

**MORRIS COUNTY CONSTRUCTION BOARD OF APPEALS  
MINUTES**

Thursday, October 24, 2019 - 7:30 p.m.  
MC CBA Hearing Room  
30 Schuyler Place, 2<sup>nd</sup> Floor, Morristown, NJ 07960

Chairman Theodore Maglione called the meeting to order.  
Pledge of Allegiance  
Open Public Meeting Statement

**MEMBERSHIP**

The Chairman welcomed the newly appointed members as per the Board of Chosen Freeholders Resolution #43 dated July 10, 2019 Nick Marucci, appointed to an alternate term ending July 31, 2023, and Resolution #16 dated October 7, 2019 Chris Walthour, appointed to an alternate unexpired term ending 12/31/2020.

Chairman Maglione requested a roll call.

**PRESENT:**

Regular Members: Chairman Theodore Maglione, Vice Chairman Jeffrey Betz, (5)  
Harold Endean, John Kostrowski, Jr., Keith Lynch

Alternate Members: Timothy Braden, Kimberly Hurley, Sean Donlon, Nick Marucci, (5)  
Chris Walthour

**ALSO PRESENT:** Staci L. Santucci, Esq., Assistant County Counsel  
Evelyn Tierney, Board Secretary

**APPROVAL OF MINUTES:**

Minutes of the meeting held on July 25, 2019, were previously distributed. Keith Lynch made a motion to approve the minutes as submitted. John Kostrowski, Jr, seconded the motion. The Board approved the minutes as submitted by the following roll call vote:

**YES:** Chairman Theodore Maglione, Vice Chairman Jeffrey Betz, Harold Endean, (6)  
John Kostrowski, Jr., Keith Lynch, Sean Donlon

**NO:** None (0)

**NOT VOTING:** Timothy Braden, Kimberly Hurley, Nick Marucci, Chris Walthour (4)

**APPROVAL OF RESOLUTION ---NONE---**

**CASE TO BE HEARD**

**MC#2019-12** K. Hovnanian c/o The Residences at Columbia Park (Block 9101, Lot 6) v.  
Township of Morris

**Appearances:**

John Caniglia, Esq., *representing the applicant*

John Mills, III., Esq., *representing the municipality*

Albert Mastrobattista, Construction Official, Township of Morris

Ronald Auth, Building Inspector, Township of Morris

Richard Arzberger, expert witness on behalf of K. Hovnanian Company

Dawn Korbelak, RA, AIA, Director of Corporate Product Development, K. Hovnanian Company

*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.*

Counsel Santucci swore in the witnesses.

Chairman Maglione stated for the record that there are eight (8) “Notice of Violation and Order to Terminate”, dated September 11, 2019 on appeal. It was confirmed by counsel Caniglia that K. Hovnanian received homeowners consent to represent the owners in fee before the Board at the hearing.

It was noted and stipulated by the parties that the following documents previously received by the Board Secretary and distributed to the Board members along with documents identified and marked during the hearing constitute the record:

A-1 Appeal application dated September 18, 2019 (received by MCCBA on September 19, 2019) including eight (8) Notice of Violation and Order to Terminate (Post-Certificate of Occupancy – Residential Construction):

1. Violation Number **V-19-00042** Bldg. 19 Leslie & Joan Satz (8 Aldrich Court)
2. Violation Number **V-19-00035** Bldg. 19 Donald M. & Patricia McHugh (10 Aldrich Court)
3. Violation Number **V-19-00036** Bldg. 22 Robert & Lois Lieberman (12 Oheka Place)
4. Violation Number **V-19-00040** Bldg. 22 Linda K. Levi (13 Oheka Place)
5. Violation Number **V-19-00041** Bldg. 23 William M. & Angela E. Laufer (9 Oheka Place)
6. Violation Number **V-19-00037** Bldg. 23 Edward Y. Huang (10 Oheka Place)
7. Violation Number **V-19-00038** Bldg. 24 Paul L. Onderdonk (5 Oheka Place)
8. Violation Number **V-19-00039** Bldg. 24 Richard J. & Eve Cella (6 Oheka Place)

A-2 Applicant package dated October 15, 2019 (received by MCCBA on October 17, 2019) including signed consent order forms from all eight homeowners authorizing K. Hovnanian to pursue the appeal process on their behalf.

