

ZONING BOARD OF REVIEW MINUTES
Tuesday, October 25, 2016 Meeting 7:00 pm
Town Council Chambers, Town Hall

Present: Richard Land, Chair; Renu Englehart, Vice-Chair; Ashley Cullion, Jody Sceery, Christopher Mulhearn and Melody Alger (Alternate).

Absent: Barry Golden (Alternate).

Staff: Lea Anthony Hitchen, Assistant Town Planner; Wayne Pimental, Building/Zoning Official, and Town Solicitor Peter Clarkin.

Mr. Land, Chair of the Board, called the meeting to order at 7:00 PM and introduced the members and staff present. He then read the Board's procedures into the record. Each person addressing the Board will first state his or her name and address for the record. The applicant and his or her legal representative will present the case and witnesses may be called to testify. Such testimony must be relevant to the application. Expert witnesses will be sworn in and there will be no prejudice as to the expertise of any witness. Pictures, diagrams and other documents given to the Board as evidence will be appropriately marked as exhibits and will be retained by the Board for the record. Upon completion of the applicant's presentation all other persons wishing to offer evidence in favor of the application may then do so one at a time. Following that all persons wishing to offer evidence against the application may then do so one at a time. It is asked that comments are confined to the zoning matter being heard and that repetitive remarks are avoided. Cross examination or rebuttal may be allowed if the Board feels it would be appropriate and useful. All questions from the floor will be directed through the Chair only. After all relevant facts have been heard the Chair will call for a motion; the Board will then discuss the motion and the Chair will call for a vote. During the discussion among voting Board members, the Board will not accept any new and further testimony unless it is specifically requested by a Board member. The Board will make every attempt this evening to render a decision. The

written decision will be recorded in the Town Clerk's Office as soon as possible following the approval of the minutes of the meeting.

Zoning Board of Review Hearings – 7:00 PM

1. **Leslie Massaro** for property located at 277 Kenyon Avenue; Map 74 A.P. 9 Lot 286 (Zoned Residential, R-30). The Applicant requires Dimensional Variances from Table 2 of Chapter 260 of the Town Code; Zoning Ordinance, Dimensional Regulations by Zone which sets forth the setbacks for the zone and Section 8(F) of the same chapter pertaining to the siting of accessory structures and swimming pools. The Applicant is in process of constructing an in-ground swimming pool within the side setback. **(Continued from the September 27, 2016 meeting.)**

Attorney Matthew Callaghan, with offices in Wickford, represented the applicant, Ms. Leslie Massaro. He thanked the Board for giving her the opportunity to obtain counsel in order to fully represent her.

Mr. James Newcomb of 163 Highland Avenue, Warwick, RI, a Real Estate Broker in RI and MA since October 1993 with New Key Realty located on Broadway in Pawtucket, RI. Mr. Newcomb stated he was familiar with RI home appraisals and had the opportunity to visit Ms. Leslie Massaro's residence and saw the surrounding properties. He mentioned the pool in question would be located near the abutting residence, the Raimbeault's driveway and looking at an aerial view, even closer to that home is another pool from the neighbor the rear. He added there are approximately 1 in every 4 homes in the immediate ¼ mile that have pools. Mr. Newcomb was of the opinion that the subject pool would not have any adverse effect on the property and did not believe the subject pool would change the character of the neighborhood as there are quite a few pools in the area already.

Attorney Nolan cross-examined Mr. Newcomb and noted there are several pools in the immediate area. Atty. Nolan asked Mr. Newcomb if any of those pools are located in the side setback. Mr. Newcomb commented that he was not a surveyor so he could not say for sure.

Atty. Nolan recalled Mr. Newcomb saying he made a determination that the subject pool would not have an adverse effect but was not sure it was in the setbacks or not. Atty. Nolan pointed out in the East Greenwich Zoning Ordinance one can have a pool in the rear yard but not the side yard. Mr. Newcomb testified technically the pool is in the back of the house as much as it is in the side of the house.

