Village of Lansing

Board of Zoning Appeals

Monday, May 15, 2000, 7:32 p.m.

The May 15, 2000 meeting of the Village of Lansing Board of Zoning Appeals was called to order by Acting Chairman Mary Sirois at 7:32 p.m. Present were Board members Donald Eckrich, Lorraine Johnson, Michael Ward, Code Enforcement Officer Curtis and Village Attorney Marcus. Also present: Attorney Peter Walsh and Douglas Sutton, members of the public Evan Meltzer, Dick Ferguson and Steven Halevy.

Appeal No. 2000-1:

Douglas Sutton and Anne Serling-Sutton request an area variance to cure a ten foot side yard setback deficiency of their home at 24 Cedar Lane in the Low Density Residential District, Tax Parcel No. 48.1-2-43. Sirois asked if there was proof of neighbors notification and Curtis confirmed there was.

Introduction:

Douglas Sutton and Ann Serling-Sutton are applying for an area variance, to permit non-compliance with the setback requirement on the south side of their property where an addition to the house has been constructed. As built, the addition is ten (10) feet closer to the lot line than would be permitted by the zoning ordinance.

Peter Walsh stated that he was the lawyer representing the Suttons. Walsh distributed copies of a supplement to the Sutton's application. Mr. Sutton was present to respond to questions.
Walsh stated that this is a matter that has been before the Board on earlier occasions. In the spring of 1991, the Suttons sought to purchase property from Howard and Jane Stevenson. The Suttons wanted to build an addition to the house and redesign the kitchen on the south side of the property. Because the setback requirement would be exceeded on the south side, the Suttons and the Stevensons in May, 1991 together sought a zoning variance from the Village. That variance was

refused on the ground that there was no showing of hardship.

Before the Suttons bought the property, they entered into discussions with the owners of the property and the Stevenson's neighbor, James Hartshorne. They arrived at an arrangement where the Stevensons granted to Hartshorne a 15' right-of-way along the western boundary of the Stevenson property. No agreement contemplating the arrangement was ever signed. On July 12, 1991, the Stevensons conveyed to Jim Harshorne the 15' right-of-way. On August 15, 1991, the Stevensons sold the premises at 24 Cedar Lane to the Suttons, subject to the right-of-way conveyed to Hartshorne in July. Hartshorne, in exchange for his right-of-way, was to convey a strip of land 10'x40' on the north side of his property sufficient to satisfy the zoning ordinance setback requirement for the Suttons' proposed addition.

It was not until late Spring of 1993, that a survey was done to identify the strip of land that would be required. In July 1993, the Suttons and Hartshorne signed and jointly applied for a minor subdivision approval to allow the conveyance of the strip of land which would be required to conform with the setback requirement. Sketches with different sized parcels were submitted as part of the application and subdivision approval was granted. Because the design itself was still not settled, the subdivision map was not filed at that time. In 1995, the subdivision approval period for filing had expired so the Suttons now needed to get reapproval in order to file the subidivion map. They did so and the Planning Board re-approved the subdivision application in March, 1995.

Construction of the addition began in the Summer of 1995. Unfortunately, having gone to the effort of filing the subdivision map and starting construction, the important step of obtaining and recording a deed to the strip of land was missed. The Suttons dropped the ball. The house was constructed under the building permit. Shortly thereafter, James Hartshorne was diagnosed with lung cancer and died before he signed a deed for the Suttons.

In 1996 a person engaged by the Suttons to trim some trees cut a number of trees, some of which

were on the Hartshorne property. Mr. Hartshorne's heirs began a lawsuit against the Suttons for damages to the Hartshorne property, which they said was intended to remain wild as a memorial to their deceased parents. The lawsuit by Mr. Hartshorne's heirs against the Suttons was settled by a payment to them of $96,000, for which they gave the Suttons a general release of all claims. The Suttons have asked the Hartshorne heirs to convey to the Suttons a 40' x 10' wide strip that James Hartshorne had agreed to convey. By letter to the Village of Lansing Planning Board dated April 10, 2000, a copy of which was sent to the Suttons' attorney on April 18, the Hartshorne heirs stated that they had no intention of conveying any piece of property to the Suttons.

