

TOWN OF DOVER ZONING BOARD OF APPEALS REGULAR MEETING HELD ON WEDNESDAY, October 15, 2008, AT 7:00 PM AT THE DOVER TOWN HALL:

PRESENT: Chair Marilyn VanMillon
Member George Wittman
Member Anthony Fusco

Also in attendance was Secretary to the Board, Maria O’Leary, and Attorney Michael Liguori of Hogan and Rossi.

Chair VanMillon called the meeting to order at 7:02 pm and began with the Pledge of Allegiance.

Chair VanMillon read the first item on the Agenda as follows:

DISCUSSION - **CAMP RAMAH** – Z 2008-02 – Applicant seeks two area variances to appeal Section 145-11 B. of the Town of Dover Zoning Law. The requested 9,576 sq ft area variance and the requested 25’ area variance would, if granted, allow the applicant to erect a gymnasium on the property without meeting the required 6,000 sq ft maximum and the required 40’ front yard setback from Ramah Road for the RU district. This property is located at 91 Ramah Road, Wingdale, NY, on tax grid #132600-7161-00-610450.

Attorney Liguori: I was under the impression that the Planning Board had previously adopted a negative declaration under SEQRA, analyzing the entire project. The project before the Planning Board proposes the building as if the variance was granted, which is very appropriate for them to do. Normally, the Planning Board can analyze environmental impacts to see if fully developed. Normally, when an area variance is brought to the Zoning Board, it’s a Type II Action under SEQRA and the Zoning Board doesn’t have to do anything. In this case you have a peculiar instance, but come up frequently when you have projects that are before multiple boards, which is this particular circumstance, is when you have an area variance that is a Type II Action that is proposed in connection with a project that is either a Type I Action or an Unlisted Action, here we have the ladder, it’s an Unlisted Action; it is no longer a Type II Action and it’s all part of one Unlisted Action; you can’t separate out the two because it is physically impossible for the Zoning Board to analyze the environmental impacts of the area variance alone. We can’t analyze from 6,000 feet to 15,000 square feet without doing the whole thing; one Board has to do the whole thing. In this case, the appropriate Board is the Planning Board because they have the capacity to do it; we certainly could do it, but why would we, we’re not the Planning Board.

When the applicant came before the Board, nothing was presented to me to make me think otherwise; I had just assumed that that was done, otherwise I would have said to the Zoning Board that I believe that you were precluded from making a decision on the Camp Ramah application because SEQRA had not yet been complied with. By the Board voting without SEQRA having been complied with, the vote was void; it’s as if it

had never happened. The Board has to make a decision within 62 days, those are told by statute; we're not under any obligation until SEQRA is complete. When SEQRA is complete, then that time period will begin to run.

Member Wittman: Right now the clock is stopped?

Attorney Liguori: It has stopped. When SEQRA is complete, then it will start over. I believe the applicant is going to request that the Board re-open the public hearing and I had some discussions with Curt (Johnson, from Zarecki & Associates) after the meeting and one of the most important things was that had he known in advance that Roz (Cimino, previous Zoning Board member) was no longer on the Board, he would have waited for the Board to make a decision, or at least advise his client to say we need a unanimous decision of the Board; we would ask the Board to make a vote or wait for an addition member to be appointed to the Board. We know there is no guarantee that there will be some additional member in the future, ideally there would, but we don't know when that's going to happen.

The other thing that I advised Curt was that even though he had made a presentation to the Board about the various factors that the Board applies in connection with the variance, obviously the writing was on the wall because the Board took a vote and he now knows it's a losing vote. Not only does he know that it's a losing vote, but he has to complete the SEQRA before he can get back to us for a denial. I said to him that I think it behooves your client to hire an attorney to present a memorandum to the Board as to the various factors, and I said I would suggest that you address the substantial issue because that's the heart of the issue.

