

**MILLSTONE TOWNSHIP
BOARD OF ADJUSTMENT
MEETING MINUTES
AUGUST 26, 2009**

Meeting called to Order by Mr. Novellino at 7:30 p.m.

Mr. Frost read the adequate notice.

Salute to the Flag.

Roll Call: Present: Curcio, Novellino, Bailey, Conoscenti, Frost and Lambros. Absent: Barthelmes, Devine and Morelli.

MINUTES: Mr. Bailey made a Motion to approve the July 29, 2009 Meeting Minutes and Mr. Curcio offered a second. Roll Call Vote: Bailey, Curcio, Conoscenti, Frost and Novellino voted yes.

RESOLUTIONS:

Z09-01 SHELLY'S SCHOOL FOR DOGS – Block 57, Lot 33 – Located at Burnt Tavern Road consisting of 56.47 Acres in the BP Zone. Applicant seeks preliminary site plan approval to construct a 25,471, one-story building to operate a facility to include boarding for dogs and cats, pet training school, pet grooming school and pet grooming. Granted Preliminary Site Plan Approval 7-29-09.

Mr. Curcio made a Motion to memorialize the Resolution and Mr. Bailey offered a Second. Roll Call Vote: Curcio, Bailey Lambros, Conoscenti and Novellino voted yes to memorialize.

NEW APPLICATION:

Z09-03 PARAMOUNT MARINAS – Block 54, Lot 1. 14.4 acres located in the RU-P Zone Located near Yellow Meeting House Road. The applicant seeks to construct a single-family dwelling house on the premises. Bulk Variance needed. Deemed Complete: 4-23-09. Date of Action: 8-21-09. Jurisdiction accepted on 5-27-09. Carried to 6-24-09; 7-29-09; 8-26-09 without any further notice. Extension of time granted to 8-31-09.

Board Attorney Greg Vella advised that the jurisdictional packet was accepted before the Board and was in order and jurisdiction had been taken over this application subsequently carried while soil removal was being prosecuted. The application before the Board is a continuation of hearing the request for bulk variance relief.

Attorney Vella read into evidence the following exhibits:

- A-1 Jurisdictional Packet
- A-2 Application dated 2-16-09
- A-3 Plot Plan prepared by PDS, Inc. dated 2/23/08, no revision date
- BOA-1 Township Engineer's Report dated 5/19/09

Mr. Dasaro asked the Board to look at this application with fresh eyes because it is a separate application. ~~This is an opportunity to present the evidence for the Board.~~

Appearing for the applicant is William Stevens P.P. and P.E. Mr. Stevens had been accepted as both an engineer and planner and has testified before the Board in the past and would provide testimony on the application this evening.

The applicant is seeking one for no road frontage on a public street. ~~This~~ is the result of inadequate road frontage because none exists, there is no access through Millstone Township. The private driveway would be through Upper Freehold Township and would be maintained by the homeowner.

Attorney Vella stated that the Board's previous finding on the soil removal permit application on the subject lot is that any contaminated soil should be removed from the site. Mr. Vella advised that the Board had denied the permit for soil removal and, therefore, the soil should not be there. He advised that the soil should not be there as part of this plan. The municipal court's decision does not affect this application since. ~~He advised that~~ the municipal court does not have authority to grant the soil removal permit.

Attorney Vella explained the process of an application going before a zoning board, superior court, appellate division and the supreme court. He stated that the municipal court cannot tell the Board of Adjustment what to do since they are not the reviewing authority. This Board of Adjustment had decided a soil removal permit was needed and the permit. ~~The issue~~ was denied. Attorney Vella stated that from the Board's prospective, they denied the soil removal permit therefore the soil it has to be removed in order to comply with the Zoning Board of Adjustment's previous decision.

