

**BOROUGH OF AVALON PLANNING/ZONING BOARD**

**Minutes of Work Session/Regular Meeting of September 8, 2015**

Members Present: Sam Beddia  
William Burns  
Sharon Cooper  
Neil Hensel  
James Fleischmann  
David Knoche  
James Lutz  
Thomas McCullough  
Brian Reynolds  
Susan Rhoads  
Beth Tipping

Members Absent: Michele Petrucci

Chairman Hensel called the meeting to order at 7:00 p.m. and led the Board in the Pledge of Allegiance. After a roll call of members, Chairman Hensel recited the Open Public Meetings Act Statement.

The Board first considered the Minutes of the August 11, 2015 meeting. There were no amendments. A motion was made to approve by Mr. Lutz, seconded by Mr. McCullough, with all eligible members voting in the affirmative.

There were no Resolutions for memorialization.

Chairman Hensel then called Application PZ#15-4, Mary Wynne, Trustee of the Frances M. Hudome Revocable Trust which was requesting variance relief for side yard setback, total side yard setback and minimum elevation of the first floor regarding the raising and renovations to a single family dwelling located at Block 52.04, Lots 9, 11, 71.01, 72.02, 73.01 and 74.02 on the Municipal Tax Map of the Borough of Avalon commonly known as 5249 Ocean Drive, Avalon, New Jersey. Cory J. Gilman, Esquire of the law office of Josephson, Wilkinson & Gilman, Avalon, New Jersey appeared on behalf of the applicant. His proposed witnesses, Mary Wynne, Thomas Wiedenman and John Geisenheimer were sworn in preparation for their testimony.

Mr. Gilman explained the nature of the application to the Board and the multiple events that resulted in the variance relief requested and how same related to the requirements of the

zoning ordinance and Avalon's Flood Damage Protection Ordinance. Mr. Gilman advised that he had spoken to FEMA's CRS Coordinator and was advised that one variance would not affect Avalon's flood insurance rating.

Board Solicitor, Dean R. Marcolongo, Esquire discussed the history regarding the renovation of the house. The house had been raised and a second floor and loft had been added to the building. Unfortunately, the house encroached several inches into the side yard setback and had not been raised enough. Apparently it was approximately 8 inches short of the old regulations. Mr. Marcolongo noted that the applicant had received his permits to raise and renovate the building in late 2013 and several days later Avalon's ordinance was amended to set the new height at base flood elevation plus 3 feet rather than base flood elevation at 1 foot and the datum had been changed from 1929 Datum to 1988 Datum.

Mr. Marcolongo advised that he had a telephone conference with Crystal Smith, FEMA's District 2 CRS Coordinator and Mr. Gilman. Ms. Smith confirmed that FEMA had required the adoption of the Flood Damage Prevention Ordinance and that the ordinance did contain a variance procedure. When ruling on the variance for minimum building height, the Chapter 19 criteria should be used rather than normal bulk variances under the zoning ordinance. Mr. Marcolongo also advises that Ms. Smith noted that if the Borough granted only one variance for minimum building height, it would be unlikely that would have an impact upon our flood insurance discount particularly if sufficient justification was in the record.

Mr. Gilman called John Geisenheimer, the applicant's contractor, who advised that he had prepared the plans for the raising and renovation of the home. He noted that it was a two phase project to raise the building and construct a second floor and loft. He noted that decks, siding and windows were added although there was no expansion of the footprint. He testified that he had received all necessary permits for the development including one for raising the building and second for the addition to same.

Mr. Gilman marked as Exhibit A-1, a packet containing eight sheets including the permits to raise the building. He noted that all of the permits were issued before or contemporaneous with the change in the zoning ordinance. Mr. Gilman noted that an elevation survey of Gibson Associates was filed, however, that was in the 1929 Datum rather than 1988 Datum resulting in a 1.3 ft differential.

Mr. Geisenheimer noted that the house was raised immediately after the issuance of the permit and the inspection was completed on February 4, 2014. Thereafter, when he applied for a certificate of occupancy, a construction survey was conducted and it was at this point that he received a call from John Tracy, Construction Officer, advising that the house was constructed 8 inches too low. In his opinion the error was as a result of Gibson Associates using the wrong datum. He also noted, based upon questioning from the Board, that he did have a structural engineer on this project.

Upon further questioning from the Board, Mr. Geisenheimer noted that the old foundation had been used with additional block added. The house was also supported by helical pilings. He also testified that the side yard encroachment always existed and that the house remained on the existing footprint.

Tom Wiedenman, the applicant's architect, testified that he had prepared the plans for the renovation. Testifying from Sheet Z-1 on his plans, he noted that the building was to be constructed at Elevation 10.1 which would have met the FEMA requirements. The elevation survey evidences that there was an 8 inch error in the calculations which results in the building being 1.9 ft below the new zoning requirements. He noted, however, that, in his opinion, the building would have met the old elevation requirements.

