

AT A MEETING OF THE ZONING BOARD OF APPEALS OF THE VILLAGE OF MAMARONECK,
WHICH WAS HELD ON JUNE 7, 2007, THE FOLLOWING RESOLUTION WAS ADOPTED.

RESOLUTION

APPEAL OF HENDERSON CASE 2A-2007

FINDINGS

George and Irene Henderson (the "Hendersons" or "Applicants") have appealed the issuance of a building permit for 818 The Crescent ("the Property"). The Appeal was filed in a timely manner within sixty (60) days of the issuance of the building permit at issue. A prior application was made by Suzanne McCrory and Mr. and Mrs. Weiss ("McCrory/Weiss Application") raising the identical issues now raised before this Board by the Hendersons. Because the McCrory/Weiss Application was rejected on procedural grounds, this Board incorporated the record of the McCrory/Weiss Application into this Application so that the parties would not be forced to repeat or resubmit the extensive information already submitted to this Board. In fact, Suzanne McCrory has been advocating and appearing on behalf of the Hendersons in connection with this Application.

I. This Board's Jurisdiction

Initially, we note that the property owners have raised an issue concerning the jurisdiction of this Board to review the Hendersons' Appeal based upon Village of Mamaroneck Code ("Village Code") § 126-25(A) (entitled "Appeals"), which provides that appeals may be taken to the Village of Mamaroneck Board of Trustees ("Village Board"):

Except as otherwise specifically set forth in any law, ordinance, rule or regulation administered by the Director of Building, Code Enforcement and Land Use Administration under this article, appeal from his decision may be taken to the Board of Trustees of the Village of Mamaroneck.

Notwithstanding Village Code § 126-25A, we believe this Board has jurisdiction for several reasons. First, the Village Board referred this matter to the Zoning Board of Appeals ("Zoning Board") thereby affirming that the this Board (and not the Village Board) was the appropriate board to hear and decide the Applicants' Appeal.

Second, irrespective of the Village Board's referral, we have been advised by counsel to the Zoning Board that Village Code § 126-25A has been superseded by both Village Code and State Law. Specifically, Chapter 342 of the Village Code, which governs zoning, provides in Village Code § 342-1 that: "if there is a clear conflict between any provisions of this chapter and that of any other ordinance of the Village, the terms of this chapter shall be deemed to prevail." And Village Code § 342-90 (entitled "Powers and Duties") provides that the Zoning Board:

shall hear and decide appeals from and review from any order, requirement, decision, interpretation or determination made by any administrative official or board charged with the implementation or enforcement of this chapter and may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and make such determination and order as, in its opinion, ought to be made in the premises.

Finally, the provisions of Chapter 342 (namely, Village Code §§ 342-1 and 342-90), which were adopted after the enactment Chapter 126, are consistent with New York Village Law which was also adopted after Chapter 126 and specifically provides that appeals shall be heard by the Zoning Board (see Village Law § 7-712-a(5)(b)). Further, we have been advised by counsel to the Zoning Board that the Appellate Division, Second Department (the appellate Court having jurisdiction from actions brought in Westchester) has conclusively established that a Village's Board of Trustees is "without power to review the acts of the Building Inspector in granting the permits; that power is vested exclusively in the Board of Appeals of the Village."¹

II. Summary of Determination

For the reasons set forth below we believe that the Building Inspector had insufficient and/or incorrect information when he issued the building permit at issue and should not, at that time, have issued the building permit. Nonetheless, based upon the extensive record that has now been developed by this Board we believe that although the grounds used by the Building Inspector for issuance of the building permit were incorrect, the new information submitted to this Board demonstrates that there were (in certain instances) reasons other than those used by the Building Inspector, to support certain of his decisions.