The thing that struck me about this particular application, and the Board can go back to how we voted before without any issues, but I had said to Curt the situation that you want to be in from your client's perspective is, you need to have a full presentation to the Board on that substantial issue because one of the critical components about their application, I don't think they've ever presented that information to the Board, is that they can have five 6,000 square buildings on their property, the limit is only on the size of the building and I said if I were you, I'd come back to the Board and say instead of us building three 6,000 square foot buildings that have 18,000 square feet, we only need one 15,000 square foot variance and even though that's a substantial variance, when you really analyze that Code, it makes more sense to do it with the 15,000 instead of the three 18,000; quite frankly you can't have the gym, but provide some basis to the Zoning Board that gives your client some grounds if he still wants to pursue it to bring a litigation, and I'm not suggesting to do that, but if this is such an important thing, then at least give your client a basis and also give the Zoning Board members something to chew on, which would be a memorandum with case law, something that you guys could review and say, "I've reviewed your memo, I've reviewed the case law that you've presented to me, based on the case law we either feel 'this way' or based on the case law it reconfirms exactly what we felt the first time around," and then go to the Board with a vote because the way it is right now for something that is such a significant variance, I don't think they've had the representation that they really need because I

think there's case law out there that they could present to your Board which would provide the basis to mitigate that substantialness. Whether or not they do it, that's up to them, but if they want to do that then they have to ask you to re-open the public hearing because that's been closed and it was closed properly. It would be a letter from Curt requesting a re-opening. I suggested to him that if they did do that, they submit it to the Board with enough lead time for a re-notice to occur.

Member Wittman: When you said re-open the public hearing, do you mean re-visit the case?

Attorney Liguori: By re-opening the public hearing, it permits them to submit additional information.

Member Wittman: It would, but we have already voted and there is a defect here. Since there is that defect that you pointed out, does that mean that we really have to go back to before and that permits it to be re-opened?

Attorney Liguori: The first vote was to close the public hearing, so that would be the first request, to re-open the public hearing; and then it would be as if that night never occurred. I believe that would have to be a unanimous decision of the Board. I believe that an applicant can submit information to the Board anytime regardless of whether or not the public hearing is open, but my suggestion to the Board is that if any further additional information is submitted, then the public hearing be re-open so that the public get a chance to digest it just like everybody else.

Those are solely my discussions with the Board all with the disclaimer that there's no guarantee that your public hearing will be re-open, the only thing I can guarantee to you is that there will be another vote. My suggestions and discussions with Curt were really the basis of, "You missed your opportunity and for fortunate reason, you now have this opportunity, you now have a second chance and I wouldn't screw it up twice, especially if you can find some case on point that someone can hang a hat on."

Chair VanMillon read the next item on the Agenda as following:

Public Hearing - **DUNKIN' DONUTS** (Kevin Allardi) – Z 2008-03 – Applicant seeks to appeal Section 145-39 D. (3)(a) of the Town of Dover Zoning Law and requests a 6.7 square foot area variance and a 3.5 inch height area variance to keep an existing sign that was not erected in accordance with ARB approval. This property is located at 3042 Route 22, Dover Plains, NY, on tax grid #7063-00-562258 and is in the HC district.

In attendance was the applicant, Kevin Allardi.

Chair VanMillon: The public hearing is still open. Scott (Daversa, Chair of the Architectural Review Board), would you like to say anything?

Scott Daversa, Chair of the ARB, was sworn in.

Scott Daversa: I don't know where the Board is going with this. I just wanted to come and express my opinion on this. I've taken over the chair (of the ARB) about a year/eight months ago; it's been a battle for me as far as enforcement, the rules and regulations and everything else. By granting a variance, you're almost saying, "You went through all the approval process, you said you were going to do it a certain way, you did it your way anyway, and now you can come to the Zoning Board and let it stay." Why even come to my Board then, because everybody can do whatever they want and then go for a variance afterwards. Is that really the precedence we want to set?

