

**ZONING BOARD OF ADJUSTMENT  
BOROUGH OF ESSEX FELLS  
MINUTES OF THE MEETING OF JUNE 23, 2022**

The meeting 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, Secretary Thomas O'Beirne, Allison Semaya, William Kovacs, Oscar Bate and MJ Jolda. In addition, Michael D. Sullivan, Board Attorney, was present:

On motion made by Vice-Chairman Spellman, seconded by Board Member Jolda, the minutes of the meeting of May 26, 2022 were adopted unanimously by all those eligible to vote.

On motion made by Board Member Kovacs, seconded by Vice-Chairman Spellman, the resolution of Jaclyn and Bill Courter, 30 Forest Way, Block 11.07, Lot 7 for floor area ratio, side yard setbacks and front yard setback variances was approved by a vote of 3 – 0 (Chairman Candido, Vice-Chairman Spellman and Board Member Kovacs voting in in the affirmative).

The next matter to come before the Board was the hearing of Michael Lahue and Robin Piocosta-Lahue, 15 Rensselaer Road, Block 6.03, Lot 5, for an accessory structure building height variance. Board Member Bate recused himself from the hearing. Nicole Magdziak, Esq. of the firm of Day Pitney was present on behalf of the applicants. Ms. Magdziak advised the Board the applicants are seeking a bulk variance for accessory structure height of a tree house. The structure is elevated between two trees. The ordinance permits a height of 15 feet and the tree house is elevated 12 feet resulting in an aggregate height of approximately 24 feet from the ground to the peak.

Ms. Magdziak called Ken Fox of Fox Architectural Design PC, 546 State Route 10 West, Ledgewood, New Jersey who was accepted by the Board as an expert architect and planner. Mr. Fox marked into evidence Exhibit A-1 consisting of Sheet Z1, site layout plan, dated May 10, 2022 prepared by his office with color added. Mr. Fox noted the property contains a two-story single-family dwelling which was rebuilt following a fire. He referred to Exhibit A-1 and noted the exhibit depicts improvements, the property is magnificently landscaped and contains a bocce court. The rear of the property is heavily wooded and oversized containing approximately 113,000 square feet. It is one of the largest if not the largest lot in the neighborhood. Exhibit A-1 depicted the location of the tree house which is under construction for use by the applicants' grandchildren. Mr. Fox introduced into evidence Exhibit A-2 consisting of two aerial photographs prepared by his office dated June 23, 2022. The tree house is located 100 feet, 111 feet and 129 feet from the closest property lines of adjacent properties on Oldchester Road and Fells Road. The tree house is located 250 feet, 320 feet and 425 feet to the closest residences on neighboring properties. Mr. Fox introduced Exhibit A-3 consisting of a photo board of 14 photos of the subject property. Mr. Fox referred to Sheets Z2, proposed tree house plans prepared by his office dated May 10, 2022. Mr. Fox noted you can see under the tree house which will utilize shingles to match tree bark in the area and minimize visibility. Decks on each side of the tree house will contain railings. The tree house will be building code compliant and plans will be submitted to the Building Department for approval. A spiral staircase with handrails is proposed and the structure is safe.

Mr. Fox noted the applicants are proceeding under both c(1) and c(2). With respect to c(1), he noted the location of existing structures, size of the property and its unique characteristics are relevant. He opined the purpose of the ordinance regulating height of accessory structures is to limit visibility. With respect to c(2), Mr. Fox stated approval of this application advances the purposes of the Municipal Land Use Law and provides adequate light, air and open space noting the shed is 12 feet in height and would comply if it was on the ground but it is elevated and open below (-2c). Mr. Fox stated the application provides sufficient space in an appropriate location for recreational use (-2g) and promotes a desirable visual environment with the proposed materials (-2i). With respect to the negative criteria, Mr. Fox introduced into evidence Exhibit A-4 consisting of two photographs of a tree house on 364 Roseland Avenue as well as a photograph of a tree house with slide at 10 Hawthorne Road both in Essex Fells. Mr. Fox opined that the height of the tree house at 364 Roseland Avenue is at least as high as the tree house proposed by the applicants. There would be no electric service to the tree house and it will be well screened. Approval would not substantially impair the intent and purpose of the zoning ordinance or master plan and would not result in substantial detriment to area properties.

