

MORRIS COUNTY CONSTRUCTION BOARD OF APPEALS MINUTES

DATE: Thursday, January 24, 2013 - 7:30 p.m.
FREEHOLDER PUBLIC MEETING ROOM

Chairman Theodore Maglione called the meeting to order
Pledge of Allegiance
Open Public Meeting Statement
Chairman Maglione requested a roll call

PRESENT: Regular Members:
Chairman Ted Maglione, Vice Jeffrey Betz, Edward Bucceri, (5)
Harold Endean, Craig Villa
Alternate Members:
William Asdal, Sean Donlon, Kimberly Hurley, Keith Lynch (4)

ALSO PRESENT:
Martin F. Barbato, Esq., Board Attorney
W. Randall Bush, Esq., Assistant County Counsel
Evelyn Tierney, Board Secretary

APPROVAL OF RESOLUTION:

- Approval of Resolution 2013/1 (2013/14 CBA Meeting Time/Dates). The Board reviewed the 2013/14 meeting date schedule for any potential conflicts. Edward Bucceri made a motion to approve resolution for the 2011/12 meeting schedule as submitted. Vice Chairman Jeffrey Betz seconded the motion. The Board approved the resolution by the following roll call vote:

YES: Chairman Ted Maglione, Vice Jeffrey Betz, Edward Bucceri, (5)
Harold Endean, Craig Villa

NO: None (0)

NOT VOTING: William Asdal, Sean Donlon, Kimberly Hurley, Keith Lynch (4)

APPROVAL OF MINUTES:

Minutes of the meeting held December 20, 2012 were previously distributed. Edward Bucceri moved the approval of the minutes as submitted. Chairman Maglione seconded the motion. The Board approved the minutes as submitted by the following roll call vote:

YES: Chairman Ted Maglione, Vice Chairman Jeffrey Betz, William Asdal, (8)
Edward Bucceri, Harold Endean, Kimberly Hurley, Keith Lynch, Craig Villa

NO: None (0)

NOT VOTING: Sean Donlon (1)

CASES WITHDRAWN (“*Withdrawal Confirmation*” faxed & mailed to all parties and made part of the case files)

MC#2012-13 David Chiarolanio (Block 1105, Lot 28 worksite: 85 Park Avenue) v. Borough of Madison

MC#2013-1 Mountain Club Condo Assoc., Inc c/o Impac Property Mgmt. (2467 Rt. 10 E, Unit 40-2A) v. Parsippany-Troy-Hills Fire Prevention Bureau

CASE POSTPONED

MC#2013-3 Anthony Luzba, A-1 Remodeling LLC., Agent (John & Brenda Crooks, Block 2301, Lot 12 Worksite: 52 Village Rd.) v. Township of Pequannock (2/28/13 – 2ND MEETING DATE)

CORRESPONDENCE

CASE FORWARDED TO SOMERSET COUNTY – CONFLICT OF INTEREST - Township of Boonton, (Appeal was received by the Morris County CBA on 1/17/13, and forwarded to Somerset County CBA on 1/18/13 copying all parties).

Budget Balance as of January 24, 2013 = \$605.18

NEW BUSINESS

- Board member 2013 contact information distributed. Review and inform Board Secretary of any updates/changes to be made.
- Distribution of 2012 Annual Report.
- Process Correspondence and Appeal case files as per NJAC 5:23A-2.4 records retention and the provided State of New Jersey Archives and Records Retention schedule. Last processed in January 2010. Board authorized the secretary to process files for archives as per retention schedule.
- Membership updates for expired terms and renewal to another four year terms were made as well as announcement of Chair Ted Maglione for 2013 and Vice Chair Jeffrey Betz for 2013 as per Freeholder Resolution # 22 dated January 4, 2013.
- Alternate member appointment announcement of Sean Donlon, appointed by Freeholders on January 23, 2013.

