

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 01 OF 09**

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
Ken Metzler, Zoning Enforcement Officer
Attorney Susan Bartkowski
Jim Zazewski, Builder & Engineer

Pledge

PUBLIC HEARING-

7:03 PM

NACHBAUER, Craig and Sharon

S/B/L: 33.17-1-40

Area Variance Application

With proof of notice available that the legal notice for the Public Hearing for Craig & Sharon Nachbauer was published according to law, the Public Hearing proceeded as follows:

Chairman Dave Davidson explained that the purpose of the public hearing being held tonight was for the Zoning Board of Appeals to decide if an area variance will be granted. He stated that the meeting is for the Nachbauers or their representative, Attorney Susan Bartkoski to speak to the board. He asked that they come up before the board when they speak so that all can hear properly.

Chairman Davidson wanted to clarify the denial letter change that was presented in the last meeting. The original letter stated that the lakeside was the front of the house. In fact the front of the house faces the road. The requirement for the setback for the back of the house given the size of this lot is 15 feet. The application asks for approval for 4.2 feet from that line resulting in a request for a variance of 10 feet from the property line.

Attorney Avigdor states that that is the request for the property line setback. He questioned if there was also a request for a variance from the shoreline setback.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 02 OF 09**

Chairman Davidson said there is one implied. All the materials have been sent to the Adirondack Park Agency (APA) and they will wait on our interpretation.

Attorney Avigdor clarified that there could be two variances needed, one for a variance from the property line setback and one from the shoreline setback. The APA does not have property line setbacks so they would be reviewing our decision only as to the shoreline setback.

Chairman Davidson stated that the shoreline setback requirement is 75 feet and the siting is 52 feet and that would result in a variance of 23 feet on the shoreline. It is 11 feet on the property line setback.

Attorney Susan Bartkowski spoke next. She is representing the Nachbauers who are currently in Nicaragua. If needed she can reach them by phone. She also introduced Jim Zazewski who will answer any questions about the structure.

Attorney Bartkowski stated that she has the application with the revised building plan showing the parameters of the variance that they are seeking. There is also approximately 10 letters of support from neighbors which should have been received by the Zoning Board of Appeals. They sent out to the mailing list provided which she felt went well beyond the 500 feet requirement.

Attorney Barkowski continued by reminding the board that Mrs. Nachbauer spoke last time and stated that the O'Reillys have been living there for well over 30 years. The new home would be a place for everyone to have a place to stay. It is on the same footprint, though a little bit larger and have it blend in as much as the old house did. Unfortunately when the building plans were submitted the house was put in compliance with zoning code which would put this house very close to the front road. It is a taller structure and would be clearly visible from the road and could potentially block the views of the neighbors across the street. There are letters of support from the neighbors.

Chairman Davidson stated that it is not on the same footprint. It overlaps in the front and back substantially.

Attorney Avigdor wasn't sure if being on the same footprint matters. The old house is gone and this is an application for putting in the new house.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 03 OF 09**

Attorney Bartkowski states the the new house is larger. It overlaps the footprint. She then discussed the qualifications that she has the burden of representing.

The first is whether it will cause an undesirable change in the character of the neighborhood or a detriment to nearby property would be created by granting this variance. She listed the support there is by the neighbors with their letters. They want to keep the structure down below the treeline and down below where people can see the top of the house. Moving the house up towards the road would deviate from the standard that is currently there.

The second factor is whether benefit can be sought by other means feasible to the applicant. The answer has to be “no”. If the house is placed where it would comply with zoning rules it would be moved substantially closer to the road. It would not achieve the desire of the Nachbauers to have it in the same area as the old and would not appease, but offend the neighbors.

The third factor is whether the request is substantial. The shoreline variance, while substantial due to the numbers, the shoreline location has moved. The mean high water mark is much closer than it was prior. Maps have been redrawn and changed due to the massive storms that we have had the past few year.

Next is whether request will have adverse physical or environmental effects. No adverse effects are noted. No opposition is noted by the neighbors.

Lastly is whether the alleged difficulty is self-created. The answer is “Yes”. The Nachbauers want their house away from the road for reasons that were discussed previously. Had the Nachbauers known what would have happened they probably would not have torn their house down. They are lifelong residents of the community. They want a structure that has room for their children and grandchildren to fit in.

Attorney Bartkowski closed with a request for a favorable vote. She reintroduced Jim Zazewski for any questions.

Attorney Avigdor had a technical point regarding the high water mark. The NYCRR is New York’s official compilation of regulations. In the case of the Great Sacandaga Lake mean high water mark shall mean a spillway elevation contour of 771 feet above sea level. That does not change with storms or physical features.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 04 OF 09**

Mr. Zazewski presented the plans which the board had previously seen. The view from the road is almost two stories. The lakeside, because of the grade, ends up with a walk-out basement. He does not think that placing the house where the Nachbauers want it will block the view very much.