Board Attorney Sullivan referenced the review memorandum prepared by Petry Engineering, LLC dated May 27, 2022. With respect to comment 2.4, Mr. Fox stated there would be one door and one window on each side, the wood deck would be stained and there would be no gutters. Mr. Sullivan noted that in the event the application is approved it would be subject to comments 4.1, 4.2, 5.1, 5.2 and 5.4 of the memorandum. Mr. Fox stated the railing would be made of lumber but could be covered with tree material similar to the color of the shingles. The spiral staircase is steel with wood railings and the staircase would be lightened to match the color of the tree house. In response to a question from a Board Member, Mr. Fox noted he did not design the tree house. Mr. Fox also agreed to a suggestion by a Board Member that an arborist confirm the two trees to which the tree house will be attached will not be harmed. Mr. Fox noted the plans will have to be revised for submission to the Building Department. Vice-Chairman Spellman expressed concerned about the structural integrity of the tree house and Mr. Fox stated that the structural design has not yet been completed.

The matter was opened to the public. Paige Daniels, 31 Oldchester Road, Essex Fells, New Jersey stated that she believes there are wetlands in the rear of the subject property. Board Attorney Sullivan noted that if the application was approved it would be subject to comment 5.1 in the Petry memorandum which deals with obtaining any and all approvals required by outside agencies which includes NJDEP. She stated the tree house is visible from her property six months of the year. She attempted to introduce a letter from neighbors in opposition to the application, however, Board Attorney Sullivan noted it was not admissible. She did introduce four photographs which were marked as Exhibits O-1 showing a view of the tree house from her property. She advised the Board she opposes the application and the issue is visibility. Mr. Fox advised that after the tree house is completed it would be hidden significantly. Six months of the year it would not be seen. Mr. Fox noted that currently the tree house under construction contains bright white clean wood which is not what it will look like when it is completed and he referred to Sheet Z2 of his plans. Ms. Magdziak summarized the testimony and noted that a stop work order had been issued and no work had been undertaken since then. She stated the tree

house has been designed to blend in and noted that area properties are located more than 100 feet away.

Board Attorney Sullivan outlined the proofs for granting c(1) and c(2) variances. Under c(1), the applicants must prove the “positive criteria” and show (a) by reason of exceptional narrowness, shallowness or shape of the property; or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing therein, the strict application of the zoning regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the applicants. The applicants must also meet the “negative criteria” and prove that the grant of the variance will not cause substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Under c(2), the applicants must show that the application (1) relates to a specific piece of property; (2) that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements; (3) that the variance can be granted without substantial detriment to the public good; (4) that the benefits of the deviation would be substantially outweigh any detriment; and (5) that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Mr. Sullivan noted that the grant of a c(2) variance requires a public benefit. If the applicants meet the proofs under either c(1) or c(2), the application should be approved. If the applicants fail to meet the proofs under both c(1) and c(2), the application should be denied.

The Board began deliberations. Board Member Jolda said she had no concern with the application and noted the applicants have made an effort to minimize the visibility of the tree house. Secretary O’Beirne stated the tree house is way too high for an accessory structure and he was opposed. Vice-Chairman Spellman stated the tree house is visible from Fells Road and he was opposed. Board Member Kovacs expressed concern relative to the view of the tree house from the neighbor’s property but noted that when it’s completed visibility will be reduced. Board Member Semaya expressed concerns about visibility of the structure and noted there was no public benefit. Chairman Candido stated he couldn’t see the tree house from any vantage point which is located in the middle of a forest this time of year. He noted the tree house at 364 Roseland Avenue did not come before the Board.

