

TOWN OF WARWICK
ZONING BOARD OF APPEALS

MAY 29, 2012

Members Present:

Jan Jansen, Chairman

Mark Malocsay, Co-Chairman

Diane Bramich

Attorney Robert Fink

Norman Paulsen

Kevin Shuback

CHAIRMAN JANSEN:
minutes from the meeting of April 23, 2012 approved?

Is there a motion to have the

MS. BRAMICH:

I make a motion to approve.

MR. PAULSEN:

I second.

CHAIRMAN JANSEN:
favor?

Any further discussion; all in

All in favor (Four Ayes), motion carried.

PUBLIC HEARING OF ROBERT & SUSAN TOSCANO – for property located at 168 Lake Shore Road. Greenwood Lake, New York and designated on the Town tax map as Section 74 Block 5 Lot 14 and located in an SM District for a variance of Section 140.4B allowing construction of an in-ground swimming pool 6.37 (+/-) feet from both side yard lines where 15 feet from any side yard line is required. **Continued from the 4/23/12 ZBA Meeting.**

ATTORNEY FINK: Is this going to create an undesirable change in the character of the neighborhood or be a detriment to the nearby properties?

MS. BRAMICH: No.

ATTORNEY FINK: Can this be achieved by any other feasible means?

MS. BRAMICH: No.

ATTORNEY FINK: Is it a substantial variance?

MR. MALOCSAY: Yes.

ATTORNEY FINK: Is this going to have an adverse effect or impact on the physical or environmental conditions in the neighborhood?

MR. MALOCSAY: No.

ATTORNEY FINK: Is this self-created?

MR. MALOCSAY: Yes.

MS. BRAMICH: I motion this is an Unlisted Action with no environmental impact.

MR. MALOCSAY: I second it.

CHAIRMAN JANSEN: Any discussion; all in favor?

All in favor (Four ayes) Motion carried.

MS. BRAMICH: I make a motion to grant this variance as advertised.

MR. MALOCSAY:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four ayes) Motion carried.

PUBLIC HEARING OF EMANUELE B. INTORRELLA - for property located at 34 West Cove Road, Sterling Forest, New York and designated on the Town tax map as Section 76 Block 1 Lot 5.2 and located in an SM District for a variance of Section 164.41.A(1)(b) and Section 164.43.A permitting construction of an accessory building 6 (+/-) feet from the front setback where 55 feet are required and 2(+/-) feet from the side setback where 5 feet are required.
Continued from the 4/23/12 ZBA Meeting.

CHAIRMAN JANSEN: Any change from last month?

MR. INTORRELLA: No.

ATTORNEY FINK: Is this going to create an undesirable change in the character of the neighborhood or be a detriment to the nearby properties?

MR. MALOCSAY: No.

ATTORNEY FINK: Can this be achieved by any other feasible means?

MS. BRAMICH: Not really.

ATTORNEY FINK: Is it a substantial variance?

MR. MALOCSAY: Yes.

ATTORNEY FINK: Is this going to have an adverse effect or impact on the physical or environmental conditions in the neighborhood?

MR. MALOCSAY: No.

ATTORNEY FINK: Is this self-created?

MR. MALOCSAY: Yes, I motion this is an Unlisted Action with no environmental impact.

MS. BRAMICH: I second it.

CHAIRMAN JANSEN: Any discussion; all in favor?

All in favor (Four ayes) Motion carried.

MR. MALOCSAY:
variance as advertised.

I make a motion to grant this

MS. BRAMICH:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

JOHN KEHOE & DENISE MEININGER KEHOE - for property located at 27 West Cove Road, Sterling Forest, New York and designated on the Town tax map as Section 76 Block 1 Lot 41 and located in an SM District for a variance of Section 164.40N and Section 164.41.C.(4)(i) permitting interior construction and addition of an additional story on an existing single family dwelling with a minimum lot area of 0.179 acres where 0.5 acres are required, lot depth of 90 feet and 104 feet where 100 feet are required, lot width of 80.5 feet and 81 feet where 100 feet are required, rear setback of 2.1 feet where 20 feet are required and rear setback for a deck of 2.1 feet where 5 feet are required. **Continued from the 4/23/12 ZBA Meeting.**

ATTORNEY FINK: Is this going to create an undesirable change in the character of the neighborhood or be a detriment to the nearby properties?

