

Memo

To: Members Town of Chester Zoning Board

From: Robert J. Dickover

Date: 11/27/2020

Re: Pal Application for Area variances to allow construction of a link between existing barn and existing house so as to increase the size of one dwelling on the existing lot

1. The Request for Relief

This property was previously before the Board seeking a use variance to allow conversion of the existing barn into a second dwelling unit where the zoning code allows only one dwelling per lot. That application also sought area variances for front yard setbacks. That application was denied by the Board.

The applicants, Yogesh and Aradhna Pal, now seek to connect the existing barn to the existing house and thereby increase the living space of the single family residential dwelling on the lot. By letter dated 10/26/2020, the building inspector denied their application for a building permit and described the "size" of variances needed as "buildings, structures + uses + set back requirements". The denial identifies code sections 98-8 and 98-9. They have sought area variances in order to obtain issuance of a building permit for the necessary construction.

2. The Property.

Address: 15 Davis Hill Road

TM #: Sec. 7 Bl. 1 Lot 51

Zoning District: AR-3

Size: 2.13Acres

3. The Application.

The application appears to be complete.

4. GML 239-m. ¹

¹ GML 239-m. 3. Proposed actions subject to referral.

(b) The proposed actions set forth in paragraph (a) of this subdivision shall be subject to the referral requirements of this section if they apply to real property within five hundred feet of the following:

(i) the boundary of any city, village or town; or

(ii) the boundary of any existing or proposed county or state park or any other recreation area; or

If the property is located within 500 feet of any of the applicable features,² then the application and all supporting materials must be sent to the Orange County Planning Department. It appears that this application must be referred to the OCPD.

➤ Confirm that the project has been referred.

5. SEQRA.

This application is subject to compliance with the provisions of SEQRA and the procedures therefore must be followed.

The applicant has submitted a short form EAF.

That portion of the application seeking area variances is by definition a Type II action in that it is one seeking an area variance for a one, two, or three family residential building.

6. The Facts.

The applicant seeks to connect the existing barn to the existing house and thereby increase the living space of the single family residential dwelling on the one lot.

As the structures presently stand, the existing front yard for the barn, at 28.7 feet, is a legal pre-existing non-conforming front yard. A change in use of the existing barn into a part of the residential dwelling would change the legal pre-existing non-conforming use of the structure as a barn (non-living space) into a non-conforming structure because of the non-complying front yard. That structure (the converted barn into living space) would have a non-conforming front yard area. The code requires a minimum front yard of 50 feet (Note is made that this is a non-conforming lot of 2.13 acres. Pursuant to § 98-9 the front yard requirement is 50 feet). [98-9]

(iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or

(iv) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or

(v) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or

(vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, except this subparagraph shall not apply to the granting of area variances.

2 GML 239-m 3. Proposed actions subject to referral. (a) The following proposed actions shall be subject to the referral requirements of this section, if they apply to real property set forth in paragraph (b) of this subdivision:

(i) adoption or amendment of a comprehensive plan pursuant to section two hundred seventy-two-a of the town law, section 7-722 of the village law or section twenty-eight-a of the general city law;

(ii) adoption or amendment of a zoning ordinance or local law;

(iii) issuance of special use permits;

(iv) approval of site plans;

(v) granting of use or area variances;

(vi) other authorizations which a referring body may issue under the provisions of any zoning ordinance or local law.

From the site plan presented, I cannot determine the existing side yard for the barn structure. The code requires a minimum of 30 feet. The plot may be "20 +/-". This may be a second area variance required. [98-9]

➤ Check for need for side yard variance.

The existing house appears to also violate the required front yard setback of 50 feet. From the copy of site plan that I am working off of, I cannot determine the existing setback for the house. If the house violates the current setback, it is a non-conforming structure. By increasing its size, the non-conformity is being increased.

Pursuant to § 98-8.B.(3) Normal maintenance and repair, alteration, reconstruction or enlargement of a building which does not house a nonconforming use but is nonconforming as to district regulations for lot area, lot width, front, side or rear yards, maximum height and lot coverage or other such regulation is permitted if the same does not increase the degree of or create any new nonconformity with such regulation in such building.

This exception for enlarging the residential structure appears to be permitted if the degree of the front yard setback is not increased by the construction. The current degree of nonconformity of the front yard is as shown on the plat. There does not appear to be any new construction closer to the road. Therefore, I believe it can be concluded that the degree of nonconformity of the front yard setback is not being increased and therefore, no variance is required with respect to the provisions of § 98-8.

7. The Law.

§ 98-7 Schedules of District Regulations.

The Schedules of District Regulations which accompany this chapter are hereby made a part of this chapter.

98 Attachment 2 – AR-3 Bulk Table provides that a single family dwelling not to exceed one dwelling unit per lot is a permitted use. Also permitted as an accessory use is a garage and storage building.