On motion made by Secretary O’Beirne, seconded by Vice-Chairman Spellman to deny the requested accessory height variance of approximately 24 feet where a maximum of 15 feet is allowed failed by a vote of two in favor and five opposed (Secretary O’Beirne and Vice Chairman Spellman voting in the affirmative and Chairman Candido and Board Members Jolda, Semaya and Kovacs voting in the negative).

On motion made by Board Member Jolda, seconded by Board Member Kovacs to grant the requested accessory height variance of approximately 24 feet where a maximum of 15 feet is allowed subject to the following conditions: (1) compliance with items 4.1, 4.2, 5.1, 5.2 and 5.4 contained in the review memorandum prepared by Petry Engineering, LLC dated May 27, 2022; (2) the applicants shall obtain approval from the Building Department; (3) the applicants shall submit a report from an arborist confirming the two trees to which the tree house is attached will not be harmed; and (4) the applicants shall be bound by all representations made in testimony;

(5) the applicants shall be responsible for payment of all escrow charges; and (6) the color of the shingles shall match what is depicted on Sheet Z2 and will contain dark grays, brown and black. the deck, staircase and railings shall match the color of the shingles was approved by a vote of 4 – 2 (Chairman Candido, Board Members Jolda, Semaya and Kovacs voting in the affirmative and Vice-Chairman Spellman and Secretary O’Beirne voting in the negative.)

The next matter to come before the Board was the application of 9 Old Chester Road LLC, 9 Oldchester Road, Block 6.03, Lot 9 in Essex Fells and Block 61.01, Lot 3 in Caldwell for a floor area ratio variance. Matthew Posada, Esq., of Sills Cummis & Gross was present on behalf of the applicant. Board Attorney Sullivan advised of the sewer moratorium in effect and noted if the application is approved a condition would be imposed as follows: “Compliance with an Order Imposing Scarce Resource Restraint, Requiring Submission of Sewer Capacity Analysis, and Appointing Special Master to Oversee Sewer Plan entered March 14, 2022 by Honorable Robert H. Gardner, J.S.C. Re: In the Matter of the Application of the Borough of Caldwell, Essex County, New Jersey, Docket No. ESX-L-3999-16. The Order, among other things, prohibits the Borough of Essex Fells from issuing sewer service connection permits for the discharge of waste water to the Caldwell Sewerage Treatment Plant subject to the waiver process set forth in paragraph 6 of the Order. This approval shall not confer vested rights for allocation of sewer capacity in the Caldwell Sewerage Treatment Plant upon the applicant without the Court’s review and approval.”

Mr. Posada stated the subject property is located in the Borough of Essex Fells and the Borough of Caldwell. Mr. Posada noted that in 2014 the subject property received a variance from the Zoning Board to permit a floor area ratio of 19.37% where a maximum of 17% is allowed to construct a new residence. The home was never constructed and the variance has expired. Mr. Posada called Richard Adelson of Frank H. Lehr Associates, 101 South Harrison Street, East Orange, New Jersey who was accepted by the Board as an expert engineer. Mr. Adelson noted the property is in the RA-4 Zone and he reviewed the zoning ordinance and master plan. The property contains 17,360 square feet in Essex Fells and 16,730 square feet in Caldwell. The house previously on the property has been demolished and there is some pavement existing. He referred to the site plan Sheet SD-2 dated March 30, 2022 prepared by his office. The proposed home will face Oldchester Road and would be 81.5 feet from the centerline of the road. The westerly side yard setback would be 27.1 feet and the front setback from Hawthorne Road in Caldwell would be 37.5 feet. The rear yard setback would be 53.2 feet. Mr. Adelson referred to the grading and utility plan Sheet SD-3 dated March 30, 2022 prepared by his office. The property drains primarily to the southwesterly corner. All roof water would be collected into a drainage system which would result in an improved situation. Porous pavement would be utilized in the driveway which was counted towards the impervious coverage calculation. Overall impervious coverage would be less than 25% and compliant with the ordinance. There are no wetlands on the site. The location of the drywells as shown on the plan would need to be relocated. Eric Georges, 11 Oldchester Road, Essex Fells asked about stormwater management and Mr. Adelson indicated rain will go into drywells and roof leaders would be piped to drywells.

