

Town of Bethel
Zoning Board of Appeals

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Minutes of the October 19, 2009 meeting

Present: Stephen Morey, Chairman
James Crowley, Vice Chairman
Richard Conroy
Gary Rohrs
Robert Yakin
Jesse Komatz

Attendees: Jannetta MacArthur
Recording Secretary
Dan Sturm - Supervisor

Robert Brown absent

Denise Frangipagne – Councilwoman excused.

BJ Gettel excused

Dan Sturm – acting liaison replacing Denise Frangipagne.

The Town of Bethel Zoning Board of Appeals held it's monthly meeting on October 19, 2009. The meeting was held at the Town of Bethel Justice Court, 3586 State Route 55, Kauneonga Lake, at 7:30 PM. On the agenda at this time are the following:

Pledge to the flag

Motion to accept minutes from the September 21, 2009 meeting by Richard Conroy, second by Gary Rohrs

All in favor – 6

All opposed –0

Agreed and carried

All registered mail receipts received

1) Public Hearing for an Area Variance located at Lot 29, Top Ridge, Chapin Estates, White Lake, known as Bethel Tax Map #: 55E-2-45, proposed by Regina Stem. (Watkins)

Motion to go into public hearing by Gary Rohrs, second by Jesse Komatz

All in favor – 6

All opposed –0

Agreed and carried

Richard Stoloff: Can I make a suggestion? It would be appropriate before you actually take public comment on a public hearing to do a seqr analysis first. Which is now required to be done

before the public hearing.

Steve Morey: And you are?

Richard Stoloff: Richard Stoloff

Steve Morey: And you are telling me that you believe procedure is that the seqr short form should be done before public hearing.

Richard Stoloff: Yes. I happen to be the town attorney for the Town of Mamakating for many years; they basically clarified it about a year ago, some time ago that before the public hearing that the boards are required to conduct the seqr analysis based upon the statues. It is to avoid someone making an attack

Steve Morey: With the agreement of the board members we will just delay the opening of the public hearing? Okay, the short Environmental Assessment form is for the applicant, Regina Stem, for Stem residents located **at Lot 29, Top Ridge, Chapin Estates, White Lake, known as Bethel Tax Map #: 55E-2-45** for the construction of single family home. I'll read all parts of it, beginning with will proposed action comply with existing zoning or other restrictions – the answer here is **No** because of the setback. Existing rear yard setback is 50 ft desired length is 25; present land use in that vicinity is single-family residence. Does action need involve a permit approval or funding now ultimately from any other governmental agency? The answer is **No**. Does any aspect of the action have a currently valid permit or approval? The answer is **No**. As a result of proposed action will existing permit approval require modification? Answer being **No**. This is signed and dated 9/21/09. I'm not sure whose signature this is. Does action exceed any type 1 threshold in 6NYCRR in part 617.4? **No**. Will action receive coordinated review as provided for unlisted actions in the same 6NYCRR part 617.6? **No**

Richard Stoloff: The answer is going to be there is no other involved agency

Steve Morey: I'm not certain about the county itself. Do you know if it has been returned? The 239 from the county review has not come back

Richard Stoloff: Because it is near a county road?

Steve Morey: I believe because of the Toronto Reservoir.

Richard Stoloff: Okay, you're right

Steve Morey: At this point in time I am going to say the answer to that question is **Yes**, and that we are waiting that review.

Richard Stoloff: I guess you will not act until you get the review back. When do you have your next meeting?

Steve Morey: It is a month from today. November 16th. It could result in any adverse affects associated with the following: existing air quality, surface or ground water, quality or quantity,

noise levels, existing traffic patterns, solid waste production, or disposal, erosion, drainage or flooding problems. We're all in agreement? Aesthetic, agricultural, archeological historic or other natural resources or cultural resources or community or neighborhood character? We're all in agreement, that's *No*?

Gary Rohrs: Is this giving our....., this is just for the seqr, it has nothing to do with the issues of the case

Jim Crowley: It's like putting the cart before the horse

Steve Morey: No. Vegetation or fish, shell fish, or wild life species significant habitats or threatened or endangered species – *No*. A community existing change or goals as officially adopted or change in use or intensity of use of land or other natural resources? *No* Growth, subsequent development or related activities likely to be induced by the proposed action? *No*. I'm going to presume we are going to respond *no* to these unless I hear otherwise? Long term, short term punitive or other affects not identified in C1. Thru C5? Which were the ones we just asked. Other impacts including changes in use of either quantity or type of energy? *No*. Will the project have an impact on the environmental characterizes that cause the establishment of a critical environmental area? *No* Is there or is there likely to be controversy related to adverse impact? *No*. That concludes these questions.

Richard Stoloff: There should be a motion from somebody to declare a negative declaration on seqr.