MS. BRAMICH: No.

ATTORNEY FINK: Can this be achieved by any other feasible method?

MR. MALOCSAY: No.

ATTORNEY FINK: Is it a substantial variance?

MR. MALOCSAY: Yes.

ATTORNEY FINK: Is this going to have an adverse effect or impact on the physical or environmental conditions in the neighborhood?

MR. MALOCSAY: No.

ATTORNEY FINK: Is this self-created?

MR. MALOCSAY: Yes.

MS. BRAMICH: I make a motion this is an Unlisted Action with no environmental impact.

MR. MALOCSAY: I second it.

CHAIRMAN JANSEN: Any discussion; all in favor?

All in favor (Four ayes) Motion carried.

MS. BRAMICH:
variance as advertised.

I make a motion to grant this

MR. MALOCSAY:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

PUBLIC HEARING OF ALBERT & JANICE R. GENITI - for property located at 172 Union Corners Road, Warwick, New York and designated on the Town tax map as Section 17 Block 1 Lot 21.41 and located in an RU District for an interpretation whether a helicopter landing pad on a parcel improved by a single family dwelling used to access that dwelling for approximately 40 years is a permitted accessory use and/or a legally permitted non-conforming use. **Continued from the 3/26/12 ZBA Meeting.**

CHAIRMAN JANSEN: Please identify yourself for the records.

ATTORNEY LIPMAN: My name is Alan Litman and I am the attorney for Mr. and Mrs. Albert Geniti and I would like to talk about a procedure issue. There are at least 3 deviations from the memorandum from a couple of months ago. My purpose tonight is to narrow those issues by eliminating one or two technical problems. I would like to address the sufficiency of the complaints. I believe the notice of violation is insufficient and have discussed this with your attorney and suggested that we could dispose of that issue and deal with the issues that, I believe, are important.

CHAIRMAN JANSEN: We will follow our counsel's advice.

ATTORNEY FINK: If I understand this correctly, the Building Inspector has alleged the violation of the code and that section of the code pertains to the usage of the helicopter/heliport as a principal use.

ATTORNEY LIPMAN: That is correct.

ATTORNEY FINK: Your argument has been that it has never been a principal use; it has been an accessory use. The issue has been clouded by how long it has been in use. I don't believe that is at all relevant because there isn't any issue as to whether or not it was ever a legal non-conforming use because it was never legal. What you are saying is, it is a legal accessory use.

ATTORNEY LIPMAN: Yes.

ATTORNEY FINK: So it could have been started yesterday and either it's legal as an accessory use or its not; it has nothing to with how long its there.

ATTORNEY LIPMAN: I can't quite agree with that, it doesn't cloud the issue I want to address tonight.

ATTORNEY FINK: Let me be clear on that because in order to be a legal non-conforming use: #1 it has to be non-conforming at the time; that is not your position. Your position is conforming. #2 it had to have been legal at some point; there is nothing in the code that makes it legal. So to simplify your position, it is an accessory use that is not covered by the code that you are allowed to do.

ATTORNEY LIPMAN: It is a use which the ordinance may not prohibit as it prohibits many uses. I believe that if you look at the code, and I realized that the code has not been amended since 1966. So it is virtually the same now as it was then.

ATTORNEY FINK: I went through the codes and there is virtually no difference. The only difference is that they restricted it in some districts where it once was legal. But it always required a principal use and it always required Planning Board approval and it was never listed as an accessory use. On the one hand, the code says if it's not listed in the code, then it is prohibited. You are arguing that a lot of things are not listed in the code, for example, automobiles. So if you want to limit it to the fact that the Building Inspector claimed a violation, because it is a principal use and you are saying it is not a principal use because it is used on a property that the principal use is a dwelling. The complaint lacks jurisdiction and should not be rewritten by this board. The Board has a choice, it can look at this very narrow view and I concur that the violation is improperly drawn and should be dismissed in court because they are saying it is not a principal use, it is an accessory use. We can look at it there and be done with it until the Building Inspector rewrites it as an accessory use, it's not permitted by the code and then go on and talk about it. Or you can take a broader view and, in fact, the applicant came in looking for an interpretation as to whether or not it is an accessory use.