Request for Variance

Walsh asked the Board to grant the variance based on the following findings pertaining to the statutory requirements that were set out by Mr. Marcus in his letter to the Zoning Board in May 8, 1991:

(1) Whether the variation requested is the least necessary to accomplish the purpose intended. Walsh submitted that the variance requested by Suttons is the minimum required. The improvements as they now exist on the property are 10 feet closer to the sideline than the zoning ordinance permits. The requested variance is for the same amount, no lesser amount would satisfy the requirement of the ordinance.

(2) Whether granting the variance will impair the application of the Zoning Law's regulations for the zoning district in which the property is located. Walsh told the Board the variance will not impair the Zoning Law in any respect. This is a very unusual set of circumstances. The lot on which the improvements are located is large enough to accommodate a much larger structure, no increase in density will occur by reason of the grant of the variance; and no increased demand on governmental services or infrastructure will be caused by grant of the variance.

(3) Whether the variance will cause a change in the character of the neighborhood or the adjoining properties. Walsh suggests that the answer is no. This is a low density residential neighborhood of substantial, one-family dwellings on large lots. This will work no damage to the character of the neighborhood whatsoever and it will work no damage to the adjoining properties.

Again, this is unique because the Hartshornes have said in the lawsuit that they intended that property to stay wild as a memorial to their parents and intended never to build on it. So it cannot even be said that the situation of the improvements closer to the property line than allowed by the Ordinance would work a difficulty or hardship on the adjoining property. Indeed, Walsh said, without a surveyor's transit and a map, the Board would be hard put to say that it was closer to the border of the properties than it should have been.

(4) Whether the applicant could complete their intended project in a manner that wouldn't require variance. Walsh stated that in this instance the answer was "No". Two possibilities exist, one is to tear down the improvements which would be needless and a waste, not required by circumstances. And the second would be to say, "No, you have a further remedy which is to bring a lawsuit against the Hartshornes." The Suttons don't want to bring the lawsuit. They were in a bitter lawsuit. It resulted in considerable recriminations with the neighborhood and has been used as a tool since then against the Suttons even though it was settled by the payment of money and released. Walsh suggested to the Board that solving the matter without a lawsuit is in everyone's best interest.

(5). Finally, the point is whether "justice will be served" by granting the variance. Walsh said justice will be served by the variance. The Courts will look at all these factors of law, the question of justice. Mr. Walsh suggested that Mr. Marcus will advise the Board to consider whether this hardship was self-created. Under New York Law, even a self-created hardship would not in itself be a bar to a grant of a variance. But it's certainly something that the Board may consider. Walsh stated that there is no self-created hardship in this case. Typically an example of a self-created hardship would be somebody buying a property, knowing full well the limitations on it and then going ahead to build with no regard for the Law. Or, building without the building permit or having a building permit granted and an appeal denied and saying, "I'm going to build it anyway." Walsh asserts that none of these apply in this case. It is perfectly clear in the Suttons case that they should have, in a perfectly orderly way, after the minor subdivision was approved and a map filed, asked for a signed and recorded deed for the 10' x 40' strip of property. And it's further clear that Mr. Hartshorne

would have given the deed because Hartshorne had twice signed the subdivision application with them to achieve exactly that result. Walsh stated he didn't think there was any question about Hartshorne's intent. It is clear that this was not an attempt on the Suttons' part to flout the law. The evidence speaks most clearly from the beginning that the Suttons investigated and found the addition would not comply with the setback requirements of the Zoning Law. The Suttons sought a variance, they were denied. Then the Suttons sought another permissible way to develop their property. The Stevensons struck an arrangement with Mr. Hartshorne to grant Hartshorne a right-of-way he wanted. In turn, Hartshorne would deed the necessary land to the Suttons. The Suttons are asking to put their property in legal compliance with the law. The Suttons are not damaging their neighbors' property. It is clearly an object lesson to the Suttons and anybody else that the handshake should be in writing and each of the documents recorded.