Attorney Vella stated that since the applicant refuses to consent to the removal of the soil, which is required by or refuses to comply with a previous decision of the zoning board, there is little value in continuing the hearing on this application. ~~He further advised the Board that if the zoning officer determines that you need a variance the zoning board of adjustment is the entity that would review that. Code enforcement says you did not get a permit and you decided to apply for a permit. We denied it. Code enforcement advises that you are in violation.~~

Attorney Vella ~~suggested it would asked would it not~~ be prudent for the applicant to just ~~say~~ disagree with the zoning officer and board and when a high court makes a determination on the soil removal permit deals with this issue ~~then they can~~ come back at that time. ~~We will come back when this gets litigated one way or the other.~~ Any approval the board would grant would be conditioned upon removal of the soil anyway.

Mr. Dasaro stated that if the court determines the soil is to be removed then it would be removed.

Attorney Vella offered that it is more simplistic to litigate the soil removal permit matter before the courts than to continue the hearing before the board at this time. The current location of the soil also raises other issues for the board to consider. For example, ~~w~~what is a reasonable location of the septic and the well relative to the location of the home and future resident of Millstone who will live there. If we have an order from the court that says the soil remains there then we would ~~it~~ discuss the safety factors of where the septic, well and home and should be located.

The Board had approved the variances twice already before the board became aware of the contaminated soil. ~~The real issue would be they have a huge environmental issue on different sides of the coin.~~ Attorney Vella stated that the application should be withdrawn without prejudice and continued when a court decides on the soil removal permit issue. Mr. Coppola advised that the contaminated soil this is a safety issue and Board is not satisfied with the testimony given by the applicant's professionals and has even asked for permission from the applicant to test the area and that was denied. He offered that approving this house from a planning viewpoint is condoning that the contaminated soil remain. ~~The prudent way to proceed was discussed.~~

Mr. Dasaro withdrew the application without prejudice and the board agreed to waive application fees if the applicant wishes to file the application again after the soil removal issue is decided in litigation. ~~–~~ Mr. Curcio made a Motion to accept the withdrawal without prejudice. Mr. Lambros offered a second and by unanimous vote, the application was withdrawn without prejudice. ~~–~~

NEW APPLICATION:

Z09-04 SEASONAL WORLD – Block 57.01, Lot 21.01. 2.91 Acres located in the HC-1 Zone know as 532 Monmouth Road. Applicant seeks use variance relief to allow the display of three above-ground pools. Use variance and amended major site plan approval sought. Application deemed complete 8-11-09

Attorney Vella advised that he has reviewed the jurisdictional packet and finds same in order to accept jurisdiction over the application.

Attorney Vella read the following into evidence:

- A-1 Jurisdictional Packet
- A-2 Web Notice posted on 8/11/09
- A-3 Application dated 8/6/09
- A-4 Variance Sketch prepared by Crest Engineering dated 01/10/09
- A-5 Environmental Impact & Assessment prepared by Crest Engineering dated April 2009
- A-6 Use Variance & Site Plan prepared by Crest Engineering dated 4/22/09; last revised 8/6/09
- A-7 Mounted Side by Side Plan
- A-8 Twelve photographs of existing above ground pools.
- BOA-1 Notice of Violation dated 3/17/09
- BOA-2 Township Engineer's Report dated 8/19/09
- BOA-3 Resolution granting use variance & preliminary & Major site plan approval with bulk variance & design waiver relief approved 4/16/01; memorialized 5/21/01
- BOA-4 Resolution granting use variance approval dated 6/17/02
- BOA-5 Copy of approved Landscaping & Lighting Plan dated 1-10-01; last revised 9-11-01

Attorney Christopher Stevens representing the applicant. There was discussion if the application required a use variance and is an amendment of a former major site plan approval.

Attorney Stevens introduced the applicant, Mr. Anthony Schiavone.

He is sworn in by Attorney Vella . He advised that due to the nature of his business, there is no room inside and outdoors would be the only logical place to expand. Mr. Schiavone stated that above ground pools have become a significant part of his business. The explained that customer demand for above ground pools.

The applicant advised the Board that eight years ago he did not sell above ground pools. Due to the state of the economy, [the demand for](#) above ground pools [hasave](#) increased.

He was the owner of the facility in 2001 when the original conditions were in place. He agreed to condition at the time but the poor economy caused the need for the applicant to also sell above ground pools.

