

A regular meeting of the Town of Victor Zoning Board of Appeals was held on July 2, 2018 at 7:00 P.M. at the Victor Town Hall, 85 East Main Street, Victor, New York, with the following members present:

PRESENT: Michael Reinhardt, Chairman; Mathew Nearpass, Vice-Chairman; Donna Morley; Scott Harter; Fred Salsburg

OTHERS: Ed Kahovec, Town Board Liaison; Al Benedict, Code Enforcement Officer; Matthew Loomis; Debby Trillaud, Secretary

The meeting was opened, the Flag was saluted, and the Pledge of Allegiance was recited.

There were no minutes completed to be approved.

TABLED PUBLIC HEARING

909 FENWICK LANE

10-Z-2018

Fence Area Variance (Carried over from the 6/18/2018 meetings)

The applicant is requesting to install several sections of privacy fence placed on raised flower beds. The proposed fence will have a total height of 7 feet 6 inches, whereas Section 211-41D(1) limits the height of fences in residential districts to six feet from grade. The applicant was before the Town Board on June 25th to request a Hold Harmless agreement for placing the fence sections in a utility easement.

Chairman Reinhardt – We have a little more information that you provided for us. I thank you. You provided the lease agreement from the Monroe County Water Authority. That’s helpful. My understanding is that the Town apparently looks like they are willing to sign a hold harmless agreement, but that isn’t until the ninth.

Mr. Loomis – Yes.

Chairman Reinhardt – My thought is, and we’ll see what the rest of the Board has to say, if this Board decides to grant the variance, that will be a condition to the variance. In other words, if the Town doesn’t follow through with the hold harmless agreement at the Board meeting, then there is no variance.

Mr. Loomis – Correct.

Chairman Reinhardt – I don’t see anything else. Your neighbors haven’t changed their minds?

Mr. Loomis – Nobody’s changed their mind.

Chairman Reinhardt – You provided us with some documentation concerning the swale that your intention is to create some flow so that if there was a problem the fence wouldn’t...

Mr. Loomis – It wouldn’t impede it. It would flow essentially right through the four inch perforated pipes.

Chairman Reinhardt – Alright, that’s helpful. I think that is the information we have so far. Is there anything else you want to add before the Board asks you some follow-up questions?

Mr. Loomis – I don’t think there is anything additional other than my three take-aways for homework.

Chairman Reinhardt – Let’s see what the Board has to say and as we go through it you can certainly add and answer questions as you see fit.

Ms. Morley did not have any follow-up questions.

Mr. Nearpass – The one thing I’m having trouble with is, ...so both the hold harmless agreement, and I read the license agreement from Monroe County Water Authority, do they run with the land? The variance is going to run with the land. When you sell the home it passes on to somebody else, but these agreements look like they are only with you, between you and the Town and between you and the Monroe County Water Authority. Are these going to be recorded with your deed?

Mr. Loomis – Yes, with the deed at the Ontario County Clerk’s office. That’s the fee I had to pay to Monroe County Water Authority; the check was written to Ontario County so it’s going to be put with the deed to the property. I’m assuming the Hold Harmless is going to follow the same pattern.

Chairman Reinhardt excused himself for a few minutes.

Mr. Nearpass – It sounds to me like both agreements are going to be recorded with the deed. That was my only real concern. It’s not that I’m against it; I don’t think the design is necessarily within character of the neighborhood. You have letters here from your neighbors; they were for it. I’m not trying to judge it based on aesthetics, but I was a little concerned how this would flow with the variance so that the next homeowner doesn’t get put into a negative situation.

Chairman Reinhardt – I don't think we can say one way or another. We know a variance runs with the land. He could say I'm going to file it at the Clerk's office. You can file any number of things with the Clerk's office. It doesn't mean that it is legally binding to the individual; the land. He's going to file it but whether or not it runs with the land is for legal counsel to figure out.

Mr. Harter – I think the way the Monroe County Water Authority did it is the right way to do it. They've issued a license agreement which is an overlay to the easement that you obtained. To your point Matt, on page two, paragraph seven, "Successors and Assigns" ...and this document will be filed because Monroe Water Authority will make you file it.