Both Village Code § 342-90 and Village Law § 7-712-b grant the Zoning Board not only the power to reverse, affirm or modify the Building Inspector's determination, but to also make the determination that "ought to have been made" by the Building Inspector. Village Law § 7-712-b (1) (entitled "Orders requirements, decisions, interpretations, determinations) provides:

The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with

¹ *113 Hillside Ave. Corp. v. Village of Westbury*, 27 A.D.2d 858, 278 N.Y.S.2d 558 (2d Dep't 1967), relying upon Village Law § 179-b (now Village Law § 7-712-b).

the enforcement of such local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

III. The Appeal

The Appeal is from the issuance of a building permit which allows the owners of the Property, the Ottingers, to construct a new home and swimming pool at the Property. The appeal raises four basic grounds on which the Applicants claim the Building Inspector erroneously issued the building permit in question:

- (1) that the lot in question fails to meet the minimum requirement for lot area of 15,000 square feet as required in the R-15 district in which the Property is located;
- (2) that the house under construction which was approved by the building inspector exceeds the permitted floor area ratio ("FAR");
- (3) that the proposed construction encroaches on required yard setbacks; and
- (4) a permit for a pool was issued without an application.

We will separately address each of the four issues.

A. Lot Size

We have been provided with a number of opinions regarding the size of the Property and have reviewed all of the written material provided regarding this and the other issues. It should be noted that the Building Inspector relied upon the statement in the plans submitted by the architect for the Ottingers that the lot is 13217 square feet. For the reasons noted below, this is incorrect.

The Property owners have relied upon a survey which uses the "Deep Waters Line" established in 1912 as the rear lot line for the property. The Applicants contend that the mean high water line is currently just seaward of the existing seawall but landward of the 1912 line and therefore the lot is less than the required 15,000 square feet. While the Applicants, for the first time at our last hearing, raised a question as to whether the lot would contain 15,000 square feet if the Deep Waters Line were used, the surveys relied upon by the Ottingers clearly demonstrate that if the 1912 Deep Waters Line is used the property has the requisite 15,000 square foot lot area. There also is no serious question that if the line used by the Applicants is correct, the lot is undersized by approximately 1,800 square feet (+/-).

The Ottingers have submitted a letter from Professor John Humbach of Pace University School of Law, which argues that the lot meets the definition contained in the Zoning Ordinance which states: "LOT — A parcel of land not divided by streets, consisting of one or more lots as shown on a filed subdivision plat or on the Village Assessor's Map, devoted or to be devoted to a particular use or occupied or to be occupied by a building or buildings as permitted by this chapter, together with such open spaces as are required under its provisions, and having its principal frontage on a street or on such other means of access as may be deemed, in accordance with the provisions of law, to be adequate as a condition of the issuance of a building permit for a building or buildings on such land."

We have been advised by counsel that the case law on the subject is complex and somewhat contradictory. One line of cases states that the average mean high water line must be determined by taking measurements over an 18.6 year period to determine the outer limits of private ownership of lands along a navigable waterway to determine state ownership (*Borax Consolidated Limited v. City of Los Angeles*, 296 US 664 [1935]). Another line of cases says that the determination of the seaward boundary of property should be dictated by surveying practices over an extended period of time so as to ensure continuity of title (*Dolphin Lane Associates, Ltd. v. Town of Southampton*, 37 N.Y.2d 292 [1975]).

At the Board's request our counsel made inquiry of the New York State Office of General Services ("OGS"), which in a letter dated January 29, 2007, declined to opine on the subject. We were advised by our counsel that his discussion with the counsel to OGS, revealed only that there are two methods of measurement cited above, that OGS prefers the former, but would not engage in an opinion in this matter, which it views as a purely local matter.

The record reveals that on two prior occasions the Property has come before this Board and the Property has been treated as conforming as to lot area based upon the computation using the 1912 survey. We have been further advised by our counsel that there is a long line of cases in New York which dictate that a Board is bound by prior determinations unless it establishes a basis for reaching a different conclusion. Essentially, it is the law in New York that a zoning board of appeals is not bound by its prior precedent involving approval of a variance on a different lot provided the zoning board indicates its reason for reaching a different result. Consequently, a zoning board could, for example, deny the variance request of one neighbor after previously granting a request of another neighbor for a variance provided the board indicates its reason for a different result.

But our counsel advises this is not the situation here — the Ottingers are not merely relying upon prior precedent alone and are not relying upon the board's determination with respect to some other applicant or property. Rather, they are relying upon a prior determination by this Board concerning the same property. Therefore, we are advised we are bound by prior determinations of this Board.

