

**ZONING BOARD OF APPEALS**

September 21, 2010

Present: Michael Dudick, Chairman, Christopher Lemire, Douglas Strother, James Whalen

Also Present: Joel Peller, Esq., ZBA Counsel  
Steve Myers, Director, Building & Zoning

Absent: Deborah Ferro, Brian Telesh, Robert Ritter

Mr. Dudick called the meeting at 7:10 p.m.

**PLEDGE OF ALLEGIANCE**

Mr. Dudick informed the applicants that ordinarily there are seven members on the board with one alternate member. The alternate is not here, one member has resigned from the board and two of the members were unable to attend. In order for an application to be approved, it must have four votes regardless of the number of members present. Today there are four voting members which means that to approve an application all four of the members, 100% of those present, must vote in favor. He asked the applicants if they would like to postpone their application to a later date with the expectation that there would be more voting members present. He stated it is rare for only four members to be present, and typically there are six or seven attending. Ms. Lescault stated she would like table the vote but would like to speak. Mr. Andress stated he would like to speak and table the vote as well. Mr. Mackey stated he would like to go on.

**OLD BUSINESS:**

1. **An application from Melissa D. Lescault, Esq., for a variance from Section 208-86B, for a front (not side) setback for an existing addition to their home (front faces the street).**

**Fifty (50') feet required, 41' available, 9' variance needed. The property is located at 6 Hilltop Court, Rexford, New York. (Permit #80775)**

Melissa Lescault, representing the application for Genstar, stated that she would like to table the vote until the next meeting, however, she wanted to present some new information regarding the application. She informed that Patricia Collins, who resides at the home on Hilltop Court is also present. She stated that, at the last meeting, when the application was presented it was complicated by the occupation of a business in the house. She advised the board that the “home occupation” of the business has moved and is no longer residing in the basement of the house. She stated that the town inspector, Steve Myers, has visited the home and did a house inspection as well as visiting the new location of the business. She stated that they are hoping that this will now be a simple variance application before the board. She indicated that they still wish to postpone the vote until the next meeting.

Mr. Dudick asked for clarification of “home occupation”; does she mean the occupation of the business in the home? Mr. Lescault stated “yes”.

The application will be tabled until the October 5, 2010 meeting.

**2. An application from One Fairchild Square, Inc. requesting variances to further subdivide property into 5 parcels (currently 3 parcels) 1. Section 208-65E(1) No parking allowed in the front yard, Lots C,D & E all show parking in the front yard (3 variances)**

**2. Per 208-65C and 208-65E (2) there shall be a 25' buffer of vegetation along the side and rear property lines. Variances required.**

**Lot C – East & west sides of property (2 variances)**

**Lot D – West side & rear of property (2 variances)**

**Lot E – North side of property (1 variance)**

**Notes: Only one curb cut is allowed per lot per 208-661. The same curb cut is proposed for all 3 properties. Access is provided per a common roadway.**

**The property is located at 1 Fairchild Square, Clifton Park. (Permit #80792)**

Tom Andress, ABC Engineering, representing One Fairchild Square, Inc and the owner, Mark Rekucki, stated he wanted to be heard but would like the opportunity to table the vote. He stated there is additional information to add to the record.

He presented a map and reviewed the variances requested that deal with parking, setbacks and buffers. He stated that the subdivision itself is not an action subject to the zoning board of appeals but the combining of lots and having common driveways across them along with common access, and utilities creates the need for variances. He stated the Planning Board requested they develop the property utilizing an access through Van Patten Drive rather than utilizing the frontage on Ushers Road. He stated the variances are the same variances that were granted to the two lots on Ushers Road; those two lots are now not part of this application. He mentioned that the question at the last meeting was why the parcel could not be developed as one parcel rather than subdividing. He stated developing them as one parcel becomes an issue with access off Ushers Road and the Planning Board does not want to have access off Ushers. He stated with subdivision, truck access would be through the new road off Van Patten and they would be able to turn around and exit the same way.

He mentioned they received a letter from the SEDC discussing the need for this type of development. He stated the demand is there for individual ownership but not as high for a large parcel. He said that all of the buildings would conform to the requirements of the setbacks.

Mr. Dudick indicated this is an open meeting and asked for comments.

Eric Mackey, 40 Male Drive, Clifton Park said he has been on the property when he reads water meters for the water authority. He stated that he thinks this is a good piece of property for businesses. He felt anything adding to Clifton Park was a good thing. Mr. Peller asked if he was speaking as a town employee or for himself. Mr. Mackey stated this was 100% his personal opinion. Because there would be no vote tonight, Mr. Dudick stated he would leave the public comment open since there was no decision if there would be a vote at tonight's meeting.

Mr. Strother said he had made a motion to approve the application at the last meeting, however, he had read the Planning Board minutes for as far back as he could go and noted that not all the discussion was in support of the project. He mentioned that the Zoning Board approving the variances does not address some of the greater concerns that the Planning Board had explored. He does not feel that granting the variances represents a high risk move for the ZBA because Planning is addressing other issues. He asked that in the future, he would like Mr. Andress to cite the meeting where he indicates that preferences were described by the Planning Board so they can pull the minutes and scrutinize them.

