

Town of Wappinger
Zoning Board of Appeals
March 10, 2015

Town Hall
20 Middlebush Road
Wappinger Falls, NY

MINUTES

SUMMARIZED

Members Present:

| | |
|--------------|----------|
| Mr. Rexhouse | Member |
| Mr. Johnston | Member |
| Mr. Galotti | Member |
| Mr. Casella | Member |
| Mr. Prager | Chairman |

Others Present:

| | |
|-----------------|----------------------|
| Mr. R. Graham | Attorney |
| Mrs. B. Roberti | Zoning Administrator |
| Mrs. M. Gale | Acting Secretary |
| Mrs. B. Ogunti | Secretary |

SUMMARY

Smart Subdivision – Interpretation Decision

Minutes from 2-24-15 - Accepted

Appeal 14-7527 (Interpretation)

Smart Subdivision-Is seeking an Interpretation of the Determination from the Zoning Administrator in regards to a 2 lot subdivision as it pertains to an existing non-conforming 3 family house. Where a legal non-conforming 3 family exists on 2.059 acres, the applicant is seeking to subdivide the parcel into 2 lots with the legal non-conforming 3 family house to remain. The determination of the Zoning Administrator is that the applicant should remove one unit before subdividing the 2.059 acres into two approximately one acre parcels. The property is 2.059 acres and is located at **191 River Road North** and is identified as **Tax Grid No. 6056-01-241913** in an R-40 Zoning District in the Town of Wappinger. (Hudson Land Design) (Cantor)

Appeal No. 14-7526 (variance)

Smart Subdivision- To discuss a proposed 2-lot subdivision where the existing non-conforming legal 3 family home will remain on lot 1 and a second lot will be created in the rear of the parcel. Each lot will be served by private wells and subsurface sewage disposal systems and the existing driveway will continue to be used as a shared driveway for both lots. An individual paper driveway is shown on the plan as an alternate means of ingress/egress for Lot 2. The property is 2.059 acres and is located at **191 River Road North** and is identified as **Tax Grid No. 6056-01-241913** in an R-40 Zoning District in the Town of Wappinger. (Hudson Land Design) (Cantor)

Mr. Prager: Motion to go into Executive Session

Motion: Mr. Johnston
Second: Mr. Casella
All – Aye 7:05PM

Mr. Prager: Motion to come out of Executive Session for legal advice.

Motion: Mr. Casella
Second: Mr. Johnston
All – Aye 7:28PM

Mr. Prager: Read Decision – after reading asked for Roll Call Vote (attached)

Mr. Rexhouse – Aye
Mr. Johnston – Aye
Mr. Galotti – Aye
Mr. Casella – Aye
Mr. Prager – Aye

Mr. Prager: Motion to adjourn
Motion: Mr. Johnston
Second: Mr. Casella
All in Favor – Aye

Respectfully Submitted,

Adjourned: 7:48PM

Michelle Gale
Acting Secretary
Zoning Board of Appeals

DECISION OF THE ZONING BOARD OF APPEALS

Appeal 14-7527 (Interpretation)

Smart Subdivision-

Appeal No. 14-7526 (variance)

Smart Subdivision-

Wendy Lynn Smart, residing at 191 River Road North, Wappinger Falls, NY (herein, the “Applicant”), made an application on April 25, 2014, to appeal the February 26, 2014 determination of the Zoning Administrator (“Determination”).

The Applicant is the owner of a 2.059 acre parcel which is improved by a three-family home known more commonly as 191 River Road North (Tax Grid No. 6056-01-24193) located in the Town of Wappinger, County of Dutchess and State of New York (the "Property").

On February 6, 2014, the Applicant requested a determination from the Zoning Administrator of the following:

- a. **your confirmation that the existing dwelling on the Smart property containing three dwelling units has the status of a non-conforming use pursuant to the Town of Wappinger Zoning Law,**
- b. **your determination that this lawful non-conforming use may be continued on a lot of approximately 41,098 square feet (subject to obtaining of subdivision approval), and**
- c. **your determination that the reduction of the lot size for the lot housing the non-conforming three dwelling unit structure is not a prohibited intensification or prohibited change of a non-conforming use.**

The Zoning Administrator stated in her Determination: "While the house on this parcel has been determined to be a legal non-conforming three-family house by the town which has existed for many decades, it is not consistent with the character of the neighborhood which is primarily one family residential homes." The Zoning Administrator went on to say that the subdivision of the lot would result in an unlawful increase of the non-conforming use and therefore should be denied unless the Applicant agreed to remove one of the dwelling units from the multi-family dwelling.

By implication, the Zoning Administrator answered the first question posed by the Applicant in the affirmative, but then answered the remaining two questions in the negative.

In this appeal, the Applicant asks this Board to reverse the Zoning Administrator's Determination and to hold that (a) the lawful non-conforming three-family use may continue on a lot of approximately 41,098 square feet, subject to subdivision approval, and (b) that the reduction in lot size for the lot where the three family dwelling is located is not a "prohibited intensification or prohibited change of a non-conforming use."

