

TOWN OF DAY ZONING BOARD OF APPEALS

MINUTES – REGULAR MEETING

FEBRUARY 23, 2012

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

Members Absent: None

Motion by Judy Traeger, seconded by Board Member Newton to approve the minutes of January 19, 2011. Ayes: Davidson, Dixon, Traeger, Newton, Poe. Carried: 5-0.

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

Chairman Davidson provided each Board Member with a summary of procedures which he composed for utilization in the decision making process.

Chairman Davidson also reviewed the request by Mr. and Mrs. Szyfman for an area variance for seven feet where 15 feet are required an 8' x 10' tool shed. A public hearing was held at the January 19th meeting and comments were received from the applicants and adjoining neighbor, Brad Salerno along with a letter from Mr. Salerno's brother, Adam, each of whom has a shared interest in the adjoining neighbor parcel. All Board Members have visited the site. Chairman Davidson asked for Board Member comments:

- ∞ Board Member Dixon stated based on the steepness of the site and the areas where water flow would be an issue, she does not believe siting the shed eight or ten would make a difference in what adjoining neighbors would see. She would be in favor of granting the variance.
- ∞ Board Member Traeger stated she observed an area directly in the rear of the house or next to the garage where the shed could be located without the need for a variance. It would speak to the concern of the adjoining neighbors.
- ∞ Board Member Poe stated he agreed with Board Member Traeger. He also stated the argument of keeping access to the well site open would become moot if a large snowfall occurred in November which would make the well location

inaccessible until spring. The issue would be not the shed location preventing access to the well but rather the location of the well in and of itself.

- ∞ Board Member Newton stated she also agreed with Board Members Poe and Traeger. She stated there were three different locations for the shed without the need for an area variance which would not create a hardship for the applicants.
- ∞ Chairman Davidson stated he also observed several areas on the lot where the shed could be located without the need for the variance. He further stated the issue before this Board is not of hardship but of feet required in setback regulations. While he can appreciate Board Member Dixon's rationale, the law is very clear in what is required.

The Board reviewed the area variance criteria:

- ∞ Whether the benefit can be achieved by other means feasible to the applicant:
 - Board Members were agreed that the benefit could be achieved by other means.
- ∞ Whether there will be an undesirable change in the neighborhood character or to nearby properties:
 - Board Member Poe referred to a lengthy letter from adjoining neighbor, Salerno, which indicated they believed there would be an undesirable change in the neighborhood. He stated he would concur and that the area variance request would be contrary to zoning law.
 - Board Member Dixon stated there would not be.
 - Board Members Traeger and Newton stated the neighbor would have the shed in their direct line of sight.
 - Chairman Davidson stated he did not believe it was visibly intrusive to the adjoining neighbor.
- ∞ Whether the request is substantial:
 - Chairman Davidson stated it would be substantial because it is 45% of the requirement of 15 feet. All Board Members are in agreement.
- ∞ Whether the request would have adverse physical or environmental effects:
 - Board Member Poe stated it would due to the location of the shed near the property lines regarding line of sight of the neighbors (view). Board Members Dixon, Traeger and Newton agree.
 - Chairman Davidson stated it would not have an adverse effect.
- ∞ Whether the alleged difficulty is self-created:

- Chairman Davidson stated it is not self-created.
- Board Members Poe, Newton, Traeger and Dixon stated they believed it would be. Town Attorney Avigdor stated an example of self-creation similar to example given at the January 19, 2012 minutes (page 4). Board Member Poe stated the well location would be an example of self-creation in his understanding. Town Attorney Avigdor stated without a site visit, the designation of self-creation in this application would be impossible for him to make as his role would be the legalities of the application.

Motion by Board Member Traeger to deny the request for an area variance of seven feet where 15 feet are required. Chairman Davidson seconded the motion. All in favor, none opposed. Carried: 5-0.

Chairman Davidson polled the Board Members regarding their vote. Board Members Poe, Traeger, Newton and Chairman Davidson stated the compelling reason was the ability to locate the shed in a different area which would not require an area variance. Board Member Dixon stated that while she did vote to deny the variance, she stated an area variance had already been granted for the garage and the additional area variance for the shed would not have made a difference.

