

**RUSH ZONING BOARD OF APPEALS
REGULAR MEETING
MINUTES OF May 11, 2017**

A regular meeting of the Rush Zoning Board of Appeals was held on May 11, 2017 at the Rush Town Hall, 5977 East Henrietta Road, and was called to order at 7:00 PM.

PRESENT: Amber Corbin, Chairperson
David Flass
Lee Hetrick
Shivaun Featherman, Deputy Town Clerk

EXCUSED: Garry Koppers, Vice Chairperson
Susan Swanton

OTHERS: Councilperson Jillian Coffey, Town Board Liaison
David Matt, Schultz Associates
Sue Miller, Resident
Sandy Laughlin, Resident
Bryan Laughlin, Resident
Angela Capps, Resident
Paul & Susan Hennessy, Residents

Chairperson Corbin welcomed all and called the May Zoning Board of Appeals meeting to order at 7:00 PM.

PUBLIC HEARING:

Application 2017-01Z by David Matt of Schultz Associates, agent for Pamela Tuety, requesting a front setback variance for a proposed garage. The proposed location does not comply with 120-18 of the Rush Town Code. Property is located at 533 Fishell Road and is zoned Residential-30.

Chairperson Corbin read into the record a letter received from applicant Pamela Tuety dated April 19, 2017, giving permission for David Matt to represent her in meetings regarding **Application 2017-01Z** for 533 Fishell Road, Rush, NY.

David Matt explained that they would like to build a proposed 12' x 20' garage. Ms. Tuety is also planning to build a home 10' from the existing septic tank and leach field and pointed out the location on the site map. Mr. Matt explained that there are several different versions of Site Maps dating from 1970; all using the footprint of an existing foundation from an old building that had been there at one time. The plans from 1980 show the house as bigger but being pushed into a 100 year flood zone, so the first thing he did was to make sure the house would fit outside the flood zone.

Mr. Matt explained that they tried many different designs for a garage, and this plan is the most financially feasible.

The proposed home location has a couple of different approved variances. The house location remains the same. The garage variance that they are seeking is 22' in front of the house front setback variance. The garage will sit at the end of the driveway and the roof will barely be seen from the road. There is really no other location to put the garage on the property due to the flood plain, the slope and the creek.

Chairperson Corbin asked what the proposed use of the garage will be. Mr. Matt replied it will be used for outdoor equipment storage; snow blower, lawn mower, etc. but the garage will be large enough to fit a car for future use.

Chairperson Corbin thanked Town Clerk Bucci and Deputy Town Clerk Featherman for their help in gathering old records on the history of the property. Chairperson Corbin provided a timeline of the history of the property, beginning with reading aloud an approval letter dated July 10, 1978 from The Zoning Board to Mr. Tuety, which stated that the Zoning Board granted a front setback variance for the proposed home on July 6, 1978:

Dear Mr. Tuety,

The Rush Zoning Board of Appeals at their regular monthly meeting on July 6, 1978 has voted to grant your request for a front setback variance for the home you wish to build on Fishell Road. The variance granted is based on the revised map submitted to the Zoning Board and is pending on the approval of the Planning Board on this project."

Chairperson Corbin noted that there was no activity on the property, and in 1985 the Tuety's again applied to the Zoning Board. On July 11, 1985 the Zoning Board granted a front setback variance of 57 feet to allow for the construction of a residence on an existing foundation on the south side of Fishell Road. Chairperson Corbin read aloud the approval letter from the Zoning Board dated July 12, 1985:

Dear Mr. Tuety,

The Rush Zoning Board of Appeals at their regular meeting on July 11, 1985 has voted to grant your request for a front setback variance of 57 feet to allow for the construction of a resident on an existing foundation on the south side of Fishell Road opposite 534 Fishell Road. This approval is conditioned upon the review and approval of the Rush Planning Board for a subdivision of this property. No other variances will be granted on this parcel.

Chairperson Corbin noted that again, there was no activity on the property. Chairperson Corbin had recently talked with John Felsen, the Planning Board Chairman, and he recalled that there was a proposed parking section across the street, which she did not see on Mr. Matt's site plan but had found on a Site Map from 1987, and did not know if Mr. Matt was aware of that.

Mr. Matt stated that there was a parking area but it has been removed from the Site Map. It's not needed for the required square footage and they have allowed space for parking by the house, which is more ideal than parking across the street.

