

**BOARD OF ADJUSTMENT
BOROUGH OF ESSEX FELLS
MINUTES OF THE MEETING OF OCTOBER 28, 2021**

The meeting was conducted via Zoom and was called to order at 7:31 p.m. The Open Public Meetings Act announcement was read as required by law. Those present were: Chairman Michael Candido, Vice-Chairman Michael Spellman, Secretary Thomas O'Beirne, Henry Albuлесcu, Oscar Bate, Bernard D'Avella, Annmarie Scolnick, Chris Shearin and MJ Jolda. In addition, Michael D. Sullivan, Board Attorney, was present.

On motion made by Vice-Chairman Spellman, seconded by Board Member Albuлесcu, the minutes of the meeting of September 23, 2021 were adopted unanimously by all those eligible to vote.

On motion made by Board Member Albuлесcu, seconded by Board Member Bate, the resolution of Stanley and Laura Terlecky, 280 Roseland Avenue, Block 11.08, Lot 5 for floor area ratio and impervious coverage variances was approved by a vote of 6 – 0 (Chairman Candido, Vice-Chairman Spellman, Secretary O'Beirne and Board Members Bate, Scolnick and Albuлесcu voting in the affirmative).

Chairman Candido announced that the November 18, 2021 meeting needed to be rescheduled. On motion made by Board Member Bate, seconded by Vice-Chairman Spellman, the November 18, 2021 meeting was rescheduled to November 15, 2021 at 7:30 p.m. by unanimous vote.

The next matter to come before the Board was continued hearing of the application of Anthony and Jenna Forte, 33 Holton Lane, Block 3.02, Lot 10 for variances relating to floor area ratio, maximum number of stories, impervious coverage and generator output/pad size. The matter was previously heard at the Board's May 27 and June 24, 2021 meetings. Elizabeth Durkin, Esq. was present on behalf of the applicants. Board Attorney Sullivan noted that Board Member Scolnick signed a certification that she viewed the entire Zoom recording and reviewed the exhibits of the hearings held on May 27 and June 24, 2021 in this matter and therefore, will be eligible to vote. Greg Kotchick, Esq. of Durkin and Durkin appeared on behalf of Adam and Michele Blackwood, 39 Holton Lane, Essex Fells, New Jersey.

Board Attorney Sullivan referenced an email dated September 23, 2021 from Ms. Durkin which asserted Secretary O'Beirne has a disqualifying conflict of interest that should have been disclosed. Ms. Durkin clarified that it was the applicants' belief that Secretary O'Beirne has a disqualifying conflict of interest. Secretary O'Beirne indicated he read the email from Ms. Durkin and does not believe he has a disqualifying interest and does not believe he should recuse himself. Board Attorney Sullivan noted the next step is to have a hearing to explore the conflict issue that was raised. Secretary O'Beirne was sworn in and responded to a number of questions from Board Attorney Sullivan stating the property at 191 Eagle Rock Avenue is owned by 172 Eagle Rock Avenue Corporation which he is the sole managing member. Secretary O'Beirne indicated that he had received a correspondence from the law firm of Drinker Biddle on behalf of North Fullerton Associates, LLC who had an interest in purchasing his property. In April 2019, a contract was entered into by and between the parties. The purchaser subsequently terminated

the contract in June 2019. Subsequent to entering into the contract, Secretary O'Beirne indicated he became aware that Marshall Smith was a member of North Fullerton Associates, LLC. Secretary O'Beirne indicated he never spoke to Mr. Smith. There were no further negotiations or discussions with the purchaser subsequent to termination of the contract. The property is not currently for sale. The property is currently occupied by BSR as a tenant. Secretary O'Beirne indicated he could fairly judge the case based upon the facts presented. He further stated he has no personal or financial interest in connection with the applicants or any other party appearing. Ms. Durkin indicated she believed there was a conflict and since there was a full board present, Secretary O'Beirne should recuse himself.

Ms. Durkin asked Secretary O'Beirne a series of questions. Secretary O'Beirne indicated that he became aware that property adjacent to the property he owns at 191 Eagle Rock Avenue is owned by the Smith family or an entity related to the Smith family when he received the email from Ms. Durkin. Secretary O'Beirne stated that he believed the elder Mr. Smith was involved in the property and he had attended one of the hearings in which Secretary O'Beirne was seeking approval for a Dunkin Donuts on his property. Secretary O'Beirne stated the property was the subject of a development application for a Dunkin Donuts some years back before the Roseland Zoning Board which involved 17 hearings. Secretary O'Beirne indicated he did read Ms. Durkin's email which contained documents identifying the adjacent property owner as LGS Realty Corp. and Marshall Smith is the agent and a business address is listed as 39 Holton Lane. Michele Blackwood lives at 39 Holton Lane adjacent to the property which is the subject of this application. Ms. Durkin indicated that until now she was not aware that Secretary O'Beirne had entered into a contract with regard to the property. Ms. Durkin stated she understood there were negotiations between Secretary O'Beirne and the Smith family to either sell Secretary O'Beirne's property or acquire the adjacent Smith property so as to combine the parcels to increase the development potential. Ms. Durkin indicated that she understood the reason a use variance is required is because Roseland does not permit a stand alone Dunkin Donuts but it would be permitted if it was part of a shopping center. Ms. Durkin stated that if the O'Beirne parcel and the Smith parcel were combined a shopping center would be permitted.

