

**ZONING BOARD OF APPEALS
TOWN AND VILLAGE OF ARCADE
17 Church Street, Arcade, New York 14009
Village Office 585 492-1111
Town Office 585 492-4685**

At a meeting of the Zoning Board of Appeals of the Town and Village of Arcade held on Monday, March 18, 2013 at 7:00 P.M. in the Village Boardroom, 17 Church Street, Arcade, New York:

MEMBERS PRESENT: Jeff Snyder, Paul Sanders, Lee Ameis

MEMBERS ABSENT: Gordon Cramer, Doug Eigenbrod

OTHERS PRESENT: ZEO Chris Lexer, Attorney James McAuley, Rev. Michael O'Hara, Mike and Lori Ptak, Amanda and George Hudson, Bonnie Daunce, Gary and Debbie Spencer, Neil Howell, Sandra Dutton

The meeting was called to order at 7:01 P.M. by Chairman Snyder followed by introductions of Board members, Secretary and ZEO.

APPROVAL OF MINUTES:

Approval of the minutes of the meeting of February 18, 2013 was tabled as there was not a quorum from that meeting present.

PUBLIC HEARING FOR AREA VARIANCE APPLICATION, PERMIT NO. 2168-AV, SUBMITTED BY GEORGE HUDSON, REQUESTING CONSTRUCTION OF A TWO-CAR GARAGE NOT IN COMPLIANCE WITH SECTION 412, NO. 9 OF VILLAGE ZONING LAW, AT PROPERTY LOCATED AT 96 EAST MAIN STREET:

The Chairman:

1. Explained the procedure for a Public Hearing and although there may be other issues, this hearing is for the purpose of discussing only the above variance;
2. Read the application and explained that the garage is only 8 ft. off the property line and needs to be 10 feet according to Village Local Zoning Law;
3. Read the recommendation and comments from the Wyoming County Planning Board (see Attachment A) and the Arcade Planning Board (see Attachment B). Both Boards recommended denial of the variance;
4. Read a letter from Attorney James McAuley, representing Father O'Hara (see Exhibit 1). The letter asks for denial of the variance. The O'Hara property abuts the back yard

setback of the property in question.

The applicant and attorney were given copies of all of the above documents.

MOTION by Lee Ameis, seconded by Paul Sanders and unanimously carried, to open the Public Hearing for Area Variance Application, Permit No. 2168-AV submitted by George Hudson.

The Chairman asked for comments from the public.

1. Neil Howell, residing at 123 East Main, asked what exactly the dispute is about. The Chairman explained:
 - a. The applicant thought the line of trees at the back of his property was the property line.
 - b. He applied and received a Certificate of Zoning Compliance as the ZEO took it upon good faith the applicant knew where the property line was and did not ask for a survey. The applicant received his Wyo. Co. Building permit and began construction.
 - c. At that point the neighboring property owner residing at 15 Clough Ave., Father O'Hara, had a surveyor find the metal surveyor stakes and replace the missing wooden stakes. It was found that the garage was not the minimum 10 feet off the property line.
 - d. The ZEO was notified and he issued a stop work order on the garage and informed the applicant he could either apply for a variance which may or may not be approved or relocate the garage. The applicant decided to apply for a variance.
2. When asked by the Board, the applicant stated he did not know where the back of the original structure was located so he does not know if the original structure complied with the setback.
3. Father O'Hara stated that although the rest of his wooden survey markers were still in place on his property lines, the ones on the property line with the applicant had disappeared. It took only five minutes for the surveyor to find the metal stakes and replace the wooden stakes.
4. Attorney McAuley stated that a survey should always be required as one cannot rely on tree lines and what people say or may believe to be true. Requiring a survey is for the protection of everyone. It was not necessary to go to the expense of a complete survey, but the applicant could have inexpensively and easily shot a line for the back of the property. The value of both properties could be reduced and not easily sold if the minimum setbacks are not adhered to.
5. The applicant stated he agrees that he is only 8 feet from the line and does not dispute that. He thought he knew where the line was and he just made a mistake.
6. Bonnie Daunce, residing at 24 East Main, stated that the applicant had removed the old barn, which was an eye sore and not useable, which would improve the look of the

neighborhood. She does not think the 2 feet in question is a big deal and it is not hurting anything. The applicant just made a mistake.

