

**BOARD OF ADJUSTMENT MEETING
CITY OF REHOBOTH BEACH**

January 30, 2012

The Board of Adjustment Meeting of the City of Rehoboth Beach, was called to order at 7:00 p.m. by Chairman Thomas Evans on Monday, January 30, 2012 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Ms. Myrna Kelley
Mr. Thomas Evans
Mr. Frank Cooper
Mr. Clifton Hilderley

Absent: Mr. Doug Popham

Also Present: Mr. Craig Karsnitz, Esq., Board of Adjustment Solicitor

A quorum was present.

CORRESPONDENCE

There was none.

APPROVAL OF MINUTES

Minutes of the November 28, 2011 Board of Adjustment meeting were distributed prior to the meeting.

Mr. Frank Cooper made a motion, seconded by Ms. Myrna Kelley, to approve the minutes of the November 28, 2011 meeting as written. Motion carried unanimously.

OLD BUSINESS

There was none.

NEW BUSINESS

Case No. 1111-08. An APPEAL OF THE DECISION OF THE BUILDING INSPECTOR in regard to Section 270-82 of the Municipal Code of Rehoboth Beach to issue a building permit for residential construction. The property is located in the R-1 Zoning District on Lot 6, Silver Lake Shores at 6 Silver Lane. The Appeal is being requested by Eugene M. Lawson, Jr., Esq. of The Lawson Firm LLC on behalf of Silver Nine LLC, Martha Lou Cochran, Save Our Lakes Alliance 3 and Rehoboth Beach Homeowners' Association Inc. The property is owned by the Joseph & Veda Levy Trust. Chairman Evans noted that all parties were present and that the appeal hearing would be a two-step process. The first burden is why the Appellants should be heard when the Board of Adjustment's Rules of Procedure say that a decision of the Building Inspector must be made within 30 days of the decision. If the argument is found in favor of, the Board will proceed to the merits of the case. The order of events was also noted, and that this proceeding was not an open forum with the audience.

Board of Adjustment Solicitor Craig Karsnitz noted that this Board has limited jurisdiction, and it is permitted to hear appeals from the decisions of the Building Inspector from person aggrieved by those decisions. The Board's rules say that any such appeal must be filed within 30 days of the decision unless there is good cause shown for a later date. Good cause would be for not filing within 30 days, not whether there is good cause or not with respect to the appeal. The review of the paperwork in this case shows that the decision of the Building Inspector was in early May 2011, and the appeal was not filed until the November 23, 2011.

Ms. Myrna Kelley made a motion to grant permission to the Appellants to present their case to be heard. The motion was rescinded.

Mr. Eugene M. Lawson, Jr., Esq. provided testimony on behalf of Silver Nine LLC, Martha Cochran, Save Our Lakes Alliance 3 and Rehoboth Beach Homeowners' Association Inc. On January 26, 2012 Attorney Lawson received a letter from counsel for the property owners, the Levy's raising the issue that this appeal was time barred. The Board's rules also say that for good cause, the deadline can be extended. The State status also indicates that an appeal should be taken within reasonable time. Attorney Lawson felt that reasonable time still remains and thought that this should be looked upon as a laches defense rather than a statute of limitations

situation. The building permit was issued in May 2011, and the Building Inspector's report indicates that footing excavation was done the end of July 2011 which was the first time any of his clients were aware that something was going on next to the lake. The Building Inspector's report indicates that she was approached two weeks later by one of the applicants, and after that there were a number of inquiries and file inspections from mid-August to mid-October 2011. These inquiries were in addition to the applicant's calls to meet with the Mayor, City Manager and several Commissioners requesting clarification of what they perceived to be construction going on in Silver Lake. On November 3, 2011, Attorney Lawson delivered a letter with exhibits and arguments to the City and met with Mayor Samuel Cooper and City Manager Gregory Ferrese. A meeting was held on November 17, 2011 which did not result in a resolution. Ms. Jane Patchell, Esq. who was representing the Levy's was provided with additional documents which she had not seen before, and agreed to review the materials. The appeal was filed on November 28, 2011 which was six days after the meeting. In the event the appeal is not heard and resolved this evening, the next opportunity will come when the application for Certificate of Occupancy is filed. At that point, there would be a 30 day period for an appeal of the Building Inspector's action. There would be an additional hardship because the house would be finished as opposed to now when there are foundations walls up. On behalf of the applicants, Attorney Lawson requested the Board deny the request that the appeal is untimely and proceed with the hearing. None of the appellants which Attorney Lawson represented discovered that this was construction that was conceivably in the lake until late in the fall 2011. There was not a conscious decision to wait until November 23, 2011 to file the appeal because there was diligent research going on. The Appellants wanted to know what was going on, and that took some research with respect to a naturalist, engineers and surveyors. They wanted to make sure that the appeal would not end up being unreasonable.

