

TOWN OF WARWICK
ZONING BOARD OF APPEALS
JANUARY 30, 2017

Members Present:

Jan Jansen, Chairman

Mark Malocsay, Co-Chairman

Diane Bramich

Kevin Shuback

Attorney Robert Fink

Chris Daubert

CHAIRMAN JANSEN: Do I have a motion to accept
the minutes from the ZBA meetings of October 24, 2016 and November 28, 2016?

MR. MALOCSAY: So moved.

MR. SHUBACK: Seconded.

PUBLIC HEARING OF Second Amended Application of Black Bear Campground – for property owned by Rita P. Smith as Trustee of the Rita P. Smith Living Trust and located at 197 Wheeler Road, Warwick, New York and designated on the Town tax map as Section 8 Block 2 Lot 27.14 and located in an RU District for an interpretation of whether the applicant is subject to the limited occupancy provisions of Section 164.49.2V of the Warwick Code for the existing 74 sites, adding the application for a variance of Section 164-49.2(F)(1) for 35 of the existing 74 camp sites allowing encroachment wholly or partially within the 100 foot setback(s). **Continued from November 28, 2016 ZBA Meeting.**

CHAIRMAN JANSEN: Today we have the continuing open Public Hearing on Black Bear Campground. Anyone here who would like to address this application?

ATTORNEY FINK: To inform the applicants of the chief objectives, I received a call from Mr. Muldoon, who asked the status of where we were on this. I told him that tonight's meeting would probably result in reaching a consensus in February with a formal resolution being signed in March.

CHAIRMAN JANSEN: Anyone here to make a presentation? Otherwise, I will close the Public Hearing.

MR. FURST: My name is John Furst, Attorney for Mr. Neeman, I would like to summarize the following: The Planning Board never intended to approve the campsites within the setbacks of 1980; they never had the authority or the intent. The approvals were connected with the accessory recreational facilities; nothing to do with the campsites themselves. The 74 sites were generally confirmed in the 1980 survey, but not as uses shown today. There was no intent in 1980 to approve the location of the sites. Mr. Neeman has no issue to the 74 campsites previously approved; his only issue is in respect to the location of the campsites and how they have changed since 1980. He would like to submit an affidavit stating that there were no campsites, in 1980, within 200 feet of the property line. An aerial photograph was presented showing the position and number of campsites present from 1974 to 2017. It used to be very rural; now the campsites are lined right up to the property line. I would also like to submit that the Building Inspector's interpretation never covers the location and now the Town is now misrepresenting this.

MR. GOLDEN: My name is Richard Golden and I represent an adjacent neighbor, the Estates of MiraBella, I would like to submit some photos showing that my client's property is visible from the campsites. If the variance is granted, we want some conditions attached to ensure that the sites within the setbacks be screened in such a manner so that they are not visible by my client. I do want to emphasize that what we dealing with here is not with respect to whether or not there are "X" number of campsites authorized, it is

where they were authorized. In my opinion, it is clear from the law, the Planning Board could not have authorized the location of sites within the setbacks adjacent to my client's property. They don't have the power to do it. I don't think that their approval says that it has to be within that or is allowed to be within that setback and even if it did, it is illegal. Only this Board can allow that setback variance to be modified so you cannot rely upon prior Planning Board approval. The proof isn't there that it was previously authorized. The proof is required to be put forth by this applicant that, in fact, there was an authorized, legal basis to have those there. There has been no proof put before you that says that there is anything, any proof of any approval from this Board, which is the only Board that can allow structures to be within the setback adjacent to my client's property. Therefore, there are none and what you are looking at is whether you ought to do it now. I think you should not as it is a substantial change in the neighborhood which outweigh the benefits to the applicant. Moving a few of the sites back to the setback is not that difficult. One of your charges is that you're required, by law, to give the minimum variance necessary to achieve their goal. If they can achieve their goal without a variance, then it should not be granted; especially one that modifies the character of the neighborhood. So the Planning Board could not have given any kind of approval for them to be within the setback. I think they ought not to be. I think you should deny the variance as it does not satisfy the five factors that you should consider.

MR. MALOCSAY: We were given a site plan that was signed and dated, showing these campsites in a time frame of that being noted, done. Anybody could have looked at that and said that this is wrong and have that within 30 or 60 days afterwards to either an article 78 or, I don't think there is a way to contest it once it is filed unless an article 78.

ATTORNEY FINK: I was going to question the authority but assuming that is correct, that the Planning Board legally gives its decision, then its authority, you can't contest it unless you file your article 38, Article 78 within thirty days that it is filed. As is argued by both attorneys, the Planning Board had no legal authority to grant a variance so that the back field was taken, is irrelevant. My question is going to be that I am inclined to agree with that although the Town attorney is not. Do you have any authority?

