

December 1, 2004

Zoning Board of Appeals

Proceedings by Authority

State of New York,
City of Jamestown, ss:
Council Chambers

The regular meeting of the Zoning Board of Appeals of the City of Jamestown, New York, was held on Wednesday, December 1, 2004 at 3:30 p.m.

Members Present: Chairperson Tammie Donato, Suzanne B. Howig, Ellen Ditonto, Mary Lou Edwards, Richard Hanson, Charles Nazzaro, Timothy Thomas

Others Present: City Clerk Shirley A. Sanfilippo, Zoning Officer Lawrence Scalise, Corporation Counsel, Marilyn Nieves-Fiore and John Whittaker of The Post-Journal

Chairperson Donato called the meeting to order.

BRIAN J. MAUDE, MAUDE DEVELOPMENT, LLC – 10 PROSPECT STREET

The secretary read the petition of Brian J. Maude of Maude Development, LLC, 22N159 Peper Road, Barrington, Illinois 60010 for a use variance to operate a 24 hour Walgreen Pharmacy with a double drive thru pick up window on the property located at 10 Prospect Street, in a R-2 Zone, owned by St. James Roman Catholic Church Society of Jamestown, New York, 27 Allen Street, Jamestown, New York. (Section 300-306 – Retail sales are not a permitted use in the R-2 Zone. The first permitted zone is the C-1 Neighborhood Commercial Zone.)

Mr. Brian Maude with Maude Development, 735 Delaware Street, Buffalo, New York appeared on behalf of his client, Walgreen's in asking for a request for a zoning variance to put a Wallgreen's Pharmacy where the St. James School is currently located at Prospect and Main Street.

Chairwoman Donato asked if there were any questions or comments.

Ms. Edwards moved to table the motion since they do not have the County referral.

Ms. Howig seconded.

Carried: 6 ayes, 1 nay
(Thomas, nay)

RHOE B. HENDERSON, III - 552 W. 3rd STREET

The secretary read the petition of Rhoe B. Henderson, III, 552 W. 3rd Street, Jamestown, New York for an area variance to place a 3' x 5' sign approximately 1' from the front property line on the property located at 552 W. 3rd Street, in a C-2 Zone, owned by Rhoe B. Henderson, III, 8 Briggs Street, Lakewood, New York 14750. (Section 300-710 – The required setback for a sign in the C-2 Zone is 10'. The proposed setback is approximately 1'.)

Mr. Gregory Smith, 126 Arcade Avenue, representing Rhoe Henderson, has nothing to add to the petition.

Mr. Thomas asked if this was a replacement sign.

Mr. Smith stated there was no sign there previously, it was a wall sign.

Ms. Howig asked if it was going to be lighted.

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Mr. Smith stated no. There is no sight line obstruction entering or leaving the optometric retail building that is next door and there is no sight line obstruction entering or leaving the bus garage on the other side of the property.

Mr. Stahlman has an office across the street from Mr. Henderson's and stated he is in favor of the sign and does not feel it will effect the flow of traffic or obstruct any eyesight of people exiting the plaza. Mr. Stahlman stated he has been in that location since December, 1965 as has Mr. Henderson, and he has no problem with it at all.

Ms. Ditonto moved to approve the petition.

Mr. Hanson seconded.

Carried: 7 ayes, 0 nays

LAWRENCE M. SCALISE – 2 JERSEY AVENUE

The secretary read the petition of Lawrence M. Scalise, Zoning Officer for the City of Jamestown, New York, 200 E. 3rd Street, Jamestown, New York for an area variance to erect a 20' x 24' attached garage to the existing house approximately 5.4' from the west side property line on the property located at 2 Jersey Avenue, in a R-1 Zone, owned by Wilfred and Gisela Cordero, 2 Jersey Avenue, Jamestown, New York. (Section 300-305 – The required side yard set back for an attached garage is 10% of the lot width or 8.5'. The proposed setback is 5.4'. An error was made and a building permit was issued. The error was discovered after substantial completion of the garage.)

