

Present: Fisher, Anderson, Waterbury, Murphy, Schuster
Kennedy (attorney)

Absent: Canonico, Daly, Schwartz, Ventre

Chairman Fisher called the meeting to order @ 7:30 pm

Salute to the flag, roll call, open public statement read

Minutes:

A motion was made by Mr. Anderson, seconded by Ms. Waterbury to adopt the minutes of the March 5, 2014 as submitted. All approved.

Correspondence:

• **Annual Report**

Mr. Fisher prepared a summary of the resolutions approved in 2013, and it was reviewed by the board. After a discussion it was agreed that the Planning Board should consider amending the Ordinance for a front facing garage, since this variance is an undue time requirement and the public, and it is costly for the homeowner. The board should not allow the change in zones where there are side facing garages.

A motion was made by Ms. Waterbury, seconded by Mr. Anderson to write to the Planning Board advising of the Zoning Board's desire to have the front facing garage door Ordinance amended to be applied to the zone where there are predominantly side facing or rear garage doors.

Roll Call:

Affirmative: Fisher, Anderson, Waterbury, Murphy, Schuster

Negative: None

PB Rep Report:

- Master Plan meetings continue – 6:00 pm prior to the regular Planning Board meetings on the 3rd Wednesday of the month
Applications being reviewed at the Planning Board – 471-475 Shrewsbury Ave LLC, M/M Peter Borriello, M/M M Carpinello

Unfinished Business:

Mr. Schuster recused himself and left the board table.

M/M R DeCaprio:
B 72, Lot: 17

Continuation of hearing

Mr. Kennedy advised that all board members are current on the hearings. Board Secretary verified that Mr. Daly was the only member and he did listen to the 3/5/2014 meeting.

Mr. Kennedy marked the following into evidence:

A-11: Letter received from Mr. Ellenport dated 4/1/2014 – to Board Secretary

B-8: Letter in response to Mr. Ellenport's correspondence dated 4/1/2014

A-12: Letter received from Mr. Ellenport dated 4/2/2014 to Board Secretary

Mr. Kennedy advised that Mr. DeCaprio remained under oath. Mr. DeCaprio agreed.

Mr. Kennedy stated that we have 4 board members out tonight, but we do have quorum, this is a majority vote application. Mr. DeCaprio said that he is willing to proceed.

Mr. Kennedy explained that Mr. Ellenport is not in attendance tonight due to a prior commitment, but because Mr. DeCaprio is not a corporation or LLC he does not have to be represented by an attorney, and he asked Mr. DeCaprio if he wants to proceed tonight? Mr. DeCaprio said yes. Mr. Kennedy said that he doesn't have to proceed tonight, he could ask for an adjournment and have your attorney present at a later date, but you do wish to proceed? Mr. DeCaprio said yes.

Mr. DeCaprio asked Mr. Kennedy if he could ask for an adjournment and have him come at a later date? Mr. Kennedy said if you do not want to proceed tonight.
Mr. DeCaprio said that he doesn't want to hold up the board.

Mr. Kennedy said that there has been a request from the attorney (which has been marked into the record as A-8) to request this application withdrawn without prejudice.

Mr. Fisher asked Mr. DeCaprio to explain what he wants. Mr. DeCaprio said that he has worked on this plan along with the engineer and architect and he feels that they have come up with a plan which would not require any variances, except for impervious coverage of 21.5% where 20% is permitted. He has eliminated all of the setback variances and he would like to ask for a continuance and have his architect and engineer finalize the plan and bring it back in front of the board.

Mr. Anderson asked Mr. Kennedy, if the proposed project was to go forward and he came back for approvals, doesn't he have to start the process all over again.

Mr. DeCaprio said that is why he would like to continue and carry without further notice, at this point.

