

BOROUGH OF DEAL

PLANNING BOARD/BOARD OF ADJUSTMENT MINUTES

April 3, 2023

A special virtual meeting of the Planning Board/Board of Adjustment of the Borough of Deal was called to order by Planning Board Attorney Erik Anderson.

FOLLOWING THE SALUTE TO THE FLAG, Stephen Carasia, Board Secretary, read the following sunshine law, in conjunction with the "Open Public Meeting Law", p.l. 1975 C231, the notice required by this statute has been satisfied as per a resolution passed on December 5, 1997 at 8:00 P.M. at Borough Hall at a regular meeting of the Planning Board, Borough of Deal, Monmouth County, New Jersey. This meeting is a judicial proceeding. Any questions or comments must be limited to the issues of what this Board may legally consider in reaching a decision and decorum appropriate to a judicial hearing must be maintained at all times.

Roll Call of those present: Mrs. Jannarone, Vice Chair J. Cohen, Mr. Antebi, Commissioner Simhon, Mayor Cohen

Those Absent: Chair Cummings, Mrs. M Cohen, Mrs. N Cohen, Mrs. Mamiye, Mr. Zeevi. Mr. Kassin

MINUTES – None

CORRESPONDENCE - None

RESOLUTIONS-

The first item on the agenda is the adoption of the Resolution 2023-002, 15 Poplar Avenue, Block 13 Lot 11.01. Appeal denied at the February 7, 2023 special meeting.

RESOLUTION 2023-002

Richard Dweck is the record owner of 21 Poplar Avenue, Deal, New Jersey "Dweck Property". Nathalie Vilinsky is the record owner of 15 Poplar Avenue, Deal, New Jersey "Vilinsky Property". The properties are adjacent to each other. Vilinsky submitted a zoning application on July 29, 2022, to the Borough of Deal to construct a new single family home with pool, sports court, and other improvements. On September 6, 2022, the Borough of Deal's zoning official, Stephen Carasia found the zoning application to be acceptable as submitted and the zoning permit was approved. On September 22, 2022, Dweck filed an appeal of the zoning official's zoning permit approval and also requested an interpretation of the Borough of Deal's Development Regulations and other ordinances.

Hearings were held in connection with the Dweck appeal before the Unified Planning Board of the Borough of Deal ("Board") on 12/7/2022, 1/4/2023 and 2/7/2023.

The Appellant/Applicant ("Appellant"), Richard Dweck was represented by Michael Convery, Esq.

Nathalie Vilinsky was represented by John Giunco, Esq. and Steven Ward, Esq.

The Isadora and Kenneth Chamlin Trust ("Trust"), which owns 5 Poplar Avenue, Deal, New Jersey, was represented by John Buzzuaro, Esq. Mr. Buzzuaro advised that his clients were an interested party in the subject matter of the appeal and were not objecting to the zoning officer's decision per se.

Attorneys Convery, Ward and Buzzuaro participated in the zoning appeal hearings.

Whereas the Board after carefully considering the evidence presented by the Appellant, Appellant's expert, interested parties, other experts and the comments, if any, by the general public, has made the following factual findings:

Procedural History

On, or about, July 2, 2019, Vilinsky submitted a zoning application for certain improvements to the Vilinsky property. It was determined that certain aspects of the proposed plan required the Board's review and approval. A variance application was submitted, and a hearing scheduled before the Board on September 5, 2019. At the September 5, 2019, hearing, the matter was adjourned with no new hearing date set. When the hearing was to be rescheduled, counsel for Vilinsky was to re-notice that hearing. The Board took no testimony/evidence relating to that application.

On May 22, 2020, Vilinsky submitted new plans relating to improvements to his property to the zoning officer for review. On June 9, 2020, it was determined by the zoning officer that the application was acceptable as submitted and a zoning permit was approved. On June 25, 2020, Vilinsky filed an appeal relating to that approval. The Trust also joined in that appeal.

On November 19, 2021, Vilinsky again submitted new plans relating to improvement to his property to the zoning officer for review. On March 30, 2022, it was determined by the zoning officer that the application was acceptable as submitted and a zoning permit was approved. On April 14, 2022, Dweck filed an appeal relating to that approval. Attempts were made to schedule a hearing in connection with that appeal in May 2022, June 2022 and July 2022. Due to scheduling conflicts of the attorneys and experts, no hearings occurred in connection with that approval.