Mr. Coppola asked about when the figures changed. Mr. Schiavone advised that this is his first year selling the above ground pools. They cost from \$2,500 to \$7,000.00 while i- ~~In~~ ground pools range from \$21,000 to \$25,000. He stated that they top end ~~in~~ in-ground pools couldn't be substantially higher.

Chairman Novellino advised that he had visited the site.

The applicant reported that he has only one store and it is in Millstone Township.

Attorney Vella swore in Peter Strong P.E. & P.P. of Crest Engineering. Mr. Strong is familiar to the Board and has appeared many times before them and he is accepted as applicant's expert planner and engineer.

Referring to Exhibit A-7, Mounted side-by-side plan, Mr. Strong explained that the original site plan had a sidewalk and green lawn with 12 junipers and 3 evergreens.

He discussed visibility from the roadway of the pools. There are currently three (3) above ground pools, sidewalk that runs along the side and partly to the front of the store as shown on the original plan. There is stamped concrete and some shrubs and landscaping stone (tan). The pools are set back from roadway and behind display area. There is significant landscaping between the two buildings. No bulk variances- are necessary for this plan ~~have been created~~.

Mr. Strong went over the report of Board Engineer Matt Shafai's. Impervious coverage was discussed. Engineer Shafai views the pools as impervious. Pools cover the ground area which has increased some 800 sq. ft. (6%) and is well within the allowable range in accordance with the ordinance. Regarding storm drainage, Mr. Strong advised that water stays inside of the pool. In actuality there would be a slight decrease due to back washing which would not be at the same time as a severe storm. Mr. Strong advised that the pools would stay up year round and would be winterized.

The applicant offered that there is a 40 year warranty on the pools and they would remain up all year long.

Regarding the landscaping, in 2001, 38 trees were to be placed on the property. The town made sure that they went in before they released the applicant's bond a few years back. The trees were put in so that the tent displays would not go up.

The applicant advised that for safety purposes, the above ground pool displays have cages around them (at least 6 feet in height). The applicant has a permit for the electrical outlets.

The Board took a look at photos of the above ground pool as marked into evidence A -8 12 pictures of existing above ground pools

Mr. Strong advised that they have put in more landscaping than what was originally approved. The Shade Tree Commission did not like the way they trimmed the trees in 2001. The applicant agreed to add more tree coverage at that time and added that it was a large expense for them.

Board Planner, Richard Coppola, advised that clearly the applicant should be before the Board requesting approval of a use variance. The fact that the above ground pools are built and landscape is in is helpful so that the Board can see what they will get. Both Messrs Shafai and Coppola made a field visit to the site. Mr. Coppola feels that the landscaping and shielding testimony is accurate. Mr. Coppola advises that economics is not a reason to grant a use variance but rather, it is a change in the needs of this particular enterprise in order to compete that is driving the applicant to request the variance. -

Mr. Coppola wanted it to be clear that nothing is to be changed unless the applicant comes back. He has to come back and might ask for a waiver of site plan review but the Board should have a chance to review any future changes before they occur. ~~it~~

Attorney Vella explained that the applicant has filed an appeal saying they need site plan approval not use variances, Counsel had decided to appeal that decision that if the use variance is needed. Attorney Vella explained that this is an expansion of a non-conforming use and thus a use variance is required. -

Mr. Strong stated that previously, the Board granted Seasonal World a variance to sell pools. He stated that the use has not expanded or changed. The only change is in the fact that he wants to display the things he sells. That is his position.

If we need a use variance there are special reasons that promote the purposes of zoning.

The Township granted site plan and use variance approval and finding of fact #3 was stated. Finding of fact #4 stated that the proposed use is not specifically stated in zoning as a permitted use.

The Board went over the positive and negative criteria to grant use variance approval.

The Board offered this is an important service to all parties and no detriment to the site or surrounding area. The above ground pools are not obtrusive where they are located on the site.

Mr. Coppola stated that the original approval was for sale of pools, and related materials but when the original approval was granted there was a specific indication that no above ground pools were to be displayed outside. A use variance is required in the line of questioning. There is no restriction against the sale of above ground pool pools so the use accommodates all pools of any type. In going to the Medici test, Mr. Coppola stated that it was the applicant's testimony because of the prior use variance approval and coupled with the need to display the above ground pools that this existing use is particularly well suited to have these displays. He stated that the negative criteria is the location of these displays is such that it creates very minimal impact on traveling or onsite public. The landscaping that was required earlier has been added. Mr. Strong confirmed this understanding.

