

Town of Danby Board of Zoning Appeals  
Minutes of Hearing and Meeting  
December 18, 2018

**PRESENT:**

Lew Billington  
Gary Bortz  
Toby Dean  
Betsy Lamb  
Earl Hicks (Chair)

**OTHER ATTENDEES:**

Town Planner           C.J. Randall  
Town Councilperson    Leslie Connors  
Recording Secretary    Alyssa de Villiers  
Public                    Don Barnes, Ernie Bayles, Ted Crane, Ben McClintic, Kate McClintic, Barbara  
                                  Miller Fox, Ralph Nash, Ken Ridley

*The meeting was opened at 7:02pm. (Moved by Lamb, seconded by Dean).*

**CALL TO ORDER/AGENDA REVIEW**

The order of appeals was switched such that the first appeal heard was that of Benjamin McClintic at 56 Michigan Hollow Rd.

**MINUTES APPROVAL**

**MOTION:** Approve minutes from the October 23<sup>th</sup> meeting

Moved by Dean, seconded by Billington

**The motion passed.**

In favor: Billington, Bortz, Dean, Lamb

Abstain: Hicks

**PUBLIC HEARING (56 Michigan Hollow Rd.)**

The Town of Danby Board of Zoning Appeals will hold a Public Hearing at 7:00 p.m. on December 20, 2018 at the Danby Town Hall, 1830 Danby Road, Ithaca, NY, to consider the appeal of Benjamin McClintic, Owner and Applicant, 56 Michigan Hollow Road (14.-1-3.2) for an area variance from Town of Danby Zoning Ordinance Article VI, Section 600(8) height limit of thirty-six feet. Applicant is appealing the decision of the zoning enforcement officer denying permission to construct a new single-family house with proposed height of thirty-eight feet from lowest exterior grade level. The property is in the Low Density Residential Zone.

*The public hearing was opened at 7:08pm.*

### **Public Comment**

No letters were received from the public regarding this area variance appeal.

The applicant, Ben McClintic, responded to the five factors the Board considers: (1) Little undesirable change will occur because the house is not highly visible and the variance will only apply to one side of the house, (2) The benefit to the applicant is higher ceilings while maintaining the desired roof pitch, (3) The variance is not substantial as it is only 2' and the average height to grade is 32', (4) There would not be an adverse impact in the neighborhood because the house is not very visible, and if anything the structure would be more appealing with the steeper roof pitch, and (5) Yes, the difficulty is self-created, but the 36' height limit felt restrictive under the circumstances.

Don Barnes, who lives across the street, said he has no issue with the proposal and supports the application. As a neighbor, Gary Bortz commented that he and his wife are in support of granting the variance; he also stated he would be abstaining from the vote. Ted Crane spoke in favor of the variance; he thought it highly unlikely the 2' difference would be noticeable.

### **Discussion**

Lamb asked Randall if a 36' height limit was standard, to which Randall said it was common in the area. Ernie Bayles, the project architect, commented that there is variation in how towns measure, for example Lansing measures to the average exterior grade as opposed to the lowest grade level. Ted Crane added that Ithaca and Danby are the only Towns in the area to count the height from the lowest external elevation rather than using the average or upper, making it difficult for those building on a slope.

The applicant clarified that the side where the height will reach 38' from grade is the west side, not the side that faces the road. Bayles showed the angle seen from the street and explained that that height there is more like 26-28'.

*The public hearing was closed at 7:21pm. (Moved by Billington, seconded by Lamb).*

### **Board Discussion**

Hicks sought clarification that the height limit was not related to fire safety or length of fire equipment, to which Randall said she did not believe it was. He asked about the additional height of a photovoltaic system, but Randall clarified that a solar collection system is permitted on any existing building. He also said that he appreciated the thorough work of the applicants, including the drawings showing the house at 38' versus at 36' to the highest point. Billington said that the only alternative he could see would be to add fill rather than changing the plan.

### **AREA VARIANCE FINDINGS & DECISION**

The Board of Zoning Appeals considered the Appeal of Benjamin McClintic for an area variance from Town of Danby Zoning Ordinance Article VI, Section 600(8) height limit of thirty-six feet at 56 Michigan Hollow Road (14.-1-3.2).

1. The Board agreed that no undesirable change would be produced in the character of the neighborhood or any detriment to nearby properties. The house is not highly visible to begin with, and the high side will not be visible from the road. It is also blocked from view by trees to the west.
2. The Board agreed that the benefit sought by the applicant could not be achieved by a feasible alternative of the variance.
3. The Board agreed that the requested variance was not substantial. The average height to the ridge line was 32', within the Town's limit, and the variance was for 2' on only one side of the house. Also, because of the slope, the height is less obvious.
4. The Board agreed the variance would not have an adverse impact on the physical or environmental conditions in the neighborhood.
5. The Board agreed that the alleged difficulty was self-created. As the house design is under the applicant's control, it is self-created.