Mr. Scalise stated that he had met with the property owners, the Corderos, who were interested in erecting a garage on the property. They talked about various setbacks and scenarios. Mr. Scalise stated he got the numbers confused, issued the permit in error. When the error was discovered, the garage was substantially complete.

Chairperson Ditonto asked if the Corderos were present.

Mr. Scalise stated they were here if anyone would like to hear from them. He advised that he brought this before the Board on behalf of the Corderos, because it was his error and it would require a variance.

Mr. Richard Sotir, 8 E. 4th Street, representing Wilfred and Gisela Cordero spoke to the issue of the garage being substantially constructed since the permit was issued by Mr. Scalise. The setback that is in question is a difference of 37". The property line abuts a vacant lot which until the notice came to the surrounding property owners, it was more in the nature of a heavily grassed field. The controlling statute is Section 300-1107 of the City Code and he believes that the application meets all the criteria in the Code and their variance should be granted.

Mr. Kevin Sirwatka, Hotel Jamestown Building, appeared on behalf of Angelo Donisi who owns the adjoining property on Jersey Avenue. Initially, he stated, with no disrespect to Mr. Sotir, he disagrees with him as to the contents of the notice. The notice was published with the language setting forth that there was substantial completion of the garage prior to the mistake being pointed out. Mr. Sirwatka stated that it was his understanding that at the time the City was put on notice of this non-compliance with the Zoning Code, there was approximately three posts put into the ground. Now, the situation is that yes, the garage is substantially completed, but at the time non-compliance was notified to the City of Jamestown, any minimal expense to move the posts would not have created any undue hardship to the Corderos. The building permit was granted in August of 2004. Mr. Donisi informed Mr. Sirwatka that he contacted Mr. Scalise in the very beginning of September, 2004. He was advised that he would be recontacted after the matter had been looked into. Approxiiately two weeks went by, construction continued, and Mr. Donisi then contacted Mr. Centi who indicated that Mr. Scalise would get back to him. Another two weeks go by and the garage continues to be built. The garage is attached to the house, is a pole barn construction, 4 x 4 posts into the ground, plywood around the outside, a two car garage with shingles on the top. Mr. Sirwatka wants to make clear for the record that the legal notice was incorrectly posted and at the time the City became aware

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and the petitioner became aware of the problem, there was not substantial construction. In the event there is any economical hardship on Mr. and Mrs. Cordero, it is a result of the City's inaction to quickly remedying the situation. He believes that one of the criteria of whether or not the economic hardship is self-created – he believes it was self-created, based upon the inaction after the notification of Mr. Donisi.

Secondly, Mr. Sirwatka stated they dispute the condition of Mr. Donisi's property. Mr. Donisi owns on Jersey Avenue a frontage of 170 feet and depth of 284 feet. The lots were purchased with the intention of building one-family residences– two of them on those lots. Those residences would result in a tax benefit to the City once they have been constructed. We believe the cost of the houses would be in excess of \$100,000.00 which would be of great benefit to the City. The garage, in the condition it is, should it be granted by the Board, would put Mr. Donisi's plans in jeopardy. Mr. Sirwatka stated that he believes that what is being portrayed to the Board concerning the measurements is not accurate. He presented photographs from the frontage of Jersey Avenue back to the rear property line. He further asked for a survey to be done to review the measurements. Further, in regards to the measurements, he points out to the Board that the Corderos' residence is approximately 1288 feet (taken from the Assessment Roll for the City of Jamestown). He stated that the garage may be encroaching on his clients' property. Again, Mr. Sirwatka stated that we need to see a survey.

Chairperson Donato commented that they do have a survey dated July 16, 1996 done by Jerome Erickson that clearly shows that there are two lengths between the property line. In back it is 5'4 and at the front it is 6'7 from the property line to the garage.

Mr. Sirwatka then stated that the garage did not exist in 1996.

Chairperson Donato agreed, but stated that this is showing the addition to it.

Mr. Sirwatka stated again that the garage did not exist in 1996.

Chairperson Donato asked who obtained the survey.

Mr. Scalise answered that the Corderos gave him the survey. The garage indicated on the survey was added by himself to show where the garage is in relation to the property line.