CASE TO BE HEARD

MC#2006-34/1 Tucker Kelley (Block 30503, Lot 12) vs Twp. of Rockaway

The Chairman requested a roll call to affirm what members had reviewed the files including transcripts of previous hearings as provided to all members in October 2012 in preparation for this hearing in regards to the appeal:

YES: Chairman Ted Maglione, Vice Chairman Jeffrey Betz, William Asdal, (8)
Edward Bucceri, Harold Endean, Kimberly Hurley, Keith Lynch, Craig Villa

NO: Sean Donlon (1)

NOTE: The following is a summary of the hearing on this matter. The official recording of the hearing serves as the official record of this matter.

Board attorney Barbato explained that the Board has to consider only the part that was remanded by the appellate court ruling as to the factual testimony by the witnesses in regards to the omission of the garage door and moving of the front door. The air conditioning violation stands. The appellant stated that he had verbal permission from Mr. Hartman not to install the garage door and move the front door.

This is the fact question that the Boards need to consider. On page nineteen and twenty of the appellate courts ruling it provides what it is asking the Board on remand. The Board shall permit the parties to supplement the evidence concerning the statements allegedly made by Mr. Hartman on which the plaintiff reportedly relied when he failed to install the overhead door and moved the front door.

The Board could find that the statements were made by Hartman were plausible, or it could find the reverse, or that it has not been properly established by the appellant.

If the Board concludes that the statements were made the question then becomes whether Mr. Hartman was authorized to tell the appellant that he did not have to install the garage door. The court on page twenty on the first paragraph states that “Even if the Board determines that the township was not estopped from enforcing the UCC for the violations concerning the overhead garage door and the pedestrian door” if the Board in fact finds that Hartman made the statements as asserted by plaintiff, the Board may consider those statements in determining a fair and appropriate penalty.

The Board should consider the witnesses’ testimony based on the appellate decision.

Appearances:

Representing the Municipality:

John Iaciovano, Esq., law office of Iaciovano, Fiamingo & Perrone, Morristown

Representing the Appellant:

David Pennella, Esq., law office of Pennella & Claps, Dover

The following witnesses were sworn in by Board attorney Barbato

Tucker Kelley, “Mr. Kelley” residing at 449 Green Pond Road, Rockaway NJ

Raymond Witwick, “Mr. Witwick” residing at 31 Growar Road, East Hanover NJ, Building Inspector at the time.

Counsel Pennella objected to the distribution to the members of Mr. Iaciovano’s January 23, 2013 response to his January 14, 2013 letter brief which was less than ten days prior to the January 24, 2013 hearing which is contrary to Board policy.

Objection noted. Counsel Iaciovano indicated that he did not anticipate any submittals to be made. Once he received the letter brief he felt it appropriate to respond to same.

Mr. Kelley testified that on the property he owns at 62 Megan Road an issue arose concerning septic failure. The septic field appeared to be close to the proposed garage door to be installed as shown on a permit and plans as well as an entrance door. He had to move the proposed driveway a few feet back and move the proposed entrance door to assure a solid foundation. Once the septic tank failure and field location arose he contacted the health department as well as Mr. Hartman who he then had a meeting with concerning the septic tank/field hardship issues. Mr. Witwick was called into the meeting and Mr. Hartman explained the issues to Mr. Witwick. The agreement was to omit the garage door and to move the entrance door to the left a couple feet. The meeting with Mr. Hartman occurred the week after the 4th of July weekend in 2000 in the township office.

Cross examination followed, of the witness by Counsel Iacofano asking if anyone else other than Mr. Kelley were in attendance and if it was correct that Mr. Kelley applied for a building permit. Mr. Kelley stated that he did file for a permit with plans in 1999. Counsel Iacofano asked if at the time he submitted the documents it showed a pre-existing non conforming use.

Counsel Pennella objected to the questioning of his witness as to the scope of questioning.

Response by Iacofano – the credibility of the witnesses is essential and what they are vouching to the Board and that the meeting in fact took place and what allegedly was said. Any questioning that can provide detail would be helpful.

Chairman Maglione asked that in order to receive a building permit, zoning approval would have to be provided. The Board is here to enforce the Uniform Construction Code and does not allow statements concerning zoning issues which are not under the Board's jurisdiction.

