

TOWN OF NEWBURGH: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

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In the Matter of the Application of

DANIEL HESIDENCE

DECISION

For area variances as follows:

- *Grant of a variance allowing a rear yard setback of 4 feet where 40 feet is required;*
- *Grant of a variance allowing a side yard setback of 0 feet where a minimum of 15 feet is required;*
- *Grant of a variance allowing a combined side yard of 7.2 feet where a minimum of 30 feet is required;*
- *Grant of a variance allowing a lot building coverage of 3,987 square feet where 2,905 square feet is the maximum square footage permitted.*

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Introduction

Daniel Hesidence seeks area variances¹ as follows: (1) An area variance allowing a rear yard setback of 4 feet where 40 feet is required; (2) An area va-

¹ The applicant originally sought the issuance of a Special Use Permit in addition to the variances he requested. He was under the impression that a Special Use Permit would be needed to allow him to utilize a portion of the premises as an "Art Studio" as a Home Occupation. During the course of the hearing it became apparent that while the applicant would be painting in the premises, his activity would not rise to the level of a Home Occupation. The request for a special Use Permit was therefore withdrawn.

riance allowing a side yard setback of 0 feet² where a minimum of 15 feet is required; (3) An area variance allowing a combined side yard of 7.2 feet where a minimum of 30 feet is required and (4) An area variance allowing a lot building coverage of 3,987 square feet where 2,905 square feet is the maximum permitted.

The property is located at 28 Waring Road in the R-3 Zoning District and is identified on the Town of Newburgh tax maps as Section 65, Block 3, Lot 13.

A public hearing was held on April 22, 2010, notice of which was published in *The Mid-Hudson Times* and *The Sentinel* and mailed to adjoining property owners as required by Code.

Law

Section 185-11 of the Code of Ordinances of the Town of Newburgh [Zoning], entitled "Utilization of Bulk Table," requires compliance with the bulk regulations set forth in the bulk and use schedules set forth within the zoning ordinance.

These schedules require, for this property in the R-3 Zoning District, a rear yard setback of 40 feet; a side yard setback of 15 feet; a combined side yard of 30 feet; and a maximum lot building coverage of 15% (2,905 square feet).

Background

After receiving all the materials presented by the applicant and hearing the testimony of Frank Valdina, Michael Pomarico and the applicant himself at

² A portion of the building on the premises under consideration encroaches upon adjacent property to the east. This condition appears to be allowed pursuant to a provision contained in the adjoining property owners deed.

the public hearing held before the Zoning Board of Appeals on April 22, 2010, the Board makes the following findings of fact:

1. The applicant is the owner of a 0.45± acre lot (tax parcel 65-3-13) located at 28 Waring Road.
2. The lot is improved by a concrete block building. A portion of this building encroaches upon lands to the east. This condition appears to pre - date zoning and is apparently allowed by a recorded instrument encumbering the burdened parcel to the east.³
3. The applicant now proposes to occupy this concrete block building as his principal residence. This use is permitted in the R-3 zone.
4. As noted hereinabove, area variances are required for rear yard, side yard, combined side yard and lot building coverage.
5. The applicants' proposal is set forth on a series of photographs, a set of plans and survey prepared by Frank M. Hoens dated July 22, 2002. Those photographs, survey and plans are hereby incorporated into this decision and a set shall remain in the zoning board's file in this matter.
6. The required, existing and proposed dimensions (in feet) and the extent of the variances requested are as follows:

³ The following note appears on the survey of the subject premises presented by the applicant: "Flannery's deed [the property adjoining to the east] L.1653 p.982 excepts 'that part or portion of the said lots on which there is a lavatory and/or wash room which is attached to and forms a part of the contiguous building formerly used as an iron fabrication shop.'" While the Board is not in position to establish the validity of this note, there was no challenge made to this representation and the Board assumes, for purposes of this decision, it is accurate.

Bulk Requirement	Allowance	Existing	Proposed	Variance	Percentage
Rear Yard Setback	40'	4'	4'	36'	90%
Side Yard Setback	15'	0'	0'	15'	100%
Combined Side Yard	30'	7.2'	7.2'	22.8'	76%
Lot Building Coverage	2,905 S.F.	3,987 S.F.	3,987 S.F.	1,082 S.F.	37.2%

7. Members of the public were heard during the hearing. They expressed a variety of concerns relating to the nature of the intended Home Occupation. Because the applicant will not be conducting a Home Occupation on the premises and because the request for a Special Use Permit was withdrawn, these concerns have been rendered moot.
8. The Building Inspector denied a building permit application by letter dated December 10, 2009.

The applicant has appealed the Building Inspector's determination.

After hearing the testimony at the public hearing and considering the materials received by the Board and after viewing the subject site, the Board decides as follows:

SEQRA

This matter constitutes a Type II action under the State Environmental Quality Review Act inasmuch as it involves the granting of an area variance(s) for a single-family, two-family or three-family residence [6 NYCRR §617.5(c)(13)]. As such, this project is not subject to review under the State Environmental Quality Review Act.

GML 239 Referral

This application is not required to be referred to the Orange County Planning Department for review.