Walsh stated that the permit granting for use of the residence as a home occupation is not an issue for this board's concern. Also the number of deliveries to the house is irrelavant to this board.

Marcus disclosed to the Board that he represented the Hartshornes in litigation against the Suttons but has since not represented them. He will absent himself if the Board, Walsh or Sutton feels it is necessary. No one objected to his presence. Marcus reminded the BZA that the letter of instructions dated 1991 utilized by Walsh in his presentation was satisfactory at that time, but the Zoning Law of the Village changed in 1994 or 1995 to reflect changes in the State's Laws. The current requirements fit quite well with the 1991 criteria. There were, however, some changes between the 1991 and 1994 regulations, and the Board must evaluate the application under the current regulations.

Eckrich was concerned that additional support material for this meeting was delivered to him when he arrived at the meeting. Eckrich protested that he did not get a chance to review it. Eckrich believed that the Board's prior decisions were very pertinent and wished to know the Board's rationales and

reasons for their decisions. Marcus responded to Eckrich's remarks concerning handouts to the Board at the time of the meeting. Marcus has attended most of BZA meetings, it's not uncommon to distribute additional materials at the meetings, oftentimes by other parties. Eckrich asserted that in this case the material is far more technical and far more elaborate than the kinds of add-on materials the Board has received in the past. Eckrich wanted to note for the record that it would have been very useful to have had these papers in advance. Marcus reminded the Board that they were entitled to review materials that still are relevant but the Board cannot base a current decision on a prior decision. And in this case where improvements were made, the facts were different then. Walsh stated that the additional material should be seen as supporting footnotes to the position laid out in the request for a variance. The additional materials are a part of the public record and available to anyone to read. Johnson was of two minds – the BZA can consider the case based on the material received in their packets or the BZA can say it is not going to look at the request now and postpone the meeting. Sirois said that it's nice to have the extra background but this particular information should not impede the decision making of the BZA. Marcus again reminded the Board of Zoning Appeals that its decisions are not judicial decisions, they do not set precedent. They are decisions unique to the facts of each application and each application has to be considered on it's own merits. That's State Law. Factually, there's a very significant difference over what the Board was looking at then versus what the Board is looking at now. The Board is now looking at a situation where improvements exist. The basic reason the Board reached that decision in '91 was the concept that there was an alternative to granting a variance, i.e. buying the necessary land from Hartshorne. If an alternative exists there is a preference for seeking it out. There was no hardship. The Suttons wanted to build closer to the lot line which meant moving the lot lines.

Johnson referred to the Suttons' statement that it was the Hartshorne's intention to keep their lot wild, is there any written proof? Is there a declaration that the lot will be a forever wild area? If someone purchased that property and wished to build a house on it, could they build? The Hartshornes have

said that was their intention but they have not put it in legal form.

Echrich questioned the feasibility of the Suttons pursuing a legal recourse to remedy this situation. Walsh reponded that a lawsuit is not desirable as it is divisive and expensive and the Suttons feel it can be resolved in another manner.

Johnson requested details on when the fact that the deed was missing was discovered. Walsh stated the absense of the deed came to light when the Hartshorne lawsuit was filed and then it was recognized there was not a deed. It was not realized when the addition of the house was begun and it was subsequently completed. Upon completion, a new survey was never done. Ward said he drove by the property prior to the meeting and it is possible to see the boundary lines and the encroachment into the setback area. Sirois also viewed the site and could see the 10x40 strip.

The BZA returned to a discussion of the processes that have occurred. Curtis said the Suttons realized that they couldn't build this addition without a variance. The recourse was to go for a subdivision to get that ten foot parcel. The Suttons elected to follow that process through. The Suttons had the survey done and the map drawn and filed with the Planning Board. The Suttons filed the approved plat with the County Clerk and the County Clerk gave a receipt for filing which then went to the Code Enforcement Officer.

