

MINUTES OF THE BOARD OF ADJUSTMENT
March 17, 2010

PRESENT: Chair Harrison, Vice Chair Fleischer, Mr. Burr, Ms. English, Ms. Holloway, Mr. Kenney, Mr. Susswein and Mr. Whipple; also, Mr. Sullivan, Esq., and Mr. Charreun, Assistant Secretary

ABSENT: Ms. Cockey and Ms. Kadus, Secretary

Assistant Secretary Charreun called the roll and announced the regular meeting of the Montclair Board of Adjustment. Notice had been given in accordance with the Open Public Meetings Act. On motion by Mr. Whipple, seconded by Mr. Susswein, the **Minutes of the December 16, 2009** regular meeting were adopted as modified, Mr. Fleischer and Mr. Burr abstaining. On motion by Mr. Whipple, seconded by Mr. Susswein, the **Minutes of the January 20, 2010** regular meeting were adopted as modified, Mr. Fleischer abstaining. On motion by Mr. Whipple, seconded by Ms. Cockey, the following Resolution memorializing the Board's decision on the application of **Thomas Buerkle & Barbara Rosen, 53 Brookfield Road** was adopted, Mr. Fleischer, Ms. Holloway, and Mr. Kenney abstaining:

WHEREAS, Thomas Buerkle & Barbara Rosen, as owners, did make an application to the Board of Adjustment of the Township of Montclair for variances pursuant to N.J.S.A. 40:55D-70c to construct an addition onto the front porch of their single-family dwelling on property designated as Lot 33 in Block 1705 on the Township Tax Map and located in the R-1 One-Family Zone; and

WHEREAS, the applicant requested variances from **Montclair Code Section 347-45B(2)** for a front yard setback less than permitted required, and from **Montclair Code Section 347-45C(1)** for a westerly side yard setback less than permitted; and

WHEREAS, the applicant submitted a property survey dated June 4, 2005 and a plot plan and architectural drawings, prepared by Edmundo Lopez, Architect, P.C.; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on February 17, 2010 at which time it was established that notice was properly published and the property owners within 200 feet of the property in question had been properly served notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The property is an interior lot located in the R-1 One-Family Zone and measures 50 feet in width and 7,987 square feet in lot area. The property contains a 2½ story single-family dwelling and detached garage in the rear yard.

2. A one-story addition is proposed to extend the existing enclosed front porch into the westerly side yard of the property. The porch addition measures 6 feet 5 inches in width and 19 feet 1½ inches in length.

3. The required front setback for the porch addition is 34.3 feet, which is based on the average front setback of the 3 nearest dwellings, 2 to the right and only 1 to the left, which is on the corner of Brookfield Road and Edgemont Road. The existing dwelling has a nonconforming front yard setback of 30.9 feet measured to the existing porch. The addition is aligned with the existing porch and front wall of the dwelling and would also have a front yard setback of 30.9 foot front yard setback. A variance is requested in that a minimum front yard setback of 34.3 feet is required.

4 A side yard setback of not less than 6 feet is required from the westerly side property line. The dwelling is positioned at an angle to the westerly side property line. The proposed porch addition extends 4¾ inches into the required 6 foot setback at the front corner of the porch, and 2 feet 4½ inches into the required 6 foot setback at the rear corner of the porch. A variance is requested in that a side yard setback of less than 6 feet is proposed from the westerly side property line.

5. The Board determined that the requested variances could be granted. The porch addition is aligned with the existing porch and front wall of the dwelling and has the same front yard setback. The proposed front yard setback is also in keeping with the properties to the east. The angled westerly side property line causes the side yard setback of the addition to be reduced towards the rear. The addition is appropriately sized and positioned and the larger front yard setback of the dwelling on the adjoining lot to the west reduces the impact of the proposed westerly side yard setback.

WHEREAS, the Board, based upon the foregoing findings, concluded that the applicants proved peculiar and exceptional practical difficulties and exceptional and undue hardship and proved that the variances could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and the zoning ordinance pursuant to NJSA40:55D-70C(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicants proved that the purpose of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and proved that the benefits of the deviation would substantially outweigh any detriment and proved that the variances could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of NJSA40:55D-70C(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of **Thomas Buerkle & Barbara Rosen** is hereby approved; and

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council, Township Clerk, Township Engineer and Construction Code Official.