I know a lot of people have a hard time understanding this; there's definitely square footages and all these things. To me, the detriment to the community is all those rules and regulations are out the window because once you start letting anybody do whatever size they want, you set a precedence again that the size and the requirements don't mean nothing because everybody could come back and say, "Dunkin' Donuts can have a sign." Legally, they can have a sign, it's just gotta be within the limits. I guess they might have to buy a new sign, but legally, they can have a sign; it's not like you can't have a sign up, nobody's saying you can't have a sign up. This law's got a lot of stuff in there and once you set the precedence that the sizes don't matter, to me that's a huge detriment to the community. He can have a sign, nobody's saying it can't say "Dunkin' Donuts" nobody's saying it can't have "Drive Thru," they can all be up there legally.

Member Wittman: Just to clarify things, you were not on the Board at the time; you had nothing to do with the original decision at all.

Scott Daversa: You gotta understand, he had an approval.

Member Wittman: Let's talk about the property because any of these variances that we're talking about here have nothing to do with him or anybody else, it's got to do with the property because the variance goes with the property, so I want you to understand that. There is nothing personal here. There was a violation here, which we were certainly not aware of, because apparently prior to your being on the Board they told him they had no objection to the previous owners trying to get a variance for the size sign that they wanted. There was no final check on it, so as a result, they put up the sign; whatever the reason they put the sign up they wanted to put it up, it never had a variance, we never knew about it, I'm sure the ARB never knew about it.

Scott Daversa: I'm going to be honest with you, the sign went up that day, Brigid Casson (Chair of the ARB at the time of approval), from what I know was there that day saying, "That's not the sign that's approved" and it sat there for the last two years, that's wrong, that's an enforcement issue. That sign should have come down that day. He can legally have a sign that says "Dunkin' Donuts" and he legally have a sign that says "Drive Thru" and that can be up there legally so why does he need a variance, so he doesn't have to buy a new sign? The detriment to the community is then, this law is gone because once you say, "He can go over the square footage 'cause he has the sign

up,” then everybody could have a variance because the sign’s up; that’s not right, that’s basically re-writing the law and saying we might as well throw this in the garbage.

Member Wittman: We’re talking about property here, we’re not talking about people. I fully understand where you’re coming from.

Scott Daversa: And you have to understand my point, too, because I have to look at it from my point of view as the person came to us, they had an approval, they said they were going to do the sign a certain way and they went and did whatever they wanted and now they’re going to get rewarded for it. Is that really the precedence you want to set?

Chair VanMillon: Reward... that’s not the correct word for it.

Scott Daversa: If the sign was taken down that day, I understand, but part of this Code is from 1999 and there’s no “grandfathering;” by 2004, a bunch of signs were supposed to come down. So now, anybody who comes in front of me says, “Well, I already have my sign up;” that’s re-writing the law, it’s a detriment to the community in my mind because you’re tying my hands, I don’t know why I would be here, then.

Member Wittman: Scott, I want you to know that what we discussed was that we wanted to send this back to the ARB as it constituted for an opinion, which is what we did, and we wanted your opinion on this and your Board’s opinion.

Scott Daversa: The problem for me is that once we dismiss the square footage, then to me, that sets precedence that anybody who has a sign up... I’m trying to work with the Town Board and with the Building Department on enforcement of stuff that needs to be done and you’re on the other side flipping it out and saying, “Well, people have the sign up, we can’t make them build a new sign.” Guess what... this Code says, “Yes, we can.”

Mr. Allardi: When you mention the sign, I’ve got that little border that basically the channel sits in, do you go to the edge of that or just the sign itself?

Scott Daversa: I didn’t measure the sign; the measurements came from the Building Department of the actual sign. Supposedly, what was suggested to the previous owner, he wanted “Drive Thru” and they’re allowed to have 50 square feet on that monument sign, you would have to break it down into different signs. Legally, you can have “Dunkin’ Donuts” on one sign and “Drive Thru” on another sign; that 16 square feet is the maximum per sign.

Mr. Allardi: So, I can go for another whole sign? If I took the “Drive Thru” out and moved it down, it now meets Code?

Scott Daversa: Right. Legally, he can have everything he wants on his sign, so why should we give him a variance? It’s the precedence that it sets.