A-3 Master Deed dated 03/01/2018 and recorded 03/09/2018.

M-1 Municipal package dated October 1, 2019 (received by MCCBA on October 4, 2019).

M-2 Resolution of the Morris Township Planning Board Re: 101 Columbia Road, Application for Preliminary and Final Site Plan approval and Variance relief. Action dated April 18, 2016, adopted on June 20, 2016.

M-3 Drawing – Description: Wall Modification, Model Wheaton/Pratt with red handwritten notes.

Mr. Mills provided the following opening statement. The project consists of approximately 235 units, eight units are under appeal, and specifically the exterior projection of the structure above the roof of the adjoining structure. The township contends that those areas need to have the 2-hour fire protection.

Building Inspector Ronald Auth testified that he serves as the Building Inspector for the township of Morris and is familiar with the project in question. As per the code the common wall/fire wall needs to run from the foundation to the underside of the sheathing. In this case, the eight units that are under appeal the fire wall was installed to the roof line of the lower level roof. The Township contention is that it should run all the way up to the upper level.

Mr. Auth noted that the buildings that have been constructed thus far (approximately 53 buildings) have been constructed with the core wall/fire wall being installed to the upper level, which allowed for the projections/overhangs/vented soffit. Mr. Auth testified that if a fire were to occur in the units without the retrofit, the fire could easily spread from the lower unit into the soffit and in turn spread through the upper soffit to the adjoining unit.

Cross examination followed. Mr. Auth was asked if he knew what the form of ownership was for the units at Columbia Park, he answered that he did not. Mr. Auth was asked if it would change his opinion if he was made aware that the master deed recorded the units as condominiums. Mr. Auth answered that it would not. Mr. Auth was further asked if he was aware that there were building permits issued for the eight completed units in question, as well as certificates of occupancy had been issued. Mr. Auth stated that Columbia Park is large projects and inspections were urgent, and these units slipped through.

Questions by the Board followed regarding the issue with running the wall all the way up to the highest unit, and the issuance of the permit for each building. It was noted that the eight units in question do not conform to the approved building plan.

Construction Official Albert Mastrobattista testified that he has been the Construction official for the past twenty-six years. Mr. Mastrobattista stated that he did not perform the plan review or inspections, but that he is familiar with the project that received Planning Board approval by resolution PB-05-15 for action taken on April 18, 2016. Mr. Mastrobattista read into the record the following, on page two paragraph 3 “K. Hovnanian has applied for preliminary and final site plan approval, variance relief and site plan exception relief/design waivers to develop 164 townhouses and a club house structure on Lot 6 and 71 townhomes on lot 7 and associated infrastructure”. He stated that he was surprised that the project is now constituted as a condominium. Mr. Mastrobattista stated that it was brought to his attention that the detail was missed on the eight units that have been occupied. The parties met and it was agreed that the deficiency on the remaining units that did not have the Certificates of Occupancy issued would be corrected. For the eight units occupied the Violation Notices were issued.

In re-direct Counsel Caniglia questioned Mr. Mastrobattista if he was aware that there are different unit type townhomes, some 26 foot wide and 28 foot wide with master bedroom down units. Counsel Caniglia noted that the units in question are master bedroom down units.

A Master Deed was provided by the applicant and marked (A-3).

Mr. Arzberger testified and provided his expertise. He is a registered architect licensed in New Jersey since 1984, mainly providing architectural services to homebuilders concentrating on multifamily construction, as well as being a member of the Monmouth County Construction Board of Appeals for twenty five years. Mr. Arzberger noted that he was appointed by the DCA commissioner back in 2000 as a member of the committee that evaluated the adoption of the 2000 IBC and IRC.

Mr. Arzberger stated that he does not agree with the code interpretation the municipality provided, and the statement that the construction of the eight units varied from the approved plans.