Mr. Kennedy said that we are talking two different things now, now you are saying that you want to continue and your letter from your attorney states to “withdraw”, Mr. DeCaprio said that he knows that, and he said that if the board doesn’t agree with a continuance he will be back in front of the board, at a later date. Mr. Kennedy said that he has to tell the board what he is proposing.... Mr. Kennedy asked to “jump back” a little. Mr. Fisher said yes, he wants to do this legally and correct, because there is a bunch of different issues here.

Mr. Kennedy said that there are a couple of issues, and he doesn’t think that there is anything particularly right or particularly wrong about any course of action that we take. But, he just wants to obviously have the board make as fully and informed decision as possible, and to do something not to expose us to any legal liability later on.

Mr. Kennedy stated that at the last meeting Mr. DeCaprio “rested” his case. Mr. Vogelsong brought up the issue which made us think the Doctrine of Res Judicata and the other application. Very clearly at the last meeting the applicant rested and the sole issue that was to be discussed tonight, as we left it, was the applicability of the Doctrine of Res Judicata and the board vote. Subsequent to that there has been some discussions, and he knows that there has been discussions between the applicant representatives and board representatives which is totally fine. At one point there was a discussion about revising the plans and returning tonight to talk about the revisions, he advised the applicant against that because members of the public left with the understanding of a vote tonight, not caring about the Res Judicata issue.

Mr. Kennedy had concerns with further testimony on the plan revisions those members would have been shut out of that process, and he feels that wouldn’t have been the right thing to do, it wouldn’t have been the right legal thing, and we would have been legally exposed. If that was going to happen he would have had to re-notice.

Mr. Kennedy said that the concept of withdrawing the application without prejudice. Under the circumstances knowing that there was 4-5 months of hearings and countless comments from the public he didn’t want to make the decision that it would be ok to withdraw it without prejudice, it shouldn’t come administratively from him, the Zoning Officer, Board Engineer, or the Board Secretary. Under these circumstances he thought it would be better for the board to make that decision.

Mr. Kennedy explained what withdrawing an application without prejudice means. It means that the applicant has decided that he is officially not pursuing the application, he is essentially taking the application off the table, so it’s not going to be a subtenant decision but rather a procedural decision and it will be withdrawn. The board would not vote to affirm or approve or deny the application, it will be withdrawn.

Mr. Kennedy advised why is that significant? It all has to do with the Doctrine of Res Judicata that was talked about, or that it has already been adjudicated. In the zoning context what that Res Judicata means is that you cannot bring a subsequent application, once it has already been submitted, and affirmly addressed, you cannot bring a second application in unless its substantially different than the first, and it's the million dollar question as to what constitutes substantially different, it's a fact question.

Mr. Kennedy stated that the significance is if you withdraw this application it all has to do with the Doctrine of Res Judicata. If the application is withdrawn and there is no subtenant ruling that means that there is no Res Judicata attached to this application that was presented, and Mr. DeCaprio or any other applicant can bring the exact same applicant in one month, one year, two years, 5 years, and that is the significance. Let's assume for the purposes of this discussion that there was a subtenant denial of the application, you voted on Mr. DeCaprio's application and it was denied, in that event, the applicant or successor would always have whenever he or she would bring application forward concerning this property they would have to prove that it was substantially different than this application that this board denied. Does this matter to anyone or should it matter to anyone, he doesn't know, but under the circumstances he wants it to be the boards call. Does the board have the ability to say no and grant the withdrawal, because we have gone through all of these hearings, it's a good question and he did some research on the matter and interestingly the case which is cited in COX was Sansone Olds Cadillac vs Shrewsbury Borough in 1986. The court dealt with the question whether an applicant at the conclusion of the hearing and becoming evident that the board is going to deny the application has the right to withdraw the application without prejudice. In this particular case the board denied the applicant's request to withdraw the application and proceeded to deny the applicant.

