

**TOWN OF DAY ZONING BOARD OF APPEALS
MINUTES – REGULAR MEETING
JANUARY 21, 2010**

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

Supervisor Mary Ann Johnson conveyed the appreciation of the Town Board for the recent applications for Chairmanship of the Zoning Board. Supervisor Johnson expressed appreciation to Ken Johnsen for serving as Chairman during 2009 as well as to Chairman Traeger and Board Member Davidson for their work on the Comprehensive Planning Committee.

Motion by Dave Davidson, seconded by Board Member Volpe to approve the minutes of the December 21, 2009 with one correction on Page 2, second full paragraph, line two from "...this Board would be confided to..." to "...this Board would be confined to...".
Ayes: Traeger, Johnsen, Davidson, Volpe. Carried: 4-0.

Old Business: None.

New Business: None.

Board Discussion: **MARTIN, Donald 09-03ZBA
Tax Map #30.-2-9 Area Variance**

Chairman Traeger stated it was suggested by the Town Board that at meetings where there are no Old or New Business agenda items, it would be recommended that the Board to review various items to reach a better understanding or clear up any confusion.

Chairman Traeger stated there were issues with a recent approval of a pole barn which was submitted by Donald Martin. Mr. Martin's total acreage on this parcel was in excess of twenty acres and submitted an application for an area variance. Board Member Volpe stated in his experience of working with heavy equipment, the area which Mr. Martin represented to the Board as being too costly to have excavated, may have been able to be excavated to a point which would not have required any variances to be granted. Board Member Davidson stated he believed the variance was

appropriate due to the fact many trees would have also been removed which would have had more far reaching consequences. Board Member Volpe stated he was not happy with the result. Board Member Johnsen stated the Board would not have been able to determine that fact. Town Attorney Avigdor stated the Board must be more comfortable requesting professional expertise.

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. He further stated whether a variance is approved or denied, the decision will displease one party. Chairman Traeger stated the fact that Mr. Martin owned so much acreage but still required a variance was an issue. Board Member Davidson stated he does not agree with the position that it could have been relocated and the tradeoffs were much greater than the effect of the variance.

Board Member Johnsen stated if this Board is given the authority to determine if a variance should be granted, it is difficult to then express dissatisfaction with what the Board determines. Board Member Volpe stated in light of Town Attorney Avigdor's comment that they should seek professional advice; test holes for ledge rock should have been made. Board Member Davidson stated it was not a matter of seeking professional advice, the issues he based his decision on did not involve excavation. He weighted the issues of cost to the applicant and loss of tree cover.

Board Member Johnsen stated he based his decision on what existed on the property and this did not cause any substantial change. Board Member Davidson stated this same discussion occurred at the time of the granting of the variance and the Town Board should refer to those minutes for the reasoning which was behind that decision. Town Attorney Avigdor agreed and further stated the only more complete record would be to listen to the tape recording of the meeting which would be an imposition on the Town Board's time.

Interpretation – Definition of Permanent and Temporary Structures

Chairman Traeger inquired if all existing temporary structures were grandfathered. Town Attorney Avigdor stated he has not been asked for any formal determination. The general law on grandfathering states that if it is grandfathered (meaning it is allowed to remain) it was legal at the time of construction and

precedes a change in the law. Town Attorney Avidgor stated he did not believe the law changed but interpreted what the law is. If Zoning Law is interpreted to mean that these “things” are buildings and are required to be set back, there is an argument that it may not have been legal when installed and would now be determined to be a structure and therefore, not legal when it was installed. He would like to make the discussion more formal at this meeting in stating this Board has the jurisdiction to determine interpretations and variances and there is no application before the Board at this time. It is the decision of the Code Enforcement Officer to determine if any action will be taken. If the Code Enforcement Officer requires a zoning interpretation, he will bring it before this Board and if he requires a legal interpretation, he will refer it to Town Attorney Avidgor.

