# TOWN OF WARWICK

# ZONING BOARD OF APPEALS

# NOVEMBER 23, 2009

**Members Present:**

**Mr. Jan Jansen, Chairman**

**Mr. Mark Malocsay, Co-Chairman**

**Mr. Norman Paulsen**

**Mr. Charles Todd**

**Attorney Robert Fink**

**Members Absent:**

**Diane Bramich**

**Chairman Jansen called the meeting to order at 7:30 P.M.**

**CHAIRMAN JANSEN:** **Can I have a motion to approve the minutes of the October 26th, 2009 meeting?**

**MR. PAULSEN:** **I make a motion to approve the minutes with no additions or corrections.**

**MR. MALOCSAY:** **I second it.**

**CHAIRMAN JANSEN:** **Any discussion; all in favor?**

**All in favor (Five Ayes), Motion Carried**

**Public Hearing of <u>JOSEPH M. ROSCITT, III</u> – FOR PROPERTY LOCATED AT 12 Lake Trail, Greenwood Lake, New York and designated on the Town tax map as Section 73 Block 8 Lot 5 and located in an SM District for a variance of Section 140.4.A allowing a pool in the front yard. *Continued from the 10/26/09 ZBA meeting.***

**CHAIRMAN JANSEN:** **The public hearing is still open for this application. Is there anyone else here that would like to make a comment regarding this application? No? The public hearing is now 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's not visible from the road.**

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

**MR. MALOCSAY:** **No. A variance would be needed no matter where you put it.**

**ATTORNEY FINK:** **Is this a substantial variance?**

**MR. MALOCSAY:** **Yes.**

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

**CHAIRMAN JANSEN:** **No.**

**ATTORNEY FINK:** **Is it self created?**

**CHAIRMAN JANSEN:** **Yes.**

**MR. MALOCSAY:** **I make a motion that this is an Unlisted Action with no environmental impact.**

**MR. PAULSEN:** **I second it.**

**CHAIRMAN JANSEN:** **Any discussion; all in favor?**

**All in favor (Four Ayes), motion carried.**

**MR. MALOCSAY:** **I make a motion to grant this variance as advertised.**

**MR. PAULSEN:** **I second it.**

**CHAIRMAN JANSEN:** **Any discussion; all in favor?**

**All in favor (Four Ayes), motion carried.**

**Public Hearing of <u>MARY ELLEN RICCARDO</u> – for property located at Chardavoyne Road, Warwick, New York and designated on the Town tax may as Section 16 Block 1 Lot 33 and located in an RU District for an interpretation of Section 164.43.A allowing a 2 lot subdivision with lots of 4 acres each (including an O&R easement) and front yard setbacks of less than the required 75 feet for the purpose of a 2 lot subdivision. *Continued from the 10/26/09 ZBA meeting.***

**ATTORNEY FINK: Before we go forward; to make this easier, let's get a few of the preliminary questions out of the way. Mr. Bollenbach had some issues and it's highlighted on the paper that I've given to you; if you look at the portion at the top of the sheet, you'll see what it was that he had to say. We're dealing with two issues under section 164.43A. There was some discussion as to exactly what the front setback was, so we can discuss that. And then the next issue is rights of way, easements, does that subtract from the square footage of the lot and if so, obviously that would effect the application itself. Just look at it for a moment and then we'll discuss it.**

**"Mr. Bollenbach: That is an issue we could discuss at a work session before we make a recommendation to the ZBA. There was also one additional issue raised in the course of the 3 years with the ZBA. That was found in §164-43B in the supplemental regulations. There was a question regarding the Right-Of-Way. It is stated as follow: *"In calculating the required lot area, lot width, depth of yards as part of the required area (including those measured according to §*164-43.2*), right-of-way shown, if any, shall not be considered as part of the required area"*. There may be additional variances required. You would have to take a look. I believe there are some utilities. I don't know if they are easements or R.O.W. That would also be something for the ZBA to determine. Also, there might be a dedication strip. That would also have to be taken into account. I think before the Planning Board could make any recommendation, the applicant's engineer would need to provide those calculations to show whether or not they are in conformance and to what degree they are.**

