

Town of Copake Zoning Board of Appeals

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Meeting Minutes of October 23, 2014

The regular meeting of the Zoning Board of Appeals of the Town of Copake was held on October 23, 2014, at the Copake Town Hall, 230 Mountain View Road, Copake, NY.

An audience of about 40 was present as well as,

Edward Ferrato: Building Department.

Susan Sweeney: Town Board Liaison, Jean Mettler : Town Board.

Bob Haight: Planning Board.

Jeff Nayer : Town Supervisor.

The meeting was called to order by Hilarie Thomas at 7:00 PM.

Roll call:

Present at this meeting were: Frank E. Peteroy, Hilarie Thomas, Michael DiPeri, Jon Strom ,Adam Resnikoff was excused.

Kenneth Dow: Copake Town Attorney was also present.

Veronique Fabio was present to record the minutes.

Reading and approval of the minutes of preceding meeting:

~ Hilarie Thomas asked for a motion to waive the reading of the August 28, 2014 minutes and approve them as well as the September 25 minutes.

~ Frank Peteroy indicated the August minutes were not corrected yet.

Jon Strom made a motion to approve the September minutes, Michael Diperi second, all agreed.

September 25, 2014 minutes are approved.

Correspondence:

10/02 –land use training October 27.

10/07 - From David Silver request for online zoning map of Copake.

10/07 - Letter of interest for ZBA from John Hilliard.

10/08 - Invoice sent to H. Freeman for payment of bill from Clark Engineering.

10/09 - letter of interest for ZBA from Joseph Malhiero.

10/14 - Planning Board memo for Fournier and Shagbark applications.

10/14 – From Christine Nicholson Parmalee , letter in support of BMC.

10/15 - letter of interest for ZBA from Adam Resnikoff and David Goldman.

10/15 – From Kim Burlaley in support of BMC.
10/15 – Letter from Rock solid Development.
10/20 – Ken Dow “No Action” letter.
10/21 – From Arlene Alberg supporting the ZBA decision on BMC.
10/21 – From Jacquie Burdick.
10/23 – 55 letters in support of BMC.

Public Hearing:

**1) 2014-11, Fournier, 8 Snyder Pound Rd. Tax Map # 186.2-10.
Area variance for roof over 10x10 porch.**

Mr. and Mrs. Fournier came to the table.

~ Hilarie Thomas asked for a motion to open the public hearing. Jon Strom made the motion, Michael DiPeri seconded, all in favor.

Hilarie read the Planning Board memo in reference to the application.

January 23, 2015

Fr: Bob Haight, Chair, Planning Board

At the October 2, 2014 Planning Board meeting the members reviewed the application of Donald and Gail Fournier on Snyder Pond Road.

After reviewing the Site Plan Check List the Board approved the Site Plan subject to the approval of the Rear Variance and the additions of the Outside Lot Dimensions, Address, Zoning District, Size of the Lot in Acres, and any trees on the property constituting screening be added to the site map.

Mr. and Mrs. Fournier added the trees on the site map as per Planning Board request.

~ Jon Strom noticed that there was a mistake on the applicant’s paper work; a 54’ side yard variance requested, the Fourniers corrected the form to a side yard variance of 29’.

Hiarie asked if anyone had comments, being none;

~ Hilarie Thomas asked for a motion to close the public hearing. Jon Strom made the motion, Michael DiPeri seconded, all in favor.

~ Hilarie indicated that the ZBA had 62 days before rendering a decision, but she believed that the members will be able to make a decision tonight.

Hilarie proceeded to read the 267-b Permitted action by board of appeals.

a. The Zoning Board of Appeals shall have the power, upon an appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law, to grant area variances as defined herein.

b. In making its determination, the Zoning Board of Appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination, the board shall consider:

1; Whether an undesirable change will be produced in the character of the Neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

Answer: NO

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;

Answer: NO

3; Whether the requested area variance is substantial;

Answer: NO

4; Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district;

Answer: NO

5; Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.

Answer: Yes

c. The Board of Appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

The board tonight will vote on;

Relief from section 232-24 B (2) (a) [2]. And [5].

Relief from the density control schedule.

A Side yard area variance of 29'.

Roll call vote: Frank Peteroy, YES.
Hilarie Thomas, YES.
Michael DiPeri, YES.
Jon Strom, YES.
Variance granted.

