

Minutes of the Zoning Board of Appeals Meeting held on June 8, 2022, at 7:30PM

Present: Karen Ungerer, Chairwoman
Craig Brady, Rachel Bruce, Ed DeJesus Jr., Andrew Zoumas

Also Present: Kelly Naughton, Village Attorney; Christopher Gerver, Planning Board Chairman; Evan Yan, Planning Board; Beth Zoumas, Water Department Billing Clerk

Chairwoman Ungerer, opened the meeting with the pledge of allegiance, introduced the board and its new member Mr. Ed DeJesus Jr. and stated the next board meeting will be on July 13, 2022.

1. Executive Session: N/A

2. Approval and Acceptance of Received Minutes:

Motion was offered by C. Brady, seconded by A. Zoumas, to approve and accept the minutes of the meeting held on May 11, 2022. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	5	Ungerer, DeJesus, Brady, Bruce, Zoumas
	NOES	0	

3. New Business:

4. Action on Decisions:

A. Beer World –

Review Decision requesting variances from: (1) Section 310-32(B) to exceed the square footage for a retail establishment; (2) Section 310-30(D)(2)(d) to allow an additional wall sign in excess of what is permitted; and (3) Attachment 11 of Chapter 310 to allow additional wall sign area in excess of what is permitted. Said property is located in the LC Zoning District at 159 State Route 32 in Central Valley and is known on the Village of Woodbury Tax Maps as Section 226, Block 1, Lot 9.2.

DECISION

Village Code § 310-32(B)(2): Maximum Square Footage of Single Retail Establishment – Area Variance

Pursuant to Village Code § 310-32(B)(2), retail shops, “as permitted in Item 9 under ‘special permit uses’ in the Schedule of Zoning District Regulations, LC District, are restricted as follows: retail shops limited to the sale of food, beverages and miscellaneous small items, including convenience stores; ... , provided that . . . [n]o single retail establishment shall exceed 8,000 square feet, except a supermarket, which shall not exceed 40,000 square feet.” The Applicant is proposing to construct a 12,860.5 square foot structure containing a single retail establishment for the sale of beverages (with accessory storage and recycling),¹ requiring a variance of 4,860.5 square feet.

Consistent with its statutory obligations under New York State Village Law § 7-712-b when considering an area variance, the Board balanced the benefit to the Applicant as weighed against the detriment to the health, safety and welfare of the neighborhood or community if the requested variance was granted. Further, as also required by statute, the Board took into consideration the following five issues in its balancing test:

1. Whether an undesirable change would be produced in the character of the neighborhood, or a detriment to nearby properties would be created, by the granting of the requested area variance.
2. Whether the benefit sought by the Applicant could be achieved by some method, feasible for the Applicant to pursue, other than an area variance.
3. Whether the requested area variance was substantial.
4. Whether the requested area variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

¹ The Applicant has represented that the Beer World retail store would be 10,860.5 square feet, and the redemption center would be 2,000 square feet.

5. Whether the difficulties professed by the Applicant were self-created.

The Board was also aware of its obligation to grant the minimum variance that it deemed necessary and adequate.

