

**VILLAGE OF GOSHEN  
ZONING BOARD OF APPEALS  
July 10, 2013**

The regular meeting of the Zoning Board of Appeals of the Village of Goshen was called to order at 7:30 pm on Wednesday, July 10, 2013 in the Village Hall by Chair Wayne Stahlmann.

Present: Lynn Cione  
Garfield Clark  
Neal Frishberg  
Wayne Stahlmann, Chair  
John Strobl

Also Present: David Donovan, Esq., ZBA Attorney  
Ted Lewis, Building Inspector

Mr. Stahlmann opened the meeting with the Pledge of Allegiance.

**Application of Karel Morse, 13 Oxford Road, Section 113, Block 4, Lot 23**

Relief Requested: Variance to permit a front yard setback of 22.7 feet where 25 feet is required to permit the applicant to construct a covered front porch.

The applicant presented notice of mailings.

Mr. Morse said he wants to put a front porch seven feet out and thirty feet long and said it will be in line with everyone else's property on the street. There are others with front porches he said. Mr. Morse said that currently there is a four to five foot overhang from the front door. He believes building the porch will improve the home.

ZBA members had visited the site and said they found it in character with the rest of the neighborhood and that it fits the criteria for approval.

Mr. Stahlmann asked for public comment. There was none.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen closes the public hearing on the application of Karel Morse. Motion approved unanimously.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen grants the variance as requested on the application of Karel Morse. Motion approved unanimously.

**Application of Edwin & Carole Garling, 91 Murray Ave. Section 108, Block 4, Lot 61.1**

Relief Requested: Variance to permit a 6 foot tall fence to be erected in a front yard. The maximum allowed for fences in a front yard is 4 feet.

The applicant presented notice of mailings.

Mr. Garling said he is proposing a 6 ft. tall fence in his front yard for privacy. He gave ZBA members copies of photographs showing where the fence will be situated.

It was stated that the existing fence from the rear of the property to Murray Ave. is 6 ft. so what is being proposed will finish where that fence ended. Mr. Stahlmann remarked that there is already a 10 ft. fence on the line that the applicant will be finishing. It was

noted that St. John’s Church fence is between 8 and 10 feet in height and that the applicant’s fence will not be noticeable from the church because of the existing vegetation and bushes. It was also noted that it will not obstruct traffic because the Garling property sits much higher than the roadway.

ZBA members had viewed the property and said they do not think the 6 ft. fence will affect the character of the neighborhood.

Mr. Stahlmann asked for public comment. There was none.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen closes the public hearing on the application of Edwin and Carole Garling. Motion approved unanimously.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen grants the variance as requested on the application of Edwin and Carole Garling. Motion approved unanimously.

**Application of Orange-Ulster BOCES, Section 116, Block 3, Lot 1.11, 4 Harriman Drive**

**Relief Requested:** Variance to permit internally illuminated signs on the premises. Signs which are internally illuminated are not permitted.

Representing the applicant: Mark Fellenzer, Engineer

The notice of mailings were presented to the ZBA.

Mr. Donovan said the applicant seeks a number of variances in addition to the variance permitting internally illuminated signs. He said they also are asking for a variance for the number of signs allowed, sign location and height. Mr. Donovan said the Village of Goshen Board recently amended the sign ordinance to allow internally illuminated signs in commercial zones outside of the Architectural Design District which means that this portion of the application is moot, as they are permitted to have internally illuminated signs.

Mr. Fellenzer said the three variances they are now seeking include: having four signs instead of the two allowed; having nine foot tall signs (for two of them) instead of the eight feet allowed and locating a sign five feet from the right-of-way instead of the 15 ft. allowed on Harriman Drive.

Mr. Fellenzer talked about the site and showed the proposed location of the two additional signs, stating that the two current signs are not well seen because of the steep topography. He spoke of the importance of clarifying what the site is. The signs are back illuminated signs, he said. There will be a masonry foundation, brick work, and two columns with the sign in the center. Fixed information “Regional Educational Center at Arden Hill” will be at the top of the sign. The rest of the sign will have changing information and will stay illuminated 24 hours a day. He showed ZBA members a photo of the typical sign they would like to use and said they want it in character with the re-development of the property. The applicant believes there needs to be four signs approaching the facility from the four different approaches, he said. These signs will be both directional and instructional.

Mr. Frishberg noted that it will be a substantial change going from two signs to four signs but will not adversely impact on the neighborhood. Mr. Donovan said that the Board could consider the impact of four signs on the total acreage of 33 acres.