Discussion by counsel followed regarding the issue of credibility of the witness and the potential of new facts which were not known at the time. Counsel Barbato stated that the prior record has examined the issue of the general credibility of the witness.

The burden is on the appellant to establish that the alleged meeting took place. The Board can decide considering the combination of the information that has been provided by testimony and the examination of the prior record conclude as to credibility if it is sufficient or insufficient.

Counsel Iacofano reserves his objection. He continued with cross examination of witness Kelley. Mr. Kelley stated that most of the inspections were performed by Mr. Witwick.

Re-direct by Counsel Pennella followed.

Questions by the board followed of Mr. Kelley as to the discussion he had with Mr. Hartman concerning the omission and or the possible re-locating of the garage. Explanation was provided by Mr. Kelley to the Board as to what is shown on the plan, and what is existing at the location not shown on the plan such as dividing walls and utilities. When asked at what point he decided to eliminate the garage door Mr. Kelley indicated that once the septic tank collapsed and the waste lines broke he discovered the location of the existing field. The proximity of the field to the proposed garage door became an issue since he could not pave over the field. Member Asdal asked if anything else on the property that could be considered a "field change" occurred. Mr. Kelley stated that the garage door location, driveway and the door entrance were the only issues that arose

after the septic issue occurred. The first floor is an open area with a dining room, kitchen with a two riser platform leading either upstairs to a second floor or down into the storage/utility area.

Re-cross by Counsel Iacofano of Mr. Kelley followed, questioning Mr. Kelley as he had testified at the hearings in 2007, and as the Board found at that time that revised plans would have been required for the changes as it notes on the application to the municipality for the Certificate of Occupancy that he signed. Mr. Kelley stated that he did not have knowledge of what the application, that he partially filled out actually said, and what it meant to him. Counsel Iacofano asked if Mr. Kelley recalled testifying and admitting too at the last hearings that a building permit contained language advising him to file revised plans or drawings in the event any changes were made to the project, and the Board finding that as a fact at the last hearing? Mr. Kelley stated that he did not recall his testimony at the previous hearings in its entirety. Counsel Iacofano asked if Mr. Kelley recalled Mr. Creran's testimony that was accepted by the Board as to his findings after inspection of that area and premises were turned into a living space? Mr. Kelley answered that that was Mr. Creran's testimony. Nothing further was added.

Board member Asdal questioned Mr. Kelley whether Mr. Kelley or any tenants lived in the space at the time. Mr. Kelley stated that the property is a rental property.

Mr. Witwick testified that he was called into a meeting with Mr. Hartman and Mr. Kelley. Plans were on the desk and Mr. Hartman explained to him that Mr. Kelley had made him aware of the septic field location issue. Mr. Witwick testified that the solution was per Mr. Hartman to move the entry door to the left to not impact the piping of the septic field, and eliminate the garage door. All inspections were performed by him and in accordance with the construction plans and Mr. Hartman's verbal instructions. He stated that he did not ask Mr. Kelley for revised plans, and believes that such were not required. He believes that the move of the opening of the entrance door is a small (diminimus) change and the omission of the garage door also did not require revised plans since the existing wall was solid with no cracks or heaving. He feels that no revised plans were necessary.

Cross examination by Counsel Iacofano followed. Your testimony tonight is that you never told Mr. Kelley that he had to file remanded plans, but did you ever tell him he didn't have to?, you never told Mr. Kelley anything about the requirement that is on the permit or the occupancy application?, Mr. Witwick stated that his position at the time was building inspector not building subcode which would make that determination if revised plans would be necessary and at that time it would have been Mr. Hartman's responsibility. The various subcode inspections were performed by him. Did you see anything anywhere in the file (construction jacket file) or notations, memorandum confirming in any way the waiver was given by Mr. Hartman as to the garage door and entrance door. Mr. Witwick indicated that he did not.

Counsel Iacofano further asked if Mr. Sanfillippo who became the Construction Official and who signed the Certificate of Occupancy received the file there was no indication or notes on that application to any of the above? Mr. Sanfilippo would have no way of knowing that any changes were made on this project? Mr. Witwick stated that not unless Mr. Hartman told him something.

