

**Town of North Salem
BOARD of APPEALS
Public Hearing
May 13, 2010
8 p.m., The Annex**

MEMBERS PRESENT: Brian Ivanhoe, Chairman
Richard O'Leary
Deidre Sokol
William Monti
Patrick Browne

OTHERS PRESENT: Gerald Reilly, Counsel
Bruce Thompson, Zoning Enforcement Officer
Janice Will, Recording Secretary
Members of the Public

Chairman Ivanhoe called the May 13, 2010 Town of North Salem Zoning Board of Appeals meeting to order.

Chairman Ivanhoe set the next meeting for Thursday, June 10, 2010.

The minutes of the April 8, 2010 meeting were unanimously accepted.

HEARINGS CONTINUED

BA09-32 Joseph Bryson (2 Fields Lane) – **Use Variance** – To permit the use of an existing building for a sales and service business, per Article IV Section 250-11 and the Table of General Use Requirements for the R-1/2 zoning district.

Carried over pending progress of Planning Board application.

BA09-33 Fuelco Food Marts, Inc. (2 Fields Lane) – **Area Variance** – For the operation of a gasoline station and convenience store per Article V Section 250-15, Article VI Section 250-22 (C), Article IX, Article XIII Section 250-73 (B) and (C), the following variances are requested:

- Decrease the front yard setback from 35 ft. required to 12 ft. proposed for placement of a fuel pump island with canopy.
- Decrease the distance from an intersection from 100 ft. required to 49 ft. proposed for modification of an entranceway.
- Increase the maximum height of a fence in a front and side yard from 4 ft. permitted in the front yard/5 ft. permitted in the side yard to 6.5 ft. existing/proposed for replacement of a fence.
- Increase the maximum size of a free-standing sign from 8 sq. ft. permitted to 33 sq. ft. existing/proposed.

Carried over pending progress of Planning Board application.

BA09-34 Fuelco Food Marts (2 Fields Lane) – **Interpretation/Use Variance** - Whereas the Building Inspector determined that the addition of a convenience store to the existing non-conforming gasoline service station requires a use variance, application is made to the Board of Appeals to find that the convenience store is permitted as an accessory use; or in the alternative, request a use variance per Article IV Section 250-11 and the Table of General Use Requirements for the R-1/2 zoning district if the ZBA's interpretation of the circumstances is the same as the Building Inspector's.

Carried over pending progress of Planning Board application.

BA10-13 LP Partners (125-143 Vail Lane) – **Area Variance**- For a variance per Article V Section 250-15 and -18 and per New York Town Law Section 280-a in order to permit creation of a subdivision lot. A decrease in the required street footage from 150 ft. to 0 and permission for the lot to access a street not shown on the Official Map for the Town (Chestnut Hill Road, Ridgefield, CT) are requested.

Carried over pending progress of Planning Board application.

PUBLIC HEARINGS

BA10-22 Nancy Burdick Fagnani (6 Peach Lake Drive) – **Area Variance** – Per Article V Section 250-15 and Article XIV Section 250-79 A. The following variances from R-1/2 bulk requirements are requested for an as-built deck, shed and covered porch:

- Decrease the front yard setback from 30 ft. required to 26 ft. existing, a variance of 4 ft.
- Decrease the combined side yard setbacks from 40 ft. required to 4.53 ft. existing, a variance of 36 ft.
- Decrease the rear yard setback from 35 ft. required to 3 ft. existing, a variance of 32 ft.
- Increase the maximum development coverage from 25% permitted to 47.61% existing, a variance of 23%.
- Increase the maximum building coverage from 10% permitted to 33.90% existing, a variance of 24%.
- Increase the maximum Floor Area Ratio from .20 permitted to .26 existing, a variance of .06.

Christopher Harrigan of CMH Design Studio addressed the Board, describing the subject property as a 55 ft. x 98 ft. proprietary-lease lot in Pietsch Gardens. He displayed a drawing of the site with the shed and additions highlighted.

Chairman Ivanhoe asked if the plans were approved by the Pietsch Gardens Co-op, and Gerald Reilly pointed out the Board of Directors' approval stamp.

The Chairman asked if the deck meets Building Code standards for the time when it was built, and Bruce Thompson stated that it does.