Mr. Allardi: So, if I get rid of the “Drive Thru” section, then it might make more sense?

Scott Daversa: If you removed the “Drive Thru” section, then you’d probably be within the 16 square feet.

Mr. Allardi: Can I put that down lower as a second sign? Do I have to go through another approval?

Scott Daversa: No, you don’t need nothing.

Attorney Liguori: I don’t know if you guys are “mixing apples and oranges” there’s a plaza sign...

Scott Daversa: Which is illegal.

Attorney Liguori: The Code still provides for, if you have multiple signs advertising a shopping plaza...

Scott Daversa: Yeah, and it’s not even on the shopping plaza’s property, it’s on a totally different grid number, which needs Planning Board approval.

Attorney Liguori: The question is whether or not the “Dunkin’ Donuts” portion is part of the overall plaza.

Scott Daversa: He’s on the plaza property, the plaza sign is not on the plaza property, which needs a Planning Board approval, that sign is totally illegal. Not only is it illegal in size, but it’s not even on the property that it’s supposed to be on.

Attorney Liguori: All I can say is that there is a plaza sign that permits up to 50 square feet and Dunkin’ Donuts can be on the plaza sign. If that’s not the case, then your independent store sign is limited to 16 square feet and it’s my understanding that the 16 square feet is the whole sign, for instance, 10 feet is the actual tip...

Scott Daversa: To be quite honest, to me, whether it’s 10’ 3”, put some dirt around the sign and now it’s 10’ and you won’t need a variance.

Mr. Allardi: I asked for a height variance.

Scott Daversa: That monument sign, it’s the only sign that’s actually on the plaza property. That other sign, which is illegal by all standards, is not even on the property.

Attorney Liguori: I only brought up the plaza sign because the concept of him taking the “Drive Thru” and moving it down and now the Board can consider it a plaza sign, I really think is wise.

Scott Daversa: It is a freestanding, monument sign, that's legally what it is.

Member Wittman: The way that sign is presently constituted does not meet the regulations in square footage. It was my understanding, and I guess I'm wrong, is that in order to bring it into compliance, you have to do one of two different things. You can either grant a variance or you could reduce the size of the current sign down to 16 square feet, which would mean probably removing the "Drive Thru" portion. I had no idea that you can just take the "Drive Thru" portion and drop it down a few inches and that makes it a legal sign. Is that what I'm hearing?

Mr. Allardi: He's saying that on a monument sign, you can have more square footage...

Scott Daversa: No individual sign can be more than 16 square feet.

Member Wittman: I would read that as being a multiple store/business sign.

Scott Daversa: It doesn't say that it has to be a different business. "Individual freestanding signs shall not exceed 16 square feet in area...that are grouped together on one sign structure..." (read from Section 145-39 (3)(a)).

Chair VanMillon: So, right now, this is two signs grouped together.

Scott Daversa: They told him to make it two separate signs, and he can do it.

Attorney Liguori: I think the issue I have is that if, and I get that the other freestanding sign is illegal, this just goes to poor wording in the Code, but the issue is that by considering the Dunkin' Donuts sign the plaza sign, essentially, we are now jeopardizing the other stores in the plaza, because I would think that makes the assumption that is now the plaza sign.

Member Wittman: I don't think we can make that assumption.

Mr. Allardi: I think a monument sign is a monument sign, so that doesn't have to be for the plaza, because clearly the plaza has this huge sign and its 20' high.

Member Wittman: Does it say that the two signs can't touch each other?

Attorney Liguori: No, but I guess it's assumed when it says that freestanding signs that are grouped together on one sign structure, I think that by virtue of the language that they're grouped together is an assumption that it's various different parts that are different businesses.

Member Wittman: I'm just thinking that maybe we have two signs that just happen to be touching each other.

Mr. Allardi: When you told me that, can you separate them, I thought it was one piece, it's not one piece. There's two separate signs on the same monument. It is two pieces, 'cause I went and looked.

