

THE AYERS LAW FIRM, PLLC

KENNETH L. AYERS, Esq.

P.O. Box 683
50 West Grand Street
Palatine Bridge, NY 13428
(518) 673-8100
(518) 673-8106 facsimile*

* Not for service of legal papers

Of Counsel
JENNIFER L. CHRISMAN, Esq.

NICOLE HUBAL
Paralegal

March 18, 2020

Via Email to the Town Clerk

Town of Caroga
Zoning Board of Appeals
Attn: Douglas H. Purcell, Jr., Chairperson
P.O. Box 328
Caroga Lake, New York 12032

**Re: 325 East Stoner Lake Road, Town of Caroga
(SBL# 24.7-1-41)
John & Lenore Bellinger
Application No. Z2019-07**

Dear Mr. Purcell,

My firm represents Philip R. Thibodeau et al., the owners of 233 E. Stoner Lake Road Caroga, NY (SBL# 24.7 –1– 32.5) in connection with the Bellinger’s application for a use variance to install a 200-foot dock into East Stoner Lake (“Application”). My clients oppose the Application and respectfully request the ZBA to deny the Bellinger’s Application for a use variance for the reasons set forth below.

Background.

The Applicant’s half-acre parcel (SBL# 24.7-1-41) is in an R- 10 Zoning District. See “Town of Caroga Final Draft Zoning Map 2018” (“Zoning Map”). Based on the Zoning Map and information contained in the record, there are approximately 15 parcels located around East Stoner Lake which are in the R 10 Zoning District. Under Article 4, Sections II and III of the Town of Caroga Zoning Law, docks are prohibited from being installed on parcels in an R 10 Zoning District.

The Code Enforcement Officer denied the Applicant’s application for a building permit because docks are prohibited in the R 10 Zoning District (See Denial Notice and denial of Building Permit Application which are part of the record.). The Applicant has applied to the ZBA for a Use Variance to construct the proposed 200-foot dock adjacent to their parcel.

Opposition to Application.

A. Application Incomplete and Misleading.

- a. Applications for a Dock Permit are required to include a deed and survey prepared by a NYS licensed land surveyor. See Caroga Zoning Ordinance (“Zoning Law”), Article 5 – Supplementary Regulations, Section II entitled “Shoreline Regulations.” No survey signed by a licensed land surveyor was submitted by the Applicant. There is nothing in the record which indicates that the Code Enforcement Officer waived the requirement for a property survey.
- b. The ZBA should require a property survey prepared by a licensed land surveyor because, among other things, the drawings submitted with the Application do not show the property line along the shoreline which delineates the dividing line between State Land (East Stoner Lake) below the mean high water line and the Applicant’s private property.
- c. The Zoning Law Shoreline Regulations for dock permits require both the dock and boat hoist to be located on the property owner’s property. The Applicant’s drawing labeled “Boardwalk Elevation Detail” indicates that the portions of boardwalk and the entire dock are proposed to be constructed and installed below the mean high water line and anchored to lands owned by the State of New York (East Stoner Lake). Without a survey the exact location of the dividing line between State Land and Bellinger’s private property cannot be determined from the Applicant’s drawing. Hence, it is impossible to determine whether the proposed dock meets the requirements of Caroga’s Shoreline Regulations which require that the dock be located entirely on the Applicant’s property. In addition, there is no detail for the construction and design of the 200-foot dock itself, only an elevation detail for the “boardwalk.”
- d. The Boardwalk Elevation Detail drawing submitted with the Application does not accurately and completely show the full projection of the proposed 200-foot dock into the waters of East Stoner Lake. The drawing shows a “break” along the dock indicating that the full 200-foot length of the dock is not fully depicted on the drawing. Based on the scale depicted on the drawing, only approximately 75 feet of the dock is shown as projecting into the lake to reach the point where the water depth was measured in July 2019 as being 2 feet deep. In other words, 125 feet of the proposed dock is not fully depicted on the drawing. As a result, it is impossible for the ZBA to determine and assess the impact of the proposed dock vis-à-vis its relationship to neighboring waterfront properties. Without a survey which shows the relative location of the proposed dock to the nearby residential waterfront properties, the ZBA cannot fully appreciate or evaluate the potential impact of having a 200 foot dock capable of accommodating 5 motorboats on neighboring residential properties or the effect on the flora and fauna in that protected and undeveloped portion of the lake.