Steve Morey: I'm a little ahead of things without the input back from the county.

Richard Stoloff: What I suggest to you is this; I know Mike wants to get into the ground, because Regina would like her house. If the county makes any statement as far as that is concerned you can consider that at the time you do your voting and consideration of it. But with coming into a situation where each and every time you come to a no, there is a difference between a negative dec and any final determination on the zoning. I'm not your attorney, but I would say to you that you have a second chance to look at all of those factors once you receive the County's 239. You can't open your public hearing without completing a seqr. My suggestion is you vote on the negative dec., if you want to. You could open the public hearing take your comment, if you feel uncomfortable you could continue next month I don't know if you need that in case you want to take any other comment. In order to proceed tonight we do need to complete the seqr process.

Steve Morey: Regarding the 239 review from the county, let me repeat that question which is – will action received coordinated review as provided for unlisted actions in 6NYCRR part 617.6 if no, a negative declaration may be superceded by another involved agency. Therefore I think Mr. Stoloff's advice is probably fine for us to declare a negative declaration provided that the other involved agency can supercede our declaration.

Motion to accept negative declaration by Gary Rohrs, second by Jim Crowley

All in favor –6

All opposed –0

Agreed and carried

Motion to open public hearing by Jim Crowley, second by Richard Conroy

All in favor –6

All opposed –0

Agreed and carried

Steve Morey: Mr. Stoloff, you are representing Regina Stem?

Richard Stoloff: I am representing Regina Stem. I would ask the secretary to please read the notice of the public hearing and note that in the record.

Jannetta MacArthur: The Town of Bethel Zoning Board of Appeals held it's monthly meeting on October 19, 2009. Public Hearing for an Area Variance located at Lot 29, Top Ridge, Chapin Estates, White Lake, known as Bethel Tax Map #: 55E-2-45, proposed by Regina Stem. Represented by Watkins and Stoloff

Richard Stoloff: Regina Stem purchased this property, (I sent over copies today) she bought on October 10, 2008. I provided you with copies of the deed. She purchased the property for a total of \$1,250,000.00. It is reflected in the deed. I also provided to you with copies of a survey originally issued to her and the point I am making in looking at the survey, that the survey was certified to her on September 22, 2008. It shows the outline of where the location of where the house would be. At the time my client purchased the property, at the time the survey was done, the setback in this particular zone was 50 ft. What you are in as far as the zoning district, I was advised by BJ Gettel that it wasn't until July 9th of this year that setbacks in Forest conservation was increased from 50 ft to 75 ft from the road. What I would also call your attention is that if you would look at this subdivision map, I know this board does not deal with variances with the subdivision plan, but the way these lots are created in Chapin Estates, the road is owned by the parcel owner that adjoins the road. Since Ms. Stems parcel, lot 29 is on both sides of the road, she owns actually the road across this particular property subject to easement for everyone to be able to travel along that road throughout the Chapin Estates. What I am saying is this is not considered a self created hardship because at the time that she purchased the lot, the zoning would have permitted to build a home with a 50 ft setback from the road and a 50 ft setback from the rear yard of the property. What we are proposing to do, and I want to show that she always anticipated when she purchased this, building the home in the lot closes to the water, because to be reasonable this is what causes the lot to have that value. If someone could not build on that side of the road, this lot would not have drawn that price. It was always her intention she is not asking something different than what she always intended to do to build on that side of the road. In doing so, we are trying now to comply with your existing zoning to the best that we can to get the most limited relief from the zoning ordinance. What we would like to do is to push the house back to comply with the front yard setback 75 ft from the road. It does give Ms. Stem some benefit. Because the roads in Chapin are dirt roads. It put her further away from any noise or any dust that is kicked up when other people drive on this road. By going back towards the reservoir what we are doing is, we are not affecting lots 28 or lots 37, as this would impact those lots. The property line on these lots is basically 50 ft back from a parallel, which is called a 1,225 elevation parallel to the reservoir. So what is created there is that the real lot has basically no potential, in the future to ever be built behind that because it is the reservoir, which is owned by Alliance Energy Renewable. Alliance Energy Renewable was able to send you a correspondence. In essence, that don't say they have an objection to this, they merely wanted the