Mr. Posada called Adam Raiffe of Raif Design LLC, 21 Hillcrest Avenue, Morristown, New Jersey who was accepted by the Board as an expert architect. Mr. Raiffe indicated he considered

the bulk standards in designing the home and looked at a variety of styles of homes. The proposed home was rooted in the art renaissance architectural style specifically Palladian. The proposed home will contain limestone, a metal roof and stone wrapping around the edges. The design before the Board has been reduced from the original design. The mass of the home is minimized by the setback of the home. The floor plan is similar to a center hall Georgian colonial. Mr. Raiffe introduced into evidence Exhibit A-1 a conceptual plan dated June 23, 2022 as well as Exhibit A-2 depicting exterior materials dated June 23, 2022. The home will be constructed of cast limestone material which is a mixture with greater longevity. The thickness has not yet been determined. The roof is setback from the parapet walls and will be copper. In the rear of the home is a terrace and a sunken garden beyond the terrace at the basement level. The main structure will have four bedrooms upstairs and one bedroom downstairs. Mr. Raiffe indicated that reducing the size of the home would degrade the architectural integrity and reduce the usability of the interior space. The owner's suite section contains one bedroom, a closet and a master bathroom. Mr. Raiffe described the three-bay garage. The home is designed to conform to the "golden ratio."

Mr. Posada called Matt Flynn, 101 Gibraltar Drive, Morris Plains, New Jersey who was accepted by the Board as an expert planner. Mr. Flynn indicated he reviewed the zoning ordinance and master plan. He introduced Exhibit A-3 prepared by his office consisting of seven sheets include a tax/parcels map, aerial map, land use map, zoning map and photographs. Mr. Flynn cited the 2018 Essex Fells master plan which indicated the intent of the floor area ratio is to keep properties somewhat in scale with surrounding properties even though lots may be overly large. The proposed home would comply with all bulk standards except for floor area ratio. The purpose of floor area ratio requirement is to limit the mass of the home. He noted the property is located next to the RA-2 Zone. Mr. Flynn cited the *Randolph Town Center* case and noted the Board's focus must be on whether the site will accommodate the problems associated with the larger floor area. The propose floor area is 20.4% where a maximum of 17% is allowed which is an average of 3.4% and just over 1,100 square feet. Mr. Flynn said approval of the application would advance purposes of the Municipal Land Use Law; namely, N.J.S.A. 40:55D-2a, c, g, i and m. With respect to the negative criteria, the proposed home would be compatible with other properties. Mr. Flynn stated there would be no substantial detriment to the public good if this attractive building was approved. There are no environmental impacts, stormwater is addressed and impervious coverage is less than the maximum allowed. The building footprint is 5,600 square feet and the home is 7,020 square feet. In response to a question from a Board Member, Mr. Flynn indicated he did not look at the floor area ratios of Lots 10, 11 and 12 on Oldchester Road. Mr. Flynn reiterated the property is located at the end of the RA-4 zone and is partially located in the Borough of Caldwell. In response to a question from a Board Member Mr. Flynn indicated that the trees in the cluster in the circle and some additional trees would be removed. Mr. Posada indicated the applicant would agree to additional screening.

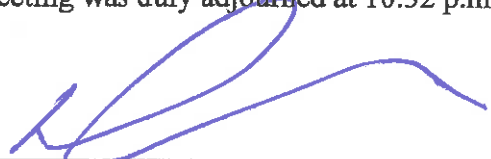
Board Attorney Sullivan referenced the review memorandum prepared by Petry Engineering, LLC dated May 31, 2022. Mr. Sullivan noted that in the event the application is approved it would be subject to comments 3.3, 3.6, 3.7, 3.8, and 4.1 through 4.4. Mr. Posada agreed to comply with same.