Mr. Stahlmann asked for public comment on the variance increasing the number of signs. There was none.

Mr. Fellenzer spoke about the request for a variance for sign height, from eight feet (allowed) to nine feet. He said it is the columns themselves at the top of the sign that extend the sign to nine feet. He noted that there are several signs across the road higher than eight feet.

ZBA members said they did not think this negatively impacted the neighborhood and that it satisfied the five factors that must be considered.

Mr. Stahlmann opened the discussion to public comment.

Edwin Garling of 91 Murray Avenue said that the building and the roadways have been there for a long time and that in the late 1990s all of the hospital signs there were re-done and there were 21 signs at the time. He said that this number of signs will be a dramatic decrease.

Mr. Fellenzer spoke about the variance request regarding sign location and its proximity to Harriman Drive. If the sign is within the 15 foot setback it will not be able to be seen unless someone is right up on it because of the topography.

Mr. Stahlmann asked for public comment. There was none.

Mr. Donovan said that because the site is within 500 feet of Route 17, the ZBA cannot act without a 239 Referral to Orange County. The Board cannot act without a response from Orange County or until thirty days have lapsed from the time of the referral. He said that the ZBA can close the hearing but take no action on the requests.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Ms. Cione, the Zoning Board of Appeals of the Village of Goshen closes the public hearing on the application of Orange Ulster BOCES. Motion approved unanimously.

Mr. Stahlmann said the board will be prepared to make a decision on the application at its August 14th meeting.

**Application of DeProspro – Section 109-5-24 – Request for a reversal of the Building Inspector’s determination to issue a building permit to Betro & Pray.**

**Application of Betro & Pray, Inc. seeking a variance allowing a deck to be constructed in the rear of the LeBaron building.**

Mr. Donovan said that there was prior litigation between property owner Chester LeBaron and Mr. DeProspro, one of the owners of the neighboring property, and that his law firm represented Mr. DeProspro. That litigation terminated some time ago but he wanted to disclose it again and would like the representatives to indicate for the record that they have no issue with his continued representation of the Zoning Board in this matter. Jay Myrow, Esq., representing Betro & Pray, Inc.; Richard Golden, Esq. attorney for Mr. DeProspro, and all members of the Zoning Board stated at the meeting that they have no objection.

Mr. Donovan said there are two issues before the ZBA. A request for a variance allowing Betro & Pray, Inc. to install an outdoor deck onto the building owned by Chester LeBaron and an application of Mr. DeProspro to appeal the determination of the Building Inspector to issue a building permit. He suggested, after speaking to both attorneys, he said, that the ZBA open both public hearings simultaneously since the issues are intertwined. Mr. Donovan said the issue of whether or not this is a permitted pre-existing non-conforming use is the critical issue and the ZBA will not decide it is okay to have the deck but not okay to have the use. Both attorneys said they had no objections.

Mr. Donovan told the board that Building Inspector Ted Lewis is present pursuant to a subpoena issued by Mr. Myrow on behalf of Betro & Pray.

Mr. Donovan said he received a letter today from Mr. Golden stating “he has filed an appeal to the issuance of the CO and the sign permit, and is asking to have his application amended to include those two things.” Mr. Donovan said he has no objection to the amendment. The ZBA members said they have no objection. Mr. Myrow said that he hasn’t seen the sign permit and didn’t know it was going to be an issue until yesterday. Following an explanation by Mr. Golden, Mr. Myrow said he can agree that the ZBA can hear the issue if the basis of the appeal is not some other infirmity regarding some technical issue regarding the document and is simply tied to the fact that it will be void on the issue of non-conforming use either way. Mr. Golden said he “so stipulated.”

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen opens both public hearings and grants Mr. Golden’s request to amend his application. Motion approved unanimously.

