

**ZONING BOARD OF ADJUSTMENT  
BOROUGH OF ESSEX FELLS**

**MINUTES OF THE MEETING OF MARCH 25, 2021**

The meeting was conducted via Zoom and was called to order at 7:33 p.m. The Open Public Meetings Act announcement was read as required by law. Those present were: Chairman Michael Candido, Vice-Chairman Michael Spellman, Henry Albuлесcu, Oscar Bate, Bernard D'Avella, Anne Marie Scolnick, Secretary Thomas O'Beirne, Chris Shearin and MJ Jolda. In addition, Michael D. Sullivan, Board Attorney, was present.

On motion made by Board Member Shearin, seconded by Board Member D'Avella, the minutes of the meeting of February 25, 2021 were adopted unanimously by all those eligible to vote.

On motion made by Vice-Chairman Spellman, seconded by Board Member D'Avella, the resolution of Peter and Karen Milano, 121 Gordon Road, Block 8.03, Lot 1.01 for variances to permit installation of a pool, equipment pad, patio and 4-foot high fence in the front yard was approved by a vote of 6 – 0 (Vice-Chairman Spellman and Board Members Albuлесcu, D'Avella, Scolnick, Shearin and Bate voting in the affirmative).

The next matter to come before the Board was consideration of a revised resolution in the application of Barry Maurillo, 379 Fells Road, Block 8.01, Lot 1.01 for a floor area ratio variance. Board Attorney Sullivan, Secretary O'Beirne and Board Member D'Avella recused themselves from consideration of this matter. Kevin O'Connor, Esq. was present on behalf of the Board. Chairman Candido explained that pursuant to an Order in the matter of Elizabeth Durkin v. Borough of Essex Fells Zoning Board of Adjustment and Barry Maurillo; Docket No. ESX-L-6257-19 in the Superior Court of New Jersey, Law Division – Essex Vicinage, the Court ordered the matter remanded to the Board to provide more specific factual findings. Board Member Shearin certified that he had listened to the recordings of the December 6, 2018, March 28, 2019 and June 10, 2019 meetings. Board Member Scolnick certified that she had listened to the recording of the December 6, 2018 meeting. As a result, Board Members Shearin and Scolnick were eligible to vote. On motion made by Board Member Bate, seconded by Board Member Shearin, the revised resolution was approved by a vote of 6 – 0 (Chairman Candido, Vice-Chairman Spellman and Board Members Albuлесcu, Bate, Scolnick and Shearin voting in the affirmative).

The next matter to come before the Board was the application of Gary and Susan Botwinick, 235 Oldchester Road, Block 9.03, Lot 6.02 for floor area ratio and side yard setback variances. Jason Ritte, Esq. was present on behalf of the applicants. Board Attorney Sullivan advised that Board Member Scolnick had signed a certification by absent member that she had viewed the Zoom recording of the hearing held on January 28, 2021 and reviewed the exhibits and, as a result, was eligible to vote. Mr. Ritte noted that this was a continued hearing from January 28, 2021 and that the applicants took into consideration Board comments and submitted revised plans with a revision date of March 5, 2021. Mr. Ritte noted the maximum permitted floor area ratio is 11% where 13.2% is existing and 15.6% is proposed. The left side yard setback requires a minimum

of 45 feet where 39.1 feet is existing and 38.75 feet is proposed. The right side yard setback requires a minimum of 45 feet and 42.1 feet is existing and 40.75 feet is proposed.

Chairman Candido noted the revised plans result in a reduction in floor area ratio as the lowest level has been corrected to be considered a cellar rather than a basement. He indicated that he viewed this change with skepticism but our Board Engineer, Petry Engineering, LLC has carefully reviewed and confirmed the determination is correct in a March 15, 2021 memo.