Therefore, our counsel advises that absent a clear determination by this Board that there is some substantial error in its prior determination that the Property is conforming as to lot area, the Board is bound to its prior decisions finding that the lot is conforming as to lot area.

Further, contrary to the Applicants' interpretation, the deeds produced by the Ottingers support the prior determination of this Board. The chain of title into the Ottingers is as follows:

- a. In a deed dated March 27, 1944, Raymond Bill conveyed lots 42, 43, 44, 45 and 46 (shown on the 1912 survey) to the De George Company. The description of lots 42 and 43 provides in part: "and all right, title and interest of, in and to any land under water where said Lots 42 and 43 abut upon the waters of Long Island Sound."
- b. In a deed dated July 31, 1945, the DeGeorge Company, Inc conveyed the same lots to Ella Bernard. In that deed the description of all five lots is followed by the following language: " Together with all right, title and interest of the party of the first part in and to the lands now or formerly under the waters of Mamaroneck Harbor, in front of and adjacent to the said premises..."
- c. On June 30, 1978, Ella Bernard aka Ella Bernard Scher conveyed portions of lots 42, 43 and 44 to Oscar and Rebecca Davis. That deed left out all mention of the lands under water and the description ends at the sea wall.
- d. On November 8, 1984, Oscar and Rebecca Davis conveyed the same property they received from Ella Bernard to Richard Ottinger, absent any conveyance of lands underwater and thereafter Richard Ottinger conveyed the same to himself and his wife June.
- e. On April 17, 2006, Charles Scher the representative of the Estate of Ella Bernard Scher issued a Confirmatory Deed to Richard and June Ottinger in which he purported to correct an error in the conveyance to Davis and by Davis to Ottinger and described the premises at issue as including: "All the right title and interest of the party of the first part in and to the land now or formerly under the waters of Mamaroneck Harbor, in front of and adjacent to the said premises".

The applicant argues that the Ottingers do not own the lands under water which are at issue, but that such lands are owned by the State of New York. However, as noted above the State has made no such claim and has declined to become involved. Even if the State had made such a claim, this Board is not the forum for determining such disputes. The law in New York is clear that a municipal board may not use a dispute over private property rights between an applicant and another party as a basis for denying an

application. Rather the issue before this Board is whether for purposes of zoning compliance the Ottinger's "lot" has the requisite area not whether the Ottinger's have clear and unencumbered legal title to all of the "lot". The issue of title is a private issue between the Ottingers and whomever may have a claim to title, Therefore this Board is bound by both its prior determination that the lot is conforming in area and by the plain language of the deeds which reference the 1912 survey showing the property line out to the "Deepwaters Line" and which convey "right title and interest...to land now or formerly under the waters of Mamaroneck Harbor...".

Applicants' have submitted a title abstract which they claim is definitive proof that the Ottinger's do not own any of the lands under water, however, as noted by the Ottinger's counsel such a title abstract is merely a preliminary determination by the title company that it would not be willing to insure that title. Further a close look at the deed attached to the title report shows that the title conveyed to Treupel in 1911 included "all right title and interest ...to the land under the waters of Mamaroneck Harbor in front of said premises to the middle of said harbor"(see page stamped 184).

The criteria we must apply are different from the criteria applied by a title company. The 1912 survey shows a 15,000 square foot lot, the maps on file with the Village (including the 1912 Treupel-Shaw Co. "Plan of Subdivision" showing the lots in question going out beyond the high water line to a point 140 feet from the road) show a subdivision with lot lines going out to the Deep Waters Line, the assessor's records show the Property to be 15,000 square feet, this Board on two prior occasions determined the Property conformed with the 15,000 square foot requirement and therefore solely for purposes of determining Lot Area pursuant to the Zoning Code the Property is 15,000 square feet.