Board Member Johnsen inquired once a member has cast a vote, it can be rescinded. He further stated he has misgivings about his vote which was in favor and on reconsideration; he wished to vote against the interpretation because it was too inclusive. Town Attorney Avidgor stated, regarding reconsideration, under Zoning Law it states “whenever the Board after hearing all the evidence presented upon application or appeal of the provisions denies same, the Board of Appeals shall refuse to hold further hearing on the said or substantially similar application or appeal by the same applicant, his successor or assigned, for a period of one year except and unless the Board of Appeals shall find and determine from the information supplied by the request for a rehearing that changed conditions have occurred relating to the promotion of public health, safety, convenience, comfort, prosperity, or general welfare and an a reconsideration is justified.” Such rehearing would only be allowable upon motion initiated a member of the Board of Appeals and adopted by a unanimous vote of the members present.”

Town Attorney Avidgor stated he believed the important phrase would be “a similar application by the same applicant” and the applicant in this case would be Code Enforcement Officer Metzler. In the event, Code Enforcement Officer Metzler brings an enforcement proceedings against a property owner and they appear before this Board stating they were not present when this decision was made and they had additional information which was not presented at the time of the initial interpretation, they would be allowed to present that additional information. He would not be bound by a proceeding in which he was not a part of.

To address Board Member Johnsen's concerns, this Board did make a decision but it can be reconsidered at the time of a new application. The reason for this, for example, is if an applicant appears before the Board for an area variance for ten feet where 50 feet are required and is denied. He reappears with an application for 10½ feet; this Board would deem it too similar. However, if a different individual appears, it would be considered a different application. With that in mind, Town Attorney Avigdor would advise the Board to act on an application for interpretation relating to this temporary building when and if it is received and consider it from scratch.

Town Attorney Avigdor stated this Board has 62 days upon the close of the public hearing to act on an application. It has been the practice of this Board to come to a decision in most applications on the night of the public hearing. While this is good government, if a Board Member is not comfortable making a decision without being able to give sufficient consideration to that decision, it should be tabled to the next meeting. If a motion is made at the meeting to make a decision, the Board Member should abstain from the vote. If the motion does pass in spite of the abstention, it would not have had an impact on the matter anyway.

In terms of completeness of an application in regard to depth to bedrock or a drawing of a proposed structure by an architect (one Board Member stated his displeasure with the pole barn after it was constructed), the Board could ask for an architect's rendering of the structure instead of only a plot plan. While any of these requests will add to the cost of the application on the part of the applicant, it is the right of the Board to request them. The Board should not be swayed by who the applicant is, whether they are local, etc. but to do the proper land use application. Town Attorney Avigdor stated any of his statements are not a criticism of any Board actions but since the Town Board is asking for discussion, he will also add his input.

Chairman Traeger stated when the interpretation of the temporary building was presented to the Board, they considered what the definition of a structure was as it was stated in Zoning Law. Board Member Davidson stated that definition was very specific. If this Board may have been too restrictive, there is an alternative for property owners to pursue regarding these structures. He stated the Town Board also has a process to make changes to the law. To Code Enforcement Officer Metzler's reservation to this Board to consider only documentation which he presented, the goal of this

Board was to restrict their decision to a specific structure and not to every possibility.

Board Member Johnsen stated in his opinion, it did widen the scope due to the fact that the initial photograph resembled a structure with a roof and was not enclosed with walls which was what Code Enforcement Officer Metzler originally approved and then it evolved into an entirely different structure and this Board saw the photographs of that. The question was is this Board to consider the initial structure or the fact that he built an enclosed building and there is no question in his mind what was ultimately built.

Board Member Davidson stated it was a two-part question which he considered. He reread the codes and temporary was not an issue and was not mentioned. If the structure is larger than 100 square feet, it is required to conform to zoning law and there is no room for interpretation. Chairman Traeger stated in her work with the Comprehensive Plan Committee, she and Code Enforcement Officer Metzler will be reviewing all zoning districts and determine if there are changes which need to be made. While the Comprehensive Plan Committee cannot make changes, they will be making recommendations for any changes to the Town Board.