7. Debbie Spencer, residing at 10 East Main, stated she agrees with Bonnie Daunce and also stated that the applicant has purchased a number of run down properties in the Village and has improved them. This has added to the tax base as assessments are increased for better looking properties.
8. The Chairman agrees that the applicant is improving properties; however that is not at issue. It does not mean a property owner can do whatever they want and not abide by Local Zoning Law. The issue is whether the ZBA can grant a variance based on the NYS laws for Criteria for Area Variance.
9. The Chairman asked the applicant if he would be willing to remove the back four feet of the building and have a smaller garage, or add the four feet to the front.
 - a. The Chairman explained that the measurement of a building to the property line has to be from the closest part of the building, i.e. overhanging eaves, and not just from the foundation.
 - b. The Board always suggests that a property owner give a few extra feet leeway and not build exactly the required minimum amount from the property line.
 - c. The reason for a setback is to allow a property owner to maintain his buildings and set up a ladder without having to encroach on a neighbor's property. Without the proper setbacks law suits could result if there were to be an accident resulting in an injury to the resident.
10. Neil Howell stated that Arcade residents are not as "sue" happy as other areas.
11. Amanda Hudson, wife of the applicant, commenting on Exhibit 1 stated:
 - a. She does not see how property values would be lowered from just the two feet in question;
 - b. She had owned other property where it was found that part of the neighbor's porch and hot tub were on her property. She gave them the one foot of property to be neighborly.
 - c. She admitted that they should have gotten a survey but her husband honestly thought that the property line was at the tree line.
 - d. To now move the building that has been partially constructed would cost over \$2000 and would be an undue hardship for such a small amount of space in dispute.
 - e. Although she was not present, she admits there was a heated argument between her husband and Rev. O'Hara and regrets it happened. She apologized for the branches that were cut and left on his property. They had intended to clean them up but when they were able to return to do it they found that Rev. O'Hara had it done.
 - f. Her husband is trying to make the community look better.
12. Attorney McAuley stated that it is a good thing to buy and renovate properties but that due diligence is required to comply with zoning regulations. He cited others, such as Bill

Sprague, who did not investigate beforehand and ran into all manner of problems. Duty of care is upon the property owner.

13. Board Member Ameis asked if the applicant would be willing to move the structure four feet and Mrs. Hudson again cited the cost to do so.
14. Board Member Ameis stated:
 - a. You encroached upon the property line because you didn't want to spend the money to remove the old concrete.
 - b. If you look to the neighboring fence you can clearly see where the rear property line runs. According to the Wyo. County Zoning Map the line is the same for both properties. It is easy to see there is an approximate four foot difference in the tree line.
 - c. The applicant could simply have asked Rev. O'Hara where the property line was.
15. Board Member Sanders stated that this whole issue stems from the applicant not having a survey done.
16. The applicant stated he asked where the property line was and an argument ensued.
17. Father O'Hara stated that the applicant lied.
18. The ZEO stated that he takes partial blame for the construction not being in compliance. He took it on good faith that the applicant knew where the property line was located and he did visit the property and measure from the tree line to make sure of the 10 ft. compliance from that point.
19. Attorney McAuley stated that the survey of the O'Hara property does follow the tax map.
20. The applicant stated that he is not trying to be difficult but to remove four feet at the back of the building that is cemented in would be difficult and the garage would then be too small. His tenants would like to put a pickup truck in the garage. He is not on anyone else's property.
21. The Chairman stated that the four feet could be added to the front of the building.
22. Attorney McAuley stated that the applicant should take due care and build it correctly in order to insure a profitable resale.
23. Board Member Ameis stated that he does understand what the applicant is faced with as he himself, before he was a ZBA member, was faced with a similar problem. He also had to go through the variance process and had to spend additional time and money to remedy his property issues. He stated that one of the measures put in place by NYS variance law is whether the problem is self-created. This Board is tasked with determining that.
24. Attorney McAuley stated that towns that do not adhere to their own zoning laws have falling property values. Arcade is a desirable community because the public can be assured that laws are enforced and variances not just automatically granted. Arcade is known for its ability to say no and insure good property values. The applicant could have renovated the barn. Older buildings that are historically renovated are beautiful

and tend to have a higher value. The new garage may be nice but newer is not always better. The garage will make the properties darker.