Mr. Strother stated that he tended to agree with the SEDC sentiment but he thought that Mr. Andress had said that it was not economically viable to the develop or sell the property as a single parcel. He didn't see that mentioned in the SEDC. He indicated he was expecting something to be mentioned and asked if that is what Mr. Andress had said. Mr. Andress indicated that is not the case, he is not bringing up economic viability, but rather preference for development. He stated there is demand for it. He indicated the Planning Board had already approved ½ of the development with the first two lots. He stated that Mr. Ritter, who was not attending tonight, was going to have a meeting with the Planning Dept and Mr. Scavo.

Mr. Dudick read the SEDC letter into record. He restated for clarification that it is a preference for the land to be subdivided, but if it weren't it could still be developed. It is easier for it to be developed with parcels being subdivided. Mr. Andress said there is a greater demand for parcels that could accommodate 20-50,000 sq ft and not that many companies coming into the state that are requesting 100,000 sq ft. or more.

Mr. Dudick asked if the board did not approve this application, could the buildings still be built and located where they are now. Mr. Andress said "no" because they wouldn't be able to cross between one property line to the other. He said the buildings could only be built within that area if there was no subdivision proposed and the property was owned by one owner. They could not be built in the configuration shown if they have to conform to the setback requirements. He answered to Mr. Dudick's question that there is no difference in the intensity of use whether whole or subdivided. The granting of the variance will improve traffic because it will allow a road with access off Van Patten Drive. Without the variance they have the right to go off Ushers Road.

He stated that the purchase of Lot D allows them to have the property to change the access.

Mr. Lemire asked about the curb cuts of the property as it sits right now. It was clarified that A & B has its curb cut on Ushers Road..

Mr. Dudick summarized that currently there are two parcels. Parcel D, the one just purchased has access to Ushers Road with a possible curb cut (the one just purchased, D). He questioned if the variance is granted for the parcels, then the access would not be created on Ushers. Mr. Address said that is what they are presenting and are willing to do. Mr. Dudick said not granting the application makes for one or possibly two more curb cuts on Ushers.

Mr. Lemire asked counsel, after the variances are granted and it is subdivided and sold, is there anything in what the board does today to forbid the new owner from requesting a variance to Ushers from Lot C or D. The answer was that you can't prevent someone for asking for a variance. Mr. Lemire expressed concern

Mr. Address said that Mr. Pellegari reviewed the language in Planning and they owners won't be allowed to construct anything different than what is show on the map.

Mr. Dudick asked if Mr. Address would be willing to put in a deed restriction preventing the creation of access to Ushers Road. He said they would be willing. Mr. Peller informed that this is the only way to prevent it is with a covenant to the deed. It won't prohibit anyone from asking for a variance, but they would be told that according to the deed, they could not. Mr. Peller said they would have to go to the Supreme Court to have that overturned.

Mr. Lemire asked what grounds would be needed to attempt to do that. Mr. Peller said it would be very difficult and they would have to bring an action to quiet title and one of the things the court would look at would be the intent of the first transfer, which would be no access on Ushers Road. Mr. Lemire asked if the intent would be the granting of the variance in return for the deed restriction. Mr. Peller agreed.

Mr. Dudick asked Mr. Myers if he had any comment. He did not.

Mr. Dudick asked if Mr. Address would like him to call for a vote. Mr. Lemire stated he has not changed his position at the last meeting and sees nothing to change his mind.

Mr. Address requested tabling the vote until the October 5, 2010. Mr. Strother requested he find the last date the project was submitted to the Planning Board.

Mr. Dudick stated he would keep the Public comments open.

Mr. Address requested to waive the 62 day rule.

- 3. An application from Robert Mackey requesting two variances; First variance is a setback from Section 208.11 for attached garage addition. Fifty feet (50') required in R-1 zone. Variance required = 11'. Second variance is for accessory structure; new carport not attached to the house. Setback required from Section 201-12 is 80' feet, proposed setback is 18', 62' variance required. The property is located at 40 Male Drive, Clifton Park. (Permit #80795)**

Mr. Robert Mackey, 40 Male Drive, Clifton Park, stood to present the continuation of his application. Mr. Peller informed him that he had represented a former neighbor of Mr. Mackey's over a common driveway. He asked if Mr. Mackey would prefer to have another attorney, and if so he would recuse himself. Mr. Mackey stated he was ok with Mr. Peller acting as counsel on the board.

Mr. Dudick gave him another opportunity to table the item until the next meeting. He stated he wanted to proceed and reserve decision to table.

Mr. Mackey read a real estate law "where a person specifically purchases knowing that a given operation is located nearby the moving to the nuisance doctrine usually will prohibit injunctive relief. In this manner if a person moves into a house next to a baseball field the doctrine may prohibit the person from seeking relief from the lights and noise." He stated the neighbor that shares his driveway moved into the house next door when he had the equipment and knew that is what it will be like at Male Drive.

He wants to separate himself from the neighbor and wants to do that by building the garage which will be aesthetically pleasing. He states his wife is an EMT and rushes to emergencies and is part of a transplant program at Albany Med, where she must rush to several times a year. It would be quicker under a carport during the winter.

