

TOWN OF WARWICK
ZONING BOARD OF APPEALS

OCTOBER 22, 2012

Members Present:

Jan Jansen, Chairman

Mark Malocsay, Co-Chairman

Attorney Robert Fink

Norman Paulsen

Diane Bramich

Kevin Shuback

CHAIRMAN JANSEN:
minutes from the meeting of September 25, 2012 approved?

Is there a motion to have the

MR. MALOCSAY:

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.

THOMAS and THERESA POST – Not on agenda.

CHAIRMAN JANSEN: Before we get to number one on the agenda, I would to handle this application. Please come up and identify yourself for the record. The issue here is that it is a single building and not two buildings and the Building Inspector needs a letter from us stating that is okay.

MR. POST: I am Tom Post.

MR. LEWIS: I am Paul Lewis.

ATTORNEY FINK: What are the sizes of the two buildings?

MR. POST: They are 40 by 30 and 50 by 40, approximately 3600 square feet.

ATTORNEY FINK: Do we move to amend the variance and I will draft a letter to the Building Inspector indicating that combining the buildings and reducing the square footage 600 square feet.

MR. PAULSEN: So moved.

MR. MALOCSAY: Seconded.

CHAIRMAN JANSEN: Any discussion; all in favor?
Four (4) ayes; motion carried.

PUBLIC HEARING OF KARA-MARIE REYES-RINALDI - for property located at 59 West Ridge Road, Warwick, New York and designated on the Town tax map as Section 31 Block 1 Lot 5 and located in an RU District for a variance of Section 164.40N permitting conversion of a 1 family dwelling to a 2 family dwelling on a 2.001 (+/-) acre parcel where 4 acres are required.

CHAIRMAN JANSEN: Now the continued public hearing of Kara-Marie Reyes-Rinaldi, please come forward.

ATTORNEY FINK: Two issues have come up since we last met. The acreage requirement shown is 4 acres; in fact it is 8 acres. This is one thing, the other being the acreage per dwelling unit is 4 acres each. It was also brought to our attention by the Planning Board attorney that this is part of a sub-division map that is maxed out by the number of lots and this would exceed the permissible number of lots.

MR. REYES, JR.: What sub-division map?

ATTORNEY FINK: This is part of a major sub-division and you will be exceeding the number of lots allowed in this sub-division. This is something this Board has no jurisdiction over; you would have to go back to the Planning Board and have them issue an additional number for lots allowed. Does this Board have any comments or questions as what it wants to do?

MR. MALOCSAY: I think you should take a look at what we are talking about: the increase in acreage from 4 to 8 acres. And second that this is part of the larger sub-division. I think it would be difficult for this Board to grant a variance of this size.

MR. REYES, JR.: Can you tell me what the sub-division it was?

ATTORNEY FINK: I would refer you back to the Planning Board attorney.

MR. REYES, JR.: Okay, I will check with them and hopefully we can come back here.

CHAIRMAN JANSEN: This is continued until we hear either from the Planning Board or the applicant.

PUBLIC HEARING OF SAYED M.SHAH - for property located at 827 County Rt 1, Pine Island NY and designated on the Town tax map as Section 3 Block 1 Lot 44 and located in an LB District for a variance of Section 164.40N allowing conversion of a single family dwelling to a two family dwelling with the provided/required dimensions - minimum lot area 93,220 square feet/98,000 square feet, one side setback 9.7 feet/35 feet and livable floor area with 1,159 square feet less than required by Section 164.46.J(17).

CHAIRMAN JANSEN: Please identify yourself for the record.

ATTORNEY FINK: If I can, just before that; we received a response from the county and they tell us we have to find the correct statutory criteria. But they are also in favor of this increasing the exclusionary housing units in the town of Warwick.

MR. DEHAAN: Chris DeHaan, DeGraw and Dehaan Architects.

MR. SHAH: I am Sayed M. Shah.

CHAIRMAN JANSEN: Briefly tell us what it is you are trying to do.

MR. DEHAAN: Mr. Shah had acquired a property in 2008, and at the time it had two apartments in this existing building. At the closing, during the title search nothing came up to indicate a violation. Then recently, Mr. Shah went to do some work on the building and discovered it was approved as only a one family building and he wants to move forward to get it approved for the two-family. Two-family are permitted in the zone; however, they do require special use from the Planning Board. We are willing to do that but there are some items that need variances in order to move forward.

CHAIRMAN JANSEN: Any questions? One of the questions is, is do you have a piece of property next door to that, that has the additional square footage that would make it a conforming area?

MR. DEHAAN: He does have an empty lot but other partners are involved so it is not that clean.

CHAIRMAN JANSEN: Are there any questions from the Board? No, then I open this up to the Public for discussion. Is there anyone here from the Public to address this application? Okay, public discussion is closed.

MR. MALOCSAY: I have a question; I don't think this has come up before. Title Company does a search, doesn't find anything wrong with it. All of a sudden there's something that appears to be a violation. It sounds like the Title company-

ATTORNEY FINK: No, here's the problem; the Title Company asked for municipal search of violations. Most Building Inspectors will go to the file to see if there are any outstanding permits and/or violations. Very few will actually go out and inspect the property. That is how this comes up all the time.

MR. MALOCSAY: Ok, but because the town made a mistake, they need a variance.

ATTORNEY FINK: You could say that.

CHAIRMAN JANSEN: I think in this case, they don't know when this was established as a three-family residence.

MR. DEHAAN: It has been a two-family for who knows how long.

MR. PAULSEN: Were there two families living in it?

MR. DEHAAN: Yes.

MR. SHUBACK: Are you planning on making it bigger?

MR. DEHAAN: No. We are just re-doing it; it will stay exactly the same.

CHAIRMAN JANSEN: You are trying to make it legal?

MR. PAULSEN: Were there two families in there prior to it being zoned a two-family home?

