

**TOWN OF DAY ZONING BOARD OF APPEALS
MINUTES – REGULAR MEETING
MARCH 15, 2010**

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

Motion by Ken Johnsen, seconded by Hank Lang to approve the minutes of February 18, 2010 with the following correction: Page 1, third paragraph, first sentence, change from “Board Member Davidson stated he spoke with Supervisor Johnson...” to : “Supervisor Johnson spoke to Board Member Davidson”. Ayes: Traeger, Davidson, Volpe, Johnsen, Lang. Carried: 5-0.

Old Business: None.

New Business: None.

Correspondence: The Zoning Board Members are in receipt of a letter from Supervisor Johnson (copy attached) regarding comments which were made at the last Zoning Board meeting and were attributed to Town Board Members regarding recent ZBA decisions.

Board Member Lang stated the subject did require explanation and believed Supervisor Johnson did explain the circumstances. Board Member Davidson stated the record this Board leaves should reflect the decision which they have made. In the future, the Board Members should take into consideration these comments and be certain they are explicit in their statements. Board Member Johnsen stated the Town Board may have missed the nuisances of hypothetical questions which this Board may ask and may interpret that as true feelings of Board Members.

There was confusion on the part of some Board Members as to which case the comments were referring to: the recent interpretation requested by Code Enforcement Officer Metzler or an area variance application. Town Attorney Avigdor did not believe which matter the Town Board was referring to was the issue. There were several important comments made this evening:

- There may have been a misunderstanding of a hypothetical question or the basis of an opinion.
- The reader of the minutes, or most importantly the judge who may be hearing a suit against this Board, should be able to ascertain from the minutes how the Zoning Board arrived at their decision from the facts presented.
- The judge would want to see a clear record which supports the Board's decision.
- Town Attorney Avigdor stated that whatever the debate, the decision may not be unanimous which would explain the contrary comments during the debate.
- A member may make contrary comments and then at the time of the motion, agree with the motion because he was brought around by the debate. Board Member Volpe agreed.

Town Attorney Avigdor stated the debate should be free and open but at the time of the motion, it should not be stated that "I move to deny (approve) the variance because..." and review the five factors with the limited statement "I believe the impact on the neighborhood is strong", "The benefit can be achieved by some other way" and "I think it is self-created." It should be stated more specifically such as "I believe the impact on the neighborhood is strong because..." and site the facts which lead to that conclusion. This may be different from another Board Member's opinion but that is the motion which is being put on the table.

Board Member Davidson stated while he may agree that a variance should be denied, his reason may be different and that would not be part of the motion. He inquired why not make the motion to simply approve or deny and let the discussions after the motion cover the specific reasons. Town Attorney Avigdor stated the resolution, which is written after the fact by the Secretary, needs to recite the reasons so that a court can see what those reasons were. If the Board were to be sued, a judge is not supposed to substitute his discretion for the Boards'. The judge is supposed to see if the Board exercised discretion in a meaningful way and that the decision was not arbitrary but based on the reality. If there are two different views on reality, the judge should accept either as long as this Board concluded them on a thought process and based the decision on the facts of the law.

After a motion is made and the reasons stated within that motion, the Board debates the merits of the motion and during that debate another reason is brought to the table. The Board Member who has made the motion may be asked to amend his motion to reflect

the additional reason. If the motion is defeated, a new motion could be made to grant or deny on other grounds. If three members believe a motion can be granted, one would assume those members would be able to come to a consensus on the reasons. Town Attorney Avigdor stated while he would not tell a Board to grant or deny, he would provide assistance when articulating reasons as this would be his first responsibility to the Town to protect their legal interests.

Board Member Davidson inquired if the record includes both the motion and discussion. Town Attorney Avidgor stated it does but the discussion is made by multiple members with differing opinions. The judge will put more weight on the reasoning set forth in the resolution which was actually voted on than in the debate which may meander as positions change. The resolution is more important than the debate. In a situation where the Board is not prepared to make a decision after the closing of the Public Hearing, the law permits the Board 62 days to arrive at the decision and this is for a good reason. Board Members may wish to make notes so they would have a coherent statement and make the motion at the next meeting. The applicant may state that they are present at this meeting and they would like a decision. The Board would reply that they would wish to make a correct and sustainable decision.

Board Member Johnsen stated this would allow two or three members to return to the next meeting with differing opinions and the debate would begin once again. Town Attorney Avigdor stated this may occur but there will be the benefit of completeness. The motion would reflect a thoughtful, working document. Board Member Lang agreed with Town Attorney Avigdor. He further stated perhaps the Board should articulate their opinions prior to the voting which may reveal why a Board Member arrived at their decision as an individual. This may allow the reader to see why each Board Member voted in the way they did. Board Member Volpe stated he believed that was the reason for discussion to hear all Board Members reasons for approval or denial. He further stated that after listening to other Board Members' opinion which may originally be contrary to his, he may change his mind. All members and Town Attorney Avigdor agreed that is what discussion and debate is for. Town Attorney Avigdor stated this was the reason why the New York State Legislature created boards with multiple members who are citizens of the town with diversity of opinion. It is understood that there will be differences of opinion. If this was a mechanical decision, it would be referred to

one mechanically orientated person such as the code enforcement officer rather than to five citizens.

Board Member Davidson stated the core notion is that when a Board would vote to grant or deny a variance, the Board would need to state they are granting or denying this variance for the following reasons. While Town Attorney Avigdor agreed, he further stated the Board does not have to agree on all five factors which are taken into consideration at the time a variance is granted or denied. All five factors do not have to be on the same side (which would be all to grant or all to deny). Once a Board comes to a conclusion on all five factors, they must be weighed against each other and balanced against each other.

Chairman Traeger stated these discussions will not include any specific cases but simply be general discussions. Board Member Johnsen stated it would be appropriate to note that the Board received Supervisor Johnson's letter, read it and accepted her explanation. No motion was necessary in this matter. All members were in agreement with Board Member Johnsen's statement.

There was no interest in attending Saratoga County Planning's April 1st meeting regarding their annual conference.

Secretary's Report: Saratoga County Planning Director Jason Kemper reviewed the County's GIS website at the March 1st Planning Board Meeting and would be willing to provide additional training once the website is fully functional.

Motion by Dave Davidson, seconded by Board Member Johnsen to adjourn the meeting at 7:20 p.m. Ayes: Traeger, Johnsen, Davidson, Volpe, Lang. Carried: 5-0.

Respectfully submitted,

Diane Byrne
Secretary