**§ 164-43. Supplementary regulations for all districts.**

**The provisions of this chapter applying to all districts shall be subject to such exceptions, additions or modifications as herein provided by the following supplementary regulations:**

A. **Front yards on narrow streets. Except in the Traditional Neighborhood District, on streets with less than a fifty-foot right-of-way, the front yard requirement shall be measured from the center line o the existing roadway, and 25 feet shall be added to the front yard requirement.**
B. **Rights-of-way. In calculating the required lot area, lot width, depth or yards as part of the required area (including those measured according to § 164-43.2), rights-of-way shown, if any, shall not be considered as part of the required area.**

**Easement. A servitude imposed as a burden on land. The right which one person has to use the land of another for a specific purpose not inconsistent with a general property in the owner and not including the right to participate in the profits of the soil charged with it. Precisely, a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil. 25 Am J2d Ease § 1.**

**Easement -1. An act or means of easing or relieving 2. A nonprofitable interest in land owned by another that entitles its holder to a specific limited use or enjoyment.**

**Right-of-way- 1 : a legal right of passage over another person's ground 2 a : the area over which a right-of-way exists b : the strip of land over which is built a public road**

**Right of way- a right of passage, an easement. The right of one person, of several persons, or of the community at large, to pass over the land of another. Kurz v Blume, 407 Ill 383,95 NE2d 338, 25ALR2d 1258.**

**ATTORNEY FINK: Alright, before we get to Bollenbach, there was some issue as to what the front yard setback was; in this district it is 75 feet. I don't think there's any issue that we're dealing with a road or right of way that's less than 50 feet. So under 164.43A, I don't see any ambiguity. You go to the center of the road, that's where you begin from, not the lot line, and add 25 feet to the requirement. So, the way I read it, is the front yard setback would be 100 feet from the centerline of the road. And it really doesn't affect us, that is an issue the Planning Board deals with, but it was discussed. More importantly, you can see that Mr. Bollenbach wants this Board to interpret 164.43B. And 164.43B says regarding rights of way, "In calculating the required lot area, lot width, depth or yards as part of the required area, rights-of-way shown, if any, shall not be considered as part of the required area". So the issue becomes, is the easement a right of way, which would *not***

**be included as part of the lot width. I want to draw your attention to subsection A above it and that talks about streets with less than a 50 foot right of way and right under it, it talks about rights of ways. So can we conclude from that, that they're equating a right of way with a street? I don't know. But under the traditional definitions of easements and rights of ways, rights of ways appear traditionally to be in the way of roads or streets while easements traditionally are a servitude imposed upon someone else's property. The way I look at it, is it seems to me that an easement is not a right of way. You might equate a right of way with a street and an easement with what O & R has on her property. Any discussion?**

**MR. MALOCSAY:** **I agree with that.**

**CHAIRMAN JANSEN:** **I agree as well.**

**ATTORNEY FINK:** **If we limit it to that very specific topic, does anyone have an issue with that otherwise?**

**MR. ZISGEN:** **I was going to address this a little later on with Mr. Garling's testimony, quite frankly.**

**ATTORNEY FINK:** **Well, let's address this one issue now because once the Board decides that issue, then we can move on to the issue of area. What we're looking for with his (Mr. Garling) opinion, is it opposite from the Boards opinion that easements are not subtracted from the bulk area whereas rights of way, streets are, and what we're dealing with, this O&R easement, is not to be subtracted under the ordinance. That is the sole issue right now.**

**ED GARLING:** **That's really open to interpretation. Clearly if the belief is that the rights of way are listed only under a portion of the Zoning that deals with streets, then clearly that would be street rights of way. If it's rights of ways in general, they are for transmission of certain items. One would be electrical rights of way. When you need a right of way to get from one point to another whether or not it's electricity, you're going to need an easement over the property to do that. So I think that could be interpreted both ways.**

**MR. ZISGEN:** **So is it your position then, in this particular circumstance, there's an O&R easement that traverses a portion of the subjects property and also given the fact that the deed of easement speaks to allowing O&R employees to prune trees, maintain the lines in order to access the area in question. It seems to me, easement and right of way are equivalent and interchangeable.**

