

Minutes of the Zoning Board of Appeals Meeting held on July 10, 2019 at 7:30PM

Present: Karen Ungerer, Chairwoman  
 Kevin Abrams, Craig Brady, Joseph DeVenuto, Gary Kestenbaum  
 Absent: None  
 Also Present: Attorney Richard Dickover; Sandra Capriglione, Planning Board; Andrew Giacomazza, Village Board

**1. Attorney Client Session held at 7:30 the board returned at 8:30PM**

**2. Approval and Acceptance of Previous Minutes:**

Motion was offered by C.Brady, seconded by J. DeVenuto, to approve and accept the minutes of the meeting held on June 12, 2019. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

AYES 5 Ungerer, Abrams, Brady, DeVenuto, Kestenbaum  
 NOES 0

**3. New Business – n/a**

**4. Action on Decisions –**

**A. Brach –**

Review decision for fencing placed in the side and front yard area variance to permit a portion of the solid 48 inch high fence in the front yard to remain. The applicant has erected 6 ft. high solid fencing in a side yard, whereas pursuant to Section 146-5(B) and 146-7(A) fencing in a side yard shall not exceed 4 feet high and shall be less than 50% solid. Property is located at 273 Seven Springs Road, HM SBL 213-1-67.

In employing the balancing tests set forth in Village Law Section 7-712-b (c), the Board hereby grants the area variance for the fence height as requested.

*By roll call a motion to adopt the area variance for fence height was voted as follows:*

|                          | Aye | Nay | Abstain | Absent |
|--------------------------|-----|-----|---------|--------|
| Chairwoman Karen Ungerer | Aye |     |         |        |
| Member Craig Brady       | Aye |     |         |        |
| Member Gary Kestenbaum   | Aye |     |         |        |
| Member Joseph DeVenuto   | Aye |     |         |        |
| Member Kevin Abrams      | Aye |     |         |        |

With respect to the second requested relief being the “Challenge” to the determination of the Code Enforcement Officer (“COE”) in a Notice of Violation (“NOV”) that the fence location violates Code Sec. 146-6 the Board finds from the survey and photos presented that the fence is located in excess of six inches from the side yard boundary and therefore that the COE determination otherwise is incorrect and is hereby nullified.

*By roll call a motion to adopt the foregoing determination was voted as follows:*

|                          | Aye | Nay | Abstain | Absent |
|--------------------------|-----|-----|---------|--------|
| Chairwoman Karen Ungerer | Aye |     |         |        |
| Member Craig Brady       | Aye |     |         |        |
| Member Gary Kestenbaum   | Aye |     |         |        |
| Member Joseph DeVenuto   | Aye |     |         |        |
| Member Kevin Abrams      | Aye |     |         |        |

With respect to the “Challenge” to the determination of the CEO in his Letter dated February 25th, that the fence violates Code Sec. 146-7(A) (Uniformly less than 50% solid) and if determined to be correct reserving the right to pursue a variance allowing a solid fence where a maximum of uniformly less than 50% solid is permitted, the Board finds that based upon the photographs presented and the Board members viewing of the premises that

the fence is in excess of 50% solid due to the insertion of landscaping inserts within the openings of the chain link fence and based thereupon upholds the determination of the CEO.

*By roll call a motion to adopt the foregoing determination was voted as follows:*

|                          | Aye | Nay | Abstain | Absent |
|--------------------------|-----|-----|---------|--------|
| Chairwoman Karen Ungerer | Aye |     |         |        |
| Member Craig Brady       | Aye |     |         |        |
| Member Gary Kestenbaum   | Aye |     |         |        |
| Member Joseph DeVenuto   | Aye |     |         |        |
| Member Kevin Abrams      | Aye |     |         |        |

With respect to the “Challenge” to the determination of the CEO in his Letter dated February 25th, that the fence violates Code Sec. 146-6 (finished face must face outwardly from the property) the Board finds that the applicant did not address this portion of the appeal. The public hearing on this appeal has been closed. If the applicant wishes to have this issue decided he shall state his request within 30 days of the date of this decision otherwise the determination of the CEO is upheld.