Secretary O'Beirne indicated has never spoke to or seen Marshall Smith. Ms. Durkin stated that the record should be corrected because Mr. Smith did in fact appear via Zoom at the Board's June 24, 2021 hearing. Other than Marshall Smith's appearance via Zoom at the June 24, 2021 meeting, Secretary O'Beirne indicated he has never seen or spoke to him. Secretary O'Beirne indicated that at no time did he negotiate for the sale of his property or purchase of the adjacent property with any member of the Smith family. Board Attorney Sullivan noted that there certainly had to be negotiations between the attorneys for the parties in order to enter into the contract. Secretary O'Beirne indicated all negotiations were conducted through counsel only. Ms. Durkin indicated that she believed Secretary O'Beirne clearly has a conflict. Ms. Durkin thanked Secretary O'Beirne for disclosing that the property was under contract. Ms. Durkin noted that Marshall Smith was an objector to the Forte application. Board Attorney Sullivan stated that he was not sure Marshall Smith, 142 Old Chester Road, was an objector. He did appear at the June 24, 2021 hearing and according to the minutes asked questions about the floor area ratio and noted the revised proposal brings the plan closer to what the ordinance allows. Board Attorney Sullivan noted that based on the record thus far he may be an interested party but it is not clear he is an objector. Attorney Durkin noted that Marshall Smith's sister, Michele Blackwood, is adjacent to the Forte property and is an objector and has retained counsel. Ann

Smith, also a sister, has objected to the Forte application. Board Attorney Sullivan stated in his opinion he did not believe Secretary O'Beirne had a conflict. The fact that there was a contract entered into and terminated some two and half years ago is not a conflict and is remote. If there were current negotiations going on that might be different, but that is not the case. In response to a question from Chairman Candido, Secretary O'Beirne indicated he is not doing business with the Smith family. Chairman Candido indicated he was not sure what the conflict would be. Ms. Durkin noted that the Smith and O'Beirne families continue to own the adjacent properties in Roseland. Board Member D'Avella moved that there was no conflict on behalf of Secretary O'Beirne, seconded by Board Member Scolnick passed by a vote of 6 – 1 (Chairman Candido, Vice-Chairman Spellman, Board Members Albuiescu, D'Veila, Scolnick, Shearin voting in the affirmative and Board Member Bate voting in the negative). Board Attorney Sullivan noted that as a result of motion, Secretary O'Beirne will continue to sit on the case.

Ms. Durkin noted the matter was the subject of previous hearings on May 27 and June 24, 2021. The FAR as originally submitted was 20.5%. It was then subsequently reduced to 18.5% and again to 16.9%. Ms. Durkin indicated there was no height variance required. There is a variance for maximum number of stories, the home has a basement, first floor, second floor and attic. Ms. Durkin called Michael Roth of Roth Engineering, 52 Quail Run, Long Valley, New Jersey, who was previously accepted as an expert. Mr. Roth referred to his Lot Grading and Variance Plans dated February 3, 2021 revised through September 9, 2021. He noted the house was reduced in size and was more centered on the lot. The covered patio was eliminated. An uncovered patio is proposed at the rear. The pool structure was eliminated. He noted impervious coverage is proposed at 28.5% where 28.5% is existing and a maximum of 25% is allowed. There is no increase in stormwater runoff and a drywell is proposed to take roof runoff which will result in a great improvement. Mr. Roth noted the proposed FAR is 16.9% where 13% is existing and a maximum of 12% is allowed. He also noted the applicants still require variances relating to the number of stories and the generator output and pad size. Mr. Roth indicated the applicants would comply with the comments contained in the Petry Engineering, LLC review memorandum dated September 13, 2021.

Board Member O'Beirne questioned comment 3.9 in the Petry memorandum which references the creation of approximately 522 square feet of new impervious surfaces. Mr. Roth indicated the reference to 533 square feet was from a prior plan. Mr. Roth indicated the existing driveway is a paver driveway and the new driveway will be paved. Mr. Roth indicated both count towards impervious coverage. Board Member Jolda inquired about the removal of 12 trees. Mr. Roth indicated that the trees must be removed in order to construct the improvements.