- e. The short form EAF (SEAF) submitted by the Applicant is insufficient to assess the environmental impacts and is both factually incorrect and incomplete. The SEAF does not take into consideration the impact of the 170 feet of boardwalk that will be necessary to be installed through the wetlands in order to get to the dock for which the permit is requested. I note the Applicant advised DEC that their application was modified to “include only the 200-foot long section of dock” and that the Applicant “intends to pursue construction of the boardwalk at a later time.” See, DEC letter dated February 21, 2020 to the Applicant which is part of the record.

This is troubling for two reasons. First, by modifying the Application to divide the project into two phases the Applicant cleverly avoids the DEC’s review and permit process. More importantly, SEQRA requires that a single project not be split into “segments” for environmental review. "Segmentation" means the division of the environmental review of an action such that various activities or stages are addressed for a SEQRA review as though they were independent, unrelated activities. See 6 NYCRR part 617.2 (ah). It is clear that the Applicant’s intent is to pursue the construction of the boardwalk at a later. As such the SEAF and the SEQRA review of the project must include both installation of the 200-foot dock and the 170-foot boardwalk as part of a single, unified environmental review.

- f. The extension of the dock 200 feet into East Stoner Lake will also interfere with navigation in the lake shallows by kayaks, canoes and similar low impact watercraft. Similarly, there is no information submitted with the SEAF indicating the potential impacts on habitat or nesting waterfowl, beaver, birds of prey and other migratory birds that are residents and frequent visitors to this area of the lake.
- g. The SEAF leaves blank the answer to question 5 (b) regarding the proposed action’s consistency with the adopted comprehensive plan. Likewise, the Applicant leaves blank the answer to question 13 which, if answered yes, requires the Applicant to identify the specific wetland or water body and the “extent of alterations in square feet or acres.” The Applicant provides no calculation of the extent of impact of the 370 linear feet of dock and the boardwalk on the wetlands as required; making it difficult to assess the potential impact.
- h. Given that the proposed dock is at approximately 10 times larger than any other dock on East Stoner Lake and is proposed in an area where docks are prohibited, the ZBA should require the Applicant to submit a long form EAF (“EAF”) to provide more detailed information regarding the potential impacts on the wetlands, wildlife, habitat and nearby neighbors in the area proposed to be occupied and dominated by this intrusive and massive structure.

B. Standard for Grant of Use Variance.

Because the requested use variance would authorize a use that is prohibited in the R 10 Zoning District by Caroga's Zoning Law, the standard for demonstrating the Applicant's entitlement is extremely demanding and an Applicant must satisfy each of the enumerated standards pursuant to the requirements of the Town Law § 267-b (2) (b) and Article II of the Caroga Zoning Law.

Pursuant to Town Law § 267-b (2) (b). "No... use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship." In order to prove "unnecessary hardship" the applicant must demonstrate to the ZBA that for each and every permitted use in the R 10 Zoning District that:

- (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and,
- (4) that the alleged hardship has not been self-created. See Town Law § 267-b (2) (b).

Pursuant to Town Law § 267-b (2) (b), the Applicant has the burden of demonstrating with documents and evidence that he satisfies each of the four standards necessary to establish unnecessary hardship and is, therefore, entitled to a use variance.

The Applicant provides two reasons why he is entitled to receive a use variance to install the 200-foot dock in the R 10 Zoning District. In response to section B.1 of the Application, which addresses why strict application of the ordinance would produce an undue hardship, the Applicant responded, "access the lake so we can enjoy lake life and add value to our investment." In response to section B.2 of the Application, which addresses whether the requested use variance would observe the spirit of the ordinance and would not change the character of the district, the Applicant responded, "dock will be 18" off water to prevent disturbing the water or vegetation."