B. FAR

The question of permitted Floor Area Ratio ("FAR") is related to the lot area. The Property is located in an R-15 district which permits an FAR of .40. For the reasons set forth below the conclusion by the Building Inspector that the house met the FAR based upon a lot of 13,217 square feet cannot possibly be correct and the plans submitted in support of the building permit application showing a lot of 13,217 square feet conforming as to FAR were clearly incorrect. However based upon the above finding that the lot actually contains 15,000 square feet the Building in question meets the FAR for a 15,000 square foot lot, albeit based upon an entirely different calculation of Floor Area than the calculations used by the Ottinger's architect and the Building Inspector..

Chapter 342 (section 342-3(B)) provides the following definitions that are relevant in determining FAR:

"FLOOR AREA RATIO — Numerical value obtained by dividing the gross floor area, exclusive of cellars or basements used only for storage and utilities, within a building or buildings on a lot by the area of the lot"

"FLOOR AREA, GROSS — The sum of gross horizontal areas of the several floors of the building or buildings on a lot, measured from the exterior faces of exterior walls or from the center line of party walls separating two buildings, excluding:

- (1) Roof areas.
- (2) Cellar areas used only for incidental storage or for the operation and maintenance of the building.
- (3) Any areas devoted only to accessory off-street parking or loading.

The Building Inspector has indicated that his interpretation of the FAR provisions allowed for the areas used for storage that were not cellar areas and areas where the ceiling height is below seven feet to be excluded from calculating the FAR. His rationale is that since the Property is in a flood area and FEMA regulations do not permit cellars the property owner should be allowed some area for storage and mechanical equipment within the house that should not be included in FAR. As for the areas below seven feet high he believes they should be excluded because those areas are not "habitable area".

However the Zoning Code contains a specific definition of Cellar and Habitable Floor Area which are:

CELLAR — That space of a building that is partly below grade which has more than half of its height, measured from floor to ceiling, below the average established curb level or finished grade of the ground adjoining the building."

FLOOR AREA, HABITABLE — All spaces within the exterior walls of a dwelling unit, exclusive of garages, cellars, heater rooms and unheated porches and breezeways."

Yet the definition of FAR does not mention Habitable Floor Area or make it a criteria in determining FAR. Further, the exclusions from FAR do not include storage or mechanical areas above the cellar level. Laudable as the Building Inspector's interpretation may be he does not have authority to vary the clear language of the Zoning Code. Only this Board may grant variances. In fact the Zoning Code requires at 342-86: "It shall be the duty of the Director of Building, Code Enforcement and Land Use Administration to enforce, literally, the provisions of this chapter and of all rules, conditions and requirements adopted or specified pursuant thereto." If the Building Inspector or others believe the Zoning Code does not properly address the circumstances

of properties within flood areas or the practicality of using certain areas in calculating floor area they should petition the Village Board to amend the Zoning Code.

Thus we do not agree with the Building Inspector's FAR interpretation. While some may think our inquiry should stop with a finding that the Building Inspector had made an error in his interpretation, we believe, since the Applicant's have raised the issue of the proper manner of calculating the FAR, we should address that issue by determining the proper calculation of FAR for the house on the Property. Therefore, in accordance with our authority under Village Code § § 342-90 and Village Law § 7-712-b, we shall analyze the conflicting FAR calculations to determine the FAR by applying the clear provisions of the Zoning Code and thereby render the determination that "ought to have been made" by the Building Inspector in connection with FAR.

Although there has been some dispute among the Board members concerning the procedure that must be adhered to when this Board retains consultants (which issues are beyond the scope of these Findings), the Village's independent planning consultant firm (BFJ) has provided us with an analysis of the FAR issue. They have concluded that if the lot is 15,000 square feet the building, after including those areas we have concluded the Building Inspector should not have excluded, is approximately 6059 square feet and that a 6,000 square foot building would meet the .40 FAR requirement. BFJ also concluded that since they were using copies of plans and not CAD files that there was a margin of error which allows the actual calculation to fall at or slightly below 6,000 square feet. The Ottinger's architect confirmed that using the CAD files and including the areas used by BFJ in calculating FAR the actual square footage was just below 6,000 square feet. Therefore if we accept the manner of calculating FAR used by BFJ there is compliance with the FAR requirements.