The detail that was provided and approved on the plans is what is shown on page five in the package the applicant provided to the Board. K. Hovnanian agreed to modify and retrofit the continuity detail of the wall assembly for any buildings that were still under construction. Mr. Arzberger stated that using the same retrofit for the eight units already occupied would be problematic. The retrofit was not necessary and what had been constructed was code compliant. Mr. Arzberger provided testimony concerning the various code sections:

- International Building Code 2015, New Jersey Edition – FIRE WALL
- 2015 International Residential Code Commentary page 2-29 [RB] LOT, page 2-45 TOWNHOUSE
- International Residential Code 2015, New Jersey Edition Chapter 3 Building Planning R300.2 Increase in area, R300.2.2, and R302.2 Townhouses, 302.2.1 Continuity, and R302.2.2 Parapets for townhouses.
- 2015 International Residential Code Commentary Section R302 page 3-41 Fire Resistance Construction, Exceptions.
- International Building Code 2015, New Jersey Edition Chapter 5 Section 503.1 General, and Table 601

The Fire Engineer's report that has been submitted confirms that what was constructed and shown on the plans would follow under the exception of the parapet. Once you reach higher than the level of the roof sheathing for the lower unit, that wall assembly ceases to be a wall assembly that separates two units, rather separates one unit from air space, at that point the parapets code section apply and which the applicant relies on in this case which reads "Where roof surfaces adjacent to the wall or walls are at different elevations and the higher roof is not more than 30 inches above the lower roof, the parapet shall extend not less than 30 inches above the lower roof surface. In particular "Exception: A parapet is not required in the preceding two cases where the roof covering complies with a minimum Class C rating as tested in accordance with ASTM E108 or UL 790 and the roof decking or sheathing is of noncombustible material or approved fire-retardant-treated wood for a distance of 4 feet on each side of the wall or walls, or one layer of 5/8 -inch Type X gypsum board is installed directly beneath the roof decking or sheathing, supported by not less than nominal 2 inch ledgers attached to the sides of the roof framing members, for a distance of not less than 4 feet on each side of the wall or walls and any openings or penetrations in the roof

are not within 4 feet of the common walls. A parapet is not required where the roof surfaces adjacent to the wall or walls are different elevations and the higher roof is not more than 30 inches above the lower roof. The common wall construction from the lower roof to the underside of the higher roof deck shall have not less than a 1-hour fire-resistance rating. The wall shall be rated for exposure from both sides”.

Mr. Arzberger stated that it is his contention with respect to the first issue which is the treatment of the wall which extends above the lower roof to the top roof is that what was designed and illustrated in the submittal provides a 1 –hour fire resistance from both sides is exactly what is called out for in the code. The second issue is the penetration/projection issue cited on the Violation section Table R302.1 (1) exterior walls, minimum fire separation distance. The project was done as condominium form of ownership without lot lines. The definition of what a fire separation distance is defined as the “distance measured from the building face to one of the following: 1) The closest interior lot line, 2) The centerline of a street, an alley or public way, 3) To an imaginary line between two buildings on a lot”, none of which apply in this case, since there is no fire separation distance. The table that was noted in the “Notice of Violation” issued to the eight homeowners does not apply.

Cross examination followed. Mr. Mills asked if he understood that the testimony provided is that townhouses and condominiums can share the exact same construction. Mr. Arzberger answered that condominium is a form of ownership and not a building type according to the code. Townhouses in the code are defined as a building form, condominiums are a form of ownership. Townhouse is not a form of ownership. How could an ownership vary from a condominium type of ownership to another type of ownership? Mr. Arzberger noted that the Commentary notes that the difference of ownership is that you can have multiple dwellings on a single lot, whereas in a fee simple form of ownership each townhouse is on its own independent lot. In this particular case we dealing with a condominium type of ownership as was presented in the Master Deed as well as on the plans that were submitted to the municipality.

Chairman Maglione stated that under definitions in the IRC it reads under townhouse “a single family dwelling unit constructed in a group of three or more attached units in which each unit extends from foundation to roof with a yard or public way of not less than two sides”, it does not address the form of ownership, rather it refers to a structure. It seems beyond the Uniform Construction Code to consider the different type of ownership. The commentary as referred to by the witness is not the adopted code within New Jersey, and thus has no legal bearing.

