

BOARD of APPEALS
Public Hearing
April 12, 2012
8 p.m., The Annex

MEMBERS PRESENT: **Richard O’Leary**
 Cynthia McKean
 William Monti
 Brian Ivanhoe, Chairman

MEMBER ABSENT: **James Murphy**

OTHERS PRESENT: **Bruce Thompson, Building Inspector**
 Janice Will, Recording Secretary
 Members of the Public

Chairman Brian Ivanhoe called the April 12, 2012 Town of North Salem Zoning Board of Appeals meeting to order.

Commenting that the agenda was quite long, the Chairman stated that the ZBA would try to move things along while also giving everyone a fair hearing and also take some items out of order.

Chairman Ivanhoe set the next meeting for Thursday, May 10, 2012.

The minutes of the February 9, 2012 meeting were unanimously accepted. *(No meeting in March.)*

PUBLIC HEARINGS

BA12-17 Episcopal Society (296 Titicus Road) – **Area Variance** – To replace an existing non-conforming free-standing sign with a larger sign, per Article IX Section 250-37 and 250-44. A variance of 10 sq. ft. is requested (8 sq. ft. permitted; 9.16 sq. ft. existing; 17.5 sq. ft. proposed).

Jack Caley stated that he was representing St. James’ Church in their applications for a sign, and they would like a variance for the square footage of the proposed new sign so that it will be large enough to accommodate different messages.

Chairman Ivanhoe stated that the Board was in receipt of a referral from the Planning Board dated March 13, 2012. The Chairman asked Mr. Caley if he had a sketch of the sign.

Mr. Caley showed the Chairman a hand-drawing that was included in the application packet.

Cynthia McKean asked if the new sign will be on June Road or Titicus Road, and Mr. Caley replied that it will be on Titicus Road.

William Monti asked if Mr. Caley was making the applications to the Planning Board and the ZBA as some sort of project.

Mr. Caley responded that it was a project to earn an Eagle Scout badge from the Boy Scouts.

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

Gerald Reilly read a draft resolution.

Motion by: William Monti
Seconded by: Cynthia McKean

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Chairman: Aye

Chairman Ivanhoe asked if the new sign is to be illuminated, and Mr. Caley answered that it is not.

Area variance granted, as requested.

BA12-18 Salem Golf Club Associates LLC (18 Bloomer Road) – Area Variance – For the installation of 2 pillar-mounted 2 ft. x 3 ft. illuminated signs, per Article IX Section 250-37 and 250-40.1B. Permission for a second sign (only 1 permitted), and a front yard setback variance of 9 ft. (10 ft. required; 1 ft. proposed) are requested.

Todd Zorn, manager of Salem Golf Club, was present.

Mr. Monti asked if the existing pillars are to be taken down.

Mr. Zorn replied that they are, as one has been damaged.

Chairman Ivanhoe noted that the new pillars will be a little different from the existing ones/constructed of natural stone.

Ms. McKean asked if the existing, hanging sign is to be taken down.

Mr. Zorn said the hanging sign will remain; it can be painted/repared.

The Chairman asked where the club's address will be posted, and Mr. Zorn responded that it will be added to the existing hanging sign.

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

Mr. Reilly read a draft resolution.

Motion by: Cynthia McKean
Seconded by: William Monti

Mr. O'Leary: **Aye**
Ms. McKean: **Aye**
Mr. Monti: **Aye**
Chairman: **Aye**

Area variance granted, as requested.

BA12-13 Westchester Exceptional Children Inc. (520 Route 22) – Area Variance – To legalize 2 as-built sheds, for construction of a third shed and a greenhouse, and installation of a generator and underground LP storage tank, per Article V Section 250-15. A rear yard setback variance of 75 ft. (75 ft. required; 0.58 ft. existing/proposed) and a development coverage variance of 6% (40% permitted; 46% proposed) are requested.

John Caralyus, member of the Board of Directors of WECS, addressed the Board. Mr. Caralyus stated that the school has an outdoor garden and now, thanks to the Reisler and Keeler Foundations, they are planning to construct a greenhouse. Mr. Caralyus explained that directly to the rear of the school is Route 684, a major highway. He said there are already 2 old sheds at the rear of the school, and another shed is needed. Referring to a submitted photo of the greenhouse, he stated that it will be a permanent structure and meet Building Code requirements. Finally, he explained that the school would like to have a back-up generator, adding that the school would be well-suited for use as an emergency center in the future.

Ms. McKean said that when she went out to make site inspections she could not access the rear of the school, and she asked if 684 is all that's behind the school.

Mr. Caralyus said that was correct. He added that the new shed will be attached to the back of the building.

Chairman Ivanhoe asked how the generator will be powered, and Mr. Caralyus replied that it will use propane, the tank to be installed by Heritage Fuel. *(tank will not require variance)*

The Chairman stated that the Board had received a letter of referral from Cynthia Curtis of the Planning Board, recommending granting of the variances. He noted there were no other questions or comments and closed the public hearing.

Mr. Reilly read a draft resolution.

Motion by: **William Monti**
Seconded by: **Cynthia McKean**

Mr. O'Leary: **Aye**
Ms. McKean: **Aye**
Mr. Monti: **Aye**
Chairman: **Aye**

Area variances granted, as requested.

BA12-09 Titicus Road Commons LLC (104 Titicus Road) – Area Variance – To allow continued use of an existing non-conforming driveway for a non-residential use (12 ft. required; 9 ft.-existing/proposed), per Article VIII Section 250-30A.