MR. DEHAAN: We don't know. There is no documentation, it is in an agricultural area; the building was built prior to the current and prior building codes.

MR. MALOCSAY: In rough numbers, when was it built?

ATTORNEY FINK: The only reason the permit was denied, was they need an area variance; as far as the Building Inspector is concerned. The Building Inspector has not raised any other issues. We need to take it at face value that it is the only thing they need.

MR. PAULSEN: Was it pre-existing?

ATTORNEY FINK: The Building Inspector has not raised any other issues and did not bring this up before us.

MR. MALOCSAY: I did not realize that so it makes things easier.

CHAIRMAN JANSEN: The reduction from 98,000 to 93,200 is not a major reduction in size.

MR. MALOCSAY: And the side set-back is existing; it's not as if we will be changing anything.

MR. DEHAAN: Correct.

CHAIRMAN JANSEN: What is the required livable floor area?

MR. DEHAAN: The actual livable floor area is 900 square feet, from a tabular standpoint but from the bulk table, each dwelling unit has to be a minimum of 1000 square feet. And right now both dwelling units exceed a 1000 square feet. Specifically the first floor unit is 1055 square feet and the second floor unit is 1159 square feet. They are above the minimum required area. There is part of this variance seeking relief on one

section of the code that indicates that the first dwelling must be 2000 square feet; we are asking a variance to the 1159 square feet. Because that one was in existence prior to this.

CHAIRMAN JANSEN: So we have less than required square footage.

ATTORNEY FINK: The site plan map shows the minimum lot area of 9800 required.

CHAIRMAN JANSEN: So is this major or insignificant? Ok, 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 nearby properties?

MR. MALOCSAY: No, it exists now and there are going to be no changes to how it exists.

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

MR. MALOCSAY: No, because it already exists as it is.

ATTORNEY FINK: Is it a substantial variance?

MS. BRAMICH: No.

MR. MALOCSAY: No.

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

CHAIRMAN JANSEN: No.

ATTORNEY FINK: Is this self-created?

CHAIRMAN JANSEN: Not really.

ATTORNEY FINK: There is no indication that is a violation.

MR. SHUBACK:
owner, did not know either.

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

MR. SHUBACK:

CHAIRMAN JANSEN:
favor?

All in favor (four ayes) motion carried.

MS. BRAMICH:
variance as advertised.

MR. MALOCSAY:

CHAIRMAN JANSEN:

All in favor (Four ayes) Motion carried.

Mr. DeMarco, the previous

I motion that this is an

I second it.

Any discussion? All in

I motion to grant this

I second it.

Any discussion; all in favor?

PUBLIC HEARING OF BRIAN J. & MELISSA SINGER - for property located at the west side of Briller Road, Warwick NY and designated on the Town tax map as Section 66 Block 1 Lot 75 and located in a CO District for renewal of a Section 280-a variance granted on 4/27/09 which expired on 4/27/11, or, in the alternative, a new variance to allow a 2 lot single family residential subdivision to be accessed by a private road.

NOTE:
himself from hearing this application.

Mr. Malocsay has excused

CHAIRMAN JANSEN:
the record.

Please identify yourself for

ATTORNEY MYROW:

My name is Jay Myrow.

ATTORNEY FINK:
one is the application that has expired and the criteria for extending the variance is no-change in circumstance. All you really have to show is that there has been no change since the variance was originally granted.

There are two issues here;

CHAIRMAN JANSEN:
circumstances?

Are there any changed

ATTORNEY MYROW:
received a letter re-confirming that the road is suitable for emergency vehicles.

No. And I believe you

ATTORNEY FINK:
litigation?

I understand you are in

ATTORNEY MYROW:

Yes.

ATTORNEY FINK:
application has been made to stay this Board from granting or entertaining this application?

I understand that an

ATTORNEY MYROW:
application was made there was pending before the Planning Board. They were considering granting final approval pending the granting of a variance by this Board and the court refused to grant them injunctive relief and let the plaintiff proceed to getting final approval. The approval was granted and the maps perfected; they have been signed and filed.

At the time that this

ATTORNEY FINK: Are you in litigation at the present time?

ATTORNEY MYROW: Yes.

ATTORNEY FINK: Has an application been made to stay this Board?

ATTORNEY MYROW: No. I looked at the letter and it was basically for this Board not to consider this application until litigation is complete. I don't see any basis for treating this application differently from any other applicant.

ATTORNEY FINK: I would assume that was the issue in litigation.

ATTORNEY MYROW: I can tell you now that I have not been notified.

CHAIRMAN JANSEN: Before I open this to the public, please identify your self for the record.

ATTORNEY MYROW: I did. Brian and Melissa are also present as well as their architect, Kirk Rother. He submitted the original designs and this Board approved it. The original variance was granted November 4th, 2008.

CHAIRMAN JANSEN: This is open to the Public for discussion. Is there anyone here to address this application?

MS. MCQUAID: I am Theresa McQuaid and I live at 12 Briller Road. What I am concerned about with this right-of-way, that has been there. There is an existing road that goes through; if Mr. Singer decides to do what he wants to do, the road will come right across my front yard. We never had it staked out to find out exactly where my septic is and my leach field and there is a 4 (four) foot drop and I have a pool. So I am going to be having a roadway right in front of my pool. I bought my property over 25 years ago and the intent was to let Phyllis Briller use it as a right-of-way; but there is property over on Phyllis' side to make an existing road. That is what we always believed would happen and not go across my yard and impact my septic. Is the Board going to assure me that if my septic or leach fields are ruined that Mr. Singer is going to pay for a new septic? There are no markers to let me know exactly where it is coming through.

MR. PAULSEN: Is the septic on your property?

MS. MCQUAID: Yes, the septic is on my property.

MR. PAULSEN: And the road is on his property?