Chairman Davidson asked how much add-ons between the new and the preexisting camp.

Mr. Zazewski states he does not have the measurements of the old camp.

The discussion that followed was how obtrusive the house will be if it is moved closer to the road.

Attorney Avigdor stated that the applicant has the burden of proof. If the applicant wishes to express anything further they may.

Chairman Davison reviewed a phone call he received from Bill O'Hara, who had received one of the letters from the Nachbauers. His conclusion was to leave the decision to the professionals.

Dawn Graham, clerk to the Zoning Board of Appeals, read 9 letters to the Town of Day all in favor of the Nachbauers application. They were from the following people: Phyllis L. Chapman, Patricia G. Mulhall, Dorothy L. O'Reilly, Michael O'Reilly, Robin O'Reilly, Louis A. and Beverly A. Tessier, Gary Wilson, Kathleen Young and Edmund J. Zalewski. The letters are on file at the Town Hall.

Attorney Avigdor felt that to complete the record he would like Kenneth J. Metzler to come forward. He has been the Town Building Inspector, The Zoning Officer and the Code Enforcement Officer for the Town of Day for 30 years.

Mr. Metzler first became aware of the project that is the subject of this application approximately 6 to 7 years ago. It was silence for awhile and different ideas would surface. The Nachbauers came into his office to discuss the building project. They told Mr. Metzler that their builder would be handling the applications. Jamie Muller, the builder saw Mr. Metzler also. He applied for a building permit and a demolition permit. Mr. Metzler advised him that he would not be giving a demolition permit until the building permit was written. Knocking down a house would not guarantee him a building permit. A plot plan was lacking. The builder stated that David Barass, a licensed surveyor, would be giving the plot plan. Mr. Metzler had worked with Mr. Barass for many years.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 05 OF 09**

Mr. Barass notified Mr. Metzler that he was having difficulty fitting the house on the plot. He was told to look at 8.5 of the Zoning Code which is for small lots. Mr. Barass did that and presented a plot plan to Mr. Metzler. They were rejected once because they were too high for the zoning code. They were lowered and then both a demolition permit and a building permit were issued.

Mr. Metzler continued and said the house was demolished. The builder flagged the lot. The owner came by and said that is not where I want the house. The owner showed where he wanted the house. He was told that was a problem with the Town of Day zoning. The Nachbauers were recommended to get an application for an area variance and also the APA water set-back. It was explained that it could all be handled here on a local level but Mrs. Nachbauer preferred to go thru the APA.

Attorney Avigdor clarified with Mr. Metzler that the original building permit is still in place. The structure could be built at this time. It met the building code and the zoning code for 8.5. Mr. Metzler has copies of application for demolition permit, the demolition permit and the application for the building permit which was approved and the building permit that he will provide for the board. Attorney Bartkowski asked to see them and they were provided to her. They were given to the Clerk for the record.

There was no change in the house itself. The original house was 30 feet from the roadway. The porch to the Hudson River line is not marked. The information isn't currently available.

Mr. Zazewski states that there is 37 feet from the front to the lakeside property line. It was changed to 27 feet further from the road than the originally approved plan.

There was a discussion on the septic plans. It is currently shown under the new house. The system is ok but will need to be moved. The Department of Health Code 75A does not allow the septic to be where it is.

Attorney Avigdor said the board has no jurisdiction on the septic plan. After the public hearing is closed he would like to clarify some issues with the board. He will offer Attorney Bartkowski the same privilege.

Chairman Davidson opened to the board.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 06 OF 09**

Member Lorraine Newton had questions on the height of the building.

Chairman Davison had an observation about the public hearing. He listened to 9 letters read in support of the application from neighbors. Everyone said that the new house would be on the same footprint as the old house. He said that it is simply not correct. He says neighbors are operating under a misunderstanding.

Attorney Bartkowski replied that the word footprint was not used. The neighbors were concerned that the house would be closer to the road.

Member Don Poe stated that 4 letters were the same.

Motion, made by Lorraine Newton, seconded by Al Graham, to **close this public hearing**, was made at 8 PM.

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

Carried: 5-0

REGULAR MEETING

Attorney Avigdor reminded board that they will be reviewing 5 factors in the statute. They must all be considered and weighed.

Factor one – whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance. Attorney Avigdor has no legal opinion on this. It is a factual determination for the boards judgement.