Michael Sirignano, attorney, was present for the applicant. He stated that he had been before the Board for approval of an accessory apartment above the office on the subject property the previous November. He explained that he has more recently been with the Planning Board re site plan approval, and the issue of the existing driveway came up. Mr. Sirignano said the existing driveway is about 9 ft. wide; a commercial use like the office requires a 12 ft.-wide drive. He said the drive is over 100 years old; he would like to keep it as is, and the Planning Board is in favor of this also. Mr. Sirignano said the driveway is safe and stable to use, and he noted that a representative of the church next door called to say they had no objection to the variance.

Mr. Reilly informed the Board that they could not make a resolution until after the Planning Board's SEQRA review is finished, but he recommended they give Mr. Sirignano a sense of the Board.

The Chairman said he has seen the driveway, and he asked Mr. Sirignano if a shrub to the left will be removed to improve visibility.

Mr. Sirignano said he will remove the shrub.

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

The ZBA indicated that they all viewed the application favorably.

BA12-12 Elizabeth/Gregory Allen (242 Mills Road) – Area Variance – To decrease the minimum front and side yard setbacks in an R-4 zoning district, per Article V Section 250-15. A front yard variance of 7 ft. (68 ft. proposed; 75 ft. required) and a side yard variance of 5 ft (75 ft. required; 70 ft. proposed) are requested for construction of front and rear porch additions to a non-conforming, single-family dwelling.

David Dunne, architect, was present. He explained that the single-family residence is non-conforming. A new front porch will be entirely within the required front yard setback and a corner of a new back entry will be within the required side yard setback, so both will require area variances.

The Chairman noted that the front porch will be small and only a small portion of the rear addition will require a variance. He said the additions will enhance the appearance of the house, which is in a prominent location in the neighborhood. Chairman Ivanhoe said that if any exterior lighting is installed, it must not be visible at its source.

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

Mr. Reilly read a draft resolution, noting that there were no objections from any neighbors and any lighting must not be visible at its source.

Motion by: William Monti
Seconded by: Cynthia McKean

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Chairman: Aye

Area variance granted, as requested.

BA12-11 Shelley Grasinger (991 Peach Lake Road) – **Special Permit** – To amend existing Special Permit BA11-12 (for the keeping of up to 2 horses) to include one additional horse, to be sheltered in the existing 3-stall barn, per Article XIII Section 250-72.

Shelley Grasinger stated that she received a special permit in 2011 for 2 horses; a mare and foal. She has found that she cannot take one animal off the property without the other, so she would like to have a third horse she can work with the foal and the mother or with the third horse separately. Ms. Grasinger said she has 3 stalls already and 3 pastures as well. She intends to have an extra weekly manure pick-up and keep the same size dumpster she has now.

Mr. Reilly asked for the size of the subject property, and Ms. Grasinger said it is 2.17 acres.

Ms. McKean commented that the property is mostly paddock-space.

Ms. Grasinger explained that she rides on a farm next door.

Chairman Ivanhoe asked how the paddocks are holding up.

Ms. Grasinger said they are good, although some rainfall would be helpful.

The Chairman asked how long the horses are turned out for, and Ms. Grasinger explained that they are out all day.

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

Mr. Reilly read a draft resolution, noting that there is adequate stall and pasture space and all the same conditions in BA11-12 will apply to the amended special permit, BA12-11.

Motion by: Cynthia McKean
Seconded by: William Monti

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Chairman: Aye

Special permit amendment granted, as requested.

BA12-14 Robert Daros (4 Deveau Road) – Area Variance – To decrease the minimum front and side yard setbacks per Article V Section 250-15 and Article XIV Section 250-79(A) (because the non-conforming lot is subject to R-1 bulk requirements). A front yard setback variance of 24 ft. (51 ft. existing/required; 27.4 ft. proposed) and a side yard setback variance of 15 ft. (20 ft. required; 5 ft. proposed) are requested for construction of a detached 3-vehicle garage.

Viktor Solarik, architect, addressed the Board, describing the single-family residence on the subject property as a sprawling ranch with a short driveway. He said his client has historical vehicles and needs a place to store them. Mr. Solarik said the proposed garage would be at the edge of the existing parking area, which is a good place for it, but it will be in the setbacks.

Mr. Solarik said the 1.5-story garage is to have a loft for storage, adding that he tried to keep the roofline low. He explained that the grade of the subject property goes uphill, so the rear of the garage will be less exposed than the front. Passing around elevation drawings, Mr. Solarik pointed out that the rear elevation of the garage area is 5 ft. higher than the front.

The Chairman asked what the ridge height of the garage will be, and Mr. Solarik replied that it will be 27 ft.

Chairman Ivanhoe asked how many parking spaces there are on the property now.

Robert Daros, property-owner, stated that there are about 2 and a half plus an existing garage. He explained that there is insufficient height in this existing garage, and he also keeps his pool equipment there.

The Chairman commented that it is a tight lot, and he could not see where else a garage could be constructed.

Chairman Ivanhoe asked if the loft area will remain unfinished, and Mr. Solarik said it will.

Mr. Reilly asked if there will be any plumbing or lights in the loft.

Mr. Daros said there will be lighting.

Chairman Ivanhoe said there should be no spot- or floodlights on the exterior, and Mr. Solarik said none are planned.

The Chairman commented that the rear of the garage will face a neighboring property, and he asked how the exterior will be finished.

Mr. Solarik said the garage will be built with board and batten siding and stained.

Mr. Daros said he has not decided what color stain to use yet, but Mr. Solarik assured the ZBA that it will be a natural tone.

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

Mr. Reilly read a draft resolution, noting there were no objections to the application, there is no reasonable alternative location for the garage, and any exterior lighting must not be visible at its source.

Motion by: William Monti
Seconded by: Cynthia McKean

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Chairman: Aye

Area variance granted, as requested.