MS. MCQUAID: Yes, but you need, well, it's not his road on the property, not as of yet. Unless he gets this application.

MR. PAULSEN: I don't understand.

MS. MCQUAID: If he keeps the existing unpaved roadway where it is, everything is fine. But if he comes in the 10 (ten) feet or so, nobody showed me exactly where the 10 (ten) feet is going to be. It could go right into my leach field and at the other Board meeting; they talked about a buffer of trees. What if the trees' roots grow into my leach field? We are building on mountain residential; it is not easy to get septic tanks in. Also, about my pool; it would have cost an astronomical amount to put it in my back yard.

CHAIRMAN JANSEN: Thank you, anyone else?

MS. BRILLER: I am Phyllis Briller and as was previously noted, there is litigation ongoing so I am excluded from saying much of anything because it could be used in court against me. You have received a letter from my attorney and in that letter, Charlie Frankel, the attorney, did ask that this application be stayed or denied until such time as the litigation is finalized. I don't know how you go about getting an application to have something stayed but it certainly isn't right and we wish, we request that it be stayed.

ATTORNEY FINK: You would make a motion in the Courtroom that the proceedings are going forward.

MS. BRILLER: Given that I did not receive notification of this meeting until I picked up my mail today, it would have been difficult.

ATTORNEY FINK: The letter we received from Mr. Frankel didn't mention anything about wanting additional time to enable him to make a motion.

MS. BRILLER: That is true, he did not.

ATTORNEY FINK: Had the Board been asked for that time, the Board would have favorably considered it. But that is not the case.

MS. BRILLER: I do have a question, if I might. On the approved copy of the plan, for this 2 lot sub-division, remembering that the Singers have two (2) approvals, they were both conditional until they requested that one of them be finalized.

ATTORNEY FINK: You are talking about something for the Planning Board, correct? The only thing this Board granted was a 280a variance.

MS. BRILLER: I understand.

ATTORNEY FINK: So we have nothing to do with any of that.

MS. BRILLER: And that variance, as Ms. McQuaid indicated, goes straight across her property. The approved 2-lot subdivision that is now before you indicates that they are applying for a 16 (sixteen) foot width. However, the specifications on the first page also indicate that they have to comply with Section 168, attachment to Exhibit E.

ATTORNEY FINK: The problem is the court granted a variance; this Board's discretion now is very limited. It is known as "law of the case". Once we make a decision and no one appeals it, we are stuck with it; even if we made a mistake. So we can't go back and re-visit those facts. All we can do is, say, if something happened or they changed circumstances and the ultimate circumstance would be that this road is no longer passable. That does not seem to be the case; so we can not rededicate and look at all the facts again. We are stuck with what we did before.

MS. BRILLER: But you were not aware that the road was not on the land that you approved.

ATTORNEY FINK: Again, we made a decision and nothing has changed since we made the decision. What we do when we re-visit those facts and the applicant went to court. I guarantee you, we would lose.

MS. BRILLER: The specific specifications that the Planning Board is now dealing with were not before this Board.

ATTORNEY FINK: All we are doing now is renewing what we gave them before and if that is not what the Planning Board is dealing with, that is a Planning Board issue. We can't look at that.

MS. BRILLER: Is it possible to ask, to determine, if the compliance of the specifications are concerned with only the areas you looked at before, which was, an unpaved traveled way.

ATTORNEY FINK: You are asking us to revisit the application; we can't do that. We made the decision, it wasn't appealed and we are stuck with the decision. The only thing we can look at now is, have circumstances changed. In essence, whereby that road is now impassable.

MS. BRILLER: But you didn't make a decision on the road.

ATTORNEY FINK: We did; we had to have in order to grant a 280a variance. I remember that it was an issue whether or not the road was passable.

MS. BRILLER: The road was passable? But the criteria that you used are over area where the road is not run.

ATTORNEY FINK: You are asking again that we re-visit the application; we cannot do that. We made a decision and we are stuck with our decision. Right or wrong.

MS. BRILLER: Your decision does not say that it includes a road; it just includes an area.

ATTORNEY FINK: All we are doing is renewing that decision. If, somehow, it is defective and doesn't give the applicant what he wants before the Planning Board; then it is a Planning Board issue. You don't have anymore to do with once it leaves here.

MS. BRILLER: But if you are approving this road-

ATTORNEY FINK:
approval we once gave; or denying it.

We are just renewing the

MS. BRILLER:

I think I understand.

CHAIRMAN JANSEN:
If not, the Public hearing is closed.

Anyone else from the Public?

ATTORNEY FINK:
variance, we are renewing the existing one.

We are not granting a new

MR. SHUBACK:
Court and things get changed; do they come back?

What happens if they go to

ATTORNEY FINK:

That may be.

MR. SHUBACK:

Whatever the Court says?

ATTORNEY FINK:

Yes, whatever the Court says.

ATTORNEY MYROW:
that challenge may be approved.

Once it is before the DEP,

ATTORNEY FINK:
different; all we are looking at is, have there been any changes that would change the variance?
Or preclude this Board from renewing the variance.

The criteria here are a bit

MR. PAULSEN:

No.

CHAIRMAN JANSEN:
knowledge, no.

No, to the best of our

ATTORNEY FINK:
this as an Unlisted Action with no environmental impact?

Does someone care to type

MR. PAULSEN:

I make a motion.

MR. SHUBACK:

I second it.

CHAIRMAN JANSEN:
(Three Ayes) Motion carried.

Any discussion? All in favor;

ATTORNEY FINK:
variance two years from this date?

Any move to extend the

MS. BRAMICH:

I make a motion to move.

MR. SHUBACK:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Three Ayes) Motion carried.