On motion by Mr. Whipple, seconded by Ms. Cockey, the following Resolution memorializing the Board's decision on the application of **Marc Zuluaga, 25 Bellaire Drive** was adopted, Mr. Fleischer, Ms. Holloway, and Mr. Kenney abstaining:

WHEREAS, Marc Zuluaga, as owner, did make an application to the Board of Adjustment of the Township of Montclair for variances pursuant to N.J.S.A. 40:55D-70c for a proposed second floor addition and front porch onto the single-family dwelling at the property designated as Lot 2 in Block 1515 on the Township Tax Map and located in the R-1 One-Family Zone; and

WHEREAS, the applicant requested variances from **Montclair Code Section 347-45B(2)** for a front yard setback of less than permitted from Bellaire Drive, from **Montclair Code Section 347-45C(4)(a)** for a greater dwelling width than permitted, from **Montclair Code Section 347-45D** for a rear yard setback less than permitted, and from **Montclair Code Section 347-45E** for a greater principal building coverage than permitted; and

WHEREAS, the applicant submitted a property survey dated October 3, 2008 and a plot plan, floor plans, and elevation, prepared by the applicant; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on February 17, 2010 at which time it was established that notice was properly published and the property owners within 200 feet of the property in question had been properly served notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The property is a corner lot at the intersection of Bellaire Drive and Central Avenue located in the R-1 One-Family Zone. The property is irregularly shaped, measures 2,575 square feet in lot area, and contains a 2½ story single-family dwelling. There is no garage on the property. A driveway from Bellaire Drive provides access to a parking area on the easterly side of the dwelling. Pursuant to the guidelines in the ordinance, the northerly property line is the side property line and the westerly property line is the rear property line.

2. The required front yard setback for new construction on the property from the Bellaire Drive front property line is 25 feet, since the average front yard setback of the 2 nearest dwellings on the same side of Bellaire Drive is less than 25 feet. A second floor addition is proposed on the easterly side of the dwelling above an existing one-story section of the dwelling. The addition will be aligned with the first floor below it, and would be set back 13.24 feet from the Bellaire Drive front property line at its closest

point. A variance is requested in that a front yard setback of not less than 25 feet from Bellaire Place is required.

3. An existing vestibule at the front entrance facing Bellaire Drive is to be removed, and a roofed front porch, measuring 15 feet 1 inch by 6 feet 10⁵/₈ inches is proposed. The porch would be set back 8 feet from the Bellaire Drive front property line at its closest point. A variance is requested in that a front yard setback of not less than 25 feet from Bellaire Place is required.

4. Pursuant to the guidelines in the ordinance, the limitation of the width of the dwelling is applicable as applied from the Central Avenue frontage of the property. The Central Avenue frontage measures 27.8 feet, and a maximum principal structure width of 18.07 feet, or 65 percent of the frontage, is permitted. The existing dwelling is already nonconforming in this regard, measuring approximately 21.5 feet at its widest point. The proposed roofed front porch would extend this width by approximately 2 feet to 23.5 feet, and a variance is requested.

5. The minimum rear yard setback required from the westerly property line on the subject property is 25 feet, since 30 percent of the 83-foot lot depth is less than 25 feet. The existing dwelling is positioned on the westerly side of the lot, has a nonconforming rear yard setback, and a significant portion of the existing dwelling is already located within the 25-foot rear setback. A portion of the proposed roofed front porch would be located closer than 25 feet from the rear property line, and a variance is requested.

6. The lot area measures 2,575 square feet. A maximum principal building coverage of 25 percent of lot area is permitted. The existing dwelling has a nonconforming principal building coverage of 28.1 percent including the landings and exterior stairways. The proposed front porch addition adds approximately 69 square feet of building coverage, increasing the coverage to 30.8 percent, and a variance is requested.

7. The Board determined that the requested variances could be granted. The variances are caused by irregular shape of the property, the relatively small lot size, and the position of the dwelling on the lot. The proposed second floor addition and front porch improve the living and recreational space of the dwelling and would enhance the appearance of the dwelling without having a negative impact on an adjoining property or the streetscape. The proposed improvements to the dwelling represent a benefit to the property and the neighborhood; and

WHEREAS, the Board, based upon the foregoing findings, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and proved that the variances could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and the zoning ordinance pursuant to NJSA40:55D-70C(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant proved that the purpose of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and proved that the benefits of the deviation would substantially outweigh any detriment and proved that the variances could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of NJSA40:55D-70C(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of **Marc Zuluaga** is hereby approved; and

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council, Township Clerk, Township Engineer and Construction Code Official.