Re-cross by Counsel Pennella he asked the witness when in Rockaway Township is the application required to be filled out for a final CO (Certificate of Occupancy)?.

Objection was made by Counsel Iacofano for not being the scope of the previous testimony.

Proffer by Counsel Pennella to the Board that Counsel Iacofano is contesting that there is language on the applications that you have to file for revised plans when there are changes. If the CO application is filed in concurrence with the building permit, an applicant would sign it blank until the project is completed which could mean it would be some time and how would an applicant remember what it said.

The Board allowed the question to be asked. Mr. Witwick stated that the UCC states that an applicant files the application for a CO at the time when you file for the permit application. In Rockaway Township it is required at the time of permit application. Cross by Counsel Iacofano asked if he knew when Mr. Kelley filed the CO application?. Mr. Witwick stated that he did not.

Board member Villa asked if Mr. Witwick was asked by Mr. Sanfilippo if there were any changes on this project. When he signed off he placed the date and his initials on the file then handed it to the subcode official at the time Mr. Sanfilippo signs the CO. Questions were asked about the township requirements of the submittal of "as -built" plans. Mr. Witwick indicated that those are sometimes required when there are major structural issues, but not for minor changes as he believes were made in this case.

Re-direct by Counsel Iacofano followed that at the time the CO was signed Mr. Sanfilippo was the Construction Official and he would have been the one making the determination if "as-built plans would be required. Mr. Witwick stated it would have been the subcode who at the time was Mr. Sanfilippo.

Redirect by Counsel Pennella. At the time Mr. Hartman was the subcode official? Mr. Witwick indicated that at the time Mr. Hartman and Sanfilippo were both at various times the subcode and construction official due to illness, retirement, passing tests, etc. When Mr. Hartman was in the office he assumed that he was there as the subcode and construction official and when he received instructions he would follow them.

Nothing further by counsels.

Questions by the Board of the witness occurred as to who was in charge. At the time, Mr. Hartman was the subcode official, construction official and zoning officer.

Counsel Pennella rests.

Counsel Iacofano called rebuttal witness Lois Martin and asked that she be sworn in by Board Counsel Barbato. The witness was sworn in.

The witness is to testify in regards to the credibility of the testimony given by Mr. Witwick.

Ms. Martin testified that she retired in 2006. She had served as the Chief Administrative Secretary directly serving under Mr. Hartman for six years, and has worked a total of nineteen years in the Rockaway Township Construction Office. Her responsibilities included the processing of permits, financial work and preparing correspondence for the Construction Official, Zoning Officer and Inspectors, as well as other office related jobs. Her primary job was working as Mr. Hartman's secretary. She described Mr. Hartman as responsible, fair and very knowledgeable. She stated that

in her experience Mr. Hartman when permitting a change to a permit or plans, at the very least a notation would be placed in the file, or somewhere on the file confirming an amendment.

Questions by the Board followed. She was not present at the meeting described, but in her experience a note would have been placed in the file after a meeting. At the time when she left there were approximately a thousand applications filed. No further questions and Ms. Martin was excused.

The parties rested.

Counsel Barbato stated the decisions made by the Board in March 2007 that the Board found the changes made to the building during the construction process were not reflected in the permit application or made known by application for the Certificate of Occupancy contrary to NJAC 5:23-2.24. The appellate court reversed the CBA Board leaving room for the plaintiff to give testimony as to why he did not build in accordance to the plans and or made known in the Certificate of Occupancy that he had altered the work from the original plans.

The two next steps would be:

- 1) The credibility of the statements and whether Hartman instructed Kelley that he could eliminate the garage door and move the front door shown on the plan and that he was silent to the issue reflecting these changes in the Certificate of Occupancy application. The Board is to determine whether the statements were made and decide weight to that.
- 2) Did Mr. Hartman have the authority to make the determination and provide the statements he made to Mr. Kelley allegedly? Was that in scope of his authority?