Member Wittman: If that's the case, then he doesn't need a variance and you have no violation. If we come with that decision here, which is what I really think needs to happen. If that's what the Board wants to do, then we would have to notify the Code Enforcement Officer that really it was a misinterpretation of the Code and that we do not see that a variance is needed for that. We could grant the height variance, but if we interpret it that way, then there probably isn't a need for a size variance.

Scott Daversa: Which I'm fine with, too, 'cause I don't want that on the books.

Member Wittman: I do want you to know that we really don't want to get involved in your ARB business and we certainly understand that you have a valuable function to perform in making sure the sign is correct and I know that there are other violations, but we can't get into that.

Attorney Liguori: I don't make decisions for the Board, I only advise whether or not what they're doing is legal and I have to agree that that way the Code reads is that it looks like you can have the same business advertise up to 50 square feet on a freestanding sign provided as long as you're limited to 16 square feet blocks that don't touch each other. I don't think that is the intent of what the Code meant, but I'm not here to interpret the intent, I'm only here to tell you what's legal.

Member Wittman: With the current regulations as constituted, that's the only thing we can deal with at this point.

Attorney Liguori: You're bound by what's in the Code.

Scott Daversa: I'm not saying that the law is right, but I have to defend it.

Attorney Liguori: The applicant has applied for a variance, the applicant hasn't applied for an interpretation, he doesn't have to apply for an interpretation, you guys can do what you want, but you are interpreting that Code. You do have interpretation authority; you are the Board of Appeals, so just note that if you interpret it to read that way, then that's how it's going to be.

Member Wittman: He currently has an outstanding violation on the property for the sign, correct?

Mr. Allardi: He gave me a period of time to fix that and I came and applied for my hearing by that date.

Attorney Liguori: Every violation is told, and it doesn't matter, you can put up something blatantly wrong, you have every right to apply for a variance, once you apply for the variance, the enforcement is told until the outcome of the variance.

Member Wittman: The way I'm seeing this is that in a way he applied for a variance to resolve the violation; there are essentially two violations, one is the size of the sign and the other is the height of the sign. Although he applied for a variance, we could see that as a relief from a violation, in other words, interpreting. Can we split that and say, in one case, the Code Enforcement Officer was correct and we would issue a variance, if the Board sees it that way. In the case of the square footage, we think he was wrong because the way we interpret the sign regulations, we don't need to grant a variance, we don't want to grant a variance, but we're interpreting the fact that there is no need for a variance.

MOTION: Member Wittman motioned to close the public hearing; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

MOTION: Member Wittman motioned that we consider separately request for height variance and the request for a square footage variance; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

MOTION: Member Wittman motioned that we consider the height variance, which would include going through the five steps; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

Chair VanMillon went over Section 145-59 D. (2) of the Code of the Town of Dover:

- a. Whether an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance? No.
- b. Whether the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than an area variance? Yes.
- c. Whether the requested area variance substantial? No.
- d. Whether the proposed variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district? No.

- e. Whether the alleged difficulty was self-created, which shall be relevant to the decision of the Board, but which shall not necessarily preclude the granting of the area variance? Yes.

MOTION: Member Fusco motioned to grant the height variance; seconded by Member Wittman.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

MOTION: Member Wittman motioned to determine that based on a reading of Section 145-39 (3) (a) of the Town of Dover Zoning Law, "...Freestanding signs that are grouped together on one sign structure shall not exceed a cumulative total of 50 square feet per structure..." the "Dunkin' Donuts" portion and the "Drive Thru" portion are actually two separate signs grouped together, therefore, a variance is not required; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

APPROVAL OF MINUTES - Approve September 17, 2008 minutes.

MOTION: Member Fusco motioned to approve the September 17, 2008 minutes; seconded by Member Wittman.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

MOTION: Member Fusco motioned to adjourn the meeting at 7:41 pm; seconded by Member Wittman.

VOTE: Chair VanMillon – Aye Member Fusco – Aye
 Member Wittman – Aye

Meeting adjourned at 7:41 pm.

Respectfully submitted by:

Maria O'Leary
Secretary to the Zoning Board of Appeals