

**Town of Southeast
Zoning Board of Appeals
Minutes of August 19, 2019**

Timothy Froessel, Chairman	Present
Paul Vink, Vice Chairman	Present
Roderick Cassidy	Present
Greg Wunner	Present
John McNeill	Present
Steve Corozine	Present
Andres Gil	Present
Willis Stephens, Jr., Town Attorney	Absent
Victoria Desidero, Secretary	Present
Cathy Chiudina, Assistant Secretary	Excused

Work Session:

Regular Session:

**1. Robert Nikaj / Nikaj Estates LLC
784-790 Route 312, Tax Map ID 46.-3-8**

Continued Public Hearing to review an application for a Use Variance to utilize an existing building for apartments and increase the number of dwelling units by 5 to allow a total of 28 dwelling units on the property where there are currently 23 dwelling units in an R-160 Zone. Robert Nikaj of Station-Glo, New England was sworn in and the mailings were verified to be in order.

Boardmember Vink: Mr. Nikaj, I just want to remind you that you are still under oath from the last meeting.

Chairman Froessel: OK, so I believe we left it as we were looking for some competent financial evidence with respect to your application for a Use Variance.

Mr. Nikaj: I've got something from the accountant.

Chairman Froessel: OK, why don't you hand that on up and we'll take a look at it.
(Board members talk amongst themselves.)

Chairman Froessel: Has everyone had a chance to review?
(Board members talk amongst themselves.)

Chairman Froessel: Has everyone had a chance to review the information from the applicant? Anyone have any questions for the applicant? Is there anyone in the audience that has any comments or questions about this application?

Boardmember Vink: I'll ask a question: If I understand this statement correctly, it looks to me like you are in fact making a profit of at least \$9,000 and probably more than that because of the depreciation expenses be taken too so probably more like \$30,000 in profit a year is what this statement looks like. That's the way I read it. Is that the way you understand it?

Mr. Nikaj: To me what I see is the difficulties... even my driveway. I just came from there, just to do that is like over \$20,000. It is not like one building, it's like seven, eight buildings.

Boardmember Vink: I know, I was there.

Mr. Nikaj: It is hard for somebody to understand how much maintenance is needed and when the roof goes down... it is some profit, I'm not zero, but it is not like I can really move on to improve the property or to maintain the way it should be. I do my best, I increased like four or

five apartments since I get it, you know. Still I am not comfortable. There is always... if one roof goes, it's seven roofs to that building and much money goes to fix that. I'm not saying I'm not making zero profit but to keep doing business and to invest in the property it needs money and since the building is there that's why I need your help and it's a residential use; 23 units there already. That's the way I see it. Making commercial I don't think, whatever you approve, whatever you guys say I am ready to do anyway.

Boardmember Vink: Well, I don't think you can go back to being commercial. It's a residential zone.

Mr. Nikaj: Yes, exactly.

Boardmember Vink: I don't know how you would use it as commercial.

Mr. Nikaj: Like I told you it's the best construction building on the property. This is solid bricks.

Boardmember Vink: Conceptually I don't have a problem with what you're proposing. I don't think it is out of character for what's there. It's just that the criteria that we have to apply to the situation is that you cannot realize a reasonable return without the variance, without the Use Variance, and I'm not sure that what you've given us convinces me that that's true, that you can't.

Chairman Froessel: And on top of that, I'll just note that this is an independent accountant's compilation report. It's not something I think I've ever seen before, but the accountant who signed this makes the statement 'we have not audited or reviewed the company's financial statements and accordingly do not express an opinion or provide an assurance about whether the financial statements are in accordance with OCDOA income tax basis of the United States of America.' Then it goes on to say 'management has elected to omit substantially all of the disclosures required by accounting principles generally accepted in the United States of America. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and cash flows. Accordingly, the financial statements are not designed for those who are not informed (inaudible)' So, what this is basically telling me is this guy took your financial statements and put a letter on top of it. Am I mistaken?

Mr. Nikaj: No, she reviewed my income taxes and my deposits to the banks and expenses and that's why she made it that way. I don't try to make any number or anything. I'm not here to lie to you. If you can approve it, I really appreciate it.

Chairman Froessel: I'm not accusing anyone of lying, I'm just saying it's very (inaudible) the way of this document.

Mr. Nikaj: I'm being honest. I give her my income tax for 2017 and 2018 and I told her the situation. I'm in front of the Zoning Board for a Variance Use and they wanted something from the company and she says based on tax statements I'm going to do my best. I told her whatever is there. I'm not trying to make up numbers or so but that's the way she... and that's the way she explained it.

