

**Town of Copake
Zoning Board of Appeals
Minutes - October 22, 2009**

The regular monthly meeting of the Zoning Board of Appeals of the Town of Copake, was held on Thursday, October 22, 2009, at the Copake Town Office, 230 Mountain View Road, Copake, NY. The meeting was called to order by Chairman, Jeff Nayer at 7:15 PM.

Present at this meeting were: Jeff Nayer, Hilarie Thomas, Frank Peteroy, Leslie Wood, Shawn McClain, and Michael DiPeri. An audience of approximately 8 attended, including Bob Sacks, Town Board Member. Copake Town Attorney, Lawrence Howard was also present as legal counsel to the ZBA.

Minutes:

The minutes of September 24, 2009 were reviewed. *Leslie made a motion to dispense with the reading of the minutes of September 24, 2009, this was seconded by Michael. The motion carried. Leslie made a motion to accept the minutes as written, this was seconded by Michael. The motion carried. Shawn abstained, since he had not been at this meeting.*

Correspondence:

None to report

Public Hearings:

Application # 2009-01, Lisa & Mark Nielson, SW Colony Rd, Copake Lake, Area Variance:

The Public Hearing which had remained open from July 23, 2009 was re-opened.

Audience member, Larry Mercillott, requested to speak, after being granted permission, he again expressed his concerns with the deeded easement for the septic system. His concerns were for a possible subdivision of the parcel. To this suggestion members of the ZBA assured Mr. Mercillott that the zoning law 232-24.C.3, does not allow the creation of nonconforming lots.

The Nielson's attorney, Todd Mathes came forward to answer questions regarding a large packet of additional information presented to the board members prior to the meeting. Jeff read the cover letter dated October 9, 2009:

Dear chairman Nayer and Members of the Zoning Board of Appeals:

The purpose of this letter is to respond to the issues raised in my August 27, 2009 letter

to the Zoning board, as well as the issues raised during the Zoning Board's last meeting at which the Nielsen area variance requests were discussed.

- 1. The Cabana has been shifted slightly so that more than 15 feet of open space will exist on either side of the cabana. A revised site plan showing a 16'11" setback from the neighboring parcels is attached as exhibit "A".*
- 2. The applicant will not construct the cabana unless or until construction of the single family residence is commenced on the portion of the parcel on the west side of Southwest Colony Road. This should eliminate any confusion about which variances are necessary and where the front yard, side yard and rear yards are located. the only variance required is from the water-body setback.*
- 3. The NYS Department of Environmental Conservation (NYSDEC) has confirmed that the project will not impact wetlands and that NYSDEC has no jurisdiction over the project. A letter from NYSDEC Region 4's Deputy Permit Administrator is attached as exhibit "B".*
- 4. Storm water from the project will not adversely impact water quality in the lake or groundwater. Again, although not required under NYSDEC's General SPDES Permit requirements, a storm water pollution prevention plan (SWPPP) has been prepared for the project. The SWPPP is attached as exhibit "C".*
- 5. Wastewater from the project will not adversely impact water quality in the lake or groundwater. The Columbia County Health Department has reviewed and approved the septic design plans are attached as exhibit "D". The septic system will be installed in accordance with the County's approval.*
- 6. The cabana is meant for storage, and to accommodate a bathroom, but not as a primary residence or "guest house". A Sketch of the proposed interior of the cabana is attached as exhibit "E".*
- 7. The cabana is consistent with the prevailing character of the neighborhood along Southwest Colony Road. A summary of relevant case-law on this topic is attached as exhibit "F".*

For the reasons set forth in my August 2009 letter to the Zoning Board and herein, the benefit of awarding the variance relief to the Nielsen's clearly outweighs any potential detriment to the health, safety and welfare of the community. This is particularly true given the abundance of caution being exercised by the Nielsen's to avoid any potential environmental impact to the lake, and given the conformity of the proposal with the prevailing character of the neighborhood.

Thank you,

Very Truly yours,

Todd M. Mathes

C: Lawrence Howard, Esq.

Jeff continued that this proposed project was not before the Building Department, nor before the Planning Board. He checked with both Departments, no applications have been received. You can't ask for a variance for an auxiliary building when there is nothing else on this property. Mr. Mathes addressed this issue and stated that according to the plan of the owners, when the main residence gets built so will the accessory building be built.