Richard Golden, Esq. said he represents Mr. DeProspero and DP&L, LLC, property owners adjacent to the subject property. Mr. Golden said his client objects to the deck and the issuance of two building permits and a Certificate of Occupancy with respect to opening a restaurant. He said the use is not allowed because restaurant use is a prohibited use and has been in that area of the Village since 1998. He said that pre-existing restaurants are allowed to continue going forward unless there has been a lack of restaurant use for more than a year, then the pre-existing stops and an applicant would have to come before the ZBA for a use variance or ask the Village Board for a zoning change. “It is not just a case of going to the Building Inspector and getting a CO.” Mr. Golden said they are in the difficult position of proving a negative that there has not been a restaurant there but that he believes that as long as there is some doubt that there has been some continuous restaurant use there for the past 15 years, then this would not be a permitted use. Mr. Golden said he has submitted an affidavit from Mr. DeProspero, dated May 29, 2013, stating he has had the opportunity to view the premises on a daily basis night and day and to his recollection it has been at least two years, if not longer, that there has been no visible restaurant in use. Mr. Golden said that up to the time that the CO and building permits were issued, there was nothing in the record indicating that there was a pre-existing use. The owner, Mr. LeBaron must prove that there was continuous use for the past 15 years, he said, suggesting that it can be proved with sales tax receipts, credit card receipts and/or employment records. He said that when the CO and building permits were issued there was no evidence showing that any proof was put forward to say that there was a pre-existing non-conforming use, yet the CO and building permits were issued based upon the assumption that there was. “I don’t think they should have been issued for those reasons but now the ZBA has to look at this and determine what evidence was in the record when these were issued to substantiate that it was a pre-existing non-conforming use of a restaurant continuously for 15 years, except that the lack of continuity was less than a year in duration.” Mr. Golden said he has found nothing in the files or records of the Building Department, the Planning Board or the Zoning Board of Appeals to demonstrate that there has been a pre-existing non-conforming use of a restaurant at that site for the past 15 years.

Mr. Golden said that if the ZBA concludes that an area variance is the standard, he doesn’t think the applicant has met the area variance standards for the ZBA to grant an area variance for the deck. After reviewing the five elements of the balancing test that must be applied, he said he concludes that the deck would alter the character of the neighborhood and would be a detriment to the nearby properties, certainly his client’s property. Mr. Golden said the area now has a courthouse, residences, offices and an historic track, and an outdoor deck for drinking, eating, smoking and music is contrary to the character of the neighborhood as it is now. He also said there has been no proof that the deck is necessary. The applicant has not shown that he cannot achieve the benefit he needs except by getting this variance. He said it is self-created.

Mr. Golden said that the deck, 40 x 16 feet, is clearly substantial. The focus, he said, is the substantiality of what is permitted at that site versus what there is at that site. Whether or not it is okay in some other area of the village is not relevant, he said. The ZBA is suppose to give the minimum variance necessary and there has been no substantiation for a large deck like this. Mr. Golden said he believes it is an Unlisted Action for which the ZBA has to go through the SEQRA process.

Mr. Golden also stated that the applicant's proposed parking is not in conformance with the Village Code and said he believes the applicant would have to seek an additional variance in regard to parking.

Jay Myrow, Esq. said he represents Betro & Pray, Inc. and Joe Betro. Mr. Myrow said that generally uses are permitted in a zone, whether they are legal non-conforming or not, but must be listed in the zoning ordinance. Restaurants are listed in the CS zone. The legal non-conforming use for this property is as an eating and drinking place as set forth as a permitted use in the CS zone. Mr. Myrow read from Section 8.2.221(d) of the Village Code on the continuation of non-conforming use.

Mr. Donovan said that the ZBA has the right to make the decision that they believe the Building Inspector should have made, based upon the proof and evidence before them.

Mr. Myrow said that Building Inspector Ted Lewis made a determination based on what he knew of this property, that it has always been an eating and drinking establishment, whether a restaurant or not. Mr. Myrow cited a legal case which he said addresses the issue of abandonment of non-conforming use stating that the case says that even the most minimal use in the course of a year is enough to preserve the non-conforming status of a property.

Mr. Myrow said he doesn't believe the applicant needs a variance to construct a deck. He talked about the doctrine of accessory use and cited a court case where the landowner is permitted to maintain an accessory use in conjunction with a permitted non-conforming use when the accessory use is truly incidental to the non-conforming use and does not change the basic use of the property. Mr. Myrow said he believe the ZBA can simply apply the doctrine of accessory use and recognize that the accessory use is incidental to the use and by interpretation can conclude that this deck is truly incidental. Mr. Myrow also cited Sadler vs. Zoning Board of Appeals for the Town of Unionville whereby one party was all that was necessary to prove that the use was not abandoned within one year.