applicant to understand that by pushing the house further back she would be within 25 ft of space of the area around the reservoir. Which they are required under their license to open up public access around the reservoir if someone wanted to walk around the reservoir. I can tell you as representing Woodstone, when the sale was made we give everyone a binder that is about 3 " thick with all the declarations, she was represented by independent counsel she was represented by Brian Edwards of Monticello. In that they tell everyone about the 50 ft setback. Which is particularly shown on this survey, which was given to her in September 2008. My client understands that, and she is willing to deal with that and accept that because she is trying to do what she always intended to do, is build a house on this portion of the lot. I also provided to you a letter from Chapin Estates HOA, which is required under their declaration to review the locations and setbacks of the properties and they are entitled under their declaration to give people relief from setbacks. If it is necessary. And there have been times when they have given relief from the rear setback if it is necessary. In this case you have a letter from the Association agreeing to the location of the home recognizing that as a result of the change in the zoning to in order to comply at least with the location of the 75 ft from the road. The only way to build this house on this lot it is necessary to push it back and therefore the lot would need a 25 ft variance to the rear. When we are looking at this particular property and the issues we have to deal with, with regard to the property, you have a couple of items that you have to consider in making your determination whether to grant the variance. It is in 267 B in the zoning code. Basically, there was a time it wasn't codified, Zoning Boards and Courts were dealing with area variances, and almost making up their own rules and regulations. It's been pretty well codified at this point, and the question is whether an undesirable change will be produced to the character or neighborhood or detriment to nearby property creating in granting the area variance. If anyone in this development objected to this you would have received a letter. In fact the only one that is affected by this is AER, and AER has no objection to the variance, it doesn't change the nature or the character of the community. It allows my client to build the house where she always intended to build the house. Whether the benefit can be achieved to the applicant by some other feasible method, well again, other than the area variance, to follow the plan she always had to build a house in this location, she needs a variance. She can't do it otherwise. If she had built the house before July 9th, we wouldn't be here, if we were here within 3 years of filing the subdivision map, which in 2003 under the law, she would have been grandfathered, and we wouldn't of had to come to you. Because it is now 2009, and she has been working with Mr. Watkins for a period of time before July 9th to design this home. No one realized the change in the zoning was going to have any affect on her. Sometimes zoning excludes certain changes for existing lots. It didn't happen that way, so we have no choice except to come before you and ask for that. I don't think there is any other method, in the least limited way to affect anyone else in trying to comply with the zoning ordinances as it has been amended is to push the house back 75 ft. There is no house behind. Is the request substantial, I would say to you, it is 25 ft of a 50 ft variance request for a setback? I think more than 25 ft would be substantial, but I think you have to look at the character of the land and the community. Behind this particular lot there is nothing except sometimes water, sometimes dry land. Hopefully there will be water again there. The other thing that I would want you to consider does it have an adverse impact on the physical environment or characteristics of the community? I don't believe that it does. Again, the house would have been there regardless, we are pushing it back 25 ft. The neighbor in lot 28 isn't here to basically complain about that, and has no complaints; they were given notice of it. I would also say to you this is a unique situation that we don't expect..... If it wasn't for this particular zoning change, there is no other lot that I know of in Chapin Estates that has this

circumstance that because of the change in the zoning they have to be pushed back because of the change in the zoning. This is like a unique situation I think you will see it once. It is only because of the width of lot, it would have complied previously. The area doesn't comply right now. Again to talk to self-creation the law basically is when there is a change in zoning which creates it, it is not a self-created hardship. There are cases on it, it used to be when you changed the zoning after the person purchased the property, there were a number of cases that originally said you are mandated to give the variance. The case law has changed, you are not mandated to give the variance, you have to go through all the steps and looking at the variance is appropriate. In this circumstance I would respectfully submit to you that at least let her continue with the design that she always intended and it will be beneficial to the town, she will build her house will pay substantial taxes, on this lot right now based on the purchase price, she will pay more taxes on the lot if she had to build on the upper side of the lot, that is what she was limited to, this lot will really not be worth what she paid for. Her understanding was that she was building by the water. In Chapin Estate if you have a water lot, what you want to do is build by the water. I would basically like to answer any other questions that you have. If you don't have copies of the deed and the other things, I have extra copies. I faxed them over this morning.

Faxed copies to Building Department will be made part of the record.

Richard Stoloff: Here is a redrawn Stem plan what the lot would look like with the 75 ft setback. You can see the house with its location. It still stays within the footprint. It can't be done otherwise.

Steve Morey: The hatched area on this map is considered the buildable area?

Michael Watkins: Yes.

Steve Morey: I thought that is what you told us last time. Mary Anne, would you like to make a comment during this public hearing?

Mary Ann Burke – Smallwood – Friends of Toronto: I have been enjoying that reservoir for the past 27 years, and we have been struggling for 7 years now to preserve our access there. The public parking lot there, that is very near the property, and of course the public, has the right to walk very close to the house in this plan. The problem is the precedent that is being set here. The precedent being 25 ft from the property line. And of course the public has the right to be there, 25 ft away. That is the objection I would like to make.

Bob Barrett: Smallwood - The point that was made by Mr. Stoloff was the fact that this is very unique probably the only situation that you might be dealing with. I don't know how valid that statement is in terms of uniqueness as far as the future is concerned. I don't know if the precedent that is talked about, what it does it reduces that public area from 50 ft to 25 ft. If there is a problem there, these things come up after. Later on, it is usually more difficult to rectify. The facts that the area itself is right near that parking area, which is the public parking lot. Of course that is still being adjudicated, I think there are impediments that need to be considered by the board.

