

**TOWN OF DAY ZONING BOARD OF APPEALS
MINUTES – REGULAR MEETING
FEBRUARY 18, 2010**

Members Present: Judy Traeger, Chairman **Members Absent:** None
Ken Johnsen
Dave Davidson
Pat Volpe
Hank Lang
David Avigdor, Town Attorney

Approve Minutes: Chairman Traeger requested a motion be made to approve the minutes of January 21st. Board Member Lang stated he was not present at the January meeting and had questions regarding the discussions. He stated there was some discussion among the Town Board Members and that discussion was not in the January minutes. Board Member Lang read the following statement from the January 21st minutes, “Board Member Davidson stated this Board reached their decision on different conclusions and would like to know what the Town Board had in mind when they expressed their displeasure with the Zoning Board’s approval.”

Board Member Davidson stated Chairman Traeger introduced the concept of using agenda time to review past cases; and only a review of the tape of the January 21st minutes would reveal the precise verbiage which elicited his response. He was motivated to make the comment due to some concern by the Town Board regarding decisions. Chairman Traeger stated at the time of her interview for chairmanship, the Town Board why the Zoning Board voted in the way they did but were not criticizing the Board.

Supervisor Johnson spoke to Board Member Davidson and she assured him that it was not the intent of the Town Board to criticize decisions of the Zoning Board and it would be inappropriate for the Town Board to make such comments. Board Member Lang wished to state for the record that if in the future the Town Board does have concerns regarding a decision made by the Zoning Board, he would like them to contact the Zoning Board directly. . Board Member Johnsen stated he was in agreement with Board Member Lang.

Board Member Davidson stated in lieu of a significant agenda, he would consider productive to discuss a common issue but he does have reservations discussing previous cases which were decided at a public meeting. Board Member Volpe stated previously it was the practice of the Board to discuss past cases which he found to be helpful and instructive.

Town Attorney Avigdor stated a discussion in the abstract between Board Members such as what constitutes a precedent or how various factors to reach a variance decision would be weighed would be advantageous. However, to discuss a person's personal property after a decision has been already been reached would be a disservice and he does not know what the benefit would be.

Board Member Davidson inquired if it would be permitted for two Board Members to discuss a recent decision out of the context of a public meeting. Town Attorney Avigdor stated it must be limited to two members because three members would constitute a quorum. The definition of a meeting is at least a quorum of the Board discussing Town business.

Board Member Davidson's concern is discussion of a previous decision at a meeting would create a new record. Town Attorney Avigdor stated if the Zoning Board was to discuss a denied variance 30 days after the fact and if a person read the minutes, it would lead them to believe the Board had made a mistake which may lead to a lawsuit. He does not believe the Board is well served in having such discussions. If further discussion would be beneficial, the Board is under no obligation to make their decision at the time of the public hearing.

Board Member Johnsen inquired if a Board Member wished to poll members one at a time to discuss a decision, would that be permitted? Town Attorney Avigdor stated Board Members can speak individually but not in groups of three.

Chairman Traeger inquired if the Board had spoken generally about amount of acreage in regard to granting variances without mentioning a specific case, would that be permitted? Town Attorney Avigdor stated if the Board had only one case which involved specific acreage and they spoke to that specific acreage, it would be as identifying as using the name. For example, in libel and slander law, if a person does not use a specific name but states the chairman of the Board of Assessment Review is taking bribes. The person who made the statement could be sued for slander due to the fact that it would be ascertained who was being referred to.

Board Member Davidson stated in reference to Board Member Volpe's statement that a variance is only granted when there is no other means to construct a building without one; his decision was based on the principle of a balancing act between the cost to the applicant without the variance and the cost to the community with the granting of the variance. Town Attorney Avigdor stated while he agrees with Board Member Davidson, he would use the word "difficulty" instead of "cost" as it can key into money but not only money.