Chairman Froessel: So, the numbers on these statements...

Mr. Nikaj: I told her you do your best as our accountant and I'll present it to them because they ask me for it. I do it my way, they don't accept that and that's why...

Boardmember Vink: Did you have a comment?

Mr. Nikaj: That's my son.
Joseph Nikaj was sworn in.

Mr. J. Nikaj: So, you have to take into consideration depreciation in the sense that if we were to liquidate the asset today it's still a loss, right? So, maybe that's not an operating expense. It's not a current yearly, but if you were to get rid of the asset that's still going to be a loss in

our pocket and we're still going to have to cover some sort of expense down the line by liquidating the asset. So, if it's not going to happen today, it's going to happen the following year or the year after that; whenever we do think about liquidating the asset if we have to. In a sense it's still a loss but not a recurring per year, but down the line if you were going to liquidate it's a loss.

Boardmember Gil: I think from my perspective as a member of the Board and I just pulled up a case on Carlton for the Zoning Board of Appeals 111AD2D169, second apartment from 1985 for the record. From my interpretation of it, I think that this document does not meet the criteria that we're looking for. The analysis that we needed, the financial statement, Mr. Chairman please correct me if I'm wrong here, is that what is the property valued at today, what's your rate of return today, and what's your rate of return if you had the improvement done and then the analysis comparing the two to show your rate of return today vs. your investment and then your rate of return after an improvement projected and then you can show us whether or not there is a hardship there if you don't have our authorization to obtain the Use Variance. I think what we see right now is a past comparison, whatever it's based upon, but it's a comparison from 2017 and 2018 returns. It should be whatever it is today compared to what your projections are for the future after the return so we can essentially have an analysis as to whether or not this fits the hardship criteria. You may want to go back to the drawing board. There are other ways that you can make a rate of return that we might look at according to the case law is: can you seek a higher value for the apartments than what you're seeking now and does that increase your rate of expected rate of return. What I'm saying is: the analysis that is before us, I think it only gives us one piece of the puzzle that we need to make a decision applying the facts to the criteria. I think there is something lost in translation. I'm not sure.

Mr. J. Nikaj: If that's exactly what you want, we can build out a year projected cash flow, that's cool. You're absolutely right, that's something you would want to see. I completely agree. You want to see what this can result in.

Boardmember Vink: Not want, it's something the statute requires, you have to have it.

Mr. J. Nikaj: Right, I just..

Boardmember Cassidy: We need competent financial evidence.

Mr. J. Nikaj: Well, I mean do you guys want a full-blown audit?

Boardmember Corozine: I think we'd probably want something that an auditor can stand behind because apparently, based on the language in this letter, the auditor is not really standing behind the numbers. It's basically saying, as Chairman Froessel pointed out, that this is a presentation based on the numbers given to me. That's really what they're saying so a strong statement that they're backing the numbers themselves..

Mr. J. Nikaj: Sure.

Boardmember Corozine: So, number one... that's one issue. The other thing is just to go back to the initial part of the Public Hearing is we have reviewed the finances from before you purchased the property and what the financials looked like then and then what the financials look like after you bought the property and based on the financial information presented during that hearing you indicated that profitability was in parity with what purchased. There was no drop-off, you were really earning based on what your expectations should have been as presented in those numbers. I know you had specifically brought up the fact that there was an approximate \$300,000 investment that was not reflected in those numbers that was painting a different story. I think we had spoken about presenting evidence of what your level of investment would have been that would have limited your profitability now. I don't think this document shows that.

Mr. Nikaj: No, I am saying that the last two years are my best two years in this business here because the first and second I was... in 2016 and 2017 I was upgrading apartments and I had to invest all the money to make another four or five apartments to come up to here and that's the result after all this work. If you go back, I don't mind going back since I bought it in 2013. It was presented to me by my lawyer and he said, 'you know what you are buying.' But, looking into fixing it up myself and putting an effort there I thought I got it turned over. The property was on the market for four or five years; no one bought it because I was not the smartest one, I told you the last time, looks like I don't know what I am doing. If it was that profitable it would not be there for many years and I told you can you go there any time and see the difference so someone who knows the property. I'm not looking to make something against the rules, against the law. You guys are here to help us or make the decisions, that's fine with me. We are trying to give more apartments to the people and benefit our business. If I am losing, I will put on the market and sell it whenever I can and another guy is going to come to you again. That's the way I see it myself.