Atty. Nolan reiterated that Mr. Newcomb made a determination that the pool would not have an adverse effect but he was not sure whether that it is in the side or rear yard. In his defense, Mr. Newcomb stated he is not a lawyer, appraiser or an assessor; he confirmed it was his opinion it will not have an adverse effect.

Ms. Leslie Massaro of 277 Kenyon Avenue, property owner and applicant, stated she selected the pool location because it was the most ideal place and the only real flat portion of the back yard. She added the other sections of the yard had large slopes and high water tables.

Attorney Callaghan submitted Exhibit 1, a diagram of the property which highlighted the different features of the backyard. He explained the orange area, being the northwest quadrant was heavily wooded and had between and 8-15 degree sloped as confirmed by Ms. Massaro.

Ms. Massaro testified back in 2014 she hired Green Hill Environmental perform a wetland delineation boundary. Atty. Callaghan submitted Exhibit #2, the RIDEM site evaluation form and correspondence from Green Hill Environmental. Atty. Callaghan pointed out the report indicates the water table in the wetland, located in the lower part of the rear yard in terms of seepage groundwater depth is 41” and seasonal high water table is 29” which is also located in the blue shaded area on Exhibit #1 – therefore a pool could not be located in the blue highlighted area. In terms of the green highlighted area on Exhibit #1, Ms. Massaro asserted that is the location of a 15 degree slope which is also not conducive for a pool installation.

Atty. Callaghan submitted Exhibit #3, a “googled” image of the appearance of a 15 degree slope. Ms. Massaro indicated by having to construct a pool in that steep of a slope, being 15 degrees, it would be a substantial

inconvenience and huge expense. She contacted a few contractors for estimates, one being Old Fashioned Stone Work owned by Tim Geremia who priced the construction for a concrete retaining wall with the dimension of 30'x4'x10" thick at \$10,000.00 – quotes was submitted as Exhibit #4. Ms. Massaro also spoke of a proposal by R.T. Nunes to completely move the existing in-ground pool conclusively at a cost of \$24,424.00, marked at Exhibit #5.

Ms. Massaro explained that in order to move the pool towards the wooded area there is a slope and 5 or 6 mature trees would have to be removed at the cost of \$1,000.00 per tree. She noted that as it stands now, the pool is paid for and has owned the property for over 16 years. She did not create the backyard slopes; the pool cannot be put in front of the house per zoning regulations; she did not plant the numerous mature backyard trees; and she did not create the wetland area on her property – all hardships Ms. Massaro is claiming for the current location of the pool. The current location of the pool is the least relief she could obtain without running into one of the hardships.

Atty. Nolan inquired if a survey was performed on the subject property before locating the pool. Ms. Massaro said no. Atty. Nolan asked for the reasoning why the pool was not located slightly south. Ms. Massaro stated there is an existing sewer line.

Atty. Nolan commented the pool can definitely be moved but it is about the Applicant saving money at this point. Ms. Massaro verified if the pool were to be moved it would cost upwards of \$50,000 and she would have to finance the cost; the cost of the original investment of the pool was paid for by cashing in a mutual fund.

When questioned by Atty. Nolan of the pools current status, Ms. Massaro said it is a hole, steel walls with a bracket/bracing system and concrete footings. She was of the impression that it could be moved with a jackhammer but it would be very disruptive to the neighbors and would most likely take about three weeks to remove as she would have to do it herself.

Mr. John Larsson of 277 Kenyon Avenue, an excavator by trade, testified it would be an inconvenience to move the pool further into the slope of the backyard as digging down at least 4' would have to be executed on one side, level across and then fill out about 15-20' because the pool has to be built on virgin soil (one cannot fill in then build a pool on top of that as it will settle) and then the retaining wall would be constructed.

Atty. Nolan asked Mr. Larsson if he is an excavator as his profession. Mr. Larsson said yes. Atty. Nolan queried if he was familiar with obtaining building permits before doing this type of work. Mr. Larsson indicated he does not get into that.

