

ZONING BOARD OF APPEALS TOWN OF CANADICE

Canadice Town Hall

August 13, 2014

Present: Linda Moorhouse, Chairperson
Diane Horning
Marty Gascon
Ed Bott
Bob Best, CEO

Guest: Greg Goodridge
Corey Auerbach
Frederick Wolf
Phyllis Fritz
R. M. Fritz
Steve Engard

PUBLIC HEARING - GOODRIDGE & WOLF

Chairperson, Linda Moorhouse called the meeting to order at 7:30 p.m. Chairperson, Linda Moorhouse introduced the Zoning Board of Appeals members and stated that a quorum was present to hear the application. The criteria, which the Zoning Board of Appeals uses to make decisions regarding an area variance, were reviewed.

- 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.
- Whether the benefit sought by the applicant can be achieved by some other method feasible for the applicant to pursue other than an area variance.
- Whether the requested area variance is substantial.
- Whether the proposed area variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.
- Whether the alleged difficulty was self-created, in which consideration shall be relevant to the decision to the Board of Appeals but shall not necessarily preclude the granting of the area variance.

Chairperson, Linda Moorhouse then read permitted action for the Zoning Board of Appeals.

Public Hearing - Goodridge

L. Moorhouse - Invited Mr. Goodridge to come and sit before the board.

L. Moorhouse - Mr. Goodridge, you have two applications?

G. Goodridge - Yes, I split the application, one, for the addition and the other for the garage.

L. Moorhouse - OK, so, we will be taking care of both those issues tonight?

G. Goodridge - Yes. There was no real change to the original application as far as the addition goes. The attached garage, I did center between the north and south boundary. It is now about 9ft. on both sides.

L. Moorhouse - Do any of the Board Members have any questions?

L. Moorhouse made a motion to close the public portion of the meeting at 7:34 p.m., E. Bott seconded, all in favor.

E. Bott made a motion to accept the application for the addition as complete, M. Gascon seconded, all in favor.

Roll Call Vote to accept or deny: Variance application for the addition.

Chairperson, L. Moorhouse, **YES**, E. Bott, **YES**, D. Horning, **YES**, M. Gascon, **YES**,

Chairperson, L. Moorhouse - 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Ed Bott – 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Diane Horning - 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Marty Gascon – 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

The variance was approved with a quorum of 4 ayes. Notification will be sent by letter to the applicant and the Code Enforcement Officer, Bob Best.

E. Bott made a motion to accept the application for the garage as complete, L. Moorhouse seconded, all in favor.

Roll Call Vote to accept or deny: Variance application for the garage.

Chairperson, L. Moorhouse, **YES**, E. Bott, **YES**, D. Horning, **YES**, M. Gascon, **YES**,

Chairperson, L. Moorhouse - 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Ed Bott – 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Diane Horning - 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

Marty Gascon – 1. No, 2. No, 3. No, 4. No, 5. Yes – **YES**

The variance was approved with a quorum of 4 ayes. Notification will be sent by letter to the applicant and the Code Enforcement Officer, Bob Best.

The Public Hearing for Mr. Goodridge ended at 7:45 p.m.

Public Hearing - Wolf

Interpretation of Zoning Laws - Section 120-11 definitions of a permanent structure, accessory structure, or an accessory use. Section 120-21 C(6) permitted accessory uses. Section 120-21 E(5) setback requirements.

L. Moorhouse invited Mr. Wolf and his attorney, Mr. Auerbach to come and sit before the board.

C. Auerbach - I am with the law firm, Damon Morey. Just a brief background, I have been a zoning lawyer now with Damon Morey for 3 years and before that, I was the attorney for the Association of Towns. So, I switched rolls. I went from representing municipalities and advising planning and zoning boards about variances and interpretation appeals to representing developers mostly in the Buffalo area. It is obvious to me after listening to the hearing that proceeded us, that the board is well aware of all the statutes that guide the Zoning Board process. The Interpretation Appeal, which is what we are here for tonight, are far less common than variances. Some people think of the Zoning Board of Appeals as the variance court. There is an alternate function of the ZBA, to review the determination of the administrative official charged with enforcing the code, in this case, the Code Enforcement Officer. The one thing I love about my job, is it brings me into beautiful areas like this. When Fred asked me to come along, he took me down to the lake and it's marvelous here. We sat on Fred's porch and showed me the reason why he is concerned about the structure at the house next door. Basically, when you sit down in his wife's favorite chair and you look south, that beautiful opening at the south end of the lake, unfortunately, where the cross beam of the swing is located blocks the horizon, the area where the lake meets the valley. Fred, after speaking with his neighbor, who is here and I'm sure you will be hearing from, were not able to come up with a compromise between them after some discussions. Fred approached the Code Enforcement Officer and asked if this was in compliance. From what I understand after looking at the communication, the Code Enforcement Officer's determination was that swings do not require a building permit, so it does not have to comply with the setback requirements. I jumped into your code and read it from front to back and talked it over with Fred and in my mind, the code for the Honeoye Lake District is very clear about what is allowed, it has a list of permitted uses and permitted accessory uses and those are the only things that are allowed, it is right there in the code. This isn't about what I think the code says, or what you think the code says, it's about what the code actually says. It is not a matter of opinion here. Basically, it is a strict legal interpretation. It talks about what are the permitted accessory uses that are allowed and some of those things, and I am reading right from the code, garages, signs, pools, satellite dishes, those are all things that are under accessory uses.

