan and what could be brought back into the new plan so as to be acceptable for the Board to consider.

Ms. Sisko asked Mr. Baio what it is that he is asking of the Board to consider.

Mr. Baio quickly summarized his proposal and effectively amended the application to reduce the proposed seating from 36 seats to 16 seats.

Mr. Dubowsky stated that he felt that the Board should hear from the applicant to discuss these matters.

Mr. Spiegel expressed his concern that normally the applicant comes forward to the Board with a plan and the Board reacts to the plan.

Ms. Sisko also raised a concern stating that what the Board is doing is asking the owner what his vision is whereas the Board should be looking at plans.

Ms. Lagay opened the hearing to the public for questions for Mr. Baio.

Deborah DeSantis, 48 Oak Avenue, formerly of 8 Linden Avenue, requested clarification of one of conditions of approval, specifically, on page 23, regarding automatic revocation. Given that much of the conditions of approval have not been completed, how could get applicant seek further expansion from the Board?

Mr. Renaud stated that this was a legal question. The applicant has an approval and it has

conditions. The applicant has come forward to request to amend some of the conditions and that is what the purpose of the hearing is.

There was a long discussion regarding the requirements where the applicant did not comply with the prior approval and the aforementioned issue of automatic revocation. It was of Mr. Renaud's opinion that the applicant could return to the Board. The Zoning Officer is not empowered with denying the applicant the right of coming back before the Board. The Board makes that determination. Ms. Andrews opined that she agreed with Ms. DeSantis and that the applicant should start the application over. Mr. Spiegel referenced specific conditions of approval that had not been completed, such as buffering between the parking lot and the patio, where there is none.

Ms. Lagay asked Mr. Renaud if the Board could continue.

Mr. Renaud opined that they could. The Board could, presumably, decide not to grant further approvals given that previous conditions of approval had been completed. He continued and stated that there are several issues, especially whether or not the Board was going to grant a D variance. The applicant could come back in another meeting to address various concerns made by the Board. As an example, one of the conditions of approval stated that a landscaping plan was to be submitted and subject to the approval of the Planner. Mr. Renaud stated he did not know whether or not that actually had happened. Other conditions were discussed at length.

Ms. Lagay noted that Mr. Dubowsky had left the hearing and the applicant was no longer represented by an attorney.

Mr. Sondergard expressed his concerns regarding automatic revocation.

Mr. Renaud apologized and wished to convey that he did not write the resolution and he does not necessarily agree that there is such a thing as automatic revocation notwithstanding the language. The approval can be revoked but not automatically.

Mr. Cosenza recalled that the approval is good for two (2) to three (3) years. The applicant is operating under a Temporary Certificate of Occupancy.

The discussion regarding revocation and time frames continued.

Mr. Renaud expressed he was not an expert with the UCC but explained that it was to his understanding that once a building is safe to occupy and certain elements such as landscaping had yet to be completed, a Temporary Certificate of Occupancy can be granted. Usually, the applicant has to bond for things that had not been completed but these are not Board issues, they are construction issues. He continued and explained that it seems what the perception is that the process is not moving forward properly but that is not the case. There were conditions. There was a TCO granted with terms. The applicant was summonsed by the Zoning Officer. The Municipal Court ordered the applicant to go back to the Board.

Ms. Sisko stated that the Board should consider asking the applicant to start over in order to ascertain what has been completed and what has not and react accordingly.

Ms. Lagay asked the Board to review the various letters written by the Engineer and the Zoning Officer regarding inspections made by the respective office(s).

After a brief discussion regarding various conditions of approval, Mr. Renaud asked where Mr. Dubowsky had been.

Mr. Papanicolaou stated he had taken ill.

Mr. Renaud stated that, as a result, the application could not move forward without having an attorney representing the applicant. It was pointed out that the name of the applicant was listed as an individual, Constantine Papanicolaou, operator of the Metuchen Inn. Despite this, Mr. Papanicolaou expressed that he would not want to continue without having an attorney present.

Ms. Lagay stated that the application would be continued at a future date after review by the Technical Review Committee (TRC).

Mr. Renaud stated that the applicant would have to re-notice after TRC.

Mr. Cosenza stated that the next meeting date for TRC is August 4th since July 21st would be too late. Given that, there would not be enough time to properly notice for the August 11th hearing date.

There was a discussion regarding what conditions were to be reviewed. Ms. Elliott reiterated the issues at hand: some of the conditions were not completed, a summons was issued and the applicant is at a standstill because they do not want to complete certain conditions. Furthermore, no landscape plan was submitted for the Planner to review so Mr. Constantine has not even been given the opportunity to say that the applicant has deficiencies in its landscaping.

Mr. Constantine expressed that it is a complex issue and that the Board wished to work with the applicant, but it should be noted that the only landscaping proposed was on the architect's first floor plan.

Mr. Spiegel asked how a building permit was issued when no landscaping plan was submitted.

Mr. Renaud opined that, given his experience with the Planning Board, before the matter goes to the Construction Official, there should be an approved landscaping plan. If there is a decision to defer the landscaping plan, what happens is what we are seeing tonight.

Mr. Spiegel stated that what may have happened is that work began to correct the fire damage of the restaurant and the applicant proceeded to apply for a use variance and site plan to expand the restaurant afterwards.

Mr. Renaud summarized that the Board is of the opinion that the plans submitted to the Board are insufficient for it to determine whether or not to grant outdoor dining. The applicant can proceed with the current plans or the applicant can come back with revised plans. The matter will have to be deferred.

Mr. Papanicolaou raised his concerns regarding the fact that he thought he had submitted a landscaping plan with the swale.

Mr. Renaud clarified that the swale was part of a drainage plan; it is not a landscaping plan. They are two different matters. He suggested that the applicant utilize his experts in order to prepare a plan to the Board's satisfaction. The Board will not prepare the plans for the applicant.

After a discussion regarding whether or not the applicant will go to TRC and the issue of re-noticing, it was agreed that the Engineer and Planner could do on-site resolution compliance in lieu of a TRC meeting and the applicant could be carried to a next meeting date. Updated plans shall be filed at least 10 days prior to the next meeting. It was mentioned that the applicant could make the following hearing date, August 11th at 7:45 P.M.

Mr. Spiegel asked Mr. Constantine to ensure that the applicant presents a complete plan.

Ms. Lagay closed the public portion of the hearing.

RESOLUTIONS

03-6371 **Benjamin Bisogne / Metuchen Mower** – Applicant is seeking to amend site plan and use variance approval to increase the building height and install a small warehouse area above the counter.

865 Middlesex Avenue Block 130.01, Lots 5 & 6 B-4 Zoning District

Ms. Lagay if there are any questions regarding the resolution.

The Board discussed the issue of “automatic revocation” at great length. In the end, once the Board adopts a resolution, the responsibility of the Board is finished. Ideally, the applicant presents a plan that is 100% complete. Most of the time, the Board generally leaves it up to the professionals for issues such as lighting and landscaping. Generally, Mr. Renaud writes that revised plans shall be reviewed and approved within 60 days, as a condition. With respect to Metuchen Inn, the applicant could not open its restaurant until a TCO was issued and a performance bond in place.

A motion was made to approve the resolution as written by Mr. Sondergard, seconded by Mr. Spiegel. Roll call vote taken. Motion carried unanimously.

ADJOURNMENT

The meeting adjourned at 10:06 p.m.

Respectfully Submitted,

Chris S. Cosenza
Recording Secretary