Building Inspector Ted Lewis was not sworn in but his appearance was subpoenaed by Mr. Myrow. Both Mr. Myrow and Mr. Golden asked questions. Mr. Lewis said he characterized the property at 40 Park Place as an eating and drinking establishment – a restaurant. In April the applicant said he wanted to do an interior alteration to create a bar and restaurant and Mr. Lewis issued a building permit April 3. He issued the permit aware of what pre-existing non-conforming use means, he said. He said he doesn't believe the establishment ever lost its continuity for what the code requires, so didn't bring it to the ZBA but issued the building permit with complete confidence. Mr. Lewis said that Mr. LeBaron was using the property as a catering hall, renting it out for various parties. Mr. Myrow introduced a 14-page document (Marked as Exhibit 1). He reviewed the documents with Mr. Lewis who said that based on the information available to him, he is not aware of the use ever being abandoned for a period of one year. Mr. Lewis said that while he characterized it as an eating and drinking establishment he did not author any documents in the file that state it was an eating and drinking establishment. When he issued the original CO for the building permit for alterations, he characterized it as an existing restaurant bar. He said that based upon various fire inspections, conversations with Mr. LeBaron, common knowledge, observation and frequent police reports he received regarding noise, he believed that Mr. LeBaron was using it as an eating and drinking establishment, although he had not personally witnessed it being used as such.

Mr. Donovan reminded the ZBA that it has the ability to make an independent determination whether or not there is a legal non-conforming use.

Chester LeBaron, owner of 40 Park Place, said he has owned the property since 1982 and recently rented it to Betro & Pray to run Delanceys Restaurant . He has run a restaurant there himself and has rented it to others to run as a restaurant, he said. He mentioned that he has a liquor license under his own name. Since 2010 Mr. LeBaron said he has rented it out for parties. Mr. LeBaron brought copies of receipts which were marked as Exhibit #2. He said the receipts represent people who were renting the space for parties. Mr. Myrow said there were approximately 40 receipts for the year 2010, 65 receipts in 2011, 62 receipts in 2012 and 13 receipts so far in 2013. Mr. LeBaron said that since 1982 the space has never ceased to be an eating and drinking place and there had never been a period of one year when it didn't operate. He said he was often at the parties that were hosted there and that mostly people would bring in their own food and serve the food themselves so he didn't need to hire anyone. He said the parties were held almost every weekend.

Mr. Golden pointed out that some of the receipts were for parking rental spaces, not having anything to do with a restaurant use.

Mr. Myrow said that it is his position that the uses on site were for eating and drinking functions and that it was rented out for that purpose.

Mr. Golden told the ZBA that he didn't think that use qualified saying that "we are not talking about an eating and drinking establishment, we are talking about a restaurant/bar this is what the CO and building permits were issued for, this has not been operated as a restaurant/bar. He said the evidence shows there has not been a continuous use for a restaurant/bar therefore that pre-existing restaurant/bar use at that location has lapsed.

ZBA members asked questions and Mr. Stahlmann asked for public comment on the issue of whether this use was continuous as a pre-existing non-conforming use. There was no public comment.

Mr. Stahlmann asked board members for comment.

Ms. Cione said that there is no definition in the code as to what constitutes a restaurant and what constitutes an eating and drinking establishment. She said that Mr. Lewis based his opinion on common sense, community discussion, inter-awareness, personal observation and documentation. She said she comes back to common sense and thinks it has been an eating and drinking establishment, saying that she lives across the Historic Track and can attest to the significant activity at the site for the past few years, based on the noise coming from it.

Mr. Clark said that he agrees with Mr. Lewis.

Mr. Strobl said he believes that Mr. LeBaron has presented written proof of the use of the building.

Mr. Frishberg said that the code permits this piece of property to be continued indefinitely. He said he believes that a restaurant and a catering facility are eating and drinking establishments and that the use here has continued stating that Mr. LeBaron has sustained his burden of proof providing documents dating back at least to 2010. He said that "if the applicant came to us to issue a building permit I would be inclined to give him a building permit."

Mr. Donovan said that as a Type II Action it does not require SEQRA action.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen closes the public hearing with respect to the application of DeProsopo, DP&L LLC for a reversal of the Building Inspector's determination that a non-conforming use at the premises located at 40 Park Place has not been abandoned. Motion approved unanimously.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen denies the relief requested by DeProspero DP&L, LLC and determines that the use is a permitted pre-existing non-conforming use. Motion approved unanimously.

On the request for a variance to construct an outdoor deck, Steve Esposito provided the ZBA members with a history of the process so far. He said the proposed deck would be located on the southeasterly side of the building fronting along the Historic Track. It will be 600 sq. ft. and accessed through the dining room only. Mr. Esposito said there will be a railing around the deck and the deck will be screened and landscaped.

Ms. Cione commented that the neighborhood is exceptionally quiet at night and said she is concerned that the noise from an open air deck at night will travel over the huge open expanse of property that is the Historic Track. She asked if the deck will be used by bar patrons.