Mr. Ritte called Susan Botwinick, applicant, 4 Everett Court, West Caldwell, New Jersey. Mrs. Botwinick said she and her husband, Gary, are excited to become part of the Essex Fells community. Essex Fells is beautiful, charming and has a warm small-town feel. They currently live in West Caldwell but are very familiar with Essex Fells. Five years ago they decided to find a new home with more property and started looking. They focused on ranch-style homes where they could age in place. They believed they found the perfect property and purchased 235 Oldchester Road in August 2020. The home is a 1950's ranch which they intended to renovate in a fashion that compliments the neighborhood and brings the home up to modern standards. They spent time and resources designing a plan that will modernize interior rooms with an open format, kitchen/great room, volume ceilings, two spaces for a home office which is now necessary in a COVID impacted world while still retaining a 4-bedroom home. They have two children ages 20 and 24 and aging parents who may need to live with them in the future depending on their circumstances and they hope to have many grandchildren coming to visit in the future.

Ms. Botwinick stated the proposed added space includes two small areas to add architectural interest. The bulk of the space is in the rear and includes a third car garage and a covered patio. The additional garage space will make it unnecessary to park a car in the driveway. The covered patio in the rear of the home is essential to provide sun protection while safely enjoying the outdoors. She said her husband, Gary Botwinick, has a history of skin cancer so the shade is very important.

Ms. Botwinick noted, the revised plan incorporates concerns from the public and the Board raised during the January 28, 2021 meeting. Over 500 square feet is reduced from the initial plan. She stated they wish to enjoy good relationships with the neighbors. When a window in the revised plan was a concern to a neighbor to the north, she said they listened to the concerns and moved the window. She also stated that major revisions to the plan were made to address the concerns of the neighbor to the south. She thanked the Board for their time and consideration.

Mr. Ritte called Gary Botwinick, 4 Everett Court, West Caldwell, New Jersey. He stated he had been working from home but now goes to the office as he is the managing partner of his law firm. He typically goes to the office Monday through Friday but will work from home on evenings and Saturday and Sunday. There are no clients coming to the home and he will adhere to the home business office zoning ordinance in Essex Fells.

Mr. Ritte called Christine L. Misco, 205 Mt. Pleasant Avenue, East Hanover, New Jersey who was previously accepted by the Board as an expert architect and professional planner. Ms.

Miseo stated that the plans were revised in response to Board and neighbor concerns. She said she made a mistake by designating the lower level as a basement rather than a cellar in the initial submission. This resulted in a reduction of 1,440 square feet of floor area. Approximately 113 square feet was removed from the first floor by cutting back the master bedroom and garage. The second floor was reduced by approximately 246 square feet by reducing the size of the bedrooms. Windows were rearranged in response to concerns by the neighbor to the north. Approximately 76 square feet was removed from the garage and approximately 93 square feet was removed from the covered porch. A total of 528 square feet of floor area was removed. The height was lessened to minimize the impact on the neighbor to the south. She noted the house to the south is located in the RA-3 zone and the homes to the north are much larger. The addition to the home is mostly to the rear and garage. In the front there is a bump out addition to the master bath to provide architectural variation. The house to the north is much larger in mass and the house across the street is also much larger in mass. There are a number of considerably large trees along the left side of the property and any shadows on the adjacent property to the south would be from the trees not the proposed addition to the home. The covered porch is open on three sides and has been reduced in size by approximately 93 square feet. The proposed garage is 17 feet wide which would allow for approximately 5 feet of width for pool equipment storage. The front addition to the dining room is necessary to increase the size which is currently inadequate. A proposed new fence which is necessary for the pool does not go forward of the rear line of the home. The lowest level is a cellar not a basement and is approximately 95% underground. Mr. Ritte reviewed the memo prepared by Petry Engineering, LLC dated March 15, 2021. He stipulated compliance with comments 4.1.3, 4.1.5, 4.1.6 and 6.1 through 6.4.

The matter was opened to the public. Doni Feinberg, Esq. of Spector Foerst & Associates, Millburn, New Jersey appeared on behalf of Charles Greef and Shawn Lech, 227 Oldchester Road, Essex Fells, New Jersey. Her clients were concerned with the potential impact of a second floor window on the north elevation and requested a condition protecting her clients. Ms. Miseo advised on the north elevation the sill height at the bottom of the window will not be less than 6 feet from the finished floor and the height and style of the windows shall be as shown on the plan.