L. Moorhouse - Sir, if I may interrupt you, we are aware of this. Taking us through our

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code may be a mute effort.

C. Auerbach - I will bring it all together, I am just setting the stage for my analysis.

L. Moorhouse - OK.

C. Auerbach - Those are the things that are permitted accessory uses, a satellite dish, a sign, a pool. And then it leads to #6, which includes other structures for private use of the land owner. This leads me to wonder to myself, what is a structure? Then I flip to the definition section of the code, the definition of structure, section 120-11, anything constructed or erected to a fixed location on the ground. It is a very broad definition. Just what it says, anything constructed or erected to a fixed location on the ground. So, looking at the accessory uses, which permit any other structure for the private use. It's clear, at least to me, that this would contemplate the swing on the adjoining property. And, as an accessory use, pursuant to the code, the dimensional requirements apply for all uses in the Honeoye Lake District. So, having established that this is a structure, an accessory use and all accessory uses are required to comply with the setbacks. It is immaterial that a building permit is not required. The code doesn't say here are setbacks requirements for all things that require a building permit. It just says that these are the setback requirements for all uses. It is right in the section of the code 120-21 E. The following dimensional requirements apply for all uses. Not distinguishing building permitted uses or other uses. So, I think the code is very clear, just by looking at the plain meaning of the word, contained within the four corners of the code, that as an accessory use, setback requirements are to be followed for the swing on the adjacent property. So, we are here asking you to review the determination of the administrative official, that said his determination, no building permit, not required to comply with the setbacks. The reason why we are appealing that, it because the code clearly states that all uses must comply with the setback requirements in the Honeoye Lake District. One last very important point, if this were not an accessory use that was permitted in the Honeoye Lake District, it would not need to comply with the setback requirements. However, the code also says in section 120-71, that certain uses are prohibited. Section F of that code says all uses not listed as an accessory use, are prohibited. So here lies the dichotomy, if it is an accessory use as we maintain that it is, then it is clearly required to comply with the setback requirements. All accessory uses are required to comply with the setbacks. If it is not an accessory use, then it is not permitted, it is a prohibited use. Although we agree that this use is allowed, our position is that if it is allowed, then it must have to meet the setback requirements. If you determine it is not an accessory use, then it is prohibited and it is not even allowed at all. So, that is basically the dichotomy that we perceive in the code. I didn't mean to take you through your own code, but I felt it was important to describe why we think that the determination of the administrative official should be amended because of the reasons we just stated.

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L. Moorhouse - OK. Thank You.

F. Wolf - I have nothing to add, but, I will answer any questions that you may have.

L. Moorhouse - I do have one question. (Pointing at the pictures) Who's shrub is this?

F. Wolf - I think that is Ron and Phyllis's shrub. We have some lilac bushes that are right up against our property line and they are right next to these shrubs.

C. Auerbach - The shrubs that are closest to the swing are the adjoining property owners and the lilacs are the Wolfs'.

L. Moorhouse - You are Mr. & Mrs. Fritz?

R. Fritz - Yes.

L. Moorhouse - Did you plant those shrubs?

R. Fritz - They were there when we bought the house 3 years ago.

L. Moorhouse - 3 years ago? They were there?

R. Fritz - Yes.

E. Bott - I have one question. Who took this picture?

F. Wolf - My son took it with his cell phone. I asked him to take a picture with his cell phone, because it shows the base of the swing.

E. Bott - On their property?

F. Wolf - He didn't have to go on their property. The picture is on their property, but he stood on our property to take that picture, it's that close together.