Atty. Nolan provided a picture of a large excavator on the subject property and asked Mr. Larsson if it was his. Mr. Larsson responded that the excavator was not his; his boss let him use it. Atty. Nolan commented that Mr. Larsson was using it on this particular site and asked him if he did not think about getting a building permit. Mr. Larsson confirmed that he does not get into the permitting aspect; he simply just does the work as it is up to the homeowner or contractor.

Atty. Nolan questioned whether pools have to be installed on virgin soil or can be constructed on infill. Mr. Larsson advised that the standards recommend building on virgin soil but static compaction is done via cranes on infill soil and the installation of a retaining wall. When asked if it is costly, Mr. Larsson said yes. Atty. Nolan asked if the reason we are here tonight is because maybe it is too expensive to do it that way. Mr. Larsson stated no, we are here for a side setback variance.

Atty. Nolan asked if the pool structure can be removed. Mr. Larsson noted it can be removed but hopefully not damaged.

Atty. Callaghan remarked with respect to not asking for a building permit – we all understand it is easier to say sorry than ask for permission but he did not think that was the case in this situation. Frankly, with structures it is one thing but with recreational facilities he was not sure what he would do under this circumstance if his own kids wanted to erect a basketball hoop in the backyard and wanted to lay asphalt out to dribble a ball, create an ice rink in

the backyard, erect a play structure or install a trampoline that needs to be anchored to the ground— he queried if a building permit is necessary in any of these circumstances. When the Applicant went online, saw they could install a pool themselves and with Mr. Larsson's background in construction they did it without a permit explained Atty. Callaghan.

Atty. Callaghan did not believe there to be intentional malice or do anything wrong when the Applicant went forth with the pool installation. He went on to say the Applicant is looking to receive a dimensional variance request, not a special use permit or use variance that has stricter standards. He reminded the Board the request is for a dimensional variance for only one end of the pool; the other end being in the building envelope.

Atty. Callaghan recapped that per the zoning ordinance a pool cannot be installed in the front yard which encompasses 1/3rd of the parcel; another 1/3rd is encumbered by wetlands, a flood zone and 8-15 degree slope; and the other 1/3rd is a wooded area which would be extremely expensive to locate the pool in that area. Atty. Callaghan indicated the only area left on the subject property to locate the pool is in an area with a 15 degree slope which again would cost a tremendous expense. He noted a 12' request for relief is not a significant distance and the Applicant has met all the standards in this situation – the pool will not change the character of the neighborhood as there are existing pools all over the neighborhood; adding this pool is not going to change that in any respect. Atty. Callaghan again noted it was the least relief necessary because to put the pool somewhere else would be cost prohibitive.

Atty. Nolan stressed that none of the standards have been met. He mentioned it was the Applicant that created this problem as she constructed this edifice 12' from the neighboring abutter. He pointed out the Applicant has 2 acres to construct a pool on and the Applicant should not be telling us that it will cost more money as that is not the criteria for review. Atty. Nolan was adamant that there was definitely space to move the pool and meet the setback requirements. He reminded the Board the Applicant knew it was appropriate to file a zoning board application to seek relief for a barn that constructed on the property – this time perhaps the Applicant thought the pool could be snuck in.

Atty. Nolan stated the relief to be granted is supposed to be the least relief necessary. He noted the Applicant has 2 acres of land and could install the pool in many locations on the property and would not need relief. Atty. Nolan pointed out it is fairly common and almost a guarantee that if someone wants to install a pool a tree will have to be cut down. He felt as though the Applicant has not met the criteria at all.

Ms. Englehart questioned whether or not the Applicant had performed a land survey of the property which was a condition upon approval for the barn relief a couple of years ago. She was under the impression that if a survey had been completed during that timeframe the Applicant would know where to install the pool.