On July 29, 2022, Vilinsky submitted new plans relating to improvements to his property to the zoning officer to review. By letter dated September 6, 2022, it was determined by the zoning officer that the application was acceptable as submitted and a zoning permit was approved. On September 22, 2022, Dweck filed an appeal relating to that approval.

Vilinsky ultimately withdrew the July 2, 2019 application, May 22, 2020 application and November 19, 2021 application.

The September 6, 2022 zoning officer approval of the July 2022 application is the subject of this appeal.

Hearing Procedures

On December 5, 2022, an email was sent from the Board's attorney to Mr. Convery and Mr. Guinco regarding whether the Mayor (Class I) and/or Commissioner (Class III) could sit for the appeal. Counsel was advised that based on NJSA 40:50D-25, it was the Board attorney's opinion that the Mayor and Commissioner could sit for the appeal. No objection to this opinion was lodged by Convery or Guinco. At the December 7, 2022, hearing this issue was again brought up and the email was read into the record. Mr. Buzzaro, Mr. Convery and Mr. Ward had no objection to the Mayor and Commissioner hearing the appeal (ultimately only Commissioner Simhon participated). Additionally, no member of the public/audience voiced an objection to this position.

Further, in the December 5, 2022, email a procedure was proposed regarding how hearing would be conducted. That email was sent to Mr. Convery and Mr. Guinco. No objection to the proposed procedure for the hearing was lodged by Convery and Guinco. Again, at the December 7, 2020, hearing this issue was again brought up and the email was read into the record. Mr. Buzzaro, Mr. Convery and Mr. Ward had no objection to proposed procedures for conducting the hearing.

The hearing was conducted per those parameters set forth in the December 5, 2022 email and agreed to on the record at the December 7, 2022 hearing.

Nature of the Appeal

The Appellant contends that the zoning officer made errors in not identifying variances, waivers, exceptions and other items of relief associated with the authorization of a zoning permit for the new single-family residence, sports court, pool, and other improvements at 15 Poplar Avenue. The Appellant also seeks an interpretation by the Board of the Borough of Deal

Development Regulations and other Deal Ordinances that the following items of relief are required to be sought in connection with the issuance of permits for the new dwelling, pool and other improvements at 15 Poplar Avenue:

1. Inadequate lot frontage per Section 30-48;
2. Sports court set in a front yard and violates set back requirements;
3. Roof deck;
4. Intensification of a non-conforming condition (non-accessory driveway);
5. Improvements proposed within a floodway (Ordinance 19-4.42(c)); and
6. Parking in the front yard.

Exhibits Entered into Evidence

1. The Appellant entered the following exhibits into evidence:

AP-1 Plot Plan by Matrix New World Engineering dated 9/23/21.

AP-2 Architectural Plan dated 11/30/21

AP-3 Avakin letter dated 9/1/22.

AP-4 Zoning Plan determination dated 9/6/22.

AP-5 Slide presentation by Peter Steck dated 12/3/22.

AP-6 Plot Plan for 8 Roosevelt Avenue dated 5/2/13.

AP-7 Avakin review letter for 8 Roosevelt Avenue dated 4/15/13.

AP-8 Copy of cover sheet for 60 Ocean Avenue dated 3/7/19.

AP-9 Avakian review letter for 60 Ocean Avenue dated 3/1/19.

AP-10 Plot plan for 91 Ocean Avenue dated 9/5/18.

AP-11 Avakian review letter for 91 Ocean Avenue dated 8/24/18.

2. Vilinsky entered the following exhibits into evidence:

R-1 1953 Filed Map #16-28 recorded with the Monmouth County Clerk 2/24/53.

R-2 1953 Deed in the Monmouth County Deed Book 2405 page 219 recorded 3/5/53.

R-3 Deal Ordinance #1084.

R-4 Deal Ordinance #1257.

R-5 Deal Ordinance #892.

R-6 Deal Ordinance #868.

3. Additional exhibit marked into evidence:

B-1 Slide presentation of Leon Avakian.

C-1 Written closing submission of Mr. Bazzurro.

