



## BOARD OF APPEAL

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CE 5-1664

Appeal of persons aggrieved  
Rush B. Lincoln, Jr.  
8 Oakcliff Rd.

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:00 p.m. on February 10, 1966, on the appeal of certain persons claiming to be aggrieved by the action of the Inspector of Buildings in issuing a permit to erect a swimming pool on premises at 8 Oakcliff Road, owned by Rush B. Lincoln, Jr. Said appeal was taken under the provisions of Section XXIV of the Zoning By-law.

The Inspector of Buildings, upon the application of Rush B. Lincoln, Jr., issued said permit on November 29, 1965, there being no apparent violation of the Zoning By-law or of the Building Code. On November 30, 1965, the appellants filed their appeal with this Board, alleging that the construction of the proposed pool would violate Section XVI of the Zoning By-law. Appellants contend that due to the depth of the peat on the lot, the excavation of the pool could result in a serious threat to the structural integrity of the house on the adjacent lot and may be otherwise harmful to adjoining properties and that the likely use of the pool would probably be disturbing to the abutting neighbors.

At the hearing the following persons spoke in opposition to the issuance of the permit for the proposed pool; George R. Rich, 20 Woodchester Road, Arnold E. Johnson, 159 Cliff Road and Suzanne Johnson, 189 Cliff Road.

The following spoke in favor of the issuance of the permit: Rush B. Lincoln, Jr., 8 Oakcliff Road, owner of the premises on which the pool is proposed to be constructed; Eugene F. Hurley, owner of the company installing the pool, Dr. George C. Prather, 11 Oakcliff Road, Gordon C. Peterson, 4 Woodchester Road and Katherine Prescott, 25 Woodchester Road.

A letter opposing the proposed pool was received from Constant E. Schradieck, 26 Woodchester Road.

#### Statement of Facts

The lot involved containing 25,454 square feet, is located within a Single-residence District requiring a minimum lot area of 20,000 square feet. There is a dwelling on the lot and the Inspector of Buildings has issued a permit for the construction of a swimming pool 20' x 40', approximately sixteen feet from the rear of the dwelling, approximately 42' from the westerly side lot line and approximately 37' from the easterly side lot line.

George R. Rich, abutting property owner on the easterly side, qualified himself as a consulting engineer and testified in opposition to the permit. He stated his opinion that the existence of soft peat to a depth of 15 or 20 feet in the area created a grave risk that an excavation of the type proposed would disturb the foundation material and so weaken the lateral support for his house as to cause serious damage. He further alleged that the

swimming pool excavation would cause a hazard to the integrity of the 18-inch Town drain which begins in front of the Lincoln property and crosses his property.

The testimony of Mr. Johnson indicated that his opposition to the permit was based upon apprehension that the proposed pool would necessarily be used in a noisy, distracting and otherwise offensive manner, to the detriment of abutting property owners.

Mr. Lincoln testified in support of the permit, describing the location and dimensions of the proposed pool and stating his opinion that there was no engineering problem and assuring that the pool would be constructed in a manner which would not endanger any other property and would be used in a proper manner.

Mr. Eugene F. Hurley, owner of the company proposing to install the pool, qualified himself as an expert in the construction of swimming pools, and testified as to the technique to be employed in installing the pool in question and that he had made successful installations in soil of the type present on the Lincoln premises and envisioned no serious problem in accomplishing the installation without any hazard or damage to abutting properties.

#### Decision

In the opinion of the Board, Section XVI of the Zoning By-law is intended to prohibit the construction of any building or structure which in and of itself would be obnoxious, offensive, dangerous or injurious to the public health, morals, safety or welfare or harmful to property therein. It is not intended to restrict the erection of buildings or structures which are by their nature neither injurious nor harmful to the community or property therein, even though conceivably harm could be done incident to improper methods of construction, or such buildings or structures might later be used in an unlawful or improper manner. There is no prohibition in the Zoning By-law of the installation of structures to be used for the purpose of swimming. The Board is therefore of the opinion that the issue of method of construction and the anticipatory issue of manner of use are not properly cognizable under Section XVI of the Zoning By-law.

However, in the interest of prompt consideration of these issues on their merits the Board has considered them as properly raised under pertinent provisions of the Zoning By-law and Building Code. The Board has found no basis in the facts adduced for granting the relief sought by the appellants. The only evidence tending to support appellants' position consisted of the purportedly expert testimony of Mr. Rich who, though apparently well qualified professionally, was certainly not disinterested. On the other hand, Mr. Hurley, though not qualified as a professional engineer, testified on the basis of a great deal of practical experience and under the circumstances could be regarded as well informed, objective and basically disinterested.

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The Board is, therefore, of the opinion that the appeal should be dismissed on its merits and that the permit shall be regarded as effective as of this date provided that Mr. Lincoln shall, prior to commencing said construction, furnish the Inspector of Buildings with an affidavit of a reputable registered engineer accompanying plans of said swimming pool on file or to be filed, and stating that proper implementation of said plans will not involve any hazard to abutting properties, and subject to Mr. Lincoln's furnishing such further assurances, if any, as the Inspector of Buildings may from time to time require in respect to compliance with the Building Code and any other applicable provisions of law.

Richard O. Aldrich

Dana T. Lowell

Filed with Town Clerk

5/6/66

F. Lester Fraser