In the alternative, the Applicant requests an area variance "to allow the approximate one acre lot to be used for the existing non-conforming three-family dwelling."

This Board's authority in reviewing this application for an interpretation is found in Town Code § 240-107[B] (2), which provides that the Zoning Board of Appeals is authorized

to reverse or affirm, in whole or in part, or to modify an order, requirement, decision or determination appealed from and is further authorized to make such order, requirement, decision or determination as, in the opinion of the ZBA, ought to be made, and to that end the ZBA shall have all the powers of the Zoning Administrator or any other administrator or official from whom the appeal is taken.

More particularly with regard to interpretation of the Town's Zoning Ordinance, the ZBA is authorized as follows:

On appeal from an order, requirement, decision or determination made by an administrative official or on request from any official or agency of the Town, the Board of Appeals is authorized to decide any question involving the interpretation of any provision of this chapter . . .

Town Code § 240-107[B] (2) (a).

The Board will consider the issues raised on this application in the order they were originally presented to the Zoning Administrator by the Applicant.

I. Does the existing dwelling on the Smart property containing three dwelling units have the status of a non-conforming use pursuant to the Town of Wappinger Zoning Law?

The Applicant requested a determination from the Zoning Administrator that the use of the Property as a three family residence was a non-conforming use under the Town's Zoning Law.

A “nonconforming use” is defined as:

“A use of a building, structure or land that does not conform to the regulations as to use in the zoning district in which it is located, which use was lawful under the Zoning Law in effect at the time the use was established.”

Town Code § 240-5. The Town of Wappinger Zoning Ordinance was first adopted on January 29, 1963. With the adoption of the Zoning Ordinance, the subject parcel was zoned R-20 which only allowed single family residences. The Applicant claims that the Property three-family dwelling pre-existed the adoption of zoning by the Town, and therefore is a "non-conforming use" as that term is defined above.

At the outset of the public hearings on this Application, the Board advised the Applicant that it needed additional information to confirm the nature and extent of the non-conforming use claimed by the Applicant. Further, the Board advised that it was inquiring into the status of the Property as reflected in the property’s tax assessment records. The Board’s concern was whether the Property was a non-conforming two or three dwelling residence at the time that zoning went into effect in 1963. If the Property were a two family dwelling in 1963, the concern was that a subsequent conversion to a three-family dwelling, without a permit, may have been improper.

To that end, the Board received evidence of the tax assessment records dating back to November, 1963 as well as the testimony of the current tax assessor as to how the records were compiled. The tax assessment property card for the Property, dated November 14, 1963 (Exhibit "1"), indicates that the Property consisted of a two family house with only two kitchens and two bathrooms. From that time going forward, the assessment records for the Property consistently show the Property classified as a two-family residence up until February 12, 2002 (Exhibit "6") when on an “AUPD Change Notification” form, the Property is for the first time classified as a three-family residence.

The Board also reviewed the Building Department’s records for this Property and found that there was no record of building permit being issued to convert the Property from a two-family to a three-family residence.

The Applicant was given full and fair opportunity to offer her own evidence and legal arguments on the issue. She therefore presented the Board with several sworn and unsworn statements in an attempt to show that residence has been continuously used as a three-family dwelling since before 1963. Additionally, the Applicant attacked the credibility of the assessor's records, claiming that there were numerous errors throughout the records as to the number of bedrooms, the number of kitchens, the number of bathrooms, etc.

On the last day of the public hearings, Applicant's counsel, for the first time, argued that the Board was raising the issue over the extent of use of the Property "sua sponte" and therefore was without jurisdiction to contradict her Determination on that issue.

The Board finds that the issue of whether the residence on the Applicant's Property constituted a legal, non-conforming use was initially raised by the Applicant in her counsel's letter to the Zoning Administrator on February 6, 2014. Therefore, the resolution of that question has always been before this Board on this appeal. Furthermore, the issue was not raised "sua sponte" as the Applicant's lawyer has argued, as the Applicant has been full opportunity to litigate the issue before the Board and has in fact presented numerous documents for the Board to consider.

The burden for establishing a non-conforming use is upon the Applicant. The courts have stated

"[T]o establish a right to a nonconforming use, the person claiming the right must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective." (*Matter of Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 284).

"It is the conduct of the owners of the property at the time the zoning ordinance was adopted that is controlling." *McQuade v. Zoning Bd. of Appeals*, 248 A.D.2d 386, (2d Dept, 1998)

Additionally, part of the Board's function in these matters is to weigh the credibility of witnesses, determine the extent to which witnesses' statements may be biased or lack corroboration. In this instance, the Board weighs the credibility of the evidence on this issue in favor of the Applicant.

The Board finds that the critical point in time for determining the status of the Property is January 29, 1963, the date that the Town's zoning ordinance went into effect.