Mr. Kennedy read ***“while the court held that it was not abuse of discretion by the board, the board could have granted withdrawal on certain terms and conditions i.e. requiring the applicant to reimburse the Borough and the objectors for all the expenses including attorney fees incurred on the variance application. The Court indicated that the board should have at least considered any appropriate terms or conditions for granting withdrawal of the application without prejudice. The court remanded the matter back to the board, for that reason, being careful to point out that the remand should not be construed as a directive to grant the request subject to terms rather the board was only directed to consider any appropriate conditions for withdrawal and to report its determination to the court. The board is perfectly free to reaffirm its prior action. It should be noted that in this case the board rules apparently contain no provisions relating to withdrawals, for had the board adopted such a rule it would have been binding on the court, providing the rule was reasonable.”***

Mr. Kennedy said that the above statement means that if the board is going to deny the withdrawal you have to have a discussion as to if you want to do that or is there something to mitigate the harshness of the denial of the withdrawal or do you want to withdraw. He is not trying to push any agenda, he just wants to know what the board want. He wants to know A: that you knew this, and you make a fully informed decision

and you recognize the significance. The only thing that he would suggest respectively to Mr. DeCaprio is that the letter from the applicant's attorney from April 1st and April 2nd asks for a withdrawal, and now the applicant himself tonight is here without counsel, essentially saying he doesn't want to withdraw he wants to be carried without further notice. Mr. Kennedy said that many members from the public have not come tonight because they thought it was being withdraw. He feels whatever they do tonight will probably require a new notice, but we will address that later on.

Mr. Anderson asked Mr. DeCaprio what does he want the board to do? Mr. DeCaprio said that he has done everything to reduce the size... he would like the board to give him a continuance to further develop his plan, return back to the board with only a request for the coverage and no other variances. Mr. Anderson made it clear to Mr. DeCaprio that Mr. Kennedy is not your attorney. Mr. DeCaprio said that he understands.

Mr. Anderson said that he has the option to have the board vote on his application, request to have the application continued to another hearing date or request that the application be withdrawn, correct? Mr. Kennedy said yes. Mr. Anderson asked, out of those 3 options you are asking the board to continue this hearing? Mr. DeCaprio said yes that is what he would like.

Mr. Fisher said that the applicant made it clear at the last meeting that he "rested", I know we are not a Supreme Court, is this an issue if we continue the applicant from the fact that he has stated that he "rested"?

Mr. Murphy asked didn't we also ask him a lot of questions about water and engineering and how he was going to disburse the water and how he was going to handle that, he really didn't have any answers for us and he was going to work on that. Mr. DeCaprio said that he has been working on it and he has reduced the size of the plan, he has made the house smaller and eliminated the variances, and reduced some of the coverage by doing all of this.

Mr. Fisher again asked if this would be issue if we were to continue it, with the fact that he rested? Mr. Kennedy said at a minimum he would have to re-notice. Mr. Anderson said that there is no question in his mind that the notice is going to occur whether they withdraw, come back or carry. Mr. Fisher again asked, is he able to continue after he rested? Mr. Kennedy said that if there is a re-notice and it's ok with the board, it gets procedurally a little complicated because there is discrepancy between the applicant and his attorney and the letter.

Mr. Anderson said that this has been 3 or 4 month where we have gone from proposal "A" to "B" to "C", it's continually changing. He understands why the applicant is doing that, we have seen this with other applications with minor changes, but they are now changing the scope of the plan. This is not the original application that was before the board. Mr. Kennedy said again at a minimum notice will be required. Mr. Kennedy said that the plan has morphed for the right reasons. Mr. Fisher said that he is listening to the board and the public.

Ms. Waterbury said that she doesn't have a problem with carrying the application with a notice as to what the new application, obviously we don't have anything before us. The notice will have to include what they are seeking now. We still have to deal with the res judicata so we can make a determination about that. She does have issues with the April 2, 2014 letter from the attorney. Mr. Kennedy said he does also.

Mr. Anderson said that he has a number of issues procedurally, but the least would be the division between what the attorney is writing and what the applicant says. He seeks no harm if we carry the application with new notice requiring that his counsel be here. We do not want to create a situation where we expose anyone either the applicant or the objectors. If for some reason we said that we are not granting the continuance, we are not allow the withdrawal and we vote on it and whatever the outcome is, he is not thrilled by the fact that we have now taken 3 hearings and your attorney was not at 2 of them. Every ones time on this board is valuable as well as yours and Mr. Kennedy's.