Chairman Froessel: Well, I agree with Boardmember Corozine that I think the document we've been given doesn't satisfy the element of proof of giving us a competent financial statement. I'm willing to give you one more swing at this. Would you like to adjourn the hearing today and not have us vote and come back next month and see if you can come back with something?

Mr. Nikaj: Whatever you see it if you need. From the first day I tried to put together the best way because actually I can't even afford paying accountant like my own. When I need someone, I know and I tell her I need this one or look at this for me I do that. That's why I do the management, cut the grass, and I put a super there. I'm just trying to cut every expense to benefit me.

Boardmember Vink: But we have certain legal requirements that we are required to uphold and we are guided by the need for financial information...

Mr. Nikaj: No, I understand that. Joseph is in this business too. He works in the city. My knowledge is not like that to understand, my language is... I come here first and I don't even understand.

Boardmember Vink: Joseph, did you understand?

Mr. J. Nikaj: Yes, I get everything.

Boardmember Vink: You understand everything that Boardmember Gil said about what we think is necessary to provide.

Mr. J. Nikaj: Yes, he is going to write down projected cash flow and output, projected income, projected expenses if these improvements were to take place.

Boardmember Gil: If they were to take place versus if they weren't to take place and that includes all of your operating costs. Part of this actually if you were to break out some of the operating costs but it also doesn't indicate... your father has a larger business so it doesn't indicate whether or not this relates just to this property here. So, like with relation to just this property location what are your ordinary necessary business expenses, what's your rate of return and investment and then compare it to what it would be if you were authorized to do the improvement so we can compare those two numbers and then we can yield whether or not that's a reasonable rate of return which is the standard that we have to apply.

Boardmember Corozine: Well, my understanding is that it's in parity with the purchase of the property and what the probability was before the purchase then that's a reasonable rate of return. The question is: how do you provide evidence to prove that.

Mr. J. Nikaj: I mean everyone has a different rate of return and what they want as a return. Someone is happy with 2%, someone is happy with 3% so it's different for someone. If

someone takes a great risk, they should be able to get a better rate. So, besides that you guys want a full financial audit. Is there like a specific... I'm not into accounting so I don't know like a particular... like an auditing procedure or just something that solidifies the fact that...

Chairman Froessel: I don't think audit is the correct word.

Mr. J. Nikaj: You just want something more concrete?

Boardmember Corozine: I think we need more clarity on what the financial bar is that needs to be met because I really hate to see you go out, pay for an audit, do an audit but it doesn't suffice in terms of the evidence.

Chairman Froessel: To the extent that you can give us a rundown of what the financial picture looks like if you had these extra four or five apartments and give us a comparison of that to what you have.

Boardmember Vink: Including what it would cost to create the apartments.

Chairman Froessel: Yes, and anticipated rents.

Mr. J. Nikaj: Is it... for example we have a lot of improvements we have to make at the present time, like some siding, gutter work, and we have a huge driveway that needs a lot of work so can we include stuff like that too because it's going to have to be done sooner or later.

Chairman Froessel: Do you have a business plan to do that work?

Mr. J. Nikaj: Yes.

Chairman Froessel: If it's within the next couple of years I would say you should include that.

Mr. J. Nikaj: OK.

Boardmember Vink: Anticipated capital improvements I think is a legitimate line item, yes.

Chairman Froessel: OK, so let's keep the Public Hearing open; we'll adjourn and come back next month. What is the date for next month, Victoria (Desidero)?

Secretary Desidero: Next month is September 16.

Chairman Froessel: So, we will see you back September 16 and let you take another crack at this and see what you come up with in the meantime.

Mr. Nikaj: I will try to do my best.

Chairman Froessel: Next month we will take care of it one way or another.

2. Dax Colasacco

4 Turk Hill Road, Tax Map ID 67.11.-1-5

Public Hearing to review an application for a height variance of 3 ft. for a fence in the front yard where 3 ft. is permitted and 6 ft. is proposed.

Ms. Desidero: I brought the pictures back for everyone, but especially Boardmember Gil because he wasn't here.

Chairman Froessel: OK, very good.

Boardmember Vink: Just a reminder that you are still under oath from the last meeting.

Chairman Froessel: We heard back from County Planning and they did not have a negative view of it so you need four votes to get a variance. If they had disapproved it you would have needed five votes.

Mr. Colasacco: That was the State, right?