PUBLIC HEARING OF MARYL HALLETT - for property located at 26 Denton Lane, Warwick NY and designated on the Town tax map as Section 31 Block 2 Lot 141 and located in an RU District for a variance of Section 164.40(N) & (M) and 164.41.A(1)(a) allowing construction of a 40 foot X 80 foot pole barn (3,200 square feet) where no more than 1,200 square feet are permitted and with a median greater than 48 feet as an accessory use on a vacant lot with no principal use, or, in the alternative, reducing required acreage for a commercial agricultural operation (cattle) from 20 acres to 6.6+/- acres.

NOTE:
himself from hearing this application.

Mr. Malocsay has excused

CHAIRMAN JANSEN:
the record.

Please identify yourself for

MS. HALLETT:

My name is Maryl Hallett.

MR. HALLETT:

My name is John Hallett.

CHAIRMAN JANSEN:
is that you are trying to do.

Briefly tell the Board what it

MS. HALLETT:
pole barn, 40 X 80 foot for crop and equipment storage and some shelter for livestock. And then to fence that area. She showed photos of area to be affected.

We are proposing to put up a

CHAIRMAN JANSEN:
Public to address this application? No.

Is there anyone here from the

MS. HALLETT:
contain goats. The pole barn is a fairly large structure because we want to store hay and it will be located on the only level spot in the area. That location is also central to the property. We also want to store our equipment that is presently outside in the elements. This location is not visible from the road but is visible from the house. This is good for security reasons.

We want to fence the lot to

CHAIRMAN JANSEN:
know where it will be.

We were up there so we

MS. HALLETT:
the barn there is, we don't have any shelter for livestock there or hay storage.

Another reason for placing

CHAIRMAN JANSEN: Our concern is that it will be located on a separate 6 acre lot with no home. It would strictly be a barn on 6 acres.

MS. HALLETT: Yes, no septic-

ATTORNEY FINK: You have other lots that are part of this operation?

MS. HALLETT: Yes, 46 acres. (She indicates on the map where they propose to locate the barn and the fencing.)

ATTORNEY FINK: I understand that and fencing is not the issue.

MS. HALLETT: We propose to install the barn to demonstrate our agricultural use of the land.

ATTORNEY FINK: Have you considered erasing the line so that those 2 lots become one?

MS. HALLETT: That would be undoing the sub-division that the previous owner did.

ATTORNEY FINK: That's correct.

MS. HALLETT: Every farmer, every legal person we have talked to said they would consider us fools to undo this. This was a very difficult sub-division for the previous owner to achieve.

ATTORNEY FINK: You are in an agricultural district, and you have an agricultural exemption.

MS. HALLETT: We have an exemption on the 2 other lots. They never came out of the agricultural exemption.

CHAIRMAN JANSEN: The other lot was not in there previously? The 6 acre lot?

MS. HALLETT: This lot was; what happened was that the previous owner sold the lot but was not paid for it. She had to re-acquire it. Then she never followed through to show the agricultural exemption for it.

CHAIRMAN JANSEN: Because this year, they are renewing the agricultural districts and all you have to do is apply.

ATTORNEY FINK: Agricultural districts and agricultural exemptions are two separate things.

CHAIRMAN JANSEN: I know but if she is trying to get it back into the agricultural district, and combine it with the farm; then it becomes-

ATTORNEY FINK: Aren't you in the agricultural district?

MS. HALLETT: District 2, yes. But it is not receiving a tax exemption.

ATTORNEY FINK: That is an agricultural exemption; that is different. What title do you have?

MS. HALLETT: Right now, we have none.

ATTORNEY FINK: What are you doing now to entitle you to an agricultural exemption?

MS. HALLETT: Hay, we are growing hay. But we want to do more.

ATTORNEY FINK: What this Board did was to require this in order to enter upon an agreement whereby it was part of an agricultural business.

MS. HALLETT: Yes.

ATTORNEY FINK: Whereby when it ceased to be part of an agricultural business, that barn had to be taken down or a house had to be put on the property because then it would be an accessory. Do you have any problem with that?

MS. HALLETT: No.

MR. SHUBACK: How many acres do you have altogether?

MS. HALLETT: It is between 45 and 46 acres.

MR. SHUBACK: How many cattle are you
planning to have?

MS. HALLETT: We are going to start off
small with organic beef. We would also like to run meat goats. That is why we need the fence.

MR. SHUBACK: I think you have plenty of
acreage. Our biggest concern was that you would have enough acreage.

MS. HALLETT: Our neighbors to the back
said it would be okay.

CHAIRMAN JANSEN: Is anyone here from the
Public to address this application? No, the public discussion is closed.

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

MR. SHUBACK: No.

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

CHAIRMAN JANSEN: Yes, but you would have to
erase a line.

MR. SHUBACK: Yes, but unfeasible.

ATTORNEY FINK: Is it a substantial variance?
Or an accessory use?

MR. SHUBACK: Right.

ATTORNEY FINK: So it is not really a
substantial variance. 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. SHUBACK: Yes.

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

MR. SHUBACK: I second it.

CHAIRMAN JANSEN: Any discussion; all in favor?

All in favor; (three ayes) Motion carried.

ATTORNEY FINK:

MR. SHUBACK: I make a motion to grant this
variance on the condition that if it is no longer an agricultural zone, the barn has to come down
or a house has to be built on it.

CHAIRMAN JANSEN: That will be an agreement
that you will have to sign and submit.

ATTORNEY FINK: What will happen is that
when they do the agreement, I am going to get it to you. You have your attorney look it over,
you will then have to sign it, and the town will sign it. You are responsible for filing it and
getting it back to us. You will have 30 to 60 days to do this.

MS. HALLETT: Are we not allowed to start
construction?

ATTORNEY FINK: You will have this by the end
of the week.

MS. HALLETT: That's great.

ATTORNEY FINK: And then it will be a matter
of you signing it and filing it.

MS. HALLETT: Are you going to send to me
directly?

ATTORNEY FINK:
it to?

Who do you want us to send

MS. HALLETT:

To me.