No other documentation, evidence, or other supporting information was provided to the ZBA in connection with the Bellinger's Application for a use variance. The record is devoid of any documentation or evidence which supports the Applicant's claim of unnecessary hardship or that the proposed 200-foot dock would be in harmony with the spirit of the ordinance and not change the character of the R 10 Zoning District.

The claim that Applicant will suffer undue hardship because without a use variance he will be unable to "enjoy lake life" and be unable to "add value to our investment" falls far short of the financial evidence necessary to demonstrate that he cannot realize a reasonable return on his investment. In order to demonstrate a lack of reasonable return on investment, a landowner seeking a use variance must demonstrate that the property cannot yield a reasonable return "if used only for uses permitted in the zoning district. A landowner seeking a use variance must factually demonstrate, by dollars and cents proof, an inability to realize a

reasonable return from any of such permissible uses.” See, *Dreikausen v. Zoning Board of Appeals*, 287 A.D. 2d 453, 456 (2d Dept 2001, *appeal dismissed*, 98 N.Y.2d 165 (2002); *Village Board Village of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 257 (1981). Here, the Applicant has not, and simply cannot, demonstrate that there is no permitted use in the R 10 Zoning District which would not allow the Applicant to receive a reasonable return on his investment. Although the Applicant is entitled to a reasonable return, the Applicant does not have a right to the most profitable return. *Crossroads Recreation v. Broz*, 4 N.Y.2d 39 (1958).

The Applicant’s failure to demonstrate an inability to realize a reasonable return from each use permitted in the R 10 Zoning District bars the applicant from entitlement to a use variance. See, e.g. *Forrest v. Evershed*, 7 N.Y.2d 256 (1959). See *Crossroads, supra*.

The Applicant provides no factual basis supporting the claim that the requested use variance, to install a dock projecting 200 feet out into East Stoner Lake, would observe the spirit of the ordinance and would not change the character of the R 10 Zoning District. The Applicant’s response that the “dock will be 18” off water to prevent disturbing the water or vegetation” simply does not address the questions regarding compliance with the spirit of the ordinance or that a dock, 10 times larger than any dock presently existing on the lake, would not change the character of the R 10 Zoning District.

The R 10 Zoning District expressly prohibits docks so the dock proposed by the Applicant is clearly not in character of the land use existing or permitted in the R 10 Zoning District. Furthermore, a dock 10 times larger than any other dock on the lake will clearly change the character of the R 10 Zoning District in which docks are currently prohibited and few, if any, exist. The spirit and intent of the Zoning Law is to preserve the existing ecosystem and habitat and protect the uniquely undeveloped character of this portion of the lake by regulating and prohibiting the installation of docks. Therefore, it is impossible for this massively outsized dock to be in harmony with the spirit of the Zoning Law, especially in the R 10 Zoning District.

A key component of an applicant’s request for a use variance is proving an explanation of the existing land uses in the general neighborhood, the existing conditions relevant to addressing planning concerns, such as impact of the use on the lake and natural habitat, and the effect of the proposed use on the neighborhood, including nearby neighbors.

The Applicant has failed to provide any evidence, much less the substantial evidence required, to demonstrate that the proposed 200- foot long dock would not change the character of, or is in harmony with, the spirit of the Zoning Law’s R 10 Zoning District which prohibits the installation of docks. The Applicant is required to demonstrate that the proposed use is consistent with and will not have a significant detriment impact on the neighborhood or community. The introduction of a use which is contrary to the zoning plan for a district, by its very nature, inherently interferes with the character of the district and disturbs and conflicts with existing and permitted uses.

