

MINUTES –REGULAR MEETING

FEBRUARY 19, 2020

THE REGULAR MEETING OF THE VILLAGE OF LOCH ARBOUR PLANNING BOARD WAS HELD IN THE LOCH ARBOUR MUNICIPAL BUILDING, 550 MAIN STREET, LOCH ARBOUR, NEW JERSEY, ON WEDNESDAY, FEBRUARY 19, 2020 AND WAS CALLED TO ORDER BY MAYOR, PAUL V. FERNICOLA AT 7:30 PM.

FOLLOWING THE SALUTE TO THE FLAG, the following member was sworn into office as a Member of the Planning Board of the Village of Loch Arbour and signed the Oath of Allegiance and Office.

- Carol Wilusz, as a Class IV (resident) Member for a 4-year term

The secretary called the roll. PRESENT WERE: Mayor Fernicola, Ms. Appello, Ms. Gosline, Mr. Wiener, Ms. Wilusz, Mr. Maisto. ABSENT WERE Commissioner D' Angelo, Mr. R. Fernicola, Mr. Santos.

Also present were Board Attorney, Sanford Brown, Board Engineer/Planner, Peter Avakian, and Board Secretary, Marilyn Simons.

The Board Secretary announced the notice requirements of C. 231, P.L. 1975, have been met by transmitting the notice of this Regular Meeting to the Planning Board's two designated newspapers on January 20, 2020, posting a copy of the notice on the Municipal bulletin board, and filing a copy of the notice with the Municipal Clerk on the same date.

MINUTES –

UPON MOTION of Ms. Appello, seconded by Mayor Fernicola, carried, the following minutes are hereby approved as presented.

- Rescheduled Regular Meeting of the Planning Board held on December 17, 2019.

Recorded Vote:

Ayes: Mayor Fernicola, Ms. Appello, Ms. Gosline

Nays: None Absent: Commissioner D' Angelo, Mr. R. Fernicola, Mr. Santos

Abstain: Mr. Wiener, Ms. Wilusz, Mr. Maisto

CORRESPONDENCE – None

OLD BUSINESS –

A. Memorialize 5 Ocean Place., Block 9, Lot 10

**RESOLUTION OF THE PLANNING BOARD OF THE
VILLAGE OF LOCH ARBOUR
REGARDING 5 OCEAN PLACE
DENYING APPLICATION FOR
VARIANCE RELIEF**

WHEREAS, JACK AND LOTTIE TERZI (hereinafter referred to as "Applicant"), as the owner of property located at 5 Ocean Place in the Village of Loch Arbour designated as Block 9, Lot 10 on the Tax Map of the Village of Loch Arbour (the "Property") has filed the application subject of this Resolution; and

WHEREAS, the Village of Loch Arbour Planning Board pursuant its power granted under N.J.S.A. 40:55-25c to act as a board of adjustment (the "Board") has considered this matter; and

WHEREAS, the Applicant filed two applications, one for Variances and the other for a Certificate of Appropriateness; and

WHEREAS, a review of the notices and publication indicate that the Board has jurisdiction to hear these applications; and

WHEREAS, an initial hearing was held on August 15, 2018, and the Applicant returned to the Board for a hearing on all issues on January 15, 2020, and all interested parties were given an opportunity to be heard and express their opinions; and

WHEREAS, the Board and professional staff reviewed the materials submitted and the Board reviewed and carefully considered the reports of the Planning Board Engineer and Planner, Peter R. Avakian, P.E. PP, revised through November 27, 2019, as well as all of the evidence and testimony from the Applicant and Applicant's expert witnesses and from the Board's Engineer and Planner and an objecting neighbor;

WHEREAS, the Board has made the following findings:

1. The Property is known as 5 Ocean Place in the Village of Loch Arbour and is located in Block 9, Lot 10 on the municipal tax map.

2. The Property is located in the Village Residential Zone.

3. The Applicant filed applications which were initially heard on August 15, 2018 (2018 hearing) which was adjourned by the Applicant.