Chairman Froessel: It's County Planning. The application itself I think is pretty straightforward. He wants to build a 6 ft. fence fronting Route 22 and he is at the corner of Turk Hill Road and Route 22.

Boardmember Gil: OK.

Boardmember Cassidy: You have the stone wall along Turk Hill Road?

Mr. Colasacco: Yes, I do.

Boardmember Cassidy: And that's 3 ft. tall?

Mr. Colasacco: That's 3 ft.

Boardmember Corozine: So, you don't have any intention of changing that stone wall, you're just looking on the Route 22 side.

Mr. Colasacco: Just the Route 22 side. I'd like to taper the fence down into the stone wall so 6 ft. down to the wall.

Chairman Froessel: Is there anyone in the audience with any comments or questions on this application? No? OK, we have County Planning's feedback so we can vote on this tonight. Does anyone have any additional questions?

Boardmember Vink: Did you look at putting in any bushes or other plantings that would create the barrier on Route 22 that you're looking for without putting up a 6 ft. fence?

Mr. Colasacco: I did look into some bushes and stuff that I would like but I would love to have the fence and then the bushes as a double barrier.

Boardmember Vink: I live on Milltown Road. It's not as busy as Route 22 but it's fairly busy and I live probably as close to Milltown Road as your house is to Route 22. I have a series of evergreen trees along Milltown Road that effectively block, not the grim in particular, but a lot of the noise and certainly lessens the impact of Milltown Road on my property and I'm not sure... I understand you have kids. So do I.

Mr. Colasacco: No, I don't have kids. My nieces and nephews they come over all the time and they're at the age where they run around like crazy.

Boardmember Vink: OK, but it seems to me a series of hedges or hedges and evergreens could have the same impact as a fence would and I don't think there are any similar fences lining properties on Route 22. There is that one property across from the reservoir that may have a low fence; the one at Dean's Corner. I think they have a taller fence but they didn't get it from us. That's my only comment.

Mr. Colasacco: Yeah, I'd like to do both though to keep the kids and the yard and I'd definitely plant behind it if you know...

Boardmember McNeill: The fence that you're proposing: is this a standard Home Depot stockade fence?

Mr. Colasacco: No, the fence that I showed you was just an example I took a picture of. I want to do a cedar fence with a sweep to it so it doesn't look so commercial.

Boardmember McNeill: So, it's not this fence?

Mr. Colasacco: No, it's not that. I was just showing you a wood fence. I would love to do a sweep so actually it's going to drop from 6 ft. to about 4-1/2 ft. if you'll allow me and then go back up. You know what I'm talking about? I don't want it to look commercial.

Boardmember Vink: Yeah, I think that would actually take away from your property value.

Mr. Colasacco: Yeah, no, no, I don't want to wreck the property. It's pretty historic over there so... But I think a fence like that would look really nice though with the bushes so what I'd really like to do the sweep and then plant in the middle of the sweep like the giant arborvitaes.

Chairman Froessel: You realize that from our perspective once we give you a 6 ft. height variance, the next guy after you could come in and put up that 6 ft. stockade from Home Depot so the variance stays with the property forever.

Mr. Colasacco: I see.

Chairman Froessel: Are we OK to vote on this? Yes? OK. We will close the Public Hearing and take a vote. Before I close the Public Hearing, do you have any final comments you'd like to make in support of your application?

Mr. Colasacco: No.

Chairman Froessel: OK. Do you feel that you've been given a fair and adequate opportunity to present your application?

Mr. Colasacco: Absolutely.

Chairman Froessel: Very good, thanks. With that we will close the Public Hearing and I will entertain any motion anyone would care to make on this application.

The motion to deny the application for a 3 ft. variance for a fence was introduced by Boardmember Vink, seconded by Boardmember Gil. The Criteria:

1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties created by the granting of the variance.
I believe that it will be an undesirable change in the character of the neighborhood and the other properties in the neighborhood do not have fences of this type and I believe that the visual affect on a particularly the long stretch of Route 22, a 6 ft. fence would be an undesirable change.
2. Whether the benefit sought by the applicant can be achieved by some feasible method other than a variance.
I believe it can. I believe that plantings can accomplish the same effect as a fence can in this situation.
3. Whether the requested variance in substantial.
Yes, it is. It's a 100% variance request.
4. Whether the proposed variance will have an adverse effect or impact on the environmental conditions in the neighborhood or district.
I don't believe there will be any.
5. Whether or not the alleged difficulty was self-created.
Yes, it was. When the property was purchased there was no fence in that area.