Chairperson Corbin stated that she had recently spoken with Mr. Tuety to obtain some history on the property from him. Mr. Tuety said there was an old Scout cabin with an existing foundation and they were originally going to build on that foundation in 1978 and expand, but then did not. They came back in 1985 to have their plans reapproved, so the lot has been approved for a single family residence with no other accessory structures.

Chairperson Corbin explained to Mr. Matt that the big concern is they are asking for a 74.2 percent relief because it is the center of the highway right-of-way. Apparently the road itself is not centered in the highway right-of-way.

Mr. Matt stated he understands that 74.2 percent is a large number when looking at it by the Town Code, but looking at it as being on Fishell Road, it's not an unprecedented amount for the type of road. There are two other houses on Fishell Road to the east that are similar. One is 69 percent, so they are only asking for 5 percent more than that, and the other houses are within 50 – 60 percent. Additionally, it is not a heavily traveled road.

Chairperson Corbin opened the floor for public comment and asked anyone speaking to please state their name and address for the record.

Bryan Laughlin lives at 534 Fishell Road which is across the street from Ms. Tuety's property. Mr. Laughlin asked where the location of the proposed garage will be. Chairperson Corbin invited Mr. Laughlin to the front of the room to view the Site Map, and Mr. Matt pointed out the proposed garage location. Mr. Laughlin explained that last week he was concerned about drainage and had spoken with Mr. Matt, and thanked Mr. Matt for calling him with information. He had been concerned that they were going to raise the portion of the Tuety lot on the north side of the road, which sits in his southeast corner, to use as parking, thus possibly plugging a culvert and preventing drainage from his property. Chairperson Corbin stated that in 1987 that area had been proposed for parking because there was no viable spot on the property, but currently there is nothing proposed for that side of the road.

Susan Hennessy lives at 591 Fishell Road. Her property backs up to the Tuety lot and would like to know how far from the property line can the garage be built?

Chairperson Corbin explained that the side setbacks are 25' from their property line but they have to be 100' from the center of the highway right-of-way, and in 1985 a variance was granted that they could build a house 57' from the highway centerline. For example, Ms. Hennessy could build 25' up to the property line, and the Tuety's can build up to 25' to the property line. Ms. Hennessy stated she would like to make sure that they can't build 2' from the property line. Chairperson Corbin replied not without appearing before

the Zoning Board and asking for a variance. Ms. Hennessey asked how far from the property line is the distance of the garage being proposed? Mr. Matt replied 58.9'.

Ms. Hennessey stated at one time Mr. Tuety built a house on that property, which has since been removed, and it started to slide. They had to put supports there. It is not a good area for building a house. All the drainage goes down the hill and almost every year there is flooding.

Chairperson Corbin stated that the applicant is here seeking a variance just for a garage. The proposed location for a house has already been approved. The Board's purpose tonight is to consider whether or not to grant a variance to build a detached garage 25.8' from the centerline off the shoulder.

Mr. Laughlin asked if they are going to build the garage before the house is built.

Mr. Matt replied that it's his understanding that both the house and garage will be built at the same time.

Chairperson Corbin added that a primary residence must be built prior to building an accessory building.

Mr. Hennessey asked if there is historical information on how high the creek has risen in the past.

Chairperson Corbin stated they do have Monroe County's review, which she will be reading into the record, but the Board does not have any scientific data.

Mr. Hennessey expressed his concern about a house being built there with flooding in the area.

Chairperson Corbin stated they are not in the flood plain.

Mr. Matt explained that the 100 year flood zone that is shown on the map was determined by the Army Corps of Engineers and it's on the Federal Emergency Management Agency (FEMA) Flood zone maps. It's about as well studied as a creek can get because it's elevated.

Ms. Hennessey asked if anyone has contacted the Environmental Protection Agency (EPA) regarding environmental drainage from the septic system being on such a steep hill.

Chairperson Corbin stated the septic system has been there a long time and no one has used it, but they had to go through a permitting process.

Mr. Matt explained that the septic system was installed in 2007 and it had to go through review by the Monroe County Health Department. It is a special design; it's not a standard system. It's raised and has a sand filter bed.