ATTORNEY LIPMAN: I think we filed this as a legal application.

ATTORNEY FINK: But with every appeal, this Board has jurisdiction to interpret the codes. So do we want to look at this narrowly in that context or whether or not it is a permitted accessory use?

CHAIRMAN JANSEN: I tend to go along with Attorney Fink regarding the violation that has been posted is not the proper one at this point. If this Board chose not to go forward because the violation claim is not the alleged use, the Building Inspector is free tomorrow to rewrite it as a accessory use that is not permitted by the code and the applicant could appeal that.

ATTORNEY LIPMAN: Then we would know precisely what the issues are.

CHAIRMAN JANSEN: At this point, we can just dismiss this?

ATTORNEY FINK: If it is the consensus of the Board, in short, the motion would be that this Board finds that the violation claimed by the Building Inspector is not the alleged use. As such, the Zoning Board is granting the appeal of the applicant from the violation as its alleged. The Building Inspector is to rewrite the violation as an illegal accessory use.

ATTORNEY LIPMAN: Is the end result a dismissal so that they don't have go to court?

ATTORNEY FINK: Yes, if that is the finding of the Board.

CHAIRMAN JANSEN: Motion to that effect?

MR. MALOCSAY: I move that so there is a chance to discuss that.

MS. BRAMICH: I second it.

CHAIRMAN JANSEN: Any discussion?

The motion was withdrawn to allow a discussion as to the clarification of the interpretation.

CHAIRMAN JANSEN: What we are saying is that the operation of the helicopter out of the property is not the principal use of the property. And the violation was issued as to the principal use. This has caused discrepancies in the procedure. The next step is that the Building Inspector has the opportunity to rewrite it, if he wishes, but in proper legal language.

ATTORNEY FINK: To allege that is an illegal accessory use. In order to be a legal, pre-existing non-conforming use, the law has to have changed, so it was legal at one point and then the law changed and now it continues. But that is not the situation here; they claim it's legal because it's an accessory use that is permitted in the code. It's permitted today just like it was permitted 40 years ago. They are not coming in under the position that it was legal at one time but it's not legal now; but it was pre-existing. Their position is that it was always legal as an accessory use.

There was a discussion of the town code and could it be rewritten to effect this variance.

CHAIRMAN JANSEN:

The public hearing is closed.

ATTORNEY FINK:

In substance, the Board determines the violation did not allege the activity that was involved, mainly principal use of the property. The Board finds it is an accessory use. If it's legal or not is a whole other issue and because of that the Board grants the appeal from the alleged violation. And without prejudice, the Building Inspector could rewrite it.

MR. MALOCSAY:

So moved.

MS. BRAMICH:

I second it.

CHAIRMAN JANSEN:
in favor?

Any further discussion? All

All in favor (Four Ayes) Motion carried.

PUBLIC HEARING OF AMENDED MARY BETH & VIK STOCKMAN – for property located at 47 Ackerman Road, Warwick, New York and designated on the Town tax map as Section 31 Block 2 Lot 124 and located in an RU District for a variance allowing construction of a 28 foot X 14foot 6 inch carport on an existing single family dwelling to be attached by a 25 foot X 5 foot breezeway to an existing garage resulting in a composite single family dwelling located 26 (+/-) feet from the side line where 75 feet are required. **Continued from the 4/23/12 ZBA Meeting.**

CHAIRMAN JANSEN: This is a continuation from the 4/23/12 meeting. Are the Stockman's present?

ATTORNEY FINK: Please tell the Board what is different in your application.

MS. STOCKMAN: There is a car port and the breezeway will be attached to the carport. I have pictures.

ATTORNEY FINK: How long is the breezeway?

MR. STOCKMAN: 25 feet.

CHAIRMAN JANSEN: What does it matter if it is 25 feet, 50 feet or 100 feet?

ATTORNEY FINK: We need an idea to see what is proposed and if it is way out in left field.

CHAIRMAN JANSEN: Is the connection going to now be able to do a rental property in there or ...?

MS. STOCKMAN: We are not going to have a rental property in there.