Mr. Fisher said that Mr. Anderson is suggesting that we continue the hearing with new notice, require that your attorney is here for the next meeting and that your attorney is able to address the res judicata issue with the board, and there may be comments from the public and members of the board. That issue is going to clearly have to be addressed before we go forward on any application.

Mr. Anderson said another issue to be addressed is the issue of reopening the application and can we have another version. Mr. Kennedy said that if the board wants to do this they can under the circumstances, subject to the requirements of notice and the plans are to be on file 10 days prior to the hearing. He is comfortable with that.

Mr. Anderson said that he is looking to continue it not for the purposes of submission of revised plans. They closed the hearing. Mr. Kennedy said that the applicant rested. Mr. Anderson has a problem with re noticing with a new set of plans. Mr. Fisher said that is what the applicant said. Mr. Anderson said that the attorney wants to withdraw it. Mr. Fisher said that the applicant, who is in front of us, wants to continue the hearing and has made it clear that he has different plans.

Mr. Fisher again asked Mr. DeCaprio what he wants the board to do. Mr. DeCaprio said if it is agreeable he will comply with all of the requests that the board had, notice etc., if not he will have to withdraw and come back, with a modified plan to comply with all of the variances except for coverage.

Ms. Waterbury doesn't feel it's inappropriate to let them present whatever he wants to present but the public has to have the right to be able to come, but at some point, when it's done its done. She has concerns with the attorney's comments. She asked Mr. Kennedy if he is required to be represented by an attorney? Mr. Kennedy said no. Ms. Waterbury said that the applicant is either going to be represented by counsel or you are not. Right now we have a mix and in that regard she needs to know which is it going to be. If your attorney is going to present case law but we have a right, if he is going to

present that information as to where he got from, we need to see the copies of that information. He has to be here or not be here. Mr. DeCaprio said that he will be here at the next meeting. Ms. Waterbury has no problem with the applicant being allowed to reopen his case, but it has to be re noticed and the information from your attorney needs to be presented. She has seen it many times where cases have been reopened.

Mr. Fisher doesn't have a problem with continuing as long as there is a re notice to the public, as well as the assessment of the plans as it relates to variances.

Mr. Murphy asked if the continuation is allowed can he submit new plans? Mr. Kennedy said that it is up to the board.

Mr. Fisher said that a motion will have to be made for a continuation of the hearing under the presumption that the applicant is going to submit new plans as part of that process.

Mr. Kennedy stated that the board would be justified, members of the public could say that they were here on 8/7/13, 11/16/13, 3/5/14 and now 4/2/14 and enough is enough, he rested public comment and if the board feels that they want to vote it would be justified, he also feels that if the board decides they want to conditionally reopen the hearing that would be acceptable as well. You have 4 options, carry for the limited purposes of having the res judicata discussed and then the vote, or carry it with the understanding that there will be a re notice and submit revised plans, and deal with res judicata, or the board decides to approve/deny or vote to withdraw without prejudice. Mr. Anderson said that there isn't a request to withdraw the application.

Mr. Fisher feels that the board will need to vote on what the applicant is requesting, which is a continuance with new plans as part of that process. Ms. Waterbury agreed.

Mr. Kennedy asked Mr. DeCaprio if his plans will be ready for the next meeting? Mr. DeCaprio said that the engineering is pretty much completed, yes, and he will have them to the Board Secretary 10 days.

