

THEODORE R. LEWIS
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LEWIS AND WALTERS

46 SOUTH FOURTH STREET
EASTON, PENNSYLVANIA 18042-4532

GEORGE F. COFFIN
1896-1937

GEORGE F. COFFIN, JR.
1928-1986

NAZARETH OFFICE:
BY APPOINTMENT ONLY
LIBERTY AND CENTER STREETS
NAZARETH, PA. 18064

MAILING ADDRESS:
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(610) 253-6148
FAX (610) 253-5885

October 24, 2011

Hanover Township Engineering
ATTN: Yvonne D. Kutz
Hanover Township Municipal Bldg.
3630 Jacksonville Road
Bethlehem, PA 18017

**Re: Hanover Township Zoning Hearing Board –
Thomas K. & Jennifer P. Maloney**

Dear Yvonne:

Enclosed herewith find copy of Correction to Findings of Fact and Conclusions of Law in the above matter, along with a copy of the cover letter enclosing the same.

Very truly yours,



Theodore R. Lewis, Esquire

TRL/bn
Enclosure

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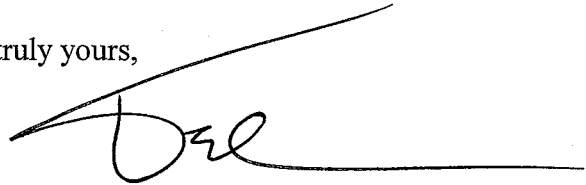
Thomas J. Maloney, Esquire
901 W. Lehigh Street
P. O. Box 1279
Bethlehem, PA 18017

**Re: Hanover Township Zoning Hearing Board –
Thomas K. & Jennifer P. Maloney**

Dear Tom:

Enclosed herewith please find a true and correct copy of the Correction to Findings of Fact and Conclusions of Law of the Hanover Township Zoning Hearing Board that I am sending to you as attorney for the petitioner in the above matter.

Very truly yours,



Theodore R. Lewis, Esquire

TRL/bn
Enclosure

cc: Yvonne D. Kutz, Zoning Officer

HANOVER TOWNSHIP ZONING HEARING BOARD

OF NORTHAMPTON COUNTY, PENNSYLVANIA

CORRECTION TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

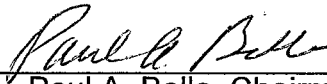
Re : Thomas K. Maloney &
: Jennifer P. Maloney
Dated : July 26, 2011
Property : 4632 Susan Drive

The Hanover Township Zoning Hearing Board after rendering its written decision in the above matter dated October 12, 2011 and after becoming aware that there is an error in paragraph 44 thereof in that said paragraph did not correctly reflect the decision of the Board, hereby corrects paragraph 44 to read as follows:

44. The Board, therefore, grants a variance to permit the paver construction, subject however to the condition that the applicant remove a strip of pavers being the last two feet along the rear lot line and drainage easement side of the construction.

WHEREFORE, the Hanover Township Zoning Hearing Board hereby adopts the above correction to its Findings of Fact and Conclusions of Law.

HANOVER TOWNSHIP ZONING HEARING BOARD

By: 
Paul A. Balla, Chairman

Dated: October 24, 2011.

THEODORE R. LEWIS
THOMAS L. WALTERS

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October 12, 2011

Hanover Township Engineering
ATTN: Yvonne D. Kutz
Hanover Township Municipal Bldg.
3630 Jacksonville Road
Bethlehem, PA 18017

**Re: Hanover Township Zoning Hearing Board –
Thomas K. & Jennifer P. Maloney
& New Cingular Wireless PCS, LLC**

Dear Yvonne:

Enclosed herewith find copy of Findings of Fact and Conclusions of Law in the above matters, along with a copy of the cover letters enclosing the same.

