

**TOWN OF DAY-ZONING BOARD OF APPEALS  
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES  
MARCH 21, 2016  
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**Members Present:**

Chairman Dave Davidson  
Member Lorraine Newton  
Member Al Graham  
Member Donald Poe  
Member June Dixon

**Members Absent:**

None

**Also Present:**

Attorney David Avigdor  
Attorney Susan Bartkowski  
Jim Zazewski, Builder & Engineer  
Sharon Nachbauer

**Pledge**

**PUBLIC HEARING-**

**7:01 PM**

**NACHBAUER, Craig and Sharon**

**S/B/L: 33.17-1-40**

**Area Variance Application**

The Public Hearing for Craig & Sharon Nachbauer was reopened with the purpose of the Zoning Board of Appeals deciding if an area variance will be granted. Chairman Davidson submitted a page with his observations and questions for the applicant. He was unsure if he would be able to attend the meeting so he provided this information written out. It was provided to the board and Attorney Bartkowski and Sharon Nachbauer. This page will be attached to the minutes.

There was two letters which were received after the last meeting. The first was from the Hudson River – Black River Regulating District which had no issue with the application. The second letter was from The Red Legacy, LLC, signed Tara Moffett in favor of the applicants. Attorney Avigdor clarified that the LLC was a family corporation for a nearby camp and so was relevant.

Ms. Nachbauer stated the the footprint can't be the same as the house is bigger. She is not asking to go any closer to the water side.

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Chairman Davidson said information previously presented showed that the extension on the lake side is the dimensions of the porch and the extension on the road side is about 10 feet plus the porch. Footprint has specific meaning, meaning that it was in the same perimeter. He stated that he had used that term incorrectly as this house is not in the same footprint as the old house. It extends on both sides and is larger. He has no idea what the letter writers meant by what they wrote.

Ms. Nachbauer stated that they did have a walkout basement in the previous camp. It had a second story so it was 7 feet, not 8 feet.

Chairman Davidson had asked Mr. Zazewski at the last meeting what the height difference was and he said it was about 9 feet.

Attorney Avigdor stated that typically at this board we are not concerned about if an attic is a second story design. Our concern is total height and if it is in code.

Chairman Davidson said that the issue underlying his question is pretty clear. The contention is that the house will block views based on where it sits. No data to that effect has been submitted to the board. He had been to the site four times and it is difficult to see.

Attorney Avigdor states that Chairman Davidson has adequately expressed his concerns. The applicant can present what they want. Chairman Davidson has one vote when it comes to a resolution.

Chairman Davidson requested some clarification on the issue of height.

Mr. Zazewski stated that when you look straight out all the houses in that area all sit in a hole and all have walk-out basement.

Attorney Avigdor asked for clarification. He asked that if a person was standing on the road and looked level, would he look right over the house?

Ms. Nachbauer then showed a photo from her phone to the board members that showed the view from the roadside. She will submit it for the record.

Chairman Davidson stated that the Nachbauers had asked for a variance, a relief from compliance with the law. The reason was that if the house was compliant it would block views. He felt that was not shown by the applicants.

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Mr. Zazewski stated that he did not have the data here. He said that we're going by what was there and what is existing there. If they knew that this question was going to come up he could have had a surveyor there to gather that information.

Attorney Bartkowski stated that she did inquire whether grades had already been shot and they had not. Problems doing that include the time of the year and the condition of the property. She feels it is not practical @ this time. What can be shown if the size and appearance overall. She states that what is being talked about is aesthetics and blocking views for neighbors.

Mr. Bartkowski said that if it was not changed there would have to be a lot of digging and a massive retaining wall to hold the road back. The door would be down in the ground.

Mrs. Nachbauer showed photographs from the original application. She explained that they were taken from the road.

Chairman Davidson stated that the excavator in one photo was sufficiently large to affect the view.

Mr. Zazewski and Ms. Nachbauer stated that the house would be much lower than that. They did not know the height of the excavator. Ms. Nachbauer stated that since the proposed house is in code that it was not relevant.

Attorney Avigdor said that yes, the proposed house is in code as to its height. But it does not mean that the height is irrelevant to the variance discussion because putting the house in the location for which you need a variance creates a physical reality that the board can consider in all its aspects including its height.