Mr. Thomas, in looking at the survey, stated that if you were looking at Mr. Cordero's house, standing on Jersey Avenue, it says the front of the house is 12' from the property line and the back is 13 ½ feet. So, let us assume that is 13 ½ feet all the way across. And, further, the house is 46.3'. When those are added up, 46 and 13, we're roughly 60', and you are talking about a 20' wide garage. So, that is 80' and the survey says that the lot is 85' we are not counting something that is in there, it is hard to conceive that it is on Mr. Donisi's property. However, the survey could be wrong.

Mr. Sirwatka again presented photographs indicating the location of the garage in relation to the back stake of the property.

Mr. Nazzaro asked if Mr. Sirwatka was requesting a survey to be done.

Mr. Sirwatka said yes in order to best coordinate the decisions.

Ms. Edwards asked when Mr. Donisi bought the property.

Mr. Sirwatka said the property was purchased from the County of Chautauqua in 2001.

Ms. Edwards asked if he bought the property without having a survey done.

Mr. Sirwatka said that was correct.

Chairperson Donato asked why Mr. Donisi has never asked for a survey to be done so he would know where his property lines were located.

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Mr. Sirwatka stated that the stakes were there, as well as, in Mr. Donisi's opinion, the anticipated location of the front stake.

Chairperson Donato then asked how that says that the garage is on his property.

Mr. Sirwatka alluded back to the photographs. The line from the back stake going towards the road, creates a question of the location of the garage in relation to the property line.

Mr. Thomas asked Mr. Scalise if he measured the garage.

Mr. Scalise stated yes.

Mr. Thomas asked if it was 20' across the front and 24' deep.

Mr. Scalise stated yes.

Chairperson Donato asked if Mr. Scalise has any knowledge of where the front stake is located.

Mr. Scalise stated that he used the survey when it was provided to him, he did return to the Corderos, he did measure it out to the best of his ability and came up with a logical assumption of where the stake was located. He stated he did not dig and find it. He was using the dimensions based on the survey in an attempt to locate it.

Chairperson Donato commented that Mr. Donisi has owned this property for three years. He bought it with the intention of building houses on it and in three years he has not done anything in that direction.

Mr. Sirwatka stated that he has cleared the land.

Chairperson Donato asked when that happened.

Mr. Sirwatka said about a month ago.

Chairperson Donato remarked that after this entire issue started, he cleared the land. She went on to ask if he had any construction plans, contractor, house plans?

Mr. Sirwatka said no to the above.

Chairperson Donato commented then that this is still just a "theory," or what you hope to do then.

Mr. Angelo Donisi, 1364 Forest Avenue Ext., Town of Busti commented that he has always planned on doing the construction. He stated that he talked to Mr. Scalise about the plans.

Mr. Scalise stated that Mr. Donisi did talk to him about the plans about a year ago.

Chairperson Donato asked Mr. Scalise if it was true that he knew about this error back in the beginning of September and no action was taken by the City.

Mr. Scalise answered that Mr. Donisi did call – he was questioning the garage addition – he told him that the permit had been issued and if they built it by the dimensions the permit was issued under, it should have been compliant. At that time, what Mr. Scalise assumed he did, he thought was correct. He had no reason to assume otherwise. He is very thorough when he does these. Mr. Donisi was very persistent in calling and he did talk with Mr. Scalise's superior and Steve Centi asked him to look into the matter again. Mr. Scalise did spend another couple of hours on it and when he pulled the survey out and went over it again, he discovered his error.

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Chairperson Donato asked exactly what Mr. Scalise's error was.

Mr. Scalise stated that when he was speaking to the Cordero's, there were several different scenarios on setbacks, attached garages, etc. Originally, they wanted to put a 24' x 24' addition on the house. They went through all that together and that was when he stated to the Corderos that they were going to be too close to the property line, and they asked him about a detached garage, further in the back. They did not want to incur the expense of running the driveway back there because of the swimming pool back there and other things. A detached garage would have been only 5' away. They asked why they couldn't put it 5' away and not attach it to the house, but put it in this location. Mr. Scalise told the Corderos they could not do that because the State Building Code requires at least a 10' separation between the two. If you take the 10' off, it would end up being a 14' wide garage. That was too small for their purposes. Mr. Scalise stated that evidently in the process, he took the 5' from the detached and used that when he put that on there, and unfortunately, we have gotten to the point where we are now.