Ms. Durkin called Erick DeLine of the Nishuane Group, 105 Grove Street, Montclair, New Jersey, a professional planner of the State of New Jersey, who was accepted as an expert by the Board. Mr. DeLine indicated he watched videos of the prior hearings. Mr. DeLine introduced a planner's briefing document which was marked as Exhibit A-9 consisting of 11 pages dated October 28, 2021. He distinguished floor area ratio from building coverage as floor area ratio addresses the scale and coverage of property. Mr. DeLine referred to the various sheets in the exhibit. The proposed FAR is 16.9% where a maximum of 12% is allowed. Mr. DeLine noted that ten of the 25 homes on Holton Lane would exceed 12% FAR as per Jessica Caldwell's memo. He further believed that the FAR's in Ms. Caldwell's memo were under calculated. Essex Fells Zoning Board of Adjustment minutes dated February 27, 2020, July 23, 2020 and

January 31, 2019 were marked into evidence as Exhibits A-10 through A-12. Mr. DeLine referred to the February 27, 2020 minutes and the application of David and Stacy Schlosser, 28 Holton Lane which sought a floor area ratio of 21.2% where 20.8% is existing. Mr. DeLine stated that utilizing tax records is unreliable for calculating floor area ratio. He referred to the January 31, 2019 minutes and the application of Joseph and Susan Pannullo at 57 Holton Lane and noted the tax records indicated building square footage significantly less than what exists.

Mr. DeLine cited the *Coventry Square* case and stated the property accommodates problems typically associated with a larger floor area and unlike a d(1) use variance it is not necessary to prove site suitability. He indicated that under the positive criteria the application advances purposes of the Municipal Land Use Law; namely, encouraging appropriate use of land which promotes the general welfare (-2a); provides adequate light, air and open space (-2c) and provides sufficient space in an appropriate location for residential use (-2g). There will be no substantial detriment to the public good. The application replaces a 50 to 60 year old home with a new modern home. Mr. DeLine noted the 2018 Master Plan discussed regulating oversized homes on overly large lots. The subject property is not an oversized lot. The applicants also need a variance for the number of stories which arises because the cellar counts as a story. The impervious coverage percentage is staying the same. The Master Plan discusses enforcing floor area ratio to keep houses in scale with the size of the lots. Ten of the 25 lots on Holton Lane exceed 12% floor area ratio based upon tax records, however, it is likely that more homes exceed 12% FAR.

Mr. DeLine stated the variances relating to impervious coverage, maximum number of stories and generator output and pad size are justified under c(2) only. Impervious coverage is 28.5% existing. A unique element of the Essex Fells Zoning Ordinance is the fact that a cellar counts as a story which in our case would not be visible to the public. The proposed 24kw generator and associated larger pad is more appropriate to meet the needs of a modern home. The generator ordinance was adopted in 2013 and the requested increase in output reflects modern conditions. The impact of the generator is mitigated by the fact that it is located in a side yard three times larger than the minimum required. Mr. DeLine said in his opinion calculation of the FAR doesn't matter if it's an addition to an existing home or relative to construction of a new home. Mr. DeLine discussed the difficulties in obtaining accurate FAR numbers for existing homes. The only way you could be sure the FAR calculation is accurate is if you have a recent application before a board or from original building plans. Mr. DeLine discussed the properties at 57 Holton Lane and 28 Holton Lane noting they would not jump out as monster homes. Mr. DeLine introduced Exhibit A-13 which is a tax map with the Schlosser property at 28 Holton Lane delineated. He noted Lot 8 is owned by Franks, Lot 9 by Caughey, Lot 10 is the subject property and Lot 11 is owned by the Smith LLC. Three of these properties are objectors to the current application but none objected to the Schlosser application.

Greg Kotchick questioned Mr. DeLine regarding the nature and extent of improvements to 28 Holton Lane. Mr. DeLine stated the previous testimony by Ms. Caldwell listed FAR's using tax records when the actual FAR's were higher than discussed. In response to a question, Mr. DeLine conceded every application stands on its own merits.

Ms. Durkin recalled Douglas J. Coleman, 266 King George Road, Suite C1, Warren, New Jersey, an architect previously accepted as an expert by the Board. Mr. Coleman referred to his

architectural plans revised through September 9, 2021. Mr. Coleman indicated he was present at the two prior hearings. The house size has been reduced from 5,079 square feet to 4,508 square feet. The garage has been reduced from 891 square feet to 793 square feet and the 300 square foot covered porch was eliminated. The FAR has been reduced from 18.5% to 16.9%. There is not a singular architectural style in the neighborhood which consists of ranches, expanded ranches, ranches converted to two-story colonials and two-story colonials. Styles include French provincial and country English. The proposed home has been designed to fit into the character and scheme of the street. In response to a question, he indicated water infiltration has caused cracking of the foundation. He referred to Exhibit A-7 which overlaid the front façade of the new home (when the FAR was 18.5%) over the existing home. Mr. Coleman indicated the house could be renovated and be habitable. His clients were contemplating cleaning up the residence and renting it.