Mr. Myrow said the deck is only for dining purposes, for seated customers only. The only music will be ambient background music that will not go off the site. The last seating will be at 9 p.m. on weekdays and 10 p.m. on weekends. The deck will be strictly monitored, he said, and will provide a unique dining experience and will be a true asset for the Village.

Mr. Stahlmann asked what makes the applicant think a deck is appropriate. Mr. Esposito said that of the twenty-seven eating and drinking establishments in the Village, seventeen provide outside seating. The majority of those are in the Central Business District and one is in the OB zone.

Mr. Esposito called the deck an accessory to the pre-existing non-conforming restaurant and said it is consistent with the fabric of the historic church park district.

M. Golden said that this is considered an area variance and that as such the ZBA is constrained by the five part balancing test. This is not consistent with the neighborhood and in fact is going to change the character of the neighborhood as there is nothing like it in the neighborhood, he said. It is going to affect the nearby properties and so fails the first part of the test. He said he has gone through all of the five elements and that it fails each one. If the ZBA is going to adhere to the balancing test with the five elements, there is no way this can pass this test, he said.

Mr. Myrow said that “if you interpret this to be a merely incidental use you don’t use the area variance.” But, he stated, that if seen as an area variance and using the balancing test, he reasons that it does not have a substantial effect on the neighborhood. He said there is no visual impact, it is on the back of the building and there will be no foot traffic coming off the deck, no noise impact and no impact on the environment. He said the applicant can’t build the deck without a variance and that while it may be considered substantial, it is not if you consider the totality of the circumstances.

Mr. Donovan said he disagrees with Mr. Myrow on the law of incidental use, stating that the case he cited does not apply. He said he is not persuaded that it is an accessory use and that in his own view it is an area variance and the Board will need to apply the five factors.

Mr. Golden said he believes there are in fact environmental factors to consider because it will clearly affect the surrounding residential homes and create a big change to the neighborhood.

Mr. Stahlmann asked for public comment. There was none. Mr. Stahlmann asked the ZBA members for their comments.

Ms. Cione asked about the parking and screening along the northerly side of the deck.

Mr. Esposito said there will be a net gain of one parking space. He said there will be landscaped screening along the northerly side of deck, where a double row of shrubs, evergreens and junipers, will be planted. The junipers can grow to a 12 ft height, he said. There will also be landscaping around the entire deck.

Mr. Clark reiterated that there are letters from the police chief about the frequent noise complaints from hosting parties there and said “that is without the deck.” Mr. Esposito said the applicant is going to correct the noise problem.

Mr. Strobl said he is concerned about adding 600 sq. ft. without adding another emergency fire exit. The deck will be 2-1/2 feet off the ground. Mr. Esposito said that if the applicant is required to put an emergency exit off the deck, he will.

Mr. Golden reminded the Board that variances run with the land, not with the owner, and said he believes it to be a substantial variance at this location.

Mr. Frishberg said he doesn't believe the deck will create an undesirable change in the neighborhood because it will be used only for dining, will have screening around it, and the noise ordinance will be enforced. The only people who will be able to see the deck are those who are positioned behind it. Mr. Frishberg said he doesn't believe outdoor dining can be achieved at that location without a variance to allow the deck. He said that in regard to substantiality, it depends how it is looked at, reasoning that going from a deck to no deck is substantial, but it is less substantial if you consider it from the additional tables it will create, an additional six to the dining room's sixteen. Mr. Frishberg said he hasn't heard any evidence that it will have an adverse impact on the physical or environmental condition of the neighborhood, other than the possibility that there may be noise and lighting. He said that while it is self-created, he doesn't see that it is going to be a detriment to the health, safety and welfare of the neighborhood.

Mr. Donovan said that this is an Unlisted Action so the ZBA will need to make a negative declaration under SEQRA.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen closes the public hearing on the application of Betro & Pray for a variance allowing an outdoor deck. Motion approved unanimously.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen issues a negative declaration in terms of SEQRA as the application will have no adverse impact on the environment. Motion approved unanimously.

**VOTE BY PROPER MOTION**, made by Mr. Frishberg, seconded by Mr. Strobl, the Zoning Board of Appeals of the Village of Goshen grants the request for a variance allowing a deck as requested. Motion approved unanimously.

**ADJOURNMENT** – Upon motion made and seconded, the ZBA adjourned at 10:30 p.m.

Wayne Stahlmann, Chair  
Notes prepared by Susan Varden