Chairperson Donato asked counsel what is the remedy when a city employee makes an error like this and issues a building permit?

Corporation Counsel Fiore-Nieves remarked that the remedy is exactly where we are at. It would be no different than a property owner building it and finding out after the fact that they had to obtain an area or use variance and come into the Board after the fact. The simple matter is that Mr. Scalise, because he discovered the error, filed on behalf of the property owners. This is the remedy.

Ms. Ditonto again stated, that as she understands it, to correct the record, he did not discover the error, the adjoining property owner discovered the error.

Mr. Scalise stated he discovered the error after Mr. Donisi's insistence that it was too close.

Mr. Sirwatka stated that to make it clear, Mr. Donisi was the one who actually discovered the error, contacted the City of Jamestown. Nothing was done for over a month and the Corderos continued their construction. That is why we now we have a garage that is substantially complete.

Ms. Ditonto asked if the City has any record from the Department of Development showing when Mr. Donisi called, the follow up that apparently occurred in early September and a call two weeks later.

Mr. Scalise stated that he does keep a phone log when he is not in the office, with the time and date. Usually he just puts a checkmark on the slip when the person calls back. Evidently, Mr. Donisi's phone calls had a check mark on them, but he did not put a return date down, which would indicate to Mr. Scalise that he called and talked to Mr. Scalise and he went down his list and marked it off. Mr. Scalise did not mark the time that it occurred. He did go through his phone list and he did have a call from Donisi on September 27, October 14 and October 28. He doesn't have a return date when he spoke to Mr. Donisi. Mr. Scalise said there may have been other times when Mr. Donisi has called and spoken to him and he did not mark those calls down.

Ms. Ditonto then asked if the first phone records were September 27, 2004.

Mr. Scalise stated that did not mean that Mr. Donisi did not call him earlier than that.

Mr. Nazzaro asked to clarify all this. The petition is for an area variance .

Mr. Scalise stated that was correct.

Mr. Nazzaro stated it was for an area variance because of the setback. But do we have to answer the question first, - it seems the concern here is that its on Mr. Donisi's property possibly, but is that something – he further asked if we have to settle that issue first. How can we vote on a variance unless we know whose property the garage is on. We have the survey that was done in 1996 and the garage is drawn in, and Mr. Thomas points out that the math adds up and that it appears that it is not on your property, however, there is a doubt here.

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Corporation Counsel Fiore-Nieves stated that she cannot tell everyone what the right answer is. You all have to ask if the survey is accurate, and if you feel it is not, then do you want to get another survey. You have to decide that for yourselves.

Mr. Thomas asked if it would be appropriate to assume that this survey is accurate, in the absence of evidence to the contrary, when it is certified by a licensed surveyor and it has dimensions on it and the only item that is left off, Mr. Scalise has measured and made representations as to that measurement. He wondered if all of this information and facts could be put together to make a decision individually as to if the garage is on Mr. Donisi's property or not.

Corporation Counsel Fiore-Nieves said yes.

Mr. Sirwatka stated that what the Board has in front of them is not an actual survey. In an actual survey will indicate that any alterations to that document pursuant to the Department or education laws renders the map null and void. What we have here is a photocopy of a survey which has notations on it either by Mr. or Mrs. Cordero, or Mr. Scalise. So we do not actually have a survey. To be clear, the reason we have some concern as to the location of this garage possibly encroaching upon Mr. Donisi's property is there has been an encroachment by the adjoining landowners on Mr. Donisi's property without his consent. There is a drainage ditch with drainage piping from the rear of the property onto Mr. Donisi's property adjoining on Jersey Avenue.

Chairperson Donato remarked that they are getting away from the issue and should not be discussed here.

Mr. Sirwatka said that it goes to the credibility and reputations of the Corderos to this Board.