With respect to the applicant’s assertion that he is challenging the authority to enforce Village Code Chapter 146 through the provisions cited in the NOV, to wit: Section 310 of the Village Law and Section 310-50 of said Law, the Board declines to make a decision on this request as same is not within the jurisdiction of the Zoning Board. The matter has been referred to the CEO for such action as he may deem appropriate.

Motion was offered by C.Brady, seconded by J. DeVenuto, to approve and adopt the decision as read. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

AYES                    5                    Ungerer, Abrams, Brady, DeVenuto, Kestenbaum  
 NOES                    0

**B. ALDI Inc. –**

Review decision for an area variance to permit wall signage having 5 colors (corporate logo) and proposed 2 wall signs, Property is located at 43 Center Drive CV SBL 225-2-1.12.

In employing the balancing tests set forth in Village Law Section 7-712-b (c), the Board hereby grants the variances as requested upon the following conditions:

This approval is not granted in a vacuum but is rather one of three independent yet interconnected discretionary approvals (the others being within the jurisdiction of the Village Board of Architectural Review (“ARB”) and Planning Board). As such, this grant of variance is conditioned upon approval of the proposed signage by the Village of Woodbury ARB and Planning Board. This approval by the Zoning Board of Appeals is intended to do no more than vary the specified strict limitation provisions of the Code; it is not intended to authorize construction of a particular building nor approve the footprint, size, volume or style thereof. The Planning Board and ARB remain possessed of all of their power and authority to review, limit, request modifications to, and to ultimately approve (absolutely or conditionally) any application in reference to this project as may come before each of them. Should the ARB or Planning Board require changes in the size, location or configuration from what is shown on the sign plan before the Zoning Board of Appeals that require greater or different variances, the applicant must return to the Zoning Board of Appeals for further review and approval.

As noted above, this application is not decided in a vacuum but is rather tied to a specific application for approval pending before the Planning Board and Architectural Review Board. Therefore, this approval is conditioned upon the applicant diligently pursuing his application before those boards. Should the applicant not have obtained approval from those boards within 180 days after final approval from the Planning Board upon its site plan application, it must then request an extension of this approval from this board. A failure to obtain either an approval from the Planning Board and Architectural Review Board or an extension of this grant of variance from this board shall result, without further action, in a lapsing of this approval 180 days after final approval from the Planning Board upon its site plan application.

Motion was offered by J. DeVenuto, seconded by C.Brady, to approve and adopt the decision as read granting the variance to the applicant. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, Brady, DeVenuto, Kestenbaum |
| NOES | 0 |  |

**C. Route 32 Property LLC/Iron Chef (formerly Gasho) –**

Review decision for an area variance to permit an existing wall sign of 64.89 Sq. ft. to remain. Property is located at 365 Route 32 CV SBL 218-1-19.

In reviewing the facts presented for the requested area variance, the Board considered the five standards for determining whether the applicant has sustained its burden of proof as required by Village Law Section 7-712-b (c). Each factor has been considered relevant to the decision of the board of appeals, but no single one is viewed as precluding the granting of the variances.

In employing the balancing tests set forth in Village Law Section 7-712-b (c), the Board hereby grants the variance as requested upon the following conditions:

1. The sign shall be illuminated only during the business hours of the restaurant and not beyond 11 PM.

Motion was offered by Chairwoman Ungerer, seconded by G. Kestenbaum, to approve and adopt the decision as read. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, DeVenuto, Brady, Kestenbaum |
| NOES | 0 |  |

**E. Falkowitz –**

Review Decision Public Hearing for a Special Permit and variance pursuant to Section 310-43(C) and 310-43(B)(7) to permit the demolition and expansion of an existing 3 family dwelling non-conforming use in the R2A Zoning District. Applicant proposes to replace the existing 3 family dwelling with a 2 family dwelling and expand the use by less than 10%. Property is located at 12 Skytop Road, HM SBL 217-3- 4.