C. Auerbach - You can see in that colored photo that the swing is almost on the property line.

E. Bott - I seriously doubt that you could get to the inside of that swing standing on your property.

F. Wolf - He told me that he took it standing on our property.

E. Bott - I want to know if you got permission from them to go on their property?

F. Wolf - I'm not sure if he asked permission and I'm not sure if he got permission. He took the picture, he said he was standing on our property. If you want to come down there with me, I will show you how close it is.

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E. Bott - You would have to have an awful long arm to get to the middle of that swing. You understand the problem here with someone presenting evidence when it was obtained unethically, or illegally?

F. Wolf - I don't know if he stood on the sidewalk. Our cottage is so old, it's a non-conforming pre-existing use.

C. Auberbach - I am sure the occupants would have had no problem with it.

E. Bott - We will find out from them.

C. Auberbach - There is certainly no indication from that photograph that anyone committed anything illegal.

L. Moorhouse - (Pointing at the picture) These L-brackets that are holding this swing to the wood? Is that correct Sir? (Speaking to Mr. Fritz)

R. Fritz - Yes.

L. Moorhouse - If you were to unscrew those, the swing comes right off?

R. Fritz - Yes.

E. Bott - At this time, I would like to open the hearing to the public.

L. Moorhouse - Mr. Fritz, did you have something you wanted to say?

R. Fritz - This is the first time that I knew this was going to happen. I have never seen these photos. I never saw anyone take the photos. This photo right here, had to have been taken from my property. If they had asked me, I probably would have said yes, but no one asked me.

L. Moorhouse - When did this go up?

R. Fritz - Shortly after we moved in, about 3 years ago.

L. Moorhouse - So, it has been there for 3 years?

R. Fritz - Yes.

L. Moorhouse - Do you ever take it down in the winter? Is it pressure treated so you don't have to?

R. Fritz - We take the swing part off, but the frame stays there.

L. Moorhouse - Do any of the Board Members have any questions?

E. Bott - I don't have any more questions. Is there anyone else that would like to make any statements in the Public Meeting?

F. Wolf - We get along very well for neighbors. I like Ron and Phyllis my grandchildren play with their grandchildren. My grandchildren sleep in their cottage sometimes and their grandchildren sleep at our cottage sometimes. I had this discussion with Ron about moving the swing, because of the location. He has room to the south that he could put it. Basically, he didn't want to move it. And, basically where we left it, and this was over a year or so ago. I said that I didn't think it was code compliant. He said, if it isn't code compliant, then I will move it. He got the permission from the Building Inspector, because it didn't need a permit. I think our issue here is no one said that he has to meet the setback requirements, I'm not even sure if he has to meet the setback requirements. Somebody needs to go down there and measure it off the side line and measure it from the lake side and look at the adjoining properties because of the requirements. Somebody needs to go down there and figure it out, and maybe come back and say, he meets the requirements. So, that isn't where I'm at. It is a simple thing. If there is a building permit that is not required, are there still setbacks required? If it is an accessory use and it meets certain requirements, it doesn't matter. That is not the issue, the issue here is do they have to meet the setback requirements? With the configuration of the sidewalk, the way that it is situated, it comes right up against the concrete, they have to walk down to their boat. I think they are hard pressed to move that swing out of its current location. I want to say one more thing, regardless of how the votes are, he has a big stone break wall and a big boat hoist. I said to him, I don't want you to break your back trying to lift that hoist up over that break wall, you can put it on my beach and you can leave it there all winter. I just didn't want him to put it on my beach before October 15th, because we come down and like to look at the leaves and things.

C. Auerbach - In fact, he offered to buy them a swing, to replace the existing one. And Mr. Bott and the others that object to the photos, if you don't even want to consider the photographs, you can just ask the property owner if the swing is attached to something, having a fixed location on the ground. That is the definition of a structure, attached to something having a fixed location on the ground. Regardless of the picture, you need evidence of whether it is fixed to something on the ground.

E. Bott - We don't conduct an investigation, we are here to do an interpretation of the law. That's what we are required to do.

C. Auerbach - Yes, and part of that is determining if this is a structure. And if there is any question as to the photograph, that we provided, I think the applicant can attest to whether or not that it is in fact attached to something on the ground.

E. Bott - Except, there is no applicant.

C. Auerbach - Excuse me, property owner.

M. Gascon - I do have a problem with the way the pictures were obtained.

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C. Auerbach - I understand that, and I would just like to ask that Mr. Best ask the property owner if it is in fact attached to the ground or not.