Evidence Presented to the Board

1. Stephen Carasia testified as follows:

- a. Stephen Carasia testified that he is the zoning officer for the Borough of Deal.

- b. Carasia was called by Mr. Convery, counsel for Dweck.
- c. Carasia testified that he has served as the Borough Administrator, Borough Clerk and Zoning Officer for approximately ten years.
- d. Carasia testified that as the Zoning Officer he determines if zoning applications conform with the Borough's development regulations.
- e. Carasia testified that he reviewed the Vilinsky plan documents relating to the application at issue in this matter.
- f. Carasia testified that as the Zoning Officer he relies, in part, on the Borough of Deal's engineer for guidance and input in making zoning determinations.
- g. Carasia testified that as the Zoning Officer he makes the ultimate decision regarding applications presented for review.
- h. The Borough of Deal's engineer is Leon S. Avakian, Inc.
- i. For this matter he consulted with Peter Avakian and Denis Higgins from Leon S. Avakian, Inc.
- j. Carasia testified that he issued the zoning approval for the Vilinsky property dated 9/6/22.
- k. Carasia testified that it was his opinion that the sports court was located in the side yard of the property and complied with applicable setbacks.
- l. Carasia testified that he had no knowledge if Vilinsky attempted to acquire additional property for his lot from Dweck or the Trust.
- m. Carasia testified that he discussed the positioning of the dwelling and setbacks with Avakian and Higgins.
- n. Carasia testified that he discussed the proposed balcony, parking and floodway with the Avakian and Higgins.
- o. Carasia testified that the decision to issue the zoning permit was his.
- p. Carasia testified that he used his normal process for evaluating the Vilinsky application as he does for any other zoning application.
- q. Carasia testified that in his opinion the Vilinsky plan conformed with Deal's Development Regulations and no Board review was necessary.

2. Testimony of Peter Steck:

- a. Peter Steck is a NJ Licensed Planner and was accepted by the Board as an expert.
- b. Steck was called by Mr. Convery, counsel for Dweck.
- c. Steck testified that he reviewed the zoning application submitted by Vilinsky, as well as Borough correspondence relating to the application.
- d. Steck testified that the Vilinsky lot is non-conforming. He noted the minimum lot width permitted is 150 feet. He noted that the minimum lot frontage permitted is 150 feet. The Vilinsky lot line adjacent to Poplar Avenue is 100 feet. Steck testified that as a non-conforming lot attempts should be made to make the lot conforming. In this case there is no evidence that Vilinsky attempted to do that (e.g. acquire additional property) and as such, Board review and approval is required for all aspects of the Vilinsky application.
- e. Steck testified that Vilinsky needs to demonstrate that there is no land that can be reasonably acquired that would render the lot more conforming.
- f. Steck testified that the dwelling encroaches in the front yard, requiring Board review and approval.
- g. Steck testified that the proposed sports court was being placed in a front yard. He noted that Borough Ordinance provided that no accessory structure, such as a sports court, could be placed in a front yard. It was his testimony that the lot line at the rear of the Dweck property (parallel to Poplar Avenue) should be considered a front lot line creating the area where the court is proposed a front yard requiring a variance.
- h. Steck opined that the sports court is an accessory use and per Borough Ordinance must be placed in the rear yard otherwise a variance is required.
- i. Steck testified that the proposed sports court, since in the front yard was required to be set back 50'. The proposed sports court was within this setback requiring a variance.
- j. Steck testified with regard to applications with similar lot configurations/issues, which required Board review and approval.

Specifically, 60 Ocean Avenue, 8 Roosevelt Avenue and 91 Ocean Avenue. It was his opinion as that these matters concerned similar properties and similar proposed improvements, the current application should also be subject to Board review and approval.

