

Minutes of the Zoning Board of Appeals Meeting held on August 10, 2022, at 7:30 PM

Present: Craig Brady, Acting Chairman; Rachel Bruce, Edward DeJesus Jr., Board Members

Absent: Karen Ungerer, Chairwoman; Andrew Zoumas, Board Member

Also Present: Attorney Kelly Naughton; Christopher Gerver, Planning Board Chairman

Acting Chairman Brady, opened the meeting with the pledge of allegiance and a stated the next meeting will be held on September 14, 2022. He also stated he would be acting as chairman for this meeting since the ZBA Chairwoman as well as Board Member A. Zoumas are not in attendance.

1. Executive Session:

2. Approval and Acceptance of Previous Minutes:

Motion was offered by E. De Jesus Jr., seconded by R. Bruce, to approve and accept the minutes of the meeting held on August 10, 2022. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

3. New Business:

4. Action on Decisions:

A. Mera –

Review decision of variance for the construction of a 10' x 18' storage shed in the side yard. Said property is located in the R2A Zoning District at 6 College Drive in HM SBL 245-2-8.

DECISION

§ 310-7 and Schedule of District Regulations, R-2A District (Chapter 310 Attachment 2): Minimum Side Yard Setback: Area Variance

Village Code § 310-11(C), Permitting Accessory Building in Rear Yards Only: Area Variance

Village Code § 310-11(C) provides that “[a]n accessory building or use may be permitted only in a rear yard.” On the R-2A Schedule of District Regulations, a single-family dwelling, and related accessory structures, are required to have a side yard setback of thirty (30) feet. The Applicant is seeking an area variance to construct an accessory storage shed located between six (6) and eight (8) feet from the side property line, within the required side yard. 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:

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.

Whether the benefit sought by the Applicant could be achieved by some method, feasible for the Applicant to pursue, other than area variance.

Whether the requested area variance was substantial.

Whether the requested area variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

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, and that

the adjacent properties are residential lots, some of which have storage sheds. The Board found that the storage shed would be visible from the roadway but noted that the Applicant proposes to have the shed match the façade of the existing house on the Property. In order to maintain consistency with the character of the neighborhood and avoid adverse visual impacts, the Board determined that the granting of any variances must be conditioned upon the exterior facade of the shed matching the house in both color and material. The Board concluded that with this condition, the variances will not produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties.

Additionally, the Board weighed whether the variances to permit the storage shed in the side yard were substantial. The Board determined that the shed would be placed more than 50% within the required side yard setback, and not located in the rear yard at all. The Board found that the variances were substantial.

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. The Board considered the Applicant’s argument that placing the storage shed in the rear yard would be very complex, as it would require the relocation of the existing fence, leveling of the topography, an extension of the driveway and increased impervious surface coverage. The Board determined that it was not feasible to locate the shed in the rear yard due to these complexities and requiring it to be so located would be more impactful on the environment. The Board then determined that the alleged difficulty was self-created by the Applicant because he is requesting to construct the storage shed in the side yard but noted that this factor does not necessarily preclude the granting of the variances and that no one factor under the balancing test is determinative.

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, conditioned upon the exterior facade of the shed matching the house in both color and material and the Applicant receiving all necessary permits from the Building Department, and hereby finds that the variances as granted are the minimum variances necessary to preserve and protect the character of the neighborhood.

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. On motion by Member E. De Jesus Jr. seconded by Member R. Bruce:

Role Call as Follows:

Chairperson Karen Ungerer	Absent
Member Craig Brady	Aye
Member Rachel Bruce	Aye
Member Edward De Jesus, Jr.	Aye
Member Andrew Zoumas	Absent

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

5. Public Hearings -

A. Southside Oil/Dunkin Donuts –

Continuation of Public Hearing requesting an interpretation of Sections 310-2 and 310-7 and whether adding a drive-through 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.

Mr. Jonathan De Joy the attorney for the applicant as well as David Panella the applicant’s attorney were present. Mr. De Joy stated the applicant is seeking to add a drive-through to the property and stated that the property has been operating as a Dunkin Donuts since the early 1990’s and has never had a drive through, he then

stated since the industry has changed it is no longer feasible to operate the business without a drive through. He then stated that the Building Inspector has indicated that making this a drive through would make it a fast-food restaurant, but their position is that there is nothing in the code that indicates that drive-throughs are limited to fast food or somehow transform a known retail use into fast food. Mr. Panella then requested to share his screen. Acting Chairman Brady stated he could share the screen, however during the initial public hearing two months ago there was a presentation as well as a request for recusal at last months meeting where the board asked if the applicant for further information to be provided. Mr. De Joy stated he would be happy to answer any questions but at this time he doesn't have any submissions or specific information that wasn't provided before.

Attorney Naughton stated that the board will allow the applicant to give a summary; however, the applicant must also keep the presentation focused on the matter that is in front of the board right now which is the appeal of the determination from the Building Inspector.