BA12-15 Baxter Road LLC (141 Baxter Road) – **Special Permit** – To amend existing special Permit BA08-39 (commercial boarding operation for up to 13 horses) to include boarding, breeding, and personal use of up to 29 horses; construction of a 16-stall breeding barn with 1 employee dwelling unit and a garage with living quarters for 4 employees, modification of an existing sand ring and additional paddocks/fencing, per Article XIII Section 250-72. This application supersedes application BA12-04.

BA12-16 Baxter Road LLC (141 Baxter Road) – Area Variance – To decrease the minimum front yard setback from 100 ft. required to 65 ft. proposed for installation of a generator and construction of a farm equipment storage garage per Article V Section 250-15; to permit parking within a required (front) yard per Article VI Section 250-20; and to permit construction of 4 employee dwelling units in a single structure (3 dwelling units permitted) per Article XIII Section 250-72 H(6).

Matthew Edmonds (owner of the subject property), Tina Burbank of Kellard Sessions Engineering, and Tasos Kokoris (architect) were present.

Chairman Ivanhoe asked Mr. Kokoris to describe what may have changed in the special permit application.

Mr. Kokoris stated that the access driveway was changed to a single entrance and follows the bridle path. He said there are also architectural changes to the storage garage and barn.

The Chairman asked if the new driveway is to be paved, noting that Baxter Road is an historic dirt road.

Ms. Burbank said the driveway will not be paved, and Mr. Edmonds added that Item 4 may be employed.

The Chairman said it is important to keep it natural as it was surveyed in George Washington's time/paving would be inappropriate.

Mr. Edmonds said he wouldn't want the drive paved.

Noting a stone pier with a call-box at the proposed gate, Chairman Ivanhoe asked the secretary what the Historic Preservation Commission had said about the proposed drive.

The secretary replied that the HPC approved the driveway, stressing the importance of maintaining mortar-free rubble walls and asking that as few trees/saplings as possible be taken down. She added that the proposed gate is approximately 150 ft. back from the road; the HPC's jurisdiction only goes 25 ft. from the center of the road back, so they did not discuss the gate or pier.

Mr. Kokoris said the gate is positioned this way so there will be enough room for trucks to pull in well off the road and also to conceal it from view.

Chairman Ivanhoe asked if closing the gate wouldn't cut off access to the bridle trail.

Mr. Edmonds said that is not his intention; riders should be able to pass to the side of the gate/he just wants to keep vehicles out.

The Chairman noted that the Kennel property is next to the proposed driveway entrance, and he asked if they have an easement for their drive.

Mr. Edmonds said he believes so.

The Chairman asked if the bridle trail has an easement also, but Mr. Edmonds did not think so.

Chairman Ivanhoe asked Mr. Edmonds how he would feel about providing permanent access to it, adding that he is aware that a lot of the property is already in a conservation easement.

Mr. Edmonds said he is happy for the use to continue, but he is not anxious to put a permanent encumbrance on his property.

Mr. Kokoris said that in laying out the driveway, care was taken to make sure riders may continue on the bridle path.

The Chairman said he understood Mr. Edmonds not wanting an encumbrance on his property, but it would be nice to see the use of the trail continued.

Mr. Edmonds said he and his wife would consider the request. He added that they do not police the bridle trail although he has noticed damage during periods of heavy use which he has let go, but he is concerned about an open-ended arrangement for its use.

The Chairman said the trail is mostly used by the Goldens Bridge Hounds and is not very well-known. He said he would like Mr. Edmonds to consider the proposal so a future owner of the property could not decide to close off access to the trail.

Mr. Edmonds said he would be happy to consider the Chairman's suggestion.

Mr. Reilly asked if Mr. Edmonds would agree that his property has had relaxed considerations because it is in the Agricultural District, commenting that he would otherwise have had to go before the Planning Board.

The Building Inspector said Mr. Edmonds would only be before the Planning Board for the lot-line change.

Mr. Reilly suggested that perhaps the Planning Board would consider a bridle trail easement as part of their review of Mr. Edmonds' lot line-change application.

The Chairman said he would prefer to keep the subject with the Board of Appeals.

Mr. Reilly said it might be appropriate for the ZBA to condition their approval of the special permit amendment on the bridle trail easement, perhaps temporarily/to be reviewed again.

The Chairman said he appreciated that Mr. Edmonds and his wife would be willing to consider the easement.

Mr. Reilly asked the Chairman if he would want the Edmondses to consider the easement with the trail association or with the ZBA.

The Chairman said he thought the most appropriate thing in lessening the impact and maintaining the same or less use of the trail, would be something relating to the driveway and Kennel Realty which would be with the Golden Bridge Hounds; making use of the trail a condition of the special permit would open it up to increased use which he did not think they should ask of the Edmonds.

Mr. Edmonds reiterated that he would be happy to consider preserving use of the trail.

Asking for the height of the proposed pier with call box at the new gate, Chairman Ivanhoe asked if the one at the house had been reviewed by the Historic Preservation Commission.

Mr. Kokoris said he thought it had been existing.

The Chairman said there had been no pier or call box before. He added that the gate should have been reviewed by the HPC also, but it's done now.

Mr. Kokoris said he had been unaware at the time, and Mr. Edmonds said it had been part of a construction plan.

The Building Inspector said he had missed the historic road implications also.

Mr. Kokoris said the new gate will be about 3 to 3.5 ft. tall, so the pier will need to be about 4 ft. high.

Mr. Edmonds said it just needs to be high enough for the call box gooseneck.

Chairman Ivanhoe said a variance would be needed if the pier was to be any taller, but the Building Inspector pointed out that the gate/call box will be out of the setback.