Side-yard, rear-yard, front-yard, what is the front of the house, it's all confusing, Mr. Mathes explains, there is confusion at least on our part as to where the Board viewed these. In order to avoid further confusion, we are proposing that it only gets built as an accessory to a primary structure. The residence gets built, the accessory building gets built on the lake side of SW Colony Road. It will be in the rear and side yard and the lake setback is the relative setback.

Jeff questioned the front of the house because the driveway has been moved a couple of times. Mathes addressed this issue as well, the previous set of plans submitted showed the driveway leading out to SW Colony Rd, and would run parallel to the lake.

Leslie questioned why do you use the word commence rather than complete, answer the assumption is that it will be built all at once. Then the proposal has changed, originally in June when she came to us, she was only going to build the cabana, now you are saying she is going to build the house and cabana. Hilarie questioned a statement made by Mr. Mathes that the Nielsen's intended to get the variance and then sell the lot. Mr. Mathes quickly replied that the proposal before the board was that to build the house and then the cabana. He continued that they have changed the location of the building to allow for 15' on either side of the proposed building to accommodate the easement issues. It also became clear that these were walking easements. As to whether the lot was marketable down the line had no significance to this application. He also stated that whether Ms. Nielsen's original presentation was misleading regarding the hardship of walking 75 or so feet to go to the bathroom was also irrelevant. At which Leslie pointed out that often times hardships can be very relevant in decisions made by this Board.

Jeff interjected by pointing out that the bottom line is she still need a variance. The proposed house is going in within 100' from the Lake. He then read the considerations in making a determination for an area variance:

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

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

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;

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;

iii. Whether the requested area variance is substantial;

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

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

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

4. Imposition of conditions. The Board of Appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the zoning ordinance or local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

Shawn suggested that the Nielsen's build the house then request the variance for the cabana. He cautioned that should the variance be granted as requested, the applicant could renege claiming a financial hardship. Now with the variance granted, up goes the cabana, not the house. We have no guarantee that the house will be built, especially now that there has been suggestion of the lot being for sale. Attorney Mathes replied that the environmental impact of doing both at once would be less intrusive to the property, and that the ZBA could impose criteria with the issuance of the variance that no building permit be granted for the cabana until the house is built. Leslie questioned just one variance, I thought they needed three. Jeff clarified by stating that when the Nielsen's moved the building, and if they build the house the way they say, then the cabana would only need the lake setback variance.

Frank made the board members aware of some discrepancies that would need attention. 1. The septic plan, says Town of Ghent, should be Town of Copake. 2. Installation of the manhole, County Health Dept. requires not shown on the plans 3. Arrows do not go where they should be going, Storm water. 4. Scale of 20 x20 building is not correct. 5. Pushing the rear yard/ side yard, SW Colony road splitting the lot. 6. Unique situation, not a side lot, it is the front.

He continued by reading a written statement:

Memo

Nielsen Appl dtd 15 May 09, Agent Mr. T.M. Mathes, Esq. Tax # 165.14-2-67.12, Zoned R2, 30K, FYSB 40', SYSB30', RYSB 75', Lot cov 25%, Lot size 0.88 AC - 38,332.8sf. Property divided by private road. Lakeside area 1.177AC -7710.12sf.

Original appl 15May09, requests a 'small out building 50 ft from the lake 20x20'... for 'storage/bathroom... Attorney's ltr(Mathes) & supporting data, dtd 9Oct09 requests a 'cabana', for storage...bathroom, but not as a primary residence, or 'guest house'.

In the absence of a definition in Copake Zoning Laws for a 'cabana', & to establish a generally accepted description, common usage here in these United States (here we have expanded the use to include showers & toilets) as opposed to elsewhere, the following is noted:

1. *Webster's Dictionary 1959: Cabana, origin Spanish; a beach shelter resembling a cabin usually with an open side facing the sea.*
2. *Webster's Dictionary, 20th Century, 1977; Cabana , 1. a small house or cabin. 2. a small shelter used as a bath house.*
3. *Dictionary of Architecture & Construction, 1975, Cyril M. Harris, Professor of Architecture & Electrical Engineering, Columbia University; Cabana, 1. An open or tent-like structure at a swimming pool or at the shore. 2. Originally, a simple spanish dwelling resembling a hut or cabin.*
4. *DAC, C.M. Harris; Bathhouse, 1. A building equipped with bathing facilities. 2. A small structure containing dressing rooms or lockers for bathers, as at the seaside.*
5. *Wikipedia; Cabana, Structures, a small hut built with a thatched roof, most commonly built in tropical climates near bodies of water, or a temporary or permanent free standing shade structure with traversing curtains, decorative drapes and/or solid walls.*