Both counsels should come up and explain to the Board their client's position with regard to the authority of Mr. Hartman to issue the change and the silence on the issue to reflect the changes in the permit and CO application, and was that in Mr. Hartman's authority to not instruct the applicant to make the changes that the appellant relied upon.

Counsel Pennella stated that the most telling line in the appellate court decision is on page seventeen that states "we are satisfied from the review of the record that several Board members may have voted differently had they been permitted to consider Hartman's statements". Counsel Pennella stated that Mr. Hartman did have the authority. There was no violation. NJAC 5:23-14 which is a lengthy paragraph. Nothing in it requires a plan to be modified especially when there is work not being done, and in this case it was an omission and not construction. There is no triggering event. There were two minor changes to a permit application by omitting a garage door and moving an entrance door a few feet.

NJAC 5:23-2.15(v) Amended plans and Specifications: states "Amendments may be filed at any time, such amendments shall be deemed a part of the original application and when released shall be filed there with, amended plans and specifications shall be required where the deviation affects matters controlled by the code". Plans show a door which was relocated by moving it a few feet – dimenimus, nothing to be done to the wall so the code is not impacted. "Where deviations reflect matters controlled by the code and in the judgment of the subcode official having jurisdiction such amended plans may be necessary to assist in the determination of code compliance". In this case it is not about zoning issued but about code compliance and is it built to code. Mr. Hartman had the authority as construction code and building subcode official and made the call that is not necessary

for amendments. NJAC 5:23-2.15 sub section Plans, plan release, 1, x - The construction official under advice of the appropriate subcode official may waive the requirement of plans when the work is of a minor nature. The appellate court also brought up the estoppel certificate. Six years after the issuance of a Certificate of Occupancy his applicant was served with a Notice of Violation. At that point in time Mr. Hartman was deceased. His client relied in good faith upon the action of a municipal official. The issue the Board should consider is if they believe Mr. Kelley and Mr. Witwick as to whether the statement was made by Mr. Hartman. Mr. Kelley relied on that. Mr. Kelley acting properly and with authority of the municipality and the complaint should be dismissed.

Counsel Iacofano indicated that the appellate court decision did not say that the prior decision was wrong but remanded a part where it felt the Board made a wrong evidential ruling in excluding testimony. All of the evidence shall be considered including the prior record and the testimony provided tonight in order to make a determination. This matter has been going on for so long that the successor to Mr. Hartman, Mr. Sanfilippo is also deceased. Several uncontroverted facts are known 1. Material deviation from the plans and specifications originally submitted with respect to this project 2. The complete intentional ignoring of the admonition on the permit application and the CO application to file amended plans or specification for any deviations, every excuse given for not doing those simple things. Mr. Witwick six years ago testified that he did tell Mr. Kelley to take care of the air conditioning problem by filing for a permit. Six years later when the Violation was issued that was also not done. That should provide you with the insight of the mentality of the testimony provided by the applicant Mr. Kelley tonight. All these explanations are about why there was no compliance. The change was spotted six years later and interestingly an inspection required a search warrant at which time the inspector found the living arrangements for which the Violation was issued. The authority was vested in Mr. Hartman as to the Construction Official and he could have done it in terms of his act. You heard from Ms. Martin tonight and she told you that Mr. Hartman never permitted a modification without the very least of memorializing that fact in the file. No wonder the CO was issued in this case due to Mr. Sanfilippo never being told that there were any deviations, and when he reviewed the jacket only seeing check off marks from the inspector Mr. Witwick. The law of estoppel requires clean hands. Do you have any evidential records that the septic issue ever took place, and that the alleged meeting took place that is independent of the testimony of Mr. Kelley and Mr. Witwick? You know from testimony that the inside of the house is different than what is on the plans. The decision the Board made last time is the only correct decision and respectfully requests after considering the additional testimony to be exactly the same as the last time around.

Board Counsel Barbato advised that to clarify for the record. The wording on the violation converted a garage to a living space, and installed central air conditioning without a permit. Findings of fact on the violation when it was first heard in 2007 itemized in the appellate court decision is that the use of the building reflected finished living space on the first floor where the plans specified a one car garage to have been provided. Neither the owner, nor the inspector noted the deviation during the construction to the construction official prior to the issuance of the CO verbally or by noting the application for CO. The court notes on page fourteen that the plaintiff acknowledges that he was instructed that the area designated on the original building plans as a garage could only be used for storage, not living quarters. The issue of estoppel respectfully has not been established by counsel properly.