ATTORNEY FINK: It is not a legal use and it is up to the Building Inspector to police that. We can't put a legal condition on it. They are looking to attach a garage to a house which under most circumstances could still be a rental property. Normally they are closer.

CHAIRMAN JANSEN: I don't think the closeness or the distance is really very material and I don't want to restrict the future of these things.

ATTORNEY FINK: The problem is that a lot of things that this Board does have precedent value. We grant a variance for one thing and somebody comes in with something very, very close; you have to distinguish what you granted before. I have never seen anything quite like this. But the town is aware of this application and if the town wanted to amend the zoning ordinance to restrict joining structures in some way, whether it is the length, or whatever else, the town is free to do that. The point is that the code is restrictive and it deprives people of their development property rights. It should be construed by any Board in a conservative manner; it shouldn't expand upon it. I can't find anything in the code that says they can't do it. The overall concept is, is the benefit sought by the applicant going to be a detriment to the health, safety and welfare of the neighborhood or community. Who has come in to show the Board how this is going to be detrimental to any neighborhood property?

MRS. STOCKMAN: We did notice them three times.

CHAIRMAN JANSEN: Given the past history, I don't know whether we can put anything in there to restrict rental usage.

ATTORNEY FINK: That is an interesting thought. Can a variance be conditioned upon it not being used illegally and in the event, it's determined in court, not just by the Building Inspector. I don't know why we couldn't do it.

MRS. STOCKMAN: We are not going to rent it.

CHAIRMAN JANSEN: Then do you mind if we put that into the resolution, would that be acceptable to you?

MRS. STOCKMAN: That we are not going to rent the garage?

CHAIRMAN JANSEN: No that you are not going to use it illegally.

MRS. STOCKMAN: Well, renting it would be illegal?

MR. MALOCSAY: Renting is just one.

ATTORNEY FINK: Renting is the only thing I can think of right now; it may become legal in the future.

CHAIRMAN JANSEN: We can leave it generic.

ATTORNEY FINK: Ok, why don't we leave it to state that if it used for any purpose that is illegal in the code as the code exists at any present or future time. If the Building Inspector notes a violation, goes to court and the court sustains it, the variance lapses.

MR. STOCKMAN: Then we have to take down the breezeway.

MR. MALOCSAY: Then this becomes a two family dwelling, not a rental property.

ATTORNEY FINK: Then that becomes a violation.

MRS. STOCKMAN: It will not become a two family dwelling.

CHAIRMAN JANSEN: You own the property today. And maybe next week you decide to sell it. So now the next owners, they may just do that. This variance goes to the property, not the owners.

ATTORNEY FINK: We are going to have to condition this upon drawing a restrictive covenant that is filed.

MRS. STOCKMAN: It was our understanding that to connect it would make the garage part of the main building; a one family dwelling, not a two family dwelling.

MR. MALOCSAY: On a two family, I believe we define it that it has a separate entrance and exit and that it has a kitchen. I am under the assumption that this building has its own entrance and exit and some type of kitchen.

ATTORNEY FINK: This Board has never seen two structures joined like this to become one house under these conditions. The Board is having a problem finding why it would be illegal. They don't want this odd structure to be approved if it is going to be used illegally.

MR. MALOCSAY: Just so you understand where we are coming from, it completely makes sense, you can do anything you want with it as long as

it is legal.

ATTORNEY FINK: If it is not legal, whether you rent it or it becomes a mother/daughter dwelling or a two family dwelling, if the code says its okay, then it's okay. But if you do something illegal and you don't stop it, then you lose the variance.

MRS. STOCKMAN: So, what is legal?

ATTORNEY FINK: Then you have to read the code.

MRS. STOCKMAN: A family/recreation room is legal?

ATTORNEY FINK: Yes, that is legal.

CHAIRMAN JANSEN: So you can put that covenant into the variance?

ATTORNEY FINK: I hate to hold you up but we are going to require you to sign a restrictive covenant that is filed, at your cost, but I am sure you will want an attorney to look at it. I can draw it up and give it to you. If you want someone to look at it, that is up to you and then this Board will vote on it at the next meeting and presumably approve it.

MR. MALOCSAY: At this point, you have been before us for awhile. Once there has been a violation filed, and it is before us, it is in limbo. Nothing happens. You weren't planning on breaking ground tomorrow.