**ATTORNEY FINK:** **But isn't it true that Zoning that restricts the property owners rights should be interpreted to the benefit of the property owner? I also want to add that rights of way and easements are *not* defined in the code.**

**MR. PAULSEN:** **I make a motion that it is the Interpretation of the Board that 164.43B refers to roads, not transmission easements.**

**MR. MALOCSAY:** **I second it.**

**CHAIRMAN JANSEN:** **Any discussion; all in favor?**

**All in favor (Four Ayes), motion carried.**

**ATTORNEY FINK:** **Now the other issue we're dealing with is a lot area wherein the O&R easement is not subtracted, it is still less than the required 4 acres though. Due to her work schedule, Mrs. Riccardo couldn't attend tonight's meeting. She did, however submit a letter to the Board; we'll summarize it. The first item refers to additional land. At the last meeting, a question was raised as to whether or not any additional property could be obtained. Was a letter sent and was there a response?**

**MR. RICCARDO:** **A certified letter was sent and we received no response.**

**ATTORNEY FINK:** **Was it received and signed for?**

**MR. RICCARDO:** **No. No response whatsoever.**

**ATTORNEY FINK:** **Alright. Do you know anything about that?**

**MR. ZISGEN:** **I do. Mr. Sheeleigh got the letter and we were going to address it tonight.**

**ATTORNEY FINK:** **Is there property available?**

**MR. SHEELEIGH:** **I'm not going to sell my property.**

**ATTORNEY FINK:** **Alright. Moving on to number two; the front yard setbacks. That's not really before us, that's a Planning Board issue.**

**MR. CABRELLE:** **The front yard setbacks are not an issue for the Zoning Board?**

**ATTORNEY FINK:** **No, not unless you're looking for a variance.**

**MR. CABRELLE:** **I thought that was what this discussion was about.**

**ATTORNEY FINK:** **I apologize; what variance are you seeking?**

**MR. CABRELLE:** **For the front yard setback on Lot 1, for 80 feet where 100 feet are required. I created four different scenarios because I wasn't sure if**

**the road surface was considered part of the area. One with the roadway, one without, one with the easement, one without, etc. It got so complicated, even I was getting confused.**

***Long discussion regarding front yard setback requirements.***

**CHAIRMAN JANSEN: So the only variance we're considering is the reduction of lot size...**

**MR. RICCARDO: There are three variances; 2 bulk variances and 1 front yard setback for Lot 1.**

**CHAIRMAN JANSEN: Does either side have anything else to add?**

**MR. ZISGEN: I have some testimony to put on the record. Mr. Garling, would you come and stand next to the recorder? Please state your name and address.**

**EDWIN GARLING: My name is Edwin Garling and I reside at 91 Murray Avenue, Goshen New York. I have a business located at 301 Main Street, Goshen New York.**

**MR. ZISGEN: Mr. Garling, what is your line of work?**

**MR. GARLING: I'm a Consulting Planner.**

**MR. ZISGEN: How long have you been licensed in the state of New York?**

**MR. GARLING: There is no licensure in the state of New York, only in New Jersey and Michigan, but I have been practicing continuously in New Jersey since 1961 and in New York since 1967.**

**MR. ZISGEN: Have you appeared before the Planning Board in the Town of Warwick on previous occasions?**

**MR. GARLING: Yes I have.**

**MR. ZISGEN: Has your testimony been accepted by the Board?**

**MR. GARLING: Yes it has.**

**MR. ZISGEN: Will you tell the Board what you did to prepare for your testimony here this evening?**

**MR.GARLING: Well, about 3 years ago I was asked to look at the site and testify. I went down and looked at it several times and reviewed the maps,**

**looked at the properties in the general vicinity, reviewed the zoning law, the comprehensive plan for the Town at that time and since that time, I have looked at those regulations again and have gone into the area and looked at the tax map and the general vicinity of the Community. I have also looked into the comprehensive plans when they were created and modified over the course of time.**