Under Successors and Assigns it indicates that this is a perpetual license. It indicates that if you are gone, whoever succeeds you in ownership of the property after you are gone has the same right as you've achieved here. I don't believe that that is the same thing that you get with a hold harmless agreement. I believe a hold harmless agreement is a singular acceptance by the Town with you as the current owner. I don't believe that it is perpetual and I don't believe that it is filed normally. I've never seen one filed in my experience. So it would be my position that if the hold harmless agreement were drafted in a way that does indicate that successors and assigns are covered. I think that would achieve the same goal.

The Water Authority has always been pretty good at doing this stuff because they do a lot of them. Ideally I think the Town should mirror this agreement. Then I think it's a done deal, it'll be covered perpetually. I think that what you got from the Water Authority is exactly correct. Maybe we can have a discussion on how we craft something similar on the Town's side. You have a unique piece of property. You have a Town easement and a MCWA easement on the other side. I think you have the MCWA side covered fine, no problem. I don't know if I can give you have a variance but you have 50% of me right now. I'm not sure of the other 50%.

Mr. Salsburg – I thought this was buttoned up pretty tight.

Chairman Reinhardt – Those are good points. I'm OK with the direction it's going as far as the license and the hold harmless agreement. What's concerning me as I look through the criteria is the first one, whether or not it's going to change the character of the neighborhood. I don't think there are any other 7'6" fences in the neighborhood. The second criteria, can you do it by some other feasible means; you can. You can attach some screening to the deck. I understand, you said last time, you don't want to lose your yard. If you are looking for privacy on your deck, I think there are other ways you can do that without needing a variance. Is it going to have an adverse impact on the physical and environmental conditions? It's a little bit of a toss-up, but I think you have addressed some of the issues that if there is some water flow, you are addressing that piece of it. However, you need a licensing agreement, you need a hold harmless agreement to make this work for you. I'm not feeling the warm and fuzziness of putting a 7'6" fence, even those three sections, for what you are trying to accomplish. Let's put it this way, if I were the deciding

vote, I'd probably say no, but I'd like to take a straw poll with the Board and see if they have any other comments.

Mr. Loomis – The idea of blinding on the deck would just limit us to privacy on the deck. I want to obtain privacy in the backyard also. That's what we had before with the arborvitaes so we could play soccer and lacrosse and not bother the neighbors while they are eating dinner on their back deck and visa versa. I know that by the Code this is a 7.5 foot fence, but I see it as a six foot fence on a raised flower bed.

Chairman Reinhardt – The way the Code reads it's at ground. If you keep raising the ground you can say "I have a six foot fence" and if that berm is eight feet off the ground that's where you measure it from. It's the lay of the land.

Mr. Loomis – I completely understand that, but making the statement that it's a seven and a half foot fence, I think there is a gray area to that. I'm going to have a very nice flower bed around it with plantings that are going to grow. Then I have a six foot nice vinyl fence that accents our house and my neighbor's house. That's how I look at it.

Ms. Morley – I'm OK with it if he gets what he says he's going to get from the Town.

Mr. Nearpass – An extra 18 inches. Is it really going to make that much of a difference?

Mr. Loomis – I believe so. I wouldn't have spent all this time and effort to come to multiple meetings and put this whole package together. I think it's important. If I really thought it didn't make a difference I wouldn't have put in all this time and effort. If I'm going to do it, I'd like to do it the way I want, obviously with the Town's blessing and do it the right way with all the approvals and licenses.

Mr. Nearpass – I'm on the fence with this one but I'm leaning toward yes for the approval.

Mr. Harter – Al, why does the 18 inches count in our calculation here?

Mr. Benedict – The definition of a fence includes berms. It can be a row of trees, anything that provides screening or separation.

Mr. Harter – What defines this as a berm? It's just a planting area beneath it.

Mr. Benedict – I think that would be my interpretation.

Mr. Harter – I think the request is minor. I think the Town's hold harmless approach is not the correct solution to that. I think MCWA knows how to do it.

Mr. Benedict – May I read the definition? (Yes)

“Construct a barrier erected to enclose, screen, separate or decorate areas of land including but not limited to walls, trees, hedges and earth berms”.