MR. GOLDEN: I can look that up and in a post hearing submission in respect to my research. This is jurisdictional in nature, which is different from challenging things that the Planning Board has jurisdiction to give an opinion on and then you challenge what they have jurisdiction. This to me is annulities from the very beginning, therefore there is no need to challenge it and you cannot depend on annulities, by my opinion. I can look for case law on that and I can provide that to the Board if you can give me leave to do it.

ATTORNEY FINK: Perhaps John has something, but you can submit it to Jay Myrow. We will close the Public Hearing except for legal authority.

MR. MALOCSAY: Anybody coming before us, submits plans that are signed and dated and we are given a setback requirement, and we are going off of the survey, at what point do we not look at these anymore. Because they might not be accurate. It is a lot of research to go back and figure it out. We keep going back to the 1980 site plan, and the sign and dated. It was in existence in 1966 and I believe it was the first. And I thought they were before the Planning Board in the early '70's, was it from '66 on their first site plan and nothing until 1980?

ATTORNEY FINK: I was not aware that there was any more than two.

MR. MALOCSAY: So we know in '66 the setback requirement was 300 feet and a set of plans in 1980 that show sites there in the early '70's. They were not as elaborate as they are now.

MR. GOLDEN: I am not sure they were adjacent to my client's property.

MR. MALOCSAY: I will agree with you.

MR. GOLDEN: I do not have any familiarity to say they should or should not be there. I just know from my client's adjacency that I did not see anything, even in the 1980 survey that set forth that the Planning Board even intended to say there ought to be a breach of that setback. It did not seem to me that the Planning Board said to allow them within the setback. It was rather a general statement of the general location. Even if they did do that, my argument is that they did not have the authority to do it. So therefore it is an annulity, that this Board cannot rely upon.

MR. MALOCSAY: I understand what you are saying; but if they did it, they made a mistake. It was there and that there was time for anybody to look at it and say that they weren't supposed to do it. And that didn't happen. We have a site plan that was signed, dated and nobody contested it.

MR. GOLDEN: From my point of view, it really doesn't matter. If, what the Planning Board did was generally within their jurisdiction, then it is enforceable unless someone challenges it within 4 months. If they acted outside of their jurisdiction, that does not give this property owner any rights.

MR. MALOCSAY: Do you think it's possible that between 1966 to 1980 that there was an application before the ZBA and for some reason, we don't have a record of it?

MR. GOLDEN: Certainly, that is a possibility. But what you have before you is that the applicant is asking for a variance. It is up to the applicant to make that proof. If the applicant cannot come up with that proof, then you cannot consider it.

MR. FURST: I agree with Mr. Golden, my emphasis is on the intent. I don't think the Planning Board, in 1980, had any intent to approve the location of the campsites. In the 1980 minutes, they talk about the accessory recreational facilities. There was no intent to approve those locations of the campsites. I think those 1980 minutes need to be reviewed.

ATTORNEY FINK: As far as the 300 feet and 100 feet, I am shocked that it was mentioned and that's all.

MR. FURST: Somebody raised it and nobody followed up on it. I reviewed all the town's records: Zoning, Planning and Building and I did not see any other approvals between 1965 and 1980.

MR. MYROW: I submitted numerous letters on behalf of the Town, those letters simply set forth what I believe are the facts. I have question about holding this open for written submissions?

ATTORNEY FINK: Just for that one point. I am inclined to agree that if the Board did something it had no power to do, why, if no one takes an appeal and objected to preclude it from raising that issue, years later, if possible, I would like to see a case on that with the Planning and Building or any Board.

MR. MYROW: Preliminary research I did on that issue, is quite clear that if you do not appeal within the appeal time, you're foreclosed. A year or more later is too late. As to the jurisdictional question, is whether or not the Planning Board had the authority to grant site plan approvals. Not whether or not they applied the wrong standard, the jurisdictional question is whether or not the Planning Board had the authority to grant what they granted. If they made an error in it, that was clearly challengeable in an article 78 proceeding. But in terms of jurisdiction, the Planning Board is the board empowered, given the jurisdiction to give approval of site plans. They did not exceed that. Otherwise, you are allowing these site plans to be challenged years on out and that was not the intent. Jurisdiction here is not grounds to nullify this approval from 37 years ago.

ATTORNEY FINK: There is another issue. Did they approve the campsites as they exist within 100 feet?

MR. MYROW: No matter what the application, they signed and approved an amended site plan. Whatever is in the four corners of that document, is approved. It supersedes any previous site plan.

ATTORNEY FINK: Please submit any material by 3 weeks out so that the other attorneys have a chance to review and respond to it.