- k. Steck testified that the proposed rear elevation second floor outside area should be considered a rooftop deck. Per Borough Ordinance, roof top decks are not permitted in residential districts and a variance is required.
- l. Steck testified that the proposed dwelling is a principal use. He also testified that the driveway which accesses the Trust property should be considered a principal use. Per Borough ordinance two principal uses are not permitted. Accordingly, Board review and approval are required.
- m. Steck testified that an intensification would occur on the property as the new dwelling would be closer to the driveway serving the Chamlin Trust property. As such, Board review and approval was required.
- n. Steck testified that three off street parking spaces for the proposed new dwelling are required. He also testified that the only off street parking available is on the driveway which is in the front yard. Per Borough Ordinance, parking in a front yard is not permitted. Accordingly, Board review and approval is required.
- o. Steck testified that proposed project encroaches/constitutes improvements in the floodway. Steck testified that Borough ordinance prohibited encroachment into a floodway unless it is demonstrated that the encroachment will not result in an increase of flood levels during a flood discharge. Accordingly, as no such study was performed, Board review and approval is required.
- p. Steck testified that in his opinion the zoning officer was wrong in his determination and the application should have been referred to the Board for review and approval.

3. Peter Avakian testified as follows:

- a. Peter Avakian is a NJ licensed engineer and his office serves as the engineer for the Borough of Deal.
- b. It was agreed by the parties that Avakian be permitted to testify as to the basis of his opinions. He was not called by any party.
- c. Avakian noted that Chapter 30-48.f of the Borough Ordinance provides that any development proposed on a non-conforming lot that has no ability to expand, and that is in accordance with all zoning standards, shall be able to obtain a zoning permit so long as the improvements on the property existing and/or proposed, are in accordance to the zoning standards established for said property.
- d. Avakian testified that the Vilinsky property is non-conforming as its lot frontage at Poplar Avenue is 100 feet, where 150 feet is required.
- e. Avakian testified that despite the non-conformity, the other aspects of the Vilinsky application meet all zoning requirements of the Borough of Deal.
- f. Avakian testified as to the ordinance definitions of front, rear and side yards and the impact on the Vilinsky zoning application.
- g. Avakian testified as to the Ordinance definition of front lot lines, rear lot lines and side lot lines and their impact on the Vilinsky application.
- h. Avakian testified that based on the definitions of the Borough Ordinance, the front lot line of the Vilinsky property was abutting Poplar Avenue.
- i. Avakian testified that the lot line opposite the front lot line is to be considered a rear yard lot line.
- j. Avakian testified that per Borough ordinance, all other lot lines not considered a front lot line or rear lot line were considered a side yard lot line.
- k. Avakian testified that based on Borough ordinance, the proposed sports court was placed in a side yard and met all setback requirements.
- l. Avakian testified that per Borough Ordinance, a sports court is permitted in the side yard provided it is not nearer to the street line than 50 feet or the setback maintained by a majority of buildings within 250 feet of each side of the lot. Further, a sports court must be set back 10 feet from a side yard lot line. As the sports court is in a side yard, it complies with the set back

requirement.

- m. Avakian testified that the proposed second floor balcony was not a roof top deck. Per Borough Ordinance, a rooftop deck is defined as a flat portion of any roof or extending from any portion of the roof used for walk, terrace or seating. Per Borough Ordinance, no roof top decks are permitted in residential districts. With regard to the zoning application, the proposed second floor outdoor area at the rear elevation is a balcony as it is projecting from the wall of the proposed new dwelling and is below the height of the roof of the structure.
- n. Avakian testified that development / improvements in a floodway was not within the jurisdiction of the Board, but of the New Jersey Department of Environmental Protection (“NJDEP”). If a portion of a proposed development / improvement encroached into a floodway, Vilinsky would be responsible for getting appropriate approvals from the NJDEP.
- o. Avakian testified that Deal has permitted encroachments similar to the one proposed into the floodway as long as there is no change in elevation or grade of the property where the encroachment occurs. In this case, there was no encroachment onto the volume or depth or ability of the floodway of Poplar brook to carry flood waters.
- p. With regard to the shared driveway, Avakian testified that the Vilinsky lot was the result of a subdivision of the Trust lot. The Trust lot retained an easement to access the driveway over the Vilinsky lot. He did not believe the driveway was another principal use requiring Board review. He did not believe the proposed plans would create an intensification of usage of that driveway. However, he did suggest consideration of planting shrubbery between the new dwelling and the existing driveway to act as a buffer.
- q. Avakian testified that there is no issue with cars parking on the driveway in the front of the house. There is no prohibition of parking cars on a driveway in the front yard of a home in the Borough Ordinance. Instead, parking vehicles in a front yard is not prohibited per Borough Ordinance.
- r. Avakian testified that that Borough Ordinance provides that parking in the front yard is prohibited except upon improved parking areas and drives. Parking is not permitted on a front lawn.
- s. Avakian testified that with the exception of the lot frontage non-conformity, the proposal meets zoning requirements.
- t. Avakian testified that with regard to Board review and his opinions relating to 60 Ocean Avenue, 8 Roosevelt Avenue and 91 Ocean Avenue. He noted they were separate applications that were evaluated on their unique property characteristics. He noted that those properties had narrow parts of the lot which made them flag lots and the improvements were set back further into the property.