Based on the above five factors, the BZA determined that the Benefit to the Applicant DOES outweigh the Detriment to the Neighborhood or Community. The minimum variance that should be granted in order to preserve and protect the character of the neighborhood and the health, safety, and welfare of the community was found to be 2'. The Board did not add any conditions to the variance.

**MOTION: Grant Area Variance**

Moved by Dean, seconded by Lamb

**The motion passed.**

In favor: Billington, Dean, Lamb, Hicks

Abstain: Bortz

**PUBLIC HEARING (Durfee Hill Rd.)**

The Town of Danby Board of Zoning Appeals will hold a Public Hearing at 7:00 p.m. on October 23, 2018 at the Danby Town Hall, 1830 Danby Road, Ithaca, NY, to consider the appeal of William F. Farrell, Owner and Ralph W. Nash, Esq. on behalf of Barbara Miller Fox, Applicant, Durfee Hill Road (tax parcel 13.-1-1.22) for area variances from Town of Danby Zoning Ordinance Article VI, Section 600(5) required frontage of not less than 200 feet and Section 600(6)(b) required minimum side yard width of 50 feet. The Applicant proposes to subdivide the existing 132.37-acre property into two parcels: Parcel A, measuring 129.30 acres, with 276.5 feet of frontage on Durfee Hill Road, 2907.64 feet of depth, and undeveloped; and Parcel B, measuring 3.07 acres with 36.63 feet of frontage on Durfee Hill Road, approximately 1300 feet of depth, with existing telecommunications tower. The property is in the Low Density Residential Zone, requiring a lot area minimum of 2 acres, frontage of 200 feet, and lot depth of

300 feet. A written recommendation from the Town of Danby Planning Board regarding the requested variances was issued on November 29, 2018 per New York State Town Law §§ 277(3) and (6).

*The public hearing was opened at 7:36pm.*

### **Public Comment**

No letters were received from the public regarding this area variance appeal.

Ralph Nash, attorney for Barbara Miller Fox described the situation. The part of the property where the cell tower is located is under lease through 2031, and will most likely continue to be. The owner, Bill Farrell, would like to retain the valuable lease while selling the rest of the property; the proposed subdivision creates a parcel that is the same as what is leased to the cell phone tower currently. This leased part of the property is already assessed as a separate tax bill, but is not technically subdivided. The tower has been operating since 1999. There is no intention to develop any of the land, but Miller Fox cannot complete her contract with Farrell to purchase the land without a subdivision. The frontage variance is substantial, but the side yard variance of is not. The property to the west of the proposed Parcel B is owned by Farrell's daughter; Miller Fox owns the property one further west and also the property to the east.

One neighbor, Ken Ridley, was present, but had no input.

### **Discussion**

Randall explained that a ground lease is a long-term lease that allows tax bills to be allocated correctly rather than all falling on the owner of the land. It is in the County's interest to collect tax from the high-assessed cell tower. The lot shape of Parcel B matches the ground lease the telecommunication company has. This minimizes conflicting types of land ownership because the lease matches the meets and bounds description presented in the proposed subdivision. Nash said that doing it this way there would not be a parcel where most of the land was leased but a sliver was not. Bortz pointed out that the lease could be changed, to which Nash said that was possible but difficult.

Dean asked about Parcel A's narrow strip of road frontage to the west of Farrell's daughter's house, to which Miller Fox said that she is not sure why it is there, but Farrell has done similar corridors in the past.

Bortz asked about the Article VII, Section 710 in the Zoning Ordinance regarding cell phone towers. Randall said Local Law #3 of 1999 pertains to telecommunication towers and addresses siting of new facilities or major modifications to an existing structure. She stressed that this is a subdivision and the variance is for frontage and side yard requirements. Bortz also asked how Parcel B will be zoned. Randall said it is currently Low Density Residential—it is assessed as commercial, but in the Town's zoning it is Low Density Residential; utilities, including cell towers, are allowed uses anywhere in the Town. Bortz clarified that by granting the variance the Board would be creating a special purpose non-conforming lot, and that if the cell tower went away, it would be a buildable lot.

Hicks asked if conditions placed on the variance would violate the lease with the telecommunications company; this did not seem to be the case. Nash said that he would not expect the lot to have value without the cell tower lease on it.