Very truly yours,



Theodore R. Lewis, Esquire

TRL/bn
Enclosures

THEODORE R. LEWIS
THOMAS L. WALTERS

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October 12, 2011

Thomas J. Maloney, Esquire
901 W. Lehigh Street
P. O. Box 1279
Bethlehem, PA 18017

**Re: Hanover Township Zoning Hearing Board –
Thomas K. & Jennifer P. Maloney**

Dear Tom:

Enclosed herewith please find a true and correct copy of the Findings of Fact and Conclusions of Law of the Hanover Township Zoning Hearing Board that I am sending to you as attorney for the petitioner in the above matter.

Very truly yours,



Theodore R. Lewis, Esquire

TRL/bn
Enclosure

cc: Yvonne D. Kutz, Zoning Officer

HANOVER TOWNSHIP ZONING HEARING BOARD

OF NORTHAMPTON COUNTY, PENNSYLVANIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Re : Thomas K. Maloney &
: Jennifer P. Maloney
Dated : July 26, 2011
Property : 4632 Susan Drive

The Hanover Township Zoning Hearing Board, after conducting a hearing on Thursday, September 22, 2011, and rendering its oral decision affirming in part the determinations of the Zoning Officer in the issuance of the enforcement notice of June 15, 2011, and granting in part and denying in part the requested variances, hereby makes the following findings of fact and conclusions of law in support thereof:

1. The subject property is known as 4632 Susan Drive. It is located in an R1-S, Residential Suburban Zoning District and is owned by the appellants, Thomas K. and Jennifer P. Maloney.

2. This matter is before the Board as a result of the Petition of the appellants dated July 26, 2011. The Petition consists of four pages including a page entitled Attachment to Petition. It was also accompanied with numerous exhibits, as follows:

- Exhibit A-1 Site Plan, Maloney Residence – 4632 Susan Drive;
- Exhibit A-2 Enlarged Pool Plan-Pool Surround Extension;
- Exhibit A-3 Cross Section B - Existing and Proposed;
- Exhibit A-4 Pictures before and after;
- Exhibit B Letter dated June 15, 2011 from the Zoning Officer,
Yvonne Kutz, to the appellant;
- Exhibit C A summary of exhibits and documents attached to the Petition;
- Exhibit C-1 Permit Plan dated March 29, 1995;
- Exhibit C-2 Copy of deed to the premises dated September 1, 2009 from Ferris to Maloney;
- Exhibit C-3 Copy of Declaration of Protective Covenants;

- Exhibit C-4 Copy of Building Permit dated February 9, 1998 for swimming pool on property;
- Exhibit C-5 Copy of Building Permit application dated May 13, 2010 for fence;
- Exhibit C-6 Hold Harmless Indemnification Agreement dated May 25, 2010 (without Exhibit A);
- Exhibit C-7 Copy of Building Permit for fence dated June 3, 2010.

3. Also accompanying the Petition was a list of land owners and a map showing the properties within a 500 ft. radius.

4. Finally, accompanying the Petition was a letter of Attorney Thomas J. Maloney dated July 26, 2011, wherein he requested that the matter not be heard until the regular September meeting of the Zoning Hearing Board. As a result of this request, the Board scheduled the hearing at its regular meeting on September 22.

5. In paragraph B of the recitals to the Hold Harmless Indemnification Agreement there is a reference to a plot plan of the premises and proposed location of the structure being attached as Exhibit A. No Exhibit A was attached to the copy of the Hold Harmless Indemnification Agreement accompanying the Petition to the Board. At the hearing the Township presented from its records Exhibit A to this document. After review by the appellants and their attorney, it was agreed that this document in fact was a true and correct copy of the Exhibit A that was attached to the Hold Harmless Indemnification Agreement. Therefore the Board has treated it as part of the Hold Harmless Indemnification Agreement.

6. The Municipalities Planning Code Sect. 10616.1(d), provides that when an appeal is taken from the enforcement notice to the Zoning Hearing Board it is the municipality that has the responsibility of presenting its evidence first.

7. The Township was represented by Attorney Leo DeVito of the Solicitor's Office who called as witnesses the Zoning Officer, Yvonne Kutz, and James Milot, Engineer from the Township Engineers Office.