After receiving all the materials presented by the applicant and the testimony of Jay Myrow, Esq. on behalf of the applicant at the public hearing held before the Zoning Board of Appeals on June 12, 2019, and there being no comments received from the public, the Board makes the following findings of fact:

The applicant has applied on behalf of the owner of an approximate .746-acre lot (tax parcel 217-3-4) having its primary frontage on Skytop Road.

The lot is improved by a three-family home. The home is a nonconforming use protected under §310-43.2(B), although such use is no longer allowed in the R2A zoning district where this property is located. The applicant now proposes to demolish and reconstruct a two-family home in the same footprint as the existing three-family home.

The applicants' proposal is set forth on a site plan entitled "Site Plan for Falkowitz" prepared by James A. Dillin PLS and dated October 25, 2018 [last revision: May 28, 2019]. That plan is hereby incorporated into this decision and shall remain in the zoning board's file in this matter.

No members of the public were heard during the hearing.

The Building Inspector issued a determination dated February 27, 2019.

The applicant has appealed the Building Inspector's determination seeking a special Permit to allow the demolition of the existing building and reconstruction of a new building with square footage not in excess of 10% of the existing structure.

After hearing the testimony at the public hearing and considering the materials received by the Board and after viewing the subject site, the Board decided as follows:

SEQRA

Type of Action:

This matter constitutes a Type II action under the State Environmental Quality Review Act inasmuch as the project embraces [6 NYCRR §617.5(c)(2)]. replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, . . . , as well as (11) construction or expansion of a single-family, a two-family or a three-family residence on an approved lot . . . , as well as (18) reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, . . .

Pursuant to the project being a Type II action no further environmental review is required.

**GML 239 Referral**

This application has not been referred to the Orange County Planning Department for review there being no requirement therefore on this project.

**Findings**

**Special Permit**

The board hereby determines that this expansion of a nonconforming use is appropriate and authorized under §310-43.2(C) because:

Said expansion, as proposed, will not exceed 10% of the floor area of the existing principal structure, and that:

- (1) Said expansion of the use is not detrimental to surrounding properties or to the health, safety and general welfare of the immediate neighborhood; and
- (2) No need for an expansion of off-street parking or traffic generation will occur in a residential district as a result of such an expanded use.

While §310-43.2 includes provisions [§310-43.2(B)(1)] prohibiting enlargement, extension, reconstruction, or relocation of a nonconforming use to a different location on the lot on which it sits, §310-43.2(C)—beginning with the phrase ‘notwithstanding any other provision herein’—trumps those restrictions and grants explicit allowance for an expansion of the nonconforming use of a building by up to 10%.

The Board has taken into consideration that previous applications of this nature that the Board has allowed the demolition of an existing nonconforming structure and replacement thereof even though the razing of the existing nonconforming building results in the loss of the right to maintain a nonconforming building. Based upon this precedent, the Board finds that this existing nonconforming three family structure may be replaced with a two-family residential structure provided the new structure’s square footage is not expanded in size greater than 10% of the existing three-family residence’s square footage.

As a condition to the Special Permit to be issued hereby, the applicant is to have the Village Building Inspector or Code Enforcement Officer verify the square footage of the existing structure and upon application for a building permit and presentation of architectural renderings for the replacement two-family structure verify that the new structure does not exceed a 10% expansion of the square footage.

The applicant has agreed as a condition of approval, to pave Skytop Road to Village standards. As a further condition thereof, no certificate of occupancy shall be issued by the Building Department until completion of said paving to the satisfaction of the Building Department.

