

**MINUTES OF THE BOARD OF ADJUSTMENT
NOVEMBER 28, 2005**

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

ABSENT: Mr. Haizel and Ms. Cockey

Assistant Secretary Charreun called the roll and announced the special meeting of the Montclair Board of Adjustment. Notice had been given in accordance with the Open Public Meetings Act.

Assistant Secretary Charreun announced that the attorney for the application of **PAAG, LLC, 7 Fidelity Place** has requested that the Board's discussion and vote on the application be carried to the December 14, 2005 regular meeting of the Board and that an extension of time has been granted to the Board. On motion by Mr. Fleischer, seconded by Mr. Whipple, the request was granted and no further notice would be given.

Chair Harrison called the continuation of the application of **Michael J. Murphy, 131 Lloyd Road**. Edward Trawinski, Esq., appeared as attorney for the applicant, David Owen, Esq., appeared as attorney for Fran Adler, of 22 Mulford Lane, and Kenneth Traum, Esq., of 24 Mulford Lane, appeared on his own behalf.

Chair Harrison stated that a seventh Board member would arrive at 8:00 p.m. and that the proceedings should wait until Mr. Flood arrives. Mr. Trawinski stated that he has 2 Exhibits to mark in the meantime.

Marked into evidence were:

A-10 Enlarged photograph # 49 from the Supplemental report, Darrell Alvarez, RA, PE, of Gregory Comito & Associates, revised to September 14, 2005, which depicts a mock-up of the terraced retaining wall section that could be constructed in front of the existing retaining wall

A-11 Site plan, details, and elevations, on 3 sheets, prepared by Gregory Comito & Associates, dated September 12, 2005

Assistant Secretary Charreun stated that any Board members who were not present at the November 9, 2005 meeting could review the Exhibits that were marked at that meeting.

Mr. Flood arrived.

Mr. Trawinski called Robert Ringelheim, who was sworn and stated his qualifications as a Professional Planner. Mr. Ringelheim described the application and the variances requested, and stated that the applicant is willing to comply with the

requirements regarding the fence proposed at the top of the wall. He stated that, in terms of the statutory requirements the Board must consider, according to a 1991 case from the New Jersey Supreme Court, a financial hardship can be considered if it is closely related to unique feature of the property, such as the existing retaining walls and the extreme grade that existed on the lot previously. He stated that the subject property is located in the Steep Slope area of the Township, which requires retaining walls for proper site engineering. He also stated that the purposes of Municipal Land Use Law would be advanced by a deviation from the zoning ordinance in that, the existing wall promotes the health, safety and general welfare of the public by allowing for more open air and light to the adjoining properties down the slope than conforming wall would and because the retaining wall and associated drainage system on the lot goes beyond the requirements to control runoff and serves to stabilize the steep slope. He further stated that the existing retaining wall and landscaping plan promotes a desirable visual environment because the location of the existing wall allows for ample evergreen plantings at its base, which along with the other proposed evergreen plantings, would soften the view of the wall.

Mr. Ringelheim stated that a site inspection revealed that many properties in the area have retaining walls, ranging from 5 to 18 feet in height and referred to Exhibit A-7 to demonstrate the some of the points made above regarding the planting plan. He then referred to Exhibit A-8 and continued by describing a conforming retaining wall layout. He stated that a conforming wall using terraced sections of walls would fill more volume of air space near the property line and have a greater negative effect on the adjoining property.

The Board questioned Mr. Ringelheim. Mr. Ringelheim referred to Exhibit A-10 and stated that it further illustrates his point regarding the greater negative impact that a conforming wall layout would have. Mr. Trawinski recalled Mr. Alvarez to respond to a question from the Board. Mr. Alvarez, still under oath, explained Exhibit A-10 and the potential modifications to the grade level at the base of the wall and their effect on the overall height of the wall.

Mr. Owen questioned Mr. Ringelheim. Mr. Ringelheim stated that he did not review the Master Plan. He also stated that the retaining wall is more of a site improvement than a structure in terms of principal or accessory structures and that the zoning ordinance does not restrict against the existence of retaining walls in the R-0 Zone.