8. Attorney DeVito also offered into evidence a total of ten exhibits as follows:

- T-1 Chapter 67 – Construction Standards;
- T-2 Letter of Zoning Officer and Code Enforcement Officer, Yvonne Kutz, dated June 15, 2011 to Thomas and Jennifer Maloney;
- T-3 Site Plan and Enlarged Pool Plan also referred to as Exhibits A-1 and A-2 in the documents accompanying the Petition;
- T-4 First three pages of the Petition of applicants dated July 26, 2011;

- T-5 Represented as a picture of the subject property as it looked in 2008;
- T-6 Cross Section – Existing and Proposed, also being the same as Exhibit A-3 in the documents accompanying the Petition;
- T-7 Pointe Associates Site Plan for Pointe North – Phase IV Section 1, being Drawing No. 8734-052-D-003, having a date of August 30, 1988. According to the testimony the subject premises is shown as Lot 5 on this Plan;
- T-8 Picture of landscaping on property as of September 21, 2011;
- T-9 Picture of landscaping on property from another angle as of September 21, 2011;
- T-10 Picture of landscaping on property from another angle as of September 21, 2011.

9. At the conclusion of the Township's testimony, the appellants presented their case. Attorney Maloney called as witnesses on behalf of the appellants Thomas K. Maloney as well as two neighbors.

10. Attorney Maloney also offered into evidence the following additional exhibits:

- B-1 Picture of 4640 Susan Drive being the adjoining parcel to the subject property, with plan markings superimposed thereon;
- B-2 Consisting of two sub-parcels: sub-parcel 1 being pictures of 839 Clearview Lane and 859 Clearview Lane, and sub-parcel 2 consisting of the plans as submitted for obtaining a permit in the 839 Clearview Lane property;
- B-4 Picture of 4309 Greenfield with drawings of pool superimposed thereon;
- B-5 Picture of 4632 Susan Drive prior to improvements;
- B-6 Picture of 4632 Susan Drive after improvements;
- B-8 Pool Plan as submitted for 4309 Greenfield Road;
- B-9 Building Permit for 839 Clearview Lane together with accompanying documents.

11. From the testimony and documents submitted, the Board finds that the applicant purchased the property in September of 2009 (Exhibit C-2). At that time the pool and a walkway around the pool were in existence. The permit for the same was issued in February of 1998 (Exhibit C-4).

12. The picture presented by the Township of the property in 2008 (Exhibit T-5) was not disputed by the appellants. The pre-construction picture presented by the appellant, Thomas K. Maloney (Exhibit B-5), was not disputed by the Township.

13. The parties do not dispute that in May of 2010, the appellants desired to install a fence and plantings into the drainage area, which fence and plantings required the approval of the Supervisors. They applied for a permit on May 13, 2010 (Exhibit C-5), and entered into a Hold Harmless Indemnification Agreement dated May 25, 2005 (Exhibit C-6), now including by stipulation Exhibit A. The improvements being discussed at that time are represented by Exhibit A attached to the Hold Harmless Indemnification Agreement except that the bump out on the rear as marked with xxx's was not approved and never built. A permit for the construction of the fence was issued on June 3, 2010 (Exhibit C-7).

14. The appellant, Thomas K. Maloney, indicated that there were pea gravel stones in certain areas around the pool which he did not like. He also believed that the walks surrounding the pool, on the side adjacent to the rear of the property particularly in the area where there was also a ladder, were not wide enough presenting what he believed to be a safety hazard.

15. Therefore, the appellants installed what they described as landscaping ties and pavers between the fence which they previously constructed and the existing sidewalks along that side of the pool. The appellants acknowledged that they did not get a permit for this additional construction. The result of this construction can be seen in Exhibit B, 5 & 6, as well as in Exhibits A-1 through A-4 (Township Exhibits T-3 & T-6).

16. Because of this additional construction the Zoning Officer issued her enforcement notice (Exhibit B-2 and T-2). Thereafter the appellants took the present appeal by filing their Petition dated July 26, 2011.