By definition then, a cabana is a small shelter, a hut, tent or cabin, open & closed, permanent or freestanding, containing dressing rooms & bath facilities, dedicated to that use. It cannot be classified as a shed, 232-9 T (1)(2), since the toilet service requires a permanent foundation. It may be classified as an accessory building, understanding that an accessory building may not be located in the front yard. 232-8,D(4). However, this property has 2 front yards, by right, since a private road divides the land. This uniqueness permits the cabana location.

I would classify it as an 'accessory building' - A building detached from & subordinate to a main building on the same lot and used for purposes customarily incidental to those of the main building. It may or may not, be constructed on a permanent foundation. 232-3 Def.

The incidental purpose is a cabana, a small building containing dressing space, a water closet, & lavatory functions; an open porch about 10 x20 ft, with screens only, for storage, making it an enclosed porch; no loft area, no cooking or sleeping areas; heating for summer use. The roof preference is 4:12 precluding a loft area.

The septic tank size is minimum for a 3 BR house. The CCBH requires a 'manhole' unit, their ltr; the plans show the town of Ghent not Copake, & some of the arrows are wrong, as is the building scale to the proposed 20 x20.

The setbacks are acceptable, as is the SWPP, indicating applicant's thoughtfulness. The setbacks require variances, side & rear.

Frank E. Peteroy

Mr. Mathes addressed the manhole issue; the county thinks yes, it would improve the function of the system, however they approved our plans as designed, with a strong recommendation that the manhole be installed. The engineer however disagrees stating that the system will function better without the manhole. To install or not to install, we will

do whatever to make the system work best, but we do not think there is a reason to install the manhole.

Jeff asked about the plan dated 10/09/09, Part B; Mathes to ZBA. It shows a 100 gallon pump tank and a 1000 gallon septic tank within the 100' of the lake. According to Zoning law 232.9.P.1; *No septic tank or tile field shall be located closer than 150 feet from a stream, creek, wetland or other body of water.* Both the building and septic system are closer to the lake than what is allowed. Leslie after reviewing the drawn plans asked about the scaling, expressing concerns that the 20 x 20 cabana, and the home 25 x 30 would be over the septic tank. It seems strange that the home would be almost the same size as the cabana., and how does that become a three bedroom home. Jeff also looking at the plans, stressed that with the style windows, the size of the bathroom, and a loft; it's a pretty fancy building.,

Shawn warned his concerns of a septic system that crosses under the road, and pumped up from the cabana. A failure or malfunction could send raw sewage into the lake. Mr. Mathes informed the board that there was an alarm installed on the system to warn against system failures, and again argued that a variance could be issued with contingencies to have the system pumped at scheduled regulated intervals. Hilarie asked who would enforce this, and it would not only impact the lake but the area wells too. Bob Sacks quickly informed the Board that there is no rule within the Town's structure to enforce septic inspections at this present time. The Zoning Board should not grant a variance with contingencies that do not exist. Frank added that when there is a failure with this type of system, rarely is it seen on the surface. Some controls have been put in place by the County Health Department's recommendations with an alarm light and concrete containment. The system would still need to be pumped out every 2 years. Jeff added that with a pump up system of this design, with long periods of non- use sitting within a sealed system, they often do not start. We are here to protect the lake, that is part of the reason that zoning is in effect.

Leslie mentioned that if this Cabana was placed on the other side of SW Colony RD, no variance would be needed. Jeff , Shawn and Mike agreed that there was an alternative to the applicant. Mr. Mathes interjected by saying that there was no alternative to a lake side structure. Hilarie argued, sure there is; a shed and a port-a-let. You would still need a variance for the shed within 100 feet of the lake, but you would not need the variance for the septic system. Frank and Jeff mentioned that it would be easier to construct a shed, since it would not need the concrete floor. Mike asked Mr. Mathes whether the applicant would still build the house should this variance be declined. His reply that without the lakeside conveniences of the cabana, she would not be interested in developing the lot any further.

