

**TOWN OF DAY ZONING BOARD OF APPEALS  
MINUTES – REGULAR MEETING  
APRIL 20, 2009**

**Members Present:** Ken Johnsen, Chairman      **Members Absent:** Pat Volpe  
Judy Traeger  
Hank Lang  
Dave Davidson  
David Avigdor, Town Attorney

**Motion** by Judy Traeger, seconded by Board Member Lang to approve the minutes of the March 16, 2009 meeting: Ayes: Johnsen, Traeger, Lang, Davidson. Carried: 4-0.

**Old Business:** None.

**New Business:**      **BOLT, Stephen & Geri**  
                                 **09-02ZBA Tax Map #43.16-1-2.2**  
                                 **Area Variance**

Chairman Johnsen stated the Board is in receipt of application materials from Mr. and Mrs. Bolt which does not include a denial letter from the Code Enforcement Officer. Town Attorney Avigdor stated for the record that he represented Mr. and Mrs. Bolt when they acquired this parcel and has informed them that he is representing the Town of Day in this matter. He also informed Mr. and Mrs. Bolt if they or the Zoning Board Members felt this was a conflict of interest, he would recuse himself. There was no objection from any parties.

Mr. Bolt stated the house on their parcel was constructed in the 1930's and it is their intention to demolish it and rebuild a new home. Currently there is a hand dug well and no foundation. It is their intention to eventually retire to the area within three years. It was also stated the parcel borders Daley Creek and is in the Lakefront Residential Zone. The current residence is one story and the dimensions are 31' x 46'. The proposed residence would be two story and the dimensions would be 30' x 48' to be located 28 feet at rear corner of the house and 38' at the front corner from the boundary of Daley Creek bank.

Town Attorney Avigdor stated APA setback for structures in Lakefront Residential Zone is 50 feet and the Agency has substantially changed their law effective January 1, 2009. The old law stated a new structure would be able to replace the old

structure and not be located any closer to the water. The new law states that no part of new structures would be allowed within the 50 foot setback without an APA variance. Due to the fact that the Town of Day has an approved land use program, this Board would be able to grant an APA variance which would be subject to a 30 day review by APA at which time APA could reverse it.

Currently, there are two substantial lawsuits against APA brought by a number of towns, counties and landowners over this change in law. Each lawsuit has two grounds which are 1) APA did not follow the proper steps procedurally to change the law and 2) this change in law cannot be accomplished by APA alone but by action of the State Legislature. Attorney Avigdor stated it is not possible to predict what the outcome of the litigation would be which may be determined as early as June. The applicants could choose to proceed with the application at this time with the Board making a decision regarding both Town and APA variances. The Bolts could decide to hold their application in abeyance or withdraw it until there is a decision in the APA lawsuit and if law is set aside, there would not be a requirement for an APA variance. If the variance is granted at this time, it would be subject to a possible reversal by APA. It is Attorney Avigdor's opinion, APA would reverse it. While Attorney Avigdor is not stating this Board would grant the variance, he is stating it is easier to obtain a Town of Day variance than an APA variance.

Mrs. Bolt inquired if they decided to proceed at this time and were granted a Town of Day and APA variance, and APA reversed the variance but subsequently the law was struck down when the lawsuit is decided, would they need to apply again? Attorney Avigdor stated they would not but his concern is if the lawsuit only partially reverses the law.

Chairman Johnsen stated he reviewed APA regulations pertaining to rivers or streams which are navigable. He stated he visited the site and an individual could not traverse the creek with either a kayak or canoe during regular flow. Due to this, he believed it is outside of APA jurisdiction. Attorney Avigdor agreed that APA jurisdiction applies to navigable bodies of water but further stated APA has a list of navigable waters and this Board would need to determine if Daley Creek appears on that list.

The Bolts stated they would like to proceed with the application at this time. Town Attorney Avigdor stated it should be treated as both an application for an APA variance and a Town of Day variance with the assumption Daley Creek is a navigable body of

water to avoid any delay. If Daley Creek is not a navigable body of water, he would request the Bolts withdraw the APA variance request and proceed with Town of Day variance application which would exclude APA's involvement in the Public Hearing. It was also determined Hudson River Black River Regulating District has no jurisdiction in this application.

Board Member Davidson stated Code Enforcement Officer Metzler's denial letter would be part of the application in order to determine what variances would be necessary. He further stated this Board would normally grant the minimum variance required. He inquired why the Bolts did not locate the house 12 feet further away from the property line in order to avoid the necessity of any variances. Mr. Bolt stated the property line is located in the center of the creek and the location of the septic system would be between the proposed location and the neighboring property line. Attorney Avigdor stated the Town of Day setback requirement from navigable bodies is also 50 feet, therefore, if Daley Creek is not navigable the Bolts may not require a variance from the creek. The requirement for variances from front and back yard setbacks is 50 feet and the side yard setback is 20 feet without any reduction for pre-existing, non-conforming lots.

**Motion** by Dave Davidson, seconded by Board Member Traeger to declare Application #09-02ZBA, Stephen and Geri Bolt, Tax Map #43.16-1-2.2 incomplete due to 1) absence of denial letter from Code Enforcement Officer Metzler, 2) the absence of distances from the property lines and road from the proposed structure and the existing structure on the survey map, and 3) the Board needs determine if Daley Creek is a navigable body of water. Ayes: Johnsen, Traeger, Lang, Davidson. Carried: 4-0.

Town Attorney Avigdor stated a past revision to the application requirements pertained to new construction with dimensions indicated on the survey map of the location and distances from boundary lines. Attorney Avigdor stated the Board would need to determine if they would require the applicant to hire a surveyor to determine the distances or if the applicant could present those distances by determining it using the scale presented on the original survey. Board Member Davidson stated he believed the requirement is very clear and the survey should include setbacks. Attorney Avigdor stated while the Board has required surveys of setbacks for new construction, in the case of this application; it is a complete teardown of an existing structure. He further stated he is unsure Resolution 08-01ZBA speaks to that. Board Member Lang stated if the Board was to proceed with the unsurveyed version of the setbacks and the house is not sited correctly, construction would be stopped. He further stated this would also

give the applicant certainty. Due to the small size of the lot, placement is critical and a new survey map showing all requested dimensions would be necessary which would include proposed setbacks for the new house from each of the four property lines. If Daley Creek is a navigable body of water, an additional setback from the body of water would also be required on the survey. Chairman Johnsen stated prior to the Bolts incurring the expense of a survey, it should be determined if Daley Creek is a navigable body of water.

Board Member Traeger stated this is a substandard lot and Code Enforcement Officer Metzler may reduce the setback requirements and the size of the variance would be reduced. The Secretary will contact APA for a list of navigable bodies of water

**Correspondence:** None.

**Secretary's Report:** The New York State Planning Federation Annual Conference usually held in October in Saratoga has been changed to September and this year's location will be Lake Placid. Any Board Members who had planned on this training to meet their requirement should take note of that change.

**Public Participation:** None

**Motion** by Dave Davidson, seconded by Board Member Traeger to adjourn the meeting at 7:50 p.m. Ayes: Johnsen, Traeger, Lang, Davidson. Carried: 4-0.

Respectfully submitted,

Diane Byrne  
Secretary