Board Member Lang stated in referring to the January minutes on Page 3, Board Member Johnsen brought the issue of when a reconsideration can be considered in regard to the application for an interpretation which was heard at the November and December meetings. He stated he needs a clarification in the differences between an application and an interpretation request. In his understanding of a decision of an application, an applicant has submitted an application for this Board to make a decision for an exception to the zoning law based on their individual circumstances. Once this Board has made a decision and then circumstances have changed sufficiently to reconsider a change in that decision, this Board should not be compelled to reconsider. However, if a member of the public appeared before the Board without submitting an application making the statement "were we to build..." would this Board require an application? This individual could then appear before the Board after receiving the initial answer with the same question in the form of an application. This Board would have never arrived at a decision. Therefore, Board Member Lang further stated, if this Board is rendering an interpretation of the law, it would not be binding such as an application with a motion and resulting vote. He inquired of Town Attorney Avigdor why an interpretation is treated the same as an application.

Board Member Lang stated in regard to the interpretation at the December meeting, Code Enforcement Officer Metzler may or may not act. This Board only interpreted the law or stated this is the Board's understanding of the law as opposed to having acted as a Board with a vote determining an exception to the law. In Board Member Lang's opinion, an interpretation is exactly that and is not binding. Town Attorney Avigdor stated Board Member Lang is distinguishing an interpretation from an application. An interpretation is a type of application, i.e. an individual obtains an application for an interpretation or a variance; and under the law, these are the only two types of things an individual can obtain an

application for. If a decision is made on either type of application, it is a formal decision of the Zoning Board. Board Member Lang stated an application for a variance is a request to act contrary to the law and an application for an interpretation is asking what the law is. Town Attorney Avigdor stated if an individual asks the Board what the law is, that answer is a decision of the Board.

Board Member Lang stated the individual returns a second time with substantially the same question. Board Member Davidson stated if he were to apply for the interpretation a second time, it would require new information because why would this Board reinterpret it absent new information. Board Member Lang stated he understands Board Member Davidson's statement but it does mean that the individual will act on this Board's decision. Town Attorney Avigdor stated they should due to the fact that this Board is a quasi-judicial body whose formal resolution is binding upon the law. In court, if an individual receives a declaratory judgment, he may not choose to act on it but he did receive a judgment. If a similar request for an interpretation were made, this Board must take their past interpretation into account when arriving at a new interpretation. However, if a different individual appears this Board and states he was not a party to the first interpretation and brings new information to the Board's attention, they would have to consider that without ignoring what was decided previously. However, they are not bound to make the decision due to the new information. Board Member Johnsen stated the Board would not reverse itself and put itself in jeopardy. Town Attorney Avigdor agreed. Board Member Lang stated if this Board makes a decision and there is no significant new information received, they are bound by that decision. Town Attorney Avigdor stated that is correct.

Town Attorney Avigdor read from materials issued by the Department of State to assist zoning boards in understanding their formal responsibilities, "a zoning enabling statute provides Boards of Appeals with the power to hear and decide appeals from and review decisions of the administrative official responsible for the enforcement of zoning regulations. The statute specifically allows the Board to reverse or affirm wholly or partly or to modify decisions appealed to it. This general statement of the appellate jurisdiction allows the Boards of Appeals to interpret the municipality's zoning regulations. For example, if an applicant for a building permit receives a decision of the zoning enforcement officer denying the permit and if the applicant believes that the permit should have been granted under the terms of the zoning law."

Town Attorney Avigdor stated this would not be for a variance but for an individual who believes he is complying. “The applicant may appeal the denial to the Zoning Board of Appeals. The appeal would claim that the denial of the permit is incorrect and would ask the Board to reverse the decision of the enforcement officer. Thus in *Hinna (sp.) vs. Board of Appeals*, the applicant had applied to the building inspector for a permit to build a motel, the application was denied because it was not clear that motels were allowed in the zoning district, the applicant appealed that denial to the Board of Appeals seeking a decision interpreting the zoning ordinance in her favor. The Board of Appeals upheld the denial of the permit and agreed with the building inspector’s interpretation that the zoning district regulation did not permit motels. The Board of Appeals decision was subsequently sustained by a court...”