Upon questioning from Mr. Gilman, Mr. Wiedenman testified that he believed that there would be no dangers resulting from this situation, that the reduced height is de minimis and does meet all FEMA requirements although it does not meet the Borough of Avalon's requirements. He believes that the construction is compatible with the intent and purpose of this flood zone.

Mr. Wiedenman testified that the applicant intended to meet the flood requirements and that is evidenced by the fact that the building was raised 2 ft and that they had obtained all necessary permits. He believed that it would be a hardship to fix this problem which would cause the applicant to remove a part of the house, tear up the yard and incur significant expense.

Mr. Wiedenman testified as to the bulk variances noting that the house remains on the same footprint and previously was an existing non-conforming condition. He testified that he believes that the side yard is de minimis, that it would be a hardship to remediate the situation and that the benefits of the variance relief outweigh any detriment. He testified that he believes the relief requested can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and zoning ordinance.

Applicant, Mary Wynne, Trustee, testified that the property has been in the family since 1972 and that they have decided to add an addition to same to provide more room for the family. They understood the problems resulting from Hurricane Sandy and intended to raise the house above base flood elevation to protect the house and conform to the Borough ordinances.

Joseph Maffei, Board Engineer, appeared, was sworn and testified from his review memorandum of August 3, 2015. Mr. Maffei also marked as Exhibit B-1, a residential structure first floor summary in an attempt to explain the facts and circumstances surrounding this raising and renovation. He noted that Ordinance 689-2013 went into effect on January 7, 2014 after the permits for this development were approved and issued. He confirmed that this structure has now been raised to above base flood elevation, however, it has not been raised above base flood elevation plus one or plus three.

The matter was open to the public at which time no member of the public came forward to testify. The public portion of the meeting was closed. Thereafter, Mr. Gilman summarized the application acknowledging that the errors were based upon the applicant's own professionals.

The Board decided to bifurcate their vote in this matter separating the variances for side yard setback and total side yard setback from that of the minimum building height. As to the side yard setback variances, the Board was unanimous in finding that the side yard was an existing non-conforming condition that has generally not been exacerbated by the proposed development. They found that without any significant change that the relief requested can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and zoning ordinance. As such, all voting members voted to grant the variances for side yard setback and total side yard setback.

With regard to the variance relief for minimum building height the Board noted the perfect storm of circumstances and errors that resulted in the home being constructed below Avalon's minimum height. They noted that the applicant appeared to have acted in good faith in obtaining its permits and an unfortunate circumstance resulted in the ordinance changing less than two weeks later. The Board noted the difficulties resulting from the datum change from 1929 Datum to 1988 Datum and how that affected the project in question. They found that while the home was constructed below Avalon's ordinance, that it does appear to meet FEMA's minimum ordinance and that the applicant has evidenced a significant hardship and good cause

for the granting of the variance relief. The Board by an 8-1 vote granted the variance relief for minimum height.

Chairman Hensel then called Application PZ#15-5, a Notice of Appeal filed by Donald Pohlig, alleging that the zoning officer had improperly issued a zoning permit for the construction of a single family dwelling at 652 7<sup>th</sup> Street, Avalon, New Jersey. Jack Plackter, Esquire of Fox Rothschild, Atlantic City, New Jersey appeared on behalf of the applicant. William Serber, Esquire of Serber Konschak of Ocean City, New Jersey appeared on behalf of the property owner. Mr. Plackter marked as Exhibit A-1, a color rendering of the area surrounding the subject property and discussed his communication with Zoning Officer Jeff Hesley and stated his opinion that the permit had been issued improperly.

Before the matter proceeded further, Mr. Serber asked the Board to address the timeliness of this Notice of Appeal. He noted that the subdivision approval was granted in 2006 and that Mr. Pohlig was aware of the approval and the proposed development since that time. In his opinion, his time to file a Notice of Appeal and/or Superior Court appeal with regard to this property had passed by more than nine years. In addition, Mr. Serber believes that the application should not be heard under the theory of laches and estoppel. Mr. Marcolongo advised that while Mr. Serber's arguments may in fact have merit, until all of the facts and circumstances have been heard by the Board they would not be in a position to decide that issue and that the matter should proceed.

Mr. Plackter stated that the zoning permit for the construction of the house at its present location (only the foundation had been constructed at this time) allows this house to jut out 85 ft further toward the waterway than the other homes on this street. This situation violates the intent and purpose of the zoning ordinance and the master plan. He noted that the situation is simply inconsistent with the zoning ordinance objectives and goals and argued that the ordinance requires the measurement from a portion of the bulkhead halfway through the lot rather than the most southerly bulkhead.