M. Gascon - If it is attached to the ground, I think it is for safety from the wind. That is probably the reason for it.

R. Fritz - It is attached to the ground.

C. Auerbach - So, he has testified that it is attached to the ground.

D. Horning - For safety purposes.

L. Moorhouse - That also makes it moveable. Mr. Fritz are you assessed for this? Is there value on that?

R. Fritz - No.

C. Auerbach - There is nothing in the code under the definition of a structure that requires it to be assessed. All it really says is that, nothing more, nothing less, not my words, but the codes words, anything attached to something having a fixed location on the ground. In order for it to be a structure, all it needs to be is anything attached to something having a fixed location on the ground.

E. Bott - Anyone else have anything to say before we close the public portion of the meeting.

E. Bott made a motion to close the public portion of the meeting, L. Moorhouse seconded, all in favor. Open meeting closed at 7:34 p.m.

DECISION AND INTERPRETATION FROM THE BOARD

E. Bott - A couple of things that have not been brought up is one, whether or not this is actually a structure. That is the first determination, whether or not this is a structure. You stated your opinion, whether it is a structure or not. I am going to give you a little insight to the zoning ordinance and what they tried to achieve with the zoning, because the interpretation of the law and the intent of the law becomes very important here and that is more than just an opinion. The zoning committee went to great lengths to make sure they didn't put undue burden on landowners. There is a great deal of evidence of this when they talk about basically, kiddie pools. You often referred to them as pools, making them sound like a full blown olympic pool, when they are not, they are limited, there is no power, they are only 24" deep. The same thing with swing sets and minor things like that. The Town had no intention of turning small swing sets, pools, and little things like that into some big zoning requirement and thus be restricted by building permits. Because of that, because they specifically called out for the exemption of swing sets, in my opinion, this does not constitute a structure as they intended it to be a structure. Therefore, since this is not a structure, it certainly isn't permanent, since there are only 3 or 4 screws holding it to the ground. I don't consider this to be

anything that is going to have to meet any kind of setback. Most of our setback laws are safety defined. You have to make sure that emergency equipment can get around corners, get down driveways. We have to make sure that houses aren't too close together. In this case, the attachment, increases safety. I don't think the intention of the law, did not want us to get into such petty nuances and restrictions on what people were doing with their property. They did not intend to restrict people, where your interpretation of the law would indicate. I think that is an over reach of the law, your interpretation, calling this a structure. This is not being called a structure, it is not assessable, it is not real property. In my opinion, it does not have to meet the setback rules.

C. Auerbach - What about a satellite dish?

E. Bott - Not my worry.

C. Auerbach - A satellite dish is clearly defined as an accessory use.

D. Horning - You can't deny a satellite dish, it is part of Federal Law.

C. Auerbach - The intent.

E. Bott - You need to stop right there, you gave your presentation. You don't get to argue.

C. Auerbach - It's not an argument.

E. Bott - We are giving you an interpretation and we are not done giving you our interpretation.

C. Auerbach - It's just about the words in the code. Not my opinion, not your opinion.

E. Bott - Our job is to do what? Give an interpretation of the rule and that is what I am doing. OK. Do not interrupt again.

C. Auerbach - Of the code.

E. Bott - Of the code.

C. Auerbach - Of what it says.

E. Bott - My interpretation. That's what I just did. Now, I am going to leave it up to the board to add or subtract from my statements. Mine is based on the fact that the intent of the law is to not get into this kind of petty detail.

M. Gascon - I think that was the intent in the first place.

L. Moorhouse - I also agree with Ed, in that I am sure that something like this is kind of the same thing as the portable trampolines that people have. Or for that matter, if Mr. Fritz wanted to, he could put his boat right there. It's not breaking any law, but it would make a bigger block of the view for Mr. Wolf. I think the intent was to keep things simple. And this is pretty simple. I don't believe that this is a structure as we think of a structure. That is what my interpretation would be.

C. Auerbach - Can I point out 2 things.

L. Moorhouse - OK.

C. Auerbach - I understand what you are saying about what you think the intent was. In New York State, the only define of the intent of the law, is if the words of the law are ambiguous. Otherwise, you are required to look at the four corners of what it says and render a determination based upon the words.