Board Member Hetrick stated it's better than most septic systems because it's a filter system. Those systems have been installed here in Rush. They directly discharge to Honeoye Creek. Most of them need State Pollutant Discharge Elimination System (SPDES) permits which are governed by the Department of Environmental Conservation and the Monroe County Health Department. They are actually a Home Waste Treatment Plant. They are special systems to meet special needs, and the one on the Tuety property is ideal for that situation because the discharge meets all of the standards.

Mr. Matt added that the septic system does have a SPDES permit that has been renewed over the years.

Councilperson Coffey stated that there is a history of plans that have been approved on the property, and asked if the garage had ever been part of past plans and then removed, or is it an entirely new proposal?

Board Member Hetrick replied the garage is a new proposal.

Mr. Matt pointed out that regarding the July 12, 1985 Zoning Board determination that said no other variances may be granted; the day before, in the Zoning Board Minutes, it said the Zoning Board made a Motion to approve the front setback variance, (see Application 1978-8Z), no other variances would be permitted by that Motion. That Motion that night was just a front setback. Zoning Boards are allowed to impose conditions on the variances that are before them, so at that point they would put that stipulation of no other variances on the front setback of the house, on the variance that was before them, and it can't be a blanket "no other variances at all on this property"; it's just the front setback of the house.

Chairperson Corbin stated that is correct.

Chairperson Corbin read into the record the comments of:

- The Rush Board of Fire Commissioners
- The Rush Conservation Board
- Monroe County Department of Planning & Development

With no further questions or comments, Chairperson Corbin made a Motion to close the public hearing. Board Member Hetrick seconded the Motion, and the Board polled:

Roll: Lee Hetrick aye
 David Flass aye
 Amber Corbin aye carried.

OTHER MATTERS:

Application 2017-02Z by Angela Capps requesting a front setback variance for a proposed home. The new home foundation does not comply with Rush Town Code §120-18. Property is located at 7935 West Henrietta Road and is zoned Residential-30.

**RESOLUTION OF THE ZONING BOARD OF APPEALS
OF THE TOWN OF RUSH**

Chairperson Corbin made a Motion **WHEREAS**, on July 28, 2016, David Capps, as agent (“David Capps”), submitted an area variance application to the Zoning Board of Appeals of the Town of Rush (the “Board”) requesting a variance from a front setback requirement for structures of at least one hundred ten feet (110’) as set forth in the Zoning Law of the Town of Rush (the “Zoning Law”), Chapter 120-18 for a newly constructed home at property located at 7935 West Henrietta Road, Rush, New York (the “Property”), located in an R-30 District (the “First Area Variance Application” or “Application 2016-05Z”); and

WHEREAS, this Board examined Application 2016-05Z and a Public Hearing was held on September 8, 2016 as required by law and all persons at the hearing desiring to speak on the matter were heard, all correspondence was read and those statements were considered by this Board; and

WHEREAS, on September 8, 2016, the Board denied Application 2016-05Z for the reasons set forth in the September 8, 2016 meeting minutes, copies of which are attached hereto as Exhibit A and incorporated herein by reference; and

WHEREAS, David Capps did not challenge the denial of Application 2016-05Z by the Board, and the applicable statute of limitations for such a challenge has expired; and

WHEREAS, on April 17, 2017, Angela M. Capps, as Trustee (“Angela Capps”), submitted a variance application requesting the same relief as the First Area Variance Application, specifically, a variance from the front setback requirement for structures of at least one hundred ten feet (110’) as set forth in the Zoning Law, Chapter 120-18 for the newly constructed home at the Property (the “Second Area Variance Application” or “Application 2017-02Z”); and

WHEREAS, no new information was otherwise submitted with the Second Area Variance Application, which appears to be in all material respects identical to the First Area Variance Application.

NOW BE IT RESOLVED that the Board denies a rehearing and rejects the Second Area Variance Application for the following reasons:

1. The Second Area Variance Application is virtually identical to the First Area Variance Application. Both applications appeal from the same action of the Code Enforcement Officer, dated July 2, 2016, specifically, that the “new home foundation does not meet 110 foot required front set back from centerline of West Henrietta Rd.” In this regard, the Second Area Variance Application is untimely because it was not filed within 60 days of the Code Enforcement Officer’s decision. Both applications request the identical area variance from the front setback requirements contained in the Zoning Law. No new information was otherwise submitted with the Second Area Variance Application.
2. There are no new facts which materially change the aspects of the request for an area variance as contained in the First Area Variance Application. The Property remains in violation of the front setback requirement as demonstrated by the survey map submitted with the application. This same survey map that was submitted with the First Area Variance Application. The Second Area Variance Application fails to present any new facts which materially change the aspects of the request for an area variance that was previously denied by the Board on September 8, 2016, and which was not challenged by David Capps. The time to do so has now expired.
3. Although there has been a change in the applicant from Angela Capps to David Capps, her interests were represented by David Capps, as agent, when he pursued the First Area Variance Application. David Capps is also the husband of Angela Capps who, as Trustee of the Trustee of the IGWT Trust, has at all relevant times been the owner of the Property.
4. For the reasons set forth above, the Board denies a rehearing and rejects the Second Area Variance Application because it does not differ substantially from the First Area Variance Application that was previously denied by the Board.
5. The Clerk of the Board is hereby directed to refund the application fee in the amount of \$100.00 to Angela Capps.

Board Member Hetrick seconded the Motion, and the Board polled:

Roll:	Lee Hetrick	aye	
	David Flass	aye	
	Amber Corbin	aye	carried.

Chairperson Corbin stated that the Resolution is thereby adopted.

Ms. Angela Capps addressed the Board, explaining that David Capps is her husband and the builder of the house, however, she herself has not been involved in the construction of the house. Mr. Capps did tell her that he received a Stop Work order from the Town because of the setback issue that had not been identified beforehand. She is not denying that Mr. Capps made a mistake and built the house too close to the

road, but she is trying to understand the reason it was denied; she has not read the denial. Ms. Capps believed tonight was to be a public hearing and brought supporting documentation to support her Application and is looking for other options instead of having to demolish the house.

Chairperson Corbin stated she understands, however, the matter is currently in court litigation. The timeframe in which Mr. Capps had to appeal which the Zoning Board's decision of Application 2016-05Z has expired. Chairperson Corbin suggested Ms. Capps refer to the town website to read the Zoning Board Minutes of September 2016 to understand the denial of Mr. Capp's Application.

Board Member Hetrick advised that Ms. Capps consult with the town attorney.

DECISIONS:

Chairperson Corbin made a Motion **WHEREAS**, this Board has examined **Application 2017-01Z**, submitted by Pamela Tuety (applicant) of 533 Fishell Road, Rush, New York (the "Property"), located in an R-30 District, requesting a variance of 74.2 feet from a front setback requirement for structures of at least one hundred feet (100') as set forth in the Zoning Law of the Town of Rush (the "Zoning Law"), Chapter 120-18, for a 12' x 20' detached garage; and the maps, diagrams and other materials that were submitted with the application; and

WHEREAS, the application is solely for an Area Variance, and

WHEREAS, a Public Hearing on this application was scheduled and notice posted as required by law; and

WHEREAS, all persons at the hearing desiring to speak on the matter were heard, all correspondence was read and those statements were considered by this Board, then

BE IT RESOLVED, that the Board makes the following Findings of Fact and **Application 2017-01Z** is **denied** for the following reasons:

1. The Applicant owns the Property at 533 Fishell Road, Rush, New York, which consists of 0.717+/- acres and is located in an R-30 Residential zone. The Property is currently vacant.
2. Section 267-b of the New York State Town Law establishes the requirements for an area variance. In making its determination, this Board is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted. This Board is also required to consider the following: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4)

whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

3. The detriment to the health, safety and welfare of the neighborhood outweighs the benefit to the applicant. The granting of this variance would allow the applicant to construct a detached garage 12' x 20' located 25.8 feet from the highway right of way. The detached garage would also be at an elevation that is at an approximate elevation of 550'. The existing guardrail is at approximately 556' elevation and the edge of pavement is at 557' elevation. Granting this area variance would raise a safety concern, given the plowing of snow would push a large amount of snow into the highway right of way, which is located within feet of the garage. The property is also on a curve of Fishell Road, which could create visibility and safety issues for drivers.

4. An undesirable change in the character of the neighborhood and nearby properties will be created by the granting of this area variance. There is several single family residences in proximity to the Property, which contain dwellings and garages constructed in compliance with the front setback requirements in the Zoning Law. Thus, granting an area variance of 74.2 feet from the highway centerline, to permit the Applicant's detached garage, to be constructed within the front setback and closer to Fishell Road would be detrimental to the nearby property owners and produce an undesirable change in the character of the neighborhood.