Mr. Reilly said the Board could still make the pier height a condition if they wish.

Mr. Thompson said 4 ft. is pretty low for the pier, saying it should be in proportion to the gate. He pointed out that regular paddock fencing is 4.5 ft. high.

Mr. Edmonds said he didn't mind if that if the Board wanted to restrict the height of the pier.

Mr. Kokoris stated that the call box could be free-standing without a pier.

Chairman Ivanhoe said whatever is decided/agreed to regarding the applications, everything would be contingent upon the plat for the lot-line change being filed.

Mr. Edmonds said this is being worked on.

Chairman Ivanhoe asked the secretary if the HPC would be issuing a Certificate of Appropriateness.

The secretary responded that in the case of historic roads, the HPC makes a recommendation to the Town Board that they grant a C of A.

Mr. Reilly asked if the lot-line change is still before the Planning Board or if it has been approved.

Mr. Edmonds said he believes it has been approved, subject to revision of the plat.

Ms. Burbank said the Planning Board's approval is complete.

The Chairman said he wanted to be sure that the final plan/plat do not indicate a 15 ft.-wide asphalt driveway/should read "unpaved driveway".

Mr. Reilly said the Board could put a condition in the resolution that the plat be changed.

Ms. Burbank said the plat illustrates the lot-line change but does not show the driveway. The Board has copies of a site plan, not a plat.

Mr. Reilly said it is important that all documents match; whatever has "asphalt" on it needs to be changed.

Ms. Burbank reiterated that it won't be on the plat, but Mr. Reilly said it may not be on the site plan either.

Mr. Monti asked that the drawings submitted to the Board of Appeals be changed also, and Mr. Burbank said she will see to it.

Mr. Edmonds joked that his wife would be extremely unhappy if the driveway were paved.

Mr. Monti said Mr. Edmonds had spoken of an existing apartment, but he could not remember what was said about it.

Mr. Edmonds said his old barn has living quarters in it, but they are not legal (there is no Certificate of Occupancy) and there are Fire Code issues. He stated that renovation was an option but not practical. He added that he also wants more room for a breeding operation, so the new barn plan was revised to include living quarters (in addition to those in the new storage garage).

Mr. Kokoris said the dwelling unit in the old barn will be removed.

Chairman Ivanhoe asked about the living space in the new barn.

Mr. Kokoris said it will be for the trainer.

The Chairman asked if there will be fire separation between the barn and the apartment, and Mr. Kokoris said there will be.

Mr. Thompson said that to have a mixed use in an old building would require addition of sprinklering and fire separation; difficult to accomplish in an older structure. He said he believes this is why Mr. Edmonds decided to build a new, code-compliant barn from scratch with a mixed occupancy. He explained that at least the kitchen facilities and full bath will be removed from the old, illegal apartment.

Mr. Kokoris said it may be used as a tack room, and Mr. Edmonds said it may be a break room for the staff.

Mr. Monti asked if it will be clear that the space is no longer a dwelling, and Mr. Edmonds said it will be.

Chairman Ivanhoe asked about exterior lighting of the new buildings.

Mr. Kokoris stated that lighting will be limited/indirect, placed under the eaves of the barn.

The Chairman asked if there will be any landscape lighting.

Mr. Edmonds said there will be just enough for safety, adding that he has motion-sensitive lights now.

The Chairman said a condition about lighting limitations will be in the resolution.

Ms. McKean commented that the property adjacent to the one requiring front yard variances is also Mr. Edmonds', and he said Ms. McKean was right.

Mr. O'Leary asked Mr. Kokoris to describe the dwellings in the new storage garage.

Mr. Kokoris said there will be 2 apartments; 1, 2-bedroom unit for the manager and 1, 3-bedroom unit for 3 grooms.

Mr. Thompson explained that the Zoning Ordinance considers each employee to equal one dwelling unit. He said this was done to limit the number of grooms living on a property. Mr.

Thompson stated that there may be one apartment, but each groom who resides there counts as 1 dwelling unit.

Mr. Monti noted that there will be 2 bedrooms in the barn and 5 in the storage garage.

Mr. Kokoris said the apartment in the barn will be 1 employee dwelling unit.

Mr. O'Leary commented that the building permit describes the storage building as a 2-family residence with garage.

The Building Inspector said a 2-family residence with garage is acceptable for purposes of complying with the residential building code. A 2-family residence with mechanic shop or workshop would not be acceptable for safety reasons.

Mr. Edmonds stated that he wants to limit the number of structures by combining a tractor storage facility and accommodation for staff in one building .

Chairman Ivanhoe asked where the farm might have shop space. He said he brought this up because the farm will have a lot of equipment that needs to be maintained.

Mr. Edmonds said there is a covered area being used at present, but the Chairman said an indoor facility would be best if possible.

Mr. Monti asked if the farm manager will have family residing with him.

Mr. Edmonds said he expects so; that is the reason for the 2-bedroom unit in the new barn.

Mr. Monti asked how many children would live in the apartment, and Mr. Edmonds replied that he thought probably 1 or 2.

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

Chairman Ivanhoe asked Mr. Reilly if the Board could vote on the applications.

Mr. Reilly replied that they could because they were not referred to the ZBA by the Planning Board, and the lot-line change has been approved by the Planning Board.

Mr. Reilly read a draft resolution of BA12-15, noting that all plans are to be changed to reflect that the new driveway will not be paved/paving will not be permitted, and the employee dwellings will be 1 unit in the new barn and 4 units in the new storage garage.

Re special permit amendment BA12-15

Motion by: *William Monti*
Seconded by: *Cynthia McKean*

Mr. O'Leary: *Aye*
Ms. McKean: *Aye*
Mr. Monti: *Aye*
Chairman: *Aye*

Special permit amendment granted, as requested, with specific conditions per discussion and agreement.