4. In 2018, the Applicant had requested approval from the Board for the construction of a spiral staircase in the front of the dwelling, the installation of a new pool cover and replacement of the existing concrete on the north side of the dwelling with stepping stones.

5. After the 2018 hearing, the Applicant submitted a new survey of the Property which indicated changes from the old survey to the pool patio, pool equipment, and removal of concrete north side of the dwelling.

6. The minimum lot width required per the zoned district is 75 feet. The existing lot has a width of 56.67 feet, which represents an existing non-conformity.

7. The minimum lot depth required per the zoned district is 100 feet. The existing lot has a depth of 100 feet, which conforms.

8. The minimum lot area required per the zoned district is 7,500 square feet. The existing lot has an area of 5,667 square feet, which does not conform. This represents an existing non-conformity.

9. The minimum front building setback permitted per the zoned district shall conform with those provided for adjacent buildings. The plans indicate an average front building setback of 14.72 feet. The Applicant was advised to recalculate the average front building setback as there is no dwelling on Lot 12. Also, the Applicant was advised that the calculation should not include the lot of the Applicant. The Board Engineer calculated a front building setback of 14.1 feet. The Applicant was proposing a front building setback of 15.2 feet, which conformed. The zoning table on the plan indicated a front setback of 14.16 feet.

10. The minimum side building (each) setback permitted per the zoned district is 5 feet, at the time of the submitted application. The existing side building setback is 6.5 feet on the south side and 6.4 feet on the north side, which both conform. The Applicant was proposing a south side building setback of 6.7 feet, which conforms.

11. The minimum rear yard setback required per the zoned district is 25 feet. The existing rear yard setback is 33.1 feet, which conforms.

12. The building coverage permitted by the zoned district is 20% of the lot size, which may be occupied by the principal use or structure. The existing building coverage is 32%, which represents an existing non-conformity.

13. An additional twenty percent (20%) of the lot size may be occupied by all other buildings or structures, which constitute building coverage. The Applicant indicated a lot coverage of 33.2% and the Board Engineer calculated a lot coverage of 34.4%. Both of these lot coverages would have represented an existing non-conformity, but for the fact that the Applicant had, prior to 2018, replaced an existing concrete backyard patio and replaced and expanded it with bricks which extended the patio to or very close to the rear set back line and at or near the side yard line on the rear northern area of the backyard.

14. The Applicant provided testimony at the second hearing on what was to be removed from an existing northern side sidewalk which would be changed to stepping stones reducing lot coverage. The Board Engineer calculated an increase in lot coverage which is an expansion of an existing non-conformity. A variance is required.

15. The maximum building coverage ordinance stipulates that "In no event shall the total lot coverage exceed 40% of the lot". The Applicant indicated the existing total building coverage is 63.3% and the Board Engineer calculated 66.6%. Both of these coverages represent an existing non-

conformity. The Applicant indicated a proposed total building coverage of 65.5% and the Board Engineer calculated 66.9%. Both of these coverages are an expansion of existing non-conformities. A variance was required.

16. The Architect was asked before the 2020 hearing to provide a detail of the footing or slab supporting the proposed spiral staircase. This would have been required for both construction and verification of the coverage calculation.

17. At the end of the 2020 hearing and before a vote, the Applicant withdrew the request for any relief related to the spiral staircase. Therefore, the Board took no vote related to the proposed spiral staircase (or any other type of staircase). The result of this withdrawal was the elimination of consideration of the Application for a Certificate of Appropriateness and any relief under the variance application regarding the front of the Property.

18. Left to consideration by the Board, is variance relief needed to permit the unauthorized brick patio to remain in violation of setbacks.

19. The Board finds that the unapproved construction of the patio violated the rear set back of ten (10) feet as the patio extended to the rear property line. The construction also violated the north side setback of five (5) feet as the patio extended close to or to the side setback in the rear yard of the Property. The construction also violated the maximum lot and building coverages for the Property.

20. The Applicant and his expert provided testimony in an attempt to argue why the offending portions of the patio should remain.