**MR. ZISGEN: With regard to the map that is currently in front of the Board tonight... Is this the map that's before the Board this evening, the one dated October 2009?**

**MR. CABRELLE: Yes.**

**MR. ZISGEN: Mr. Garling, have you had a chance to review this map that was prepared by Mr. Cabrelle?**

**MR. GARLING: Yes.**

**MR. ZISGEN: Would you please tell the Board what planning concerns or issues you have with the proposal as it's laid out in the plan?**

**MR. GARLING: Well, I looked at the 3 variances and the variance that I have the biggest concern with is the lot area requirements because of what happens in order to get to the lot 2 to the top of the hill where the house would be located. The location of the house, the area where the house would be situated, we have no issue with that, the problem is getting *to* it and what has to happen to the land in order to gain access to that home.**

**MR. ZISGEN: Describe specifically what the consequences would be to build that driveway and in creating this home site.**

**MR. GARLING: Well, initially, in order to get adequate sight distance, the frontage has to be cleared, a hill about 8 feet tall has to be knocked down, eliminate trees and rocks along the road to create the sight distance. This means cutting into the hill a substantial distance. The road then has to curve up the hill with a number of switchbacks in order to maintain what I believe is a 4% grade. The problem is with all the switchbacks and then with the new regulations on water protection drainage, a number of facilities are required to store and retain water on the site to meet the code.**

**MR. ZISGEN: Are those facilities depicted on the plan?**

**MR. GARLING: Not on that plan, they are depicted on the plan that's before the Planning Board which shows the impact of the zone change.**

**MR. ZISGEN: What kind of facilities would have to be constructed in order to adhere to the code?**

**ATTORNEY FINK:** **Let me interrupt for a moment. As you all know, there are certain criteria that we have to go through. In so far as Mr. Garling is concerned, I think we're talking about whether or not there's going to be an undesirable change in the character of the neighborhood or a detriment to nearby properties and whether the variance is going to have an adverse impact on the physical or environmental conditions. Keeping in mind, that unless all the environmental issues can be met, the Planning Board is *not* going approve the subdivision regardless of whether or not this Board grants the variance or not. Are you going to tell the Board that there *are* adverse effects or impacts that can't be cured by what the Planning Board is going to require?**

**MR. ZISGEN:** **We don't know what the Planning Board is going to require, Mr. Fink and I might point out that 164.54,3, subsection 4, this pertains to area variance reads, this is your own Warwick code, " whether the proposed variance would have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district".**

**ATTORNEY FINK:** **That's State Law!**

**MR. ZISGEN:** **And that's precisely what I was trying to elicit from the witness.**

**MR. RICCARDO:** **With all due respect, doesn't that refer to the other Board (Planning Board)?**

**ATTORNEY FINK:** **What we're talking about are 3 variances' lot area and 1 setback. It's this Board has to consider that. Are there going to be adverse effects if the Board grants a variance as to the lot area and the setback. In so far as all the the other things, if the Planning Board is not satisfied with the water retention and all the rest, they're not going to get their subdivision. That really has nothing to do with what this Board is considering.**

**MR. ZISGEN:** **I beg to differ. "Area variances – the Zoning Board of Appeals shall have the power upon appeal from a decision or determination ....in making such determination the Board shall also consider (#4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district." Again, that's what I was trying to elicit from this witness.**

**ATTORNEY FINK:** **You're talking about water retention and setbacks!**

**MR. MALOCSAY:** **If I may, I can clearly understand your side, because of that, it would be difficult to make a decision, I see no reason why we can't have the Planning Board take a look at this and have their input on the subdivision. Understand that I can't answer the question – is there going to be adverse effect with this subdivision. I don't see it; we hardly ever see that.**

**ATTORNEY FINK:** **I don't think that's a question you *have* to answer. You're not granting subdivision. Assuming that this was a 10 acre lot that could have 5 acres each. They still have to satisfy all other environmental concerns of the Planning Board. All you're doing is saying, alright you don't need 8 acres; you only need 3 or whatever. Now it's still up to the Planning Board to see whether or not all the other environmental issues with regard to subdividing land can be made. You're only dealing with two things; lot area and setback.**