Although not raised by the Applicant as the basis for obtaining its use variance, it is beyond question that the Bellinger’s parcel is not unique in the R 15 Zoning District. The Zoning Map and the record shows that there are at least 15 parcels around East Stoner Lake which are in the R 10 Zoning District, all of which are subject to the same prohibition against installing docks

in the lake. Determining whether a parcel is “unique” requires a showing of nothing less than a “hardship special and peculiar to the applicant’s property” to empower the ZBA to grant a use variance. *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 91 (1950), *cert. denied*, 340 U.S. 933 (1951). What is required is that “the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning district would be materially changed.” *Douglaston Civic Ass’n.*, 51 N.Y.2d 963, 965 (1980). “Proof of uniqueness must be ‘peculiar to and inherent in the particular zoning lot’, rather than ‘common to the whole neighborhood.’” *Vomero v. City of New York*, 13 N. Y. 3d 840, 841 (2009). Finally, because the “uniqueness” focuses on the property and not the owner, a use variance cannot be granted to ease the personal difficulties of the landowner. See *Belgrade v. Kocher*, 215 A.D. 2d 1002, (3d Dept. 1995).

Furthermore, because a decision by the ZBA acting in a quasi-judicial capacity is required to adhere to its own precedent, the granting of a use variance to the Bellinger’s for the 200-foot dock creates a precedent which would require the ZBA to grant any future request for a use variance for a dock made by a parcel located in the R 10 Zoning District. See *Knight v. Amelkin*, 68 N.Y.2d 975, 977 (1986).

When a ZBA grants a use variance which violates the general purpose of the local zoning law, the ZBA invades the province of the town legislative body and the grant of the use variance is invalid for want of authority. *Van Deusen v. Jackson*, 35 A.D.2d 58, 60 (3d dept 1970), *aff’d*. 28 N.Y.2d 608 (1971). Here, the requested use variance would allow every parcel in the R 10 Zoning District to obtain a use variance to install a dock. This is an extremely dangerous precedent to set. When the granting of a use variance substantially rewrites and alters the local zoning ordinance, the ZBA exceeds its authority because it is rewriting the local law and not just granting a use variance that was peculiar to the property involved.

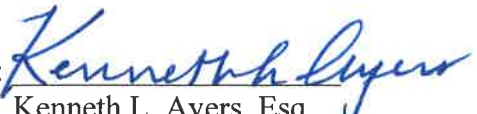
I note with interest that at the February 5, 2020 Planning Board Meeting, Planning Board Chair, Al Kozakiewicz, opined “that the Planning Board made and (sic) oversight in not allowing docks on R – 10. The Zoning Ordinance would require a variance.” Even if true, the fact is that the Zoning Law, as adopted, prohibits docks from being installed in the R 10 Zoning District. However, the action required to remedy this alleged “oversight” is not the granting of a variance to any person in the R 10 Zoning District who requests one, but rather to deny all use variances for docks and undertake the procedures necessary, including a public hearing, to amend the Zoning Law and take into consideration conditions upon which such permits could be issued, such as size, construction, location and mitigation of environmental impacts upon which such docks might be permitted in the R 10 Zoning District.

Based on the record before the ZBA it is clear that the Applicants fail to demonstrate an undue hardship based on three of the four standards upon which a use variance may be granted. Since the Applicant must demonstrate that an undue hardship exists on each of the standards set forth in Town Law § 267-b (2) (b), the ZBA should deny the Bellinger’s Application for a use variance for the installation of a 200-foot dock.

For the reasons set forth above, my clients respectfully request the ZBA to deny the Bellinger's Application for a use variance in connection with the proposed installation of a 200-foot dock for the benefit of their property at 325 E. Stoner Lake Road (SBL# 24.7-1-41)

Very truly yours,

The Ayers Law Firm, PLLC

By: 
Kenneth L. Ayers, Esq.

Via email to:

Linda Gilbert, Town Clerk (carogatc@nycap.rr.com)

James McMartin Long, Zoning Board of Appeals Clerk (james@jameslong.com)

Al Kozakiewicz, Planning Board Member (Via Email to Town Clerk)