Chair Harrison called the continuation of the application of **Falad Properties, LLC, 39-41 North Fullerton Avenue and David A. Faloni, Sr. and Molly Cotton, 30 Forest Street and Cofal Properties, LLC, 32 Forest Street and 43 North Fullerton Avenue**. Mr. Burr was the seventh eligible Board member present since Mr. Kenney had not yet arrived. David Owen, Esq. appeared as attorney for the applicants and provided his closing summary which included a set of conditions the Board could impose if the application was approved. The Board discussed the application. Mr. Kenney arrived during Mr. Owen's summation and was not eligible to vote. Six of the seven Board members voting on the application were in favor of the application with the conditions stipulated by the applicants. Chair Harrison indicated that he was not in favor of the application. On motion by Mr. Fleischer, seconded by Mr. Whipple, the application was approved subject to the conditions listed below, with Chair Harrison voting against the motion:

1. 39-41 North Fullerton Avenue shall be reduced from 68 units to 67 units as soon as one studio apartment becomes vacant and no later than 8 months from the date of this resolution;
2. The applicants' engineer shall submit to the Board's engineer for his approval amended stormwater calculations in accordance with the approved site plans;
3. The stormwater overflow pipe shall be re-routed along the driveway of 30 Forest Street in order to save the large tree between 32 Forest Street and 30 Forest Street;
4. The applicants shall comply with any outstanding items set forth in the Board engineer's report dated January 30, 2010; and

5. The residential tenant users of the parking spaces approved by this resolution shall be limited to the residential tenants of 39-41 and 43-45 North Fullerton Avenue.

Chair Harrison was recused. Vice Chair Fleischer called the application of **David & Carrie Greenbaum, 91 Lloyd Road**. Martin Newmark, Esq. appeared as attorney for the applicants. Steven Greenberg, Esq. was present on behalf of the current owner of 99 Lloyd Road, Jean Strahan. Mr. Newmark stated that an appeal has been filed with the Board of Adjustment pursuant to N.J.S.A. 40:55D-70a, 72a and **Montclair Code Sections 202-18A, 202-36** which allows any interested party affected by any decision of an administrative officer to appeal to the Board of Adjustment with respect to that decision. The appeal challenges the issuance of a Construction Permit issued to premises at 99 Lloyd Road on September 17, 2009. The appeal challenges the issuance of the aforesaid Construction Permit (No. 09-1378) on the grounds that the same permitted continuation of construction on an addition to the dwelling located on adjacent premises known as 99 Lloyd Road in a manner substantially inconsistent with certain drawings and representations which had been made when the former owners of 99 Lloyd Road, Mr. and Mrs. Michael Strahan, sought and received variance relief from the Board of Adjustment of the Township of Montclair which variance was memorialized by a Resolution adopted by the Board of Adjustment on December 11, 2002.

David Greenbaum, 91 Lloyd Road was sworn. Mr. Greenbaum was questioned Mr. Newmark while he operated a power point presentation on a screen visible to the Board. By resolution adopted on December 11, 2002 the Board of Adjustment granted a variance to the owners of 99 Lloyd Road to allow off-street parking for more than four vehicles in connection with the construction of an attached garage addition for eight (8) vehicles. Architectural plans prepared by Sionas Architecture, P.C. were submitted by the Strahans as part of their Application. The architectural plans included, among other things, an elevation of the side of the garage facing the adjacent premises at 91 Lloyd Road. The elevation was marked as an exhibit in these proceedings as A-6. As reflected in the transcript of the hearing before the Board of Adjustment conducted on November 20, 2002, the Strahans, their attorney and their Professionals made several statements and representations to the Board of Adjustment and the Public regarding the design of the proposed addition. The adjacent at 91 Lloyd Road is the most visually impacted by the new garage.

Marked into evidence were:

- A-1 Transcript of November 20, 2002 Board of Adjustment Hearing
- A-2 Planning Department Memorandum to Board of Adjustment, dated November 13, 2009
- A-3 Document entitled "Transcript Highlights" prepared by the applicants
- A-4 Document entitled "A Chronology: Actions & Correspondence" prepared by the applicants
- A-5 Document entitled "Acting with Impunity" prepared by the applicants

- A-6 Sheet SP-3, dated November 6, 2002, prepared by Sionas Architecture, submitted for the variance application
- A-7 Sheet A2.0, dated November 25, 2003, prepared by Sionas Architecture, submitted for construction permits

At 9:45 pm the Board was to take a short recess. Chair Harrison momentarily rejoined the Board. The two other applications on the agenda had to be carried to future dates. Craig Alexander, Esq. was present on behalf of **The Mental Health Association of Essex County, Inc., 354 Orange Road** and James Key, Esq. was also present on behalf of objectors to the application. After some discussion, the application was carried to a special meeting on April 7, 2010 at 7:30 pm. No further notice would be given. The Board was granted an extension of time. A subsequent meeting date of May 26, 2010 was also tentatively scheduled, which would be formally announced at the conclusion of the April 7, 2010 meeting. Cal Trevenen, Esq. was present on behalf of **86 Valley Road Associates, LLC, 86 Valley Road**. The application was carried to the April 21, 2010 regular meeting of the Board. No further notice would be given. The Board was granted an extension of time.