Mr. Monti asked if all the power supplies will be buried.

Mr. Edmonds said he thought so, adding that it comes onto the property via a pole. He added that it might be more cost-effective to bring it onto the property to a point and then bury it.

The Chairman commented that when interior poles (those on private property) are damaged during a storm, they are usually last on the list of repairs done by the power company, so that is a good reason to bury the power also.

Mr. Kokoris said he has concerns about the transformer placement on Baxter road, but he will look into it. He added that bringing a pole onto the property as far as the gate will make it fairly easy to conceal.

Mr. O'Leary said he noticed a pedestrian easement on the plan and asked if it is the same as the bridle trail.

Looking at the site map, Chairman Ivanhoe said it is actually the Kennel Realty driveway to a barn.

Re area variance BA12-16

Motion by: William Monti
Seconded by: Cynthia McKean

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Chairman: Aye

Area variance granted, as requested, with specific conditions per discussion and agreement (including removal from all plans, maps, plats, etc. of notes indicating pavement for the new drive and the requirement that any lighting installed be invisible at its source).

BA12-10 Ashok Nayyar (15 Baxter Road) – **Appeal** – To overturn a decision by the Building Inspector to revoke Certificate of Compliance #0734 (for a fence), per Article XVII Section 250-108A and 250-109.

Ashok Nayyar addressed the Board, stating that he was present to appeal a determination by the Building Inspector to cancel the Certificate of Compliance for a fence that has been on the subject property since 1999. Mr. Nayyar said Mr. Thompson bases this decision on a visit to his property when he saw a monument which he said indicates that the fence is 10 from (off) his property. Mr. Nayyar said the monument was placed last year by his neighbor's surveyor, and his neighbors (Holly and Peter Thomson, 13 Baxter Road) sued him over this. He said he believes the fence is on his property, and there is a suit in County Court over the dispute.

Mr. Nayyar said his neighbors used the same argument as the Building Inspector, but the decision by the Westchester County Court that the neighbors' survey is valid was struck down by the Appellate Division of the New York State Supreme Court. The two parties have returned to Westchester Supreme Court for a decision as to whose property the fence is on.

Mr. Nayyar said he thinks the ZBA should wait and let the court decide the issue; otherwise he intends to go back to the Supreme Court and bind not just his neighbors, but the Town also with a cease and desist order; a response to which he feels would be a waste of the Town's resources. He stated that he wants the court to decide; if the fence is not on his property, he will remove it immediately. In the meantime he wants the CC to remain in effect and to leave his fence up, unless the Town agrees to re-install the fence after the court case is decided. Mr. Nayyar said he understands why his neighbors want the fence down, but he feels it should be decided by the courts and not by the Building Inspector. Mr. Nayyar said he could point to specific parts of the ruling that indicate that the neighbors' survey and monument are not valid.

Mr. Reilly said the Appellate Court overturned a summary judgment because the surveyor did not provide an affidavit. The case is back for trial now. The Appellate decision did not determine ownership either way. He stated that the idea that the Town would pay to re-build Mr. Nayyar's fence is not at issue. Mr. Reilly noted that the fence was put in; the same surveyor has surveyed both properties (and the subdivision); all the surveys are sufficient; and it is clear to him (Mr. Reilly) that the Board of Appeals may determine whether the Building Inspector is correct or not in revoking the CC/they do not need to wait for a decision by the court in a lawsuit. Mr. Reilly stated that Mr. Thompson is the person who is bound to issue Certificates and to revoke them if he deems them to be improper. He said that, based on Mr. Nayyar's analysis of the situation, it seemed as if the Board of Appeals might as well go out of business and leave everything to the Supreme Court.

Mr. Reilly reiterated that all the Supreme Court did was send the case back because the County judge's summary judgment was inappropriate because there was an inadequacy of the affidavit. He stated that the jurisdiction of the ZBA is to determine not any of the other issues, but only the issue of whether or not to overrule Mr. Thompson's decision. In Mr. Reilly's opinion, having reviewed all of the matters involved, the facts of when the application was received and where the fence is in relation to the cement monuments which were put in by the surveyor (who surveyed both properties and the subdivision) in the same place where the original marker pins were located, the determination of Mr. Thompson fits the facts/there is no legal reason for the Board to issue a stay. If Mr. Nayyar feels he needs to go to court over this, he will do so. Mr. Reilly said that is why Article 78 is in the Code.

Chairman Ivanhoe asked the Building Inspector what time limit was given to Mr. Nayyar to remove the fence.

Mr. Thompson stated that he gave his opinion that the Certificate of Compliance was issued in error, because the permit application stated that the fence was to be installed on the property line but it was not. He said he has a partial survey submitted with the Building Permit application that shows where the fence was to have been installed (on the property line), and the survey also shows that the property line is 80 ft. long at that point. Subsequent to the installation of the fence, measuring from the corner where there was an iron pin on the original survey back to the fence the distance is approximately 62 ft.; 18 ft. short of the

property line. Mr. Thompson stated that in Mr. Nayyar's property file, there is a survey (conducted in 2000 by the same surveyor) that he submitted for another reason in 2006 that shows the as-built fence on Mr. Nayyar's survey to be 18 ft plus or minus shy of the property line/on the neighbor's property. He said this agrees with a field measurement that he took from the concrete pier at the corner to where the fence is; all surveys pertaining to this issue show the same line to be 80 ft. long. Starting from the survey submitted with the building permit application for the fence, that property line is 80 ft. long; today, where that concrete monument is there was an iron pin (referenced on the same survey) indicating the same 80 ft. distance. Mr. Thompson said he was confident in his decision because it follows every survey submitted; one with the fence application in 1999; one done in 2000/submitted in 2006 and one from 2009 when the concrete monuments were put in – all done by Donald Donnelly.

