

Minutes of the Zoning Board of Appeals Meeting held on September 14, 2022, at 7:30 PM at Village Hall

Present: Karen Ungerer, Chairwoman
Craig Brady, Rachel Bruce, Edward DeJesus Jr.
Absent: Andrew Zoumas
Also Present: Attorney Kelly Naughton

Chairwoman Ungerer opened the meeting with the pledge of allegiance introduced the Board and stated that the next meeting will be held on October 12, 2022.

1. Executive Session:

2. Approval and Acceptance of Previous Minutes:

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

ADOPTED	AYES	4	Ungerer, Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	1	Zoumas

3. New Business:

4. Action on Decisions:

A. Southside Oil/Dunkin Donuts --

Review decision 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 CV SBL 226 1-80.

DECISION

In connection with the properties located at 124 Route 32, Central Valley, New York, the Applicant requested an interpretation from the Building Inspector regarding whether the Dunkin Donuts was a "fast-food restaurant" or a "retail business" under the Zoning Code. The Building Inspector issued an email dated April 25, 2022, stating:

My interpretation on this is that on its own, not by creating a drive through, Dunkin Donuts is considered "Fast-Food" as defined within the Village Code, section 310-2:

RESTAURANT, DRIVE-IN OR FAST-FOOD

Any establishment whose principal business is the sale of foods, frozen desserts, or beverages 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.

My reason for this is the 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. The products they sell are made all day long.

On May 25, 2022, the Applicant timely appealed the Building Inspector's determination to this Board. See Village Code § A316-6(B) ("An appeal must be made within 30 days of the action of the administrative official appealed from.")

As provided in New York Village Law, a ZBA's appellate powers and discretion are as broad as the Building Inspector's initial scope of review, and it is free to make whatever decision it believes "ought to have been made" by the Building Inspector. See Village Law § 7-712-b(1). The Board was aware of how it is not the role of the Board to 'negotiate' the use of the property with the Applicant; its role is to determine what type of use the Dunkin Donuts constitutes under the Village Zoning Code.

A retail business is defined in Village Code § 310-2(B) as follows:

“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. A "gas station" or "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.”

A “restaurant, drive-in or fast-food” is defined as noted above in the Building Inspector’s determination. In considering these definitions, the Board considered Village Code § 310-51(B), which provides “Whenever the requirements of this chapter differ from the requirements of any other lawful rules, regulations or law, the most restrictive or that imposing the higher standards shall govern.”

Additionally, the Board considered that this property is located in the LC District, which permits retail stores, restaurants and drinking establishments, and convenience store with fuel sales with site plan and special permit approval from the Planning Board. It also considered Village Code § 310-32, which sets forth specific regulations for retail commercial development in the LC district.

The Board heard arguments from the Applicant and members of the public as to what constitutes a retail use and a fast-food restaurant. The Applicant argued that the definition of retail use included the ability to prepare sandwiches and other food, and to have up to 14 seats. However, in consideration of the definitions, and the Code requirement that the more restrictive standards govern, the Board concluded that the main focus - *i.e.*, principal business – of the Dunkin Donuts establishment was the sale of food and beverages in a ready-to-consume state, not the sale of merchandise. The Board determined that, in general, fast-food restaurants could be considered a subset of retail use and upheld the Building Inspector’s determination that this was a fast-food restaurant under the Village Code.

Motion was offered by C. Brady, seconded by E. De Jesus Jr, to agree and uphold the Building Inspectors interpretation. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	4	Ungerer, Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	1	Zoumas

B. Woodbury Villas –

Review decision 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 SBL 254-4-2.

DECISION

§ 310-7 and Schedule of District Regulations, R-1A District (Chapter 310 Attachment 3): Maximum Impervious Surface Coverage: Area Variance

Village Code § 310-31.1(F) provides that “[a]ll provisions regarding common areas and homeowners’ association and open space . . . shall be the same as § 310-31....” Specifically, Village Code § 310-31(C)(3) indicates “All lots in a cluster development shall meet the setback and yard requirements of the R-1A Zoning District.” On the R-1A Schedule of District Regulations, the maximum permitted impervious surface coverage for the R-1A district is 20%. See Chapter 310 Attachment 3. The Applicant is seeking an area variance to construct the clubhouse and recreational facility with an impervious surface coverage of 47%.