The Board began by discussing whether an undesirable change would be produced in the character of the neighborhood, or a detriment to nearby properties would be created, by the granting of the requested area variance, and whether the requested variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood. The Board considered the character of the neighborhood, specifically, that the adjacent properties along New York State Route 32 are commercial lots and the properties in the rear are residential. The Board recognized that the Applicant is proposing a use that is similar in nature to some of the uses in the neighborhood along New York State Route 32, but that the proposed size is different. The Board also noted that the proposed use is quite different from the residential neighborhood behind the property. Additionally, although the Board issued a Negative Declaration in accordance with SEQRA, it expressed concerns regarding the drainage and runoff due to the size of the building. The Board also found that the noise levels from the trucks and the loading area associated with the proposed use would be out of place with the residences behind the property and would result in an adverse effect on the community. The Board discussed how the surrounding neighborhood includes a diner, karate center, a motel, and a few houses. In several respects, this proposal would disrupt the character of the area, and pose an undesirable change in such character. The Board recognized that the Applicant would be allowed to construct this size building – by right – if it contained more than one permitted use, and therefore would not require a variance. The Board also considered the Applicant’s submission which stated that this use would be consistent with the character of the neighborhood because it is “in close proximity to Woodbury Common – a large shopping complex with a variety of retail and commercial uses,” but found that this large building for only one use, that is outside of the parameters of the Village Code, would be more disruptive than having the same size building with multiple uses contained therein. The Board disagreed that the building would be consistent with surrounding facilities, considering the entirety of the circumstances. The Board concluded that granting of the requested variance to allow a larger building than permitted for only one use (see Village Code § 310-32(B)(2)) would alter the character of the neighborhood and create a detriment to nearby properties and would result in an adverse impact on the physical or environmental conditions in the neighborhood.

Additionally, the Board weighed whether the requested variance was substantial, as well as whether the benefit sought by the Applicant could be achieved by some alternative method feasible for the Applicant to pursue. The Board concluded that the requested variance was substantial, both with respect to the numerical percentage of the variance, as well as in relation to the surrounding neighborhood. The larger nonresidential structures in the area are for the motel and diner which are different uses than a retail establishment. Additionally, the Board determined that, other than reducing the size of the building or adding an additional use to comply with the Village Code, there was not an alternative method for the Applicant to pursue. The Board considered the Applicant’s argument that the size of the store proposed was needed for the store to be profitable. The Board found that there are a lot of variables that go into what makes a store profitable. The Board then determined that the alleged difficulty was self-created and noted that the request by the Applicant was for a significant variance from a very specific law within the Village Code as opposed to a more generally applicable bulk regulation. Despite recognizing that a larger building could be constructed, the overall significance of this variance and impact on the character of the neighborhood was too great for the Board to grant it.

CONCLUSION

Motion was offered by R. Bruce, seconded by Chairwoman Ungerer, to approve and accept the decision as read. As a consequence of the Board’s discussions, the Zoning Board of Appeals hereby denies the requested area variance described and discussed above. The board also issued a negative declaration under SEQRA. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED BY ROLE CALL	AYES	4
	NOES	0
	ABSTAIN	1
Chairperson Karen Ungerer		Aye
Member Craig Brady		Aye
Member Rachel Bruce		Aye
Member Edward De Jesus, Jr.		Abstain
Member Andrew Zoumas		Aye

B. Clark –

Review decision requesting a variance for the construction of a solid six (6) foot fence in the side yard. Whereas pursuant to Section 146-5(B), no fence shall be more than four (4) feet in height in any side yard, and pursuant to Section 146-7(A), no fence shall be erected in a front yard in a residential district or along a public right-of-way unless the fence is uniformly less than 50% solid. Said property is located in the R1A Zoning District at 8 Ridge Road in Highland Mills and is known on the Village of Woodbury Tax Maps as Section 202, Block 1, Lot 17.8 Ridge Rd

DECISION

§ 146-5(B): Height Limitations – Fence in Front Yard: Area Variance

§ 146-7(A): Materials and Composition – Fence in Front Yard/Along Public Right-of-Way: Area Variance

Village Code § 146-5(B) provides that “[n]o fence shall be more than four feet in height in any front yard and side yard.” Village Code § 146-7(A) provides that “no fence shall be erected in a front yard in a residential district or along a public right-of-way unless the fence is uniformly less than 50% solid.” The Board is authorized to grant variances from Chapter 146 under Village Code § 146-9. The Applicant is requesting variances from these two provisions to permit him to construct a solid six (6) foot tall fence in the front yard along the public right-of-way of New York State Route 32. As stated *supra*, this property is considered a “corner lot” under the Village Code and, therefore, has two front yards – along Ridge Road and along New York State Route 32.