**New Business: Lynch, Daniel and Sharon
Tax Map #32.17-1-21
Request for Extension of Area Variance**

Chairman Davidson reviewed the specifics of the area variance application for Board Members Poe and Newton. Mr. Lynch, in the form of an email communication, had stated the uncertainty of family matters prevented the start of the addition and his misunderstanding of the date of expiration prompted his request for an extension. Chairman Davidson also reviewed legal criteria for area variance including expiration and extension. He also acknowledged the start of a building project would be the acceptance of those project plans by the Code Enforcement Officer and the subsequent issuance of a permit. The expiration was noted at the January 19th meeting.

Chairman Davidson consulted with Town Attorney Avigdor to determine if zoning law allows for an extension. Town Attorney Avigdor stated the law allows for an extension of a variance. This is not a reconsideration of the original factors

but a consideration in fairness to extend the variance. The law does not specify if the request for extension must be received prior to expiration or after the variance has expired. He further stated he can understand common sense both ways, i.e. once it has expired, it is expired. On the other hand, if this Board would have extended if the request had been made in December, what would the harm be in extending it at this time. The extension would be an additional six months from the date it is received in the Town Clerk's office.

Town Attorney Avigdor stated because the law is not clear regarding the time frame when a request for extension must occur, this Board must be consistent if another request is received from a different applicant for an extension. The decision must be the same. There have been previous requests for extension but never after the expiration date. This decision would set a precedent in policy in general.

Town Attorney Avigdor stated with land overview in mind, the land has not changed from the time the Lynch area variance was granted, therefore, what would be different at this time. The question would be if it is a land use and the conditions are balanced, what is the need for expiration? The following example was given: A landowner must build his house a specific distance from the property line and the Board grants a variance. Five years passes without the house being built and now the landowner has the resources to start construction. However, the adjoining property owner has in the meantime constructed a house on his parcel and would now be closer to the house with the variance. The law states it is fair that variances do not last forever because if there is a change in land use and how the five criteria would be judged, it is fair for the Board to consider a new application.

Chairman Davidson stated he would grant an extension prior to expiration but due to the ambiguity of the law, he would like to have a sense of the Board. Board Member Dixon inquired if there was any notation on the Resolution provided to the applicant that the area variance would expire in six months. The Secretary stated it is not included on the Resolution and this is due to continuing practices utilized in the past by her predecessors in constructing resolutions. Board Member Traeger inquired if the applicant was sent a letter advising them their area variance would expire. The Secretary stated no applicants have been notified that their

variances were set to expire. Town Attorney Avigdor stated that technically individuals are charged with knowledge of public law. The applicant's lack of knowledge can be a factor in this Board's decision to grant an extension.

Town Attorney Avigdor stated Mr. Lynch contacted him directly regarding an extension. Mr. Lynch related to him that in the Town of Holmdel, New Jersey where Mr. Lynch resides, variances are in effect for one year and Mr. Lynch assumed this was a universal code. Town Attorney Avigdor stated while this may be typical, it is not universal. He further stated Chairman Davidson is correct that this Board is considering whether to consider the request.

Board Member Dixon inquired if the law could be written that if a variance expires, it would be necessary for the applicant to reapply. Code Enforcement Officer Metzler would also recommend variances be granted for a one year period in light of the fact that the planning and securing of funds may take longer than six months. The Local Law Review Committee is charged with review of current zoning law and should review this law with the following aspects in mind: 1) is the general expiration six months or a year; 2) if the general expiration is moved out to one year, is there an opportunity to apply or is a year sufficient time period; and, 3) if there is an opportunity to apply, when must it be done – before the expiration or not.

Chairman Davidson stated this is an issue of fairness because the variance has expired. Chairman Davidson and Board Member Dixon sit on the Local Law Review Committee and recommended at their last meeting that the law be changed driven on the recommendation of Code Enforcement Officer Metzler's rationale, that changes in building and mortgage process has changed and become more time consuming; but not based solely on the Lynch application.

Chairman Davidson stated this type of change may be more than a year away. Town Attorney Avigdor stated there are different types of laws, one of which is similar to what Chairman Davidson referred to. However, there is a lower, less formal type of law which is a resolution passed by this Board. Since this Board would need an answer at this time which states that this Board will or will not entertain requests after the time as expired. Chairman Davidson stated in his consultation with Town Attorney Avigdor, he would prefer to

make a decision solely on whether or not this Board would allow the Lynch area variance to be extended and then have a discussion at next month's meeting regarding whether or not to make this change outside of the Lynch request. Town Attorney Avigdor stated it is within this Board's authority to do both.