Ms. Nachbauer states that moving the house closer to the road makes it taller and she does not want the board to think that she is trying to get a variance for the height.

Chairman Davidson states that we do not have any data.

Attorney Avigdor states that we have whatever the excavator shows you and whatever the contractor have provided. You are either persuaded by that or not.

Chairman Davidson wants to know what do the stakes mark.

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Mr. Zazewski said they probably put the offsets in off to the side than they can reference them when they put the foundation in.

Attorney Avigdor clarified that the correct answer is not known. It is not relevant to the decision.

Attorney Bartkowski asked if the board had any more questions.

Member June Dixon said that it was difficult to understand how a house that is bigger is not going to be higher.

Mr. Zazewski said that it is higher than the original house.

Ms. Nachbauer stated that we are trying to lessen the impact of the house because it is 9 feet taller by keeping it lower.

Member Donald Poe wanted to get things in perspective. Building the home can be achieved by another method by a feasible and lawful means. The applicants are going to great extent to accommodate their neighbors.

Ms. Nachbauer states that the houses are in a row and they don't want to move it out of alignment.

Attorney Bartkowski stated that yes they are going out of their way to keep their neighbors happy because they have lived there for 47 years.

Chairman Davidson stated that if a variance is granted, there will still be views obstructed.

Ms. Nachbauer shared personal reasons on why they needed a large house.

Chairman Davidson said that it is not relative. We are a land use board. The decisions are based on that and independent of the people involved. That is what we are asked to do by law. The decisions made stay with the land.

Attorney Avigdor said that aesthetically the applicant made a point and the board can take that however they take it. He felt the board was correct and despite family reasons the decision will outlast all of us.

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Member Donald Poe asked if they would be living there all year long and had questions about the road being plowed.

Attorney Bartkowski asked that we refocus on the balance of the 5 questions. The house was located previously in that general area. The overall benefits are not just for the individual applicant but to the community. It is not in the best interest to place the house closer to the road.

Chairman Davidson said that there are 2 variances required. The first is a relief from the Town of Day requirement of 15 feet. The second is the Adirondack Park Agency requirement for 75 feet from the lakeshore.

Attorney Bartkowski said that there is the preexisting use for where this house was. I understand that we are not grandfathered in with new construction but that I would ask that you consider that all of these houses are in a row on the same shoreline.

Attorney Avigdor says that questions and anything further that the applicants present is appropriate but we're at the stage and when that is done then we'll close the public hearing and debate among yourselves. Someone will make a motion on some result and at that point if the applicant chooses to add anything it will be up to the Chair if it is accepted.

Member Lorraine Newton feels that the bottom line is we're here because they would like this variance to be closer to the lake in accommodation for all their neighbors. That is what we need to focus on.

Ms. Nachbauer states that we are trying to lessen the impact of the 9 feet. She would to leave it where it was. She is not trying to move to a new location.

Attorney Avigdor said that the law states that since the house was removed it is a new location. This is a request for both a variance from the Town of Day for a line setback and the Adirondack Park Agency for a shore setback variance. The Adirondack Park Agency states that even if the house had not been removed, and even if the location of the face of the house closest to the lake was not changing but since the face would become larger it would require a variance. If a person has a house close to an Adirondack Park body of water and it was grandfathered in as permissible they can do renovation and update but any increase of in the size of the house either on footprint or height within that 75 feet from the water would require a variance. The fact that there was a house is no longer a factor.

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Mr. Zazewski said it will fit into the community better and even with the rest of the camps. This will make the least amount of impact on this project.

Ms. Nachbauer states that her neighbors sit higher than the road.

Attorney Avigdor states that regarding the letters from neighbors which urge approval for the variance. Some use terminology that is not technically correct but the application was here in Town Hall. If the neighbor didn't do their due diligence then that is their problem. The plan was here to be viewed. Don't dismiss those letters out of hand because they are not technically correct.

Attorney Bartkowski urged the board to consider the application favorably. We're trying to do the best for this community that will have the lowest impact on this property.

**Motion**, made by Lorraine Newton and seconded by Al Graham to **close the public hearing** was made @ 7:50 PM.

Ayes: Chairman Dave Davidson, Lorraine Newton, Al Graham, Don Poe and June Dixon.

