

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
November 6, 2013
Garabrant Center, 4 Wilson St., Mendham, NJ**

CALL TO ORDER

The regular meeting of the Board of Adjustment was called to order by Chair Seavey at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

CHAIR'S ADEQUATE NOTICE STATEMENT

Notice of this meeting was published in the Observer Tribune and the Daily Record on January 17, 2013 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

ROLL CALL

Mr. Palestina – Present
Mr. Peck – Present
Mr. Peralta – Present
Mr. Schumacher – Absent
Mr. Seavey – Present

Mr. Smith – Present
Mr. Ritger - Present
Mr. McCarthy, Alt I - Present
Mr. Germinario, Alt II – Absent

Also Present:

John Vitale, Esq., Attorney
Steve Bolio, Engineer

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APPROVAL OF MINUTES

Mr. Peralta made a motion to approve the minutes of the October 1, 2013 regular meeting and executive session of the Board as written. Mr. Peck seconded. All members being in favor, the minutes were approved.

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PUBLIC COMMENT

Chair Seavey opened the meeting to the public for comment on anything not on the agenda. There being no comment, the public comment sessions was closed.

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Botti, John – Hardship Variance
Block 301, Lot 74, 45 West Main St.

As the applicant had not noticed, this application will be rescheduled for the Tuesday, December 3 meeting of the Board.

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Bess, John & Joan – Hardship Variance
Block 1401, Lot 10.02, 3 Windymere Lane

Present: Thomas Malman, Esq., Attorney for the Applicant
John Bess, Applicant
Craig Villa, Engineer for the Applicant

Exhibits: A-1: Variance Plan (colored version) dated September 9, 2013
A-2: Series of 21 photos

Completeness:

Mr. Bolio referenced the Ferriero Engineering dated October 7, 2013 and advised the Board that there was no objection to waivers for Checklist Items 26 and 31. There being no further questions or comments by the Board, Mr. Seavey made a motion to deem the application complete. Mr. Smith seconded.

ROLL CALL: The result of the roll call was 7 to 0 as follows:

In Favor: Palestina, Peralta, Ritger, Smith, Peck, McCarthy, Seavey
Opposed: None
Abstentions: None

The motion carried. The application was deemed complete.

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Hearing:

Mr. Vitale, Esq. advised the Board that he had reviewed the public notices and the Board had jurisdiction to proceed.

Mr. Malman, Esq. introduced the application stating that the applicant would like to install a 16 sq. ft. generator pad behind his home. When he went for a building permit, he found out that he was already over impervious coverage. The home was purchased in 1997 by Mr. Bess as a spec house. Mr. Bess added landscaping and a deck, and at that time, 13 to 14 years ago, the landscape contractor advised him that no permits were needed. Thus, the work was completed without variances. He did not know there was a violation until he went to install a generator. When the landscaping was completed, Mr. Bess added significant drainage improvements.

Mr. Craig Villa, Engineer for the applicant was accepted as a witness given the Board's knowledge of his credentials from past applications. Utilizing Exhibit A-1, the colored version of the Variance Plan previously submitted to the Board, Mr. Villa explained Sheet 1 of 3 indicating that Mr. Bess' lot was the second lot on Windymere Lane that is a private road located off of Talmage Road. The lot is identified as Block 1402, Lot 10.01 in the one acre zone. Even though Windymere is a private road and Mr. Bess owns to the center of the right of way, they have used, in accordance with the ordinance, the area to the sideline of the private road to calculate acreage. Based on that calculation, the lot is slightly over one acre.

Continuing with Sheet 2 of 3, Mr. Villa described the existing conditions. The home is centered on the lot with a circular drive. Located in front of the home is a circular paver block area. The rest of the drive is asphalt. The lot drains from the southwest corner to northwest corner. When the developer built the homes, he built a cul-du-sac with a detention basin and some open space that ties to a river tributary behind the school. There is an A Inlet with a pipe running behind the neighbor on lot 10.03. The existing coverage is 11,007 sq. This is approximately 2200 sq. ft. over the permitted.

Further explaining the drainage, Mr. Villa testified that the water runs from the neighbor and flows to a swale to the driveway and then to an inlet. The inlet is piped to the backyard. There is also a swale on the neighbor's property. Mr. Bess has tried to protect himself and his neighbors from runoff coming on to his property and runoff coming off of his property to the neighbor. He has put an inlet on the south side that pipes water across the back to the developer's inlet on the northeast side. He collects the water, and it does not puddle in his yard. A swale was also installed when the driveway and patio improvements were made. It collects the runoff from the north that runs toward the neighbor. There is a stone swale from Mr. Bess' fence to the developer's swale. In front of his fence, the ground is graded for a swale to keep the water from running to his neighbor.

Mr. Villa stated that the proposal is to add a 3.5 ft. x 4.5 ft. generator pad toward the rear of the home. He pointed out the location. The increase of 16. Sq. ft. is a diminimous increase. As an engineer, his expert opinion is that there is no drainage problem.