Motion was offered by Chairwoman Ungerer, seconded by G. Kestenbaum, to approve and adopt the decision as read. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|         |   |                                    |
|---------|---|------------------------------------|
| AYES    | 4 | Ungerer, Abrams, Brady, Kestenbaum |
| ABSTAIN | 1 | DeVenuto                           |

**5. Public Hearings -**

**A. The Shops of Woodbury, LLC –**

Continuation of Public Hearing for area variances and interpretation. Applicant proposes to construct a commercial center and hotel having a lot area of 9.65 acres. The height of the proposed hotel is 60 ft. high, whereas, pursuant to Section 310-7 bulk regulations, the maximum height permitted is 35 ft. Furthermore, the applicant requires an interpretation as to whether a hotel is permitted as part of a commercial center pursuant to Section 310-49(c)3. In the alternative, the applicant is requesting an area variance from the minimum lot area required pursuant to Section 310-6f. Said property is located in the IB Zoning District off of the intersection of State Route 32 and Locey Lane in Central Valley and is known on the Village of Woodbury Tax Maps as Section 225 Block 1 Lots 34.1 & 34.2.

The applicant requested a continuation to the August 14, 2019 meeting via email. The Village Board recently adopted local laws #3 & 4 which created a hotel overlay zoning district. The applicant stated they are revising the plans in response to the district requirements and plan on submitting an amended application and plans in time for the August meeting.

Motion was offered by Chairwoman Ungerer, seconded by C.Brady, to close the public hearing as per the applicant’s request. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, Brady, DeVenuto, Kestenbaum |
|------|---|--|

**B. Reineke Vite –**

Public Hearing for an area variance to permit the construction of a single family dwelling on a preexisting lot having no frontage on a public roadway or suitable roadway improved to the satisfaction of the Highway Superintendent. Said property is located between 97 and 101 Smith Clove Road in the R2A Zoning District and is known on the Village of Woodbury Tax Maps as Section 218 Block 2 Lots 88.

The board discussed the other variances that the applicant has requested in the past and came to the determination that it was irrelevant due to the Village Code changing. The applicant’s lawyer Mr. Justin Kimple stated they no longer need the variances that they had requested in the past except for the road frontage variance. Due to the applicant waiting for the emergency services report, they requested to wait and continue the public hearing until the August 14, 2019 meeting.

Motion was offered by K. Abrams, seconded by Chairwoman Ungerer, to carry over the public hearing as per the applicants request to the August 14, 2019 meeting. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, Brady, DeVenuto, Kestenbaum |
| NOES | 0 |  |

**C. Schwimmer -**

Public Hearing for an area variance to permit the installation of an 8 feet high solid pool curtain around an existing in ground swimming pool. Whereas, pursuant to Section 146-5(A), 146-(B), a maximum height of 6 ft. is permitted and a fence made of cloth or canvas is prohibited. Said property is located in the R2A Zoning District at 21 Vanderbilt Drive in Highland Mills and is known on the Village of Woodbury Tax Maps as Section 245 Block 1 Lots 102.

Mr. Schwimmer stated he has a pool in a secluded area in the back of his property that is only in operation 9 weeks out of the entire year. He then stated as per our modesty regulations; the religious woman won’t enjoy the swimming pool unless it’s surrounded by a fence or a curtain. J. DeVenuto, questioned what makes a pool curtain better than a wall? Mr. Schwimmer stated he only wants it up during the summer months and that the tennis court mesh material protects against the wind.

Michelle Pollock, stated she loves the community she lives in, but she doesn’t like looking at the big black curtain. She then stated swimming season is longer than 9 weeks as Mr. Schwimmer said. CJ Graziano stated that Highland Lakes Estates HOA does not allow black tarps and it also violates the height and material restriction within the Village Code.

Mr. Schwimmer, stated that the HOA controls from the front property line to the shutters of the house and they can’t say anything about what the homeowner puts in the back yard.

Carmine Mastrogiacomo, stated the HOA is in litigation right now with some of the homeowners of the development. He then stated as the President of the HOA he will bring the HOA bi-laws to the building department so the ZBA will have a record of what is allowed in their development.

K. Abrams, stated that the HOA doesn’t supersede Village law.

Sue Gold of 13 Berkley Ct. stated it is an eye sore however she understands the plight for modesty especially from religious woman. She then stated there are other alternatives for modesty for example a burkini.