MR. KLEISTER: In regards to the sites around Mr. Golden's plan, we have no problem in communicating to resolve the vegetation issue.

ATTORNEY FINK: Just by virtue of your application, you feel that a variance is needed and that the 1980 site plan really wasn't determinant as to the existing location.

MR. KLEISTER: That's correct. If the 1980 map gave us the rights to have these sites in that location, we wouldn't be here. We are before the Board because we don't have the authority to the 1980 map. We are here because we have not gained the lawful method from the Town to keep those sites actively valid. The reason we raise the 1980 map, is because part of the map shows how these sites came into being, how long they have been in operation and how they impacted nearby properties. The Town of Warwick had a new Zoning Code in 1977 or 1978 and one of the provisions of that code was that there were non-conforming uses or structures in the town at the time that the zoning law was passed, they were allowed to continue indefinitely. We raised the issue of the 1980 map and the accompanying minutes that show the Board they we didn't start using these sites in 1980. They had been in existence well before that. The map proves that by showing electric lines that are going into that area, water lines going into that area. We are using that as support to show the Board we were utilizing these sites well before 1980. We have been using these sites for several years before 1980. The dialogue between the owner of this property and the Board, in 1979 and 1980 demonstrated that the owner was showing the Board that we have electric and water and cable in those areas. They had been well established for years. If they were established in 1977 or 1978, and the zoning law changed and non-conforming uses became lawful uses, then we were zoned in. And if no one did anything to stop us before 1977 or 1978, we became lawful in that area. We do not dispute that the map of 1980 did not grant us the rights to put the sites in that location, it was for recreational purposes that those meetings were held. The discussions for approvals for a pool, a recreational building and perhaps a laundry or bathroom. That site does not give the approval we are looking for tonight. Doesn't the passage of time, with no objections, denote there was no detriment to their property. The use of this property has not changed over the years; it is still a campground. The property was bought in 1980 and we were there already. Why is the issue raised 37 years later? Why didn't anyone object before now? We will plant some vegetation to buffer the property.

MR. GOLDEN: There were no campsites adjacent to my client's property when he purchased the property. Should the Board grant a variance based on the five factors now. They are a detriment to the neighborhood despite vegetation. There is room on their property to move some of these sites to other locations on their property. In any case, there needs to be sufficient screening between the properties.

ATTORNEY FINK: Just to be clear, Mr. Golden is referring to campsites number 47 thru 51.

MR. KLEISTER: This application stipulates that the 1980 map did not grant us a specific right.

ATTORNEY FINK: Am I right to interpret what you said as you are not conceding that you do not have a prior, legal, non-conforming use to have these campsites where they are?

MR. KLEISTER: Part of the applicant's position prior to coming before this Board, was that Black Bear had been in existence and operating before 1980 and had sites that were zoned in. However, we need to come before this Board for a variance for the sites in the setback.

ATTORNEY FINK: Mr. Malocsay brought up that if you have a legal, prior existing use which includes where they are located, there is no need for a variance and this Board shouldn't grant it. So whether you stipulate or you don't raise that point, the Board still has to consider it. And if this Board determines whether or not you brought it up, that you don't have the legal, pre-existing non-conforming use as to where these sites are located, that's it. And then the Board will consider whether a variance is granted.

MR. MALOCSAY: As to the part where we can grant the least variance necessary; we can say do this, this and this and you do not need a variance. I feel, in your case, and by your testimony, you are "grandfathered" in and do not need a variance.

MR. MYROW: I believe the Building Inspector stated that with the original 74 sites were legal, non-conforming but could not expand beyond 15%. The letter stated that expansion beyond the 15% would require a variance.

ATTORNEY FINK: You have raised a very interesting question. You interpret the Building Inspector as saying that those sites, where they exist, to be legal.

MR. MYROW: The Building Inspector's letter stated that the original 74 sites were legal, non-conforming uses of property.

ATTORNEY FINK: If that is the case, the only issue before the Board is, whether or not, in effect there are 2 phases. The first phase was 74 and the fact that they want to increase the sites doesn't affect the sites they have now. The Building Inspector states that if they want more campsites, more than the 15%, they have to be conforming to the present zoning, concerning the times they can be occupied and also the setbacks. They are here requesting a setback variance that you said the Building Inspector said they don't need.

MR. MYROW: Mr. John Bollenbach, needs to know, whether or not they can approve this without a variance for side yard setbacks.

ATTORNEY FINK: The original letter dealt with the frequency of those lots being occupied. The law allows 120 days. The second letter reads that they are legal in every way except if they expand beyond the 15%.

There was a discussion regarding the interpretation of the 74 legal, non-conforming sites and the expansion of 15% of the campsite. And the 300-foot setback that was approved to 200-foot on the 1980 map. A planting of evergreen trees and vegetation screening was presented to buffer the sites in question.

