

**BOARD OF ADJUSTMENT
TOWNSHIP OF MENDHAM
MORRIS COUNTY, NEW JERSEY**

CASE NO.: 8-23

PREMISES: BLOCK 127, LOT 119

3 OLD ORCHARD TERRACE, MENDHAM TOWNSHIP, NEW JERSEY

APPLICANTS: MARINA KENIGEL AND PAUL ZAROU

WHEREAS, Marina Kenigel and Paul Zarou have made application to the Zoning Board of Adjustment of the Township of Mendham for a waiver to disturb steep slopes in connection with the construction of a single family dwelling at 3 Old Orchard Terrace, Mendham Township, New Jersey; and

WHEREAS, the within matter was heard and considered at the regular open public meetings of the Zoning Board of Adjustment of Mendham Township on Thursday, November 9, 2023 and Thursday, December 14, 2023 held virtually via ZOOM; and

WHEREAS, the applicants submitted a proper and complete Affidavit of Service of notice of the instant proceeding upon all property owners within 200 feet of the subject property; and

WHEREAS, the applicants submitted a proper and complete Affidavit of Publication; and

WHEREAS, the aforesaid open public meeting was noticed, advertised and held in accordance with the Open Public Meetings Act; and

WHEREAS, this matter was opened to the public for both the questioning of witnesses and comments; and

WHEREAS, the Zoning Board of Adjustment considered the following:

1. Application Checklist for Kenigel/ Zarou Residential Construction, dated July 24, 2023;
2. Form 1: Application for Development with a date filed of July 28, 2023;
3. Form 2: Certification of Taxes Paid, dated June 6, 2023(expired August 10, 2023);
4. Form 4: Affidavit of Applicant, notarized July 18, 2023;
5. Certified List of Property Owners (200') prepared by Mendham Township, dated May 18, 2023;
6. Form 10: Floor Area Ratio (FAR) Calculation, dated July 18, 2023;

7. Project Proposal, consisting of 2 pages, undated;
8. Kenigel/ Zarou Project prepared by Yannaccone Villa & Aldrich, LLC, consisting of 4 sheets, dated June, 16, 2023, revised 11/28/23;
9. Architectural Drawings for Kenigel Residence, 3 Orchard Terr, prepared by Feldman & Feldman Architects, revised 11/21/23;
10. Deed information regarding wetlands;
11. Freshwater Wetlands Letter of Interpretation: Line Verification Letter from NJDEP, dated April 4, 2022;
12. Correspondence from Ryan L. Smith, P.E., dated November 29, 2023;
13. Resolution for the subject property, identified as Case No. 8-00, dated December 14, 2000;
14. Survey of property, dated October 13, 2022;
15. Mendham Tax Code Section 301-1, defining “Street” and Mendham Township tax maps depicting Old Orchard Terrace as a 50' right of way extending to the edge of the subject property
16. Report from Denis F. Keenan, P.E., dated October 4, 2023;
17. Report from Denis F. Keenan, P.E., dated December 12, 2023;
18. Report from H2M Associates, Inc., dated September 28, 2023;
19. Report from H2M Associates, Inc., dated December 5, 2023;
20. Memorandum from the Environmental Commission, dated September 1, 2023;
21. Memorandum from the Fire Chief, dated October 2, 2023;
22. Memorandum from the Fire Official, undated; and
23. Memorandum from the Historic Preservation Committee, dated August 10, 2023.

WHEREAS, the Zoning Board of Adjustment does hereby make the following findings of fact:

1. The applicants were represented by Luke S. Pontier, Esq. with the firm of Day Pitney, LLP. Adjoining property owners, Alex Motiuk and Ashley Nardone, were represented by Lisa Lomelo, Esq..
2. The property in question is designated on the tax map as Block 127, Lot 119, with a street address of 3 Old Orchard Terrace. The property consists of approximately 1.68 acres and is located in the R-3 zone district. The site is currently unimproved.

3. This application seeks approval for the construction of a two story, 5,462 square foot residential building, pool, patio, chain link fence, driveway, septic system and other related site improvements.

4. By Resolution bearing Case No. 8-00, dated December 14, 2000, this Board granted variance relief to construct a single family dwelling on an undersized lot. At that time the property was located in a zone district where a minimum lot size of three acres was required. The same holds true today. The 2000 Resolution indicates that at that time there was an existing 1 ½ story framed dwelling in poor condition. The Resolution also states that this Board had previously considered a similar application and granted the same relief by Resolution, dated February 9, 1989. In this regard the Board finds that the minimum lot size for this property has not changed. Variances do not “expire”. Thus, apart from the other relief sought in this application, variance relief is not necessary for the undersized lot since such relief already has been granted, not once, but twice.