Mr. Villa entered Exhibit A-2, a series of 21 photographs that had been taken anywhere from one month to two weeks before the hearing. The photos depict the site as it exists today. He described the photos as:

- #1 – View of the front of the house with part of the driveway visible
- #2 – View standing to the left of the home looking at the circular paver section
- #3 – The highpoint in the northern ring of the loop.
- #4 – View looking down to the street to the road showing paved area and inlet.
- #7 – 2x2 grate which is part of the improvements that were made.
- #8 – Shows the slope down toward the neighbor
- #9 – View of the front yard showing the left side fence
- #11 – The stone swale installed by the developer
- #12 – The inlet pipe installed by the developer that runs under the neighbor's fence toward the back of the school
- #13 – From backyard looking to low corner.
- #15 - 2x2 inlet picking up swale from the south
- #18 - From parking lot looking back toward fence where swale is located
- #20 – The middle of the backyard looking toward house and patio.

He continued that Mr. Bess has done a good job collecting the water. The water is deflected, and there is no problem to other owners in the area. There is no problem with an additional 16 sq. ft.

During Board questions, Mr. Ritger noted that the fence was located on the neighbor's lot. He also questioned whether a permit had been obtained for the fence. Later in the hearing Mr. Bess clarified that when they installed their fence, they connected it with the neighbor's fence and a part may be on the neighbor's property.

Continuing, Mr. Ritger questioned why the swale was not included in the impervious coverage that had been listed on the plans. It is comparable to a gravel walkway. Chair Seavey responded that a swale has never been interpreted from an application standpoint as impervious coverage, just as a retaining wall is not. There should be a coefficient for a gravel walkway as well. It is different from a walkway that is compacted with an application of gravel on the top. The swale is designed so that the water runs through it. Mr. Ritger was concerned that eventually people could use gravel in their entire front yard if they did not want to cut grass. The issue should be resolved.

Responding to Mr. Ritger on the location of the generator from the home, Mr. Bess stated that it would be 6 to 8 ft. off the wall from the house. It will be located in a landscaping bed, and it is blocked from the neighbor's by a fence.

Addressing Mr. Peck on whether there would be any impervious coverage that could be given up to accommodate 16 sq. ft for the generator, Mr. Villa stated that the patio is raised and the brick and flagstone would be disturbed. The front driveway is curbed, and it would take away from the aesthetics and also require regarding. It would be a hardship.

Clarifying the generator's distance from the neighbor for Mr. Peralta, Mr. Villa stated that it is located 28.4 ft. from the line. The accessory structure requirement is 20 ft. The closest home is 200 feet to the rear.

Mr. Smith initiated a discussion on the pre-existing impervious coverage. Mr. Malman, Esq. stated that the coverage violated the ordinance when it was first installed. The house came first, and then the driveway and patio came about a year or two after. Mr. Villa stated that there was a new ordinance in 2002 that redefined coverage. Mr. Seavey added that many people do not apply for landscaping permits, even today, and the DEP stormwater regulations were not in effect in 1997.

Addressing Mr. Bolio, Mr. Villa stated that any issues raised in the Ferriero Engineering letter of October 7, 2013 would be addressed. Mr. Bolio added that the impervious coverage calculations have been calculated to the sideline, which is how they would have recommended doing it.

Mr. Bess testified that he and his wife purchased their home in November 1997 as a spec house. At that time the driveway was unfinished with gravel. At that time there was a single entrance to the property that came into the circle. They needed to finish it themselves. They hired a locally known and reputable landscape company and architect. They decided that they did not like the single entrance and wanted to create the circular drive that exists today. A lot of thought was given to the grading and the water flow.

He continued that the improvements were completed in two phases. Phase I was done around 1998 and included the front driveway and the grading on the side. Phase II in 2000 included the patio. They also put in a stockade fence that connected to their neighbor's pre-existing fence. The neighbor has since replaced his fence.

The only drain that existed when they purchased the home was the one down the hill in the corner. There was a lot of time and money spent on drainage and a riverstone swale was installed. They also dug up every underground drain and replaced them with bigger piping to avoid clogging. A drain was also placed in the southwest corner where the generator will be located. By putting in the circular drive instead of the single drive, they move water to the street. They do not have any water problems, and their neighbors do not have any either.

Explaining the current situation, Mr. Bess stated that when he moved in, he was told that a permit was not needed. He had contacted a landscape architect and he was told that a permit was not needed for the patio. He did not know that variances were needed. He wants to make the situation right. He found out about the problem when he went to apply for the generator.

Addressing the Board on the type of generator that would be installed he stated that it is a Kohler 20K kilowatt and it is less than 16 sq. feet in dimension. He wanted to leave a little excess room with the pad.