**MR. MALOCSAY:** **The questions that we have to go through; the five questions have been brought to our attention now that it would be difficult to do that.**

**CHAIRMAN JANSEN:** **Then every application that comes before us shouldn't come here; it should go straight to the Planning Board.**

**MR. MALOCSAY:** **No, we can look at it and know because he's talking about a 4% grade with switchbacks. I understand it completely.**

**CHAIRMAN JANSEN:** **That's permitted.**

**MR. CABRELLE:** **It's allowed under the code and I daresay it exists in many locations.**

**MR. MALOCSAY:** **Usually when we have something that's coming before the Board on 2 lot subdivisions, there's usually a plan that the Planning Board has already looked at that shows us...**

**MR. CABRELLE:** **We went through this for a year and a half where each Board went like this to the other Board (pointing motions). It was very specifically made known to us to come to the Zoning Board first after about 7 different presentations. Exactly the way where all of the issues were "thrown in the pot". The issues in front of this Board are two things; whether or not the setback and bulk requirements adversely effects the environment or neighborhood. All those other issues...**

**MR. MALOCSAY:** **If I could ask you a question then, you know the property well, you're an Engineer, is it possible to put a driveway in there without affecting the neighbors? As far as water run-off?**

**MR. CABRELLE:** **Yes.**

**ATTORNEY FINK:** **And if it's not, the Planning Board is not going to grant subdivision approval.**

**MR. CABRELLE:** **On that plan is 15 different details on how to prevent the silt and construction ramifications on adjoining properties.**

**ATTORNEY FINK:** **I think Ed kind of touched upon it. He mentioned excavation has to be done but in your presentation could you dove tail it in to – is this going to create an undesirable change in the character of the neighborhood or be a detriment to nearby properties and again are the variances this Board is considering, are they going to have an adverse impact on the environmental conditions?**

**MR. GARLING:** **The concern that we really have is for the lot area of Lot 2 and the impact that creating Lot 1 and making Lot 1 a much smaller lot in order to get up to Lot 2. What occurs if this Board grants the variances that will enable the Planning Board to consider the development of Lot 2; if the Board doesn't grant eh variance, then the Planning Board won't consider the development of Lot 2 so there would be no impact at all to the hill because there wouldn't be a circular driveway going up to the top of the hill. It's quite possible that the septic for Lot 1 is above Lot 2, 60 feet above it and it would require a pumping to get up there. It is in an area that's relatively level compared to the rest of the site.**

**ATTORNEY FINK:** **A lot of subdivisions have these issues, does that mean the Planning Board can't grant it?**

**MR. GARLING:** **No, it means that by granting the variance, it will be opening up that area to have its sight distance requirement met by clearing a substantial amount of land and changing the character of that road.**

**MR. MALOCSAY:** **We have testimony from a few people and they all agreed that the best thing that could happen to that road would be to remove that tree and cut that bank back so they have sight distance going around the turn which it sounds like this is what's going to happen when the driveways go in. In fact I don't think there's been anyone who's said anything against it.**

**MR. ZISGEN:** **What will the affect be if the curb is modified, the tree is removed, the bank is cut back? What affect on traffic in your experience, will occur?**

**MR. GARLING:** **Well, it would allow the traffic to move more quickly through that area because right now...**

**ATTORNEY FINK:** **You're not going to try to say that cutting the tree down and the bank back will cause people to speed now are you?**

**MR. CABRELLE:** **That's really stretching it.**

**MR. GARLING:** **I'm not going to tell you that the tree couldn't be cut down under any circumstances, the tree could probably be cut down by the Town if it's affecting its right of way.**

**MR. ZISGEN:** **Can you describe the topography of these two proposed lots?**

**ATTORNEY FINK:** **Is what you're going to testify to going to be any different than any other subdivision that the Town could approve? Is what you're going to testify to, show it's against subdivision regulations to do what they want to do?**