The minimum required front yard is 100 feet and the minimum required side yard is 40 feet. Because the buildings are pre-existing they may remain as legal non-complying pre-existing structures.

§ 98-8 Nonconforming buildings, structures and uses.

The following provisions shall apply to all buildings, structures and uses existing on the effective date of this chapter, which buildings and uses do not conform to the requirements set forth in this chapter, and to all buildings, structures and uses that become nonconforming by reason of any subsequent amendment to this chapter and the Zoning Map which is a part thereof, and to all conforming buildings housing nonconforming uses:

B. Buildings and structures nonconforming as to bulk requirements and use.

(3) Normal maintenance and repair, alteration, reconstruction or enlargement of a building which does not house a nonconforming use but is nonconforming as to district regulations for lot area, lot width, front, side or rear yards, maximum height and lot coverage or other such regulation is permitted if the same does not increase the degree of or create any new nonconformity with such regulation in such building.

§ 98-9 Exceptions to district regulations.

A. Existing undersized residential lots of record. Nothing shall prohibit the use of an existing undersized residential lot of record containing less than the prescribed area, width or yard requirements, as specified below, when such lot is owned individually and separate from any adjoining tract at the time of enactment of

this subsection, provided that all other provisions of this chapter are met. Yard setback requirements for the following categories of lots must be the minimums specified below:

[Amended 9-9-2008 by L.L. No. 4-2008]

Minimum Yard Setbacks

Lot Area (square feet)	Front	Side- One	Side-Both	Rear
80,000 and over	50	30	80	60

8. Public Hearing:

A Public Hearing on this application is required. The applicant must produce proof of mailing the required public notice to all property owners within 300' of the project property boundaries. Proof of that mailing should be placed in the Zoning Board file on this application.

Publication of the Public Notice is also required. The affidavit of publication of the Public Notice must also be secured and placed in the Zoning Board file on this application.

If the application is subject to a GML § 239 referral no decision can be made until 30 days have transpired from the date of the referral to the County.

9. The Issue:

As to the area variances, the issue is whether the application meets the criteria for granting area variance(s) by satisfying the five (5) factors necessary for granting an area variance but no single one is viewed as precluding the granting of the variance.

10. The Law as to Area Variances – The Five (5) Factors Test.

New York State Town Law provides that the ZBA, in considering an area variance application, must weigh the benefit to the applicant if the variances requested are granted against the detriment to the health, safety and welfare of the neighborhood that may result upon the issuance of the variances. (see Matter of Pinnetti v. Zoning Bd. of Appeals of Vil. of Mt. Kisco, 101 A.D.3d 1124, 956 N.Y.S.2d 565 [2d Dept 2012]; Matter of Jonas v Stackler, 95 AD3d 1325,95 A.D.3d 1325, 945 N.Y.S.2d 405 [2d Dept 2012], lv denied 20 N.Y.3d 852, 957 N.Y.S.2d 689[2012]; see also Matter of Pecorano v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 781 N.Y.S.2d 234, 814 N.E.2d 404; Matter of Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667, 774 N.E.2d 732; Matter of Sasso v. Osgood, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254. 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254).

The Town Law further provides that in reaching its determination, the ZBA must weigh and evaluate five (5) specifically enumerated criteria in reaching its determination. The five criteria which you must evaluate are as follows:

Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance?

Can the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than the area variance?

Are the requested area variances substantial ?

Will the proposed variances have an adverse effect or impact on the physical or environmental conditions of the neighborhood or zoning district?

Is the difficulty confronting the applicant that resulted in the variance request self-created?

As to whether the alleged difficulty was self-created, while this factor is not dispositive, neither is it irrelevant (*Matter of Ifrah v Utschig*, supra; see also *Crilly v. Karl*, 67 A.D.3d 792, 888 N.Y.S.2d 189 [2d Dept 2009]; *Matter of Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91 [2d Dept 2009]). However, a zoning board is not required to justify its determinations with evidence as to each of the five statutory factors, as long as its determinations “balance the relevant considerations in a way that is rational” (*Matter of Steiert Enterprises v. City of Glen Cove*, 90 A.D.3d 764, 767, 934 N.Y.S.2d 475 [2d Dept 2011]; *Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 73, 886 N.Y.S.2d 442 [2d Dept 2009]; see *Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 841 N.Y.S.2d 650 [2d Dept 2007]; *McLoughlin v Zoning Bd. of Appeals of the Vil. of Amityville*, 2014 N.Y. Slip Op. 31146[U] [N.Y. Sup Ct, Suffolk County 2014]

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.

11. 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 local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

12. Conclusion.

I trust you will find the foregoing to be of assistance in your review of this application.

Respectfully,

Robert J. Dickover, Esq.
Counsel to the Zoning Board of Appeals

➤ Denotes an action item