Steve Morey: Dan, did you want to make any comments?

Dan Sturm: The only thing that I would like to say is briefly when we did the zoning we did change some of the lots in the southern section of Bethel to larger lot sizes and with that came the larger setback requirements. To build on that lot, it is preexisting; the setbacks are if you have a larger lot size, you have larger setbacks. That is why we changed them. We knew that when we did our zoning that at some point there would be issues like these, which I think I discussed with the chairman, that there might be issues like this to come to the zoning board. Our intent was not to inhibit any development, but we did want the larger lots sizes with larger setback requirements. We would leave it in your good graces, and your ability to hear these kinds of things; there may be more similar incidents like this that would be left up to the zoning board.

Steve Morey: Thank you. Anyone else?

Richard Stoloff: May I respond to Mr. Barrett. I think he didn't understand something that was being presented to the board, and that was we are staying within the confines of the lot. This will not affect the distance between the high water mark and the 1,225 parallel which is intended to be the area that is the area owned by AER so when Mr. Barrett thought that would reduce the size of the land that the public could walk along the reservoir, this does not do that. The house stays within that. There is still 25 ft behind my client's property. It is only behind that, which is the property of AER.

Mr. Barrett: Could I just respond to that? I was responding to the letter from AER, which has the statement about the 25 ft. That is what I was referring to.

Steve Morey: The letter from AER is that the letter to my attention dated October 9th letter? The letter you are referring to Bob? My intention is to read that letter as part of this public hearing. Does that resolve that? Any member of the board want to make a comment in the public hearing, not that you don't have the opportunity throughout the meeting.

Gary Rohrs: As a member of the public I'm asking a question. Do I have the right to ask as a member of the board as well?

Steve Morey: You have the right to ask any question you like as a member of the board.

Gary Rohrs: I have a couple of questions: One is what rights do you have on AER property now? What do other landowners do to get access to the lake? Can they cross this land at will? Can they build upon it, a boathouse a dock?

Steve Morey: We can go deal with those questions Gary after we come out of public hearing, and I think that is what we will do. There are some things I want to bring up in this public hearing, we will ask the question again once the public hearing has been closed, unless you want to make it part of the public hearing record.

Gary Rohrs: I have one, that would be, why didn't you ask for a variance based on the fact that the zoning was changed the setback was increased to get your front setback to 50 ft. I've heard the argument about that would make it closer to the road, but other people have that setback

through Chapin Estates, and how many people use the road anyway?

Mr. Stoloff: There is traffic on that road now. That road ultimately will receive more traffic on the road as the development Chapin continues through the preserve area. The town has already approved one portion of it. To my knowledge, houses within Chapin are generally much further than 75 ft from the road. I would think that with respect to, and again I don't know the reason why setbacks are created, the setback from the road is created to 75ft on a larger lot is because they want to have a higher influence or reason for pushing the house further back from the road, and generally when you have a neighbor behind you, if you were in Emerald Green you would have a different situation, here it is 1000's of ft across the reservoir until you have another house which could be otherwise impacted by this, so if you are asking could she ask for the other type of variance, the answer is yes, this is more beneficial to her, based upon your zoning to try to comply with the variance now for the 75 ft from the road. You will not have any impact whatsoever on the property of AER. AER has not filed an objection. I think all AER has asked is to notify the property owner that by pushing the house back, and of having a rear yard of only 25 ft there will only be 25 ft from the area where the public can actually walk around the reservoir, I don't know that there is that much difference between 25 ft and 50 ft, so the applicant believes it is more beneficial to her to go back 75 ft from the road. You can only ask for one request.

Gary Rohrs: Nevertheless, she did buy the land with the expectation that the setback was 50 ft. is that not correct?

Richard Stoloff: At the time, that's what it was, yes. At the time she did that, to answer your question, I would suspect if the board decided to give a variance to the rear yard, they would have to basically make statement of fact that is reasonable under the circumstances why you think it is more appropriate to have that variance in that location. I would respectfully disagree with you and I would indicate to you that in most development the primary setback what people consider the front yard setback and I think that is what the creation was because when this zone was changed, they didn't change the rear yard, just the front yard. So the Town Board is telling you when they made this change that what they consider to be the important change in the setback was the front yard. That is a legislative process that they went through. They could have left it alone but one that they wanted to change was the 50 to 75 ft in the front. Because that is what they did.

Steve Morey: I have some documents to read. A copy of letter to make public. The Homeowner Association to Chapin Estates. It is addressed to Ms. Stem - reading letter.

Letter part of file.