The Applicant's agree that the same areas we find should be included in FAR (storage, mechanical areas and areas with a ceiling height below seven feet) are correctly included in calculating the Floor Area of the house but also argue that open areas above the first floor should be added to the total floor area. We disagree. By definition to be included in Floor Area space on the second floor should have a floor and areas that do not have a floor but are open to the floor below (the first floor) should not be counted as Floor Area in calculating FAR.

It is a simple fact that the larger the lot the larger the structure that can be built on this lot based upon FAR. We are advised by our counsel that the entire 15,000 square feet of lot area may be utilized in calculating the permitted gross floor area of the house and in calculating compliance with the FAR requirements of the Zoning Code.

The recent case of *Pagnozzi v Planning Board of the Village of Piermont* (292 A.D.2d 613 [2d Dept. 2002]) the Appellate Division of the New York State Supreme Court found that: "[s]ince the Piermont Village Code does not address the use of some land that is under water to satisfy bulk area zoning requirements, the petitioner is permitted to use the area of land that is under water to satisfy those requirements...". (See also *Vezza v. Bauman*, 192 A.D.2d 712 [2d Dept. [1993]])

The Village of Mamaroneck Zoning Code is silent on the use of land under water for determining compliance with the area and bulk requirements of the code in the R-15 district in which the Property is located. Applicants' cite other unrelated provisions of the Village Code for the opposite proposition. However those provisions are either not part of the Zoning Code and therefore are not part of our review or for example in the case of the Marine Recreation Zone relate only to the Marine Recreation Zone, which further supports that if the Village had intended to apply the same rule in the R-15 Zone it would have said so. Therefore, based on the *Pagnozzi* case, the Ottingers are entitled to utilize the land under water in calculating the size of their lot and the FAR. We find that using the BFJ calculations there is compliance with the .40 FAR requirements for this Lot using 15,000 square feet as the Lot Area.

C. Setback Requirements

The third issue is compliance with setback requirements. As to the calculation of the setbacks the following provisions of the Zoning Code are relevant:

Section 342-3 provides the following definitions:

YARD — An open space on the same lot with a building or group of buildings, which open space lies between the building or group of buildings and the nearest lot line and is unoccupied and unobstructed from ground upward, except as may be specifically authorized in this chapter. In measuring a "yard," as hereinafter provided, the "line of a building" shall be deemed to mean a line parallel to the nearest lot line, drawn from a point of a building or the point of a group of buildings nearest to such lot line, and the measurement shall be taken at right angles from the line of the building, as defined herein, to the nearest lot line.

YARD, FRONT — A space on the same lot with the building between the nearest front line of the building and the front line of the lot and extending the full width of the lot. [Amended 6-18-1973, effective 6-27-1973]

YARD, REAR — A yard extending across the full width of the lot and lying between the rear line of the lot and the nearest line of the building

YARD, SIDE — A yard between the side line of the lot and nearest line of the building and extending from the front yard to the rear yard or, in the absence of either of such yards, to the front or rear lot line, as the case may be.

§ 342-14. Building projections.

- A. Projecting architectural features (horizontal). The space in any required yard shall be open and unobstructed, except for the ordinary projection of the windowsills, bay windows, belt courses, cornices, eaves and other architectural features; provided, however, that such features shall not project more than three feet into any required yard, but not closer than five feet to the property line. The sum total of such projections in any one yard shall not exceed 25% of the overall dimension of the wall from which they project.
- B. Projecting features above the roof level. The height limitations of this chapter shall not apply

to church spires, belfries, cupolas, silos and domes not used for human occupancy nor to chimneys, ventilators, skylights, water tanks, bulkheads or similar features and necessary mechanical appurtenances to a building which are carried above the roof level, except as such may be specifically modified by other provisions of this chapter. Radio and television antennas and supporting structures no more than 15 feet in height above the roof of the building to which they are attached shall be permitted; other such antennas and supporting structures shall be permitted only if approved by the Board of Appeals. Parapets or cornices used for ornamentation and without windows may extend above the roof level not more than three feet. All such features, however, shall be erected only to such height as is necessary to accomplish the purpose they are intended to serve.