25. The applicant stated that the old barn was higher, thus making the properties darker than the new one-story building will make them. The barn was not able to be renovated because of the state of its disrepair. The taxes went up on the property after the removal of the dilapidated barn.
26. Neil Howell asked how two feet could make any difference and that he doesn't think the garage can even be seen from Rev. O'Hara's house.
27. Attorney McAuley stated that the issue was not to judge the quality of the building replacement but the question is whether to approve or deny the variance.
28. Board Member Sanders stated that black is black and white is white and the fact remains the applicant did not have a survey to determine the property line correctly.
29. The ZEO stated that properties purchased through foreclosure very often are not given a survey. This started out in good faith and when the property line issue was discovered the applicant took the option of applying for a variance.
30. Attorney McAuley disputed that and said if a survey is not offered then the purchaser should have a survey done for self-protection.
31. Board Member Ameis stated that since the applicant knew of the 10 ft. setback law he should have had a survey to protect himself. He also advises anyone building to give themselves a few additional feet to insure compliance.
32. The applicant stated that he had given himself eleven feet from the trees but it is now actually eight feet from the property line as shown by Rev. O'Hara's survey.
33. The Chairman asked Rev. O'Hara:
 - a. Can you see the garage from your property? He answered yes.
 - b. Do you yourself feel your property value will be lowered? He answered yes.
 - c. Would you be willing to sell a few feet of your property to the applicant? He answered no.
34. Rev. O'Hara also stated he was concerned with the root system of the trees if the garage were to close. The ZEO stated that the root systems have no bearing on zoning law.
35. Board Member Ameis stated that this is a no win situation either way. If it were him he would add two poles to the front and take off the back of the garage and a roof panel.
36. Debbie Spencer stated that the garage could probably be seen from the O'Hara property but not from the house. The garage is better than the old two-story barn. Moving the garage two feet in her opinion would not make a difference in his property value.
37. The Chairman stated that the garage would have to be moved at least three feet to compensate for the overhang and would bring it into compliance. Since this is a rental property and the applicant does not reside there himself, the size of the garage could make or break a sale for him. The lowest cost option would be to move the back wall. The cost in legal fees would be more than moving it three or four feet.
38. The applicant stated that if it were easy to move it he wouldn't be here asking for a variance. He would have done it.

The Chairman asked if there were any other comments or questions from the public or the Board. There were none.

MOTION by Paul Sanders, seconded by Lee Ameis and unanimously carried to close the Public Hearing.

The Chairman stated:

1. In listening to the differences of opinion it is clear that no matter what the Board decides someone will be disappointed. We have support both for and against and we do not like to pit neighbor against neighbor.
2. Unfortunately, it is clear that there is a dispute between two neighbors going beyond the variance issue and we are dealing with neighbors who are not willing to get along.
3. Zoning is in place to allow neighbors the space to maintain their property without infringing on another's property.
4. Our new ZEO did not require to see a survey before granting the Certificate of Zoning Compliance and he does accept some responsibility for the issue before us.
5. For his own protection the applicant should have had the property surveyed. It is the property owner's legal responsibility to ascertain the correct boundaries of his property before beginning construction.
6. The property owner admitted at the February 18, 2013 meeting that he had begun construction two feet too close to the property line. Because he did not obtain a survey the problem is self-created.
7. In good faith, a property owner should allow additional space and not just the minimum setback.
8. According to NYS Law, a ZBA cannot grant a variance when the problem is self-created.
9. Both the Arcade Planning Board and the Wyoming County Planning Board have recommended denial of this variance.