City Solicitor Glenn Mandalas provided testimony that the appeal was not timely filed within the strict reading of both the Code and the Board's rules of procedure being 30 days and the Code saying within a reasonable time. The property owners should be able to rely upon the building official's decision after some period of time to go forward with whatever they want to do with their property. In the interest of the building official, Ms. Terri Sullivan should be able to rest at night knowing that after a period of time, she can move forward and conduct her business and her decisions have been made, and they are not challengeable months after she has made her decision. The City is not going to take a strong position as to this matter. The notion of having time bars was supported. City Solicitor Mandalas noted that Attorney Lawson was correct that he was working with the City and that there were ongoing discussions. There may have been some understanding that this process was moving forward. The building official would like to have a decision on the merits because she wants to be vindicated that she did what was right and followed the law and her procedure under the Code. There is a period of time that the building official should be able to move forward with her responsibilities and not think her decisions are still challengeable, and the property owner should be able to move forward with the decision made.

Mr. Scott Wilcox, Esq. of the law firm Whiteford, Taylor and Preston, represented the property owners, the Levy's and provided testimony. He thought it was stated properly that this Board has a strict 30 day time limit, unless the applicant can show a reason to circumvent that timeframe or to open it up. Good cause equals diligent action by the Appellant, not dilatory action. In this case, it is dilatory action. The building permit was issued in May 2011. At the end of June 2011, major construction occurred on this site. There was a big hold that was dug in the middle of the property. Work of that nature is noticeable. In the beginning of July 2011, more work was done with large equipment, excavators, bobcats, etc. The neighbors surely could have seen what was going on. The Building Inspector had noted that inquiries were made by Ms. Martha Cochran of what was going on, and it was explained to her in July that footings were being dug. If there was concern that the building was going to be in the lake, an appeal should have been filed at that time. In August 2011, construction continued on the property with the footers being put in. At that time, the contractor struck a wire and knocked out the power to that area of the development, and surely the neighbors would have known something was going on. The suggestion that the Appellants did not have a reason to file an appeal at that time is unsupported by the facts. Mr. Wilcox took umbrage with the suggestions that there were discussions during certain meetings, and he was told. In going back to the concept of laches, the balance of the equities suggested that the Board should not extend the 30 day timeframe because there is not good cause. The stay was issued in November so his client has missed almost two months' worth of construction on a project which may take even longer to get started again because of the contractors who would have to come back on the job. Based on these arguments, Attorney Wilcox asked that the Board deny the application for procedural reasons, and not allow the Appellants additional time for their dilatory conduct.

Ms. Andrea Levy, daughter of Veda and Joseph Levy, owners of the property. She provided a frame of reference of how much money is involved to the property owners which has been in the hundreds of thousands

of dollars for the architect involved, surveys done and getting building supplies to have the building started.

Ms. Myrna Kelley made a motion, seconded by Mr. Frank Cooper, to allow the Appellant to be heard.

Chairman Evans had hoped for more of a unique and compelling reason. He would have liked to hear the facts of the case. Chairman Evans was troubled by the delay, intentional or not, to drag this out so long on a person building a house under normal timeframes, and the repercussions that it might have on this Board in the future. No one has made a very good case on the part of the Appellants why they did not put in their appeal at any given time.

Mr. Cooper said that this is a very unique set of circumstances, and he did not see it opening a floodgate of appeals of this nature. This is literally a community action and not a particular aggrieved person who is building a house in the position where there is disagreement with the Building Inspector. This is a case of public outcry that culminates in the hiring of an attorney and trying to take legal action. This is a very unique situation. Mr. Cooper said that he would hardly envision that happening on any routine basis.

Mr. Clifton Hilderley noted that the Board of Adjustment is a quasi-judicial administrative body of the City and not part of the Federal Court system. It is not bound by the rules of evidence or the rules of civil procedure, but the Board is bound by its own rules. Good cause had not been shown, and equities are involved. In regard to the appeal, the Appellants were negligent in paying attention to their own rights which could have been asserted. The arguments heard on behalf of the Appellants are more of an equitable nature about preserving the beauty of the lake and how the Army Corps of Engineers establishes boundary lines, etc.

Ms. Kelley stated that rules have a purpose. She was disappointed in not hearing just cause which would merit extending the timeline as requested. Superior Court may be the next avenue. The Board of Adjustment has to go by its rules as stated.

(Kelley – against. Cause was not shown. She would be willing , in the spirit of cooperation, to consider 60 days if the situation seemed to warrant it. Evans – against, for the reasons he previously stated. The Appellant did not provide clear, unique and compelling reasons for why they should be heard outside the 30 day window. Cooper – for. This is a unique set of circumstances that was not foreseen when the rules were made. There is a clause for the exception to the rule in unusual circumstances, and this is as unusual as it get. Hilderley – against, for the reasons stated. Cause for extending the Board of Adjustment’s 30 day rule was not shown.) Motion failed. The Appellant would not be heard this evening.

OTHER BUSINESS

There was none.

The next schedule Board of Adjustment Meeting will be held on February 27, 2012 at 7:00 p.m.

There being no further business, Chairman Evans declared the meeting adjourned at 8:02 p.m.

Respectfully submitted,

(Ann M. Womack, CMC, City Secretary)

**MINUTES APPROVED ON
MARCH 19, 2012**

(Thomas A. Evans, Chairman)