

**TOWN OF DAY ZONING BOARD OF APPEALS
MINUTES – REGULAR MEETING
JANUARY 19, 2012**

Members Present: Dave Davidson, Chairman **Members Absent:** June Dixon
Judy Traeger
Lorraine Newton
Donald Poe
David Avigdor, Town Attorney

Motion by Judy Traeger , seconded by Board Member Poe to approve the minutes of December 19, 2011 with the following changes: Page 1, New Business, paragraph one, line three "...location (8 feet from...) change to "...location (7 feet from...) and Page 2, Motion, line three "...eight feet where 15..." change to "...seven feet where 15..". Ayes: Davidson, Traeger, Newton, Poe. Carried: 4-0.

Old Business: **LYNCH, Daniel and Sharon**
Tax Map #32.17-1-21 – Area Variance

For the record, the area variance for Daniel and Sharon Lynch which was issued six months ago has expired due to no activity (no building permit has been issued). There is no action to be taken on the application at this time. *The minutes will serve as notice to Code Enforcement Officer Metzler to be retained in his files.*

New Business: **Request for Badges for Board Members:**

Board Member Poe raised the issue of visiting properties for the purpose of assessing the need for a variance and if there were identification badges issued to Board Members. For example, if a neighbor who has not appeared before this Board observes a stranger on the property next door, a badge would indicate the identity of the individual. All Board Members agreed this was a positive request. *This request will be directed to the Town Board for review.*

Old Business: **SZYFMAN, Leon and Petra**
Tax Map #21.19-1-24
11-02ZBA Area Variance

Chairman Davidson welcomed to the Zoning Board of Appeals two new Board Members, Lorraine Newton and Donald Poe who will be participating in the decision on the Szyfman's request for a

variance. He does not anticipate making a decision until the February meeting. He also stated one Board Member is absent from the meeting this evening. The discrepancy of the sideyard setback in the December minutes was discussed with a determination that the submitted survey map with the hand drawn shed location by Mrs. Szyfman indicated the variance requested is seven feet. Chairman Davidson stated that should the variance be granted, this corrected figure of seven feet would stipulate the distance.

Correspondence: New York State Planning Federation Conference to be held in Saratoga from April 15-17, 2012. Any Board Members who are interested in attending will notify the Secretary.

Town Attorney Avigdor's Review of Zoning Board Procedures and Practices:

For the benefit of the new two Board Members, Town Attorney Avigdor reviewed the following regulations and procedures:

1. Town of Day has various land use laws including subdivision law which pertains to parcel division into two or more individual parcels; and, site plan review law which pertains to the change of land use of a parcel and requesting permission to do so. These are functions of the Planning Board.
2. Zoning Law specifies what a property owner can or cannot do within the various zones of the Town (zones include Lakefront Residential, Residential Low Density, Residential Moderate Density, Neighborhood Commercial and Residential/Resource Conservation).
3. The aspects of the law which do pertain to the Planning Board (Subdivision and Site Plan Review) allow the Planning Board oversight over projects to insure compliance of the law. For example, in a commercial zone, a deli is permitted but the property owner must still submit a site plan review application which allows the Planning Board to review parking areas, trash disposal, proper lighting etc. with the approach is the property owner is permitted to have a deli but it must be done properly.
4. Zoning Law specifies what is permitted and not permitted on a parcel and the whole approach of zoning is what is not permitted and the vast majority of property owners apply to the Zoning Board for a variance after being refused a building permit.
5. From Zoning Law: "The Zoning Board of Appeals shall have the power on an appeal from a decision or determination of an administrative official charged with

enforcement of such ordinance or local law to grant area variances as defined herein.” The statement means that the Zoning Board Members has the power upon the referral from the Code Enforcement Officer (Ken Metzler) to grant variances.

6. This does not mean that all variances should be granted but the Zoning Board has that authority to do so. The Code Enforcement Officer’s referral is in the form of a denial letter. The Secretary obtains these letters.
7. Variances are in two categories: area and use variances. The Szyfman application is for an area variance. Use variances do not have to do with dimensions and would involve a change of a use of the land which is otherwise not permitted. The Neighborhood/Commercial zone does not allow all commercial activity. There is a list under that zone in the zoning law which includes a list of permitted uses and permitted uses with site plan review. Standards for use variances are very difficult to meet and will be explained more in depth when this Board receives its first use variance. This Board has never received a use variance to date.
8. The term area in relation to an area variance is misleading. Area variances pertain to all the dimensions, i.e. a linear dimension as it pertains to road frontage in which the requirement would 200 feet and the parcel has only 196 feet. Other area variances would pertain to less than the required acreage or the area is not large enough to accommodate all the structures.
9. Zoning law which pertains to area variances states (and should be referred to frequently): “In making its determination, the Zoning Board of Appeals shall take into consideration *the benefit to the applicant if the variance is granted as weighed against the detriment to the health, safety, and welfare of the neighborhood or community by such grant.*” This is the most important principal. Welfare would include the neighbor’s property value and the visibility of the shed (in the case of this application) which does not mean that the Zoning Board should deny the application. Consideration should be given that the neighbor did appear at the Public Hearing regarding line of sight involving the shed and would fall into the category of welfare.
10. The Zoning Board must weigh the comments of the applicant and the neighbors in light of *the five factors* which follow. The decision is based on the balance of those five factors overall and how they impact the benefit to the applicant which may result in the granting of the