Consistent with its statutory obligations under New York State Village Law § 7-712-b when considering an area variance, the Board balanced the benefit to the Applicant as weighed against the detriment to the health, safety and welfare of the neighborhood or community if the requested variances were granted. Further, as also required by statute, the Board took into consideration the following five issues in its balancing test:

6. Whether an undesirable change would be produced in the character of the neighborhood, or a detriment to nearby properties would be created, by the granting of the requested area variance.
7. Whether the benefit sought by the Applicant could be achieved by some method, feasible for the Applicant to pursue, other than an area variance.
8. Whether the requested area variance was substantial.
9. Whether the requested area variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.
10. Whether the difficulties professed by the Applicant were self-created.

The Board was also aware of its obligation to grant the minimum variance that it deemed necessary and adequate.

The Board began by discussing whether an undesirable change would be produced in the character of the neighborhood, or a detriment to nearby properties would be created, by the granting of the requested area variances, and whether the requested variances would have an adverse effect or impact on the physical or environmental conditions in the neighborhood. The Board considered the character of the neighborhood, which is residential, and reviewed the location and materials for the proposed fence. The Board found that the proposed fence would blend nicely into the neighborhood, and that the solid six (6) foot tall fence would enhance both the existing home and the character of the neighborhood. The Board recognized that the fence is located along New York State Route 32, which is a busy road, and found that it was understandable for a property owner in this area to desire a taller fence than is permitted. The Board also found that the proposed fence raised no adverse environmental impacts, and aesthetically would match the existing dwelling. The Board concluded that the variances requested would not alter the character of the neighborhood and would not have an adverse impact on the physical or environmental conditions in the neighborhood.

Additionally, the Board weighed whether a two (2) foot height variance from the maximum four (4) feet permitted, and a variance to permit a fence that is uniformly more than 50% solid, when less than 50% is required, was substantial. The Board determined that numerically the variance appear substantial. However, the Board noted that it will be located outside of the right-of-way of New York State Route 32, and, after much discussion, the Board determined that it would not obstruct any views for traffic turning into and out of Ridge Road. Furthermore, although the yard is considered a front yard under the Village Code since the property is a corner lot, it physically appears to be a side yard due to the orientation of the dwelling and, thus, the fence has even less of an impact on the neighborhood, which decreases the substantiality of the variances. The Board concluded that the variances were

substantial but recognized that the impact of the property being a corner lot located at the intersection of two main roads within the Village create a greater need for privacy and for the safety of children and pets.

The Board also considered whether the alleged difficulty was self-created, and whether the benefit sought by the Applicant could be achieved by some alternative method feasible for the Applicant to pursue. It determined that the alleged difficulty was self-created by the Applicant in desiring a fence that is taller and more solid than what is permitted under the zoning regulations. However, the Board found that due to the setbacks applicable to the property as a corner lot, locating the fence outside of the front yard setback would substantially shrink the Applicant's usable yard area. The Board determined that a four (4) foot, see-through fence would not achieve the benefits sought by the Applicant, and would not provide the privacy and safety desired, and thus concluded that the benefit sought could not be achieved by another method feasible for the Applicant to pursue.

Finally, the Board concluded that the six (6) foot fence, and the solid style chosen by the Applicant, to be located approximately fifteen (15) feet from the edge of the pavement of New York State Route 32 fulfilled the Board's obligation to grant only the minimum variance that it deemed necessary and adequate.

CONCLUSION

As a consequence of the Board's discussions, the Zoning Board of Appeals hereby grants the requested area variances described and discussed above, to the extent noted above, and hereby finds that the variances as granted are the minimum variances necessary to preserve and protect the character of the neighborhood. Prior to any building permit or Certificate of Compliance being issued for the fence, a proper Owner Authorization form must be submitted to the Building Department.