ATTORNEY FINK:

Do I have your email?

MS. BRAMICH:
variance as advertised.

I make a motion to grant this

MR. SHUBACK:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Three ayes) Motion carried.

PUBLIC HEARING OF EDWARD & JEANNE KERRISK - for property located at 5 Regent Road, Warwick NY and designated on the Town tax map as Section 95 Block 3 Lot 2 and located in an SM District for a variance of Section 140.4.A allowing a swimming pool in the front yard setback.

CHAIRMAN JANSEN: Please identify yourself for the record.

MR. KERRISK: My name is Edward Kerrisk.

MS. KERRISK: My name is Jeanne Kerrisk.

ATTORNEY FINK: You are subject to two front yard setbacks:

MR. KERRISK: Yes.

CHAIRMAN JANSEN: Briefly tell us what it is that you want to do.

MR. KERRISK: Our house is located in the rear of a corner lot. We have about 150 feet of roadway on both sides. So the side of the house is where we want to locate the pool. There is a six foot fence about 30 feet from the roadway and there are four pine trees between the curb and the six foot fence. The pool will probably be 40 foot from the roadway.

CHAIRMAN JANSEN: Can the pool be placed anywhere else?

MS. KERRISK: No.

ATTORNEY FINK: Just for the record, why can't you place it behind the house where the deck is?

MR. KERRISK: There is a 15 foot setback from the property line and the foundation line which would leave no room to put a swimming pool. There is an existing deck there also.

CHAIRMAN JANSEN: Is anyone here from the public to address this application? No, the public discussion is closed.

ATTORNEY FINK:	Is this going to create an undesirable change in the character of the neighborhood or be a detriment to nearby properties?
MS. BRAMICH:	Can I ask a question before we answer this? From the inside of the fence?
MR. KERRISK:	Yes, from inside the fence.
CHAIRMAN JANSEN:	No was the answer to Mr. Fink's question.
ATTORNEY FINK:	Can it be achieved by any other feasible method?
MS. BRAMICH:	Not really.
ATTORNEY FINK:	Is it a substantial variance?
MS. BRAMICH:	That is not part of it.
MR. SHUBACK:	No.
ATTORNEY FINK:	Is this going to have an adverse effect or impact on the physical or environmental conditions in the neighborhood?
MR. MALOCSAY:	No.
MS. BRAMICH:	No.
ATTORNEY FINK:	Is this self-created?
MS. BRAMICH:	Yes.
MR. SHUBACK:	Yes.
MR. MALOCSAY:	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.

MS. BRAMICH:
variance as advertised.

I make a motion to grant this

MR. SHUBACK:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

PUBLIC HEARING OF HOWARD & RUSSELL HANSEN - for property located at Seminole Drive & Hansen Place, Warwick, NY and designated on the Town tax map as Section 64 Block 1 Lots 20-40 and located in an MT District for a variance of Section 164.40N reducing front setback on Lots 24-29 from 100 feet to 58 feet and lots 33-40 from 100 ft to 50 feet for proposed dwellings and Section 280-a of the Town Law allowing access to a public highway over a private driveway for Lots 20-23, 24-29 and 23-40 to enable construction of 3 single family dwellings.

CHAIRMAN JANSEN: Please identify yourself for the record.

MR. FRITZBERG: Neil Fritzberg.

ATTORNEY FINK: This is a renewal of a previous variance?

MR. FRITZBERG: That is correct. You granted that variance on September 27, 2010 with two years to build on the lots. There was also a variance to grant combining the lots to make them bigger but he needed two setbacks. You had also granted a variance regarding Section 280-a. The applicant was unable to build on these lots because no one would buy the lots because of the economy. We are seeking an extension of two years.

CHAIRMAN JANSEN: Has anything changed?

MR. FRITZBERG: No.

ATTORNEY FINK: Except the variance granted in 2008 was for a different use; subdivision is different?

MR. FRITZBERG: No, it was the same thing.

MR. SHUBACK: We reduced the lots.

MR. FRITZBERG: It is exactly the same subdivision. (He showed a map.) Nothing has change since you granted the original variance.

CHAIRMAN JANSEN: Is anyone here from the public to address this application; no, public hearing is closed.

MR. MALOCSAY:
Action with no environmental impact.

I motion this is an Unlisted

MR. SHUBACK:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

MS. BRAMICH:
this variance to two years from date.

I make a motion to extend

MR. MALOCSAY:

I second it.

CHAIRMAN JANSEN:

Any discussion; all in favor?

All in favor (Four Ayes) Motion carried.

PUBLIC HEARING OF JOHN D. TURNEY - for property located at 13 Pumpkin Hill Road, Warwick NY and designated on the Town tax map as Section 44 Block 1 Lot 88 and located in an SL District for an interpretation whether keeping up to 100 pigeons in an enclosure not less than 50 feet from the property line constitutes a prior legal non-conforming use.

ATTORNEY FINK: Before you introduce yourself, I am a couple primary remarks. It appears that the keeping of 100 pigeons was permitted under the '89 variance. That was changed in 2002 to reduce it to under 10. In 2006, there was a complaint filed, a notice of order of violation, by the Building Inspector on December 2006. He said in there, as per a conversation with Mr. Turney on November 29, 2006, there are more than 10 pigeons housed on the property. Apparently that violation went nowhere. Then we have another notice of violation on April 18, 2008 and that states, in part, 2 buildings on Mr. Turney's property were seen which housed more than 10 pigeons. Apparently that was not prosecuted. In December 2009, there was an application to expand an existing shed and that was turned down by Mr. Batz; stating he had no problem with the expansion but with the number of additional pigeons. It is the applicant's position that he has kept a flock of approximately 100 homing pigeons on the property for several years prior to January 2002, the effective change of the variance, and that he has neither increased or decreased the size of the flock and accordingly believes he should be allowed to keep the 100 pigeons as part of a pre-existing legal non-conforming use which has not been abandoned or expanded. If that's the case, if there were about 100 homing pigeons, which would have legal under the ordinance, prior to the change in 2002, and if there has not been a change, then that would constitute a pre-existing, legal, non-conforming use. And the fact that it may create issues or problems; it is not an issue before this Board. This Board has very limited jurisdiction, if it was legal then and it hasn't been lost because it was discontinued for more than a year, then everything else is irrelevant.