Unfortunately, all of the discussion by the parties has not clearly delineated which portions of the building encroach into required yards and by how much. However, the Ottinger's architect has acknowledged that stairs, platforms, walls and structures used as planters, which have foundations, do encroach into the required setbacks. Several people appeared to argue that this is a common practice. Whether or not this is a common practice our authority is limited to applying the Zoning Code as written not how people would like it to be written. Steps, platforms, walls and structures used as planters do not fall within the exceptions established in section 342-14 for projecting architectural features. Therefore to the extent those structures encroach into any of the required yards we find that the building permit was not properly issued. We note that the Ottingers have completed a substantial portion of the house at this point in time and that the encroachments appear to be minor. The Ottinger's should therefore consider applying for variances to allow these encroachments if changing those structures would constitute a substantial difficulty at this time.

D. The Pool

Finally, there is the issue of the Pool and whether it was properly approved. There has been a great deal of confusion over the status of the Pool with the Building Inspector providing conflicting information. The Pool is shown on a site plan and the building permit at issue mentions a pool. The Building Inspector had previously stated that the pool was listed on the building permit in error as there were no plans for the pool and an elevation certificate was missing. At our last meeting the Ottinger's attorney stated that the documentation had been submitted and was misfiled in the building department. At that meeting the Building Inspector confirmed that statement and we closed the record with the exception of requesting that the Building Inspector provide this Board with the documentation for the pool.

Subsequently, documentation was submitted and we find the Building Inspector's shifting position on this issue to be a continuing difficulty. One of the documents submitted was an elevation certificate which is dated July 14, 2006 but stamped received March 6, 2007. An examination of all the plans in the record before us also reveals that there is no construction plan that is stamped "approved" by the Building Department which shows a pool.

In view of the fact that there is no "approved" plan for the pool in the file, that the building inspector stated in his March 1, 2007 memo that all paperwork had not been

submitted and that the elevation certificate that we were told was one of the requirements for a permit for the pool was not even stamped in by the Building Department until March 6, 2007, it is clear that there was never a proper application for a permit to construct a pool and building permit was not properly issued with respect to the pool.

In view of the foregoing it is therefore:

RESOLVED: This Board finds that for purposes of zoning calculations the "lot" consists of 15,000 square feet.

Moved: Mr. Jackson
Second: Mr. Mgrditchian
In Favor: Sullivan, Jackson, Mgrditchian

Opposed: Neuringer

And if is further,

RESOLVED: This Board finds the proposed construction on the Property complies with the FAR requirements of the Zoning Code in that the FAR is .40

Moved: Mr. Jackson
Second: Mr. Sullivan
In Favor: Sullivan, Jackson, Mgrditchian

Opposed: Neuringer

And it is further,

RESOLVED: This Board finds that portions of the proposed structures as indicated above encroach on required setbacks and to the extent the building permit approved the encroachment of such structures the permit was not valid.

Moved: Mr. Jackson
Second: Mr. Mgrditchian
In Favor: Sullivan, Jackson, Mgrditchian, Neuringer

Opposed: None

And it is further,

RESOLVED: This Board finds that no proper and complete application was submitted for the proposed pool and to the extent the building permit was issued for a pool it is not valid.

Moved: Mr. Jackson

Second: Mr. Sullivan

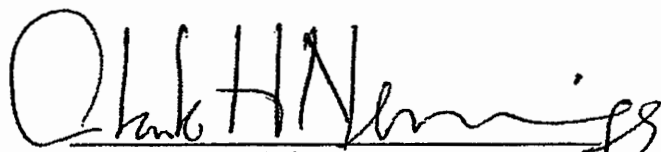
In Favor: Sullivan, Jackson, Mgrditchian, Neuringer

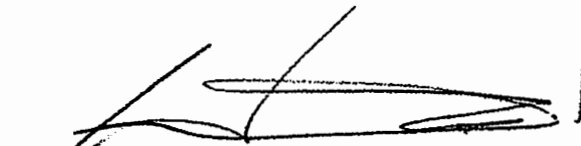
Opposed: None

Mamaroneck, New York

Dated: June 7, 2007

No. 2A-2007


Chairman


Secretary