Karen McGregor, 239 Oldchester Road, Essex Fells, New Jersey stated that she has retained a professional planner and called Peter G. Steck, 80 Maplewood Avenue, Maplewood, New Jersey. Mr. Steck was accepted by the Board as an expert planner. Mr. Steck stated he had reviewed the application materials, revised plan, ordinance, master plan, toured the neighborhood and listened to the Zoom recording of the January meeting. The proposed lot is substandard in size at approximately 38,000 square feet. The frontage is substandard and the southerly and northerly side yard setbacks are nonconforming. The existing floor area ratio exceeds the maximum permitted by ordinance. The proposed FAR is increasing to 15.6% and the side yard setbacks are further violated. The actual total floor area is 7,855 feet and following the additions will be 5,951 square feet. This is accomplished by utilizing architectural techniques to artificially eliminate calculated floor area, however, the bulk is still there. The subject property is one of five houses in a row built between the 1950's and 1961. Across the street is relatively new construction on a pie shaped lot with extended frontage which makes the lot appear to be larger. The existing home which is the subject of this application is a nice looking ranch which fits into the neighborhood. The increase in floor area ratio from 13.2% to

15.6% has a much greater impact visually due to the architectural techniques utilized to eliminate volume from the calculation.

Mr. Steck stated the proposal substantially impaired the intent and purpose of the 2018 Essex Fells master plan. One of the issues identified as affecting the community in the master plan is the increasing scale of houses relative to the lots. One of the problems identified in the master plan is that residential FAR is barely able to control the scale of development on the largest of lots in a zone and there is growing sophistication about how to circumvent FAR procedures related to half stories and cellars.

Mr. Steck referenced the 1992 master plan reexamination report which cites a study of house sizes and FAR's which is the basis for the FAR ordinance. The last study of the Planning Board's review of development patterns in Essex Fells, and perhaps the most important, was an analysis of house sizes compared to lot sizes. The Planning Board was concerned over new residential construction which was significantly larger than existing development, thus, posing a serious disruptive effect on the character, ambiance and visual quality of established neighborhoods. In some cases, older and smaller homes were being demolished and replaced with larger structures out of character with the existing neighborhood. In the RA-1 zone, house sizes range from 918 square feet to 10,971 square feet with a median of 3,593 square feet. The master plan recommended a 10% FAR in the RA-1 zone.

Mr. Steck noted that the square footages of neighboring homes cited by Ms. Miseo at the January hearing including basements where now the floor area calculations of the subject property does not include the basement. Mr. Steck noted there is no hardship and no practical difficulties associated with this application. There is no public purpose advanced in connection with the d(4) FAR variance request. The addition is driven by the applicants' personal taste and the home could be torn down and a conforming home constructed to the applicants' taste. The existing home is more in keeping with the neighborhood in this section of the street than what is proposed. There is no justification for the floor area ratio variance. Ms. Miseo did not offer any opinions on the master plan. The proposed home is oversized for the neighborhood and the proposed FAR of 15.6% does not accurately reflect the adverse visual impact of the project. Approval of this application will substantially impair the intent and purpose of the zone plan and zoning ordinance. The applicants have the burden of proof and the application should not be approved.

Mr. Ritte questioned Mr. Steck regarding the Board's approval of a floor area ratio variance granted to Natalya Izakov and Dmitriy Zelikson, 41 Avon Drive, Block 2.05, Lot 8 in 2015. Mr. Steck provided planning testimony for the applicants but did not recall the specifics of the case.

Mr. Ritte recalled Ms. Miseo. She reiterated the majority of the work is in the rear of the property and a sizeable portion of the addition is the covered porch which counts towards FAR. The existing family room is enlarged by 4 feet 10 inches and the existing kitchen which is very small is being enlarged by 3 to 5 feet. The mudroom, laundry room and small bathroom are related to the pool. The 2 foot encroachment in the rear yard is purely for aesthetic reasons. Ms. Miseo stated the application meets the positive criteria as it promotes a desirable visual environment through creative development techniques and good civic design and arrangement.