Mr. Harter – I'm on the fence too. I'm on the fence on the fence, like this.

Chairman Reinhardt – And Fred, you're OK with this?

Mr. Salsburg – Yes, there was vegetation before. It's a big open area. I don't think the extra height is very much of an impact, so I'm for it. Also, he's done his homework pretty good.

Chairman Reinhardt – As we're going through the criteria, the first, would this produce an undesirable change in the neighborhood-you're looking for a variance to construct a six foot fence on an 18 inch berm. You're securing the fence how? Dirt moves, berms, they sink.

Mr. Loomis – The posts will be sunk with wooden 4"x4" posts; concrete footing.

Chairman Reinhardt – Alright, the fence isn't going to move.

Mr. Loomis – No, then I'm going to slide the vinyl pieces that encase the wood over it and bolt them in that way so that if I have to get them off for some quick emergency from the Water Authority or Town ..

Chairman Reinhardt – If for some reason that berm or flower bed disappears, that fence is still the same height, 7.5 feet. If there is no berm or flower bed; if you're measuring it from the top of the flower bed, then it's six feet?

Mr. Loomis – Yes.

Chairman Reinhardt – I know it's your property, it's a bit uncomfortable for me to grant this.

Ms. Morley – Can I ask how tall were your arborvitaes before you took them down?

Mr. Loomis – 12-14 feet tall. Five to six feet width wise and there were five of them that ran ...

Chairman Reinhardt – That helps. I think what Fred and Donna are saying is helpful. Since something was already there for screening and you are not going anywhere near that height. You

are trying to create the same situation. I think we then can say an undesirable change will not be produced in the character of the neighborhood based on the arborvitaes being there before. You did put a new wrinkle in there for me today on the whether or not there is some other way to accomplish this because I thought what we were talking about last time was when you are sitting on the deck you were looking for some screening from your neighbors on each side. Now we have soccer and ballgames and everything going on in the back.

Mr. Loomis – That’s probably because that’s been on my mind since the last meeting. As time goes on, the neighbors, we’re all close, but they are ready for some privacy.

Chairman Reinhardt – So we can say it can’t be achieved by some other feasible means and also because your wife is allergic to bees, putting up arborvitaes is going to be a problem. The third criteria, the variance is not substantial since you are asking for a foot and a half. Number four, it’s not going to create an adverse impact on the physical and environmental conditions of the neighborhood. You have drainage and there is also a license agreement and a pending hold harmless agreement. The fifth, in this case it is self-created but this consideration is relevant to the decision but does not necessarily preclude the granting of the area variance. The condition we are looking at would be the hold harmless agreement. Again, if the Town Board doesn’t grant it then there is no variance. Also a condition that you would file the license agreement with the County Clerk.

Mr. Loomis – I can follow-up with the Monroe County Water Authority but the check I wrote out to them to get the license agreement was to the Ontario County Clerk for the filing cost. They just passed through the cost but I can get that confirmed if you’d like.

Chairman Reinhardt – Are you going to file the hold harmless agreement.

Mr. Loomis – I assume, although I haven’t seen it yet, other than knowing I have to go next Monday to the next Town Board meeting. I assumed it was going to be similar to that type of agreement.

Chairman Reinhardt – What we are trying to create here is as many documents as possible that are connected with that land, then, the better it is for the future buyers.

Mr. Loomis – Absolutely.

Chairman Reinhardt – The other condition would be, building permits are required for work, but not limited to erecting structures, placing sign poles, pools, fences, mechanical systems,.... You know you need a building permit, right?

Mr. Loomis – Yes, I've applied for the permit already.

Mr. Salsburg – My perception is that the ground falls away from the house as you go back. The fence is on a lower elevation than the front half of the property. I think that makes it less of an impact visually.

Chairman Reinhardt – The undulation of the land is certainly what we are working with, but I understand your point. You measure from wherever the ground is where you are going to put your fence.

Mr. Salsburg – Sure, but the lower the ground is the less it appears.

Mr. Nearpass – It depends on where you are, right? If you are at street level it's one way, if you're on the deck, obviously it's another way.