**MR. ZISGEN:** **If I may, Mr. Fink, you have in this locale, what's the minimum bulk?**

**MR. GARLING:** **Four acres.**

**MR. ZISGEN:** **Four acres. The applicant is seeking...The required square footage is 174,240, on Lot 2 he exhibits 157,579 and on Lot 1 98,129. Lot 1 is barely 60% of the bulk that's required.**

**ATTORNEY FINK:** **Absolutely, it's a very substantial variance.**

**MR. ZISGEN:** **I might point out that 164.54.3, one of the things that the Board has to take into consideration is "whether the requested area variance is substantial". A 40% reduction in lot size is certainly substantial.**

**ATTORNEY FINK:** **Absolutely.**

**MR. ZISGEN:** **And when you "piggy-back" that with the fact that the other lot is about 10% less than what it should be and then you couple that with and pile it on top of the fact that one of the lots needs a front yard setback which is 20 feet less than what's required, he exhibits 80 feet when 100 feet are needed. I think the combination of all those things makes this a very problematic application. One that frankly I think ought to be denied. Mr. Garling, apart from a single family residence, what other development option would this applicant have?**

**ATTORNEY FINK:** **Is that really part of the statute, that she has other alternative options?**

**MR. ZISGEN:** **164.3.2 – whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue other than an area variance.**

**ATTORNEY FINK:** **The benefit sought is a 2 lot subdivision; not "something else". It doesn't make any difference what so ever under the law whether or not they have alternatives; they want a 2 lot subdivision.**

**MR. ZISGEN:** **What other alternatives does the applicant have given that she has 6 acres?**

**MR. GARLING:** They could put in a two family and they would have more than enough land but they would need a setback variance.

**MR. ZISGEN:** Do you see any negative impact upon the zone plan if the Town of Warwick were to grant this very substantial variance?

**MR. GARLING:** In order to create the sight distance, you would have to clear a dramatic amount of land, so you would change the character of that road. We calculated that in order to build the two units that you would have to disturb approximately 1.75 acres of land. That is a substantial amount of land. The Warwick Subdivision Regulations which were prepared by the County in 1974 indicated you should limit clearance to 20,000 square feet, overall and 5,000 square feet relative to the initial site. For most 1 to 2 acre lots you would have to clear at least 15,000 to 20,000 square feet to put in a house, septic and driveway. This goes beyond the 20,000 or 40,000 for 2 lots; this is 1.75 acres or 70,000 square feet.

**ATTORNEY FINK:** If the lots were each 5 acres, would there be less clearance?

**MR. GARLING:** If the lots were 5 acres each and the lot was the same shape, it would be the same amount of clearance.

**MR. ZISGEN:** If the lot was the same shape, what do you mean?

**ATTORNEY FINK:** If they added some peripheral property to the lot?

**MR. GARLING:** If you add 4 acres all around and maybe if they got a different access or ran a road between the septic areas, there's possibilities is you changed a lot line we could disturb less area. I haven't figured it out but it could be possible.

**ATTORNEY FINK:** Have you had a chance to look at this hand out yet?

**MR. ZISGEN:** Yes.

**ATTORNEY FINK:** Do you have a problem with any of these factual statements?

**MR. ZISGEN:** Well, I do have a problem in that the author Mary Ellen Riccardo is not here to testify as to the accuracy.

**MR. RICCARDO:** She can be reached by cell phone right now and answer any questions.

**MR. CABRELLE:** **The accuracy can be verified because all the information came from a Town tax map.**

**MR. ZISGEN:** **I don't know how the memo was prepared, only Mrs. Riccardo can tell us that.**

**MR. RICCARDO:** **I can call her right now.**

**ATTORNEY FINK:** **Regardless of what she says, it's either substantiated or not by the tax map.**

**MR. ZISGEN:** **When did the bulk area requirements become 4 acres in Warwick?**

**MR. GARLING:** **In 2001.**

**MR. ZISGEN:** **What was it prior to that?**

**MR. GARLING:** **Two acres dating back to at least 1976.**

**MR. ZISGEN:** **So many of the homes on that road were built well before 2001. Several of the lots ( 1.21,1.22,1.23,114,109,113,110) on the map Mrs. Riccardo furnished are quite large; between 4- 12 acres. When was that subdivision built?**