Mr. Harrington said there is some work to be done.

William Monti mentioned a memo from the Building Inspector concerning the future sewer system for Peach Lake and zoning issues in the co-ops.

Mr. Thompson said he would like to speak to the Board at the end of the meeting and set the topics as future agenda items. He added that Ms. Fagnani's application is representative of the circumstances he wants to speak to.

Noting there were no other questions or comments, the Chairman closed the public hearing.

Mr. Reilly read a draft resolution.

Motion by: William Monti
Seconded by: Patrick Browne

Mr. O'Leary: Aye
Ms. Sokol: Aye
Mr. Monti: Aye
Mr. Browne: Aye
Chairman: Aye

Area variance granted, as requested.

BA10-23 Caroline and Barry Weissblatt (369 Mills Road) – **Area Variance** – Par Article V Section 250-15. The following variances are requested for construction of a screened porch, open porch and a portico:

- Decrease the front yard setback from 75 ft. required to 50 ft. 11 in. proposed (22 ft. 6 in. existing), a variance of 25 ft.
- Decrease the side yard setback from 75 ft. required to 56 ft. 2 in. proposed (54 ft. 8 in. existing), a variance of 19 ft.
- Increase the maximum building coverage from 10% permitted to 10.2%, a variance of .2%

Viktor Solarik, architect, was present. He stated that the house pre-dates the Zoning Ordinance and is well inside the required setbacks. He added that the lot consists of only 2 acres but is in a 4-acre zoning district. Displaying a drawing, Mr. Solarik said his clients would like to create a portico over the front door and add a porch on the side and a screened porch at the rear of the house. He pointed out that while the proposed additions are within the required setbacks, none is as close to the property lines as the existing conditions. Mr. Solarik explained that the proposed addition will exceed maximum permitted building coverage by approximately 218 sq. ft.

The Chairman asked if the plan includes enlarging the kitchen.

Mr. Solarik said one part of the plan will raise the roof over part of the kitchen, and this will provide more light in the kitchen and improve the appearance of the roof line. He stated that this part of the plan does not require a variance.

Patrick Browne commented that Mr. Solarik's clients have done a nice job with the property already.

Chairman Ivanhoe asked if any outdoor lighting is planned.

Mr. Solarik said there will probably be security lighting in the form of flood-lights in corners.

The Chairman said he would prefer that there be no flood-lights.

Mr. Solarik said it would not be necessary to use them, and he typically does not use up-lighting. He added that there will be lighting in the porch ceiling.

Rick O'Leary asked if the neighbors had any comments.

Mr. Solarik replied that they did not. He said there are only 4 neighbors, and none had raised any objections.

There were no further questions, and the Chairman closed the public hearing.

The Building Inspector told the Board that the situation is unique because the lot is non-conforming but does not benefit from lesser bulk requirements because it has the front yard width required for an R-4 zoning district.

Mr. Reilly read a draft resolution, including a condition that no flood-lights may be employed and any outdoor lighting installed must not be visible at its source from neighboring properties.

Motion by: Patrick Browne
Seconded by: William Monti

Mr. O'Leary: Aye
Ms. Sokol: Aye
Mr. Monti: Aye
Mr. Browne: Aye
Chairman: Aye

Area variance granted, as requested, with specific condition per discussion and agreement.

BA10-24 Jacqueline and Jeffrey Polish (6 Juengst Road) – **Area Variance** – To decrease the minimum setback requirements in an R-1 zoning district in order to permit a storage shed to remain as constructed, per Article V Section 250-15. A side yard setback variance of 20 ft. is requested (30 ft. required; 10.5 ft. existing).

Jacqueline Polish addressed the Board, stating that she has an 8 ft. x 10 ft. pre-fab shed for storage of a lawn mower.

Mr. Browne noted that the survey submitted with the application shows the house and shed, and asked if the buildings were included on the survey by the surveyor.

Mrs. Polish said the survey was done after a fireplace was added to her house, so the house was drawn by the surveyor. She went on to say that she drew in the shed. Her neighbor

recently had his property surveyed, and she used the surveyor's tape-line to measure the set-back to her shed.