The matter was open to the public. Greg Kotchick, Esq. incorporated his prior objections from the June 24 hearing. Mr. Kotchick indicated the Board should not zone by variance. This house was starting from scratch and there is no reason why the application should not be held to conform to the zoning ordinance. The application is contrary to the ordinance and the Master Plan and it should be denied. The FAR exceeds the ordinance by a substantial amount.

Dana Pinto, 23 Gordon Road, stated based upon the testimony she heard 56% of the homes in the area exceed the allowable floor area ratio. One home had an existing 20.08% FAR which was increased to 21% and another home had a FAR of 26% on Holton. This is an undersized lot and the applicants meet all other bulk requirements. They are adding a drywell and eliminating a nonconforming side yard. There has been significant consideration and thoughtful planning in connection with the home and she is in favor of the application. Plans were adjusted based upon Board and neighbor feedback and reduced their original ask from 20.5% to 18.5% ultimately to 16.9%. She was in favor of the Forte application and believes we should support families who want to make investments in this beautiful town and tight-knit community.

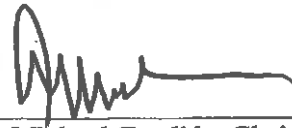
Geri Caughey, 27 Holton Lane, indicated she did not object to the Schlosser application because it wasn't a teardown and the floor area ratio increase sought was minuscule and improved the exterior look of the house. We are objecting because it is a teardown. Sandi Franks, 21 Holton Lane, said she wished to reiterate everything that Ms. Caughey said. The Schlosser home was built in 1960 and added dormers to add light to the second floor. You cannot compare that application with a complete teardown. The FAR is above what the ordinance allows. The applicants could still reduce the house to be in compliance.

Ms. Durkin thanked the Board for listening to this lengthy application. Based upon the testimony presented, there was no negative from a legal standpoint. The overwhelming majority of homes on Holton Lane exceed the allowable FAR. The applicants made efforts to reduce the size of the home and bring it closer to conformity. There is no difference with floor area ratio when dealing with a teardown or a new home. The Schlosser application was granted an FAR variance which exceeded the Forte's initial application and the Board recognized this would be an improvement to the streetscape. There are benefits to this application regarding the side yard setback and from the street this would look less built. This is not a monster house. This is a home that would be in scale with other homes on the street. Ms. Durkin thanked the Board and

D'Avella and Scolnick voting in the affirmative and Chairman Candido, Secretary Beirne, Board Members Bate and Albuлесcu voting in the negative).

Ms. Durkin said it was very disappointing and it would be very helpful if a planner and engineer were present so they wouldn't be subject to some of the comments this applicant just had. Jenna Forte thanked the Board and noted this has been a painful process that began a year ago. She asked whether the Planning Board and Zoning Board go over the numbers. Board Attorney Sullivan noted by statute the Board of Adjustment is required to review all its decisions annually and make recommendations to the Governing Body if they think the ordinances should change. That report is sent to the Planning Board and Council. She stated the condition they bought this house in was pretty bad. It may not look as bad from the outside. The inside is in very bad condition. We bought it knowing we wanted to construct a new home. As residents of the Town, when we have people purchasing properties that are in these types of condition, how can we expect people to invest the amount of money in these properties and have a low square footage. The property values are not going to match up. She stated she was ok with the Board's decision tonight, however, requiring 12% on a lot this size is giving her a 3,000 square foot house and no one will invest a large amount of money in that situation. Chairman Candido responded that the Council writes the ordinances but we are charged with allowing adjustments to that. Ms. Forte said that as more applications come in for FAR variances she hopes these numbers are reevaluated and they don't do justice to the residents of our town by limiting us to 12%. You are not getting an adequate size home with a 12% FAR on my size lot. Neighbors have stated that she should live in the same size house they do but that is their preference. She stated it is actually disgraceful the way we have been talked to on these meetings by the residents of Essex Fells coming on to object to us. This has been truly disgraceful the way we were treated. Chairman Candido said he hopes she doesn't think the Board mistreated her, we have tried to be very respectful. Ms. Forte responded yes the Board has been respectful but questioned allowing certain comments. She stated one objector was eating popcorn and laughing during the proceeding. Chairman Candido noted that the Zoom platform comes with many difficulties. Ms. Forte hopes that other people will not have to go through this painful process in the future but she appreciates the time she was given but was very disappointed.

There being no further business before the Board, on a motion made by Board Member D'Avella, seconded by Board Member Scolnick, the meeting was duly adjourned by unanimous vote at 10:45 p.m.



A. Michael Candido, Chairman
Zoning Board of Adjustment
November 15, 2021