The matter was opened to the public. Eric Georges, 11 Oldchester Road, Essex Fells expressed concern about the proposed home which is not centered on the lot. There are beautiful old houses on this street and he had privacy concerns. Mr. Posada noted that they did attempt to reduce the size of the home but it sacrificed design and the proposed home is well balanced. Board Attorney Sullivan outlined the standard of a d(4) variance noting: The purpose of FAR ordinances is to control the size and mass of a home in relation to lot size and regulate intensity and prevent overbuilding. The Board has the power to grant variances to permit an increase in the permitted floor area ratio pursuant to N.J.S.A. 40:55D-70d(4) in particular cases and for "special reasons." This is the so-called positive criteria of a d(4) FAR variance. As it pertains to the positive criteria, the Appellate Division has held that a d(4) FAR variance is more akin to a d(3) conditional use variance than a d(1) use variance so that the Board's focus must be on whether the site will accommodate the problems associated with the proposed permitted use but with a larger floor area than permitted by the ordinance. *Randolph Town Center v. Randolph*, 324 N.J. Super. 412 (App. Div. 1999) holding that the standard enunciated in *Coventry Square v. Westwood Board of Adjustment*, 138 N.J. 285 (1994) pertaining to a d(3) conditional use variance applies to a d(4) FAR variance. A d(4) FAR variance application need not show the property is particularly suited for more intensive development. The applicant must still meet the negative criteria. No variance or other relief may be granted without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Under the *Randolph Town Center* rationale, the Board's focus regarding the negative criteria in a d(4) FAR variance is identical to a d(3) conditional use variance; namely, determining whether conditions can be imposed in its approval to insure that the deviation from the FAR requirements do not cause substantial detriment to the public good and do not substantially impair the intent and purpose of the zone plan and zoning ordinance. This standard does not require an "enhanced quality of proof" required in a d(1) use variance.

The Board deliberated. Chairman Candido noted the property contains 34,000 square feet where a minimum of 20,000 square feet is required which is 70% over. The proposed floor area ratio of 20.4% where 17% is allowed is a 15% overage. Typically, we see requests for floor area ratio variances on lots containing less than 20,000 square feet. This situation is different because the lot is oversized. In this situation, the property is vacant so the applicant is starting from scratch with a clean slate. The applicant can build a home within the ordinance standards. Chairman Candido complimented the design and noted he was not in favor of granting the floor area ratio variance. Board Member Jolda agreed with the Chairman's comments and expressed concerns with the potential usage of the home which feels like multifamily. Chairman Candido noted that the ordinance only allows single-family use. Secretary O'Beirne stated the proposed home is 7,020 square feet which is too large and he was opposed. Vice-Chairman Spellman complimented the design and noted the lot is oversized and was opposed to granting the requested variance. Board Member Bate agreed with the comments of Chairman Candido noting the lot is overly large. Board Member Kovacs stated he agreed with the other Board Members and noted a house of 5,845 square feet can be built and the proposed 7,020 square foot home is too large for the lot. Board Member Semaya agreed with other Board Members and noted the scale of the home is too large for the lot.

Mr. Posada asked for a continuance to look at redesign of the plan. Board Attorney Sullivan said that such a request is up to the discretion of the Board. On motion by Secretary O'Beirne, seconded by Board Member Bate, a motion to grant a continuance failed by a vote of 2 – 5 (Secretary O'Beirne and Board Member Bate voting in the affirmative and Chairman Candido, Vice-Chairman Spellman and Board Members Semaya, Kovacs and Jolda voting in the negative). On motion made by Vice-Chairman Spellman, seconded by Board Member Semaya to deny the requested floor area ratio variance of 20.7% where a maximum of 17% is allowed was approved by a vote of 6 – 1 (Chairman Candido, Vice-Chairman Spellman and Board Members Semaya, Kovacs, Bate and Jolda voting in the affirmative and Secretary O'Beirne voting in the negative).

There being no further business to come before the Board, on a motion made by Vice-Chairman Spellman, seconded by Board Member Semaya, the meeting was duly adjourned at 10:32 p.m. by unanimous vote.



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MICHAEL SPELLMAN, Acting Chairman  
Zoning Board of Adjustment  
July 28, 2022