

TOWN OF NEWBURGH: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

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In the Matter of the Application of

SALLY POLHAMUS AND SUSAN
CARLSTROM

DECISION

For area variances as follows:

- *Grant of a variance allowing a side yard set-back of 8.8 feet where 30 feet is required;*
- *Grant of a variance allowing a combined side yard of 39.64 feet where 80 feet is required;*
- *Grant of a variance allowing a lot coverage of 28% where 20% is the maximum lot coverage allowed;*
- *Grant of a variance allowing a tennis court to be located in a front yard and not screened from view;*
- *Grant of an area variance allowing a pool and gazebo to be located in a front yard;*

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Introduction

Sally Polhamus and Susan Carlstrom, hereinafter the "applicants," or the "applicant," seek area variances as follows¹: (1) Grant of a variance allowing a

¹ The applicant has previously sought relief from the Zoning Board of Appeals pursuant to an application dated March 29, 2007. That application was subject to a public hearing and several appearances before the Board. Pursuant to correspondence dated August 10, 2007, the applicant withdrew her application for the relief sought at that time and submitted a new application which is the subject of this decision.

side yard setback of 8.8 feet where 30 feet is required; (2) Grant of a variance allowing a combined side yard of 39.64 feet where 80 feet is required; (3) Grant of a variance allowing a lot coverage of 28% where 20% is the maximum lot coverage allowed; (4) Grant of a variance allowing a tennis court to be located in a front yard and not screened from view; and (5) Grant of an area variance allowing a pool and gazebo to be located in a front yard.

The property is located at 65 Balmville Road in the R-1 Zoning District and is identified on the Town of Newburgh tax maps as Section 43, Block 3, Lot 34.2².

A public hearing was held on August 23, 2007, 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 single-family residential dwelling in the R-1 Zoning District, a side yard setback of at least 30 feet and at least 80 feet combined. While the one-story brick dwelling is a pre-existing, non-conforming structure, it loses its protected status as a result of this variance application. Therefore, variances are required for the one side yard which is only 8.8 feet and the total side yard which is only 39.64 feet. Additionally, the maximum lot cover-

² The applicant's property formerly consisted of tax parcels designated as Section 43, Block 3, Lots 31 & 34. The applicant has now combined her tax parcel which is now designated as Section 43, Block 3, Lot 34.2.

age is 20% whereas the applicant proposes 28%. Lastly, the applicant seeks variances for the following structures which are not allowed in a front yard: tennis court (which must be screened), pool, gazebo and shed³.

Background

After receiving all the materials presented by the applicant and hearing the testimony of Anthony J. Coppola, R.A., of Coppola Associates, at the public hearing held before the Zoning Board of Appeals on August 23, 2007, the Board makes the following findings of fact:

1. The applicant is the owner of a 57,199 +/- square foot lot (tax parcel 43-3-34.2) located at 65 Balmville Road.
2. The lot is improved by a single family dwelling, tennis court, pool, gazebo and a shed (to be removed). The applicant now proposes to build an addition, the construction of which will necessitate the foregoing described variances.
3. The applicants' proposal is set forth on a set of plans prepared by Coppola Associates and dated August 10, 2007 [last revision: August 10, 2007]. Those plans are hereby incorporated into this decision and a set shall remain in the zoning board's file in this matter.

³ At the public hearing the applicant agreed to remove the shed. The applicants also agreed to provide screening – the adequacy of which is to be determined by the Building Department – for the tennis court.

4. The required, existing and proposed dimensions (in feet) and the extent of the variances requested relative to yard dimensions are as follows:

Bulk Requirement	Allowance	Existing	Proposed	Variance	Percentage
Side Yard Setback	30'	29.8'	29.8'	0.2'	0.6%
Side Yard Setback	30'	8.8'	8.8'	21.2'	70.6%
Combined Side Yard	80'	38.61'	38.61'	42.39'	52.9%
Lot Coverage	20%	n/a	28%	8%	40%

5. Members of the public were heard during the hearing. Essentially, their complaints related to the extent of the non-conformities existing at the premises.
6. The Building Inspector denied a building permit application by letter dated August 9, 2007.

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 Board received conflicting testimony regarding whether or not the issuance of the requested variances would result in any undesirable change to the character of the neighborhood and/or cause a detriment to nearby properties.