21. The Board finds that the Applicant failed to prove as required under N.J.S.A. 40:55D-70c., entitlement to the bulk variances to permit the violating sections of the patio to remain.

22. The Applicant failed to prove that the benefits of allowing such deviations would substantially outweigh the detriments in order to allow for the departure from the applicable provisions of the Ordinance.

23. The Applicant failed to prove that granting the various bulk variances would not substantially impair the intent and the purpose of the Zoning Plan and Ordinance or would be consistent with the intent and purpose of the Master Plan and Zoning Ordinance.

24. As to the proposed stepping stones on the north side of the dwelling, the Applicant is encouraged to finish the replacement of the existing pathway on the north side of the Property with the stepping stones as testified to at the 2020 hearing.

25. The Board refers to the Board Engineer's report, that the Applicant should resolve the fence encroachment on the adjacent properties.

NOW, THEREFORE, BE IT RESOLVED, based upon the evidence and findings contained herein the Variance application of Jack and Lottie Terzi is denied.

BE IT FURTHER RESOLVED that the Applicant is required to remove the violating rear patio so that it no longer violates the rear and northern side yard setbacks noted above in this Resolution. This restoration of pervious coverage should take place in the immediate future.

UPON MOTION of Mayor Fernicola, seconded by Mr. Wiener.

Recorded Vote:

Ayes: Mayor Fernicola, Ms. Appello, Ms. Gosline, Mr. Wiener

Nays: None

Absent: Commissioner Cheswick, Mr. R. Fernicola, Mr. Santos

Abstain: Ms. Wilusz, Mr. Maisto

B. Memorialize 205 Edgemont Drive, Block 10, Lot 11

RESOLUTION OF THE PLANNING BOARD OF THE VILLAGE OF LOCH ARBOUR

WHEREAS, 205 Edgemont, LLC (hereinafter referred to as "Applicant"), is the owner of property located at 205 Edgemont Drive in the Village of Loch Arbour designated as Block 10, Lot 11 on the Tax Map of the Village of Loch Arbour (the "Property") and is presently located in the Residential Zone; and

WHEREAS, the Applicant appealed the Zoning Officer's determination that the pre-existing non-conforming six-unit apartment use in the existing structure on the Property (the "Building") had been abandoned; and

WHEREAS, the Village of Loch Arbour Planning Board pursuant to NJSA 40:55D-25c.(1) utilized its power to act as a board of adjustment (the "Board") in considering the matters germane to Applicant's requested relief; and

WHEREAS, a review of the notice and publication indicates that the Board has jurisdiction to hear this application; and

WHEREAS, hearings were held on May 15, 2019, July 17, 2019 and October 16, 2019, and all interested parties were given an opportunity to be heard and express their opinions; and

WHEREAS, the Board and professional staff reviewed the materials submitted and the Board reviewed and carefully considered the reports of Planning Board Engineer and Planner, Peter R. Avakian, P.E. PP, as well as all of the evidence and testimony from the Applicant and Applicant's expert witnesses, a brief submitted by the Applicant's attorney arguing that there was no abandonment, legal memorandum submitted by the Board attorney outlining the law of abandonment without argument as to whether this property was or was not abandoned, and testimony of the public and of the Board's Engineer and Planner;

WHEREAS, the Board has made the following findings:

1. The Applicant appealed the Zoning Officer's determination that the pre-existing non-conforming six- unit apartment use has been abandoned.

2. The Property is known as 205 Edgemont Drive in the Village of Loch Arbour and is located in Block 10, Lot 11 on the municipal tax map.

3. The Property is located in the Residential Zone. In accordance with Ordinance Section 704.B. "Principal permitted use on the land and in Buildings", the apartment units are not listed as a permitted use.

