

Town of Clarence  
One Town Place, Clarence, NY  
Zoning Board of Appeals Minutes  
Tuesday May 13, 2014  
7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:00 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik	Vice-Chairman Ryan Mills
David D'Amato	Patricia Burkard
Gregory Thrun	Richard McNamara

Town Officials present:

Director of Community Development James Callahan  
Deputy Town Attorney Steven Bengart

Other interested parties present:

Jeff and Judy Beyer	Jim Bielmeier
Andrew Romanowski	Holly Moschiano
Peter Caroccio	Donald Marx
Moira E. Mycio	Corey Auerbach
Shelagh Thomas	

Motion by David D'Amato, seconded by Gregory Thrun, to **approve** the minutes of the meeting held on April 8, 2014, as written.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

### Old Business

#### Appeal No. 2

Jeffrey and Judith Beyer  
Residential Single Family

Requests the Board of Appeals approve and grant a 178 square foot variance to allow for the construction of a 644 square foot attached accessory structure (garage). This proposal would bring the total attached accessory structure (garage) space to 1,138 square feet at 4120 Thornwood Lane.

Appeal No. 2 is in variance to § 229-55 (D).

**DISCUSSION:**

Eight (8) neighbor notification forms are on file.

Mr. Beyer said he is requesting the variance because he wants more garage space. There are four (4) cars in the family, plus there is pool and lawn maintenance equipment to be stored. They currently have a shed that is full; this shed will be removed if the accessory structure is approved.

Jim Bielmeier, builder, is present.

Chairman Michnik noted that since the last meeting the applicant has submitted plans for the members to review.

Mr. Thrun asked if there would be a gateway or a pass-through besides the attachment for the overhang. Mrs. Beyer said there is a path and a gate in that area for the pool.

It is clarified that the neighbor notifications are from neighbors immediately adjacent to the applicant’s property. The forms also include neighbors across the street and behind the applicant’s property. Mrs. Burkard asked how wide the opening is where the breezeway is. The applicant answered 10’4”.

Mr. Mills asked about the front façade. The Beyer’s said the plan is to make it brick, which matches the house. The breezeway will remain. Mr. Mills asked if the applicant could get away with any less square footage and have it still be a functioning two-car garage. Mr. Beyer is looking at the expense and the scale of the project and said if he is going through all this he wants to make sure it is big enough. Mrs. Beyer said it is going to be deeper, as opposed to wider, and they will still have 20’ of grass behind it. Per Mr. Bielmeier, the proposed width is standard for a two-car garage. Mrs. Beyer said none of the neighbors had an issue with the proposal.

**ACTION:**

Motion by Ryan Mills, seconded by Patricia Burkard, to **approve** Appeal No. 2 under Old Business, as written.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D’Amato	Nay	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**New Business**

**Appeal No. 1**

Peter Caroccio and Holly Moschiano  
Residential Single Family

Requests the Board of Appeals approve and grant:  
1.) A 36” variance to allow for a 76” top of foundation wall over the center of the road at the center of lot.

2.) A 17' variance to allow for a 72' front yard setback.

Both requests apply to the construction of a new home at 4055 Elma Road.

Appeal No. 1 is in variance to §229-23(A) and §229-52 (1).

