

**TOWN OF DAY ZONING BOARD OF APPEALS  
MINUTES – REGULAR MEETING  
NOVEMBER 17, 2008**

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

**Motion** by Hank Lang, seconded by Board Member Volpe to approve the minutes of the October 20, 2008 meeting. Ayes: Traeger, Volpe, Lang, Johnsen. Abstention: Davidson. Carried: 4-0.

**Old Business:**            **BERNSTEIN, Monte 08-04ZBA**  
                                 **Tax Map #41.-1-88.1 Area Variance**

Chairman Davidson stated he was not present at the October meeting but had read the minutes. Chairman Davidson stated the minutes reflected Board Member Johnsen wished to take the matter under advisement and Chairman Davidson stated he would like to discuss the particulars of the area variances with the Board Members prior to the vote on any proposed motion. He stated he noted from the minutes that Board Member Johnsen wished to take the matter under advisement. Board Member Johnsen stated he felt it was important for the whole Board to be present at the time of the decision on this application.

**Motion** by Ken Johnsen to grant the area variances of 246 feet where 300 feet are required for road frontage and 5.1 acres where 8.5 acres are required for acreage. There was no second and the motion failed to carry.

Board Member Johnsen wished to elaborate on his motion. He stated he did not believe it could be achieved by any other means because the property is not large enough to divide it into two 8.5 acre parcels. He further stated it would not create an undesirable change in the neighborhood because Mr. Bernstein's road frontage would be substantially greater than surrounding properties. He stated Mr. Bernstein purchased the property prior to the change in local viewshed law requiring greater acreage in the area where his parcel is located. He stated this would indicate is not self created. While it is somewhat substantial, it would not affect the environment. He stated these are the reasons he would recommend

the variances be approved. Town Attorney Avigdor stated with those statements from Board Member Johnsen, the motion is still on the floor. Board Member Lang seconded the motion. Chairman Davidson asked for any discussion from the Board Members. Board Members Volpe and Traeger stated they did not have anything further to discuss.

Board Member Lang stated it was not possible to subdivide the parcel into two lots due to the change in law which only occurred within the town and not on APA regulations. While he believes it is a substantial variance, he agrees with Board Member Johnsen that it cannot be achieved by any other means and that it does not create an undesirable change in the neighborhood. He cannot comment on whether it would have an adverse environmental affect in the neighborhood. He stated he believes the difficulty is self created whenever a subdivision is created.

Chairman Davidson stated he was not as concerned by the road frontage area variance as he was with the density. He stated if Mr. Bernstein had subdivided the parcel with the largest portion in the Residential Low Density which requires 8.5 acres and the remainder in the Lakefront Residential District bringing the acreage closer in compliance with the requirement, he would not object to the variances. Board Member Lang stated he believed the requirement would be for each lot to be 8.5 acres. Board Member Traeger, Volpe and Johnsen agreed with Chairman Davidson since the parcel is in two different zones, the subdivision requirements would be in effect for each of the zones it was located in.

Chairman Davidson stated Mr. Bernstein wished to keep the larger lot for his own use. Board Member Lang stated Mr. Bernstein has chosen where to divide the lots himself and he was not compelled to divide it in that way. It is in his belief that Mr. Bernstein does not have sufficient acreage to subdivide without a variance for the acreage requirement. Chairman Davidson stated Mr. Bernstein created the need for an area variance for acreage when he chose to create a 5.1 acres rather than 8.5 acres. Town Attorney Avigdor stated self created would relate to a situation which was created prior making a variance necessary, i.e. building a house first and requesting a variance to then add a deck after the house is in place.

Chairman Davidson stated this Board would not confront the criteria "creating an undesirable change in the neighborhood" often as most of these neighborhoods were created prior to zoning and presumably zoning was created to make changes in those neighborhoods which include substandard lots. He further stated that changing a requirement could be an undesirable change.

Board Member Johnsen stated were those laws enacted to force new change or act as a guideline for future requests. Chairman Davidson stated to keep them from growing in the way in which they were growing. Town Attorney Avigdor stated where the variance standard contemplates where the requested variance will not be to the detriment of the neighborhood, i.e. because a neighborhood has some detrimental circumstances occurring should they be allowed to continue. However, it could be considered that because this is the way the neighborhood is configured, this request would fit. Board Member Volpe stated it cannot be allowed to set a precedent.

**Motion** by Ken Johnsen, seconded by Board Member Lang to approve the area variances. Aye: Johnsen. Nays: Davidson, Traeger, Volpe, Lang. The motion fails: 1-4.

**Motion** by Hank Lang, seconded by Chairman Davidson to deny the area variances based on one subdivided lot of 5.1 acres where 8.5 acres are required, it is substantial and it is self-created. Ayes: Davidson, Traeger, Volpe, Lang. Nay: Johnson. Carried: 4-1.