4. The Board considered the Exhibits submitted by the Applicant and those introduced by the Board, the Board Engineer and Planner's Report. The Exhibits marked into evidence for consideration were:

- | | |
|-------|--|
| A-1 | Applicant's Architect, Michael Savarse report |
| A-2 | Six (6) pages of color photos of existing conditions and layout of interior of building |
| A-3 | Historic tax records |
| A-4 | New Jersey Property Tax System Legend |
| A-5 | July 1969 Master Plan and Summary Proposals |
| A-6 | Memorandum for Planning Board Clerk of Loch Arbour to Planning Board of County of Monmouth, dated January 10, 1977 |
| A-7 | Resolution dated January 25, 1977 |
| A-8 | N.J.S.A. 40:55D-68 |
| A-9 | Continued Operations |
| B-1 | Application |
| B-2 | Applicant's requested OPRA Documents |
| B-2-1 | 2000 Statement of Income and Expenses |
| B-2-2 | 2007 Statement of Income and Expenses |
| B-3 | Village Engineer & Planner, Peter Avakian report |
| B-4 | Village Zoning Officer Determination |

5. At the May 15, 2019, the Board heard testimony from Applicant and the Board's Professionals. Thereafter, Applicant obtained a transcript of that hearing (Tr.) which was distributed and reviewed by Applicant's and the Board's counsel.

6. The testimony and documents submitted at the May 15, 2019 revealed the following which the Board considered in its decision:

a. The Applicant's architect reviewed the layout of the building, stating that he found nothing has changed in its interior or exterior, and that they were the original walls in the building. (Tr. 39:6-41:14.)

b. Each floor has two units, a central hallway serves all floors, the piping hasn't changed, and kitchens are in the original position. (Tr. 41:15-44:2.)

c. Photos of the rundown interior were entered as an exhibit.

d. The Applicant's planner discussed the historical record of the Property, including that when part of Ocean Township there was no ordinance restricting use. He further stated that it came under Loch Arbour's jurisdiction in 1957, and in 1966 it was designated as "4C", which under the New Jersey tax system is an apartment building having five or more units. (Tr. 48:20-54:10.)

e. As of 2018, the Property was still designated as "4C". A CO (certificate of occupancy) was needed to inhabit the apartments after 1957. There is no record of any COs having

been issued. There is no record of any State inspections, as is required every five (5) years under the New Jersey Dwelling Act. (Tr. 54:11-56:13.)

f. Taxes were paid under 4C designation. (Tr. 57:21-61:6.) The 1969 Master Plan and the Chair acknowledges that the building is historically an apartment building, so there is no need for proofs on that issue. (Tr. 64:11-67:10.) Starting in 1975, having an apartment building in this area was not a permitted use. (Tr. 67:11-75:10.)

g. The only question is whether the nonconforming use was abandoned. (Tr. 80:14-83:17.)

h. There is no evidence of renting or occupancy; no evidence of COs or state inspections required every five (5) years. (Tr. 83:18-87:1.)

7. The clear policy of this State is to eliminate nonconforming uses as quickly as is compatible with justice. Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980).

8. An unsubstantiated assertion of intention cannot carry the day, for that would substantially impair, if not defeat, advancement of the elimination policy. Rather, the Applicant must demonstrate that the intention to continue the use is a continuing and definite intention, Villari v. Zoning Bd. of Adj. of Deptford, 277 N.J. Super. 130, 137, 649 A.2d 98, 101 (App.Div.1994), which must be substantiated by all of the circumstances surrounding the cessation.

9. The Applicant bears the burden of proof by a preponderance of the evidence and failed to sustain that burden in this Application.

10. The Applicant claimed that the Loch Arbour Ordinance 617 (incorrectly referred to as 618) creates an unlawful mandatory abandonment of nonconforming uses. However, the Applicant admitted that the Ordinance might also be interpreted as only presumptive, not conclusive. The Ordinance is presumptive and therefore meets the legal standard:

Abandonment: A non-conforming use as defined in the preceding section shall be considered abandoned if such non-conforming use is terminated by the owner or tenant or if the owner or tenant shall fail to use the property for a period of two years, this shall be presumptive evidence of abandonment and thereafter such building, structure and/or land shall not be used in a non-conforming manner.