5. The requested area variance is substantial. The applicant requests a variance of approximately 74.2 feet at the closest point of the detached garage foundation, to the highway centerline. Thus, the variance sought represents a 74.2% deviation from the 100-foot setback requirement in the Zoning Law. Moreover, granting a variance under the circumstances is incompatible with the Town zoning scheme, which provides that all structures located in residential districts shall be setback at least 100 feet from a town road.

6. The benefit sought by the applicant could be achieved by other methods. The applicant has stated the purpose of the detached garage is for storage of a lawn mower and gas containers for the lawn mower, etc. As an alternative, a smaller shed could be utilized on the property for such purposes. The applicant has provided verbal information as to other options they have researched as an alternative to construction of the proposed garage. Proposed parking area is designated on the Planning Board Town of Rush Tuety Subdivision map dated January 20, 1987 and signed by John Felsen. Said proposed parking area is on the 20' x 47.74' section of the lot, on the north side of Fishell Road.

7. The difficulty is self-created. The applicant's need for a variance is the result of the applicant's self-created hardship in proposing to construct a single family house on a property that was granted a front setback variance in 1985 (Application No.85-14), solely for a single family residence, and no other buildings.

In 1985 Zoning Board of Appeals motion, (1985-14) “Mr. VanLare made a motion to approve a front setback variance for 57 feet the application of Thomas Tuety (see application 1978-8). There are to be no other variances permitted by this motion and approval is dependent on the Rush Planning Board's consideration and subdivision review of the area and location with respect to the flood plain.

The reasons given for the approval:

1. The applicant can build on an existing structure.
2. The extraordinary depth of the lot.
3. A great share of the parcel is occupied by Honeoye Creek.

Mr. Mantione seconded the motion and the Board polled all ayes.”

8. This action denying the Applicant's request for a variance is not one having a significant effect on the environment. Therefore, it is not necessary for the Board to undertake a review pursuant to the New York State Environmental Quality Review Act.

Board Member Flass seconded the Motion and the Board polled:

Roll: Lee Hetrick aye
 David Flass aye
 Amber Corbin aye carried.

APPROVAL OF MINUTES:

Chairperson Corbin made a Motion to approve the Minutes of April 13, 2017 as written.

Board Member Hetrick seconded the Motion, and the Board polled:

Roll: Lee Hetrick aye
 David Flass aye
 Amber Corbin aye carried.

REPORT OF OFFICERS:

Chairperson Corbin welcomed Councilperson Jillian Coffey as the Town Board Liaison to the Zoning Board of Appeals for 2017.

Councilperson Coffey reported that at its meeting on April 26, 2017, the Town Board voted in favor of Local Law No. 1 of 2017 to amend Section 120-57 of the Zoning Law of the Town of Rush regarding off-street parking.

Councilperson Coffey stated there was also a discussion with the Monroe County Fair Association regarding a potential partnership with the Town of Rush. There was both positive and negative feedback from residents, and now the Town Board needs to consider whether or not it will enter into the partnership.

Board Member Flass asked if the Monroe County Fair Association has a deadline for the Town Board to make that decision?

Councilperson Coffey replied that the Monroe County Fair Association would like a decision as soon as possible, as they would like to have the agricultural portion of the fair at the Rush Riverside Refuge property this August.

BOARD BUSINESS:

Board Member Hetrick is in favor of discussing the suggestion that Town Clerk Bucci brought up at the April 13, 2017 Zoning Board meeting regarding incorporating the Zoning Board workshops with the public hearings.

Chairperson Corbin stated she would rather wait until a full Board is present to have that discussion, and suggested adding it to next month's Agenda.

Board Member Hetrick asked what the procedure is to consider Town Clerk Bucci's suggestion?

Chairperson Corbin replied that the Zoning Board will need to do their due diligence in researching the suggestion, such as researching what other towns do, and added that the Zoning Board is always open to improvements.

There was some discussion comparing how the Planning Board holds public hearings as to how the Zoning Board holds their workshops and public hearings. Chairperson Corbin explained that it's hard to compare the two Boards as the Zoning Board is more of a judicial type of branch.

With no further business, a Motion was made by Chairperson Corbin and agreed by common consent that the meeting be adjourned at 8:09 PM.

Respectfully Submitted,

Shivaun Featherman
Deputy Town Clerk