

**Village of Cold Spring Zoning Board of Appeals  
85 Main Street, Cold Spring New York 10516  
Phone (845) 265-3611**

**Workshop meeting to review the decision for Gary D'urso, 15 Parrott St.**

September 24, 2015

Members present: Chairman, Gregory Gunder members; Alison Anthoine , Elliott Hammond and John Martin also present was John Furst, Village Attorney from Catania, Mahon, Milligram & Rider, PLLC.

Present for the applicant was Ian MacDonald, from Daniels, Porco and Lusardi, LLP the applicant's Attorney

Chairman G. Gunder opened the meeting at 7:37 P.M. by announcing all board members. The agenda was to revisit the decision of Gary D'urso, 15 Parrott St. there should be no new information or material.

Ian MacDonald noted that Mr. D'urso would not be present and reminded the board that at one point the back yard slopes significantly. Zoning code does not preclude 6 ft. fences the fence can be put placed 10 feet in the boundary line but due to the slope the fence would be significantly higher. The board reviewed all information from the previous meetings and transcripts from the public hearing. Mr. Furst noted he sent the Board members privileged legal memos. If the Board needed to discuss them they would go into executive session.

The Board member noted their comments as follows:

Chairman G. Gunder - noted that the Board handles each case based on each applications own needs. There had been no negative comments received from neighbors. Mr. D'urso had previously spoken to his neighbors and had received no comments. Currently there is construction equipment behind the house but that could change at any point in time. It was stated that a decision made by the board lasts the lifetime of the property.

A. Anthoine – noted there have been a lot of comments in favor of the fence. It is a good looking fence and allows the light and air to go through it which distinguishes it from a stockade fence.

E. Hammond - noted it's a nice fence. It's in the back yard and can't be seen. There were no complaints about the fence and there is no adverse effect on the neighborhood.

J. Martin – noted he looks at the code and the code does not differentiate between different types of fences. The code does not allow for any circumstance above for four feet except for certain provisions such as glaring lights, mixed use or public use. He should have gone the neighbor or the proper authority if he thought the equipment was a hazard. The law is what it is you can't claim ignorance of the law. The code provision does not differentiate whether or not the fence is in the back yard or not. Deer can get over anything. The slope in the back yard would be that the fence would appear lower when you go outside the fence it would seem higher. What the Board was driving for when they made the decision would be that it would have a detriment to the community. You cannot differentiate between fences.

He noted he did not see where this was any different from other fences in the neighborhood to make a six foot fence be approved. The four foot rule is narrowly defined. There is no real reason to grant the variance for a six foot fence.

The Board reviewed each of the 5 Area Variances Criteria with the board weighing in on each criteria.

**1. Whether the benefit can be achieved by other means to the Applicant?**

The benefit **can be achieved** by a four-foot fence, which the code allows would be sufficient. A four-foot fence or a six-foot fence cannot keep deer out of the yard. Slope will not truly affect the look of the property. There is nothing that a six-foot fence can do that a four-foot fence couldn't do. Approving the variance could cause other village residence to apply for a variance and the code does not allow for it to be superseded. The majority of board members agreed that the fence would not cause a detriment to the neighborhood, due to the type of fence, location of the fence and the slope of the property.

**2. 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 area variance?**

This variance **would not** create an undesirable change had have **no detriment** or **negative impact** to the neighborhood, due to this particular type of fence, because of this particular slope and the location of the fence in the back yard. There were no negative comments from the any of the neighbors.

One member of the board had concerns stated about setting a precedent for allowing six-foot and superseding the current zoning code. It could be the beginning of a series of requests for six-foot fence variances.

It was pointed out that each appeal must be treated on its own merits.

**3. Whether the requested variance is substantial?**

The difference between 4 feet and 6 feet is 50%. The board believed that 50 % **is a substantial** variance request.

**4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?**

In this particular request, it **would not** have an adverse effect or negative impact environments conditions of the neighborhood. A portion of the fence is hidden by shrubbery, which may not be there forever.

There is a possible physical impact by making the fence two feet higher; an optical view carries a negative impact. The shrubbery currently hides some of the fence, yet the shrubbery could be removed at any time.

Overall the majority of board feels in this particular fence application that the **does not** have an adverse physical affect to the neighborhood, with one member of the board of the member disagreeing with this statement.

**5. Whether the alleged difficulty was self-created? (Which is relevant but not determinative.)**

**Yes, in this application the difficulty was self-created.** He built the fence without applying for any permits. The fact that the owner did not know the code is not a defense nor the fact the pre-existing fence was 6 foot and he added the fence to match the pre-existing 6 foot fence. There were options it could have been achieved by other method.

**Balancing:**

The balancing is based on the benefit to the applicant to grant the variance as requested versus the detriment to the health, safety and welfare of the neighborhood and community.

Alison Anthoine summarized a balancing statement which would be in favor of the applicant.

The interest of the applicant weighs in favor of the applicant for the following reasons:

- For this particular variance, the fence is aesthetically pleasing fence and the openness of the fence has a minimal visual impact.
- The Historic District Review Board approved this request
- There has been no objections from the immediate neighbors in its erected state
- This particular fence not visible from the street due to placement in the rear-yard and the significant slope of the rear yard.

John Martin summarized a balancing statement the detriment to the neighborhood and the community outweighing applicant's request for a variance.

The detriment to the neighborhood and community outweighs the applicant's request for the following reasons:

- The balancing should be in favor of protecting the code provision under these circumstances
- The applicant has not established a need for a 6 foot fence that cannot be met by 4 foot fence.
- In the past the board has granted variances for fences exceeding four feet when a public use or mixed use nuisances properties where located adjacent to the property. This is not the case in this particular variance request.
- Allowing a six-foot fence presents an adverse optical impact not only to this immediate residential neighborhood but also would be a detriment to the community as a whole.

Chairman G. Gunder reviewed the two versions before the vote and clarified exactly how each version would impact the approval or denial of this application.

- If you vote for the interest of the applicant outweighs the interest to the community you would vote in to approve of the variance in this particular request.
- If you vote for the health, safety and welfare outweighs the benefit to the applicant you would vote to deny the variance.

A. Anthoine made a motion to grant the two-foot variance in favor of granting the variance based on the balancing statement in favor of the applicant and the board’s findings on each of five criteria. E. Hammond seconded the motion. The vote was as follows.

Alison Anthoine – Yeah

Elliot Hammond - Yeah

John Martin - Nay

Gregory Gunder – Yeah

The motion was approved by a vote of 3 in favor and one opposed, to grant the variance for Richard D’Urso’s existing six-foot fence.

The final decision of the Zoning Board of Appeals for this application is a separate document and will be included in the file for this appeal.

This application is a type 2 to action under SEQRA and is exempt from review.

A. Anthoine moved to adjourn the meeting and J. Martin seconded the motion. The meeting adjourned at 9:09 PM.

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Gregory Gunder, Zoning Board of Appeals Chair

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Date