MS. DEMBAK: My name is Louise Dembak and at the first meeting, it was asked if any effort has been made to purchase adjoining property. There has not been any attempt or discussion to purchase property.

CHAIRMAN JANSEN: The Public Hearing is closed but this application will be continued at the next meeting in February.

PUBLIC HEARING OF Gregory Stobbs - for property located at 356 Buttermilk Falls Road, Warwick, New York and designated on the Town tax map as Section 64 Block 2 Lot 3 for a variance pursuant to 280-a of the Town Law permitting construction of a single family dwelling on a lot that does not front on a public highway.

CHAIRMAN JANSEN: Please identify yourself and tell us what you would like to do.

MR. STOBBS: My name is Gregory Stobbs and I own the property. I have a building permit to build a house.

ATTORNEY FINK: How did you have a building permit issued?

MR. STOBBS: I think the Building Department was unaware of the variance required.

ATTORNEY FINK: You think they made a mistake. The variance that you are applying for is a technical requirement, you have to be located on a public highway. If you have a right to get to the road either by private road or easement, you need a variance. You have to show that you have the rights to use whichever you want to use and you have to prove that the route is passable for emergency vehicles, and what issues will be caused by your use to neighbors.

MR. STOBBS: The road is there and it is passable. I assume that emergency vehicles can access the property as there are other houses on the same road. When the house is complete, I intend to comply with the 911 requirement of the proper signage of my address.

ATTORNEY FINK: Is there any issues to your right to use this road?

MR. STOBBS: None that I am aware.

CHAIRMAN JANSEN: Anyone have any questions?

MR. TESTA: My name is Rocco Testa and I live at 319 Buttermilk Falls Rd. Mr. Stobbs is here for a 280A variance, we had several people call up the Building Inspector about this building. We have had meetings with Mike Sweeton and the Town Board, there is no emergency vehicle access on Buttermilk Falls Rd. Mr. Sweeton had told us there would be a stoppage of building on Buttermilk Falls Rd because we it is a dead-end

road and there is a bridge out. We spoke with the Building Inspector and he told us that Mr. Stobbs doesn't need a 280 A variance. Plus, there should be a DEC permit as he is building next to a stream.

CHAIRMAN JANSEN: I think that has been resolved.

ATTORNEY FINK: That wouldn't have any relevance to this application. The only issue before this board is the one of access.

MR. TESTA: I have letters from the Fire Department addressing the issue.

ATTORNEY FINK: We are asking the applicant to send letters to the Fire Department and Emergency Services to verify they have access to his address. Please submit your letters for the Board to review.

MR. TESTA: We are required to bring our private road up to town's standards and the town should stop allowing more houses to be built until the road is up to town specs.

Mr. Testa testified to the bad conditions of the road and the lack of the bridge. The new builder is building at his own risk. He stated he was not satisfied with the results he received from a Planning Board meeting he attended. He was very unhappy with the results he received from the Building and Planning Departments. He demanded answers to questions not under the ZBA's jurisdiction. He had to be reminded several times to stick to the issue before the ZBA.

MS. BRAMICH: How many people are living on this road?

MR. TESTA: About 60.

MS. BRAMICH: And the road is the same way?

MR. TESTA: It's worse. And no one helps us.

MR. DEFORE: My name is Gerald Defore, 68 Buttermilk Falls Rd. I am curious how he got his property passed; it floods. Our road is on deeded property; we have a right to know what is going on, on that road. We do not have egress for emergency vehicles. We get shifted from the Building Department to the Planning Department to the ZBA. It is very frustrating.

CHAIRMAN JANSEN: We ask for a letter from all the emergency services and we are asking this applicant to do it also. We are not disagreeing with you about your issues but we cannot address these issues.

MS. KICK: My name is Christine Kick and I live at 424 Buttermilk Falls Rd. I welcome any nice structures to our area. I was not required to get letters.

There was a heated discussion about emergency vehicles, construction vehicles and deteriorated roads.

CHAIRMAN JANSEN: You have to bring these issues before the Planning Board.

MR. TESTA: The Planning Board told us to bring these issues to you! The Town just wants our tax money for doing nothing.

Mr. Testa insists that George Brunjes was given special treatment for his cul de sac and bridge approval. He demanded to know how a Stop order was ignored.

MS. BRAMICH: The Town doesn't have to do anything; you are living on a private road. I live on a private road and before it could be dedicated to the town, every home owner on that road had to bring their section of road up to the town standards. It is your responsibility to upkeep the road.

CHAIRMAN JANSEN: This application is continued until the next meeting.

This meeting is adjourned.

Submitted by Pamela J. Carroll ZBA Recording Secretary.