**MR. GARLING:** **In 2004.**

**MR. ZISGEN:** **The wall you talked about, is it depicted on the map?**

**MR. GARLING:** **Yes.**

**MR. ZISGEN:** **So that would be on the one previously marked '05?**

**MR. GARLING:** **Yes.**

**MR. ZISGEN:** **And '06?**

**MR. GARLING:** **Yes.**

**MR. CABRELLE:** **You're categorizing the rocks piled on the side of the hill as a rock wall?**

**MR.GARLING:** **Well, yes, it was an old farm.**

**MR. CABRELLE:** **There are two rocks stacked on top of each other.**

**ATTORNEY FINK:** **Have all the members of the Board been out to look at the area?**

**MR. MALOCSAY:** **I've been out numerous times.**

**CHAIRMAN JANSEN:** **Yes.**

**MR. PAULSEN:** **Yes.**

**MR. MALOCSAY:** **One of the things I see the Planning Board doing is changing the variance slightly; they're going to want to re-do the road right of way. I don't know if it will affect area roads because he owns property on the other side.**

**ATTORNEY FINK:** **That's actually a natural subdivision. There are existing 2 lots, a small sliver on one side of the road and the remainder of the property so if they were to move that road further into the property then it would decrease it.**

**CHAIRMAN JANSEN:** **Is there anyone else here from the public to address this application? No? The public hearing is now closed.**

**ATTORNEY FINK:** **One Board member absent tonight. You have the choice of having the Board vote tonight or waiting until we have a full Board at out next meeting which will probably be in January 2010 because of the holidays.**

**MR. RICCARDO:** **I would like to call my wife and discuss it with her.**

**ATTORNEY FINK:** **That's fine, we'll give you a few minutes.**

**MR. RICCARDO:** **My wife would like to Board to vote tonight.**

**ATTORNEY FINK:** **Under the code, the Board has to consider the benefit sought by the applicant against the health, safety and welfare of the neighborhood and we also have to consider the 5 steps of the criteria. Keeping in mind we're talking about 3 variances here – lot area required square footage is 174,240. Proposed Lot 1 is 98,129 and proposed Lot 2 is 167,579. They're looking for an 80 foot front setback on Lot 1 where 100 feet are required. By granting these variances, is this going to create an undesirable change in the character of the neighborhood or be a detriment to nearby properties?**

**MR. MALOCSAY:** **No, testimony was given that it would actually improve the sight distance.**

**CHAIRMAN JANSEN:** **Plus, the initial application was for 3 lots and it's already been scaled back to two.**

**ATTORNEY FINK:** **Can the benefit sought by the applicant be achieved by any other feasible means? The benefit sought in this instance is a two lot subdivision.**

**MR. PAULSEN:** **No.**

**ATTORNEY FINK:** **Are the proposed variances substantial? Let's go through each of them. Do you think the 80 foot one is substantial?**

**MR. MALOCSAY:** **No.**

**ATTORNEY FINK:** **What about the 167,579 where 174,240 is required?**

**MR. MALOCSAY:** **No.**

**ATTORNEY FINK:** **Lot 1 is 98,129 where 174,240 is required.**

**CHAIRMAN JANSEN:** **Yes.**

**MR. MALOCSAY:** **No, not when you look at the surrounding properties and the character of the neighborhood.**

**MR. PAULSEN:** **Yes.**

**ATTORNEY FINK:** **Are the proposed variances going to have an adverse effect or impact on the physical or environmental conditions in the neighborhood?**

**MR. TODD:** **No.**

**MR. PAULSEN:** **No.**

**ATTORNEY FINK:** **Is it self created?**

**MR. MALOCSAY:** **Yes. I make a motion that this is an Unlisted Action with no environmental impact.**

**MR. PAULSEN:** **I second it.**

**CHAIRMAN JANSEN:** **Any discussion; all in favor?**

**All in favor (Four Ayes), motion carried.**

**MR. MALOCSAY:** **I make a motion to grant these variances as advertised allowing a reduction in proposed Lot 1 to 98,129 square feet and a reduction in proposed Lot 2 to 167,579 square feet and a reduction of the front setback to 80 feet.**