Per § A316-9 of the Village Code, this decision shall expire if a building permit is not obtained by the Applicant within 180 days from the date of this decision. The Board may extend this time for one additional period of 90 days if such extension is warranted by the particular circumstances.

Motion was offered by R. Bruce, seconded by Chairwoman Ungerer, to approve and accept the decision as read. Granting the applicant, the requested area variances. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED BY ROLE CALL	AYES	4
	NOES	0
	ABSTAIN	1
Chairperson Karen Ungerer		Aye
Member Craig Brady		Aye
Member Rachel Bruce		Aye
Member Edward De Jesus, Jr.		Abstain
Member Andrew Zoumas		Aye

5. Public Hearings -

A. Aponte –

Continuation of Public Hearing requesting a variance for the construction of a six (6) foot fence in the side yard. Whereas pursuant to Section 146-5(B), no fence shall be more than four (4) feet in height in any side yard. Said property is located in the R2A Zoning District at 10 Sequoia Trail in Highland Mills and is known on the Village of Woodbury Tax Maps as Section 247, Block 3, Lot 9.

Mr. Aponte stated that his intension with the height of the fence was to conceal the air conditioning unit as well as his concern with privacy since the dynamic of his neighborhood has changed. He then stated it took a year for the fence to come in the way that they wanted it and after it was erected, he found out it was not allowed. The board asked if the applicant could plant trees to form the barrier and asked how far away from the property line it was. Mr. Aponte stated it was fifteen feet away and that trees would not give him the privacy he needed.

Mr. John Taylor stated he feels Mr. Aponte should be allowed to have the fence for the privacy and that a four-foot fence would be useless.

With no further comments from either the board or the public a motion was offered by A. Zoumas, seconded by C. Brady, to close the public hearing. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	5	Ungerer, DeJesus, Brady, Bruce, Zoumas
	NOES	0	

B. Southside Oil/Dunkin Donuts –

Public Hearing requesting an interpretation of Sections 310-2 and 310-7 and whether adding a drive-thru to the existing Dunkin Donuts is permitted. Said property is located in the LC Zoning District at 124 Route 32 in Central Valley and is known on the Village of Woodbury Tax Maps as Section 226, Block 1, Lot 80.

Chairwoman Ungerer asked if the applicant was present, Mr. John Furst the Attorney and Jeffrey Stewart a representative for Dunkin Donuts were present. Chairwoman Ungerer read in and excerpt from a letter from the applicant as well as the request for interpretation from the Village Building Inspector. Mr. Furst stated he represents Southpaw in connection with its application before the Village Planning Board to add a drive-through to an existing Dunkin Donuts store located within the Village’s limited commercial (LC) zoning district. He then stated that in December of 2022 there was a question as to whether adding the drive-thru service to the existing Dunkin Donuts was permitted and if adding the drive thru transformed the existing restaurant to a fast-food restaurant, which are not permitted in the LC zone. He then stated that on April 8, 2022, his firm submitted a letter with supporting documentation showing that Dunkin Donuts had been treated as a retail business which was permitted within the LC zone. At that point, the Village Building Inspector opined that the Dunkin Donuts restaurant was more likely to be a fast-food restaurant due to the basis that Dunkin Donuts serves sandwiches. He then stated that sandwiches offerings are nothing new and that the Village previously issued a Certificate of Occupancy based on plans that include equipment for sandwich preparation. He then stated sandwiches are only a small portion of the sales; coffee and donuts remain its core business. He then stated that their position will always remain that Dunkin Donuts is a retail business with or without a drive thru.