Chair Harrison left the meeting. At 10:05 pm the application of **David & Carrie Greenbaum, 91 Lloyd Road** resumed. Mr. Greenbaum continued with his presentation and testimony and was questioned by Mr. Newmark. On January 29, 2004, after having requested and been given an extension on their variance, the Strahans were issued a Construction Permit for the addition approved by the Board of Adjustment in 2002 by the Construction Official. Among the drawings submitted to the Construction Official and upon which the January 29, 2004 Permit was issued was an elevation marked as an exhibit in these proceedings as A-7. Comparing A-6, the elevation which was presented to the Board of Adjustment in 2002 with A-7, the elevation which was presented to the Construction Official resulting in the issuance a Construction Permit in 2004 reveals that same are significantly and materially different and that the differences all have the effect of negatively impacting the adjacent land owners. All of the deviations between the 2002 plans which were approved by the Board and the 2004 plans which were submitted to the Construction Official were material and significant. The elevations and representations made to the Board at the 2002 hearing were material to the Board's decision making. It is significant that the building plan submitted in 2004 is 4-1/2 feet higher than the plans shown in 2002, the windows that were shown in 2002 helped break down the scale of the property and, although the garage was built into the hillside, it was not nearly as covered by earth as was represented by the Applicant at the hearing in 2002. Given the change in massing of the building and the change in the visual presentation, the permit that was issued in 2004 should not have been issued.

Following the issuance of the Construction Permit in 2004 construction commenced but stalled thereafter for several years. By correspondence dated September 16, 2008, the Township Attorney on behalf of the Construction Office notified the property owner that in accordance with New Jersey Uniform Construction Code, the permit issued in 2004 had expired and was no longer valid. In September 2009 Ms. Strahan requested that the Construction Official issue a new permit to allow for the

completion of the structure. The request was not based upon the 2002 drawings approved by the Board but was, again, based on the 2004 drawings previously approved by the Construction Official. The Construction Official should have refused to issue the permit for the same reason that he should have denied the request of the permit in 2004; the plans were significantly and materially different than those approved by this Board in 2002.

Marked into evidence were:

- A-8 Notice of Appeal filed by the applicants, dated October 5, 2009
- A-9 Copy of Construction Permit (No. 09-1378) dated September 17, 2009
- A-10 Notice of Intent to Demolish Structure from the Alan Trembulak, Township Attorney to Jean Strahan, dated June 17, 2009
- A-11 Letter from the applicants to Mayor Ed Remsen, dated September 1, 2005
- A-12 Letter from the Alan Trembulak, Township Attorney to Mr. Newmark, dated October 28, 2009
- A-13 Email correspondence from Alan Trembulak, Township Attorney to Mr. Newmark, dated October 30, 2009
- A-14 Set of plans, dated November 6, 2002, prepared by Sionas Architecture, submitted for the variance application
- A-15 Set of plans, dated November 25, 2003, prepared by Sionas Architecture, submitted for construction permits

The Board questioned Mr. Greenbaum. Mr. Greenberg also questioned Mr. Greenbaum. The Board allowed public comment. Joseph Greenbaum, 134 Heller Way, was sworn and stated his support for the appeal filed by the applicants. Carrie Greenbaum, 91 Lloyd Road, was sworn and added additional testimony to support the testimony presented by David Greenbaum. William Scott, 23 Cedar Avenue, was sworn and stated his support for the appeal filed by the applicants. Mr. Newmark gave a closing statement reiterating points made above. Mr. Greenberg provided a statement on behalf of the owner of 99 Lloyd Road. The deviations between the 2002 drawings and the 2004 drawings are not significant or material and that in any event, the deviations were legally immaterial because the December 11, 2002 Resolution did not expressly condition the variance on faithful compliance with the drawings submitted, or the representations that had been made or the testimony of the Applicants' witnesses at the hearing.

The Board discussed the application. The majority of the Board agreed with the applicants and found from the evidence that the applicants' claim regarding the appeal has been clearly established by the evidence that was presented. On motion by Mr. Whipple, seconded by Mr. Fleischer, the Board of Adjustment sustained the appeal and declared that the permit under review, namely Construction Permit No. 090-1378 issued on September 17, 2009 was improvidently granted and was declared null and void, Mr. Susswein, Ms. English, and Mr. Kenney voting against the motion. On motion by Mr. Whipple, seconded by Ms. English the meeting was adjourned.