Factor two – whether the benefits sought by the applicant can be achieved by some other method feasible for the applicant to pursue other than an area variance. Attorney Avigdor does disagree with Attorney Bartkowski’s opinion earlier in the meeting. He does not think that the benefits sought by the applicant means legally to put the house close to the property line. If that phrase meant that, it would also be the case that there would never be a way to do that without a variance. A publication put out by the state, the department of local government services, discussed alternatives that are lawful under zoning. The benefits sought by the applicant means an opportunity to build a house on the property.

Factor three- whether the requested area variance is substantial. Attorney Avigdor has no legal thought on this. The board has the numbers. It means is the amount the applicant seek to vary large compared to what the requirement is supposed to be.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 07 OF 09**

Factor four- whether the proposed variance will have an adverse effect on the physical or environmental neighborhood or district. This is factual and left to the board's judgement.

Factor five- whether the alleged difficulty was self-created which consideration shall be relevant to the decision of the board of appeals but shall not necessarily preclude the granting of an area variance. Attorney Avigdor feels strongly that the law gives you no choice that this is self-created. The applicant took down the house. It may have been a misunderstanding. The courts basically take the position that that is "tough". The wherewithal was there to reach a proper understanding.

Weigh the 5 factors. Don't add them up on one side or the other. Rather come to a conclusion as to what weight you give the 5 factors all together. When an offer for a motion is made, explain how the 5 factors were weighed and how a conclusion was reached. Reflect reasoning.

Attorney Bartkowski disagrees on factor two. She feels that the benefit that the applicant is seeking is two fold. It is the desire to have the house in the lower location and it is a benefit to the community so as not to engender hard feelings. As far as factor five , the self-created hardship, yes there was a mistake made but she doesn't believe that trying to put this house where they don't want it would be for the benefit of everyone.

Chairman Davison asked for a general consensus by the board.

Lorraine Newton is not sure. The size of the house surprised her. She understands what they are trying to do. On the other hand, they wouldn't be here tonight if things didn't happen as they did.

Attorney Avigdor clarified that no one has to make up their mind tonight. The law gives two months from ½ hour ago when the public meeting was closed. You can vote tonight if you are ready. If the board is not ready or all are not prepared each person can abstain or table the motion. Uncertainty is OK.

Al Graham states he will need advice. He saw the site. If the house is close to the road, it would be out of line with the rest of the houses. It would change the appearance of the area.

June Dixon is also thinking like Al. The house is so much higher and will cause some neighbors to lose their view if it is up by the road. She has mixed emotions.

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 08 OF 09**

Don Poe has a couple of opinions. We are looking at several criteria. We are looking at if the benefit can be achieved by other means. There is already a building permit and plot in place. This is self-created. As far as affecting the environment, the point made about the houses line up sticks in my mind. He stated that it is February and no one will begin digging for at least another month. He'd like to go back out to the site and do more homework. He is not in favor of any motion tonight.

Chairman Davison has no reservations on Don's suggestions. He has real issues with the application. He would like to visit the site also. The proposed structure as it stands does not line up with the house that is there. A house of this size on this lot is going to block views. Lets table it for tonight. All members were in consensus with the chairman.

Attorney Avigdor said that if the applicant consents, we need to **reopen the public hearing**. If that is done, then the applicant will not need to reapply and they will not need to send notices out tonight.

Attorney Bartkowski gave consent to reopen the public hearing.

Motion, to reopen the public hearing was made by Don Poe, seconded by Al Graham.

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

Carried: 5-0

The public hearing was then adjourned.

Motion, made by Don Poe, seconded by Lorraine Newton to **approve** the January 21, 2016 Regular Meeting Minutes.

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

Carried: 5-0

OLD BUSINESS: The Application for an Area Variance has been reviewed by the board.

Motion, made by Don Poe, seconded by Lorraine Newton to **accept** the Application for an Area Variance.

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

Carried: 5-0

The board gave thanks to Dave Davison for all his hard work.

NEW BUSINESS: None

**TOWN OF DAY-ZONING BOARD OF APPEALS
PUBLIC HEARING & REGULAR MEETING-DRAFT MINUTES
FEBRUARY 18, 2016
PAGE 09 OF 09**

CORRESPONDENCE: Local Gov't Spring Workshop March 31st
Hudson Valley Community College, Troy

NYPF Conference April 17th to April 19th at
The Gideon Putnam

2016 Adirondack Park Local Government Day on
April 13 & 14 at the Crowne Plaza Resort in Lake Placid

SECRETARY'S REPORT: Forms for above conferences given to members.
Please return to me by March 23rd. (Thanks)

Motion, made by Don Poe , seconded by Al Graham, to **adjourn** this meeting of the Zoning Board of Appeals was made at 8:30pm.

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

Carried 5-0

Dawn Graham
Clerk