Ms. Miseo introduced Exhibit A-4 into evidence which was a Zillow view of 41 Avon Drive. She indicated Zillow states the property is 4,337 square feet. Ms. Miseo stated the proposed additions will not overwhelm the neighborhood. There is a hardship present relative to the request for the "c" variances. The master plan discourages cars in driveways and approval of this application will allow cars to be parked in the garage.

Mr. Steck stated that Zillow views are Google street views done by a fishbowl lens which distorts the view. The Zillow view is completely different than a view in person. Personal situations do not rise to public benefits especially with respect to a FAR variance. Ms. McGregor questioned the floor area calculations. Ms. Feinberg thanked the Botwinicks for taking into account the concerns of her clients and revising the plans. She requested a condition be imposed if the application is approved consistent with the limitations on the windows affecting the north side of the property previously discussed.

The public portion of the meeting was closed.

Mr. Ritte stated an application for a FAR variance, is governed by N.J.S.A. 40:55D-70d(4), which authorizes a variance for an increase in the permitted floor area ratio as defined in the ordinance upon a showing of special reasons known as the positive requirement and provided that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance known as the negative requirement. Randolph Town Center Associates L.P. v. Twp. Randolph, 324 N.J. Super. 412, 415-416 (App. Div. 1999). For an FAR use variance, the enhanced standards of proving "special reasons" as outlined in Medici case do not apply, meaning an applicant for a FAR variance need not show that the site is particularly suited for more intensive development. See Randolph Town Center Associates L.P. at 416. Like a conditional use variance applicant, FAR variance applicants must show that the site will accommodate the problems associated with a proposed use with larger floor area than permitted by ordinance. Thus, a FAR variance applicant must show that (1) the site will accommodate the problems associated with a proposed increase in floor area ratio than permitted by ordinance; and that (2) the variance can be granted without substantial detriment to the public good, the focus being on the effect on surrounding properties of the grant of the variance for the specific deviation from floor area ratio, the Board must evaluate the impact of the increase in FAR upon the adjacent property and determine whether or not it will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good; and that (3) the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Coventry Square Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994). It is important to note the requirement that the detriment or impairment must be substantial. All variances will obviously have some impact upon either the public or the zone and zoning ordinance, but such impact must be substantial.

Mr. Ritte noted, it is well established that the owner of land has a right to develop his property provided he can meet with reasonable requirements imposed by government; a land owner cannot be denied use of his property simply because neighboring land owners don't want changes to occur. O'Donnell v. Koch, 197 N.J. Super. 134 (App. Div. 1984). Also, suggestions of impacts on property values, loss of water pressure, blocking the sun and other statements

made by the neighbor have no proof and have not been demonstrated as being true, and are not to be considered by the Board, as our New Jersey Courts have recognized such statements as being speculative and inappropriate. Homes of Hope v. Zoning Bd. of Adjustment, 236 N.J. Super. 584.

Mr. Ritte went on to discuss the requisite proofs for granting the side yard setback variances. Pursuant to N.J.S.A. 40:55D-70c(1), a variance can be granted by reason of exceptional narrowness, shallowness or shape of a specific piece of property; by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property and by reason of an extraordinary or exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon. In addition, the Board can grant variances pursuant to the "flexible c" variance contained in N.J.S.A. 40:55d-70c(2) if the grant of the variance will further the purposes of the Municipal Land Use Law and if the benefits of granting the variance will substantially outweigh any detriment. In addition, the applicants must meet the negative criteria and prove the proposal does not present substantial detriment to the public good and must not substantially impair the intent and purpose of the zone plan and zoning ordinance. Under c(2) the applicant advances purposes of the Municipal Land Use Law namely, N.J.S.A. 40:55D-2c to provide adequate light, air and open space and subsection i to promote a desirable visual environment through creative development technique and good civic design and arrangement. There is no substantial negative impact on the zone plan, the master plan or surrounding land uses. Mr. Ritte went on to state the applicants' proposal will not substantially impair the intent and purpose of the Essex Fells master plan.