## **DISCUSSION:**

Andrew Romanowski from Alliance Homes is present and speaks on behalf of the applicants. He explained the reason for the first variance request is because there is bedrock in the area that it is 2' below the existing grade. There has been a soil boring test done and the Engineer's Report was done by a licensed engineer. There is well documented water problems associated with blasting or excavating into the rock in that area. The applicants want to build a single family home on the lot; they currently own the lot. They want to build a house without having to blast or excavate into that rock for obvious reasons. Mr. Romanowski said the reason for the second variance request is so they can do a better job of blending the house to the existing elevated condition from the street. It will allow them to take some of the taper out of the driveway and make it less steep and also do a nicer job of blending it to the side setbacks. A grading and drainage plan has been prepared by a licensed engineer. Mr. Romanowski met with the Town Engineer and the Building Inspector on more than one occasion to discuss this. The current and proposed grades are indicated on the application. The requests from the Town Engineer and the Building Inspector have been incorporated into the latest plan, which is in front of the members this evening. He noted that there will not be any negative impacts on the neighbors. The existing houses are both elevated from the street, these elevations are both higher than the current plan would allow. They have incorporated swales and yard drainage to minimize impact and make sure they don't cause any impact in terms of drainage on any of the neighboring properties. Mr. Romanowski submitted a copy of the house plans which were prepared by a licensed architect, the siding will be brought down lower on the house so it won't appear to be elevated when you look at it from the street.

Two (2) neighbor notification forms are on file.

Deputy Town Attorney Steve Bengart said it is his understanding that the Building Department makes no recommendation either way on this project. Their only concern is, based on other houses on Elma Road, digging down has caused severe water problems to the point where somebody put in a basement and it has flooded three (3) times and everything in the basement went through the ceiling of the basement and into the house. This doesn't mean the variance should or should not be approved, the Building Department does not want to see anything built down.

Mrs. Burkard asked if the house will look higher than the neighboring houses. Mr. Romanowski said not significantly and went on to explain that the neighbor to the north has a finished floor elevation of 719.9', the proposed finished floor elevation is 721.6'. The neighbor to the south shows a finished floor elevation at about 716.8'. Mrs. Burkard asked if this will cause any negative water problems with the neighbors. Mr. Romanowski said it won't because it will be graded at 18" maximum below the top of the foundation. They will drop the top of the foundation wall a little bit lower and will bring the framing down, the framing will have siding on it which will have the effect of blending that in. This allows them to get the grading down so it is not a water problem for the neighbors. Mrs. Burkard asked where the house will be placed in relation to the neighboring homes. Mr. Romanowski referred to a survey prepared by Nussbaumer & Clarke, Job No. 14J2-0050 which shows the house to the north setback 91' and the house to the south is setback approximately 61', the applicant's proposal is for a 72' setback.

Mrs. Burkard and Mr. D'Amato did not see stakes on the property designating the proposed location of the house. Mr. Romanowski said he may have missed that, he thought the drawings would be sufficient. He apologized for not staking the property.

Deputy Town Attorney Steve Bengart clarified that the water table is very high in that area to the point where the Building Department will not give a building permit to anyone who wants to build a basement without a Hold Harmless Agreement and the Town totally free of any liability.

Mr. Romanowski said this is not a self-imposed hardship because the applicant's did not put the rock there. Mrs. Burkard asked if the applicants were aware that this would be a big issue when they bought the property. Ms. Moschiano said they were not aware that the water table was that high, they knew there was rock there and assumed blasting would be OK.

Mr. D'Amato said the drainage will be an issue; the applicant's property is 5' above the neighbor's. Mr. Romanowski said the proposed grades are more in line; the top of the wall will not have any impact on the drainage because they are not grading to that slope. There are significant swales on both the north and south sides of the property. Mr. D'Amato asked if the grading will be at the neighbor's level, Mr. Romanowski said yes. The existing grades on the neighbor's side is 714 and 713.21. The proposed grades are back to 713.63 and 713.45. The only significant drop off there might be is due to the fact that they have to get the driveway grade up to match the finished floor of the garage, so they are proposing a small section of retaining wall along the garage but that will be back 18' from the property line. Mr. D'Amato asked if the applicants considered a house without a basement, knowing all the issues there are. The applicants said that is not an option. Mr. D'Amato said they are clearly going to have water in their basement. Mr. Romanowski explained that the house with documented water issues, blasted 5' into the bedrock, there was a question as to whether the water level was 2' or 3' below, but it is clearly below the rock.