Mr. Browne said he asked about the survey because the shed appears to be parallel to the side property line and the house, but it is not parallel to the house. He stated that this discrepancy could change the variance needed, and if the property is surveyed again in the future, Mrs. Polish may have to apply for another variance.

Mrs. Polish said she would measure the set-back again, and the Building Inspector said he will look at it also.

Mr. O'Leary asked how the shed was installed, and Mrs. Polish replied that it is on concrete blocks.

Mr. O'Leary commented that the shed could then be moved, and Mrs. Polish agreed that it could be.

Mr. Thompson pointed out that variances are normally granted for distances of feet and not inches. Mrs. Polish measured the distance from the property line to the shed to be 10.5 ft. but the variance request is for a setback of 10 ft., which allows a little margin of error. He stated that the presence of the surveyor's tapes was helpful.

Mr. Browne asked if the survey marker was near the shed, and Mrs. Polish answered that one cement marker was about 20 ft. ahead of the shed and there was another one farther behind the shed. She said she felt she had a good boundary line to measure from.

Mr. Monti asked if Mrs. Polish measured to each corner or used an average.

Mrs. Polish said she used an average. She added that her neighbor measured the shed's setback also and agreed that it is 10.5 ft.

Chairman Ivanhoe asked if the long side or the short side of the shed is parallel to the property line, and Mrs. Polish responded that the 8 ft. side is parallel.

Mr. Thompson pointed out that the Board may not grant a greater variance than that which was Noticed, so they should vote based on the distance given.

There were no further questions, and the Chairman closed the public hearing.

Mr. Reilly read a draft resolution, including a finding that the shed can be moved if its current location is ever a problem.

Motion by: William Monti
Seconded by: Deidre Sokol

Mr. O'Leary: Aye
Ms. Sokol: Aye
Mr. Monti: Aye
Mr. Browne: Aye
Chairman: Aye

Area variance granted, as requested.

BA10-25 Three Cocks and a Hen (4 West Cross Street) – **Appeal** – To overturn a determination by the Building Inspector that the applicants must pursue Planning Board Site Plan Review in order to landscape and add seasonal outdoor dining to the current use of an area adjacent to a restaurant in a GB district, per Article XVII Section 250-108A and 109.

Vincent Franze, architect was present. He said his clients' appeal was made with the utmost respect for the Building Inspector, but they would like the Board to reconsider Mr. Thompson's determination. Mr. Franze said he would like to see Croton Creek have outdoor dining as of right. He stated that there is a discrepancy in the Zoning Ordinance because there is a requirement in the GB district that all business be conducted indoors, but the definition of "restaurant" allows for food to be served outside the subject building, and the GB district is the only zoning district that permits restaurants.

Mr. Franze said the situation is unusual in that the restaurant fully occupies the subject property; outside the restaurant walls is another property owned by the New York City DEP. The DEP is amenable to the proposed use of the property and has offered a lease for its use. Mr. Franze stated that the Westchester County Department of Health is also agreeable, because there will be no increase in the total number of restaurant seats. When there is seating for 20 outside, there will be 20 fewer seats indoors.

Mr. Browne asked what will be done with the extra space inside the restaurant.

Mr. Franze replied that there will simply be more room. He added that the restaurant-owners anticipate greater demand for outdoor dining.

Deidre Sokol asked about entertainment.

Mr. Franze said there will be no entertainment or noise.

Chairman Ivanhoe asked how many tables will remain indoors.

Liam Harvey, one of the restaurant-owners, said they have a total of 54 seats in combinations of tables for 2 and 4; when there are 20 seats outdoors, there will be 34 indoors.

Mr. Franze stated that no structures are proposed, and he hopes the Board will find the situation falls under ordinary maintenance and repairs not subject to site plan review. He said that as part of an HUD re-development project in the past, the area was left a sort of unused no-mans-land and wasn't used except for access to the restaurant; in fact the only access to the restaurant is via the DEP property. The septic system is on the DEP property also. Mr. Franze said he hopes the Board will see the restaurant's plan for the area as an improvement of a somewhat forlorn, neglected piece of property.

Mr. Reilly stated that the only issue before the Board is the Building Inspector's opinion that the GB district definition and restaurant definition are in conflict. If the Board disagrees with Mr. Thompson, the applicants will not need to return to the Planning Board.