He stated his male neighbor had indicated in prior weeks that he was agreeable to proposal, but his wife did not and insisted on an architect drawings to review. He said he would provide after the variance approval, and gave her hand made drawings. He stated the plans were expensive to buy if he doesn't receive the variance.

He visited other neighbors and submitted statements about "his helpful nature" for the record. He stated he has had a hard time with the woman next door, although he said he has been helpful to them. He said she has called ENCON on him regarding dumping of dirt on his property from Boyack Road. He related a story about the ENCON visit which was eventually resolved.

He stated he has FOILED documents of his neighbor's complaints. He said that the neighbor had purchased the house to re-sell.

Mr. Dudick asked if it was an option for him to purchase their house. He indicated that it is possible, but they bought it at an elevated price so that option is not available at this time.

He stated if the application is denied, he would leave the raw excavation open and using the front of his house as a parking area for his vehicles. If the application is denied he stated he has backhoes, boats and things which he will move next to the house which the neighbors will not like.

Mr. Mackey said it is not necessary for the neighbors to approve where he is building his garage or carport. Mr. Dudick said that is true, but it is given some weight although will not necessarily affect the vote.

Mr. Mackey asked that the board approve the garage only, if they will not approve both.

Mr. Dudick called for public comments.

Mr. Eric Mackey, son of Robert Mackey, 40 Male Drive, stated that the garage will help his stepmother to get to the firehouse because they wouldn't have to get the snow off the cars. It would also help with storage. He stated he sees nothing wrong with it and that the neighbor has problems.

Mr. Dudick left the public hearing open as they have not determined if they will be voting on the application.

He read an e-mail that had been sent to Mr. Myers from the neighbor at 42 Male Drive. They respectfully request the board does not grant any variance for the garage/carport as it will devalue their property as well as obstruct his vision entering and exiting the property.

Mr. Mackey stated again Mr. Brennan was in support of it as first. Mr. Dudick reminded him that he is aware that he said he was originally for it, but is now entering written statement he is now. Mr. Mackey stated that there is a significant amount of distance between the end of the carport and the road and that there is little traffic on the road.

Mr. Strother stated he would speak frankly. He deeply commended Mr. Mackey on his lifetime of service and his family's volunteerism and is grateful. He understands why the neighbor was for the building and now is not. He had no prior knowledge of contention with this neighbor when he was before the board. His issue is that he cannot see the construction in his mind. He has no pre-conceived notion and will look at it on its merits, but he has a problem with the magnitude of the variance. He stated he hoped they would not vote on it tonight as he needs more discovery.

Mr. Mackey stated he would raise the structure to help with the view. He stated the neighbor has six feet of space on their driveway and a hill. If he puts his backhoe, two dump trucks and other vehicles on that hill he asked how they would get up there without hitting his vehicles. He stated he has 20 security cameras and he would know if they do it. He said it is within his right to park where he wants. He stated he will move the carport on the other side if the variance doesn't get approved.

Mr. Dudick asked if there was any possibility of building the carport on the other side of the street because it is flat. He stated no, it was wetlands and also he doesn't want to ruin it aesthetically. Mr. Dudick presented that as an option that would require no variance.

Mr. Dudick explained the purpose of the Zoning Board of Appeals, to deal with issues because the houses are close to each other. He states Mr. Mackey's property looks like it is under construction. He reminded that the board has granted two variances for garages for him that have not been built. He said the board likes to get an idea of how the finished area will look, what are they creating. He says now there is a layering on that project and what they have is multiple construction. He does not have a firm grasp of what the property will look like.

Mr. Mackey said the other garage is for his toys, ATV, equipment, etc. is going in the 32 x 50 building.

Mr. Lemire asked why they are talking about putting the backhoe and dumptruck where the new variance is supposed to go. Mr. Mackey stated if the variance isn't approved, he would put the carport where the variance is approved. He would have the inconvenience of having to walk. He stated he would take his equipment, which he agreed is partly out of spite, and move it. He stated the neighbors say they don't like the look of the garage/carport in front of the house, but they are not considering what is going to be there if the variance isn't approved.

Mr. Dudick asked him if he wants the board to vote on this. Mr. Mackey said he would like to adjourn to the next meeting of October 5, 2010. When asked if he would waive the 62 day rule, he stated yes.

**NEW BUSINESS:**

None

Mr. Dudick asked if there were enough members present to accept the minutes of September 9, 2010. Mr. Whalen was not present at the September 9 meeting. As there were only three members who were present on that date, the board was unable to vote to accept the minutes.

Mr. Dudick made the motion to approve the amended minutes of August 17, 2010 to replace the previous minutes. Mr. Lemire seconded.

Ayes: Whalen, Dudick, Strother, Lemire Noes: none

The next meeting is October 5, 2010.

The meeting was adjourned at 10:35 p.m.

Respectfully Submitted,

Susan White  
Secretary

cc: Town Clerk, Town Board, Town Attorney, Zoning Board Members, Joel Peller, Counsel, Steve Myers, Department of Building and Development, Planning Board, ECC, Assessor, Highway