variance as opposed to the detriment to the neighbor or the community.

The five factors are:

- ∞ “Whether there will be an undesirable change in neighborhood character or to nearby properties;” in the mind of the Zoning Board Member does this create a detriment (not just the neighbor’s contention that it does)?
- ∞ “Whether the benefit can be achieved by other means feasible to the applicant other than an area variance;” in regards to the Szyfman if Chairman Davidson’s statement that there may be an alternative location for the shed, it would speak directly to this factor application. (Town Attorney Avigdor does not visit the site and come to a conclusion but rather he will provide the straight legal answers and the Zoning Board will come to their own decision).
- ∞ “Whether the request is substantial”; simple arithmetic may be the factor to be considered.
- ∞ “Whether the request will have adverse physical or environmental effects”; while this is very similar to the first factor which relates to the immediate neighbor or neighborhood, this factor relates to the Town of Day at large. Examples would be noise, bright lights, traffic through town, etc.
- ∞ “Whether the alleged difficulty is self-created which consideration will be relevant to the Board of Appeals but shall not necessarily preclude the granting of an area variance”, the reason for the second part of factor is law previously consisted of four factors and one rule which was if the difficulty was self-created, the variance could not be granted. The Legislature when passing these factors made it clear they were eliminating a self-created problem being an absolute bar and rather making it one of the factors. Classic case of self-created would be the construction of a house which did not require a variance but did need to be located 50 feet from the lake; the property owner built the house 48 feet from the lake with a door located on the second floor on the lake facing side of the house; and, then applies for a variance to construct a deck on the second floor on the lake facing side. It was the decision of the property owner to add a door to the second floor on the lake facing side and build their house 52 feet from the lake. The option to build 65 feet from the lake was open. This would be the essence of self-created.

- ∞ While not a factor, the following section of Zoning Law must also be taken into consideration at the time of the Board's decision: "The Board of Appeals in granting area variances shall grant the minimum variance that it deems necessary and adequate at the same time". If the Board Members visit the site and it is apparent that a variance is required and as the property owner stated, it is hidden in trees, but in observing the slope of the land, it may reveal that a four foot variance may be more appropriate than a seven foot variance. This Board would have the authority to reduce the variance based on the five factors.

Arriving at a Decision:

The Zoning Board does not make a decision based on the count of the factors (i.e. three are positive against two that are negative) but an analysis of all the factors). If only one of the five is against granting the variance but is so overwhelmingly compelling, the variance may be denied simply on that one factor.

Decisions which this Board makes can result in lawsuits. A Board Member would be represented by the Town Attorney if they were sued individually because it is a Town matter. If the Town is sued because a zoning variance is denied, the property owner would wish a judge to make a judgment on his application which was denied. Or, a variance is granted and the neighbor believes the Board was in error in granting the variance. At this time the Town Attorney would assume the duties of defending the Town. This should not make this Board apprehensive in making decisions. The judge will want to know the basis of the decision through the transcript of the Public Hearing in order to see how this Board based their decision on the evidence in the Public Hearing.

If the Board Members visit the site with the intention of determining the weight of the shed as a reason to deny a variance, it would not be a good basis for a denial because the weight was not part of the Public Hearing. A Board Member cannot do an investigation on their own and base their decision on it.

Forming the Resolution:

More importantly, when a motion is made to approve or deny the variance, the reasons must be stated in relation to the five factors. Through discussions of the five factors, a good resolution can be formed. Resolutions will speak to both the five factors and the actual facts and evidence presented at the Public Hearing which meshed together should result in a good resolution/motion. It was

noted that the Town has been in litigation only twice in 20 years since the inception of zoning law by the same landowner regarding the same parcel in circumstances similar to the previous example of self-created and the judge found in favor of the Town. A second application was filed under the contention it was a different application which only shaved inches off the original application. There is a provision in zoning law which states that a landowner cannot reapply for a substantially similar variance within one year. A second lawsuit was brought against the Town, the judge reserved opinion past the time limit for reapplication, declared the lawsuit moot, and the second application was made and denied with no further legal action. This Board will continue to be courteous to applicants and interested public and those individuals have always left the Public Hearing satisfied they were able to make their points before the Board.