Bortz brought up two alternate scenarios that would not create a non-conforming lot. The first was the possibility of doing a third-party lease where Miller Fox leases that land to Farrell who in turn leases it to the telecommunications company. The second was making a conforming lot for the leased land, Parcel B; Parcel A could then be consolidated with Miller Fox's neighboring land. Miller Fox stated that after purchase she was likely to consolidate Parcel A with her other property. Miller Fox also stated that if Parcel B was to become available she would be interested in purchasing it; she is considering eventually donating the land to the Fingerlakes Land Trust. In this scenario, Farrell would still own the land around the lease, but a conforming parcel rather than solely the leased land. Bortz felt this would be similar to the current situation, but Farrell's property would be much smaller, Miller Fox having purchased the remainder.

*The public hearing was closed at 8:06pm. (Moved by Dean, seconded by Billington).*

### **Board Discussion**

Bortz raised the issue of setting a cell phone tower precedent. He suggested recommending rezoning the property as commercial so that a house could not be built on the highly non-conforming lot in the future. Dean pointed out that it was unlikely that the telecommunications company would be removing its tower in 2031. Randall added that removal of the tower would need to go back through the Planning Board.

### **AREA VARIANCE FINDINGS & DECISION**

The Board of Zoning Appeals considered the Appeal of Ralph W. Nash, Esq. on behalf of Barbara Miller Fox, prospective owner of property at Durfee Hill Road (tax parcel 13.-1-1.22), for area variances from Town of Danby Zoning Ordinance Article VI, Section 600(5) required frontage of not less than 200 feet and Section 600(6)(b) required minimum side yard width of 50 feet.

It was noted that the Planning Board recommended granting the variance.

1. Billington, Dean, Hicks, and Lamb thought no undesirable change would be produced in the character of the neighborhood or any detriment to nearby properties as the change already occurred when the telecommunications lease was established. Bortz felt that an undesirable change would be produced as a new non-conforming residential lot would be established.
2. Billington, Dean, Hicks, and Lamb agreed that the benefit sought by the applicant could not be achieved by a feasible alternative of the variance. The only alternative, creating a conforming lot that is larger and does not align with the cell tower lease, would require renegotiation with the telecommunications company, which is likely to be difficult. Bortz disagreed, feeling that there are feasible alternatives, including investigating the plausibility of a lease renegotiation.
3. The Board agreed that the requested variance was substantial. The lot created will be highly non-conforming.

4. The Board agreed the variance would not have an adverse impact on the physical or environmental conditions in the neighborhood. The cell tower is already in existence and is unlikely to move.
5. Billington and Dean agreed that the alleged difficulty was not self-created. They felt that because the applicant was not involved with the lease at all, but rather wants to purchase the surrounding property and can only do it via this means, it is not of self-created. Bortz, Hicks, and Lamb felt the difficulty was self-created. Bortz felt the applicant had the opportunity to make a conforming lot for the cell tower (Parcel B), but instead matched the parcel to the lease.

Based on the above five factors, the BZA determined that the Benefit to the Applicant DOES outweigh the Detriment to the Neighborhood or Community. The minimum variance that should be granted in order to preserve and protect the character of the neighborhood and the health, safety, and welfare of the community was found to be 163.37 feet from Article VI, Section 600(5) and 4.8 feet from Article VI, Section 600(6)(b).

The Board added the following conditions to minimize adverse impact upon the neighborhood or community, specifically the addition of a residence on an irregularly shaped non-conforming lot:

Condition No. 1: No permanent residential structures will be allowed on Parcel B due to insufficient ingress and egress for emergency vehicles.

Condition No. 2: Any future improvements to Parcel B will be prohibited other than an eligible facilities request per Spectrum Act § 6409 for modifications to the existing telecommunications tower that do not substantially change its physical dimensions as per Nationwide Collocation Agreement, 47 C.F.R., Part 1, App. B and Telecommunications Act, 47 U.S.C. § 332(c)(7).

**MOTION: Add Condition No. 1 stipulating no permanent residential structures**

Moved by Dean, seconded by Bortz

**The motion passed.**

In favor: Billington, Bortz, Dean, Lamb, Hicks

**MOTION: Grant Area Use Variance**

Moved by Bortz, seconded by Dean

**The motion passed.**

In favor: Billington, Bortz, Dean, Lamb, Hicks

**BOARD BUSINESS**

Earl Hicks was put forth as Chairperson in 2019.

**ADJOURNMENT**

*The meeting was adjourned at 8:43pm.*

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Alyssa de Villiers – Recording Secretary