Steve Morey: I have a letter from Alliance AER NY – Gen LLC – re: Regina Stem application. (reading letter)

Letter part of file

Steve Morey: That is all that I have to read as part of the public hearing.

Receipts of certified mailing – within 500 ft.

Motion to close public hearing and go into regular meeting by Jim Crowley, second by Jesse Komatz

All in favor –6

All opposed –0

Agreed and carried

Motion to receive and file AER letter, documentation faxed from Mr. Stoloff's office, deed, and map, DP584, letter from Chapin Estates HOA, and new site plan, by Jim Crowley, second by Jesse Komatz

All in favor –6

All opposed –0

Agreed and carried

Steve Morey: So that everyone is aware, to repeat that we have the small map, we have a larger map, deed, DP 584, and letter from Chapin Estates, HOA. Gary, I believe you had some questions.

Gary Rohrs: This is a question to the applicant. Since the public hearing is over, I just wanted to know, what rights a homeowners has in terms of the public access land of the Alliant, to the AER land.

Richard Stoloff: There are two thing, if you take a look at the deed, the deed itself indicates that it refers to unrecorded license agreement between the Chapin Estates, Woodstone Development and AER that the property is subject to that. That license agreement is referred to in the actual deed basically indicates that they can put in docks across the water, they are not entitled to build permanent structures within the 50 ft area in that location of the Chapin Estates. Forget the other side it has a different situation. They basically, what we've done we have prepared AER, and it's predecessor with dock diagrams prepared by Glenn Smith, Engineer, we update every year. We show the location where the dock is going to be located, and the type of dock that is being located, the length of the dock, separate and apart from that. They are required to permit anyone who has property adjoining, to build a dock and to use a boat to get into the water. That is the basis why you have docks throughout the Chapin Estates, for property owners within the Chapin Estates. It is not that dissimilar of a situation that you have on Swinging Bridge, where you see all these people that is the same distance back from a certain parallel. What we did originally, as part of Woodstone, is rather than relying on the ferq license, we actually negotiated an unrecorded license agreement with reasons unrecorded it is because AER has copies of the license agreements. They get copies of all the docks that are going to be built. That is the process going on since this development.....

Gary Rohrs: Do landowners have the right to build any kind of structure that would impede public access?

Richard Stoloff: They don't build structures. The docks are floating docks. There are chains holding them. No permanent structures. The HOA has to give AER a \$1,000,000.00 insurance policy naming them once they to that. Woodstone maintains a separate policy.

Richard Conroy: I have a question about the adjoining lot that is vacant. It is 55-1.22

Richard Stoloff: That lot belongs to Chapin. I asked Mike to ask Steve Dobrovsky a question about that before I put my foot in my mouth. That particular lot between the road and the reservoir is not a sufficient size to build a house. I knew that.

Jesse Komatz: I have to disagree with you. You said the primary setback would be the front. In this situation, I believe the primary should be the rear because that is public access. Usually your setback in your front, if you are in residential area and you have houses across the street from you, it gives you substantial area across. She has nothing built across the street from her. She owns it. Therefore I feel she should absorb it in the front rather than in the rear, and move the house over a little bit to the wider section which she can make up a little bit in both ways.

Richard Stoloff: I appreciate your comment, but I think that the ZBA in interpreting it's zoning and granting variances has to relate to what the town board did. Because you are not the legislative body of the town board. And when the town board basically created the change in the setback, the only change they made was in the front. It would seem to me that interpretation of what their intent was for this board to come and say, I disagree with what they were planning, because the language is very clear for increasing the setback, and to say the area adjacent, what I don't understand is this, whether I am 25 or 50 ft, I'm not impeding on any public area. This is not adjacent to the parking lot. I know all about the litigation that is ongoing that Mr. Barrett and Mrs. Burke have been involved in. But a house being closer to the water will not impact the public itself. The only one who will have to deal with that is my client. That is the reason AER in their letter said, just let her be aware that you will be closer to a public area that people may walk along from time to time. You can't boat from that property. There is only a separate area to boat from, you can't camp on the property, and you can't build a fire on the property. What they may be able to do is walk along the shoreline. That's all.

Jesse Komatz: Why didn't they make that 50 ft through all reservoirs. Why didn't they make it 25 ft way back when? Why is it 50 ft?

Steve Morey: Dan, I am going to ask you for some clarification regarding rear and front yards. Is this just an interpretation? Or is code essentially saying that a front yard is the yard that faces the road.

Dan Sturm: That is correct. When we did the zoning it was, one of the reasons, a larger lot size, like a 5-acre zone, which they are in, you need to create larger setbacks. That is what we did. 5-acre zone 75 feet. A 3-acre zone, I don't have it in front of me, but has increased from what it was, considering that the whole town was 1 acre at one point before we changed it so we increased the setbacks.