One neighbor was represented by a family member at the public hearing. This individual, representing the neighbor adjoining to the north, expressed the opinion that the issuance of the requested variances, which are many in number, would result in a detriment to the nearby properties.

The applicants' representative testified that the grant of the variances requested would result in the construction of an addition to an existing single family dwelling and permit the continued existence of a number of noncomplying, but existing, structures.

Upon review of the conflicting information submitted, the Board takes note that the property has existed in its present state for an extended period of time. None of the existing, although noncomplying, improvements are recent.

The Board acknowledges the conflicting testimony and has considered the conflicting arguments advanced regarding this issue. On balance, and after weighing the conflicting testimony and visiting the subject property, it is the considered opinion of the Board that the issuance of the requested variances would not result in any undesirable change in the neighborhood nor would it cause any detriment to any nearby properties.

(2) Need for Variance

The Board is concerned, however, regarding the number of variances sought by the applicant. Regarding the one-story frame addition proposed, with the proposed new deck and new patio, the Board finds that these proposed structures, as configured upon the plans prepared by Coppola Associates, represent an unwarranted expansion of the non-conforming side yard. While the Board is sensitive to the attempt to maintain the existing house lines, the Board finds that the proposed addition, patio and deck may be reconfigured so as not to exacerbate the non-conformity and so as not to continue the minimal side yard setback on the northerly side lot line. While the lot is narrow where the house is located, it remains feasible for the applicants to configure their addition so as to comply with the side yard set back requirements.

Accordingly, relative to the proposed one-story addition and related deck and patio, the Board finds that it is feasible for the applicant to obtain the relief sought without the need or necessity for the variances requested in this regard.

In connection with the, tennis court, pool and gazebo the Board finds that, based upon the evidence and testimony before them, it appears that the structures were constructed illegally and that the applicants failed to apply for and receive the required and necessary permits and approvals from the Town Building

Department. The Board further finds, that while the need for the variances requested relative to these structures may be avoided by the removal of these structures, that this is the only method whereby the applicant may avoid the need for the requested variances. The Board finds that this course of action would be unduly punitive. While the applicant should be appropriately and necessarily chastised for failing to apply for and obtain the required and necessary permits from the Building Department relative to the construction of these structures the Board does find that the only method, feasible for the applicant to pursue, given the unique circumstances of this L-shaped property, which has 2 front yards, is to seek the variances requested relative to these various structures.

(3) Substantial Nature of Variances Requested

The variances requested are substantial. Relative to the proposed addition, the Board has heretofore determined that the requested variances may be avoided. The relief requested in this regard is substantial in the extreme and the Board finds that the relative equities are balanced against the applicant in this regard.

Regarding the relief requested for the various, existing, structures, however, the request for these variances must be viewed in the context of (a) the fact that they are existing non-conformities 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 relative to the existing structures does not prohibit us from granting this aspect of application because there will be no variation from the existing conditions resulting from this grant of a variance.

(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' representative 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 applicants are charged with the knowledge of the existing nonconformities and non-compliant structures, and were aware, either expressly or impliedly, of the need to obtain a variance, or variances, in order to maintain or expand or enlarge those structures.

Decision

Given the number, as well as the differing nature, of the area variances requested, the Board elected to vote on this application pursuant to two different motions. The first motion is to permit a tennis court, gazebo and pool to be located within a front yard with the tennis court to be screened as required by the Town Building Department. (The applicant has agreed to remove the shed).

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 required to allow the tennis court, pool and gazebo to be located within a front yard.

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

AYES: Chair Grace Cardone
Member Ruth Eaton
Member Ronald Hughes
Member Robert Kunkel
Member John McKelvey
Member James Manley

RECUSED: Member Brenda Drake

NAYS: NONE

A second motion was then made to deny the side yard and lot coverage area variances requested relative to the proposed addition.

In employing the balancing tests set forth in Town Law Section 267-b (3), the Board hereby determines that the applicant has not satisfied the requisites of

Section 267-b and hereby denies the variances requested relative to the side yard setbacks and relative to maximum lot coverage.

By roll call a motion to adopt this portion of the Decision was voted as follows:

AYES: Chair Grace Cardone
Member Ruth Eaton
Member Ronald Hughes
Member Robert Kunkel
Member John McKelvey
Member James Manley

RECUSED: Member Brenda Drake

NAYS: NONE

Dated: _____

1/2/07



Grace Cardone, Chair
Town of Newburgh ZBA