Ms. Aida Raimbeault of 255 Kenyon Avenue stated when Ms. Massaro verbally informed her she was installing a pool Ms. Raimbault assumed the pool was going to be installed in the their backyard as they have plenty of yard in the back. Ms. Raimbault did not think the pool would be abutting her driveway. She noted safety concerns but did not want to have problems with her neighbors but also wants the system to be fair.

Atty. Callaghan noted the standard for the requested variance is not whether there is another spot on the property; the question is is it more than a mere inconvenience to put the pool structure in another location. In this case Att. Callaghan stated that spending thousands of dollars is definitely more than a mere inconvenience.

Atty. Nolan asserted the relief to be granted is the least relief necessary. He claimed there is ample property then there is no relief necessary.

Ms. Cullion inquired if the Applicant intends to install an apron or decking around the pool. Ms. Massaro said yes but she also plans to install a fence to which the apron would be within the fenced area. Ms. Cullion pointed out the apron would be even closer to the neighbors.

With no further questions Mr. Land asked for a motion.

Ms. Sceery made a motion to approve the application. For discussion purposes, Mr. Land seconded the motion.

Mr. Land took the lack of a second on the motion as the indicative of the Board's general view of this application and the circumstances under which it arose. He made a few comments noting the comments were of his own and not of the Board. The first being that this is one of those situations of where 'we did not ask for permission first and asking for permission later.' Mr. Land recognized that people make mistakes but sometimes those mistakes have a cost associated with them that may very well be the case in this situation. He noted the Board does not have any formal engineering that validated or verified what the Board heard anecdotally; the Board saw evidence but not necessarily conclusive relative to the property, i.e. slope of the property. Specifically, the Board was given an indication of a slope via an exhibit of 15 percent but it certainly is not demonstrative of the entire property. He added that in the images that were presented the metal surround for the pool installed, on one end it is clearly above ground level and the other end it appears to be at or below ground level; it appears there may be room to move this pool in one direction or another and it could have been located elsewhere at the time of the planning stages of the pool being installed. In that specific regard Mr. Land also noted there has been testimony about tree removal but it is very unclear to him how many trees would actually need to be removed. There appears to be some open land on the property in one submitted image and numerous trees on another image – so it is very unclear to him. Again he was reviewing the actual evidence submitted. Lastly, he noted there will be some additional impairment of the side setback simply to keep the pool in place should the pool be approved at that location which he thought further impairs that location and has issues with the zoning ordinance. He recognized that this Board is relatively flexible at times with respect to applications that come before us; each and every application stands or fails on its own merit and that prior applications and decisions of this Board in his view have some merits and weight to be considered but by far not conclusive and this Board strives to accommodate people's requests when it is within reason and certainly when taking into consideration the opposition and favorable comments regarding applications and more often than not there is no opposition or when opposition can be resolved we seek to accommodate. With that being said Mr. Land stated he

struggled with this particular application but he is leaning toward not approving it although recognized his decision would create a hardship for the Applicant. He appreciated the efforts of both sets of counsels in presenting their cases on this matter.

Mr. Mulhearn stated he too struggled with this application but has a slightly different view of the matter. He noted he did not second the motion to the application's request not because at least at present he viewed the application somewhat favorably, he thought a condition would necessarily have to be imposed because if the Board were to approve the requested relief in terms of fencing and some type of vegetative buffer being mindful of the concerns of the neighbors.