The Suttons brought a mylar to the Planning Board which was stamped and signed, saying approved by the Planning Board. The Suttons took that mylar down to the Court House and filed it with the Clerk. They brought Curtis their receipt for public record. The Suttons followed through but didn't complete the final step, obtaining the deed. According to the document that the Suttons filed, the construction of the addition began in the Summer of 1995. And no one realized that the deed had not been filed.

At the original application for the variance, it was quite clear that the Stevensons were granting a right-of-way to Jim Hartshorne. It was part of a bargain. Two years later, having granted the right-of-way to Hartshorne, Sutton filed for a minor subdivision application for a ten foot strip of Jim Harshorne's land. Jim Hartshorne agreed and signed
the application. Sutton failed to ask Hartshorne for a deed. It's very hard to imagine that having twice signed an application for subdivision approval, having stakes put out and a survey filed that Hartshorne would change his mind. The subdivision approval was precisely to allow the conveyance of the strip of land on the property line.

Dick Ferguson of 21 Cedar Lane spoke to the Board. Tom Hartshorne had faxed him the same letter he wrote to the Planning Board. It raised the question did Tom Hartshorne know about the original negotiations among the Suttons, the Stevensons and Jim Hartshorne? Jim Hartshorne died before the agreements were fulfilled, had anyone negotiated with Tom and his sister? Ferguson referred to a copy of the letter from Sutton to the Hartshornes which Ferguson interpreted as basically asking the Hartshornes to give the land to the Suttons.

Walsh stated it's not at all a request for a gift. A gift is something given freely without any consideration coming back. In this case there was something, an easement on the West side of Sutton's property, 15' wide. And it was a quid pro quo easement. It definitely is not a request for a gift. Ferguson asked if the Suttons had negotiated with Tom and his sister for that property.
Walsh replied that he had no response directly from Mr. Hartshorne or his sister at all. Walsh wrote to the Hartshornes directly but did not receive a response. Instead, the Hartshornes wrote to the Planning Board on April 10 and Walsh received a copy of it on April 18. The letter states that under no circumstances will the Hartshornes convey anything to the Suttons. Ferguson reported that on May 14, Ferguson asked if the Hartshornes would sell the necessary land to the Suttons. Tom Hartshorne's response was, "They never asked me. They just demanded it." Walsh noted that he

heard from one of the neighbors who spoke to the issue of additional communications between the Suttons and the Hartshornes. And it sounded as if there might be some movement feasible for the applicant to pursue.

An issue important to neighbors was presented by Evan Meltzer, living at 20 Cedar Lane. He took exception to Mr. Walsh's statement, "No harm to anyone." One of the goals for gaining the variance is that Mr. Sutton can apply for a permit to continue running his business at home. Meltzer stated that he and the Faigins, who were unable to attend the meeting, and other neighbors feel that the character of the neighborhood has been changed by this business and that will affect Meltzer. Meltzer stated that the neighbors felt granting the variance is going to impact upon their property values. Although the variance itself will not directly affect Meltzer it allows the application for a permit to be approved by the Planning Board and that does harm Meltzer in his opinion. Meltzer moved to the area because it was a very quiet, peaceful, non-commercial area. Meltzer reported that the infrastructure of Cedar Lane is falling apart. The road is crumbling. The roads are not laid out to accommodate a lot of traffic. Any increase in traffic, even 23 cars in 1999, is 23 cars too many on that road. For those who walk dogs and drive up and down the road every day, it is a dangerous place. Meltzer asked to go on record that he is not trying to deprive the Suttons of a livelihood. The Suttons have every right to conduct their business in a business area. Meltzer wants to live in a residential area.
Johnson moved to close the Public Hearing. Seconded by Eckrich. All aye.