Mrs. Mastrogiacomo spoke on behalf of Mrs. Barbara Turner who lives on 20 Vanderbilt Drive. She states she has been a resident of Highland Lake Estates since 1996 and has raised her six children here. Everyone in her development has always followed the rules and had respect for their neighbors. She then stated that she fully respects all cultures and religions; however ones own practices should not be forced upon others at any point. Allowing a large shower curtain in someone’s back yard impacts everyone’s neighborhood and it is not fair to others that follow the rules and for the record she is opposed to the make shift pool curtain.

Pat Fox stated that the mesh material is very sloppy looking and she could never see in that pool and her children used to go over that house when they were younger all the time to go swimming. So there really is no need for the curtain, if you are trying to shield yourself from prying eyes.

Motion was offered by K. Abrams, seconded by Chairwoman Ungerer, to continue the public hearing to the August 14, 2019 meeting. Chairman Ungerer, conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, Brady, DeVenuto, Kestenbaum |
| NOES | 0 |  |

**D. Colonial Cottages –**

Public Hearing for an area variance to permit the installation of 8 ft. high solid steel corrugated fence around an existing swimming pool Whereas, pursuant to Section 146-5(A), a maximum height of 6 ft. is permitted. Said property is located in the R2A Zoning District at 57 Owens Drive in Highland Mills and is known on the Village of Woodbury Tax Maps as Section 204 Block 1 Lots 8.1.

The board feels that it is a commercial property and should not have received a violation, and the Building Inspector issued a violation in error. J. DeVenuto requested the door to swing in the opposite direction as it does now. Attorney Dickover informed J. DeVenuto that, that has to do with building codes and the discretion of the Building Inspector, however the board could suggest that he look into it.

Motion was offered by K. Abrams, seconded by Chairwoman Ungerer, that a violation was issued in error and it was vacated by the board. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

|      |   |  |
|------|---|--|
| AYES | 5 | Ungerer, Abrams, Brady, DeVenuto, Kestenbaum |
| NOES | 0 |  |

**At 9:11 a break was taken, board returned at 9:21pm.**

**6. Building Inspectors Report: N/A**

**7. Deliberations on closed Public Hearings**

**A. Pulver –**

**Chairwoman Ungerer, stated she re-visited the application after a discussion with the Attorney. She stated last month they were looking at the whole road, whereas now she is looking at this application from Ice House Road to Quaker Road. With that being said, she asked the board to re-visit the questions.**

The following responses were provided in the “Statement of Ownership and Interest” provided by the applicant for a use variance and the Boards decision on each question follows:

- 1. Will the granting of this variance produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties?* The subject parcel will be developed as a farm winery which is permitted in the R-3A Zoning District. The proposed driveway for the farm winery is an existing driveway (Ice house Road). In the 450 ft. between NYSR 32 and Ice house Road, there is one shared driveway for two residences entering onto Quaker Road (a municipal road). The variance will not result in any physical change in the neighborhood and will have no adverse or detrimental effect on nearby properties.

**Chairwoman Ungerer, stated she agrees with the applicant. J. DeVenuto, stated the roads can handle it as the consultant said, however he still believes there will be an impact.**

|                                     |  |
|-------------------------------------|--|
| <b>Agree with the applicant:</b>    | <b>Chairwoman Ungerer, C.Brady</b>           |
| <b>Disagree with the applicant:</b> | <b>K. Abrams, G. Kestenbaum, J. DeVenuto</b> |

- 2. Can the benefit you seek be achieved by some other feasible method other than variance?* The applicant stated there is no other method by which the applicant can develop the parcel as a farm winery without the granting of the requested variance. **The Board Agrees with the Applicant**
- 3. How substantial is the variance that you are requesting?* The applicant stated the area variance is not substantial, especially when considering the totality of the circumstances. The 450 feet to NYSR 32 is a short distance and Quaker Road is a municipality maintained road. **The board suggested a condition for signage directing traffic to Ice House Road. They also stated the potential easement from Mr. Clark onto Route 32 would be helpful with entering and exiting onto Route 32. J. DeVenuto, wanted to make a recommendation that Evans Drive no longer be a two-way street and he would agree with the applicant as long as conditions are met.**