11. Loch Arbour Ordinance 617(B) provides a presumption which simply establishes that the burden of proof is on the Applicant to show that the Property's nonconforming use has not been abandoned. The proofs revealed that the use of the Building for multi-unit apartment use had terminated decades before this Application was filed and therefore the presumption of abandonment for failure to use for a period of two years is very relevant.

12. The Board applies the traditional subjective test of abandonment to determine that abandonment occurred in this matter. Two factors which were found here: (1) an intention to abandon, and (2) overt acts and failure to act which carries a sufficient implication that the Applicant and its predecessor neither claimed nor retained an intent in continuing the use in question.

13. The Applicant failed to present such proofs that the nonconforming use was not abandoned. To the contrary, documents submitted provided the opposite, including the Village's documents "Annual Statement of Income and Expenses for Apartment Properties" ("Annual Statement") filled out by the Applicant's predecessor, and the Property's appraisals which were marked as part of a package of OPRA documents sought by the Applicant from the Village. B-2-1 and B2-2. These documents show that the Applicant changed the designation of the Property from a five unit apartment building to a single family residence in 2007.

14. The Annual Statements and appraisals show further evidence of intent of abandonment:

Date	Document	Units	Notes
1997	Appraisal	6	
January 1, 2000 to December 31, 2000	Annual Statement (Received 2001)	5	Notes no income; annual vacancy percentage as 80%; that

Date	Document	Units	Notes
			property is vacant; and none of the units have been rented at all. Five (5) units listed on line 2 and in Part 4.
July 16, 2007 ("Reval Date: 2007/10/01")	Appraisal	5	

July 16, 2007 ("Reval Date: 2007/10/01")	Appraisal	5	
Not Dated	Annual Statement (Received June 2, 2007)	None Entered	Applicant notes that the property 100% owner occupied; 95% physical obsolescence. Does not list any units on line 2 or in Part 4, as had been done on past Annual Statements.
Note Dated ("Reval Date: 2007/10/01")	Appraisal	1	Notes: "Former 5 family dwelling converted to one family as per owner."

A property tax record may be persuasive evidence of the manner in which a property was used. This is found in the reduction in units from six (6) to five (5), and then the Applicant's predecessor designating the Property as a single family property, which has remained unchallenged on the tax rolls since October 1, 2007.

15. The Applicant failed to provide evidence that the Building:

- a. Continued in use as a multi-family dwelling;
- b. Had renovations made to keep it in repair as a multi-family dwelling;
- c. Had necessary licensures current;
- d. Was ready to be used on short notice as apartments;
- e. Was off the market for only a short while, to make necessary repairs, and then returned it to use;

- f. Was advertised for rental of the units; or
- g. Was occupied as a multi-family dwelling.

16. Applying the subjective test, the Board found that the Applicant failed to provide the necessary proofs to support its claim that the nonconforming aspect of the property has not been abandoned. The Zoning Officer's determination is supported by documentation and history.

17. The Applicant also failed to show there was no abandonment based on a limited objective test. The Applicant's intention must be substantiated by all of the circumstances surrounding the cessation of use, and must be supported by objective evidence and reasonable inferences from such evidence. A failure to act by the Applicant to rent or attempt to rent, and a failure to challenge the self-imposed designation as a single family property, are examples here, of objective evidence that the Board takes into consideration to determine abandonment.

18. The Property had not been rented out as multi-family apartments for well over a decade and possibly for decades.

19. The Board considered the Exhibits submitted and testimony by the Applicant's witnesses and experts as well as testimony by the Village's Planners and the Village Engineer at the hearings to arrive at its conclusions.

NOW, THEREFORE, BE IT RESOLVED, that the Board of the Village of Loch Arbour does DENY the appeal filed by of 205 Edgemont LLC asking for a reversal of the Village Zoning Determination that the use of the Property a six unit multi-family facility had been abandoned, upon the evidence before the Board and the findings contained herein and which vote was taken at the Board's meeting of October 16, 2019.