Mr. Sotir presented a survey done by Mr. Erickson, without alterations, stamped by Mr. Erickson, filed in the Chautauqua County Clerk's Office and for a little background, he stated that the survey was done pursuant to a HUD subsidized housing fund project of two homes on Jersey Avenue that the City was actively involved in. You don't get HUD funding without these surveys.

Mr. Sirwatka commented that Mr. Sotir correctly stated to the Board that there are various criteria that must be met prior to a variance being granted. Initially, that is the character of the neighborhood. If members of the Board went to this neighborhood and looked at all the houses, primarily there are homes in this area with one car garages. In fact, in the block from City View to Schuyler on Indiana Avenue, there are 14 houses with one car garages. On Baker Street there are seven houses with one car garages. On Delevan there are 9 houses with one car garages and on Connecticut 10 houses with one car garages.

Chairperson Donato remarked that that does not set a precedent that if you move to that area or build in that area, you can only build a one car garage.

Mr. Sirwatka agreed that it does not. It just lets you know the character of the neighborhood. This garage is outside the general character of the neighborhood.

Ms. Edwards commented that the point is when were those houses constructed as to when Mr. Cordero's house was constructed, because at that particular time, there were a number of houses with one car garages, as far as she knows.

Mr. Thomas asked at what point did the Corderos find out and if that was a self-created hardship. Further, at what point does communication change it from ignorance is bliss to self-created hardship? He asked again when did they find out that there may be a problem with the setback?

Mr. Scalise answered that he did not have it written down but believed it was relatively close to the date of filing the petition and that date was probably 10/28/04. That was a Thursday, so he assumes it was probably Monday or Tuesday of that week.

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Mr. Sirwatka stated that his client notified the City in September and asked why did the City not relate to the homeowners (Corderos) that there was a problem with their construction for approximately one month thereafter.

Mr. Thomas asked Corporation Counsel if that is something that the Board has to consider or are they supposed to consider, or is it not our problem.

Mr. Sirwatka stated that the applicant in this matter is Mr. Scalise, not the Corderos, so this condition existed because nothing was done for a month. That is a self-created hardship.

Corporation Counsel Fiore-Nieves stated that Mr. Scalise addressed that issue earlier when he acknowledged that a call was received from Mr. Donisi at sometime in September and that he advised Mr. Donisi that the permit was issued and that as long as the garage was being built in accordance with the dimensions, that they were going to be in compliance. Sometime after that, when a call was received by Mr. Scalise's supervisor, he went back in and then identified that a mistake had been made. She further stated that whether or not the hardship was self-created or not, is not the guiding factor in this Board's determination. It is one of the factors to be considered, but even if you determine that the hardship was created, that does not preclude you from granting the variance. The other factors are more determinative than that in the final factor.

Mr. Thomas asked if the Board was to assume that Mr. Scalise is the agent of the Corderos.

Corporation Counsel Fiore-Nieves stated no, he is not the agent. He recognized that he had made an error and in an attempt to correct that error, not to put the burden upon the property owners in absorbing the filing fee, filed on behalf of them to get the variance granted. The Corderos are the ones in need of the variance, they are the ones that are living in the house, and they are the property owners.

Mr. Thomas asked if at the time that a complaint was filed, would it be reasonable to assume that complaining to Mr. Scalise is the same as complaining to the Corderos. In other words, does that mean that they have knowledge that they created a hardship?

Corporation Counsel Fiore-Nieves stated no.

Mr. Sirwatka commented that he disagrees with that. The complaint of Mr. Donisi, was as to the location of the garage, and the fact that it was in violation of the Zoning Code of the City of Jamestown and instead of that being investigated at the time of the initial complaint, there was no action taken for approximately a month. With that notification that there was a zoning variance problem, (zoning dimensions), without the City then notifying Mr. and Mrs. Cordero. He stated that it is unfair to both Mr. Donisi and the Corderos. The City knew in September that there was an issue with the placement of this garage. Unfortunately, we get to the point now where the Corderos relied upon Mr. Scalise to continue construction of the garage, and Mr. Donisi believed that an action was appropriate by the City of Jamestown by complaining as to the non-compliance with the variance. Unfortunately, the Corderos did not receive the information from the City of Jamestown that there was a question as to the location of their garage. They believe they had the permission of the City of Jamestown. A building permit was issued to construct the garage in accordance with the directions of the City of Jamestown. He went on to state that where the fault lies is with the applicant because the knowledge was there that the garage was not in compliance and the applicant did not take the necessary steps to notify Mr. and Mrs. Cordero.