Mr. Traum questioned Mr. Ringelheim. Mr. Ringelheim stated that he reviewed the Montclair zoning ordinance relevant to retaining walls and the Steep Slope ordinance. He stated that in his opinion, a line of trees or an earthen berm could not be considered a fence. He also stated that, in his opinion, the height of a retaining wall would be measured from the finished grade at the base of the wall to the top of the wall.

Chair Harrison called for questions from the public. None were offered.

Mr. Trawinski recalled Mr. Alvarez to respond to questions from the Board. Mr. Alvarez stated that the plans depict the existing grade at the base of the wall at the present time and do not depict a modified grade level at the base of the wall.

Kenneth Traum, Esq., 24 Mulford Lane, was sworn and stated that he is an attorney licensed in New Jersey. Mr. Traum described the background of the litigation that preceded this application. He inquired if he would be able to mark 3 documents relating the background litigation.

A discussion ensued among the Chair, Mr. Sullivan, Mr. Trawinski, Mr. Owen and Mr. Traum, and there was no objection to the chronology of events involving the preceding litigation as described by Mr. Traum. Mr. Sullivan stated that there is no need to mark any exhibits to supplement Mr. Traum's testimony, since everyone has agreed on the chronology of events. He also identified the New Jersey Supreme Court case cited by Mr. Traum regarding the inclusion of trees and berms as fences.

Mr. Trawinski cross-examined Mr. Traum.

Chair Harrison called for a short recess.

Mr. Owen called George Kelley, who was sworn and stated his qualifications as a Professional Engineer. Mr. Kelley stated that he has reviewed the plans and reports associated with the application and that he has visited the site and the area. He described the existing retaining wall and the geo-textile fabric that is used in retaining wall construction. He stated that, although it would be time consuming and labor intensive, it is feasible to lower the existing wall to a conforming height and then construct terraced sections of retaining walls above it in compliance with the zoning ordinance. He referred to the plans submitted and stated that he has added notations to a copy of a sheet from that plan.

Marked into evidence were:

- O-5 Copy of Sheet SP-2, Retaining Wall Section, from the plans submitted by the applicant, with color added by Mr. Kelley, on a board
- O-6 Copy of Sheet SP-2, Retaining Wall Section, from the plans submitted by the applicant, with color and markings added by Mr. Kelley to show terraced retaining walls, on a board
- O-7 Standard detail of a terraced retaining wall section provided by the Alan Block Manufacturers
- O-8 Copy of Sheet SP-2, Retaining Wall Section, from the plans submitted by the applicant, with color and markings added by Mr. Kelley to show terraced retaining walls, on a board

Mr. Kelley stated that the existing wall has a significant visual impact and that a terraced retaining wall system would provide a noticeable aesthetic improvement by softening the view of the wall.

The Board questioned Mr. Kelley. Mr. Kelly stated that constructing new terraced sections over a reduced lower wall would not negatively affect the stability of the lower wall. He also stated that it would not be necessary to remove the entire wall to install a terraced wall system.

Mr. Trawinski cross-examined Mr. Kelley. Mr. Kelley stated that he has not considered the costs associated with the terraced retaining wall system. He stated that, from an engineering point of view, it would also be feasible to construct a conforming retaining wall system out of the type of concrete block typically found on State highways. He referred to Exhibit A-7, Planting Plan, and stated that the landscaping proposed by the applicant would be difficult to maintain, even if a sprinkler system was used. He also stated that a planting plan utilizing the terraced walls depicted in Exhibit O-8 would be a better option than the planting plan proposed with the existing wall.

Mr. Traum had no questions for Mr. Kelley.

Chair Harrison called for questions from the public. None were offered.

The Board questioned Mr. Kelley. Mr. Kelley stated that it would be difficult to construct a new retaining wall section at the property line and then backfill and utilize the remainder of the existing wall as the second tier.

Mr. Owen called Peter Steck, who was sworn and stated his qualifications as a Professional Planner.