The record is clear that the plaintiff did not say that he was told by Hartman that the space could be used as living space. The municipality is not estopped from a later finding that the space was being used as living space. It could have been estopped with regard to an alleged violation that he failed to get permits generally.

The Board could find that Mr. Kelley had the conversation with Mr. Hartman and that he didn't have to build to the plans, and that Hartman was silent on whether or not he had to do anything with the municipality and give updates. That does not change the other findings of the Board and the Violation Notice.

The following issues should be considered by the Board in order:

- 1) Was the testimony provided tonight credible and did Hartman make the statements?
- 2) Did Hartman have the authority to make the statements?
- 3) Decide on the estoppel issue - Did the appellant in good faith rely upon the conduct and statement made by Mr. Hartman?
- 4) Is there a fair and appropriate penalty still to be applied?

Discussion followed by the Board. The Chairman read into the record the decisions the Board issued in 2007.

The Board determined by direct testimony, cross examination, and review of evidence that:

- A permit application was made and permit issued for the full reconstruction of a pre-existing carriage house as depicted on the plans that were made part of the permit application.
- The Owner acknowledges that substantive deviations were made during the construction, specifically that an opening and door were not installed so as to create a garage, and that a central air conditioning unit was installed.
- The Municipal Inspector approved the construction.
- The Municipal Inspector requested that the electrical section of the permit be updated to include the air conditioning compressor.
- The electrical section of the permit was not updated to reflect the air conditioning compressor as requested.
- The Application for Certificate (of Occupancy) states "Rebuild second story of dwelling".
- Neither the Owner nor the Municipal Inspector identified the deviations made during the construction to the Construction Official prior to the issuance of the Certificate of Occupancy verbally or by submission of the Application for Certificate.
- The use of the building reflects finished living space on the first floor where the plans specify a one car garage to have been provided.

WHEREAS, the Members of the Board, after having been presented the above factual data, and after discussion by the Board, found that: The changes made to the building during the course of the construction project were not reflected in the permit application or made known by application for the certificate of occupancy, contrary to the provisions of N.J.A.C. 5:23-2.24 et seq.

NOW, THEREFORE BE IT RESOLVED, that; The Board upholds the Notice of Violation and Order to Terminate and the Notice and Order of Penalty issued by the Construction Code Official, Borough of Rockaway in the captioned appeal.

That is what had been previously approved. The air conditioning issue has since been resolved. A motion was offered by Chairman Maglione on the portion that was remanded by the appellate court which is as follows:

Motion is to deny the Notice, accepting appellant's testimony that Mr. Hartman orally gave Appellant permission during the course of the construction project to make changes from the original building permit application, that Hartman was authorized to grant such permission, and that although Appellant failed to submit revised plans, and did not otherwise identify the deviations made during the construction to the Construction Official prior to the issuance of the Certificate of Occupancy, either verbally or by submission of the Application for Certificate, such failure did not support the subject NOV, and therefore no penalty is payable by Appellant in connection with the NOV for the garage door and the front entrance door only. The motion was seconded by Bill Asdal. Extensive Board discussion followed. The motion was approved by the following roll call vote of the five regular members in attendance:

YES: Chairman Ted Maglione, Jeffrey Betz, Craig Villa (3)

NO: Edward Bucceri, Harold Endean (2)

NOT VOTING: William Asdal, Sean Donlon, Kimberly Hurley, Keith Lynch (4)

The motion passed and the parties were advised that the written decision/resolution will be approved at the next meeting of the Board scheduled for February 28, 2013 and mailed to all parties shortly thereafter.

NEXT MEETINGS: Thursday February 28, 2013

ADJOURN: On motion duly made and seconded, the meeting was adjourned at 11:45 p.m.

Evelyn Tierney, Board Secretary