UPON MOTION of Ms. Appello, seconded by Mr. Wiener.

Recorded Vote:

AYES: Ms. Appello, Mr. Weiner, Ms. Wilusz

NAYS: None

ABSTAIN: Mayor Fernicola, Ms. Gosline, Mr. Maisto

ABSENT: Commissioner D' Angelo, Mr.
R. Fernicola, Mr. Santos

Continued:

C. Shams, 214 Euclid Avenue, Loch Arbour, Block 10, Lot 5 - The Applicant is requesting amended approval from the Planning Board to continue to construct a new single-family dwelling with a driveway, in ground swimming pool, and storage shed. The Applicant made the following changes from the approved plan; a half story addition to the 2-story house; a new configuration of the front porch; relocation of the basement Bilco door, generator and air-conditioning condenser units; and relocation of an in-ground swimming pool, raised patio and shed.

It was determined at the meeting this application does not have a quorum, so this matter cannot be heard tonight.

This matter has been continued until the next Planning Board Meeting scheduled for March 18, 2020, with no further notice necessary.

NEW BUSINESS –

A. Goodman, 2 Elberon Avenue, Block 5, Lot 1 (MAJOR ALTERATION)

Application for a Certificate of Appropriateness: An Application was received on behalf of Mr. and Mrs. Goodman regarding the Historic Preservation Ordinance of the Village of Loch Arbour for a Certificate of Appropriateness for a MAJOR ALTERATION.

Sanford Brown, Esq., explained to the Board that this matter is not being heard by the Board tonight, due to the fact that it was determined by the Village Engineer that a USE Variance should be filed regarding this matter. The Board has always required that a Variance Application be considered first, or at the same time as the Certificate of Appropriateness. It was determined that this matter will have to be re-noticed.

B. 329 Euclid Avenue, Block 3, Lot 12. Variance Application.

An Application has been received on behalf of the Applicant, 329 Euclid, LLC. The Applicant is requesting approval from the Planning Board for a variance of the roof overhang in the

side building setback. The improvements require variance for side building setback. The improvements will require a variance as otherwise described in the Engineer's Completeness Report dated January 31, 2019.

It was determined at the meeting this application does not have quorum, so this matter cannot be heard tonight.

This matter has been continued until the next Planning Board Meeting scheduled for March 18, 2020, with no further notice necessary.

Ms. Krimko represents 214 Euclid Avenue and 329 Euclid Avenue, she stated that because both applications are being adjourned tonight, due to not having a quorum which was only determined at the meeting, the Board Secretary shall have written confirmation by each board member that they will be present at the next scheduled hearing date.

DISCUSSION/VOTE –

A. Regular Meeting scheduled for March 18, 2020.

B. Pending Application -

- **BETESH, 116 Elberon Avenue, Variance Application/Certificate of Appropriateness –**
Will be scheduled when the Applications are deemed complete.

PUBLIC COMMENTS –

UPON MOTION of Mayor Fernicola, seconded by Mr. Wiener, carried the meeting be opened to the public.

Mr. Goodman, Elberon Avenue, discussed with the Board the recent submission of an Application of a Certificate of Appropriateness for his home at 2 Elberon Avenue. Mr. Brown stated the Board will not discuss the matter at this time.

David DenBleyker, Euclid Avenue, commented there is a pattern of behavior with some homeowners in the Village regarding not building what was originally approved.

Being no further comments, UPON MOTION of Mayor Fernicola, seconded by Commissioner D' Angelo, carried the meeting be closed to the public.

Recorded Vote:

Ayes: Mayor Fernicola, Ms. Appello, Ms. Gosline, Mr. Wiener, Ms. Wilusz, Mr. Maisto

Nays: None

Absent: Commissioner D' Angelo, Mr. R. Fernicola
Mr. Santos.

UPON MOTION of Mr. R. Fernicola, seconded by Ms. Wilusz, carried, that the meeting be finally adjourned at 8:05 PM.

Marilyn Simons
Board Secretary