MOTION by Lee Ameis, seconded by Paul Sanders and unanimously carried to deny Area Variance Application, Permit No. 2168-AV, submitted by George Hudson, requesting construction of a two-car garage not in compliance with rear yard setback at property located at 96 East Main Street. It is impossible to do otherwise as the building could have been constructed within the proper setback and thus the problem was self-created.

Board Members Reasons:

Jeff Snyder – Voted to Deny

It is a property owner's legal responsibility to determine the correct boundaries of his property prior to construction. He has admitted he did not obtain a survey and just assumed he could build in the same general area as the demolished building, thus creating the problem. He could have had a surveyor simply shot the property line or worked with the other property owner to determine where the property line was located.

Paul Sanders – Voted to Deny

The required rear setback was infringed upon because the applicant did not have a survey. Because of this it is a self-created problem and by NYS law a variance cannot be granted.

Lee Ameis – Voted to Deny

The applicant failed to obtain a survey of the property prior to commencement of the new construction which was within the minimum setback. This is clearly a self-created hardship which could have been avoided. A building permit is not a blanket approval to build anywhere on a property. NYS law is clear that a variance cannot be granted for a self-created hardship.

ADJOURNMENT:

There being no further business brought before the Board, the meeting adjourned at 8:07 P.M. upon **motion** by Lee Ameis, seconded by Paul Sanders and unanimously carried. The next regular meeting of the Zoning Board of Appeals of the Town and Village of Arcade will be held on Monday, April 15, 2013 at 7:00 P.M. in the Village Boardroom, 17 Church Street, Arcade, New York.

Respectfully submitted,

Holly L. Almeter
Secretary

Wyoming County Planning Board REFERRAL RESPONSE FORM

For referrals as required in accordance with NYS General Municipal Law Article 12B, Section 239-l and m

Location of Proposed Action: 96 East Main Street, Village of Arcade

Applicant: George Hudson

Type of Proposed Action (separate form completed for each action): Construction of 24' by 24' pole style barn two car garage

Area Variance Use Variance Site Plan Special Use Permit Other: New Zoning Ordinance/Local Law New/Amend Comprehensive Plan Amend Zoning Text/Map

WCPB Recommendation on this Action

The WCPB took the following action at their meeting on March 4, 2013 with respect to this referral:

Approval with Modification Disapproval w/comments None No recommendation;

proposed action has no significant negative county-wide or inter-community impacts

Comments: The proposed action is an Area Variance requesting relief from the rear yard set-back requirements allowing the construction of a 24'x24' pole style barn two car garage. This variance request is being made after partial construction of the garage and a subsequent stop work order from the Village ZEO, when it was determined that the building setback is in violation of the Village Zoning Code. The Applicant claims to have a Wyoming County building permit. However, according to Wyoming County Fire & Building Code officials, the County does issue building permits unless a valid municipal zoning permit is included with the County building permit application.

1. The Village is commended for submitting a completed Site Plan Checklist with the referral.
2. The property owner has demolished a dilapidated barn/garage structure and begun to construct a new building in its place. However, the landowner failed to obtain a survey of the property prior to the commencement of the new construction which was within the minimum set-back.
3. Despite the Property Owner's claims in **Criteria for Area Variance, Item 5**, this is clearly a self-created hardship and one that should have been avoided. A building permit is not a blanket approval to build anywhere on a property. It is the property owner's legal responsibility to ascertain the correct boundaries of his property and the relevant set-backs prior to beginning construction. By his own admission the owner did not obtain a survey and merely assumed he could begin construction in the same general area as the previously demolished structure.
4. Additionally, it should be clarified that the building set-back extends from the nearest building projection (i.e. the roof soffits and gutters) to the property line – not from the building foundation to the property line.
5. The Village has the right to:
 - a. Refuse the Area Variance and order the immediate removal of the new construction from the set-back area;
 - b. Fine the Applicant for administrative costs, violating his zoning permit; and/or grant the Variance with strict conditions imposed.
6. The Village should also ensure that the new structure; if allowed, does not create a drainage problem on adjoining properties.
7. There appear to be no significant county-wide negative impacts related to this proposed project.
8. A record of application for and approval status of all necessary permits from State and/or County agencies or officials must be provided by the Applicant.
9. A New York State SEQRA Short Environmental Assessment Form has been submitted.
10. **Section 239-m of general municipal law requires referring bodies to file a report of the final action it has taken regarding the referral made to the WC Planning Board. This report must be sent to the WCPB within thirty days after final action.**