Mr. Nayyar said he did not put up the fence himself/he paid someone to install it, and it is possible that it is not entirely on his property. Mr. Nayyar stated that, notwithstanding the Board's view, he has a lawyer and will go to court if he has to. Mr. Nayyar referred the Board to page 3 of the Appellate Division's decision (included as part of the Appeal) where it is stated, "However this survey did not constitute competent evidence of the alleged encroachment ..."

The Chairman asked if the Court specified why the survey was not competent, and Mr. Nayyar replied by reading the end of the sentence quoted above, "... as it was not accompanied by an affidavit of the surveyor ..." Mr. Nayyar said any of the evidence provided by the surveyor is in question because he did not provide an affidavit/the court could not validate the survey. Mr. Nayyar said the surveyor will be in court, and his attorney (Mr. Nayyar's) will bring another surveyor also.

Mr. Reilly stated that he had reviewed everything submitted and saw nothing to indicate that the Building Inspector's opinion was wrong; there is no evidence to change his mind. He said there is nothing in the Court decision to stop Mr. Thompson from doing his job. Mr. Reilly proposed a resolution that the Board, based on the evidence provided, determine that Mr. Thompson's opinion was correct.

Mr. Nayyar stated that the Appellate Division did not have Mr. Thompson in mind; they responded to a judgment by the County Supreme Court that the property belongs to the neighbors and said it was not proven. They stated that the survey is not valid and the case must be litigated. Mr. Nayyar asked the Board to give the Court the time to figure out whose land it is. He said either the Board decides the Appellate Division's stay of the County Court's decision was sufficient or he asks the Court to stay the ZBA's decision also if they think he should rip out his fence before finding out in court whether or not it is on his property.

Mr. Monti asked if Mr. Nayyar was disputing the original subdivision plat lines and intersecting points, and Mr. Nayyar said he was.

Mr. Monti said he was referring to the original property lines shown when Mr. Nayyar purchased his property. He asked if there was any dispute over the intersecting property lines.

Mr. Nayyar said there was not at the time, but he is disputing it now.

Mr. Monti asked if Mr. Nayyar thinks he bought a piece of property not represented on the original plan.

Mr. Nayyar said that was correct.

Mr. Monti asked how Mr. Nayyar will know what piece of property he bought.

Mr. Nayyar said he has brought in another surveyor who has worked with the coordinate numbers and says they do not line up with the surveys. His lawyer agrees with this and it is the basis of the discussion in court.

Mr. Reilly stated that the point he made to the Board was based on what Mr. Thompson has in front of him; no one knows what may come up in court in the future.

Mr. Monti said he was asking about the drawing that was filed when the property was transferred to Mr. Nayyar. He asked what constitutes the proper description of the property.

Mr. Reilly said it is the survey and the legal description fitting/they should be the same; if they are not, the lawyer should be sued. Mr. Reilly stated that there has been no indication that the legal description (per the deed) and the survey diverge.

Mr. Nayyar asked why Mr. Reilly would say that, and Mr. Reilly replied that all the information available at present fits together/nothing else has been offered.

Mr. Nayyar said that is what he is asking the court to decide, but Mr. Reilly said it is for Mr. Thompson to decide.

Mr. Monti said that was he was trying to get at; seeing that the verbiage and the plat coordinate.

Mr. Reilly said that everything he has seen comports.

Mr. Monti asked, if the 2 comport, was Mr. Nayyar saying the monument is in the wrong place.

Mr. Nayyar said he and his lawyer were saying that the survey is not the be-all-and-end-all property description.

Mr. Reilly countered that if that were the case, Mr. Nayyar should have something else to present to show that the survey is wrong. Without that, Mr. Thompson could only do what he did.

Mr. Nayyar said the written coordinates do not line up with what is represented on the survey, and this is the basis of his lawsuit, which should be decided by the court and not by the Board of Appeals.

Mr. Monti asked if Mr. Nayyar hadn't purchased title insurance when he bought his property; and if so, was he saying it is wrong as well.

Mr. Reilly said the title company should be in trouble if Mr. Nayyar is correct.

Mr. Nayyar asked what he could expect from the title company. He said he does not want a small sum of money; he wants the property.

Mr. O'Leary asked what the time frame is for the litigation, what the value of the fence is and what the size of the property discrepancy is.

Mr. Nayyar stated that the legal issue has gone on for several years already, although his lawyer informs him that it should proceed quickly now before the County Supreme Court. He said the summary judgment delayed the whole process.

Regarding the cost of the fence, Mr. Nayyar said he did not know the amount, but the issue is taking it down and putting it back up. He guessed that the total might be \$2,000 or \$3,000.

Mr. O'Leary asked what the size of the contested area is, and the Building Inspector replied that it is 18 ft.

Mr. Reilly stated there is no way to predict just how long the trial in County court will take, and if there is an Article 78 proceeding, it will need to be litigated again. He said he thought it would be 4 to 5 years before the issue is resolved.

Mr. O'Leary asked if there have been other outstanding zoning issues between the neighbors.

Mr. Thompson said his letter summarized everything, and he did not want to try and describe it all again. He stated that there are 11, 8-ft. sections of fencing that he believes are off the property; 9 of them are about 18 ft. onto the Thomson property and 2 that start down toward another concrete monument are right on the property line. There are a total of 15 sections of fence plus one short section at the right front of the property that is near the line.

Mr. O'Leary asked if there are any other problems with the fence.