Mr. Harter – Could we make a recommendation that the Town Board, instead of issuing a hold harmless agreement, issue a license agreement and file it as was done by MCWA? Can we make a request for that?

Chairman Reinhardt – We certainly can make a request for that.

Ms. Trillaud – I don't have an example, I didn't give you one a hold harmless agreement, but they do require it to be filed with the County. I believe they do have the successors and assigns incorporated in it.

Mr. Harter – If that's the case, I'm fine with it.

Chairman Reinhardt – I don't want to start directing traffic with the Town Board. Right now it sounds like they are willing to create a hold harmless agreement with the landowner. That's what we know and that's what we can go with.

Mr. Harter – If it mirrors this document that's great.

RESOLUTION:

WHEREAS, an area variance application was received by the Secretary of the Zoning Board of Appeals on June 4, 2018 from Matthew Loomis, 909 Fenwick Lane, Victor, NY 14564 to install three sections of fence on the north and south sides of his property on raised flower beds. The proposed fence will have a total height of 7 feet 6 inches whereas Section 211-41D(1) limits the height of fences in residential districts to six feet from grade; and,

WHEREAS, said application was referred by Martin Avila, Code Enforcement Officer of the Town of Victor, on the basis of the variance requested to the Town of Victor Code; and,

WHEREAS, a Public Hearing was duly called for and was published in "The Daily Messenger" on June 10, 2018 and whereby all property owners within 500 feet of the application were notified by U. S. Mail; and,

WHEREAS, this application is classified as a Type II action under the State Environmental Quality Review Act per Section 617.5(c)(10) and therefore does not require further action; and,

WHEREAS, Public Hearings were held on June 18, 2018 and July 2, 2018 at which time no resident spoke for or against the application and two neighbors wrote letters in support of the application; and,

WHEREAS, after reviewing the file, the testimony given at the Public Hearing and after due deliberation, the Town of Victor Zoning Board of Appeals made the following findings of fact for the installation of sections of fence on raise flower beds totaling 7'6" in height:

1. An undesirable change would not be produced in the character of the neighborhood or a detriment to nearby properties created by the granting of the area variance.

Justification: Prior to the sections of fence proposal there were 12 to 14 feet high, five foot wide arborvitaes in the same area. Both immediate neighbors are in favor of the fence proposal.

2. The benefit sought by the applicant cannot be achieved by some method, feasible for the applicant to pursue, other than an area variance.

Justification: The fence sections are needed for privacy on the deck but also for playing ball in the back yard. Mrs. Loomis is allergic to venomous insects that resided in the arborvitaes.

3. The requested area variance is not substantial.

Justification: A foot and a half is not a substantial height.

4. The proposed variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

Justification: There is a plan for drainage; there is a lease agreement with the Monroe County Water Authority and a pending hold harmless agreement with the Town of Victor.

- 5. The alleged difficulty is self-created. This consideration is relevant to the decision of the board, but shall not necessarily preclude the granting of the area variance.

On a motion made by Scott Harter, and seconded by Donna Morley:

NOW, THEREFORE BE IT RESOLVED that the application of Matthew Loomis, 909 Fenwick Lane, Victor, NY 14564 to install three sections of fence on both the north and south sides of his property on raised flower beds with a total height of 7 feet 6 inches whereas Section 211-41D(1) limits the height of fences in residential districts to six feet from grade BE APPROVED:

FURTHER RESOLVED that the following conditions are imposed:

- 1. The Hold Harmless agreement with the Town is filed with Ontario County. If the Hold Harmless agreement with the Town of Victor is not filed this resolution is null and void.
- 2. Building permits are required for work including, but not limited to, erecting structures, placing signs, pools, fences, mechanical systems, etc. No person shall commence any work for which a building permit is required without first having obtained a building permit from the Planning and Building Department.

This resolution was put to a vote with the following results:

Michael Reinhardt	Aye
Mathew Nearpass	Aye
Scott Harter	Aye
Donna Morley	Aye
Fred Salsburg	Aye

Adopted: 5 Ayes, 0 Nays

On a motion from Mathew Nearpass, seconded by Donna Morley, it was unanimously agreed and RESOLVED, that the meeting was adjourned at 7:25 PM.

Debby Trillaud, Secretary