Deputy Town Attorney Steve Bengart made it clear that the Town of Clarence and Zoning Board of Appeals are not going to give the applicant a recommendation on whether they should build. They are going to advise the applicant that a basement should not be put in. Based on the issues of the past the cost to a particular home with a basement has been astronomical. Mr. Romanowski said the water level is below the bedrock, he is clear on what the Board is telling him.

Mr. Mills asked why a slab isn't something the applicants would explore? Mr. Romanowski said he can't speak for the owner but in general people are not willing to give up that storage area, it has an impact on the resale value of the home. The size of the home is approximately 2800+ square feet; the basement is 8'. Mr. Mills asked if there will be any water systems inside the basement. Mr. Romanowski said there is a perforated drain pipe and stone drainage that collects the water, there will be a sump drop. There will also be a waterproofing membrane that doesn't allow hydraulic pressure to force water through the concrete in the event that there is water there.

Mr. Thrun asked if the roof line will be significantly higher than the other houses in the area. Mr. Romanowski said not significantly, this is a two-story house and he believes the houses on either side of it are a two-story and a raised ranch.

Chairman Michnik asked what the highest point of the building will be. Mr. Romanowski said it will be approximately 26' at the highest point. Chairman Michnik asked if the house could come any closer to the road. Mr. Romanowski said they could bring it closer to the road but the closer they go to the road the steeper the driveway will have to be. Chairman Michnik voiced his concern regarding the whole height of

basement situation. The applicants have owned the lot for a year; they were not informed about the water situation when they purchased the lot. They purchased the land through a contractor that builds in the area, Jerry Logan.

Moira Mycio, of 4045 Elma Road, lives in a raised ranch so there is no basement and voiced her concern regarding flooding on her property which will result in the devaluation of her property. Ms. Mycio has owned her home of for six (6) years. Deputy Town Attorney Steve Bengart asked if Ms. Mycio is concerned with the height of the house. Ms. Mycio said she would have to review the plans before answering that question. Due to the way the lands slopes in that area, all the water will drain to her land.

Mr. Romanowski said he has addressed these issues with the Engineer and the Engineer's suggestions have been incorporated into the plan. This is the third pass at the drainage plan. He understands that the Town Engineer did not give a recommendation positive or negative. Deputy Town Attorney Steve Bengart said before a permit is issued it will go through the Building Department again for the drainage. Mr. Romanowski said what they are proposing will not create anymore surface water and there have been provisions made for the water that does land on the property.

Chairman Michnik asked the Ms. Mycio if any water from the lot in question comes onto her property now. She said not that she is aware of.

Don Marx, of 4060 Harris Hill Road, voiced his concern of what he has observed and pumping activity at 4035 Elma Rd. Presently, there is no water coming from the property under discussion over to the rear of his property. He said there are two (2) drainage ditches that run along the north and south side of the applicant's property; those ditches go back about 90 feet. He asked why the property is sloping back from the road so the drainage runs in on the property. The property should slope from the center of the property to the front of the property where it will then drain into the drainage area that runs down the street. He wants an explanation on this. He is concerned that the water has reversed its flow from how it would naturally flow. He asked where the water goes from the sump pump. If the swales push the water to the eastern side of the property and it pools there, he is concerned because that area abuts his property. Mr. Marx wants to hear what the applicant has to say about the bedrock.

Mr. Romanowski explained that the proposed plan shows a proposed 8" CMP corrugated metal pipe that gets installed along the frontage of Elma Road. At either end of the property there is the proposed yard drain and the grading plan indicates the rim and invert elevations of both of those plans, this is where the sump water and the down spout water goes. There will be an underground pipe that catches any water that comes out of the sump pump as well as any water that comes off the roof drains and takes it to Elma Road underground. Mr. Mills asked if there are storm sewers and Mr. Romanowski said yes.