If an individual seeks legal counsel to pursue a lawsuit against the Town and his attorney reviews the resolution and finds the basis for denial was clearly articulated in the resolution, the action may stop at that point. The resolution to accept or deny must include the Board's reasoning. Members can disagree on their reasoning of the factors. These factors are weighed at the time a decision is made. The record will reflect all reasoning by all Board Members.

After the vote, the Secretary will prepare a Resolution for the Chairman's signature. The Chairman may have voted in opposition of the actual outcome. The Chairman still has an administrative function which is as Chairman of the Board, he must support what the Board decides. Regardless of how many Board Members are present, it requires no less than three votes to pass an action. The Adirondack Park Agency also has a 30 day review process which can result in the overturning of a variance which this Board has approved.

Town of Day Zoning Law and APA Approved Land Use Plan:

Town of Day has an APA approved land use plan which means that while APA law applies to the Town, APA has deferred to the town bodies certain decision making functions under APA law. There are levels of APA permits: Class A (larger projects) and Class B (smaller projects). If a property owner wanted to open a deli which requires a Class B permit, it is not necessary for the property owner to apply to APA because Town of Day Planning Board can grant those permits. Similarly, ZBA decisions can be granted from APA law as well as variances from Town of Day Zoning Law.

The Szyfman application is simpler as it relates to APA law because APA does not have any setback requirements from property lines or minimum road frontage requirements. Dimensional requirements of APA law deals with lot size requirements, maximum heights for towers and buildings, etc. The Szyfman decision will only be a decision as it relates to Town of Day Zoning Law. If a shed were 50 feet tall which exceeds the APA height requirement and this Board would now be asked to consider a variance from both Town of Day Zoning Law and APA law. In those cases of approving a variance from both laws, APA is entitled to notice in advance of the Public Hearing; can participate in the Public Hearing as if they were a neighbor; and, they are allowed to overturn the variance after this Board grants. APA cannot overturn this Board's decision to grant a variance from Town of Day.

There was a variance which was overturned in the Town of Day which involved two dwellings on one parcel for an additional dwelling for an elderly relative and APA requirement was for 2.6 acres for two dwellings in that zone and the actual acreage was under both APA and Town of Day requirement.

Signature Lines on Zoning Applications:

There are three signatures lines on the bottom of Zoning applications: 1) signature of the applicant stating all submitted application materials are accurate; 2) signature of applicant allowing Board Members to visit the site; and 3) the applicant authorizes a second party to be their representative.

Site Visits by Board Members:

When a Board Member wishes to visit a site, it is not necessary to notify the property owner. Board Members should never go to the site in groups larger than two because any time the majority of a Board is together to do Town business, it becomes a meeting and meeting require minutes be taken, notice to the Town newspaper (Post Star) that a meeting will be taking place and must be posted at Town Hall. If the property owner is present at the time of the site visit, it is advisable not to enter into a discussion because discussion must take place in front of the full Board. If necessary, explain that the Town Attorney has informed the Board that discussion is not allowed. Listen but do not engage the applicant.

Survey Map Requirement of Zoning Application:

Chairman Davidson stated as a matter of course, the Zoning Board requires a survey map with the proposal drawn on the map by the surveyor. In the Szyfman application, the location of the shed was not put on the survey map by the surveyor but by Mrs. Szyfman. The requirement was waived. This requirement was added because generally property owners do not know for certain where their property lines. It was discovered when the Szyfman survey was completed that an existing deck was encroaching on another property owner's parcel. The survey was completed in November 2011 to support the application so it is feasible that the encroachment was unintentional.

Conflict of Interest:

The issue of conflict of interest can arise if the relationship between Board Member and applicant could give the appearance of collusion. In most cases, the Board Member would be the person to make that determination. Is the Board Member able to make an impartial decision if they were not involved? Board Member Poe stated he was part of the crew who drilled the wells on both the Salerno and Szyfman parcels and was very familiar with some aspects of construction which may have caused damages to the Salerno parcel. Town Attorney Avigdor stated when a Board Member recuses himself, he also sits with the audience and does not take part in any part of the application process. This can be a detriment to the parties because three votes are still required and now it is a vote of three out of four rather than three out of five. To resolve this situation, the Town Board can adopt a local law allowing for alternates on the Boards. If there is a conflict of interest or absence, the alternate can vote. The Town of Day has not done this.

Motion by Judy Traeger, seconded by Board Member Newton to adjourn the meeting at 8:30 p.m. Ayes: Davidson, Traeger, Newton, Poe. Carried: 4-0.

Respectfully submitted,

Diane Byrne
Secretary