**2) 204-12, Christopher Johnson, Shagbark farm. 85 Cage Rd.
Tax Map # 166.1-87.
Area variance for 8foot deer fence.**

~ Hilarie Thomas asked for a motion to open the public hearing. Jon Strom made the motion, Michael Diperi seconded, all in favor.

Christopher Johnson came to the table.

Hilarie Thomas read the Planning Board memo.

January 23, 2015 From Bob Haight, Chair, Planning Board

Project

Location: State Route 22, Copake

At the October 2, 2014 Planning Board meeting the members reviewed the application for an eight foot fence to be installed on Route 22 by Shagbark Farm.

The Board had concerns that the amount of fencing being installed around the Town is getting close to the point where it can start causing safety issues for the people. They questioned whether the Town can make any decisions regarding this as it is considered agricultural. They referred to the NYS Department of Agriculture and Markets Circular 1150, Article 25AA, 305-a which states: " ... and shall not unreasonably restrict or regulate farm operations within agricultural districts.....unless it can be shown that the public health or safety is threatened."

Mr. Haight, whose property is in close proximity to where the fence is being requested, acknowledged seeing bear, deer, turkey and Coyote in this vicinity and the Board noted that this area will be blocked off by the proposed fencing. They pointed out that the access routes these animals might take are in close proximity to an adjoining campground increasing their continued concerns about the amount of areas that are being blocked off by fencing.

The fact was also brought up that with the animal population increasing the safety aspect of the increased fencing in the area will cause more and more animals to enter roadways and adjoining properties. An e-mail from absent member Jon Urban acknowledged his support for Shagbark Farms however a majority of the Board recommended that you take into consideration the safety issues this could cause for people in the surrounding areas as well as the well-traveled roadways used by all.

~ Jon Strom asked Mr. Johnson how he would respond to the Planning Board concerns. Mr. Johnson said that before the fences were erected around Sky Farm, he had spoken to DEC head biologist and she had said that there was no problem for wildlife unless they were going to fence off thousands of acres.

Mr. Johnson stated that there are not too many options to protect the trees from deer damages; fences, noise cannons or shooting the deer.

~ Bob Haight wanted to clarify the fact that he was not opposed to the fence however some members on the planning Board were concerned with the rerouting of the animals because of all the fencing going on lately.

~ Mr. Johnson explained that the fences are “permeable “to small animals, they can squeeze under, also the gates are left open sometimes.

~ Hilarie asked what the future fencing plans were, if any. She noted that acreage available to wild life is taken away little by little and the deer that would be grazing in open fields end up in people’s yard and on the roadways creating safety issues. More and more residents are looking to fences to protect themselves against the deer and lime disease. She stated that she understood that a business has to be protected but this type of protection is detrimental to the residents surrounding the fenced off acres.

~ Mr. Johnson explained that the farm has aproximatly1300 total acres, there are a lot of open wooded areas left for the deer, and 859 acres are in production. He cannot estimate what the future will be as far as the fencing goes. Without fences damage caused by deer can run up to \$20,000 in one night.

~ Frank Peteroy questioned the type of trees that were grown.

~ Jon Strom noted that the application before the board is to fence off 51 acres. He suggested that this topic might be something for LURC to work on.

~ Someone in the audience asked if the type of fence was similar to what has been installed so far. Mr. Johnson responded that the same type will be installed.

A discussion followed between Johnson and Hilarie Thomas about the large deer population in the area and how it could be controlled, next to impossible in Hilarie’s opinion.

~ Jeff Nayer noted that the management of the deer population is a DEC problem.

~ Ken Dow pointed out that the ZBA had a request for fencing for crop protection recently and that fencing is a standard farming practice in an area that supports agriculture.

There were no more questions from board members or the audience.

Jon Strom made a motion to close the public hearing, Michael DiPeri seconded, all in favor.

Hilarie indicated that the ZBA has 62 days before rendering a decision, but she believed that the members will be able to make a decision tonight.

Hilarie proceeded to read the 267-b Permitted action by board of appeals.

a. The Zoning Board of Appeals shall have the power, upon an appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law, to grant area variances as defined herein.

b. In making its determination, the Zoning Board of Appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination, the board shall consider:

1; Whether an undesirable change will be produced in the character of the Neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

Answer: NO, but the issue is debatable in Hilarie's opinion.

~ Frank Peteroy asked if the fenced lots are leased or owned.