ATTORNEY BUCKHEIT: I agree with your analysis because your supporting argument is what brought me before the Board. The reason we are here tonight is not that we need a variance, but that my client has been threatened with prosecution on two previous occasions, we are subject to a prosecution before the Town of Warwick Municipal Court at this very time. We need the ZBA to give us an interpretation of the code; because as Judge DeAngelo points out, the code deals with fowl, which, she says, does not necessarily mean pigeons.

ATTORNEY FINK: The definition of fowl is it includes, but is not limited to, domesticated birds such as ducks, chickens, geese, turkeys and pheasants raised in confinement.

ATTORNEY BUCKHEIT: Although, pigeons are not typically raised for food; I believe they fall under this code.

ATTORNEY FINK: The Building Inspector has not issued a violation saying that these pigeons are not fowl. He is just saying there are more than 10. He has not raised the issue of whether or not it is encompassed within the definition so I do not think this is an issue we have to deal with.

ATTORNEY BUCKHEIT: The judge interprets it against us.

CHAIRMAN JANSEN: Please identify yourself for the record.

ATTORNEY BUCKHEIT: I am John Buckheit and I am representing the applicant.

MR. SHUBACK: Another issue is can he prove he had over 100 pigeons in 2002.

ATTORNEY BUCKHEIT: In support of that, I have submitted my affidavits and I have brought numerous people who are willing to testify.

ATTORNEY FINK: We have conflicting documents before us but we will hear what the people have to say.

ATTORNEY BUCKHEIT: If you are ready, I will bring up the neighbors who have personal knowledge of the size of the flock from their observances.

CHAIRMAN JANSEN: Is anyone here from the public to address this application?

ATTORNEY OSTRER: My name is Evan Ostrer and I am here on behalf of Mr. Quinn who is a neighbor to Mr. Turney. The first issue that we would like to address is the amount of pigeons that he had prior to 2002, all the way up to 2009. When Mr. Quinn moved in the adjacent parcel in 1994, Mr. Turney had between 15 and 20 pigeons. Over time, the number of pigeons gradually increased to the point where it was hazardous to his own property which has brought about these complaints, dating back to 2006. Back in 2002, Mr. Turney had one cage, which is not big enough for a home for 100. When he sought to expand the shed, which was going to be okay by the Building Inspector in 2009, that what he had on the premises at that time was insufficient for that number. So how he was going to house 100 pigeons, with what was currently on his property, was impossible. And if it is his claim that he had 100 pigeons prior to 2002 until the time he sought the expansion in 2009, then he was

seeking to expand beyond that 100 number, which was denied by the Building Inspector. So it is unclear how we can determine the number of pigeons and the pre-existing non-conforming use.

ATTORNEY FINK: I can't wait to hear the evidence of how these pigeons are counted. But as far as a non-conforming use, he would not have to maintain 100 pigeons everyday of the year. You could have 100 pigeons and then no pigeons for up to 10 months; if you discontinue that non-conforming use for more than a year, then you lose it. So there is no problem with the number going up and down. But there does seem to be an issue with a head count.

MR. PAULSEN: Why is a head count important? Is there anything in the zoning code stating you have to have, say, 79 or 84?

ATTORNEY FINK: You are allowed up to 100 under the previous code. And their contention is that they had 100 so they did not lose that so long as they maintained, or did not discontinue, that for more than a year.

ATTORNEY BUCKHEIT: I can address that inaccuracy.

ATTORNEY OSTRER: I am not claiming there was abandonment, and Mr. Quinn has no problem with Mr. Turney having some pigeons on his property. The number is important because if he had 60 before 2002, and there is no showing that he did have more than 100, you would be extending the protection under the old rule.

ATTORNEY FINK: You are correct.

ATTORNEY BUCKHEIT: The first thing I would like to address is the pigeon coups. The structures that are present today are actually number 1 and 3, if you go through the chronology. When my client first began keeping a flock of approximately 100, he had the first coup. That first one still exists today. At that time, there was no restriction on the size. Then he built the second coup, trying to make them more handicapped accessible. Then he built a third one. The third one is the one he got a permit for. He stopped using the second and gave it away. He has always had the capacity to house approximately 100 birds. We are not saying he always had exactly 100 birds; some die, some are born and some are exchanged with other breeders. It is easy to control the population of the birds. It is also easy for neighbors to see how many birds as they are taken out and exercised everyday.

ATTORNEY FINK: And that is a problem for the one neighbor.

ATTORNEY BUCKHEIT: For that one particular neighbor, there is a lengthy history of charges against my client. And in one charge, it was brought to trial and my client was acquitted. It illustrates the neighbor's dislike for my client and his pigeons. You are going to hear affidavits from other neighbors that my client has always maintained a flock of approximately 100 pigeons.

CHAIRMAN JANSEN: Thank you. Anyone else like to address this subject?

MR. PERO: My name is Joe Pero; I am a friend of Mr. Turney. Over the past 10 years, he has purchased from organizations and clubs, from 10 to 50 birds every year. He also needs at least 2 large coups in order to keep some of the sexes separate during breeding season to control the population.

CHAIRMAN JANSEN: Thank you, anyone else?

MS. HOUSTON: My name is Sharon Houston and my property is adjacent to Mr. Turney. I love birds and the sound they make when he lets them out. I have no problem with them; I see no droppings in my yard.