5. Initially this application sought construction of a 5,789 square foot residential building and other improvements. This necessitated variance relief for floor area ratio, a d-4 variance. At the November 9, 2023 meeting, planning testimony was offered in support of the FAR variance. Subsequent to this meeting and in advance of the December 14, 2023 meeting, the applicants’ plans were revised to reduce the size of the proposed improvements from 5,789 square feet to 5,462 square feet. This reduction eliminated the need for FAR (d-4) variance relief.

6. This property previously contained a single family dwelling that has since been demolished. Based upon a review of the topography, it appears that most if not all of the steep slopes on this property were manmade and are what remains after the demolition and removal of the house that previously existed on this lot.

7. Before a building permit can issue for the construction of a single family a lot grading plan must be submitted to the Township Engineer for review. When a grading plan depicts the disturbance of steep slopes, and it appears that the steep slopes are manmade, the Township Engineer, exercising appropriate discretion, will review the application administratively without the need to come to this Board for a steep slope disturbance waiver. When this application was submitted to the Board, FAR variance relief also was sought and because of this the Board also considered the steep slope waiver request. After the FAR variance application was withdrawn, the Board could have dismissed this application and directed the Township Engineer to process

the steep slope waiver requested administratively as is the custom. Nevertheless, because a neighboring property owners, Alex Motiuk and Ashley Nardone, appeared with counsel at the November meeting expressing concerns about steep slope disturbance, amongst other issues, the Board concluded that it was in everyone's best interest to retain jurisdiction of this matter, hear and decide the steep slope waiver request.

8. This case also raises a question regarding the status of Old Orchard Terrace. Initially the applicants took the position that this was a public street and offered proofs in this regard. A review of the applicable municipal records does not bear this out. There appears to be no evidence that the dedication of Old Orchard Terrace was ever accepted by the municipality, despite the fact that it appears on Township tax maps. Indeed there is some indication that the Township may have vacated Old Orchard Terrace as a public street.

9. Based upon these conflicting and uncertain proofs, the Board concluded that Old Orchard Terrace is a private road and proceeded on that assumption. This Board lacks jurisdiction to decide whether in fact Old Orchard Terrace is a public or private road. Deciding that issue is to be made by the Township Committee or a court of competent jurisdiction should it become necessary.

10. With respect to Old Orchard Terrace, the proofs are that this private road has been in existence for quite some time and that it has been utilized historically to gain access not only to the subject property, but the single family dwelling owned by the neighboring objector. The Board's sole concern as it relates to this private road is whether it provides adequate and safe access to the subject property. The Board finds that it does. The proofs reveal that this private road is 13.4' wide at the access point. The private road is not long enough to require a turn around bulb at its terminus. The project engineer has opined, as has our Board Engineer, that this private road provides safe and adequate access to the subject property. Neither the Fire Marshall nor Fire Chief have indicated otherwise.

11. No maintenance agreement with the municipality or for that matter between the two property owners who utilize Old Orchard Terrace exists. The presence or absence of such an agreement is beyond the jurisdiction of this Board. Although the Board encourages the parties to reach an accord, it has no power to compel this and will not condition any approval of this application upon entering into such an agreement.

12. Now that Board has addressed all of the issues that are not before it, it is time to turn to the issue that is, namely the disturbance of steep slopes. In accordance with section 16-10.13(a)

of the Township Code, the overall extent of regrading and/or stripping of existing vegetation on steep slopes on any tract which is the subject of an application for subdivision or site plan approval shall be limited by the following standards:

Slope	Maximum Portion of Tract	Proposed
<10%	Any area necessary	56.2%
10%-15%	25% of slope area	58.4%
>15%-25%	15% of slope area	60.4%
>25%	5% of slope area	69.6%

13. Since the application does not propose either a subdivision or site plan (neither are necessary to build a single family dwelling on an isolated lot) whether the applicants require relief from this Board for steep slope disturbance is debatable. Nevertheless, since the applicants have chosen to submit to the Board’s jurisdiction, the Board will decide the issue.

14. As set forth above, most, if not all of these steep slopes are manmade. Disturbing these slopes as proposed by the applicant will have the salutary effect of reducing stormwater runoff from these slopes, because the runoff will be controlled by the stormwater improvements to be constructed. Moreover, the proposed construction complies with all bulk standards in the zoning ordinance, meaning that all setbacks and impervious cover limits are being complied with.

15. Both the Board Engineer and neighboring property owner expressed concern about the level of disturbance proposed and the fact that the disturbance was just under the threshold of a major stormwater development. Had this project been characterized as a major stormwater development, more rigorous and demanding stormwater improvements would have been required. Nevertheless, the project is below the threshold and as a result, the Board finds that the stormwater improvements proposed comply with the applicable stormwater regulations. In order to prevent disturbance that goes beyond that depicted on the plans, the applicant will install a silt or snow fence to contain and restrict development to the areas of disturbance identified on the plans.