Steve Morey: Yes, but the interpretation of the code is the front yard would be the yard facing the road.

Dan Sturm: Yes, and that is in the code. The description of what the front yard is.

Steve Morey: Do you understand the point I am trying to make?

Jesse Komatz: Yes, I understand

Dan Sturm: And if I may, are you saying the rear lot wasn't changed? I didn't look it up myself.

Richard Stoloff: The rear stayed 50ft. You only changed the front

Dan Sturm: That was to get more houses on larger lots off the road that was one of the intentions

Steve Morey: That was a change as of July this year.

Dan Sturm: Correct

Steve Morey: With no change to the rear yard setback.

Dan Sturm: I believe that is correct. I know the front yard was definitely changed, in the larger lot areas.

Jim Crowley: I have a question; this elevation public setback starts at 1,225?

Richard Stoloff: We have to be 50 ft back; the property line is 50 ft back from the 1,225 elevations.

Steve Morey: 1,225 elevation represents the high-water mark

Richard Stoloff: The distance is between the water and the elevation varies throughout the reservoir. If you had a shelf and went straight up it would be a different situation, then if you had a gradual change. That is why they have to be so careful when they do these surveys. In order to actually locate the 1,225 elevation. There is a point in the damn, and an old monument that they have to go back to be able to shoot from the damn to get these elevations correct. It's a process

Jim Crowley: You can't build; you have to stay back 50 ft from the 1,225 mark?

Richard Stoloff: The rear yard is 50 ft back from the 1,225 elevation, we have to build within our lot, and it is where the property owns the lot.

Steve Morey: That sounded confusing to me. The 1,225 is the property line for this property owner is 50 ft from the 1,225 contour line.

Mike Watkins: The solid line is where Regina's property starts (showing on map)

Steve Morey: Taking that Jim, the property line is 50 ft from the 1,225 elevation line. Now the proposed setback for this structure is an additional 25 ft from that property line. Does anybody have anything else?

Richard Stoloff: May I ask one question, if we wait until your next board meeting to make a decision, by 30 days if you sent on October 21st, we send it by email in my town, we get a

quicker turnover, Mike will have a lot of difficulty going into the ground in November when we come back, depending on the weather my client would like to get this house built is there any potential that sometime after October 21st, that there would be any meetings planned for November, that you could hold a meeting later this month, as opposed to waiting to your regular meeting in November it is really for my client so that she can build this season so she can get the foundation in so Mike can frame the house before winter.

Steve Morey: There may or may not be some additional research we may like to do on this particular application. I don't know if I have the exact details, but if I'm not mistaken, we have 62 days from the public hearing before we have to take action on this application. The 3rd portion of that is that whether it is being said or not, I think you are alluding to us possibly scheduling another meeting before our next regularly scheduled meeting. Personally I would not do that we don't know when we will receive the response back from the County 239 review.

Richard Stoloff: The point of the 239 M review is to see if they have any issues, and any recommendations. They are supposed to provide to you within 30 days. If they don't provide within 30 days it has expired and lapsed, I don't know what your practice is, I only know the practice in my own town.

Steve Morey: I appreciate what you are saying, but.....

Richard Stoloff: I asked, I knew it may be something that may be pushed back. I felt obligated on behalf of my client who would appreciate it if she could get her house started this season. .

Steve Morey: Okay. One issue, Gary that came up at the last meeting, you thought you had heard on the radio a similar or like circumstance that went to an appellate court, and the decision by that particular ZBA had been reversed when they had granted an application on a reservoir.

Gary Rohrs: I found out that the case that was discussed had to do with being on a water reservoir, a reservoir for a municipal water supply that had separate regulations.

Steve Morey: I wanted to follow up on that. I would like to read our checklist for an area variance regulation

- 1) an undesirable change in the character of the neighborhood or a detriment to nearby properties will be produced by the granting of the variance; No*

Gary Rohrs: Part of the neighborhood the public access area and the general public who will be availing themselves of that once the lawsuit is settled. Would the scenic view be degraded by having this house being 25 ft closer to the lake?

Richard Conroy: I don't think it would have any impact on that.

Steve Morey: I don't think it is an undesirable change in the character of the neighborhood nor is it a detriment to nearby properties. I think what we all have in mind nearby properties would be AER, and their access provisions along that reservoir. I don't know if it would be a detriment, essentially that letter that I read earlier pretty much states there isn't a detriment, they

are not stating that there isn't a detriment, but they are making reference to the fact that there is public access. So I believe we would be answering *No*, to that question?

2) *the benefit to the applicant can be achieved in some other way; Yes*

Steve Morey: I guess I am getting some mixed signals on this. When this application was first presented to us last month the benefit was that the homeowner wanted to have their home farther from the road. You made reference that because of the property value that the benefit is actually having the home closer to the waterfront.