A motion was made by Ms. Waterbury, seconded by Mr. Fisher that the application of M/M R DeCaprio be carried to 5/7/2014 with the following:

- **New public notice to the 5/7/2014 hearing** for introduction of new plans for consideration and public comments
- Counsel to be present
- Notice for the Determination of res judicata
- Updated list of property owners from Tax Assessor
- 10 days in advance the back up for the res judicata arguments
- Additional escrow should be put on file
- Dave Cranmer to attend the next meeting

Roll Call:

Affirmative: Fisher, Waterbury, Murphy

Negative: Anderson

New Business:

Mr. Schuster returned to the board table.
Mr. Murphy stepped down as he noticed

M/M P. McManus:
50 Henry St
Bl: 24, Lot: 5

In-ground pool in front yard

Mr. Kennedy announced that he has reviewed service and finds it adequate and the board has jurisdiction to hear this application.

Mr. Kennedy marked the following into evidence:

- A-1:** Residential Development Permit, dated 6/7/2013
- A-2:** Zoning Denial letter dated 6/19/2013
- A-3:** Ordinance 94-5.7 – Site Triangles
- A-4:** Fence Guys Inc.
- A-5:** Location Survey, prepared by Thomas Finnegan, 3/25/1999
- A-6:** Application for Hearing, dated 3/21/14
- A-7:** Photo of the intersection
- A-8:** Photo of the intersection showing the applicants property
- A-9:** Photo of the intersection of Trafford & Francis Sts

M/M Peter McManus were both sworn. Mr. McManus testified that they are the owners of a single family home at 50 Henry Street for the last 14 years. He described the surrounding area of single family homes.

Mr. McManus handed out a set of visuals to board members,
A-10 of 10 photos of the area and additional photos.

Mr. McManus explained that their lot is very unique to the Borough having 3 front yards. It is a difficult lot to try and do anything with, other than the 2nd floor addition several years ago. They have been considering an in-ground pool for several years now, and they have tried to design the pool to meet the Borough's Ordinances, and the plan before the board is the result of his designs. They need some relief from the setbacks in order to get the pool in. They have installed several Leland cypresses that they hope will give them a natural privacy fence. They don't have a "back yard".

Mr. Anderson stated that they have 2 main issues one is a pool in the front yard and you have 3 front yards, and the other is the site triangle issue. Mr. McManus said that is correct. Mr. McManus stated that the plantings have taken the site triangle into consideration, they are set back 30' from the corner. The fence that they are proposing will allow motorists to see through the fence, which will be on the inside of the Leland cypresses, along with the picket fence.

Mr. Fisher asked if they are constructing a lap pool rather than a full size pool
Mr. McManus stated that the pool is a little bit bigger than a lap pool, it is 12' wide, which is good for exercising. The pool is 12' from the house, 12' from the edge of the property line or the picket fence. Mr. McManus explained that he has placed the pool to scale on his survey and has photo shopped it from a google photo, they could move the pool a little closer to Francis Street, but he would like to keep the pool 12' from the house, 12' from the picket fence, and 28' from Trafford Street, as shown on the Location Survey, dated 3/25/1999 with the hand notes **marked as A-11**.

Ms. Waterbury has concerns with the Leland cypress getting to wide in the set back on Frances St. Ms. McManus explained that they have planted the Leland cypress so they grow together, they will be trimming them so they grow beautifully together. Ms. Waterbury said that the trees are currently 3' into the setback, and they will be in close proximity of the pool. Ms. Waterbury asked if they could move the pool closer to the house? Mr. McManus said yes.

Mr. McManus advised the board that Trafford Street is 80' at the intersection vs the normal 40', there is an additional 40' visibility. Mr. Schuster asked how much traffic is on Trafford? Mr. McManus said very little, and referred to the photo marked "view of Trafford St".

Mr. Anderson referred to the variances:

- Pool located in front yard Francis Street
- Site triangle - 50' required providing 30'
- Fence location & height exceeds 30" in height in front yard

Mr. Fisher again asked if the fence will be on the inside of the trees? Mr. McManus said yes. Ms. Waterbury said that it is a long area of a patio along Francis Street, she has concerns with the surround around the pool. Mr. McManus explained that it is not their intent to put any type of skirt around the Francis Street, only if they have to, they are proposing to extend the existing deck on the house side. Mr. McManus penciled in where the deck will be along the house on the Location Survey dated 3/25/1999, marked **as A-12**

A motion was made by Mr. Anderson, seconded by Ms. Waterbury to open the meeting to the public. All approved.