The Applicant produced an affidavit from Elsie Sheppard, who states that she and her husband resided at the subject Property from 1953 to 1957, and that it was used as a three family home throughout that time. She further states that she and her husband moved next door in 1957 and that the Property continued to be used as a three family dwelling.

The Applicant also produced an affidavit from Virginia Stolz, who with her husband purchased the Property in 1968. She states that at the time of the purchase the Property had been used as a three family home by the previous owners, and that they (the Stolz') continuously used the Property as a three family house.

The sworn statements of Elsie Shepherd and Virginia Stolz, taken together, establish that the Property was being used as a legal non-conforming, three-family residence when zoning went into effect. The Board therefore affirms the finding of the Zoning Administrator in that regard.

II. Whether the Property's non-conforming use may be continued on a lot of approximately 41,098 square feet (subject to obtaining of subdivision approval).

The Zoning Administrator's Determination found that:

This converted house sits on just over two acres and if the two lot subdivision is approved as proposed it would increase the density of this multi-family home by splitting the lot it sits on to just over the one acre minimum of 40,000 sq. ft. This in my opinion increases the non-conformity substantially.

The Board agrees with the determination of the Zoning Administrator that the proposed subdivision will cause a significant reduction in the size of the lot where the three-family dwelling is located and will result in an increase in the non-conformity.

The intended housing density in this R-40 zone is one dwelling unit per 40,000 sq. ft. of lot area. It is clear from the Applicant's materials as well as her testimony before the Board, that the purpose for reducing the size of the lot where the three-family dwelling is situated is to allow for the construction of yet another residence on the Property. The Applicant has made it clear that she intends to retain ownership of the three-family home and wants to build her "retirement home" on the newly subdivided lot. The Applicant will thus have beneficial use and ownership of both parcels, even after the subdivision. The proposed subdivision therefore appears to be a mere subterfuge to build an additional residence on the Property that would otherwise be clearly prohibited in this zone. For that reason, the Board agrees with the Zoning Administrator that the proposed subdivision will impermissibly increase the non-conformity.

The Applicant would like the Board to consider the proposed subdivision of the Property in isolation. Thus, the Applicant argues that leaving the three family dwelling on a one acre parcel does not "increase" the non-conformity as there are no planned changes to be made to the residential building itself. The Board however, considers the proposed subdivision and construction of a second residence as a single project with the result that the Property which formerly maintained a non-conforming three family dwelling will now contain another residence albeit subdivided. This, the Board finds, is a prohibited increase to the non-conformity.

Moreover, the presumption under the law is that the non-conforming use extends to the full two acres. To subdivide that parcel into two single acres and then build another residence does in fact increase the overall non-conformity of the Property.

For these reasons, the Board affirms the determination of the Zoning Administrator dated February 26, 2014, and finds that the proposed subdivision of land is prohibited under the Town Code.

III. Application for an area variance.

The Applicant has requested in the alternative that the Board consider this an application for an area variance. The Applicant has not clarified with any degree of specificity the extent to which an area variance would apply to this scenario. Suffice it to say that the Applicant is seeking permission to continue the three family dwelling on a one acre lot (post subdivision) as opposed to the current two acre lot.

First, given the above analysis, the Board disagrees that an area variance is needed in this instance. The issue is that there is a non-conforming three family dwelling in a zone that is limited to single family residences. Granting an area variance will not solve that issue. For that reason alone, the application for the area variance should be denied.

However, even if the Board were to consider this as an area variance application, the decision would be the same. In determining whether an area variance should be granted or not, the ZBA must consider the following factors (Town Code § 240-107(B)(2)(b)(2)):

[i] 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.

The Zoning Administrator testified and the Board agrees that the predominate residential use in this neighborhood is single family residences and to add another residence to the Property contravenes the character of the neighborhood.

[ii] Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue other than an area variance.

Yes. Although the Applicant would greatly prefer to have her retirement home on the Property, she could either convert the existing dwelling back to a suitable residence for herself or look for alternative property.

[iii] Whether the requested area variance is substantial in relation to the requirement.

The requested variance is substantial. The three family dwelling is presently situated on a two acre parcel. Thus, to accommodate three dwellings, a property owner would theoretically need 120,000 sq. ft. of acreage. Since the Property only contains approximately 80,000 sq. ft., it is currently sub-standard by approximately 33.33 %. If the Property is subdivided as proposed, it will result in a doubling of the non-conformity, or a 66% variance.

[iv] Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

No.

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

The difficulty is clearly self-created as the Property has been used as a three-family dwelling for many years. The request for the variance is to accommodate a future wish of the Applicant and is not necessary for the Property's current use.

For all the reasons outlined above, it is hereby

RESOLVED, that the Zoning Board of Appeals affirms the Determination of the Zoning Administrator dated February 26, 2014; and further it is hereby

RESOLVED, that the Zoning Board of Appeals denies the area variance application.