Mr. Romanowski went on to explain that the swale is moderate because there isn't much pitch to the parcel. The swale stops short of the property line with the idea that there will be very little water that pools there, plus it will catch any water from the roof, then the water will go to the underground pipe and out to Elma Road. The only water to talk about is within the 18' side yard setback which needs to be protected from the adjoining property. The immediate area will experience less surface water after construction than there is now. They will not go into the bedrock. The proposed driveway slopes to the road. The north and south swales will not collect additional water, they are simply preventing water from hitting the adjacent properties to the north and south. Mr. Marx asked why a larger portion of the property can't be made to drain and slope toward the road just like the driveway is proposed, instead of having it all drain to the back of the property. Mr. Romanowski said it can't all drain towards the road because of the existing contour of

the road and the back of the lot cannot be made higher than the neighbor's property. They could possibly put an additional yard drain in the back near the swales so any concentrated water goes back out to the road. They can put a drain tile under the swale with a moderate pitch which will bring the water to the front of the property. Mr. Marx said he would be happy with that and does not have a problem with it.

Mr. Marx said he heard the discussions about the location of the water table. He has lived in his home for over 50 years; his concrete floor sits 2" above solid rock. His sump pump is an upright pump at rock level, when it rains water comes up above rock elevation by 6-9 inches. He confirmed that he has a 7' basement. He does not keep anything of value in his cellar. The water comes above the bedrock.

Chairman Michnik noted that there is a two-story house two houses away from the applicant's property, that property is raised a bit. Chairman Michnik asked if the applicant talked to those neighbors to see if they have a basement. The applicant said no.

Mr. Romanowski said the finished floor basement would be 12" above the bedrock elevation.

Mrs. Burkard said she doesn't understand why the applicants weren't made aware of the situation when they bought the property. Mr. Caroccio confirmed that they paid market value for the property. Mrs. Burkard asked if there is a legal obligation to disclose such information. Deputy Town Attorney Steve Bengart said there is a property condition disclosure statement that is required to be provided with every residential real estate closing, however, he is not sure if it is required because the property in question is vacant land. The due diligence an attorney would do would not turn this up, and the buyers might not know enough to go ask the Town. Mr. Romanowski said he had numerous conversations with the Town Engineer and the Building Department but nothing was put in writing. He clarified that it was the applicant, not the Town, that said they don't want to go into the rock.

Chairman Michnik asked if it would be acceptable for the applicant to submit a Hold Harmless Agreement and have it reviewed and approved by the Town Attorney's Office. Deputy Town Attorney Steve Bengart said yes that is a possibility, in order to protect the Town. Chairman Michnik said the Town needs to be protected no matter how far the applicant will dig in this area.

Mr. Marx said the Town needs to consider the neighbor's on either side of the property in question.

Since the Zoning Board Members are not Engineers, Deputy Town Attorney Steve Bengart would want an approval by the Town Engineering Department.

Mrs. Burkard asked the neighbor if she knew the height of her house, she did not. Mr. Romanowski estimated the neighbor's house height at 20', this is plus or minus 6' different than what they are proposing.

Mr. D'Amato asked if the applicant has thought of another option if this was to be denied. The applicant said they would sell the lot and look elsewhere so they can build a basement. They currently live in the Village of Lancaster and own a home with a basement and a sump pump. Mr. D'Amato is concerned with the 4' grade difference between the applicant's property and the neighbor's. The neighbor is going to get flooded. Mr. Romanowski explained that they are not raising the grade of the swale, what is being asked about is the slope from the edge of the proposed foundation to that swale. They will catch whatever water is there, more importantly they are significantly reducing the amount of water they are going to have to catch because any water that lands there whether it is at the proposed location of the house or at the back corner will be contained and redirected to the storm sewer at the road.

Deputy Town Attorney asked for confirmation that it is Mr. Romanowski's testimony that in a normal drain event this swale will contain the water and send it to the east of the property and will not go to the neighbor to the north or to the south. Mr. Romanowski said yes, however his is not the licensed engineer that drew up the plan, but that is the information the licensed engineer is telling him.