4. Testimony of Andrew Janiw

- a. Andrew Janiw is a NJ Licensed Planner and was accepted by the Board as an expert.
- b. Janiw was called by Mr. Ward, counsel for Vilinsky.
- c. Janiw testified that the driveway serving the Trust property which traverses over the Vilinsky property dates to at least 1953.
- d. Janiw testified that the driveway is subject to an access easement. There is no requirement of a setback to the driveway in the Borough Ordinance or easement itself.
- e. Janiw testified that the driveway is permitted in the side yard setback per Borough Ordinance.
- f. Janiw testified that there was no requirement to create a buffer between the driveway and the proposed new dwelling under Borough Ordinance.
- g. Janiw testified that the driveway serving the Trust property should not be considered a primary use. As such, there would not be two primary uses on the property.
- h. Janiw testified that the Trust driveway was an accessory use to their property and even it was to be considered a principal use on the Vilinsky property, it was grandfathered in by way of the 1953 easement and would be a pre-

- existing non-conformity.
- i. Janiw testified that in his opinion it was not possible to expand the Vilinsky lot as the lots on either side (Dweck and Trust) are improved residential properties.
 - j. Janiw testified that the lot width adjacent to Poplar Avenue is non-conforming. However, per Borough Ordinance as the lot has no ability to expand and is in accordance with all zoning standards they are permitted to obtain a zoning permit.
 - k. Janiw testified that in his opinion Avakian properly interpreted the Borough's ordinance regarding lot line definitions and that the sports court would be located in a side yard.
 - l. Janiw testified that in his opinion Avakian properly interpreted the Borough's ordinances regarding set backs as they apply to the dwelling and sports court.
 - m. Janiw testified that in his opinion Avakian properly interpreted the Borough's ordinance regarding the second floor balcony.
 - n. Janiw testified that Ordinance 1257 relied upon by Dweck regarding Board review with regard to an encroachment in a floodway had been repealed by the Borough in 2022 and was not applicable.
 - o. Janiw did not agree that bringing the dwelling closer to the driveway would result in an intensification of usage.
 - p. Janiw testified that in his opinion the application submitted by Vilinsky conformed with applicable Borough Ordinances.

NOW, THEREFORE BE IT RESOLVED, by the Planning Board of the Borough of Deal on the 7th day of February 2023 after having considered the aforementioned Appeal/Application, testimony and evidence finds as follows:

- A. The Board denies the appeal of the Appellant/Applicant;
- B. The Board hereby affirms the subject decision of the Zoning Officer; and
- C. The Board finds the request for an interpretation of the Borough's Development Regulations and other Deal Ordinances moot as the Board has interpreted those regulations and ordinances in rendering its decision.

In support of its decisions, the Board makes the following Findings of Fact and Conclusions of Law:

1. The Lot in question is non-conforming with regard to the frontage on Poplar Avenue. However, pursuant to Chapter 30-48.f, any development proposed on a non-conforming lot that has no ability to expand, and that is in accordance with all zoning standards, shall be able to obtain a zoning permit so long as the improvements on the property existing and/or proposed, are in accordance to the zoning standards established for said property. The Board finds that it is not practical or reasonable for the Vilinsky property to expand an additional 50' to conform with lot frontage and/or width at Poplar Avenue as there are improved residential lots on either side. The Board finds that the proposed plans are in accordance with all zoning standards and thereby permitted to obtain a zoning permit.
2. The Board finds that a reasonable interpretation of the Borough Ordinance defines the lot line adjacent to Poplar Avenue the front lot line and the lot line opposite the front lot line a the rear lot line. Further, the Board finds that per Borough Ordinance, all other lot lines should be considered side yard lot lines. Accordingly, the Board finds that the lot line at the rear of the Dweck properly does not constitute a front lot line of the Vilinsky property, but instead a side yard lot line. Accordingly, the area adjacent to that lot line does not constitute a front yard but a side yard.
3. Based on the findings in paragraph 2, the Board finds that the proposed sports court is not in the front yard of the Vilinsky property. Further, as it is not in the front yard, its proposed location complies with applicable side yard setbacks, requiring no

Board review.