Mr. Mulhearn made several comments about the application: he reiterated that back in 2014 Ms. Massaro came before this Board knowing that relief was necessary to construct a barn; he found it somewhat troubling that the Applicant did not take the time to inquire with the Planning Department as to whether or not relief was necessary with regard to the construction of the in ground pool. He did not believe it was a fatal to the Applicant's request but he did find it troublesome. With that being said based on the evidence all being unscientific what evidence has been introduced throughout the two evenings of hearings has not been rebutted and Mr. Mulhearn thought very candidly that is problematic for the opposition – he believed one has to demonstrate that the hardship from which you seek relief is due to the characteristics of this particular parcel and not the general surrounding area and he did not believe it is misplaced to suggest the hardship the Applicant is seeking relief from is the fact that the Applicant already constructed at least in part the in-ground pool. That is not the standard; the standard is this specific piece of property. That has not been rebutted. Mr. Mulhearn added the hardship from which the Applicant seeks relief may at least be in part due to certain efforts on your part but generally speaking he believes it speaks to the specific parcel and not the endeavor with regard to the construction. He did not believe that if the requested relief to be granted that it would change the general characteristics of the surrounding area and neighborhood – in his view the testimony of both brokers cancel each other out, neither one is an appraiser or certified to appraise properties nor has either offered a broker's opinion letter as to whether or not the completion

of the pool would adversely impact the values of properties so he did not see either of those testimonies as being germane. Mr. Mulhearn commented that this Board can use their own observations with this particular area as to whether or not the construction of the in-ground pool would adversely impact the general characteristics of the surrounding area. Mr. Mulhearn stated he does not believe that it does noting at least from the testimony to which has been offered by way of the Applicant is un rebutted. Additionally, the hardship suffered by the Applicant would amount to more than a mere inconvenience – again, noted Mr. Mulhearn, there is un rebutted testimony that there would be a significant hardship to the Applicant if the Applicant were required to deconstruct, remove and relocate the pool to other areas on the subject parcel. Mr. Mulhearn’s last point as to whether or not the Applicant has demonstrated the relief to be granted is the least relief necessary – in his opinion – a balancing of this particular standard weighs in favor of the Applicant by default. He noted the opponents of the Applicant’s application have not produced any evidence to suggest that this is anything other than the least relief necessary and he thinks the Applicant has at least produced some evidence to support that prong of the standard and given the fact that that has not been rebutted by default Mr. Mulhearn was of the opinion that has to carry the day. So for the reasons listed Mr. Mulhearn was trending in favor of approving the application with the condition that there would be required fencing and appropriate screening to address the concerns of the Raimbeault’s who as far as he understands simply do not want to see the edifice as they traverse their driveway.

Ms. Sceery noted although she did make a motion it was simply to open the discussion. She commented she knows numerous people who have installed pools and knew to obtain a building permit and have it properly located. She was of the opinion that if the Applicant had followed protocol they might have learned beforehand where to properly install the pool and that it was going to cost more money than anticipated.

Ms. Cullion stated the Applicant noted there were a couple of environmental and built constraints on the site, i.e. sewer line, the 8-15 percent slope, a high water table – these are all major constraints and speaks to a lack of due diligence not having them noted on the survey. She also mentioned that on a 2 acre site the wetlands and slopes can make installing a pool more difficult

but certainly not prohibitive and she thinks there are options and different strategies that would have allowed the Applicant to do that. Furthermore, having the pool closer to the neighbors in a close proximity is going to have a permanent negative effect, not just aesthetically and visually but with noise as well.

Mr. Land pointed out Mr. Mulhearn made mention of installing a fence as a condition. There was no second to Mr. Mulhearn's motion. Mr. Land called for a vote.

VOTE: 1 – 4 opposed. (Mr. Mulhearn voted in favor while Mr. Land, Ms. Cullion, Ms. Sceery, and Ms. Englehart voted to deny the application.)

Mr. Land noted the application fails and no variance granted. He added Atty. Callaghan has the option to appeal the decision.

Zoning Board of Review Business

1. Minutes: Review/action on the minutes of the September 27, 2016 meeting.

Motion by Ms. Cullion to approve the September 27, 2016 minutes as written. Seconded by Ms. Sceery. Approved 5 – 0.

Mr. Land asked for a motion to adjourn.

Mr. Mulhearn motioned to adjourn. Seconded by Ms. Cullion. Approved 5 – 0. Zoning Board of Review meeting adjourned.

Minutes respectfully submitted by:

Lea Anthony Hitchen,
Assistant Town Planner

For more information, please refer to the recording available in the Planning Department.