ATTORNEY FINK: Excuse me, what we are really interested in, were there approximately 100 prior to 2002? And has that approximate number been maintained up until the present.

MS. HOUSTON: I couldn't tell you that but I can tell you that he has more than 10.

MS. CARMINE: My name is Ana Carmine; John has had those pigeons since 2000. I can't really tell you if he had 100 but I think it is a wonderful hobby.

MR. R. TURNEY: My name is Robert Turney; I am John's brother. He has had those birds for a long time and the main issue is that his neighbor is disgruntled and has complained about everything.

ATTORNEY FINK: Please confine yourself to the issue.

MR. R. QUINN: My name is Rob Quinn; not related to the disgruntled neighbor. I have lived at 14 Pumpkin Hill and I have known John since

high school. John has had those birds for at least 28 years. I cannot attest that there have always been 100. But I take John at his word that he has had 100.

ATTORNEY FINK: How many have you seen?

MR. R. QUINN: I see flocks all the time.

ATTORNEY FINK: Have you seen them in the
coup?

MR. R. QUINN: I have been over but I didn't
count the birds. There are many birds.

ATTORNEY FINK: What's many: 10, 50, 75?

MR. R. QUINN: Sorry, if I could give you a
count, I would. I wouldn't be doing anyone justification by guessing.

ATTORNEY FINK: But you can't approximate
what you've seen?

MR. R. QUINN: Um, 110.

ATTORNEY FINK: But if you look at a group of
pigeons-

MR. QUINN: You asked me a question;
that is my answer.

MS. K. DEGRAW: My name is Kara DeGraw
and I have personally been in the coups ever since I was a little girl. I used to go in almost every
day. And I can say there have been approximately 100 pigeons. I used to play with the pigeons
and Mr. Turney brought some to my school for Show and Tell. And that was 10 years ago.

MS. A. DEGRAW: My name is Allison DeGraw;
I am Kara's mother. I live beside John and I find him to be a very honorable person and a good
neighbor. The pigeons have never caused a problem.

ATTORNEY FINK: And how many pigeons have
you seen?

MS. A. DEGRAW: It is hard to say because they were in a coup. They moved from coup to coup and sometimes there were babies. A lot of “mushy” babies; 10 to 15 babies and the parents. So it seems reasonable that there were a number of birds. 100 would seem reasonable to me. And I have lived in my house since 1987.

MR. SAVRIES: My name is Joe Savries and I am a friend of Mr. Quinn. The neighbors all reflect on how beautiful the birds are but if you live on Mr. Quinn’s property, he has a pool that my kids go in. A flock of birds come swarming down; and I have been there for a BBQ. And again, a swarm of birds come down. I am in construction and there is an amount of bird feces on Mr. Quinn’s new roof. They sit on it. Maybe it is the path of flight they use. I doubt the other neighbors live in the path of flight. This is similar to a neighbor allowing his dog to defecate on another person’s property. How many birds have I seen? In 2007, 15 birds.

ATTORNEY FINK: Can you be more specific than 15 birds?

MR. SAVRIES: 50, it might be 70. Do I count the birds? How can you count the birds?

ATTORNEY FINK: Was this lots of occasions? Or just one occasions?

MR. SAVRIES: I have been there several times and can attest that these pigeons have changed his lifestyle. It is interesting how a law has been passed but someone is grandfathered? And this man (Mr. Quinn) should live under these conditions? Although not relevant, this man (Mr. Turney) drove around a 4-wheeler on his property.

ATTORNEY FINK: That is irrelevant.

MR. PERO: Mr. Savries is probably right that he has seen approximately 50 pigeons fly. But John still has several inside the coups; the parents.

MR. R. QUINN: They also smell.

MS. ZERMAN: My name is Debra Zerman and my son is 14. I don’t have a count of the pigeons but my son has told me that John has over 100 pigeons.

CHAIRMAN JANSEN:

Anyone else?

MR. ENCADY:

My name is Chris Encady; I am a friend of Mr. Turney and I live in Vernon, NJ. When John is on vacation, I take care of his birds. And there are clearly 50 to 75 birds.

MS. K. QUINN:

My name is Kathy Quinn and I live next to Mr. Turney. The whole thing is whether or not Mr. Turney has 50 or 100 pigeons. None of these people live within the flight path. That is our point. None of the pigeons go over their houses. My 86 year old mother cannot sit outside when these pigeons come out. Nobody can sit outside when the pigeons come out; we can not have dinner outside on our deck. That is when Mr. Turney lets the pigeons out, between 6 and 7 pm. The others are not in the line of the pigeons flying.

ATTORNEY FINK:

Please confine yourself to the issue here; what we need to know is how many pigeons has he had; has he had them at the time the zoning changed and whether all of these other issues are concerns. Unfortunately this Board can not make a determination that because the birds are a nuisance; this Board's not going to allow this. This Board isn't going to allow or disallow anything. This Board is going to make a decision as to whether or not it is a legal pre-existing non-conforming use. That is all this Board can do. So please don't get into anything else.

CHAIRMAN JANSEN:

I would like to ask Mr. John Turney how many pigeons do you have on a year-round basis for the last 10 years.

MR. J. TURNEY:

I guess it fluctuates from anywhere between 50 and 100. At the height of the breeding season, I am usually up around 100, maybe a little bit more. At the end of the racing season, I lose a lot of pigeons to birds of prey. Birds get sick, some get hurt and some don't make it home from training. The number starts high and then gets back down. And then the following year, I build it back up.

CHAIRMAN JANSEN:

So how many do you say you have there right now.

MR. J. TURNEY:

Right now, I have about 25. I have other pigeons at my friend's property so I would say about 50. So when I breed, it goes back up to 100-110.

ATTORNEY FINK:

When do you breed?

MR. J. TURNEY:
Day.