Mr. Plackter called Kevin Dixon, a licensed engineer and professional planner from Galloway, New Jersey, who testified that he did a site inspection of the subject property and the adjacent area and reviewed same against the zoning ordinance and master plan. Mr. Dixon discussed Exhibit A-1 which is an aerial rendering of the site improved by additional graphics. Mr. Dixon testified that in his opinion the bulkhead line which is the relevant portion of the

zoning ordinance is not the southerly bulkhead but an easterly jut-out in the bulkhead approximately half through his lot. Mr. Dixon pointed the Board to Section 27-7.3S of the zoning ordinance which states that the purpose of the zoning ordinance is to maintain consistency of houses along waterways. In his opinion, the zoning permit contradicts the ordinance and allows development more than 60 ft beyond the bulkhead line.

Mr. Plackter marked as Exhibit A-2, a photograph of this “east bulkhead” together with Exhibit A-3, a photograph from the Pohlig property facing west with the photograph enhanced to show where the new structure would be located and how it would affect the Pohlig views. Mr. Plackter reviewed Mr. Maffei’s review memorandum of June 2, 2006 which suggested revisions to the plans including the rear setback. Mr. Plackter argued that the application should have been deemed incomplete in 2006 since all of the necessary datum was not included on the plans. The Board raised questions as to whether Subsection A or B of Section 27-7.3 (s) was applicable with all parties agreeing that Subsection B was applicable for this property since there is more than 110 ft to the water’s edge of the bulkhead.

Mr. Serber then cross-examined Mr. Dixon with Mr. Dixon acknowledging that the ordinance had changed since 2006, that the 2006 report and the filed plat showed a 25 ft rear yard setback and that the proposed building was set back at least 25 ft from the rear bulkhead line. Mr. Dixon noted that the location of the house scales to about 46 ft to the deck and approximately 57 ft to the house. Significant questioning took place about the use of the “east bulkhead” or south bulkhead for determination of the rear yard setback. It was acknowledged that if Mr. Dixon’s approach was used, approximately 2/3 of the lot would not be buildable for structures more than 18 inches above grade.

Mr. Maffei testified from his review memorandum and opined that he believes that the south bulkhead line is the appropriate bulkhead line for use in determining the rear yard setback.

After the close of cross examination, Mr. Serber renewed his argument that Mr. Pohlig’s time to appeal this matter would have expired in 2006 and is simply out of time. Mr. Plackter argued that since the setbacks were not on the plans that Mr. Pohlig was not aware of where the rear yard setback was during the hearing in 2006. Mr. Plackter had several questions for Mr. Maffei regarding the hearing in 2006. Mr. Maffei testified that during the meeting the rear yard setback was discussed and actually sketched out on his plan the night of the meeting. Mr. Maffei produced the plan which evidenced certain marks on same.

At this time Solicitor Marcolongo requested a motion in the affirmative to find that based upon the testimony and evidence presented that the Notice of Appeal constitutes a request to overturn the 2006 subdivision approval and not an appeal of the zoning officer's 2015 administrative decision and, therefore, is out of time and should be dismissed. A motion was made to that effect by Mr. Beddia, seconded by Ms. Cooper with the Board denying the motion by a 5-2 vote. The matter was then tabled to the Board's October, 2015 meeting.

The Board next conducted a public hearing on the proposed recommendation to the Zoning Board with regarding roofs over third floor decks. This matter had been addressed at length at the Board's August, 2015 meeting. The Board was in receipt of a pre-prepared Special Resolution No. 15-B recommending modifications to the zoning ordinance in accordance with the comments from last month's meeting. There was no public comment. A motion was made to approve the Special Resolution by Ms. Tipping, seconded by Dr. Reynolds, with all members voting in the affirmative.

The next agenda item was a discussion of master plan modifications in preparation for the master plan reexamination. Given the lateness of the meeting, Chairman Hensel tabled this agenda item and asked Mr. Maffei to bring a proposed draft goals and objectives at next month's meeting.

Chairman Hensel formally welcomed Kimberly Mastriana, the Planning/Zoning Board's new secretary and thanked her for all of her efforts in preparing for tonight's meeting. Chairman Hensel advised that the League of Municipalities meetings which occur in November of 2015 were rapidly approaching and any Board Member who wishes to attend these meetings should notify Ms. Mastriana immediately of his/her interest.

Chairman Hensel opened the matter to the public at which time Martha Wright of 7<sup>th</sup> Street, Avalon asked the Board to modify their meeting procedures and regulations to advise the public that e-mails and letters are not accepted. The Board voted in the affirmative to modify the rules and regulations.

Gary Lee Thomas commented that he had observed the Wynne application earlier in the evening and stated that the problem could have been resolved by the Borough requiring a foundation survey even for house raisings rather than simply for new construction. Mr. Marcolongo noted that Mr. Hesley had already recognized that that was a solution to this

problem and that they would address this matter internally to avoid this difficulty in the future.  
A motion was made to adjourn at 10:37 p.m.

Respectfully submitted,

*/s/Dean R. Marcolongo*

Dean R. Marcolongo, Esquire