BZA Deliberations:

Marcus reminded the Board the steps to be taken are to review each of the five criteria and make findings in each of those cateogries, and base a decision on findings of statements of fact. Johnson feels this belongs in the courts because a legal issue has not been settled. Eckrich felt the Board did not hear sufficient justification for quid pro quo and feels it belongs in the courts.

Curtis reminded the Board that the property will have to be brought into compliance one way or another, sooner or later, and without a Special Permit from the Planning Board a home business on the property is not in compliance. There is no specific time frame but the situation cannot go on ad infinitum. Eventually the property has to be brought into compliance.

Review and Findings:

The five criteria are intended to help in deliberations. State Law requires these points be considered. It doesn't say they all have to be met.

(a) whether an undesirable change will be produced in the character of the neighborhood or detriment to nearby properties will be created by the granting of the variance.

Curtis reported that five property owners were notified, Lewis, Hartshorne, Meltzer, Faigin and Hwang. Statements by the neighbors indicate that they felt the variance would create an undesirable change because of the closeness of the existing improvement to the lot line. These are references to comments of Hartshone (by letter) and Meltzer and Ferguson (by spoken comments at Public Hearing). Tom Hartshorne speaking on behalf of his sister as well, writes that there exists a privacy issue. The Hartshornes certainly are opposed to the variance, it's a detriment to their property. It is an undesirable change as far as the Hartshornes are concerned. Meltzer was concerned about the unsettled issue of a home occupation business. Meltzer referred to the damage to the infrastructure of the neighborhood. Materials presented tonight by the applicant (memo to Board providing background info and time line text) will also become a part of the record.

(b) whether the benefits sought by the applicant can be achieved by some method, feasible for the applicant, other than an area variance.

One of the considerations the BZA has to make is whether compliance can be achieved by some other means. If the BZA denies the variance, for whatever reasons, what are the options open for the applicant? The Court system could play an important role as a more appropriate place to resolve this issue. If the Court solves it then BZA is not involved. Then the land is transferred to the Suttons and

the property comes into compliance. The Court process may not be preferable for the applicants but it could be feasible for the applicants.

The issues faced by the Suttons and Hartshornes belongs in the Court, it doesn't belong with BZA. There's clearly a legal issue that has not been settled and there was a conveyance of the right-of-way that was to be traded for a conveyance of a piece of property owned by Jim Hartshorne.
Two alternatives were identified other than the removal of the addition. The alternative are to seek a legal remedy or to continue negotiations with the Hartshornes.
The statute refers to a method feasible for the applicant to pursue other than having a variance. The statute doesn't define 'feasible'. The Court would be appropriate for these issues.
Cost may be a component of feasibility. For example, asking someone to take down an addition to their house might not be feasible because of the cost involved. It might include loss of value of the property. In measuring feasibility, the costs of the alternatives should be determined. Another variable is the cost of applying for a variance or a lawsuit. Some Board members felt this is unfair expense.

(c) Is the requested area variance substantial?

The Board stated that a 25 foot side yard setback is required and there currently only exists a fifteen foot setback, so it is substantial. Ward and Eckrich also stated it is visually obvious when viewing the site.

(d) Consider whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

The Board stated this ties in closely with (a) and they felt there was no physical or environmental detriments other than those referenced previously in (a).

.(e) whether the alleged difficulty was self-created.

It could be argued that the difficulty was self-created because the Suttons (or Hartshornes) should have filed the deed. Or it could be argued that the difficulty was not self-created because the Suttons are here for a variance for something that has been built. The Suttons complied with the ordinances

carefully and failing to obtain the deed was not an intentional violation any of the regulations.

Marcus stated for the record that under the SEQRA regulations, this is an exempt action as an area variance request for a single family reisdence under 617c 12-14.
Johnson moved that the application be denied. Seconded by Eckrich. The vote was: Ayes by Johnson and Eckrich. Nays by Sirois and Ward. Therefore the variance is not granted nor was it denied.

Approval of Minutes

Minutes were not available from the previous meeting.

Adjournment

Sirois moved to adjourn the meeting at 9:35 P.M. Seconded by Ward. All aye.