I start around Valentine's

ATTORNEY OSTRER:
he had an excess of 100, one rule of law here: is for a pre-existing non-conforming use, he had to be conforming to some provision back when the ordinance was in effect prior to 2002. If he had an excess of that 100, he was never conforming to either ordinance. And he shouldn't be afforded those protections, merely because he had over the amount that he was supposed to have. So if we can't pinpoint whether it was 110 or 80, if he had over 100 he shouldn't be given protection as a result.

Can I say just one thing? If

ATTORNEY BUCKHEIT:
ordinance.

But we pre-existed that

ATTORNEY FINK:
the 100.

I don't think you pre-existed

ATTORNEY BUCKHEIT:
into effect.

In 2002, the limitation goes

ATTORNEY FINK:
talking about the previous one. His argument is if you had more than 100 pigeons under the previous ordinance, you should not be granted-

That's true. But Mr. Ostrer is

MR. MALOCSAY:
ordinance before 2002.

I never heard yet the previous

ATTORNEY FINK:

We don't know what it was.

ATTORNEY BUCKHEIT:
restriction on size-

Prior to 2002, there was no

ATTORNEY FINK:
application; yes, there was. That was the very first thing I read.

No, it is right in the

ATTORNEY BUCKHEIT:
states that in 2002 they put into effect a limitation of not more than 100. So prior to 2002, there was no ordinance.

My letter of September 18th

ATTORNEY FINK:

No, that's not true.

ATTORNEY BUCKHEIT:

That is accurate.

ATTORNEY FINK:
it very first thing. It was in my opening remarks.

No, I have it right here; I read

MR. OSTRER:
here for an interpretation and in rendering an interpretation as to whether or not there was a legal pre-existing non-conforming use. We need that set number; otherwise we are assuming a fact.

I would like to say we are

ATTORNEY BUCKHEIT:
need a set number, and you are legal.

I would argue that we don't

ATTORNEY FINK:
accessory to a residential use: not more than 100 fowl. It was allowed by the 1989 Ordinance. It was changed from 100 to 10 in 2002.

Ordinance Number 16,

ATTORNEY BUCKHEIT:
approximately 100; but that is in compliance. All the testimony from John Turney and his neighbors show the number fluctuating from between 50 to 100.

I would still argue for

There was a discussion regarding the building of the coups and the violations filed by the Building Inspector that were never pursued.

MR. PAULSEN:
keep the flock off of the neighbor's property?

Is there any way you could

ATTORNEY BUCKHEIT:
interesting saying that only the one neighbor is affected by the path when obviously there are other adjacent neighbors who don't complain. They are also in the flight line and enjoy the birds flying over.

The flight pattern is

CHAIRMAN JANSEN:
do they head directly to that location?

When you release the pigeons,

MR. J. TURNEY:
they do and sometimes they go in a different direction.

Not necessarily, sometimes

CHAIRMAN JANSEN:
another direction? Would that resolve something?

Can you turn the opening

MR. PAULSEN: Think about how you can turn the pigeons away from the other property and then we can talk about it later.

ATTORNEY BUCKHEIT: For us, we are subject to the prosecution. The Town of Warwick is prosecuting us for having more than 10 pigeons. So the Town sent us here. They will honor the determination of this Board.

MR. PAULSEN: Is there any way to reach out to satisfy the neighbors who are reacting to this?

CHAIRMAN JANSEN: Changing the release, will that help?

ATTORNEY BUCKHEIT: The property is adjoining.

CHAIRMAN JANSEN: The coup is in the middle of the yard; we were there.

MR. PAULSEN: I am asking the question, can anything be done?

MR. J. TURNEY: When they are out having a BBQ, I don't let my birds out. I do let them out early in the morning, about 6 am to exercise. I go to work. When I get home, I let them out again. They do not hover; they route. That is to say, they take off. I may not see them again for an hour; they do not circle around the house the whole time. I do not let them out with a full crop; I keep them hungry so they listen to me.

There was a discussion of the 1989 ordinance and the fluctuating number of birds Mr. Turney has had.

MR. SHUBACK: Do you keep receipts from your purchases?

MR. J. TURNEY: The bands, yes. I might have some.

MR. SHUBACK: Do you have receipts going back to before 2002?

MR. J. TURNEY: No.

MR. SHUBACK: How many coups do you have?

MR. J. TURNEY: Two.

MR. SHUBACK: How many birds does each coup hold?

MR. J. TURNEY: Comfortably, 60 in one and probably 20 in the other.

ATTORNEY OSTRER: I have been in contact with one of the people Mr. Buckheit received an affidavit from and that person is recanting the opinion that he knows the amount of birds Mr. Turney has on his property. The only person that did a physical count was the son of Ms. Zerman. And he could not attest to the number of birds in 2002 as he would have been a newborn.
(LETTER SUBMISSION)

ATTORNEY BUCKHEIT: Could we hear the letter?

ATTORNEY FINK: Quote: "I, Carol Linquinte(sp), never physically counted John Turney's pigeons. I no longer want to be involved in the matter of Mr. Turney's pigeons. Signed, Carol Linquinte(sp)."

ATTORNEY BUCKHEIT: This simply states that she doesn't want to be involved in this dispute anymore; and many people have stated that they did not physically count the pigeons.

CHAIRMAN JANSEN: We are allowed up to 100 under the prior zoning. We can not determine, to the last pigeon, exactly how many there are there. We do know that the number fluctuates. But under the old zoning, he is allowed up to 100 pigeons.

ATTORNEY FINK: I would like to keep this open for one more meeting in order to give both attorneys a chance to give me very brief legal authority as to their position and I will look at it also. Please file it with Connie Sardo and send me a copy and to each other as well. I would appreciate it.

CHAIRMAN JANSEN: So we will continue this application until the fourth Monday of November.
Meeting adjourned. Submitted by Pamela J. Carroll ZBA Recording Secretary