~ Johnson responded that all the land is owned.

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;

Answer: NO

3; Whether the requested area variance is substantial;

Answer: NO

4; Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district;

Answer: NO

5; Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.

Answer: Yes

c. The Board of Appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

The board tonight will vote on;
Area variance to fence off 51 acres with 8foot deer fence.

Roll call vote: Frank Peteroy, YES.
Hilarie Thomas, Abstain.
Michael DiPeri, YES.
Jon Strom, YES.
Variance granted.

New Application:

1) **2014-13, Lindsay LeBrecht, 285 Lakeview Rd.**
Tax Map #155.18-1-41.

Area Variance for installation of a fence higher than 4' in front yard and 6' in side yard.

Ms. LeBrecht came to the table to present her application.

~ Hilarie read the building department memo.

Tax Map # 155.18-1-41

District – R-2

The Applicant needs relief from section 232-9 (F) Fences and Walls.

Ms. Lebrecht intends to install a fence higher than the required four 4'

In the front yard and higher than six 6' feet in the side yard.

Ms. LeBrecht explained that when she sits on her deck she looks at stored boats next door. She intends to install fences only where there is no vegetation screening between her and the side of the marina next to her property.

~ Jon Strom clarified the location of the proposed fence. He asked that Ms. LeBrecht brings a more detailed sketch and measurements of the length of fence she is proposing as well as the style for the public hearing.

The application will be referred to the Planning Board.

Hilarie Thomas asked for a motion to accept the application for a public hearing on November 20, Michael DiPeri made the motion, Jon Strom seconded, all in favor.

2) 2014-14, Keifer/Freshman, SouthWest Colony Rd.
Tax Map #165.14-2-7 &165.14-2-8.

Area Variance: Construction within 100 feet of a water body.

Linda Chernewsky came to the table, she represents David Keifer and Andrea Freshman.

~ Hilarie read the building department memo.

The Applicant needs relief from section 232-9 P (1), from 232-P (2) and from 232-24 B (2) (a) [5].

A Front Yard Area Variance of 20'. A rear Yard Area Variance of 42.3'.

Jon Strom noted that the property is located near water.

~ Linda indicated that it was an undersized lot, the house now is only 18' away from the water and it will be rebuilt 38' away from the shore line. The septic system will be completely redone and relocated to the side of the property. A new well is now used. An asbestos testing was done by C.T. Male Associates from Latham NY, report dated September 2014. Removal of a small quantity of asbestos was approved by the NY health Department; April 2014. Asbestos was removed prior to demolition.

Perk tests were done all is ok. Dry well will be 75' from the water.

~ Frank Peteroy asked about the building proposed height. Linda indicated it will be 35'.

Frank also inquired about minimum size of the proposed septic tank for the number of bedrooms.

Linda Chernewsky explained that following the recommendations of the Health Department the septic tank will be 1000Gal. and the proposed treatment tank will be 800Gal.

The application will be referred to the Planning Board.

Hilarie Thomas asked for a motion to accept the application for a public hearing on November 20, Michael DiPeri made the motion, Jon Strom seconded, all in favor.

Closed Public Hearing:

2013-26 Berkshire Mountain Club @ Catamount ski area. Tax Map #157.1-11.100
Special use Permit, for a 3 building resort hotel project.

Harry Freeman from Rock Solid Development was present.

- ~ Ken Dow recapped that the public hearing for Berkshire Mountain Club was indeed

closed. At the September meeting the ZBA had voted on the special use permit, a 2 to 2 vote followed which resulted in a status somewhat unclear ; does it mean: a failure to act on the application by the board, a rejection, or a denial of the application?

The result of the vote constitute neither an approval nor a denial which leaves the matter open without a determination by the ZBA.

There is the 2001 “Tall Trees” case where there was a tie vote on a variance application, at the time, the court decided it was a denial .

A year later the legislature amended the statute and stroked out the language and created a provision whereas the ZBA is exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to *grant a variance* or *reverse* any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied.”

The current statute makes clear that a default denial can occur only in connection with the exercise of the ZBA’s *appellate* jurisdiction. Under the provisions of section 232-28(C.) of the Copake Code, which gives the ZBA “original jurisdiction for the consideration of special use permits,” the ZBA’s jurisdiction in this matter is not appellate, and the default denial provision of Town Law § 267-a is therefore inapplicable.