Chairman Froessel: I will note before we do the Roll Call Vote that the motion was to deny so a vote in favor is a vote in favor of the denial.

Roll Call Vote:

G. Wunner	In Favor
J. McNeill	In Favor
P. Vink	In Favor
R. Cassidy	In Favor
S. Corozine	In Favor
A. Gil	In Favor
T. Froessel	In Favor

The motion to deny the variance as stated in the motion passed by a vote of 7 to 0.

**3. Ernest Pacheco and Marlene Rosero
90 Cooledge Drive, Tax Map ID 56.8-1-31**

Public Hearing to review an application for a height variance of 3 ft. for a fence in the front yard where 3 ft. is permitted and 6 ft. is proposed.

Ernest Pacheco and Marlene Rosero were sworn in.

Boardmember Vink: Victoria, are the mailings in order?

Ms. Desidero: No, they are not. So, we have been trying to help Ms. Rosero with this application and there was some misunderstandings about how this needed to be done. They did do the certified but they didn't ask for the green cards back. I told them to come tonight because I didn't know how the Board would feel about that. But in addition to that when I just went through and checked the mailings one of their neighbors has a legal mailing address in California and they didn't feel they needed to send to them because they're not local but they own the property.

Ms. Rosero: Actually, I filled the name but when I went to the Post Office the man officer told me 'this is not your neighbor, this is in California, this must be a mistake' so I was like OK so don't do it.

Ms. Desidero: So, I don't know that, I can't tell that.

Ms. Rosero: I have this.

Chairman Froessel: Unfortunately, the person at the Post Office...

Boardmember Vink: Don't take legal advice from the Post Office.

Ms. Desidero: The problem is that the Tax Map ID associated with this address in California is a Town of Southeast Tax Map ID. It's one number off from the person below it so chances are they own the property even though they're clearly not here. So, I don't know how you feel about the green cards, but there is a mailing missing. Normally that would be 'not in order.'

Chairman Froessel: We could overlook the missing green cards because technically the receipt is the proof of the mailing, but if there is someone that wasn't notified then I don't think we can proceed. I think you will need to do a mailing to that person in California, do it very soon, and then come back next month and we'll open the Public Hearing and hear your application.

Ms. Desidero: And I would suggest you do it with the green card this time.

Chairman Froessel: It's not us, there is State law that requires notification to be made and the Town has a corresponding Ordinance that requires all your neighbors in a certain number of feet to get noticed and if they don't receive notice we can't even open a Public Hearing and entertain your application because all of your neighbors were supposed to be notified. But if you send something out really soon in the next couple of days it will be back in plenty of time for the next hearing in September and then you can come back on September 16 and we'll hear the application then.

Ms. Desidero: And when you mail, the document you mail, change the date on it. Come see me tomorrow and I'll help you do it, but you have to put the September meeting date on it.

Chairman Froessel: Yes, that's correct.

John Hamilton appeared before the Board.

Mr. Hamilton: They're my neighbors and I'm glad to have them. I have two of the houses right adjacent and my parents have the third one surrounding. The mailing for the Town's records came to my parents and not the new owners. The new owners bought in April so that needs to be upgraded too so the right people are noticed. I believe this California thing, there's a blank piece of property that been there... I've been there 50 years... I think that's the person on record in California that owns it. I don't know that you'll ever reach them. The neighbor that has the property adjacent uses it and cuts it as part of his yard so I'm not sure that anyone will ever find the California person.

Chairman Froessel: I don't care if anyone finds them, I just care that someone mails to them.

Mr. Hamilton: I appreciate that. I just wanted to share with you what's going on so that next month no one says hey the Hamiltons' were notified on this and not the new owners. At 96 Cooledge was my parents and there has been a new family in there since April.

Ms. Desidero: I know they went to the Assessor for the list because they didn't have any kind of a list but it means the Assessor's list is not up to date.

Chairman Froessel: Right, I can't hold them responsible for that.

Ms. Desidero: I can talk to the Assessor about it.

Chairman Froessel: That would be good. I'm more concerned about the one neighboring property that didn't get a mailing at all. If you could work with Victoria (Desidero) and we will see you again next month.

The motion to approve the Meeting Minutes of July 17, 2019 meeting was introduced by Chairman Froessel seconded by Chairman Vink and passed all in favor.

The motion to adjourn the meeting was introduced by Chairman Froessel, seconded by Boardmember Cassidy, and passed all in favor.

Respectfully submitted,
Cathy Chiudina
Victoria Desidero