Town Attorney Avigdor stated “The Court of Appeals (which in New York State is the highest court) has held that the Zoning Board of Appeals performs a quasi-judicial function when it enters an interpretation of a zoning provision and as such should act according to its own precedent. Thus where a Board of Appeals has interpreted a particular provision of municipal zoning law in a prior case, it should follow that precedent.” Town Attorney Avigdor stated following a precedent does not mean doing the same thing if the information is different. However, the Board would need a reason to distinguish a new and different action from a prior one. “This requirement points up the essentiality of good recordkeeping in maintaining easy reference to prior decisions.”

Town Attorney Avigdor stated if there is no precedent set, a Board would use common sense. For example, a property owner wished to convert an existing bar into several offices spaces and they were not permitted within a zone because offices did not appear on the list of permitted uses. In an application for interpretation, a review of the permitted uses for that zoning district was schools and clinics which contain multiple offices so by implication offices are permitted. The interpretation did find that offices would be permitted which should bind future findings of that Board. However, if a future application for interpretation should include an office with a non-permitted use that would not be permitted by an interpretation. It was emphasized that no application should bind an individual who was not a party to the application. It would not be considered a re-application but this Board would be bound by the precedential value of what was previously found.

Board Member Lang stated the instances which Town Attorney Avigdor referred to both involved denials from code enforcement officers. If an individual appears before the Board for an interpretation and not appears before the Board as an appeals board, Board Member Lang stated there would still be issues for him. Town Attorney Avigdor stated if a citizen appears before the Board and asks the Board their interpretation of a particular section of law, the Board may have a discussion and it would not be formally rendering a decision. He further stated he did consider that Code Enforcement Officer Metzler would deny a decision and then appear before this Board for an interpretation. Town Attorney Avigdor stated if Code Enforcement Officer Metzler requests an interpretation to insure he is making the correct decision, he believed the Board should make an interpretation. If the Board wished to state this would not be a formal appellate decision, Town Attorney Avigdor would consider that. If this Board should have another application for an interpretation for the subject similar to the interpretation of Code Enforcement Officer Metzler and decide the first interpretation has no precedential value, Town Attorney Avigdor would listen to that debate and would not believe it would be an unfounded decision. However, where decisions are arrived at through appeals, they would have precedential value.

Board Member Lang stated his concern was Board Member Johnsen's question of when could this Board reconsider this previous interpretation. Board Member Johnsen stated he did have second thoughts and would that be valid enough for a reconsideration and he stated it was decided it was not. Town Attorney Avigdor stated the mechanism for that would be if any one other than Code Enforcement Officer Metzler approached this Board to construct a similar building or prevent one from being erected at that time, this Board would determine that it was not a formal decision and they would not be bound by that decision and all the information would be considered new information and a new decision would be made. Courts work very diligently to decide cases narrowly because to decide broadly would imply a decision on a case which has not been brought. A Board Member should make a decision on a case at the time it is brought before the Board.

Motion by Dave Davidson, seconded by Pat Volpe to approve the minutes of January 21, 2010. Ayes: Traeger, Davidson, Volpe, Johnsen. Abstention: Lang. Carried: 4-1.

Old Business: None.

New Business: None.

General Discussion: The Secretary distributed copies of forms which were included in packets provided by Saratoga County Planning at their recent conference in Saratoga. The Board and Town Attorney Avigdor reviewed the forms and it was determined that they were for individual board member use and would not replace application forms currently being utilized. If a Board Member in making a motion wished to utilize them for purposes of making a complete motion, Town Attorney Avigdor would encourage that use.

Secretary's Report: GIS Training has been rescheduled for Monday, March 1st at the end of the Planning Board agenda. Saratoga County Planning Director Jason Kemper contacted the Secretary and requested the change due to the fact that their website is not currently up and running. He will give a short presentation and if there are any Board Members interested in additional instruction or information, Director Kemper can reschedule another training session when the website is fully functional.

Any members interested in attending the APA Local Government Day conference in Lake Placid should contact the Secretary no later than March 2nd.

All Board Members were provided with a Revised Resolution regarding training requirements.

Motion by Ken Johnsen, seconded by Board Member Davidson to adjourn the meeting at 7:40 p.m. Ayes: Traeger, Johnsen, Davidson, Volpe, Lang. Carried: 5-0.

Respectfully submitted,

Diane Byrne
Secretary