16. Soil disturbance is cumulative, meaning that future disturbance of the site beyond that which is proposed could trigger the need for more extensive stormwater improvements. A deed restriction will be filed, subject to the review and approval of the Board Engineer and Attorney, placing future owners of this property on notice of this fact.

17. Concerns by the neighbor/property owners also were expressed regarding damage to their property and/or Old Orchard Terrace during the course of construction. The applicants acknowledge that they bear responsibility for any damage to Old Orchard Terrace during the course of construction and of course are responsible for any damage to the adjoining property owners' land in the event of a trespass.

18. The applicant agreed to address all technical comments contained in the report of the Board Engineer, dated December 12, 2023, which is hereby incorporated by reference.

19. At the conclusion Board voted to approve the application with conditions.

NOW THEREFORE BE IT RESOLVED by the Board of Adjustment of the Township of Mendham, State of New Jersey, that Application Number 8-23 of Marina Kenigel and Paul Zarou be and is hereby approved subject to the following:

1. Prior to the issuance of a building permit, the applicant shall obtain a lot grading permit from the Township Engineer.

2. The applicants shall record a deed restriction, subject to the review and approval of the Board Engineer and Attorney, placing future owners of this property on notice that future disturbance of the site beyond that which is proposed could trigger the need for more extensive stormwater improvements.

3. The applicant shall address all technical comments contained in the report of the Board Engineer, dated December 12, 2023.

4. The applicant shall submit a resolution compliance package through the Board Secretary and approved by the Board Engineer prior to signature of the variance plans. Once all conditions of the resolution have been satisfactorily addressed and the variance plans have been signed, construction permits can issue.

5. Copies of all applications and supporting data for permits issued by other agencies, responses thereto and copies of all governmental permits are required to be submitted to the Board Engineer.

6. Prior to the issuance of any construction permits all conditions of any approving resolution shall be addressed satisfactorily.

7. Prior to the issuance of any construction permit, proof must be received from the Township Tax Collector or other designated official, that no taxes or assessments for local improvements are due or delinquent on the tract.

8. No work shall be done without permission from, and an inspection by, the Board Engineer or his designee. No underground installation shall be covered until inspected and approved. The Board Engineer's office shall be notified of all phases of the work.

9. During construction, the developer shall comply fully with all requirements of the ordinances of the Township of Mendham.

10. All improvements made on the premises shall conform to building standards and other regulations as set forth in any applicable, federal, state, county or municipal statute, regulation, code or ordinance at the time of the installation of such improvements.

11. All improvements made on the premises shall conform with the plans hereby approved by the Board.

12. The Board reserves the right to withdraw any approval hereby granted in the event there is any deviation from or alteration of the plans hereby approved, unless prior written approval for any such deviation or alteration has been obtained from the Board. Minor deviations and field changes may be authorized by the Board Engineer.

13. Any deviation from, or alteration of, the plans as hereby approved shall render this approval void and of no further effect.

14. The acceptance of this approval by the applicant, its successors and assigns and the performance by the applicant, its successors and assigns of any further work on the project in reliance of this approval shall operate as an agreement by the applicant, its successors and assigns to be bound by the terms and conditions set forth herein.

15. In the event any other required regulatory approval conflicts with or materially alters the terms hereof, or in the event applicant or applicant's successors or assigns fail to post any tax map review fee, review fee, inspection fee or other financial imposition of the municipality, then in any such event, the Board reserves the right to withdraw, amend or supplant the within approval.

16. The applicant shall pay any outstanding invoices for fees and costs incurred in connection with this application prior to the issuance of any permits.

17. This approval shall be null and void unless the applicants obtain a statement from the Chief Financial Officer of the Township of Mendham within 60 days that the applicant has paid all outstanding fees and costs associated with this application and further that sufficient monies

have been deposited to pay all anticipated disbursements and finally that deposit monies are not overdrawn from prior applications.

18. The applicant shall certify to the Board Engineer that all requisite governmental and regulatory agency approvals required before the start of construction have been obtained.

19. In accordance with Ordinance 15-12 as amended, the within variance shall expire within one year of the date of entry of the determination of this Board unless construction shall have commenced or the applicants have applied for an extension.

CERTIFICATION

I, Wendy Parrinello, do hereby certify the above to be a true correct copy of a Resolution regularly and duly adopted by the Board of Adjustment of the Township of Mendham at a duly called meeting of the Board of Adjustment held on _____, 2024

Wendy Parrinello