Mr. Panella gave a summary of the business, the location, how long Dunkin has been operating in that location and what they are looking to place there which would include an addition to the rear of the building as well as a double lane drive-through and additional parking spaces. He stated they would continue to offer the same menu they do currently there would just be adding the convenience of a drive through.

Acting Chairman Brady opened the meeting to public comment.

Mr. De Joy stated that the Village code is silent on drive-throughs and there is nothing in the code that prohibits a retail use, bank, or pharmacy from having a drive-through. He then requested that it is the applicant's preference that the board uphold the building inspector's other determination that the use alone is a fast-food use. Acting Chairman Brady stated that as far as he is concerned the board is not determining the allowance of the drive-through. He then stated that the Zoning Board of Appeals is strictly deciding as to whether to agree or disagree with the Building Inspectors interpretation.

Acting Chairman Brady then asked Attorney Naughton if additional submissions were made. Attorney Naughton stated she received an email from Building Inspector Hand with a few Zoning Code's; however, the applicant never reached out for the additional information that was requested of them to submit. She also stated she spoke with Mr. De Joy, and he informed her that the applicant would not be making any further submissions.

Attorney Naughton then stated that back on April 8th of this year the applicant had requested an interpretation from the Building Inspector regarding whether the Dunkin Donuts was a fast-food restaurant or retail use. The Building Inspector responded that it was considered fast food. The applicant then appealed the decision and the ZBA was then charged with determining whether the Building Inspector was correct in his interpretation that the Dunkin Donuts is a fast-food restaurant. The board then asked for historical information such as local laws and zoning in place at the time it was erected. She then stated at this time the board has the current definitions and the board can determine their deliberations on that.

With no further comments from the board or the public a motion was made by R. Bruce seconded by E. De Jesus Jr. to close the public hearing and deliberate at the end of the meeting. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

B. Woodbury Villas –

Public Hearing requesting a variance for the construction of clubhouse and related facilities that exceeds the approved impervious surface coverage. Whereas the property was previously permitted to have 38.71% impervious surface coverage, and the Applicant is requesting an increase to 47% coverage. Said property is located in the R1A and CCDOD Zoning Districts at 4 Central Valley Line in Woodbury and is known on the Village of Woodbury Tax Maps as Section 254, Block 4, Lot 2.

Mr. Jay Samuelson, James Martinez, and Steven Barshov were consultants present on behalf of the applicant. Mr. Jay Samuelson shared his screen and gave a brief history of the lot. In 2007 there was a grading plan done which would have allowed them to have a parking lot, small wading pool, playground. He stated this was a very early plan and approval set so there is nothing really defined. He then stated there was a landscape and

grading plan that showed retaining walls submitted in early 2021 with a prior application which then shifted the community center. He then stated there were multiple revisions and renditions with the Village Planning Board in which they requested modifications and a few requests. He then showed the current layout which has the community center on the northeast corner of the parking lot on the northwest the basketball and tennis courts and behind the parking and community center is the pool at the third level. He informed the board that there is a lot of sloping, so retaining walls and sidewalks with ramps were built from one level to another. Since this is the layout, they settled upon additional emergency access to the pool area was needed which resulted in impervious coverage being 47%. Previously the coverage was between 37-41% but the changes were due to Planning Board comments and requests.

Acting Chairman Brady asked what the percentage is the emergency access road. Mr. Martinez stated the access road is about 2.7% of the lot area. Mr. Steven Barshov stated that since this application is so old, this requirement could have been a Village Board requirement, since the entire project was approved years ago. He then stated due to the open space being an artificially created circumstance and that the open space they have if used could easily bring the lock coverage into compliance; however, that can't be done due to their compliance with the open space being preserved and protected open space with boundaries of the site being constrained by the open space surrounding the location.

Acting Chairman Brady asked what triggered the change from the proposed 2021 plan. Mr. Samuelson stated that one the reasons was to get the parking lot and activities further away from the residential homes and use the building as a buffer from residential housing. Mr. Barshov also stated that it took time to construct a conceptual layout that would work in terms of modesty for the mostly orthodox Jewish clientele that would be using the facility.

Acting Chairman Brady then opened the public hearing up to the public. With no further comments from the board or the public a motion was made by E. De Jesus Jr., seconded by R. Bruce. to close the public hearing and deliberate at the end of the meeting. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

A motion was made by C. Brady, seconded by R. Bruce, to assume lead agency status in an uncoordinated review and type it as an unlisted action. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

Attorney Naughton stated she prepared a SCAF part two for the boards review to determine the significance. She then stated on the New York State environmental assessment form has either a small or no impact with multiple questions that must be checked. The applicant has two indicators of a small impact. The first being a proposed action to create a material conflict with an adopted land use plan or zoning regulation is indicated as being a small impact and the material conflict is that it doesn't comply so that is why they are in front of the board for a variance. The second is the proposed action result in a change in the use or intensify of the land which would be a greater imperious surface coverage. She then stated a part 3 must be created if any of the responses to part 2 were answered moderated or large, and since none of them were answered that way, the board can go forward and make a determination of significance, unless the board would like to change anything.