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 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, and that the adjacent properties are residential lots. This property was approved during the subdivision process for use as a clubhouse and recreational facility. The Board considered that granting the variance would allow for the proposed community amenities to be constructed in the way suggested by the Planning Board and its consultants; however, the proper provisions must be in place to handle the stormwater from the additional impervious area. The Board concluded that with this condition, the variance 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 variance to permit the additional impervious surface coverage was substantial. The request to increase the percentage from 20% to 47% is substantial; however, the Board considered that the impervious surface coverage that was approved in the original subdivision approval for this lot (for the clubhouse and recreation facility), which was 38.71% impervious surface coverage. Taking this into account, the Board determined that the proposed increase is between 9-10% and was not 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 complying with the allowable impervious surface coverage would be a detriment to the community because it would require the removal of proposed amenities, such as the proposed sport court, basketball court, pool area and playground. The Board determined that it was feasible for the Applicant to comply with the Village Code requirement; however, it would defeat the purpose of having a community clubhouse and recreational facility. While none of the facilities proposed are requirements, they would add to the quality of the character in the community. The Board then determined that the alleged difficulty was self-created by the Applicant because it is requesting to construct the facility with greater impervious surface coverage than permitted but noted that it is in part based upon the recommendations of the Planning Board and its consultants, and further noted that this factor does not necessarily preclude the granting of the variance as 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 variance described and discussed above, to the extent noted above, conditioned upon the Applicant having the proper provisions in place to handle the stormwater from the additional impervious area, subject to the Planning Board's approval, and the Applicant receiving all necessary approvals from the Planning Board and permits from the Building Department. The Board hereby finds that the variance as granted is the minimum variance 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.

Motion was offered by R. Bruce, seconded by C. Brady, to grant the requested area variance. Chairman Ungerer conducted a roll call of the Board which resulted in the following:

Chairperson Karen Ungerer	ABSTAIN
Member Craig Brady	AYE
Member Rachel Bruce	AYE
Member Edward De Jesus, Jr.	AYE
Member Andrew Zoumas	ABSENT

ADOPTED

5. Public Hearings –

A. Tina –

Public Hearing requesting a variance for the construction of a 12' x 20' storage shed in the side yard. Whereas pursuant to Section 310-7, properties in the R-2A district are required to have a minimum side yard setback of 30 feet, and whereas pursuant to Section 210-11, accessory buildings may be permitted only in a rear yard. Said property is located in the R2A Zoning District at 30 Florence Drive in Central Valley and is known on the Village of Woodbury Tax Maps as Section 226, Block 1, Lot 85.6.

Chairwoman Ungerer invited the applicant to the podium and stated the applicant is asking for this variance due to the need for a shed and this being the only possible placement of the shed. She then stated there is a well in the applicants back yard, a septic tank on the other side yard and wetlands all around the back of her house. Mrs. Raisa Tina stated the shed will match the color of the house. Chairwoman Ungerer then asked if the public had anything to say. With no further comments from the public or the Board a motion was made by E. De Jesus Jr., seconded by R. Bruce to close the public hearing. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	4	Ungerer, Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	1	Zoumas

6. Building Inspectors Report – N/A

7. Deliberations on Closed Public Hearings:

A. Tina

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, granting of this variance will not produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties. This variance will maintain the character of the neighborhood and nearby properties. It will coordinate with the color scheme of the home on the property.

The Board Agreed.

2. *Can the benefit you seek be achieved by some other feasible method other than variance?* The applicant stated: No, the location of the variance (next to driveway) is the best location for what is required of it. Towards back of driveway is the septic tank. Back of property has our well that is usually very wet and also a lot of wetlands due to French drains from below the home emptying to the back of property. The Property is also graded to have water run towards the back of the property.

The Board Agreed.

3. *How substantial is the variance that you are requesting?* The applicant stated it is small. The variance is a 12x20 shed that will be used for storage for lawn maintenance and snowblower, as well as garbage and recycle bins. The shed will have matching color scheme to the home on the property. The variance will also be 100 feet away from the street.

The Board stated that the request was numerically large but that wouldn't necessarily hinder a decision.

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, there will be no adverse effect or impact on the physical or environmental conditions in the neighborhood or district. The variance are does not have any trees or shrubbery that need to be removed, it is a grass area with a retaining wall.

The Board Agreed.

5. *Is the alleged difficulty self-created?* The applicant stated: No, the way the property was build and graded was present when we purchased the home.

The Board Disagreed and stated that it is self-created.

A motion was made by Chairwoman Ungerer, seconded by R. Bruce, to have Attorney Naughton draft a favorable decision consistent with the facts and findings of the Zoning Board of Appeals discussions on the application, and to be voted on at next month's meeting. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	4	Ungerer, Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	1	Zoumas

8. 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 7:52 PM. Chairman Ungerer conducted a roll call of the Board which resulted in the motion being:

ADOPTED	AYES	4	Ungerer, Brady, Bruce, DeJesus Jr.
	NOES	0	
	ABSENT	1	Zoumas


Jessica McClennan, ZBA Secretary