In Ken Dow’s opinion no action was taken and the ZBA could take on the application and revisit the vote.

~ Susan Sweeney, town board liaison inquired if the ZBA had scheduled interviews tonight to replace the missing board member.

It was confirmed by Hilarie Thomas that interviews will take place.

~ Ken Dow added that the ZBA has 62 days to reconsider the application without needing to go through a re-hearing process. A re-hearing process would have to take place only if there had been a determination made on the application

~ Frank Peteroy questioned how the ZBA can reconcile the by-laws and what Ken Dow just talked about. He read;

Section 4- 4.4 “A *tie vote or favorable vote by a lesser number than the required majority shall be considered a rejection of the application under consideration.*”

~ Ken Dow indicated that by-laws were completely subordinate to state laws.

~ Hilarie noted that the ZBA by-laws mirrored the town laws.

~ Ken Dow noted that these by-laws are obsolete, there are some standards allowed for granting variances that are completely contrary to state laws.

~ Susan Sweeney indicated that if a new member is nominated in time for the next meeting the issue could be revisited and the tie vote resolved.

~ Ken Dow indicated that a new member would have to get up to speed and be up to date with the Berkshire Mountain Club application before being allowed to vote on that particular matter.

~ Harry Freeman questioned the procedure for the closed public hearing, is the public allowed to comment?

~ Hilarie Thomas indicated that directly impacted parties could speak as well as town board members. Comments on the procedure are allowed. Hilarie reiterated her request for independent counsel for the ZBA in this case.

~ Jon Strom wanted to share the outpouring from the public supporting the project. He noted that so far 55 letters were received asking for a revote on the project and only one letter supported the ZBA decision.

~ Ken Dow noted that the board's decision cannot be subject to public pressure. The evidence have to be considered not the sentiments of the town. The public hearing is closed.

~ Jon Strom indicated that there was a disagreement between the ZBA members concerning the determination for a resort/hotel or condominium.

A lengthy discussion went on between Ken Dow and Hilarie Thomas on the Resort/Hotel versus Condominium.

~ Ken Dow noted that if there is a reason to reverse the determination from 2003 it would take a majority of the votes to change the position. A member cannot do it on his/her own.

This board could have reversed the determination not an individual.

~ Frank Peteroy, reading the table of use from the Copake building Code from 2004 and 2005 indicated that nothing has changed.

Condominium use is a prohibited use under the code.

~ Hilarie again requested independent counsel to be appointed.

~ Andrew Gilchrist supported the chair, Hilarie Thomas's request for independent counsel. In his opinion it is necessary taking in consideration the position of the town on the project. He acknowledge a conflict

.
A person in the audience asked what will happen if a decision is not made within the 62 days remaining?

~ Hilarie indicated that the applicant has options, one of them being to file article 78. (An appeal to the ZBA's decision in Supreme Court).

~ Frank Peteroy shared that he had done a lot of research on the project. He has 50 years' experience with zoning. The safety and welfare of the public is paramount, he cannot ignore the flaws in this project. The proposal is a time share/condominium, which is not allowed under Copake Town Building Code. The ZBA would be responsible if anything happened in case of an accident and people were hurt.

~ Ken Dow debated "Who has jurisdiction over what?" The ZBA should be concerned only with the issues within the scope of the board. This is a special use permit.

~ Mr. Tuczinski (Representing the Alpers),addressing himself to Ken Dow, declared that in this case independent counsel was absolutely necessary taking in consideration who K. Dow is representing and the support for the project from the town supervisor. In his opinion there is a conflict of interest. In fairness to everybody, independent counsel should be appointed. Two boards with different positions cannot be represented by the same attorney.

~ Ken Dow defended that he has taken no position on the matter and has not weigh on the project in any way.

~ Jeff Nayer vehemently clarified his position in the matter. At a public meeting in "Four Brothers", he was merely answering questions.

~ Jon Strom expressed that he never felt any bias in his interaction with Ken Dow, he has never presented himself as an opponent or proponent to the project.

~ Jeff Nayer indicated that Hilarie Thomas should take her request for independent counsel to the town board.

Hilarie asked for a motion to go in executive session, Jon Strom made the motion, Michael Diperi second, all in favor.

Interview for Jeffrey Judd.

Meeting was adjourned at 10 PM.

Respectfully submitted.

**Recording Secretary.
Veronique Fabio**