Mr. Tim Murphy 35 Shadowbrook Rd., was sworn, and also is a member of the board, he advised that he recused himself because he owns 28 Francis Street, he stated that he has no problems with the proposed pool, and he doesn't see a problem with the site line it's a nice project.

A motion was made by Mr. Anderson, seconded by Ms. Waterbury to close the meeting to the public. All approved.

A motion was made by Mr. Anderson, seconded by Mr. Schuster to approve the application of M/M P McManus as submitted with the following conditions:

- Maintaining the Leland Cypress at the site triangle
- Using a see through fence as presented in testimony
- Deck extension of 10' x to the end of house which will start at the end of the existing steps
- Pool will be set back 12' from the house, 12' from the picket fence & 28' from Trafford Street front yard providing a 12' x 40' pool
- Relief from the site triangle
- Relief for the fence location & fence height

Roll Call:

Affirmative: Fisher, Anderson, Waterbury, Schuster

Negative: None

Resolution 5/2/2014.....

Mr. Murphy returned to board table.

Ms. Genevieve DiFeo:

Generator in front yard

256 Sycamore Ave

Bl: 63, Lot: 1

Mr. Kennedy announced that he has reviewed the service and finds it to be adequate and the board has jurisdiction to hear this matter.

Mr. Kennedy marked the following into evidence:

A-1: Application for Hearing, dated 3/21/2014

A-2: Zoning Permit Denial, dated 12/23/2013

A-3: Survey dated Seneca Survey, dated 8/24/01

Ms. Genevieve DiFeo, 256 Sycamore Ave, was sworn. She testified that she is the owner of a single family home for 12 years, she described the area as a residential area.

Ms. DiFeo explained that she is seeking permission to install a whole house generator. She explained that she has been in her house through several power outages, the latest being Sandy, and she a senior citizen who lives alone. The home is two stories and when the power goes out and she has to go up and down the stairs she is afraid of the safety issues. Ms. DiFeo that the generator will not only give her the security she is looking for but her children who live out of state as well. She is looking to keep her alarm system on, the heat in the winter and air conditioning in the summer, which will make her feel safe and comfortable when the power goes out.

Ms. DiFeo explained that the generator will be located on the west side of her home, between her home and Old Farm Road, which is a front yard.

Ms. Waterbury asked why couldn't the generator be located in the back of the house? Ms. DiFeo explained that the generator would be located in the middle of the yard, she currently has a deck on the back of her home.

Mr. Kennedy marked the following into evidence:

A-4: view of her home from Old Farm Road

A-5: view of location of the proposed generator

A-6: view of shrubs which will conceal the generator from public view.

Mr. Kennedy asked Ms. DiFeo to provide the specification sheet from the generator. Ms. DiFeo agreed to provide the information. Mr. Kennedy asked Ms. DiFeo if the generator is a new unit for a residential use? Ms. DiFeo said yes, and it is for emergency use only.

Mr. Fisher announced that there is no public in attendance.

A motion was made by Mr. Anderson, seconded by Mr. Schuster to approve the application of Ms. G DiFeo as requested, with the following conditions:

- the specifications of the generator be provided to Mr. Kennedy
- the existing shrubbery be maintained to conceal the generator from public view
- generator be placed 3' from home

Roll Call:

Affirmative: Fisher, Anderson, Waterbury, Murphy, Schuster

Negative: None

Resolution 5/7/2014.....

Board authorized the Secretary to write to Construction Department advising of the approval for Ms. DiFeo and the placement of the generator, resolution to follow after the 5/7/2014 meeting.

A motion was made by Mr. Anderson, seconded by Mr. Murphy to adjourn the meeting at 9:30 pm. All approved.