**Carried: 5-0.**

**REGULAR MEETING**

Chairman Davidson states that it is deliberations time.

Member Al Graham states that since he is new he reviewed what a zoning board is supposed to do. In considering an area variance, the zoning board of appeals shall grant the minimum variance that shall be necessary and adequate and at the same time protecting and preserving the character of the neighborhood, health and safety and welfare of the community. He felt that the character of the neighborhood was the important part. All the discussion tonight about heights is irrelevant. If the house is put where the current building permit exists it will block the view. If it is put down further it will block the view less. The impact would be less on the area.

Member Lorraine Newton states she agrees with Al but another thought she had was a variance with stipulations. She wondered if there is a leeway to put the house back 5 feet to accommodate the deck. This could perhaps satisfy both sides, the zoning laws and the owner.

Attorney Avigdor states that legally it is an option with reasonable conditions. That would relate to the land and to the criteria. If the board has in mind, an option would be to ask the

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applicant if that is acceptable. If the answer is “no” the board can still impose it. The board would go back to the criteria and weigh the 5 criteria.

Member June Dixon states that it was confusing for awhile. If you put it closer to the lake the house would be lower. If it is move closer to the road the house is higher. There is so much involved in trying to give a variance whereas if it was left where is was it wouldn't be as much as a problem. Then given the fact that the neighbors sent the letters it seems to be not a big thing with the view. I feel it would be ok to do it.

Member Don Poe said we need to focus on the 5 outcomes. The Overlook Beach Club is a mix of big and small homes. It may be the nature of the beast. He also had concern that there is a lawful way to do it. There are 11 letters from the surrounding people and he thought that if the letters said “don't do it” we would have an easier time. He was inclined that Ms. Nachbauer believes that the neighbors would be happy where it was put. Mr. Poe is inclined to think so too.

Chairman Davidson stated that there was not a place on the lot where it won't obscure views.

Attorney Avigdor says there are 2 different factors out of 5 that may be applicable here. Criteria #1 is whether there will be an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties may be created by the granting of the area variance.

The other criteria is #4 is whether the proposed variance will have an adverse effect on the physical or environmental condition of the neighborhood or district. That may be the impact on the view from the lake. The impact can be on the neighbors but also on the town. The 5 factors is not an adding up, it is a weighing of the whole.

Attorney Avigdor continues stating that as the board gets into a discussion of the criteria, someone will make a motion. The clerk, Dawn Graham will need to record to action of the board. The decision will then be drafted into a resolution with thoughts on the 5 factors. The Chair will then sign.

Attorney Bartkowski states that there is a line of pine trees that provide cover. It is on Hudson River property.

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Chairman Davidson states the 1<sup>st</sup> criteria is whether the benefit can be achieved by other means feasible to applicant. This is an unusual case. The benefit they want to achieve is not to the applicant but to the neighbors. Can the benefit to the neighbors be achieved by any other means?

Member Lorraine Newton states that in that respect the answer is “no”.

Attorney Avigdor suggests that other methods could be used. The applicant could build a shorter house without a variance.

Member Lorraine Newton states that she would also like to agree with that. Yes it can be achieved by other means.

Member Al Graham states that in his opinion the benefit cannot be achieved by moving it up to the road. He states that by other means feasible to the applicant. Neighbors or no neighbors doesn't make a difference. She doesn't want to offend the neighbors by putting it up high.

Member June Dixon feels that the benefit could be achieved by other means. The fact that the neighbors have submitted their letters that they are ok with it. The fact that the applicant and her representative have gone out of their way to make us understand that. It could be achieved by other means. Yes.

Member Don Poe feels it could probably achieved another way.

Attorney Avigdor stated that the point is people are struggling with that there is another means feasible to the applicant but are uncomfortable with that because it is outweighed by another factor.

Chairman Davidson states that he is not persuaded that the benefit will be achieved if the variance is granted. He then read the 2<sup>nd</sup> criteria regarding an undesirable change in neighborhood character or to nearby properties.

Member Don Poe states that he doesn't know if it will be desirable or undesirable. He doesn't think it will be as undesirable as you think.

Member June Dixon states that it will be more desirable and definitely benefit neighbors.

Member Al Graham agrees with June. It will be less of an undesirable change to allow it.