Richard Stoloff: No, no, no, what I am saying to you is this, the benefit is that the property owner having it further away from the road. Mike was aware that there was a zoning change in August. I think he was aware at that point. He came without counsel. He didn't know. My reference was if for some reason to build the house on the side of the road closest to the water it would have an adverse effect on the property value of that area. Again, I understand when someone is saying to the public, you're commenting to the public I think that the primarily is adversely the property owner on the other side of that property line which is AER which does not have that particular objection. Without the ferq license, the public has no license to walk around that reservoir. The party that is subject to that ferq license says the only impact that is could be adverse to that is the property owner, I would respectfully say why you answered the first question, No, and I think you should take most respectfully into consideration, what was the goal of the town to amending the zoning ordinance. You heard from the Supervisor who indicated to make the houses further away from the road. That was the reason why they did what they did with the larger lots, and I would respectfully ask you to take that into consideration because that was the basis for this particular application. It may have been more difficult to make this particular application to you, but we can't comply with the zoning applicant change, and the primary goal of the Town is to have 75 ft the minimum setback back from the road, I think that should be your primary consideration is the section that you referred to a second ago, is whether or not something other than a variance should granted. That is what that section generally means, when you are asked the question, can it be achieved in some other way. I think there is no way she can build a house on that lot without getting the variance, unless you want her to build a postage stamp house, which wouldn't benefit the town or my client, so the question then becomes what is the intent of the zoning code, and what was the primary intent to have this amendment. I think you should make that decision first, and then say if we can follow the primary legislative body in granting this variance we should follow the primary intent which the Supervisor said is to have a 75 ft setback from the road. Your choice.

Gary Rohrs: So rather than causing a hardship on the applicant, the change in zoning actually created a benefit for the applicant in that they could reduce rear yard setback and be closer to the lake, which they would want anyway. In fact, they would probably like to be right on the shore of the lake.

Richard Stoloff: In practicality, I'm not going to argue with you, but the fact is the town changed the zoning ordinances, and it does have that result, and as said to you before, as far as I understand, this is a very unique situation. Every other property has much more distance between the road and the reservoir. That is my point that I am making.

3) *the required area variance is substantial; Yes*

Bob Yakin: It's hard for me to answer a question based on 25 ft. It doesn't sound like a lot, 50% does sound like a lot. That's a tough question to answer I think. Is it substantial, I'm going to say no.

Steve Morey: We are going to answer this question by majority of the board.

Majority says Yes

- 4) *the proposed variance will have an adverse effect or impact on the physical environmental conditions in the neighborhood or district; No*
- 5) *the difficulty was self-created, which shall be relevant but not necessarily preclude the granting of the variance. No*

Jim Crowley: I have a way we could possibly work around this. Move it back 25 ft; make the driveway, 50 ft. then you're done. Move the house further up to the road. Instead of having a 75 ft long driveway, have a 50 ft.

Richard Conroy: We just talked about that. The intent is to keep the houses off the road. The town would like to see the 75 ft.

Jim Crowley: We are the zoning board, we can discuss that.

Richard Stoloff: I would submit to you that you should speak to your attorney. Even though you answered no to some of these, I don't believe that puts a closed door on this application. You have to consider the application as a whole, I can advise you with case law similarly, that talks about the substantiality of it and talks about the fact that you came to the correct conclusion, that it is not self-created. There is a lot of case law on it, once you changed your zoning. I think it is your obligation that the Zoning Board of Appeals under that circumstance should consider the factors and to come to some resolution which is to find a corresponding way to build this house on that lot and to still meet the goal of the town in the change in zoning. The problem that I see, if you are going to accept the towns actions from just a few months ago, I think my client is entitled to this variance. The only way to meet the towns goal, is to make the house on the lot, unless you can find some more land behind the property that we don't have, there is no other way to build. We can't buy the land from AER. We can't move the road.

Jim Crowley: I understand your problem. You could, I'm not saying to do it, or not to do it, but you could. Are you going to achieve what you wanted? There is other land.

Richard Stoloff: But one of the things your attorney will tell you where she bought the home, with the intention of building on that side of the road, before you changed the zoning, that is one of the considerations which you are required to give a lot of weight to. There are cases that talk about people that wanted to build by the ocean, by the reservoirs, by water bodies. The question that basically says that when you have those circumstances, the idea of the Zoning Board is to meet the goal in the most reasonable way. It is up to you to determine whether reasonable is to follow the direction of the town board, or to come to your own conclusion based upon some

other factors you want to consider. I would just indicate to you that the Town Board has recently spoken.