Ms. Korbela testified that she prepared the report dated October 24, 2019, as well as the drawing on page five which depicts the detail of the wall construction showing a compilation of three different details as were shown on the construction plans. It shows the U.L Design U373 for the core wall design, transitioning to ASW 0810 construction, a living space adjacent to an attic space, and the part as U.L. Design U344, shown on the permit plans that had been submitted and approved.

Cross examination followed and Mr. Mills asked if the drawings provided to the municipality showing the 2-hour fire wall is what was constructed. The applicant constructed the buildings with the 2-hour fire wall except the eight units which had been built and occupied. Ms. Korbela noted that they did not believe the detail is required but in order to cooperate with the township and

receive the necessary approvals without delaying closings and homeowner occupancy they agreed to include the detail on all subsequent constructed buildings.

The parties rested.

Chairman Maglione noted that the approved plan and the drawing depicted on page five showing the wall detail was constructed on the eight units under appeal. After the municipality took a closer look they decided that an omission was made in the approval, and feels that it is severe and should be corrected on the eight units in question.

Discussion by the Board followed, and noted that the commentary mentioned and referenced to by the witness numerous times is not specific to the New Jersey adopted code. It appears that the appellant's defense is the term of ownership not defined by building code. The definition for the building code reads that each unit extends vertically from the foundation to the roof, each unit opens to the exterior at not less than two sides, each unit has an independent egress. Furthermore, the parapet wall issue should never had been brought up, since the separation is not a parapet wall. The Buildings were constructed under the New Jersey Residential Code as townhouses.

The argument that the units were not built as townhouses in order to not have to provide the separation is insufficient.

The code summary details as shown in the package provided by the municipality lists the Building description as Townhouses. Townhouses call for common wall separation by either a fire resistance wall or assembly.

By reading the applicable code sections "the walls shall be rated for fire exposure from both sides and shall extend to and be tight against exterior walls, and to the underside of the roof sheathing". Regarding continuity, the fire resistant wall or assembly separating townhouses in the IRC makes no distinction between a condominium and townhouse. The code refers to building type which shall be continuous from the foundation to the underside of the roof sheathing deck or slab. The fire rating shall extend the full length of the wall or assemblies including wall extensions through and separating attached enclosures.

It was noted that changes can be addressed and made after the issuance of the Certificate of Occupancy.

Chairman Ted Maglione made a motion to uphold the eight Notices issued, and that the appellant has to correct the deficiency. The argument regarding the form of ownership is irrelevant. The code is explicit that the fire resistant wall shall extend from the foundation to the underside of the roof without exception. The appellant shall provide a mediation plan to the municipality in order for the deficient wall sections in the eight units be brought to compliance. The motion was seconded by Keith Lynch. Discussion followed. The motion was approved by the following roll call vote:

**YES:** Chairman Theodore Maglione, Jeffrey Betz, Harold Endean, John Kostrowski, Jr.,(10)  
Timothy Braden, Keith Lynch, Sean Donlon, Kimberly Hurley, Nick Marucci,  
Chris Walthour

NO: None

(0)