Board Member Johnsen stated there is a Zoning Board of Appeals but is there a Zoning Board and if there is not, is the Town Board acting as a Zoning Board in setting regulations and functioning as a Zoning Board. Town Attorney Avigdor stated there is no statutory designation as Zoning Board; however, the Town Board is the legislative branch who would pass the zoning laws of the Town. The boards which exist within the Town are the Town Board, Planning Board, Zoning Board of Appeals and Comprehensive Plan Committee and a Board of Assessment Review.

Viewshed Protection Area:

There is currently an application before the Planning Board which is located in the Viewshed Protection Area. If in the future, applications which are located in this area are made to the Zoning Board, it would be advisable to discuss possibilities during this session. Board Member Johnsen stated there are no viewshed regulations in the Town of Edinburg and he does not see any problems with clear cutting there which would precipitate such regulations. Board Member Davidson stated this is a regulation which was passed by Town of Day Town Board and is a law.

Whether or not there is disagreement regarding such a law, it is in force.

Board Member Davidson stated the Comprehensive Plan Committee has met with the Chairman of the Edinburg Planning Board and Edinburg has been in the process for the last eight years of updating their zoning laws and creating additional zoning codes with the possibility of also reviewing their comprehensive plan. The Town of Hadley does not have zoning but would fall under the regulations of the Adirondack Park Agency.

Town Attorney Avigdor stated APA regulates some zoning codes such as what the allowable uses in particular zones are and lot sizes but do not have road frontage requirements, setback requirements, colors of building, and viewshed impact. Newly created subdivisions can be restricted on colors and lighting by APA but an existing lot would not fall under those APA restrictions. It may fall under Town laws. When the Town of Day passed zoning, it was cognizant of the omissions in APA law.

Board Member Davidson stated there have not been any negative comments regarding viewshed regulations during comprehensive plan review. Board Member Johnsen stated all of the implications of viewshed regulations have not been reviewed and he has been tested on these regulations. Board Member Davidson stated numerous times throughout the survey results, property owners stressed the importance of the rural views. Board Member Johnsen stated one of the tests is flying balloons which are only required to be 30 feet high. In the case which is before the Planning Board, it was reported with binoculars at 45 feet high what appeared to be the glint of a balloon which prevented the property owner from moving forward with his building plans until further review.

Town Attorney Avigdor stated he is aware of an application before the Planning Board but is not aware of the incident of which Board Member Johnsen speaks. Board Member Johnsen stated Code Enforcement Officer Metzler gave him his account of the details. Chairman Traeger stated the rules were set for reasons which have been reaffirmed by the results of the Comprehensive Plan survey.

Building Permits for New Construction:

Chairman Traeger stated Code Enforcement Officer Metzler has informed her that when a property owner submits plans for a newly constructed structure, he will inquire if they intend to include a garage in the future. It may alleviate any need for variances in the

future with proper planning. Chairman Traeger stated if the house is existing and the property owner would like to add a garage, they would be restricted to a particular area. Town Attorney Avigdor stated this would be an area pertaining to self-created criteria. Board Member Davidson stated in the area variance applications for garages on Kathan Road; there were alternative sites where they could have been cited which he would have agreed to. Board Member Johnsen stated there are cases where a property owner constructs a structure on a small lot without intending to add a garage and finds after a few years they wish to add one.

Board Member Volpe stated discussions and reconsiderations of decisions are an indication of how seriously this Board takes its duties.

Motion by Board Member Davidson, seconded by Pat Volpe to adjourn the meeting at 7:40 p.m. Ayes: Johnsen, Traeger, Volpe, Davidson. Carried: 4-0.

Respectfully submitted,

Diane Byrne
Secretary