All Board Members agreed to discuss the Lynch request. Chairman Davidson stated he is conflicted by this because when the Lynch decision was granted, the vote was 3-2 with Chairman Davidson and Board Member Traeger being the dissenting votes. Two of the three Board Members who voted in favor of the area variance are no longer on the Board and were replaced by Board Members Newton and Poe. Chairman Davidson stated he had privately hoped it would expire and there were reasons which may have prompted the applicants to choose to allow it to expire in the form of conditions which prevented further development beyond what was allowed by the area variance. At this time, Chairman Davidson and Board Member Traeger are confronted with extending a variance which they opposed. Chairman Davidson wished the record to reflect that he is in favor of extending the variance due to the fact that the Board made a decision.

Motion by Board Member Dixon, seconded by Board Member Newton to consider the request to extend their granted variance for a period such that the total length of the variance is one year from the date of its original granting (July 26, 2011-date signed resolution was filed with the Town Clerk). Ayes: Davidson, Traeger, Dixon, Newton, Poe. Carried: 5-0.

Town Attorney Avigdor stated the area variance will expire if the Lynches do not have a building permit in effect by July 26, 2012 which is the standard which CEO Metzler considers the project to commence and is stated in zoning law. A building permit consists of plans and specifics submitted to CEO Metzler. Board Member Poe stated in this geographic area and economic times taken into consideration, a year would be appropriate for area variances and taking the previous Board's recommendation and bringing it forth for an additional six months from the expiration date is positive. All Board Members are in agreement with the extension.

Board Member Traeger stated in the future when area variances are granted, there should be a notation of the expiration date. The Secretary stated site plan review approvals contain that notation and she would suggest that

in the future, all approvals for area variances contain that notation. Discussion ensued regarding the circumstances surrounding the Lynch area variance and misunderstanding of time frames involved regarding the extension. Chairman Davidson stated in some instances, the applicant will request that the Board reveal what they would like to see in an application. He further stated the applicant is responsible for the particulars of the application. This Board is charged with making the land use decision.

SEQRA Requirement:

Town Attorney Avigdor stated there is a procedural motion which was not made as part of the Szyfman motion. There is a State law called State Environmental Quality Review Act (SEQRA) which requires a good environmental review but not an environmental impact statement. A project may require permits from several government agencies, i.e. a variance from the Town of Day and permits from APA and Hudson River Black River Regulating District. A SEQRA is not required from each but one agency must assume that review and that agency is usually the lead agency which may be this Zoning Board.

When applications are received, it should be determined who would be the lead agency and in many cases, this Board would be the only agency. This Board should declare lead agency status and determine if there is a potential negative environmental impact. If there is not, this Board would issue a "neg dec" (negative declaration). If there is an environmental impact, the project is not ended but an environmental review would be required.

Town Attorney Avigdor stated he would like this to become part of this Board's regular procedure. Chairman Davidson stated the SEQRA courses he has taken stated the kind of projects this Board has undertaken are exempt from SEQRA review. Town Attorney Avigdor stated this Board must still declare the project as having a negative impact through a motion which in essence states we are not reviewing any environmental impact because there is none. Chairman Davidson stated without reviewing his class information, he would believe that the projects this Board reviews are excluded from that procedure. Town Attorney Avigdor stated he is not relating that they are included but that this Board should be explicit about that decision – that it is exempt and this Board is not reviewing. Chairman Davidson stated it should be included as an agenda item for next meeting. Town Attorney Avigdor stated he wanted the Board to

understand that the SEQRA requirements exist and it should not be ignored. He was not trying to increase the requirements.

Town Attorney Avigdor also wanted to advise the Board that he will not be attending the March meeting because he will be out of town.

Correspondence:

Board Members were provided with conference information on NY Planning Federation Annual Conference to be held in Saratoga. Board Member Newton will be attending.

Chairman Davidson and Board Member Traeger will be attending the APA Local Government Day Conference in Lake Placid.

Secretary's Report: None.

Public Participation: None.

Motion by June Dixon, seconded by Board Member Traeger to adjourn the meeting at 8:10 p.m. Ayes: Davidson, Traeger, Dixon, Newton, Poe. Carried: 5-0.

Respectfully submitted,

Diane Byrne
Secretary