**CASES POSTPONED** (*correspondence received/ issued - made part of the case files*)

- MC#2017-8** Estate of Edward Cantor (Block 12 Lots 1.10, 1.12) v. Township of Chester (*stayed pending Superior Court hearings (1<sup>st</sup> mtg. date 10/26/2017 - stayed pending Superior Court proceedings to 11/19/2019)*)
- MC#2019-6** Reiter & Rayter, Tatiana & Wyczeslav (Block 96, Lot 47, worksite: 30 Katie Court) v. Township of East Hanover (*1<sup>st</sup> mtg. date 3/28/2019, 2<sup>nd</sup> mtg. date 5/23/2019, 3<sup>rd</sup> mtg. date 8/22/2019 HD – stayed on 8/15/2019 pending “New Jersey Appellate Division” appeal conclusion*)
- MC#2019-7** Reiter & Rayter, Tatiana & Wyczeslav (Block 96, Lot 47, worksite: 30 Katie Court) v. Township of East Hanover (*1<sup>st</sup> mtg. date 5/23/2019, 2<sup>nd</sup> mtg. date 8/22/2019 stayed on 8/15/2019 pending “New Jersey Appellate Division” appeal conclusion*)
- MC#2019-11** Asma Norris (Block 16, Lot 25 worksite: 27 Parker Road) v. Township of Chester (*1<sup>st</sup> mtg. date 9/26/2019, 2<sup>nd</sup> mtg. date 11/19/2019*)
- MC#2019-15** Xavier Pimenta (Block 701, Lot 5 worksite: 46 Waterloo Valley Road) v. Township of Mount Olive (*1<sup>st</sup> mtg. date 11/19/2019*)
- MC#2019-16** Chris Caiazza (Block 13404, Lot 1.04 worksite: 35 Morristown Road) v. Township of Long Hill (*1<sup>st</sup> mtg. date 10/24/2019, 2<sup>nd</sup> mtg. date 11/19/2019*)
- MC#2019-17** Carant Limited Partnership (Block 1700, Lot 2 worksite: 1200 Bloomfield Avenue) v. Township of West Caldwell/ESSEX COUNTY (*1<sup>st</sup> mtg. date 11/19/2019*)
- MC#2019-18** John Zhang c/o Alcott Manor (Block 163, Lot 7 worksite: 161 Mendham Road) v. Mendham Township Fire Prevention Bureau (*1<sup>st</sup> mtg. date 11/19/2019*)

**CASES WITHDRAWN** (*“Withdrawal Confirmation” letters issued to all parties and made part of the case files*)

- MC#2019-9** Lawrence Berger (Block 8, Lot 15 worksite: 139 Village Road) v. Township of Harding (*1<sup>st</sup> mtg. date 8/22/2019, 2<sup>nd</sup> mtg. date 9/26/2019, 3<sup>rd</sup> meeting date 10/24/2019 HD, withdrawn 10/16/2019*)
- MC#2019-10** B. Andersen (Block 40813, Lot 565, worksite: 39 Cliffside Trail) v. Township of Denville (*Filed 8/14/19, withdrawn 8/15/19*). **Action Taken:** Discussion by the Board followed, and it was noted that the appeal had been withdrawn within twenty four hours. Chairman Ted Maglione made a motion to approve the refund of the appeal fee. The motion was seconded by John Kostrowski, Jr. The motion to refund the appeal fee was approved by the following roll call vote:

**YES:** Chairman Theodore Maglione, Jeffrey Betz, Harold Endean, John Kostrowski, Jr.,(9)  
Keith Lynch, Sean Donlon, Kimberly Hurley, Nick Marucci, Chris Walthour

**ABSTAIN:** Timothy Braden (1)

**NO:** None (0)

**MC#2019-13** J. Bougades (Block 202, Lot 3.8 worksite: 7 Campus Drive) v.  
Twp. of Parsippany-Troy Hills (*Filed 9/24/2019, withdrawn 10/2/2019*)

**CORRESPONDENCE**

- Budget Balance as of October 24, 2019 =\$3,007.90
- **MC#2019-14N/A** – CASE FORWARDED TO SOMERSET COUNTY DUE TO CONFLICT OF INTEREST – Notice issued by Hanover Township Construction Official, Sean Donlon. Appeal document package forwarded to Somerset County CBA by letter dated October 17, 2019 copying all parties to the appeal.

**OLD BUSINESS --- NONE ---**

**NEW BUSINESS**

- Discussion about documents offered by parties at Board hearings. The members may place weight on testimony and documents as they feel appropriate.
- Jeffrey Betz indicated that he has a conflict in hearing the matter currently on the Agenda to be heard in November concerning a Violation Notice issued by the Mendham Township Fire Prevention Bureau as he is a member and former official in the municipality. He will recuse himself from the hearing.

**NEXT MEETING:** Regular Meeting, Tuesday, November 19, 2019 at 7:00 p.m.

**ADJOURN:** On motion duly made and seconded, the meeting adjourned at 8:50 p.m.

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Evelyn Tierney, Board Secretary