Audience member, Larry Mercillott was again given permission to speak; he made several points for not issuing a variance; 1. Septic enforcement does not exist, non enforceable, 2. geology of the area is fractured shale, not conducive to this type of septic system, and setting a bad precedence, and 3. he has great concerns for the deeded septic system on the other side of the road. Audience member, Robert Piper was granted permission to speak; he disagrees with Mr. Mathes' statement that these easement rights exist, there are 13 or so land owners with these deeded rights. Jeff quickly re enforced an earlier statement that

deeded easement rights were a civil matter, although cause for concern, but not an issue here since the building was moved. There is 16+ feet on one side and 19+ feet on the other. And this parcel could not be sub-divided.

After a lot of discussion regarding the size of the proposed cabana, the scale of the buildings on the site plan, and the septic system proposed, the Zoning Board at the recommendation of Attorney Lawrence Howard decided that the application would be sent to the County Planning Board for review and their suggestions. No vote would be raised on this issue tonight. It was suggested that the Public Hearing be closed, but Leslie pointed out that should the Nielsen's again change their plans, the public should have the right to voice their opinion.

The Public Hearing would remain open.

Application # 2009-05, Kevin & Anne McKenna, 3200 County Rte 7, Copake, Area Variance, rear set-back issue for an addition to house.

Shawn made a motion to open the Public Hearing, this was seconded by Leslie. The motion Carried, unanimously.

Adam Flaum was present, representing the McKenna's. It was reported that all abutters had been properly notified with return receipts returned, and notice placed in paper.

Jeff had contacted the Association of Town's Attorney, he had also been in contact with the Town of Copake, Planning Board, and Building Department, regarding the issue of the safety of the structure. We are here to issue variances, and not sure that Frank's concerns about the structure are relevant. That is up to the Building Department to inspect for safety prior to issuance of a CEO.

Adam did submit for the Board's inspection a color-coded structural plan. He explained that a 12 x 26 addition and a deck would be added to the existing house. Due to financial constraints the repairs would be done in phases. The long term is to repair the entire house, one section at a time. Leslie asked if there would be need for re-grading, Adam replied that only to back fill around the foundation. Shawn asked if the existing septic system would need to be moved, Adam replied no. Shawn also asked about how close the nearest neighbor was, Adam guessed about 75 ft. Leslie expressed concern that she wished they would fix the rest of the house. Adam replied that this was phase I, that that is their ultimate goal. Frank asked what kind of office was being planned. Adam's answer these people are weekenders, it is my understanding that he just wants to be able to check his e-mail without the family disturbing him. He is in the restaurant business. Frank then asked if there was any plan to increase the size of the bedrooms, the answer was no.

This is an application that requires a side and rear yard variance. The home is in R- Zone, the rear set back would be 50'. It was determined that he is asking for minimal relief, the rear set back would be 82' and the side yard setback would be 21.7'. The proposed new

structure as it would be situated on the property would be non invasive, and could only help improve the existing structure. Not at 25% lot coverage.

The neighbors obviously had no complaints, as there was no one present to speak against, no letters had been received, nor e-mails. Jeff asked if there were any more questions or comments, being none, he asked for a motion.

Shawn made a motion to close the Public Hearing, this was seconded by Hilarie. The motion carried, unanimously.

Jeff than asked for a roll call of votes to issue the side yard and rear set back variances, on a motion to approve the variances; *Frank: yes, Hilarie: yes, Jeff: yes, Leslie: yes, Shawn: yes. The motion carried, unanimously.*

New Business:

Meeting dates for the months of November and December would be changed due to the Thanksgiving and Christmas. November would be 11/18/09, and December would be 12/16/09.

Old Business:

By-Laws changes - tabled

Application checklist -

Michael passed out the revised edition having made the changes that he was requested to do. Leslie complimented him on the fact that he was able to get all the information on one page. Frank commented that one of the complaints of the public was that applications were complicated.

Adjournment:

Shawn made a motion to adjourn the meeting, this was seconded by Leslie. The motion carried, unanimously. The meeting was adjourned at 9:30 PM.

The Next meeting will be held on Wednesday, November 18, 2009, at 7:00PM.

Respectfully Submitted,

Theresa A Traver
Recording Secretary, ZBA