**HILICUS, Christine PEEK, Donna 08-02ZBA  
Tax Map #31.15-2-16 Area Variance**

The Board reviewed the area variance:

- **Can the benefit be achieved by other means?**

All Board Members agree it cannot be achieved by other means because both residences with their accompanying wells, septic systems, and driveways exist.

- **Undesirable change in the neighborhood character?**

All Board Members agree it does not change the character of the neighborhood for the same reason.

- **Is the variance substantial?**

All Board Members agree it is substantial.

- **Will this have an adverse physical or environmental effect?**

All Board Members agree it does not change the character of the neighborhood.

- **Is the alleged difficulty self-created?**

All Board Members agree it is not self-created because the buildings existed prior to zoning law. The only change will be adding a subdivision line on the survey map.

Board Member Volpe stated the applicants must be made aware that the granting of any future variances for any additional building on the sites will be unlikely because of the setback requirements.

**Motion** by Judy Traeger, seconded by Board Member Johnsen to grant the area variance for a two-lot subdivision for Tax Map #31.15-2-16, Christine Hilicus/Donna Peek for .67 acres for each lot where 60,000 square feet per lot is required. Ayes: Davidson, Traeger, Volpe, Lang, Johnsen. Carried: 5-0.

**OLINSKY, Lawrence & Michelle 08-05ZBA  
Tax Map #33-11-2-16 Area Variances**

Town Attorney Avigdor stated several individuals believed the standard for granting a variance is hardship and he wished to state that it is not. The standard is a balancing act of the different factors which Mr. Olinsky cited the law properly with the exception of the self-creation.

Town Attorney Avigdor stated there was discussion on the factors of two feet from the taking line and 14 feet from the road paved surface. He stated the taking line is the boundary and while he realizes it is not the paved surface, it could be. He further stated because the Board's decision is forever, they need to consider this factor in their decision that the road could be wider.

Town Attorney Avigdor stated there was also some discussion on whether Mr. Olinsky's physical condition affects the land use decision. His physical condition per se does not and the Board cannot make the medical reports part of their decision. However, his plans for a handicapped ramp and the requirements of the ramp would require this Board to consider the criteria "whether the benefit can be achieved by other means reasonable for the applicant to pursue". Chairman Davidson stated the ramp is not a part of the variance request. Town Attorney Avigdor stated it was not but it was part of the applicant's reasoning for why the garage is located where it is. He stated the Board may decide he can have the ramp and move the garage to the center of the property. The pitch of the ramp is a land use issue.

Town Attorney Avigdor stated the final concern was of the drainage swale which he feels is a non-issue due to a lack of competent engineering opinion of whether it is an issue. He further stated whomever installed the swale is not an issue and if the drainage from the roof is not a problem, it would not be an issue. He states there is not proof either way and he is not stating this Board needs proof of that issue. However, the Public Hearing is closed and if the Board felt they needed more information on this issue, the Public Hearing would have been kept open until that information was received.

The Board reviewed the area variance criteria:

- **Can the benefit be achieved by other means?**

All Board Members feel the benefit could be achieved by locating the garage in the center of the parcel and eliminate the sideyard setback variance.

- **Undesirable change in the neighborhood character?**

Chairman Davidson stated while he is not opposed to garages on Kathan, Road but he felt the majority of garages were constructed on the road which concerns him. He stated when previous variances were granted for garages on Kathan Road, the density issues were different.

- **Is the variance substantial?**

All Board Members agree the variance is substantial.

- **Will this have an adverse physical or environmental effect?**

The Board did feel it could have the potential for an adverse physical effect.

- **Is the alleged difficulty self-created?**

All Board Members agree the difficulty is self-created.

Board Member Traeger stated since this was new construction; the planned construction should have been addressed at that time. She stated it would be different if it was added to an existing home. Board Member Volpe agreed stating it was self-imposed. Town Attorney Avigdor stated because the applicant did build the home,

the Board could consider this as self created which is only criteria and would not make it ineligible for a variance.

**Motion** by Judy Traeger, seconded by Board Member Johnsen to deny the area variances for Lawrence and Michelle Olinsky, Tax Map # 33-11-2-16. Ayes: Davidson, Traeger, Lang, Volpe, Johnsen. Carried: 5-0.

**New Business:** None.

**Correspondence:** Saratoga County Planning Conference Registration. Board Members were reminded to complete and return their registration forms if they intend to attend the conference in January.

**Secretary's Report:** The 2009 Schedule of Board Meetings was distributed to all Board Members.

**Public Participation:**None

**Motion** by Judy Traeger, seconded by Board Member Johnsen to adjourn the meeting at 8:25 p.m. Ayes: Davidson, Traeger, Volpe, Lang, Johnsen. Carried: 5-0.

Respectfully submitted.

Diane Byrne  
Secretary