Chairperson Donato asked what Mr. Sirwatka wanted as an end result.

Mr. Sirwatka stated that he wanted the garage moved to get into compliance with the Code. He further stated that it should not be expensive to move a pole construction garage. There is no concrete floor, there are 4 x 4 posts, attached plywood, siding around the outside and a roof.

Chairperson Donato then asked Mr. Sirwatka that tearing down the siding and the walls, and moving the posts and repairing the roof would not be a significant expense to the Corderos?

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Mr. Sirwatka stated that the location of the siding is on the front.

Chairperson Donato commented that she only wanted his general attitude.

Mr. Sirwatka believes that the variance would not be necessary by solely moving the one wall which is located closest to Mr. Donesi's property within the required setbacks. It would mean relocating three posts, approximately one sheet of plywood, a square of shingles, and replacement of the garage door.

Chairperson Donato asked for Mr. Scalise's opinion and that of the Corderos on this topic.

Mr. Scalise commented that it could be done, but he could not come up with an expense amount. Part of the expense is that the Corderos have done the majority of the work themselves, so there is no price that can be put on that. Only materials could be determined.

Mr. Nazzaro commented that in his opinion, what is before the Board is a request for an area variance with some unusual circumstances, but it's not any different than other variances that come before the Board to construct a garage or an addition. He feels that everyone present is getting very off track with the issue. He stated if there are other issues that need to be resolved between the parties, that is not the Board's concern. The concern is to vote on the variance and either grant it or not. If the variance is denied, the garage has to be moved. If it is approved, the garage stays.

Mr. Sotir agreed with Mr. Nazzaro. He stated that if the only issue was moving the garage, they would not be in front of the Board at all. His clients assure him that this is not a pole-type construction, it is all framed in on the inside, the roof is trussed and he believes that Mr. Scalise can verify this as he has visited the property. With respect to any boundary line issues, the certified survey that has been presented resolves that issue, but the driveway to his clients' property exceeds the width of the garage. That has been the case since the house was built. This encroachment issue is a ruse. You are not authorizing anything but an area variance. In addition, the Corporation Counsel correctly stated the statute that says that even if a hardship is self-created, it is not dispositive of the issue. It is clear in the statute but different in the use variance as opposed to the area variance which has a much lower threshold to enable you to grant. He requests that, after hearing argument, he requests that the Board apply the basic law and that is the law of common sense.

Mr. Sotir asked if the Clerk was going to read into the record the letter from Concordia Lutheran Church.

Chairperson Donato said yes.

City Clerk Sanfilippo read the following letter from Rev. Darrel Moen:

November 29, 2004

City of Jamestown Zoning Board
Jamestown, New York 14701

To whom it may concern;

This letter is in response to zoning hearing that is being conducted on the issue of the garage being constructed by Wilfred and Gisela Cordero.

Our congregation has no objections in the continuation and completion of this garage construction. Nor do we find the garage to be an eyesore. The Cordero family is doing what any other family would like to do – to provide a place to ensure coverage of their vehicles from the elements.

The Cordero family have been good neighbors to our congregation and we have never had any issues with them. Like all our neighbors we wish them well.

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Since a permit was granted by the City of Jamestown for this construction in the first place we would encourage the completion of this project especially now that winter weather is settling into our area.

If you would like to speak with me further I can be reached at 716-532-9564 (home) as well as at the church (664-4101) or at my office at WGRZ-TV (849-2256).

Thanks so much for your kind consideration.

Yours in Christ,

Rev. Darrel Moen

Ms. Ditonto moved to approve the petition.

Ms. Howig seconded.

Carried: 7 ayes, 0 nays

There being no further business, the meeting was adjourned.

Shirley A. Sanfilippo, MMC, RMC
Secretary
Zoning Board of Appeals