Mr. Mills asked if the applicant has talked with anyone who owns 4035 Elma Road. The applicants have not. Mr. Romanowski has had significant conversations with the Building and Engineering Departments relative to what conditions they have, including grades. Mr. Mills asked if the applicants find it acceptable that if this is approved it would be conditioned that a yard drain be installed along the east and south sides of the property and that there is a Hold Harmless Indemnity Agreement. Mr. Romanowski marks up the plan identifying the location of the proposed drain tile, which will end shortly after the swale ends. He said there is a quantifiable distance where the end of the swale is, so he described it as the end of swale on the south side and equal distance setback from the road on the north side. He would like to have the engineers look at additional inlets for the drain tile. Mr. Mills suggested putting two (2) inlets on each side subject to the engineer's approval. The additional inlets would be at approximate 70' back. The marked up plan is on file.

Chairman Michnik said if the request was tabled and the applicant came back to the board with all the information that was requested at this meeting that does not mean it will be approved but he personally wants to protect the Town.

Deputy Town Attorney Steve Bengart clarified that what is being requested is a Hold Harmless Agreement and an Engineering plan that would take into consideration these changes to drainage, assuming they recommend the changes. Mr. D'Amato also wants to see the property staked. The applicants were hoping to start construction in June of this year.

The applicants said they are willing to table the request and come back with a plan that they think will be more presentable to the Board.

#### **ACTION:**

Motion by David D'Amato, seconded by Ryan Mills, to **table** Appeal No. 1.

#### **ON THE QUESTION:**

It is clarified that the purpose for tabling the request is to have an acceptable Hold Harmless Agreement in place prior to the next Zoning Board of Appeals meeting. The staking for the outline of the house and garage is to be done prior to that meeting, as well. An updated drainage plan is to be submitted based on the discussions that the applicants have with their engineer, not the Town Engineer at this point. Any changes made to the engineering plan, if this was to be approved, will be subject to the Town Engineer's approval. Mr. Romanowski said he understands. The changes that were discussed involved adding inlets and altering any swales based upon the neighbors comments. Chairman Michnik suggested the applicants talk with the neighbors to see what they want and/or have experienced with regards to drainage.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

## MOTION CARRIED.

**Appeal No. 2**

Mary Salvadore  
Planned Unit Residential Development

Requests the Board of Appeals approve and grant a 24' variance to allow for a 21' rear yard setback and encroachment into forest conservation area for the construction of a covered porch at 9584 Cobblestone Drive.

Appeal No. 2 is in variance to §229-52(C).

**DISCUSSION:**

Corey Auerbach, of Damon Morey LLP, said they made a determination and they can decrease the request and still achieve the desired benefit. The reduction in the request is by 4', so they are requesting a 20' variance.

Mr. Mills read an e-mail dated 5/13/14 from Mary Salvadore into the record: "Dear Sirs, Please be advised that this evening I will be unable to attend the meeting for the variance on my home at 9584 Cobblestone. I will be represented this evening by Jeff Palumbo and Corey Auerbach along with my contractor Shelagh Thomas. I am aware that today's decision is independent of the approvals that I will need from the Spaulding Lake Association. I will pursue this approval as well. I would appreciate that your approval in the consideration of my variance this evening. I love my home and really look forward to staying there for years. Shelagh will be able to reach me on my telephone this evening if for any reason you need any questions answered for agreements made. Thank you for the time this evening. Sincerely, Mary Salvadore." A copy of the e-mail is on file.