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Member Lorraine Newton states it would be a change to the neighborhood. The structures on either side are not as big. No it will not make the project more undesirable.

Chairman Davidson agrees. The scale of the house will change the neighborhood but that change is already in process in that area. Therefore granting the variance would not create an undesirable change in the neighborhood.

Criteria #3 is whether the request is substantial.

Chairman Davidson said yes it is.

Member June Dixon states yes.

Member Lorraine Newton states yes.

Member Don Poe states yes.

Member Al Graham states yes.

Criteria #4 is whether request will have adverse physical or environmental effects.

Member Lorraine Newton – no.

Member Al Graham – no.

Member Don Poe – no.

Member June Dixon – no.

Chairman Davidson states no, it will impact the view only.

Criteria #5 is whether alleged difficulty is self-created.

Attorney Avigdor states that occasionally Judges will even tell juries that this is the answer. I don't see as a matter of law how this is not self-created. Other factors may outweigh this in your opinion.

Member Al Graham –yes.

Member June Dixon – yes.

Member Don Poe – yes.

Member Lorraine Newton –yes.

Chairman Davidson – yes.

Member Don Poe states that is balanced the 5 factors. This is self-created and can be achieved by other means but moving the structure closer to the lake will probably be better for the neighborhood and a desirable change.

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Member June Dixon believes the same thing. Moving closer to the water is a better change.

Member Lorraine Newton states that it is a large request. They already had permission to put the house in another area. Perhaps the house could be set back another 5 or 10 feet.

Attorney Avigdor states that the board does not have an all or nothing question. The law requires that if the factors are met you then grant the minimum variance required. Let the board have their discussion but if you choose to make a motion with conditions then the board can consider that.

Chairman Davidson states that he does not have actual evidence that this problem will actually go away. Fundamentally the view is obscured. I find Member Lorraine Newton's idea interesting.

Attorney Avigdor clarified that he does not feel that the Nachbauers are in a position to agree with that proposal because they do not have enough information.

Member Lorraine Newton made a **motion** to deny the requested Town of Day rear line setback variance and to grant the APA shoreline variance for construction of the structure at whatever point complies with the Town of Day setback. Chairman Davidson seconded the motion.

Chairman Davidson states that the motion is on the floor for discussion.

Member Lorraine Newton said that she felt that the amount of variance was excessive. In her 3 years on the board this is the largest footage ever required. She felt that no matter where the house will be build, it will be a visual impairment.

Chairman Davidson agrees with that. He feels that this would not add very much to the altitude.

Member Don Poe would vote against the motion.

Member June Dixon would vote against the motion.

Member Al Graham would vote against the motion.

Clerk Dawn Graham polled the board on the motion.

Member Lorraine Newton – yes.

Member Al Graham – no.

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Member Don Poe – no.  
Member June Dixon – no.  
Chairman Davidson – yes.

Ayes: 2  
Nays:3

The **motion is defeated 3-2.**

**Motion** is made by Member June Dixon and seconded by Member Don Poe to grant the variance as requested.

Clerk Dawn Graham polled the board on the motion.

Member Lorraine Newton – no.  
Member Al Graham – yes.  
Member Don Poe – yes.  
Member June Dixon – yes.  
Chairman Davidson – no.

Ayes: 3  
Nays: 2

The 2 **variances are granted 3-2.**

Attorney Avigdor states that technically we have granted the variances. The APA retains 2 rights. One is to appear at the Public Hearing and participate in that. They choose not to do that. The other right that they have is to veto the granting of the APA variance. Their time period to do that is 30 days from when they receive the record of the proceedings here.

Chairman Davidson stated that he will notify the APA by email. They already have the application. They will then use our posted minutes. A copy of the resolution will be mailed to the Nachbauers and Attorney Bartkowski.

The minutes from the Public Hearing and Regular Meeting from February 18, 2016 will not be approved until the next meeting in April. That way both minutes can be approved at the same time.

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Member Lorraine Newton made a **motion** to **adjourn** this meeting of the Zoning Board of Appeals and it was seconded by Member Al Graham at 8:55 pm.

Ayes: Chairman Dave Davidson, Member Lorraine Newton, Member Al Graham, Member Donald Poe, and Member June Dixon.

**Carried 5-0**

Dawn Graham  
Clerk