A motion was made by E. De Jesus Jr., seconded by R. Bruce, to accept the SCAF part two as Attorney Naughton presented it, determining a negative declaration indicating that the proposed action would not result in any significant adverse environmental impacts. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

6. Deliberations on Closed Public Hearings:

A. Southside Oil/Dunkin Donuts –

Attorney Naughton stated that Building Inspector Panella definition of fast food that he utilized in his determination was that Dunkin Donuts is considered fast food and is determined in the Village Code says that any establishment whose principal business is that sale of foods, desserts or beverages frozen to the customer in a ready to consume state usually served in paper plastic or other disposable containers for consumption within the restaurant building elsewhere on the premises or for carry out for consumption off the premises. The Building Inspector said that his reason for this is that over the years as Dunkin Donuts transformed from just a place to get coffee and a donut or bagel to a place where one can purchase a variety of hot sandwiches and wraps prepared on site and sold all day long. The applicant appealed that determination, and they believe they are a retail business. The Village Code states that a retail business is an establishment engaged in selling or renting goods or merchandise to the general public in small quantities for personal and or household consumption or business use and rendering services incidental to the sale of such goods as gas station or an automobile service station shall not be considered a retail business. Establishments which sell prepared sandwiches or other food with no table service for consumption mainly off the premises but who may have up to 14 seats will be considered retail for the purposes of this chapter. She then stated that this property is located in the LC district. The Building Inspector’s determination is that it is fast food, the applicant says they are retail. The Boards determination is whether to determine if the Building Inspector is correct in his determination that Dunkin Donuts is a fast-food restaurant under the code.

E. De Jesus Jr. stated he is having a hard time accepting that this business is retail establishment due to their main focus being food items and not merchandise. R. Bruce agreed and stated it is very difficult to see it as anything other than a fast-food restaurant. She then stated that there are small technicalities for example the 14 seats; however, the fact that you can’t buy much else other than a cup of coffee and a sandwich supersedes all of that. C. Brady stated that fast food /quick service restaurants which are generally accepted in the industry as synonyms and are all subset of retail businesses, but the fact that Dunkin Donuts qualifies as the third largest quick service restaurant/fast food in the United States seems to be self-explanatory and common sense says that Dunkin Donuts is fast food.

Acting Chairman Brady informed the applicant that there was not a full board and asked the applicant if they would like to wait for the board to render a decision at the next meeting when a full board is present. Mr. Jeff Stewart stated he represents the applicant and would like to have clarity on it as soon as they can and would like the board to render a decision tonight.

A motion was made by C. Brady, seconded by E. De Jesus Jr., to have Attorney Naughton draft a decision, consistent with the facts and findings of the Zoning Board of Appeals, upholding Building Inspector Panella determination. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

B. Woodbury Villas –

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 granting this variance will not produce an undesirable change in the character of the neighborhood or create a detriment o nearby properties. IF the variance is granted, it will allow for proposed community amenities to be built in accordance with revisions to layout as requested by Village consultants. **The Board Agreed with the applicant.**

2. *Can the benefit you seek be achieved by some other feasible method other than variance?* The applicant stated we can reach the allowable coverage numbers to the detriment to the community by removing amenities including the proposed sport court, basketball court, pool and play area. Etc. **The Board Agreed with the applicant.**

3. *How substantial is the variance that you are requesting?* The applicant stated we are seeking a variance to increase the amount of impervious coverage area from the approved amount of 38.71 % to 47%. **The Board stated that it is substantial but not significant.**

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 the differences from the approved layout to the proposed layout are not substantial enough to have a negative effect or impact on the environmental conditions in the neighborhood or district. **The Board stated it is consistent with the EAF factor and agreed with the applicant.**

5. *Is the alleged difficulty self-created?* The applicant stated this difficulty is not self-created. The changes to the approved plans are, in part, to address comments from the Village's professionals and consultants as well as the Planning Board, which improve the overall site design and minimize the size of the retaining walls. The road, the site has access from, Central Valley Line, was raised approximately 12 feet in elevation to allow for sewer system changes which also contributed to a redesign of the site. **The Board stated it is not entirely self-created however what they are asking for will be larger than what was originally allowed.**

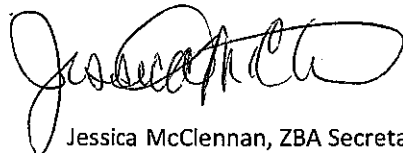
A motion was made by E. De Jesus Jr., seconded by R. Bruce, to have Attorney Naughton draft a favorable decision, consistent with the facts and findings of the Zoning Board of Appeals. Acting Chairman Brady conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas

7. Adjournment

With no further business to discuss, a motion was offered by E. De Jesus Jr., seconded by R. Bruce, to adjourn the meeting at 8:21 PM.

ADOPTED	AYES	3	Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	2	Ungerer, Zoumas



Jessica McClennan, ZBA Secretary