MR. STOCKMAN: We are waiting for Wayne Stevens to approve our drawings.

ATTORNEY FINK: We can notify him that the consensus of the Board is to approve this variance. But we won't formally approve it until the next meeting.

MR. MALOCSAY: So at least you can keep moving forward at the same time as this is being taken care of.

MRS. STOCKMAN: So we can't break ground?

MR. MALOCSAY: Not until you have a permit.

ATTORNEY FINK: You can break ground for the carport.

MRS. STOCKMAN: Okay.

CHAIRMAN JANSEN: The public hearing is still open. This is continued to the next meeting.

ATTORNEY FINK: I will email to you the proposed covenant. Try to get it reviewed right away to avoid any more delays.

MR. MALOCSAY: Regarding the carport, isn't there a front yard setback?

MRS. STOCKMAN: It is in line with everything else that is there. There was a denial for a side setback.

MR. MALOCSAY: I remember something about set back from the original variance request without the carport added on.

ATTORNEY FINK: I will make a note of it in my letter to Wayne Stevens to address.

PUBLIC HEARING OF RICHARD AND THERESA MARSIGLIA - for property located at 12 Ridgeway Loop, Warwick, New York and designated on the Town tax map as Section 18 Block 1 Lot 3.11 and located in an RU District for a variance of Section 164.46N reducing front setback from 75 feet to 45 (+/-) feet for the purpose of construction of a 24 foot X 24 foot detached garage.

CHAIRMAN JANSEN: Please identify yourself for the record.

MR. MARSIGLIA: My name is Richard Marsiglia.

CHAIRMAN JANSEN: Mark, are you familiar with the property?

MR. MALOCSAY: Yes, I am.

CHAIRMAN JANSEN: Is it different from anybody else's?

MR. MALOCSAY: No.

CHAIRMAN JANSEN: The setback?

MR. MALOCSAY: No.

MR. MARSIGLIA: The only setback that would disturb it is the center of the loop which I own now.

CHAIRMAN JANSEN: Why can't you put it someplace else?

MR. MARSIGLIA: I would disturb my septic on the other side. I could do the 75 feet but I would have to take a couple of trees down.

ATTORNEY FINK: What is the main road off your cul-de-sac?

MR. MARSIGLIA: Aldridge.

ATTORNEY FINK: That's a town road? So no
County involvement.

There was a discussion of county property and right of way rights but it did not pertain to this particular property's variance request.

CHAIRMAN JANSEN: Any questions?

MR. MARSIGLIA: And the size of the garage
will be 22 feet by 22 feet. The town lawyer told me to put down 24 by 24 and you can always
make it smaller.

MR. MALOCSAY: That's fine.

CHAIRMAN JANSEN: The public hearing is open.
Is there anyone here from the public? If not, the public hearing is closed.

ATTORNEY FINK: Is this going to create an
undesirable change in the character of the neighborhood or be a detriment to the nearby
properties?

MS. BRAMICH: No.

ATTORNEY FINK: Can this be achieved by any
other feasible method?

CHAIRMAN JANSEN: He could put it back but it
would mean the removal of several trees.

MR. MALOCSAY: On Ridgeway Loop, that one
was an older, it's not a cul-de-sac because it is an actual loop. One road goes up and then it loops
and comes back. All those houses were built when it was a 50 foot setback so I am sure it is not
going to be out of place by any means.

ATTORNEY FINK: Is it a substantial variance?

MR. MALOCSAY: Yes.

ATTORNEY FINK: Is this going to have an
adverse effect or impact on the physical or environmental conditions in the neighborhood?

MS. BRAMICH:

No.

ATTORNEY FINK:

Is this self-created?

MR. MALOCSAY:
an Unlisted Action with no adverse environmental impact.

Yes. I make a motion this is

MS. BRAMICH:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four ayes) Motion carried.

MR. MALOCSAY:
variance as advertised.

I make a motion to grant this

MS. BRAMICH:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

CHAIRMAN JANSEN:
month's meeting will be on Monday, June 25th.

Meeting adjourned. The next

Submitted by Pamela J. Carroll ZBA Recording Secretary