The Building Inspector said the application was made for an as-of-right 4 ft. fence within the setback for which no variance was required. The fence is 4 ft. 6 in. +/- in height in places and 3 ft. 6 in. high in others because it has a scalloped top; height averages are always used, so this is not an issue.

Mr. Thompson said the issue is that the application shows very clearly where the fence was supposed to be installed along the property line, parallel to and in front of Mr. Nayyar's 2 front pillars; a length of 80 ft. The survey states the length of that property line is 80 ft. Measuring from the concrete monument to the right of the pillars and down to where the fence is, the length is 62 ft. +/-; continuing another 18 ft. from there to the other concrete monument makes up the total of 80 ft. between the 2 monuments which is clearly referenced on all surveys Mr. Thompson has seen.

Mr. Thompson stated that as part of a summary to be provided to the ZBA, he took the surveys from the building permit application for the fence and the one from 2000 (submitted in 2006) showing the as-built fence. He said he was not going out and measuring back to

where the fence is and applying it to the original application; he is working with an as-built survey in addition to taking those measurements, which comport with what is on the as-built survey.

Mr. O'Leary asked if the second survey shows that the fence is off by 18 ft., and Mr. Reilly replied that it does.

Mr. Thompson said he was providing the summary paper-work to the Board so they would have exactly what he has in the property file. He said Mr. Nayyar's application was reasonably complete, as it includes the Building Inspector's letter to Mr. Nayyar explaining that the CC for the fence was to be revoked.

Mr. Nayyar stated that the Thomsons have a temporary deer fence that Mr. Thompson said would be removed by April 15, so that issue is no longer part of his appeal.

Mr. Thompson said he will check to see that the fence is down on April 16 (the 15th is a Sunday).

Don Rossi, attorney for Holly and Peter Thomson (Mr. Thomson was present), said Mr. Reilly had summarized things accurately but he wanted to make sure, given Mr. Nayyar's proclivity for litigation, that things are on the record to make the case as strong as possible in the event that the Board decides to uphold the Building Inspector's decision. He said Mr. Reilly's description of what occurred in court was accurate; the court was never presented with a survey that in any way contradicts the Thomsons' surveys, those the Building Inspector has reviewed or the subdivision map (shown to the Board). Mr. Rossi said the subdivision was before the Planning Board for 2-3 years and was considered a major subdivision because of the potential for change in the character of the neighborhood that people perceived. The property used to be called LaRanda and the subdivision is called Meadow Lane.

Mr. Rossi said that in the lower court no survey or sketch was offered to contradict what the Thomsons claimed, which was why the court granted the summary judgment that there were no triable issues of fact. This occurred after 4 years of litigation and delay tactics seeking arguments, in Mr. Rossi's opinion, to try and get the Thomsons to give up. When the case went to the Appellate Division a provision was found that many are unaware of; that under the CPLR, for a court to accept a survey as prima facie evidence, there should be an Affidavit of a Surveyor. Mr. Rossi said it was never requested by the lower court, but Mr. Nayyar's attorney found the requirement, and the summary judgment was overturned. He explained that the Thomsons will now return to Westchester County Supreme Court where hopefully they will allow this case to be re-argued and decided in their favor again. Mr. Rossi presented an original affidavit from the surveyor which he asked to be included in the ZBA's record.

Mr. Rossi said that the surveyor (Don Coleman) is the same surveyor who worked for Don Donnelly on creation of the subdivision plat, and Mr. Coleman also did the surveys the Building Inspector has spoken of. He noted that the last paragraph in Mr. Coleman's affidavit states that he told Mr. Nayyar on numerous occasions that his fence encroaches on the Thomson property. Mr. Rossi explained that the court did not say the survey was invalid; they found that it was not prima facie evidence without the affidavit from the surveyor, a technicality. Mr. Rossi offered copies of the affidavit to the Board members.

The Chairman noted that the affidavit was dated April 11, 2012.

Mr. Rossi said the absurdity of Mr. Nayyar saying he does not want to remove his fence but will spend years in litigation instead when there is no evidence that there is any substance to his claims can be seen as vexatious litigation that is being prolonged for the sake of maintaining a fence in a place that there is no possible claim to. Mr. Rossi asked Mr. Nayyar to remove the fence, adding that if he wins in court, he may put it back for a relatively small amount of money. Mr. Rossi stated that he was amazed that Mr. Thompson's decision was being questioned and appealed, as the maps speak for themselves.

Mr. Rossi handed out a blown-up a section of the Coleman survey (with Mr. Coleman's seal affixed), stating that it is entirely consistent with the subdivision plan. He explained that it is convoluted because of the intersection of the traveled way of Meadow Lane, the driveways of the 2 properties, and a 20 ft.-wide trail easement all depicted on it. He stated that every metes and bounds works. Mr. Rossi said the subdivision plat is harder to read because the distances are not exact, while they are on the individual lot surveys, but it is consistent with Mr. Coleman's multiple surveys.

Mr. Rossi said the building permit application for the fence was based on one of these surveys; a mistake was made in Mr. Nayyar's favor, and the fence should be moved immediately.

Mr. Reilly said the Board of Appeals was not there to decide whether or not the fence should be moved; rather, his appeal places a burden on Mr. Nayyar to show that the Building Inspector was wrong. The ZBA does not have to make a decision about moving the fence; That may occur in the future when it will be up to the Building Inspector to issue a Violation or whatever is called for. The ZBA needs only to decide whether or not the appeal has any substance. Mr. Reilly stated that in his opinion, Mr. Nayyar hasn't brought anything new.