TO: Arcade Zoning Board of Appeals
FROM: Arcade Planning Board
DATE: March 13, 2013
RE: ZBA Request for Recommendation and Comment on Area Variance
Permit No. 2168-AV, Submitted by George Hudson for Property
Located at 96 East Main Street

Attachment B - ZBA
Minutes of March 18, 2013

The Arcade Planning Board recommends the above referenced Area Variance be denied based on the comments below.

1. Regarding the Criteria for Area Variance completed by the applicant, he stated that he had removed an unusable barn and is replacing it with a new one. The Board maintains that this is not the matter at hand. He also stated that it is in keeping with the characteristic of the surrounding neighbors. Exhibit 1 from neighbor Father O'Hara through his attorney strongly objects to this statement.
2. The applicant in the Criteria for Area Variance maintains he has not caused the problem that he is requesting to change. This Board agrees with the Wyoming County Planning Board that he did cause the problem and it is a self-created hardship.
 - a. It is the property owner's legal responsibility to ascertain the correct boundaries of his property and the setbacks before beginning construction. The applicant admitted that he did not obtain a survey and merely assumed where the property line was located and that he could rebuild in the same area as the demolished structure.
 - b. The fact that he obtained a building permit from the County is irrelevant. The ZEO issued a Certificate of Building Compliance based on good faith that the applicant knew where the property line was located. Since the applicant has already constructed the garage to a substantial degree within the setback zone, he is completely responsible for self-creation of the problem.
3. The applicant could obtain his own surveyor at his cost to survey his property. If by chance that survey did not agree with the survey completed by Father O'Hara and the applicant's survey shows he is within 10 feet of the property line then he would have a basis for his argument. If such be the case the two parties could proceed on their own to court to dispute the surveys.
4. If the applicant can prove that it has been less than a year since demolition of the old structure, he could rebuild within the same setback of the original structure without a variance. He has told the ZBA that the new structure is not exactly on the original footprint as he was not able to remove all of the original foundation.

Respectfully,
Paul Bijhouwer, Chairman
Arcade Planning Board

ADMITTED IN
NEW YORK, MARYLAND AND
THE DISTRICT OF COLUMBIA

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February 12, 2013

Village of Arcade
Chris Lexer, Zoning Officer
17 Church Street
Arcade, NY 14009

Exhibit 1
ZBA 3-18-13

RE: Zoning Variance

Dear Mr. Lexer:

Please be advised that I represent Father Michael D. O'Hara, owner of the premises at 15 Clough Avenue in the Village of Arcade. As you are aware, one of Father O'Hara's neighbors has asked for a variance request in order to build a garage within the buffer zone. Father O'Hara has asked me to state to you, in your capacity as Zoning Officer, that he is opposed to such a variance being granted for the following reasons:

- 1.) That such a variance would lower his property values because the end result would be out of character for the neighborhood;
- 2.) Father O'Hara was not provided any other information, such as a copy of a survey;
- 3.) Until Father O'Hara retained a surveyor, the individual seeking the variance acted as if Father O'Hara's land was his (allegedly even throwing branches on Father's property!), and therefore, no variance was needed;
- 4.) It is not a reasonable use of the property because, under the circumstances, the applicant could certainly have built elsewhere, but wishes to intrude towards Father O'Hara's property;
- 5.) The denial of such a variance would not create an undue hardship for the applicant;
- 6.) It would not be unreasonable to deny the applicant's request for a variance;
- 7.) The applicant has not carried his burden to show that he has no other alternatives.

In closing, we would like to reiterate that we are opposed to the granting of said variance. Thank you.

Very truly yours,


James I. McAuley, Esq.

JIM

Cc: Father O'Hara