The Chairman asked if any work has been done yet, and Mr. Franze answered that only some clearing has already been done.

Ms. Sokol asked about lighting, and Mr. Franze replied that no additional lighting is proposed beyond the use of candles on the tables for ambience, as there is enough light from the parking lot.

The Chairman asked what some areas on the site plan are.

Mr. Franze said one is a service area. He pointed to an area where propane tanks are currently installed, an existing air-conditioning unit and a basement stairway.

Mr. Browne said he assumed that the septic system is in the same area as that proposed for outdoor dining, and he asked what kind of surface will be under the tables.

Mr. Franze said pre-cast, porous pavers on sand will be used, but there will be no slab or concrete.

Mr. Thompson said the land has a long history as being integral to the use of the building. He stated that the previous owners of the building had a licensing agreement with the DEP which expired when the building was sold. They have pursued its renewal for 4 years, and they have it now. The Building Inspector said it is also important that the DEP acknowledges the use of the land for outdoor dining.

Mr. Thompson said there is only a septic tank underground now; during the HUD renewal, what were once the septic fields became 2 large leeching pits under Back Street. He commented that Croton Falls has sandy soil, so this system works well.

Mr. Browne asked what the table configuration will be for the outdoor dining.

Mr. Franze replied that there will be 10 tables with 2 seats each.

Mr. Browne asked what would happen if the restaurant were busy and there were no more tables inside.

Mr. Franze replied that the restaurant would be limited then; part of the DEP stipulation is that no seating may be added. He added that the restaurant intends to use the outdoor area from June 1 to September 30.

Chairman Ivanhoe suggested that if the autumn is nice, they might want to use it for a longer period of time.

Mr. Harvey said they will stick to the agreement to end outdoor use by September 30. He added that they will maintain the property for the rest of the year.

Mr. O'Leary asked for specifics concerning lighting, hours of operation and sound.

Mr. Franze said there is enough existing, ambient light from street lights and lanterns at the front door that nothing more than candles on the tables will be needed. Regarding sound, he

said the DEP has stipulated that no entertainment will be permitted. He added that it is a low-key establishment/entertainment is not expected.

Jim Stake (another restaurant-owner) said the restaurant is open until 9 or 10 p.m. on weeknights and until 11 p.m. on weekends, and patrons would move indoors by 10 or 10:30 if they wish to stay on.

Chairman Ivanhoe commented that the proposal is a positive thing for the business district and there is some other outdoor dining in Town. He said he thinks the Town Board will probably correct the ambiguities in the Zoning Ordinance, so it seems there is positive feeling toward the applicants' proposal on a temporary basis. The Chairman added that the plan could add to the area.

Mr. Reilly stated that he and Roland Baroni (Town Attorney) discussed the issue at some length, including whether Mr. Thompson was right or wrong and the Town Board's intention to seek a Special Permit process, which will take long enough that the restaurant's hoped-for outdoor season would be over. Mr. Reilly said he and Mr. Baroni have not reached any conclusion yet. He suggested that the Board keep the public hearing open until he and Mr. Baroni submit certain papers and their opinion to the Town Board and the Building Inspector, and that Mr. Thompson promise not to issue any code violations until and unless his determination is voted on by the Town Board after hearing from the Town Attorneys or unless they take action with the Special Permit process.

Mr. Reilly suggested the applicants be permitted to proceed with their plan for outdoor dining, pending his and Mr. Baroni's opinion or the Town Board's. The caveat would be that the restaurant must comply with all other rules and regulations of the Town/conditions that are usually imposed, like limiting the hours of operation to 11 p.m. on weekends, no additional lighting but candles, no music piped outdoors or live entertainment. He said this way, the restaurant won't lose the season and the Board won't have to act precipitously in making a determination based on what is clearly one of many ambiguities in the local ordinance. Mr. Reilly said he felt it would be unfair to everyone to rule now. Mr. Reilly reiterated that the public hearing should be kept open and the applicants permitted to proceed, with the conditions previously discussed. He said the Board would probably not rule on the Building Inspector's opinion for some time. Mr. Reilly said his suggestion would be both practical and legal and allow the restaurant to have outdoor dining for the season. Later, the Zoning Ordinance may be changed or a process for Town Board-issued special permits may be instituted.