Mr. Ritte offered justifications for the grant of the variances. Applicants' property is an existing undersized, nonconforming lot. The zoning ordinance requires a minimum of 43,560 square feet of lot area, and the property has 38,054 square feet. Due to existing undersized lot area, applicants' existing FAR already exceeds the zoning ordinance at 13.2%, and the zoning ordinance restricts FAR to 11%; applicants are already over the maximum. With the proposed improvements, the FAR becomes 15.6%, which we submit is a small increase over the existing 13.2% FAR (2.4%). A major contributing factor is the covered patio which counts in FAR but is the least visual aspect of the plan.

Generally speaking, homes in Essex Fells are larger size homes, and applicants' property will be in keeping with the character of the surrounding residences and will not substantially impact those surrounding homes since the Botwinick's property is already smaller than several of the surrounding properties. The increase in FAR will cause no damage to the character of the neighborhood nor constitute a substantial detriment to the public good. In addition, the Botwinicks have made significant reductions in their proposed additions in an attempt to accommodate the concerns of the Board Members and neighbors. In sum, due to applicants' property being undersized and a preexisting nonconforming lot, and covered patio counted in FAR, applicants' property can accommodate the FAR violation and will have no substantial detriment to the public good nor will it have a substantially impact the zone plan or zoning ordinance.

Secretary O'Berine noted the objector's planner did not adequately support his conclusions. The variances requested are minimal and will result in an improvement to the borough and neighbors.

Vice-Chairman Spellman stated the application will improve the neighborhood and was in favor of the application. Board Member Albuлесcu expressed concern about granting the variance and setting a precedent for future applications. He noted that he disagreed with the applicants' attorney that there is adequate side yard space. Board Attorney Sullivan stated that with respect to concern about precedent all future applications would be judged on their own individual merits. Board Member D'Avella was impressed by the length to which the applicants went to address concerns by the neighbors. He thought the fact that the property is on the zone boundary was significant and noted Ms. McGregor is in a different zone and was the only neighbor complaining. He inspected the property and homes in the neighborhood and this plan will improve things. Nobody builds ranches today and Essex Fells is not a town of ranches. The master plan is not supposed to tie people up. Board Member Scolnick believed the plans addressed the concerns of the Board. The application results in a small change to the FAR but is consistent with the master plan and will improve the streetscape. She is sympathetic to the concerns of the McGregors. Board Member Shearin complimented the redesign since the first hearing and was in favor of the application and believed there was no substantial detriment to the public good. Board Member Jolda complimented the redesign which addressed concerns of the Board and noted she also was sensitive to the issues raised by the McGregors. Chairman Candido stated he initially had concerns with regard to this application but now is in favor.

On motion made by Board Member D'Avella, seconded by Board Member Shearin to grant a floor area ratio of 15.6% where a maximum of 11% is allowed and to grant side yard setback variances of 38.75 feet and 40.75 feet where a minimum of 45 feet is required subject to (1) compliance with comments 4.1.3, 4.1.5, 4.1.6 and 6.1 through 6.4 contained in the review memorandum dated March 15, 2021 prepared by Petry Engineering, LLC and (2) the sill height of the bottom of the window on the northerly elevation shall not be less than 6 feet from the finished floor and the height and style of the windows shall be as shown on the plan was approved by a vote of 6 - 1 (Chairman Candido, Vice-Chairman Spellman, Secretary O'Beirne, Board Members D'Avella, Scolnick and Shearin voting in the affirmative and Board Member Albuлесcu voting in the negative).

There being no further business to come before the Board on a motion made by Board Member D'Avella, seconded by Board Member Shearin, the meeting was duly adjourned by unanimous vote at 10:05 p.m.



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A. Michael Candido, Chairman  
Zoning Board of Adjustment  
April 22, 2021