Chairman Ivanhoe said Mr. Nayyar is asking the Board of Appeals to overturn the Building Inspector's decision, but he has not shown them anything to contradict the information Mr. Thompson's decision is based on. The fact that Mr. Nayyar is still in court is not sufficient reason for the Board to overturn Mr. Thompson's decision.

Mr. Nayyar pointed out that he had not sued the Thomsons; they sued him. Their lawyer was present; his was not. He said his appeal states that Mr. Thompson said the fence is not on his own property, but it is not for him or the ZBA to say; it should be decided by the courts.

Mr. Ivanhoe agreed that it is not up to the ZBA to decide whether or not the fence is on Mr. Nayyar's property, but he does need to provide a document that shows that the surveys Mr. Thompson used and his field measurements are wrong, which Mr. Nayyar has not done.

Mr. Nayyar said it is possible that the fence was not installed where it was supposed to be, but it is still on his property.

Chairman Ivanhoe said Mr. Nayyar needs to show the Board that it is on his property, which he hasn't done. The Board must vote based on the information Mr. Thompson had available to use.

Mr. Nayyar said he understood, but he will get a lawyer and he will get a stay against the Town. He said Mr. Reilly could come to court also.

The Chairman agreed that this was Mr. Nayyar's right. He said the Board would consider anything else Mr. Nayyar had to show them.

Mr. O'Leary said he could not see on the drawing section where the fence was proposed to be installed, so he asked if it was installed according to the building permit applied for.

Mr. Thompson stated that first there is what the fence was purported to be; he has no pictures, but it was described as being 4 ft. high. There is a picket fence that he measured, so he feels it is what was described. Then there was a line drawn/highlighted showing where the fence was to be installed. The Building Inspector said the bold line covers the property line, and he would not approve a drawing like that, although it is what he has to work with.

Mr. Nayyar said he drew the line on the survey as part of his appeal application. He said he did not know what was drawn for the Building Permit application.

Mr. O'Leary noted a Building Department "Approved" stamp on the drawing section (blow-up), but he said it does not show the fence/there are no notes about the fence.

Mr. Thompson said he assumed the highlight was intended to indicate the location of the fence on the property line.

Mr. Nayyar said he thinks it indicates where the fence is now, but he did draw in the highlight himself just recently/he did not know what was submitted with the Building Permit application.

Mr. O'Leary said that if that was the case, the drawing with the Building Department stamp did not show the fence.

Mr. Thompson noted that the Building Permit application states, "fence on front perimeter of the property as specified on attached survey". He said the highlighted line approximates the front property line; both the survey section and the subdivision plat show that line to be 80 ft. long. A later (2000) survey showing the as-built fence also shows the property line to be 80 ft. long, but the fence is not on the property line; it is inboard/onto the Thomson property. He said the concrete monuments are where the iron pins were that are noted on the previous survey.

Mr. O'Leary asked if both the pins and the monuments were placed by the same surveyor, and Mr. Thompson said they were.

Mr. O'Leary asked Mr. Nayyar if he had anything to show that the markers are not placed correctly.

Mr. Nayyar said that towns go with surveys, but courts do not. He stated that he has the metes and bounds, but they are just a lot of numbers to him/he does not understand them.

The Chairman said Mr. Nayyar should have done something with that information for the meeting, because the legal description matches up to the survey.

Mr. Rossi said the issue has been in litigation for 4 years. His clients tried to get Mr. Nayyar to move the fence before they sued him. He stated that the coordinates are on the filed map, and any surveyor will use those.

Mr. Nayyar asked how Mr. Rossi would know that. He commented that he wished he had brought his lawyer and asked if the Board would give him more time.

Mr. Rossi said Mr. Nayyar had plenty of opportunities to submit a new survey, and he has not done so.

Mr. Nayyar stated that he will present evidence at the hearing.

Mr. O'Leary said that based on the maps and monuments, he wanted to know if Mr. Nayyar would move the fence if it cost \$1000. If Mr. Nayyar gets a new survey that shows something different, he could move it back.

Mr. Nayyar said he has a driveway easement which he may use. He said Mr. O'Leary's suggestion wouldn't work, because fencing can't be re-installed; it is thrown away once it is taken down. It would have to be replaced with a new fence. Mr. Nayyar stated that in his view, the fence is on his property and he wants to keep it.

Mr. Rossi said the driveway easement is specific and does not comport to what Mr. Nayyar said.

Mr. Nayyar said he knows the easement is a separate matter.

The Chairman said the Board would not go into a discussion of the driveway easement.

Mr. Rossi suggested that if the fence is on his clients' property, perhaps they will remove it.

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

Mr. Reilly made the following recommendation to the Board:

Based on review of the evidence present in the appeal of the Building Inspector's decision, there is no evidence to support any decision other than that Mr. Thompson made the appropriate decision based on the information he had to work with. There is no hint that the fence is not 18 ft. onto the neighboring property, and the Appeal should be denied.

To support the Building Inspector's determination that Certificate of Compliance #0734 should be revoked and deny the appeal:

Motion by: *William Monti*
Seconded by: *Cynthia McKean*

Mr. O'Leary: **Aye**
Ms. McKean: **Aye**
Mr. Monti: **Aye**
Chairman: **Aye**

Appeal denied.

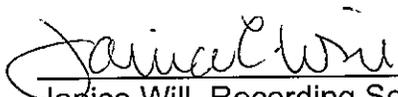
Mr. O'Leary said the applicant really should remove and possibly re-build his fence; although this would be costly, it would be the neighborly thing to do.

Mr. Nayyar stated that the Thomsons sued another neighbor recently also.

Peter Thomson said that was absolutely untrue.

The Chairman closed the meeting at approximately 10:30 pm.

Respectfully submitted,



Janice Will, Recording Secretary