Chairwoman Ungerer stated that the Village Planning Board voiced concerns including and not limited to the circulation of the site, traffic concerns and bulk criteria concerns if in fact this is allowed. She then stated the Building Inspector’s interpretation is that this is in fact a fast-food restaurant and Dunkin Donuts thinks its retail Attorney Naughton stated that fast food is not permitted in the LC district per the Village Code. R. Bruce requested that the board look at the website and compare how many sandwiches are served in comparison to everything else. Chairwoman Ungerer stated that comparison would not really matter. Mr. Stewarts stated the fundamental point of sales in their business is coffee and baked goods and that only 13% of the business comes from breakfast sandwiches. He then stated that the sandwich station has been there since 2012 when they did their renovations. A. Zoumas stated adding the drive-thru changes the dynamic. C. Brady stated that a reasonable assumption to the allowance of a sandwich station with the 2012 renovation is that it was a pre-existing, non-conforming use which would prevent Dunkin Donuts from expanding but would allow them to continue the way they have it. He then requested clarification prior to the Village forming that Dunkin Donuts was operating there.

Ms. Lisa Weasley stated it was unsafe to have a drive through in that location.

Ms. Mackenzie Mantagoza stated there have been multiple injuries and accidents at that location and she does not think it is wise to add more traffic at that location especially when there is a drive thru a half a mile away. She then added that the zoning code is there for a reason.

Ms. Denise Mantagoza stated she lives across the street and has been witness to many accidents and increased traffic and is worried with an increase in traffic what the impact might do to the residents.

A. Zoumas asked if the LC zoning district excluded fast food prior to the Village being formed. Ambiguity was then argued between the applicant’s representatives and that of the Building Inspectors interpretation.

With no further comments from the public a motion was made by C. Brady, seconded by A. Zoumas to keep the public hearing open until research could be done and questions answered regarding the LC district prior to the Village being formed. Additional discussions will be had at the next scheduled Zoning Board of Appeals meeting held on July 13, 2022. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	5	Ungerer, DeJesus, Brady, Bruce, Zoumas
	NOES	0	

6. Deliberations on Closed Public Hearings:

A. Aponte

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 applicant stated no, it is an extension of the existing fence of about ten feet which does not interfere with anything on or near the property. The Board agreed with the applicant and stated the line of sight from the road and surrounding properties; would be able to be seen over a four-foot fence so it is understandable to have the six-foot fence.
2. *Can the benefit you seek be achieved by some other feasible method other than variance?* The applicant stated no, the fence keeps property equipment hidden and allows an elegant look to the home and the area. The Board stated it could be achieved in another way. The board felt that if the applicant put up evergreen trees, he could have achieved privacy; however, that does not preclude him from receiving the variance.
3. *How substantial is the variance that you are requesting?* The applicant stated the variance will be in harmony with the general purpose of the zoning requirements. The Board stated that the applicant did not exactly answer the question; however, the applicant does have six feet all around and numerically it is substantial. C. Brady stated it was 33%.
4. *Will the granting of the variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?* The applicant stated no, as mentioned above the variance will contribute to the beauty of the home. The Board agreed with the applicant.
5. *Is the alleged difficulty self-created?* The applicant stated no, the requested variance has not been self-created, and will not alter the essential character of the neighborhood. The Board disagreed with the applicant and stated it is completely against the zoning code, but it does fit into the neighborhood, and it looks good. They stated it is not a significant impact and none of his neighbors had anything negative to say. The board then stated they have granted similar variances for others and the factors of why he erected the six-foot fence make sense.

A motion was made by Chairwoman Ungerer, seconded by A. Zoumas, to have Attorney Naughton draft a favorable decision, consistent with the facts and findings of the Zoning Board of Appeals. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	5	Ungerer, DeJesus, Brady, Bruce, Zoumas
	NOES	0	

7. Building Inspectors Report: N/A

8. Adjournment

With no further business to discuss, a motion was offered by A. Zoumas, seconded by Chairwoman Ungerer, to adjourn the meeting at 8:44 PM.

ADOPTED	AYES	5	Ungerer, Brady, Bruce, DeJesus, Zoumas
	NOES	0	

Jessica McClennan, ZBA Secretary