Findings

In reviewing the facts presented for the requested area variances, the Board considered the five standards for determining whether the applicant has sustained its burden of proof as required by Town Law Section 267-b (3). Each factor has been considered relevant to the decision of the board of appeals, but no single one is viewed as precluding the granting of the variances.

(1) Undesirable Change—Detriment to Nearby Properties

The property in question is improved by an existing block building. This building appears to have existed for some time, perhaps for more than 50 years, but in any event prior to the adoption of zoning in the Town of Newburgh. The structure is unique in that it appears to have been built as an accessory structure, not as a structure housing a principal use.⁴ A prior request to use this existing structure as a commercial storage facility was denied by this Board.⁵

The current request is to use the building as a residential home. This use is allowed in the R-3 zone. The applicant and his representatives testified at the hearing that the home would be in harmony with this existing, mature, neighborhood and would not in any way result in any undesirable changes to the neighborhood nor cause any detriment to any nearby properties.

⁴ In a prior application regarding this property, not involving the current applicant, there was contradictory testimony taken as to whether the structure was used for commercial or residential storage. (see *In the Matter of the Application of Coatti*, decided by this Board in November of 2006.) There appears to be no question, however, that the building was used for storage only.

⁵ See *Coatti* decision referenced above.

No contrary evidence or testimony was submitted to Public Hearing.

Absent any testimony or evidence indicating such, the Board cannot conclude that any undesirable change in the character of the neighborhood or detriment to the neighbors in that neighborhood will result if the requested variances are granted.

Accordingly, based upon the evidence and testimony submitted to the Board, the Board finds that granting of the request of the area variances will not result in any serious, undesirable, detriment to surrounding property owners

(2) Need for Variance

Because the structure was constructed long before zoning was adopted in the Town of Newburgh, it is not feasible for the applicant to use the structure, for any purpose, including the purpose for which it is intended, without the variances requested herein.

(3) Substantial Nature of Variances Requested

The variances requested are substantial. However, the request for these variances must be viewed in the context of (a) the existing non-conformity of the structure on the lot and (b) the extent of the *variation* from that existing condition. Because the focus of the inquiry by the Zoning Board of Appeals is upon the character of the neighborhood in question, we believe, under the circumstances presented here, that the substantial nature of the variances requested does not prohibit the Board from granting this application because there will be no variation from the existing footprint resulting from this grant of the variances herein requested.

(4) Adverse Physical & Environmental Effects

No testimony was given, nor was any evidence provided, that would indicate that issuance of the requested variance would result in any adverse physical and/or environmental effects. The applicants testified that no such effect would occur.

Based upon the evidence and testimony submitted, the Board finds that issuance of the requested variance will not adversely impact the physical and environmental conditions in this neighborhood.

(5) Self-Created Difficulty

The need for this variance is clearly self-created in the sense that the applicant purchased this property charged with the knowledge of the existing non-conformity and while aware of the need to obtain variances in order to use the structure for any purpose.

However, because of the existing nonconformity and because it is not feasible to use the existing building without a variance or variances of some kind, the board believes, under the circumstances presented, that the self-created nature of the need for the variance requested does not preclude granting the application. Moreover, as noted earlier, no undesirable change in the character of the neighborhood will occur as the result of the granting of these variances.

Decision

In employing the balancing tests set forth in Town Law Section 267-b (3), the Board hereby determines that the applicant has satisfied the requisites of Section 267-b and grants the area variances as requested upon the following

conditions:

1. There shall be no art studio or any commercial enterprise of any kind operated or undertaken at the premises
2. The variances hereby granted are granted for the purpose of authorizing construction of what is shown on the plans or described within the application materials only. No construction other than as shown or described (architectural refinements aside) is authorized by this decision.
3. Section 185-55 [Procedure; construal of provisions; conflict with state law] of the Code of Ordinances of the Town of Newburgh provides, in subdivision "D," that this grant of variance shall become null and void at the expiration of six months from issuance, unless extended by this board for one additional six-month period.

Dated: April, 22, 2010



*Grace Cardone, Chair
Town of Newburgh ZBA*

By roll call a motion to adopt the decision was voted as follows:

AYES: Chair Grace Cardone
 Member Brenda Drake
 Member Ruth Eaton
 Member Ronald Hughes
 Member John McKelvey
 Member James Manley
 Member Michael Maher

NAYS: None

ABSENT: None

STATE OF NEW YORK)
)ss:
COUNTY OF ORANGE)

I, BETTY GENNARELLI, Secretary to the Zoning Board of Appeals of the Town of Newburgh, do hereby certify that the foregoing is a true and exact copy of a Decision maintained in the office of the Town of Newburgh Zoning Board of Appeals, said resulting from a vote having been taken by the Zoning Board at a meeting of said Board held on April 22, 2010.


BETTY GENNARELLI, SECRETARY

TOWN OF NEWBURGH ZONING BOARD OF APPEALS

I, ANDREW J. ZARUTSKIE, Clerk of the Town of Newburgh, do hereby certify that the foregoing Decision was filed in the Office of the Town Clerk on JUN 29 2010.


ANDREW J. ZARUTSKIE, CLERK
TOWN OF NEWBURGH