4. Based on the findings in paragraph 2, the Board finds that the proposed dwelling does not encroach into the front yard and its location complies with applicable side yard setbacks, requiring no Board review.
5. The Board finds that per the Borough ordinance, a rooftop deck is defined as a flat portion of any roof or extending from any portion of the roof used for walk, terrace or seating. Per Borough ordinance, no roof top decks are permitted in residential districts. With regard to the zoning application, the proposed second floor area is projecting from the rear wall of the proposed new dwelling and is below the height of the roof of the structure. The Board finds this to be a balcony and not a roof top deck and requires no Board review.
6. The Board finds that the driveway which has existed since at-least 1953, pre-dates the Borough land use ordinances. It does not find the driveway to be a second principal use. Accordingly, the Board does not find that the application proposes two principal uses. Therefore, no Board review is required.
7. The Board finds that the off-street parking requirements per the Borough Ordinance has been met by the proposed plan. The Board finds that the Ordinance prohibiting parking in a front yard does not apply to parking on a driveway in a front yard. Accordingly, no Board review is required.
8. The Board finds that it has no jurisdiction over improvements in a Floodway which comply with Borough's zoning ordinance. Further, the ordinance cited by the Appellant to support the claim that the Board must review of improvements in the Floodway has been repealed. Further, the NJDEP has jurisdiction/power of approval regarding development in such areas. Accordingly, no Board review is required.
9. The Board finds no intensification of usage of the driveway in relation to the proposed new dwelling. Accordingly, no Board review is required.
10. The Board finds Appellant's arguments noting the Board review of other properties – 60 Ocean Avenue, 8 Roosevelt Avenue and 91 Ocean Avenue unpersuasive. The Board finds that each application must be viewed on its own merits and does so with the Vilinsky application.
11. The Board finds the Appellants request for a separate interpretation of the Borough of Deal Development Regulations and other Deal Ordinances is not necessary and is moot. This decision is based on the fact that the Board was required to review, interpret and apply Borough Ordinances to render its decision. Accordingly, its decision in and of itself required interpretation. As such a separate interpretation is not necessary.

THEREFORE, for the reasons set forth above the appeal is denied and the zoning officer's determination affirmed.

Moved by: Mr. Antebi

Seconded by: Mrs. Jannarone

ROLL CALL VOTE

Those in favor: Mr. Antebi, Mrs. Jannarone, Mr. Kassin, Vice Chair Cohen, Commissioner Simhon

Those opposed: None

Those absent: Mrs. M. Cohen, Mrs. N. Cohen, Mrs. Mamiye, Mr. Zeevi, Chairman Cummings, Mayor Cohen

Those not voting: None

NOW, THEREFORE BE IT RESOLVED, by the Planning Board of the Borough of Deal on the 3rd day of April, 2023 that the Resolution of be adopted.

Moved by: Mr. Antebi

Seconded by: Vice Chair J. Cohen

ROLL CALL VOTE

Those in favor: Mr. Antebi, Mrs. Jannarone, Vice Chair Cohen, Commissioner Simhon

Those opposed: None

Those absent: Mrs. M. Cohen, Mrs. N. Cohen, Mr. Kassin, Mrs. Mamiye, Mr. Zeevi, Chairman Cummings

Those not voting: Mayor Cohen

Vice Chair J. Cohen opened the meeting for public comments.

There were no public comments.

OLD BUSINESS- None

NEW BUSINESS- None

There being no further business, a motion to adjourn was made at 11:06 A.M. by Vice Chair J. Cohen, seconded by Mrs. Jannarone, and moved unanimously by all members present.

Stephen Carasia
Board Secretary