Mr. Coppola feels that a use variance is required, whether this is an expansion of a non-conforming existing use or a violation of that provision. The use variance proves that Mr. Strong offered ~~should~~ should be required in his opinion. It is a stronger position ~~foref~~ the Board and is reasonable one to take. The board can also ~~and~~ clarify the conditions of approval so that in the ~~ies the~~ future ~~so that~~ there is no further misunderstanding as to what you can and cannot do on the property.

Chairman Novellino stated the importance of clear and precise ~~solid~~ language in the Resolutions.

Attorney Vella advised when dealing with a condition issue, what is the purpose that the condition and what is it meant to protect. Did that condition protect anything. The Board is concerned that the applicant understands that anything outside of what the Board approves requires him to return to the Board. Attorney Vella advised the law allows the applicant to be released from a condition. The board needs to consider if ~~s~~ that condition too ~~se~~ important for that site plan to release the applicant from complying with it?

Mr. Lambros' comments were concerning that this is the second applicant this evening to come to the Board for approval of an item after the fact. His concerns are that applicants are not ~~cominge~~ to the Board before changing things as a continuation of an existing approval.

Mr. Frost felt there are special circumstances to grant this application and he expanding on that. He also asked the applicant to come back to the board in the future should his circumstances change.

The Board asked Mr. Shafai if there was anything left over from the prior approval that was not fulfilled that the Board should ask the applicant to fulfill as a condition of this approval. Mr. Shafai advised that the applicant did what we had asked them to do. Permits are needed, safety code must be adhered to, etc. The application would be subject to acquiring proper permits.

At 9:20 p.m., Chairman Novellino opened the application to the public at 9:20 p.m.

Seeing no public comment, the application was closed to the public.

Chairman Novellino agrees with the recommendation of Mr. Coppola that this application requires a use variance. Previous approval did not include the installation of above-ground display pools and this and it is an expansion of that use. The nature of the business has changed and nature of use of the property has changed.

Mr. Shafai asked that the applicant provide a plan that identifies the landscaping that is there so that it cannot be changed down the road.

Other conditions of approval include that there would be no further changes to the site without Board approval; no changes of models of the pools or changes to landscaping without Board approval. If the applicant replaces the pools, he must return to the Board. The applicant must secure all permits needed for the pools. If there is a change from the approval, the applicant can request a waiver of site plan approval. The Board reiterated that they want controls in place.

Appeal of the decision that a use variance is required is affirmed and the use variance, major site plan approval and waiver of condition set forth in the Resolution is also approved based on the statements put on the record by the Board and subject to the conditions set forth by the attorney, planner and engineer.

Approval subject to the condition that applicant provide a landscaping plan around the existing pool area and no changing of any models of pools or the like with Board approval or any changes to any site plan without board approval.

There are six board members present and the applicant wishes for the Board to vote on the application.

Mr. Frost made a Motion finding the application to be a use variance and a use variance is required and he made a Motion to grant the use variance and approve the amended major site plan as set forth above and Mr. Bailey offered a second. Roll Call Vote: Frost, Bailey, Lambros, Curcio, Conoscenti and Novellino.

NEW/OLD BUSINESS:

The Board discussed its concerns that after an applicant receives their [r](#)Resolution of approval, they do things that were not approved. The Board discussed the [need to better enforce conditions of approval](#) resolve. The Board is [also](#) concerned about [a multitude of](#) businesses placing advertising signs around town. The Attorney advised the Board what the appropriate channels would be to address these issues. The Board discussed their

plan of action. [Chairman Novellino agreed to draft a letter to the Township Committee to make them aware of the Board's concerns.](#)

At 9:40 p.m., the meeting adjourned by Motion of Mr. Bailey with a second offered by Mr. Conoscenti and by unanimous vote.

Respectfully submitted,

Pamela D'Andrea