Dan Sturm: I just want to comment, yes, our intent was to get them off the road. That is clear. However, there were instances that we knew that would come up, setbacks, whether it be rear, or side, front, that we would have to leave in the good auspices of the Zoning Board. That is part of when we did our zoning. This is one of those instances. If it would help the board to make a determination, I could provide counsel to them either before the next meeting or at the next meeting. I would be more than happy to do this; whatever the chairman feels is more appropriate.

Jesse Komatz: If the board did not change the setback, would we be here today?

Richard Stoloff: You might be.

Jesse Komatz: If the Zoning Board Appeals turns around and says well make her home before it was changed, the same conditions that she had before. To me that's reasonable, that is giving her what she wanted when she bought that piece of property.

Richard Stoloff: If you do that, you will be setting a precedent that every time someone needs a variance because they can't meet that 75 ft. from the road, you just set precedent that you will grant it, because they bought it at the time that there was a 50 ft setback, and we are basically setting a precedent to come in here.

Jim Crowley: Every zoning is a case by case, and there is grandfathering. You've been zoned out of grandfathering in this

Richard Stoloff: There is no grandfathering in this. I had to change a zoning ordinance in Mamakating recently where people in light industrial setting couldn't build their houses where there were subdivisions. . We changed it because it wasn't intended.

Jim Crowley: We want to talk about that; every initial lot that was purchased in Smallwood in 1929 has been zoned out of business.

Dan Sturm: If I'm not mistaken, we grandfathered the lot, not the setback. That is the area we figured would be the opportunity of the ZBA at some point to back date it.

Jim Crowley: Is the town board dead firm on this 75 ft off the road? I know Dan, you make the laws, but you can't make the law to cover every single scenario that is impossible. No legislative body can, that is why we sit here. Because I know these things come up.

Dan Sturm: Our intent was yes to get larger lot sizes, and get the houses off the road. In those larger lot areas. We did know that there would be certain instances that would fall under certain guidelines that the setbacks weren't quite right. That was expected. We respect it either way, what ever the ZBA decides.

Gary Rohrs: The fact is the existing envelope, with 75 in the front, and 50 in the back, within that areas there is still room to build the house as designed.

Richard Stoloff: No, with 75 ft in the road, and 25 ft in the back, there is the ability to build a house.

Mike Watkins: It just fits in the proposed envelope.

Steve Morey: It's on the larger map. Dan, the code change was the 75 front yard setbacks, with an existing 50 ft rear yard set back. Is that correct?

Dan Sturm: Yes.

Steve Morey: Based on that information, the majority of the board answered the benefit to the applicant can be achieved some another way, we answered yes, I'm not sure why we would answer yes to that question.

Gary Rohrs: We discussed that. We would remove the 75-foot front setback. We would move closer to the road.

Steve Morey: Based on what's on that map, how that can be done with what is shown as a design structure because what is going to happen you are going to move back 25 ft making the rear yard setback 50 ft, however, now the front yard setback will be 50 ft. I have that backwards.

Jim Crowley: You are going to need an area variance for the front yard, rather than rear yard.

Steve Morey: How does that differ from this? Whether it is front or rear yard set back, how does that differ?

Jesse Komatz: It gives them the conditions that she purchased the property under, and the setbacks she had, prior to the rear zoning.

Steve Morey: But it is still an area variance.

Jesse Komatz: Correct.

Gary Rohrs: The question is, is there an alternative plan? The alternative plan is one to include to having to make a variance.

Jim Crowley: In the front, rather than the back. It would be less substantial. 25 ft, based on 75 ft. I think the back has a big play. In 99% the road would have more of a play. Not in this.

Richard Stoloff: Could I ask this then, if you are going to deal with that for the record, I would like you to articulate what you are saying and the basis, if you don't want to have..... I'll leave it alone. I'm sorry for interfering.

Steve Morey: I would recommend that we wait, until we have a response from the county

Gary Rohrs: I think we should take Dan's offer of advise of counsel.

Steve Morey: Okay. I would request that the board put that in the form of a motion that we refer to our counsel on this, either request that she take a look at this particular case, and the information we have gathered so far with our responses to these 5 points.

Gary Rohrs: What about the request for a sooner meeting. You already decided on that right.

Steve Morey: I will go along with whatever the board would like to do, but personally I don't see a need for us to schedule a sooner meeting without response from the County for one thing, I understand the circumstances, members of the board feel differently, that is fine with me.

Richard Conroy: I agree with you

Motion to refer this matter and this file either before or at our next meeting to counsel by Jim Crowley, second by Jesse Komatz

All in favor – 6

All opposed –0

Agreed and carried

Steve Morey: This matter will be on our agenda for our next meeting.

Motion to adjourn by Gary Rohrs, second by Jesse Komatz

All in favor – 6

All opposed –0

Agreed and carried

9:00 pm

Respectively submitted:

Jannetta MacArthur

Jannetta MacArthur
Recording Secretary