Mr. Auerbach said they are proposing a two-story covered porch on the east side of the property which will encroach into the rear yard. The plans were re-submitted with the minor reduction in the requested variance. He explained that the benefit is the ability to have a covered porch to utilize in the rear yard. It was impossible to cover the existing patio because of the existing windows. The proposal is designed to use the existing roof line on the second story of the enclosed patio that is being proposed. The adjoining property to the rear is a large lot with a large setback. That house is approximately 300' away from the rear of the applicant's lot. This leads Mr. Auerbach to the statutory balancing analysis, Town Law §267-b(3)(b). This law is to aid the Board members with balancing the interests. The applicant perceives this request as a tremendous benefit to herself with little to no detriment to anyone. It will be imperceptible from either Goodrich Road or Cobblestone Drive in relation to the encroachment. Due to the orientation of the building for neighbor to the north and the curvature of the road, that neighbor will not be able to see the encroachment. The property to the south has significant encroachment already with their pool and their pool house. There will not be an undesirable change in the neighborhood. The benefit cannot be achieved by some other method. They looked into covering their existing patio but due to existing architectural features of the building it was a physical impossibility. The magnitude of the requested variance in light of its impact is not substantial. It will not have an adverse impact on the environment. There will be no trees removed as part of this proposal. Even if the request was self-created, that is not reason alone to deny the variance. They truly believe there will be no detriment to anyone if this variance is granted. Mr. Auerbach referred to a concern with regards to setting a precedent by granting this variance. He went on to explain that a variance can only set a precedent if there are identical or similar facts. He does not think there is a precedent being set here.

There is one (1) neighbor notification form on file. The applicant was unable to obtain a notification form from the other neighbor but is willing to provide it as soon as they can obtain it.

Ms. Thomas said the footprint is the same on the new plan, she referred to the foundation plan that is on file. She explained the construction materials are steel decking with concrete board and masonry around the columns; the covered porch is on the second level. The basement level is where the first floor is. The house has an existing walkout.

Deputy Town Attorney Steve Bengart referred to the conservation easement that runs all throughout Spaulding Lake and asked if it is fair to say that the pool already encroaches into it, Ms. Thomas said yes. It is clarified that the walk way to the existing patio encroaches into it as well. There is a small corner of the existing patio that encroached within the 45' setback but because it was an uncovered porch up to a 12' encroachment is allowed. Deputy Town Attorney Steve Bengart said he is only referring to the conservation easement right now. Ms. Thomas said she does not know. Deputy Town Attorney Steve Bengart asked if the permit for the pool was obtained from the Homeowners Association before it was built or afterwards. Ms. Thomas does not know. Mr. Auerbach said he has no knowledge of any interaction with the Homeowners Association related to the initial construction. It is clearly understood that now the approval of the Homeowners Association is required. Mr. Auerbach noted that a variance from this Board does not authorize the applicant to encroach into a private conservation easement. They are subject to the Homeowners Associations requirements and they will have to satisfy them.

Mr. Auerbach said there has been no contact with the Homeowners Association as of yet. If they are authorized by the Zoning Board of Appeals to move forward, then they will contact the Association.

Mr. Mills asked if there are other encroachments similar to the applicant's. Mr. Auerbach said the neighbor's pool and pool house appear to be encroaching into the conservation easement area.

Mr. Thrun asked for clarification of changes reflected in the redrawn plans that were emailed. Ms. Thomas said that the only change is that one dimension was shortened to require only a 20' variance. Mr. Auerbach said that a newer section of the development had 25' rear yard setback so this encouraged a redesign that was in keeping with that setback.

Mrs. Burkard asked why the Homeowners Association approval was not obtained first, and if approval from the Zoning Board of Appeals would influence the Homeowners Association. Mr. Auerbach said that they started with governmental approval first, and he did not think it would have influence.

It was noted that the demolition work at the site had already been started. Ms. Thomas explained that it was done with Building Department approval because there was a window of opportunity when the contractor could do it.

#### **ACTION:**

Motion by Ryan Mills, seconded by Dan Michnik, to **approve** Appeal No. 2, as written with the condition of approval by the Spaulding Lake Homeowners Association for the encroachment into the conservation area prior to any permit, and that the variance request be amended to a 20' variance to allow for a 25' rear yard setback.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Chairman Michnik reminded all Board members that they need to update their Land Use Training Hours for 2014.

Meeting adjourned at 8:45 p.m.

Carolyn Delgato  
Senior Clerk Typist