17. The Zoning Officer has the authority and the responsibility to determine violations of the Zoning Ordinance and to notify in writing persons responsible for the same (Sect. 185-42.A.(2)). Appeals from the determination of the Zoning Officer are to be made directly to the Zoning Hearing Board (Sect. 185-42.B.) which has the power to hear and decide such appeals whenever it is alleged that there is an error in any said decision of the Zoning Officer (Sect. 185-50.A.).

18. Any such appeal from the decision of the Zoning Officer must be taken by the person affected within thirty days after receipt of notice of such decision (Sect. 185-49.B.(2)).

19. In the present case, the Township contends that the appellants should be denied relief because they failed to file their Petition until July 26, 2011, even though the enforcement notice was dated June 15, 2011. The petitioners argue that they in fact did not receive this enforcement notice until it was personally delivered to them on July 8, 2011.

20. The Board notes that in some cases notice can be presumed by the fact of mailing. However, the provisions of the ordinance clearly provide the appeal period begins from the receipt of the enforcement notice, and in the present case there was nothing to cause the Board to disbelieve the testimony of the appellants that they did not actually receive the enforcement notice until July 8, 2011. Moreover, the Board is of the opinion that

justice is better served in this circumstance by dealing with the merits of the Petition rather than dismissing the matter on a procedural basis.

21. Turning then to the enforcement notice, it states that the Zoning Officer has determined from her inspection of the premises on June 6, that the appellants installed their retaining wall and paver patio without obtaining a valid zoning permit and approval by the Board of Supervisors.

22. Sect. 185-44 of the ordinance states that a zoning permit shall be required prior to the erection, construction or alteration of any building, structure or any portion thereof.

23. Structures are defined in Sect. 185-12 of the ordinance as follows: "Any man-made object or building having an ascertainable stationary location on land or water, whether or not affixed to the land, including parking lots, parking spaces and driveways."

24. The appellants argue that the retaining wall is really landscaping ties and that the pavers do not have a footer, and therefore neither should be considered structures requiring a permit.

25. The Zoning Officer did indicate that typically landscaping ties are not considered structures and that she does not require a permit for the same. However, both parties acknowledge the fact that in the present case the landscaping ties are acting as a wall to retain dirt on the pool side and enabling the leveling of the area on which the pavers were placed. Moreover, the pavers themselves are clearly not temporary items placed on the yard but are meant to be there on a continuous basis.

26. Based on the definition as contained in the ordinance and the testimony and documents submitted in this case, it is the opinion of the Board that both items are structures and require permits. Therefore, the Board affirms the determination made by the Zoning Officer in the enforcement notice that the appellants are in violation of the ordinance for not obtaining a permit prior to construction of these items.

27. Next, the enforcement notice states that the retaining wall and pavers are located within the drainage easement. However, the Township at the hearing conceded that upon examination of the premises and drawing submitted by the appellants, that the pavers are not located within the drainage easement.

28. As to the retaining wall, the Zoning Officer determined that locating it within the drainage easement is in violation of Chapter 67-2 of the Hanover Township Ordinance. It is acknowledged that Chapter 67 is not part of the zoning ordinance and that there are no provisions in the zoning ordinance which prevent the location of a retaining wall within a drainage easement. The Board therefore believes that it does not have jurisdiction to make determinations concerning Chapter 67 or to issue any waivers or variances concerning the same.

29. Finally, the enforcement notice classifies the pavers as a patio rather than part of the walkway around the pool and states that this construction is in violation of Sect. 185-25.C(5)(a)[3] limiting the area of patios in the rear yard to 150 sq. ft., and in violation of Sect. 185-25C(5)(a)[2] prohibiting the extension of patios into the rear yard any closer than 30 ft.

30. The appellants contend on the other hand that the Zoning Officer has misinterpreted the Zoning Ordinance and that the pavers are merely part of the pool surround and not a patio. They argue therefore that this construction is not subject to the regulations concerning patios, but instead is subject to the regulations concerning private swimming pools. The aforesaid area requirements and 30 foot rule are not contained in the regulations concerning private swimming pools.