Marked into evidence was:

O-9 Photo-sheet containing 4 photographs of the subject property and an aerial photograph of subject property and adjoining lots, prepared by Peter G. Steck, P.P., dated November 8, 2005

Mr. Steck described the subject property and the characteristics of similar properties in the R-0 Mountainside Zone. He referred to Exhibit A-10 and described the existing retaining wall and the proposed fence at the top of the wall. He described the proposed planting plan and stated that the area at the base of the wall is narrow and rocky and isn't suitable for successful planting. He also stated that the existing wall makes the maintenance of this area at the base of the wall difficult. He stated that the existing retaining wall has a significant visual impact and that it is visible from Mulford Lane as well as from the Adler property.

Mr. Steck stated that there is no hardship regarding any unique characteristics of the subject property and that any claim of financial hardship should be disregarded because the applicant appears willing to go to a great expense financially to construct

the conforming terraced wall system at the property line. He stated that the over-designed drainage system is independent of the retaining wall and should not be considered as a benefit of the application that would outweigh the detriments posed by the wall. He further stated that, in terms of aesthetics, the Board should consider that the governing body, by way of the retaining wall ordinance, has indicated that the existing wall is not acceptable because of its height and should be terraced.

The Board questioned Mr. Steck. Mr. Steck stated that the battered effect of the existing wall is not noticeable from the most typical views of the wall. He stated that the setbacks of terraced wall sections, just as setbacks for other structures and buildings, is the traditional method in zoning utilized to counter mass. He stated that the main detriment posed by the wall is not related to open air and light as much as is it an issue of aesthetics.

Mr. Trawinski did not have any questions for Mr. Steck.

Chair Harrison called for questions from the public for Mr. Steck.

Emily Rodine-McGrath, 70 South Fullerton Avenue, asked how the applicant could be guaranteed access to the rear of his lot via Ms. Adler's property in order to maintain landscaping or work on the wall. Mr. Steck stated that the applicant would not be guaranteed access through Ms. Alder's lot and that the problem has been self-created through the design of the wall.

Chair Harrison called for public comment.

Timothy J. Waugh, 19 Mulford Lane, was sworn, and stated that he lives directly across Mulford Lane from the Adler property. He stated that he sees the wall every day and that the wall should be reduced in height.

Priya Ghorpade, 11 Mulford Lane, was sworn and stated that the application should be denied.

Glenn Hersh, 145 Lloyd Road, was sworn and stated that he lives next door to the subject property. He stated that he has a retaining wall on his property with a fence at the top of it, which is a common feature for properties on the uphill side in this neighborhood.

Bennett Schwartz, 14 Mulford Lane, was sworn. He stated that his property is east of Mr. Hersh's lot and that the retaining wall on Mr. Hersh's lot is not as tall or as obtrusive as the applicant's wall. He stated that the wall should be reduced in height to look better.

Tracy Fontao, 18 Mulford Lane, was sworn. She stated that she lives next door to Ms. Adler. She stated that the existing wall looks like a prison wall, creates echoes and shadows, and towers over the roofs of the houses on the downhill side of the slope and that the application should be denied.

Mr. Traum, 24 Mulford Lane, gave his closing statements. He stated that the Board should consider the fact that by elevating grade levels, the negative impact retaining walls is increased. He also stated that the ordinance should be revised to also reflect this fact and that the applicant should not be allowed to circumvent the intent of the height limitations by backfilling and modifying grade levels.

Mr. Owen gave his closing statements. He stated that the applicant has failed to meet the statutory criteria required for the approval of the variance request and that the application should be denied.

Mr. Trawinski gave his closing statements. He stated that the applicant has met the statutory criteria required for the approval of the variance request and that the application should be approved.

Mr. Sullivan addressed the Board and stated that the Board should focus on whether or not the applicant has met its burden of proof under either the C(1) criteria or the C(2) criteria. He also stated that the Board should view the application as if the wall does not exist and that the applicant does not get a benefit because the wall has already been constructed.

The Board discussed the application. On motion by Mr. Susswein, seconded by Mr. Flood, the application was denied, Mr. Whipple voting against the motion.

On motion by Mr. Fleischer, seconded by Mr. Whipple, the meeting was adjourned.