Mr. Monti asked if what Mr. Reilly said meant that the restaurant may proceed with the outdoor dining immediately.

Mr. Reilly said that was correct. After the fall, the applicants may be informed that Mr. Thompson was correct or the Town Board may have created a special permit for businesses like Croton Creek.

Mr. Browne asked if the applicants' investment could be protected somehow.

Mr. Reilly responded that nothing can be guaranteed, but the applicants have reason to think things will go their way in the future.

Mr. Franze said no further assurances would be necessary; he and his clients understand the risks.

Mr. Reilly commented that getting the DEP's approval was no small accomplishment.

Mr. Thompson said he has not issued a violation to Croton Creek; he sent them a letter stating that they must stop working and go to the Planning Board. Mr. Thompson explained that if he issued a violation it would trigger a problem with the Application Processing Restrictive Law, necessitating a waiver from the Town Board before the applicants could even make application to the Board of Appeals. He stated that he will not issue a violation.

The Building Inspector asked if Mr. Reilly meant that the application will remain on the agenda every month.

The Chairman pointed out that other agenda items have been left on/open for many months. He announced that the public hearing will remain open until such time as the Town Board corrects ambiguities in the Zoning Ordinance or some agreement is reached.

Mr. O'Leary commented that if the definition of a restaurant includes serving food anywhere on the premises, perhaps that might be allowed by right, and landscaping improvements would also be allowed by right. He asked if the need for some kind of special permit requirement had triggered the issue.

The Building Inspector explained that the issue was the definition of "structure" and the requirement for a building permit. He said the ZBA might want to request that the Town Board clarify this also. Currently, a structure is defined as an assembly of materials attached to the ground. Mr. Thompson explained that people come into the Building Department to see if things they want to do require a building permit, and they nearly always do. He said the applicants propose that what they want to do is a landscape improvement. Many would say that a patio with no concrete would not seem to require a building permit, but it is an instance of 2 materials being put on the ground, which requires a permit.

Mr. O'Leary said he did not see the plan for the area outside the restaurant as involving a structure, because it will be on grade and there will be no foundation or concrete.

Mr. Thompson said the problem is that patios require building permits, and he may only issue building permits for residential or farm uses; all other uses must go through site plan approval first. Another problem is that the definition of restaurant conflicts with GB district uses. Mr. Thompson pointed out that the indoor requirement could not be met by a gas station either.

Mr. Reilly said these are the reasons he recommended leaving the issue open with no resolution that will further muddle the issues in the district while the Town Board is seeking a means of taking care of the situation.

Mr. Browne asked why the application would remain before the ZBA.

Mr. Reilly explained that the applicants challenged the Building Inspector; Mr. Thompson has not withdrawn his opinion and the applicants have not withdrawn their application. The Town

attorneys would not recommended at this time, before further study is done, that Mr. Thompson withdraw his determination, so it remains open for now.

Mr. Browne commented that if the Town Board changes the rules, the applicants won't need the Board of Appeals.

Mr. Reilly said that was correct and the application will be withdrawn then.

Mr. Monti asked if the presence of the air-conditioning units won't be uncomfortable for outdoor guests.

Mr. Stake said the air-conditioning unit will be fenced and arbor vitae planted to screen it from view and attempt to muffle the sound.

Mr. Franze said the restaurant is in a quasi urban setting, so it would not be expected to be very quiet any way.

Mr. Monti asked if the compressed gas units pose any kind of problem.

Mr. Thompson answered that it can be resolved/the restaurant-owners will handle it. He stated that there may be no source of ignition within 10 ft. and no smoking.

Mr. Stake added that there will be no smoking permitted.

Mr. Browne asked if the furniture will only be moved indoors in bad weather.

Mr. Stake answered that the tables and chairs will be taken in every night.

Chairman Ivanhoe stated that the public hearing will remain open until there is word of some progress with the Town Board. He wished the applicants good luck with the outdoor dining season, and the meeting was concluded.

Respectfully submitted,


Janice Will, Recording Secretary