31. As evidence that the Zoning Officer has misinterpreted the ordinance, the appellants submitted documentation concerning permits for pools which were issued for properties at 839 Clearview Lane on May 31, 2011, and 4309 Greenview Terrace in July of 2011.

32. The appellants also offered documents concerning a permit for a pool issued in 1999 by the predecessor to the present Zoning Officer. However, this exhibit was objected to and the Board sustained the objection by virtue of the length of time since the issuance of that permit and the fact that the provisions with respect to patios and decks had been amended and changed subsequent to the issuance of that permit.

33. With respect to the applicability of the provisions of the ordinance as it relates to pools and patios, the Board finds that the walkway area that could be associated with pools should generally be limited to 4 ft. and that the present area is considerably larger than that and much more than just a walkway around the pool.

34. The Board does not believe that the documents submitted with regards to the issuance of pool permits for 4309 Greenview Terrace and 839 Clearview Lane are sufficiently adequate to conclude that the Zoning Officer has inconsistently interpreted the patio and pool provisions of the ordinance.

35. As to 4309 Greenview Terrace, the pool plan that was submitted (Exhibit B-8) only seems to indicate a 4 ft. wide concrete deck around the pool and no patio areas are shown. The superimposed drawing on top of the picture of the aerial view of the lot (Exhibit B-4) is not entirely consistent with Exhibit B-8, and furthermore it does not have the kind of accuracy upon which the Board can clearly reach a conclusion as to what the Zoning Officer permitted.

36. With respect to 839 Clearview Lane, again the exhibits are inconsistent. It is noted that Exhibit B-9 and Exhibit B-2(2) show a line up of the house, garage, driveway and sidewalks as it relates to Clearview Lane, different than the lineup as shown in the picture of the aerial view of the premises in Exhibit B-2. With respect to that last picture, although again its accuracy as to dimensions in the opinion of the Board cannot be relied upon, it would appear that the only enlarged areas that are contained within the 30 ft. setback are the areas necessary to accommodate the spa which is a part of the pool rather than a patio area.

37. Most importantly, while the Board desires in general to maintain a consistency in the interpretation of the terms of the ordinance, this is the first time the matter has been interpreted by the Zoning Board which is not bound by prior interpretations made by the Zoning Officer.

38. As per the testimony of the applicant, the area in question is large enough to accommodate a recliner. From the view of the pictures it would appear that it is much larger

than necessary for the stated reason of extending the walkway for safety or because the pool ladder is located in that area. The Board, therefore, affirms the decision of the Zoning Officer that the pavers are in fact a patio and not part of the pool area, and are therefore in violation of the patio standards of the ordinance.

39. The appellants in the alternative have requested a variance from the patio standards to permit the aforesaid construction.

40. The Board has jurisdiction to grant variances from the provisions of the ordinance pursuant to the standards as set forth in Sect. 185-52.

41. In that regard, the applicants presented the testimony of two neighbors, Joseph Anderko of 2624 Susan Drive and Mahmood Dato of 4762 Kathi Drive. Both neighbors indicated that they did not object to the construction and did not believe it was detrimental to the public welfare or was out of character with the existing neighborhood.

42. The applicants also presented exhibits concerning the issuance of other pools, and the size of other pools and the surround area, to support its position that the grant of a variance in this case would not be out of character with the neighborhood.

43. However, one of the standards for granting a variance is that it be limited to the minimum variance from the provisions of the ordinance which will provide relief from the hardship. In that regard, the Board believes that the structure as built is greater than the minimum relief necessary to achieve the stated reasons of safety and simply extend the walkway around the pool.

44. The Board, therefore, grants a variance to permit the paver construction subject however to the condition that along the rear lot line and drainage easement side of the pool the pavers extend no more than 2 ft. from the walkway as it existed prior to the recent pavers being added.

WHEREFORE, the Hanover Township Zoning Hearing Board hereby adopts the above Findings of Fact and Conclusions of Law in support of its decision to grant the aforesaid variance.

HANOVER TOWNSHIP ZONING HEARING BOARD

By: 
Paul A. Balla, Chairman

Dated: October 12, 2011