Responding to Chair Seavey on who maintains the detention basin, Mr. Bess stated that it is the homeowners' responsibility. Mr. Bess also clarified for Mr. Palestina that most of the drainage was done when the driveway was completed. When they finished the backyard, the southwest additional drainage was installed. They became aware of the coverage problem when they went to put in the generator and the local contractor contacted the Borough. The Zoning Officer came out to the property. Mr. Palestina requested that language be used to assure that the impervious coverage be neutral going forward.

Chair Seavey noted that should the application be approved, the existing drainage would need to remain and be maintained as designed. He noted that the catch basin that was designed by the developer acts as a drywell that could have been placed on the property. He did not think the fence was an issue for this application. That would need to be addressed if he sold his home. Mr. Smith added that in total it is designed similar to what the Board would have requested in order to approve the application. Mr. Bolio advised the Board that there were not problems with drainage that they were aware of. Mr. Seavey did not see any detriment to the neighbors as the system was currently working. Previously a driveway cut permit was not needed unless it was a County road. That is different now.

Mr. Peralta asked Mr. Malman, Esq. to summarize the positive and negative criteria. Mr. Malman, Esq. stated that the variance could be a C1 or C2. A C1 hardship variance could be granted as the applicant did not know of the regulations. This, however, might be considered self created. A C2, where the benefits outweigh the detriments, would center on the drainage improvements with the patio and driveway. In terms of the negative criteria, there is no adverse impact.

Mr. Ritger expressed his concern that the Board would be setting a precedent and ignoring the ordinance. The construction was completed without a permit. They are being asked to say that is forgiven. He did not believe the applicant should be going over the existing impervious coverage and should be getting creative with the location. For example, there is a roof over the sunroom area. Alternate locations should be requested as they have been in other applications.

Chair Seavey responded that the difference in this case is that it occurred 14 years ago, and the rules could have been different. The issue is not the generator, but the circular driveway. Given the cost of the application for the minor generator request, he did not feel that the application should have to have been heard at all. Mr. Peralta added that they are not retroactively approving, they are acting on the current application. If the Board required that the drainage be ripped up, they would be hurting the neighborhood.

Mr. Bess clarified that they did look at other areas to place the generator. There is an area outside the french doors, but it still would require additional coverage as it is in the landscaping. He considered the roof, but did not want anyone going up on the roof for servicing of the unit. It would be seen from the street.

Mr. McCarthy was comfortable that given Mr. Bess' testimony he had no part in intentionally disregarding the ordinance. If he came for this application now, the Board would request he put in the drainage system. Mr. Palestina added that Mr. Bess had acted quickly once he knew about the problem.

Chair Seavey opened the meeting to questions and comments by the public. There being none, the public session was closed.

Chair Seavey made a motion to approve the application as amended to include conditions that the drainage as presently exists, that added by Mr. Bess and that as pertains to the subdivision/site plan be maintained by future owners. The approved drainage should be shown on a new survey and should become an exhibit to the resolution. The items in the Ferriero report of October 7, 2013 be addressed.

Mr. Peralta seconded.

ROLL CALL: The result of the roll call was 7 to 0 as follows:

In Favor: Palestina, Peralta, Ritger, Smith, Peck, McCarthy, Seavey
 Opposed: None
 Abstentions: None

Mr. Vitale, Esq. will provide his notes to Mr. Germinario, Esq. who will prepare a resolution for the December 3, 2013 regular meeting of the Board.

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DISCUSSION: Board of Adjustment By-Laws

Ms. Callahan explained to the Board that at the previous meeting, Mr. Germinario, Esq. had advised that he had reviewed the By-Laws and made minor changes. She added that as there were a limited number of members present, the Board requested holding off on a vote until there were more present. Mr. Vitale, Esq. advised the Board that in the spirit of transparency it is appropriate to have the By-Laws which set out the operating procedures. In this way, the public is made aware of the how the Board operates and when they can participate.

The Board clarified that the By-Laws could be amended should they change the way they operate. Ms. Callahan advised that an amendment could always be prepared, presented to the Board and voted on. The date of the revision would be noted and all members would then be given the update. Board also noted that the By-Laws would be very useful to new members.

After the short discussion, Chair Seavey made a motion to approve the by-laws as written. Mr. Palestina seconded.

The result of the roll call was 7 to 0 as follows:

In Favor: Palestina, Peralta, Ritger, Smith, Peck, McCarthy, Seavey
 Opposed: None
 Abstentions: None

The motion carried. Ms. Callahan will provide copies of the approved version to the Board in their December packages.

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OTHER BUSINESS

Board requested that a discussion item dealing with their 2013 Annual Report be placed on the December agenda. As they would like to make several comments on land use issues to the Council and the Planning Board, this would provide the opportunity for Ms. Callahan to develop a draft for their January reorganization meeting.

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ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Seavey adjourned the meeting at 9:15 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, December 3, 2013, at 7:30 p.m. at the Garabrant Center, 4 Wilson St.

Respectfully submitted,

Diana Callahan
 Recording Secretary