E. Bott - You also know...

C. Auerbach - It is clear the words here say, it is very clear without any ambiguity, anything with a fixed location on the ground or attached to something that has fixed location to the ground is a structure. Whether you agree with it or not with what this says or not, it doesn't matter. You have to think about what these few words here, say. And we have evidence that was presented, that this is attached to a fixed location on the ground. It is something that is fixed to the ground. A trampoline isn't, a boat isn't. Although we may not agree with what it says, we are not here to say what our thoughts or opinions are. Our only job tonight is to say what do these words say. I don't think anyone could disagree that anything constructed or erected with a fixed location on the ground or attached to something having a fixed location on the ground, is undeniable that this is covered by these words.

L. Moorhouse - OK, that was one, what was the other one. You said you wanted 2 things.

C. Auerbach - The one about intent if the words aren't clear. And here, the words are as plain as day.

L. Moorhouse - This is a moveable object.

C. Auerbach - But, right now, it is attached. He said so himself, if it wasn't, it would be unsafe for his kids. If he detaches it, that would be another story. The testimony presented at this meeting is that these pieces of wood are attached. It is attached and fixed to the ground.

E. Bott - Counselor, two of us gave you an interpretation, please let the rest of the board finish. Please let the other board members finish.

D. Horning - I agree with Linda and Ed. This is not the type of structure. Just because

it is fixed to the ground, it does not have to follow that rule. It is a swing set. If we get involved and tell these people they have to move it because of setbacks, it will cause complete chaos. Because, you will have every person down there telling us this is attached, this is wrong, the view is wrong. So, I agree with them that this is not an accessory and is allowed to stay where it is. If he feels he can take the screws out and it can be moved, that is his prerogative. As far as the view, that hedge is going to grow up and you are going to lose your view anyway.

M. Gascon - I agree with Ed. It's a swing set. The only reason it is attached is for safety. If you want to take the bolts out, you can do it. It is common sense to have it anchored down. It does not have to meet the setback requirements.

L. Moorhouse - Thank you, Marty. I guess the consensus is that we believe that it does not have to comply with the setback code.

C. Auerbach - It's not a structure?

E. Bott - I don't believe it is a structure by design. Although your interpretation of the rule as being that specific is an overly broad interpretation of the rule.

C. Auerbach - I am just reading the words.

E. Bott - I understand, that's why I gave my opinion the way I did. If you still don't agree with us, you have several options available. You might want to consider the fact that this is unanimous among the board. In all reality, should something come down from an upper court saying that this is permitted, then I think it is pretty clear as far as what is going to happen as far as a variance being granted. The Town was very precise in putting in zoning so that we had some control over what was going on in the town. Without being overly burdensome to the landowners. If something is ambiguous, we have to rule for the landowner, which in this case is not your client.

C. Auerbach - You have to rule for the applicant.

E. Bott - There is no application here.

C. Auerbach - There is an application for interpretation.

E. Bott - That's not the same as an application for a variance. If this was an application for a variance, we would have to rule for the landowner.

C. Auerbach - I get it, I understand your point. But, think about what you are doing. You said that it puts the board in charge of a zoning code law which you didn't write and I didn't write. You simply made a decision because you disagreed and you tried to say what you think they meant. All we ask is look at the very words as they are written.

E. Bott - And that is our interpretation.

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C. Auerbach - We all agree that this is something that is attached to the ground or affixed to something on the ground. The only requirement of being a structure. Although we may disagree, if it's a structure, it has to comply with the setback requirements.

E. Bott - Well, we ruled otherwise in this case. That's where we stand today.

C. Auerbach - I understand that. What I'm saying is, it is the words of the code.

L. Moorhouse - Exactly. My suggestion would be, if Mr. Wolf is so inclined, he could address the Planning Board, with regards to the language in our code.

C. Auerbach - We are very disappointed, but we understand your decision. Thank you for your time.

L. Moorhouse - You are very welcome. We will be sending you a letter with our decision.

C. Auerbach - Will that include the board's findings and your decision?

E. Bott - It will be the statements that we made.

L. Moorhouse - So, the answer would be yes.

E. Bott - It might take a while, we have a lot to write down.

C. Auerbach - As you are all aware, the decision has to be filed in the Town Clerk's Office within 5 days.

D. Horning - We know.

L. Moorhouse - Yes.

E. Bott - Made a motion to close the Public Hearing, seconded by M. Gascon, all in favor. Public Hearing for Mr. Wolf ended at 8:19 p.m.

Old Business

D. Horning made a motion to approve the minutes from the July 9, 2014 meeting with the noted corrections, seconded by L. Moorhouse, all in favor.

L. Moorhouse made a motion to adjourn the meeting, seconded by M. Gascon. All in favor and adjourned at 8:54 p.m.

Respectfully,
Stephanie Seeley, Secretary