**MR. PAULSEN:** **I second it.**

**CHAIRMAN JANSEN:** **Any further discussion; all in favor?**

**All in favor (Four Ayes), motion carried.**

**Public Hearing of <u>BRUCE HARDY</u> – for property located at 169 Jersey Avenue, Warwick, New York and designated on the Town tax map as Section 74 Block 9 Lot 41 and located in an SM District for an interpretation that an existing 7th apartment constitutes a legal pre-existing non-conforming use or, in the alternative, a variance of Section 164.40M, and Section 164.40N for a use variance permitting an existing 7th apartment on a lot with an area of 36,000 (+/-) square feet where 152,460 square feet would be required for 7 apartments, and a variance of Special Conditions #112 allowing the apartments to be serviced by septic and well where provision for community sewer and water is required.**

**ATTORNEY FINK:** **First of all, just so you know, the Board will not be able to vote tonight because we have not yet heard back from the County. Secondly, what is in the variance application is not necessarily so. What you want to do is not a permitted use in the district. What I did was extrapolate out Town Houses and this really isn't a Town House so there really are no requirements for what you want to do, because what you want to do isn't allowed. I think what we're really doing here is determining if you have a pre-existing non-conforming use and if you don't, then you need a use variance. If you think you have a legal pre-existing use, you might want to address that first.**

**BRUCE HARDY:** **I'm ignorant of all these proceedings. I just went by the Building Departments suggestion that I come to you about this. It's something that I'd totally forgotten when I bought the property that there was a violation on the property. I got so involved with all the repair work that it slipped my mind and only when I wanted to mortgage it, did it come back to my attention. So I'm here to try to figure out what to do and how to make it a legal property. It's something that's always been there.**

**ATTORNEY FINK:** **See, we don't know if it's always been there.**

**MR. HARDY:** **It was sometime in the late 1980's that the 7th apartment was added.**

**ATTORNEY FINK:** **According to the Building Inspector it wasn't there and when you purchased the property, you were advised it was in violation at the time. If you can show the Board that the Building Inspector was incorrect, and that this 7th apartment pre-existed the Code, then you're home free. Can you do that?**

**CHAIRMAN JANSEN:** **Which would be prior to what? It would have to be evidenced that the apartment existed prior to that time, the early 1970's and that it was occupied.**

**ATTORNEY FINK:** **Because you would have needed Planning Board authority subsequent to that.**

**CHAIRMAN JANSEN:** **Are you here to address this application?**

**MR. CHRISTIANSEN:** **Yes, my name is Joseph Christiansen and I have one question. Would the Board have an opinion about the adequacy of the septic system?**

**ATTORNEY FINK:** **If it's legal pre-existing, there's nothing this Board can do. If it's not functioning properly, then the Building Inspector or the Town could.**

**MR. CHRISTIANSEN:** **Is that 7th apartment currently not in use? Does it have a tenant?**

**MR. HARDY:** **Yes, it is occupied.**

**CHAIRMAN JANSEN:** **We were there earlier today and we noticed in the back there are 8 electric meters that are functioning.**

**MR. HARDY:** **One belongs to me for common lighting, outside lighting. I don't know why or how it was ever put in the records that there are 8 apartments. There is a big apartment upstairs that has two doors so maybe at some time someone came inside and counted doors.**

**CHAIRMAN JANSEN:** **Is there anyone there who's lived there since the early seventies?**

**MR. HARDY:** **I do have a tenant in #5, Anita, she's been there 37 years.**

**CHAIRMAN JANSEN:** **Then that would be the person that we would like to see appear here and if she can swear under oath that there were 7 apartments there prior to that time, that would be it. Is there anyone else here to address this application? The public hearing is still open, we will continue this to the next meeting.** ***Continued to the January 25th ZBA meeting.***

**MR. TODD:** **I make a motion to adjourn.**

**MR. PAULSEN:** **I second it.**

**All in favor, meeting adjourned.**

_____

**Frances N. Sanford ZBA Recording Secretary**