

**VILLAGE OF ELLICOTTVILLE  
ZONING BOARD OF APPEALS  
MEETING MINUTES, JULY 7, 2021**

**PRESENT:** Fred Musolff, Chairman  
Dan Mergenhagaen, Member  
Mike Painter, Member  
Lisa Saunders, Member  
Harry Weissman, Member

**ALSO PRESENT:** Gary Palumbo-Village Planner, Michelle & Craig Winters-Applicants,  
Jacob Alianello-MDA Consulting Engineers, Greg Cappelli, Tom &  
Joanne Arunski, David Parker-The Villager

Mr. Fred Musolff, Chairman called the meeting to order and presented the agenda for changes, additions or approval. The agenda was approved as submitted.

Mr. Musolff opened the public hearing for **VZBA-2021-079, 9 Elk Street, Craig & Michelle Winters, an area variance request for addition to a non-conforming structure.**

Mr. Palumbo presented his staff report. The applicant seeks to construct a residential addition at the rear of the pre-existing non-conforming residential structure at 9 Elk Street. The proposed 2-story addition has a 20'9"x14' footprint. The single tax parcel has two residential structures on it. 7 Elk appears to be the original principal residence, which has two dwelling units. 9 Elk St. is a converted accessory building (former garage) with one dwelling unit.

Per application materials, the applicant seeks relief from several sections of the zoning. A single-family detached dwelling is a "Permitted" use in the VR District, and 1 accessory apartment is allowed with a Special Use Permit. The subject has 2 pre-existing dwelling units in the house and 1 pre-existing dwelling unit in the converted accessory structure. Section 3A.2.G limits any property to a minimum total of two dwelling units (a principal dwelling plus one apartment/lockout unit) shall be allowed on any single property in the Village Residential District. The appeals for variances for the addition should be reviewed as an expansion to both a non-conforming structure and as an expansion of a non-conforming use. The raising and repair of the existing structure should be reviewed as an alteration under Section 7.5.

The variances request are: Minimum Side Yard- Section 3A.2.C.2) for addition- Required 10.0', provided 7.5' for a variance of 2.5' (25%)

Minimum Combined Side Yark- Section 3A.2.C.2) for addition- Required 30.0', provided 23.4' for a variance of 6.6' (22%).

Minimum Rear Yard- Section 3A.2.C.3) for addition- Required 35.0', provided 26.3' for a variance of 8.7 (28.8%)

Minimum Height of Accessory Structure- Section 2A.2.H) (max. 75% of principal structure.

Maximum allowed 19.4' (75% of 25.9-foot principal Structure -7 Elk), provided 22.8' (88%) for proposed 2 story addition, for a variance of 3.4' (18%).

The total area of both existing structures have a floor area ratio of 2.7 (27%), which exceeds the 2.0 FAR in the current condition. Adding the 2-story addition increases the FAR to 3.4, which exceeds the maximum allowed, even when granting a .5 bonus for the new second floor addition.

Mr. Palumbo advised that he contacted Richard Stanton, Village Attorney with regard to the moratorium on accessory apartments. Mr. Stanton advised that the moratorium is on the creation of new accessory apartments/lockout rooms not existing ones

Mr. Palumbo stated that 2 letters were received in response to the public hearing notice which was published in accordance with local law. One from Greg Cappelli at 47 Elizabeth Street in opposition of the project and one from Jason and Jill Andersen of 12 Elk Street in favor of the project. Mr. Cappelli read his letter for the record. Mr. Palumbo read the Andersen's letter for the record.

Michelle Winters, applicant present the plans for the addition to the existing accessory apartment. She advised that there are mold and mildew issues from the duct work of the forced air furnace which runs under the floor in a crawl space. The existing spiral staircase needs to be removed and the addition will allow for a standard staircase to the second floor. They need to elevate the structure to correct the duct work. This is needed for their daughter who has health issues. They have worked and lived in the area for over 20 years. The main house has long term tenants in both units. This is not the only lot in the Village with 3 non-conforming units. Since the past 3 owners have used 9 Elk as a residence she feels it does not meet the definition of an accessory apartment in the Village Code.

Jacob Alianello said that to address the applicants needs are falling into necessary variances in both categories. It matters how the structure is classified. If forced to classify as an accessory structure instead of a principal structure we will have to redesign.

Harry Weissman noted that he owns a 3 unit residence that is a non-conforming use. This is one of many lots in the village with houses with 2, 3 or 4 units. He questioned the rear yard setback calculation.

Michelle Winters said they will make the unit better and will put in a rain garden for drainage and improve the landscaping. The improvements will benefit the neighborhood. The house next door has an addition that encroaches 2 feet into our yard.

Mr. Palumbo advised that the most restrictive standard always applies to a project.

Mt. Tom Arunski of 11 Elk Street stated that the grade of Elk Street goes down hill. If the garage apartment next door is raised and added on to, it will ruin my foundation. My garage

does set 2 feet onto their property. My concern is how the equipment and work will affect my house.

Mr. Dan Mergenhagen asked how much are you raising the structure?

Mr. Alianello said the foundation will be 6 inches above the ground. The platform will be 1.5 feet above the ground.

Mr. Mergenhagen asked are you increasing the grade or the height?

Ms. Winters said both.

Mr. Mergenhagen said it appears that the water will drain towards 11 Elk Street.

Mr. Alianello said we did a drainage test on the property. NY State law requires a rain garden. We will install a french drain and gutters to manage the runoff which will not go to 11 Elk Street.

Mr. Mergenhagen said that 9 Elk looks lower than 11 Elk.

Ms. Winders said it is.

Joanne Arunski asked how we are guaranteed that this will not affect our fieldstone foundation?

Greg Cappelli said he appreciated what Mr. Weissman said. We have a zoning law to control what is getting out of control. What is the hardship? They are asking for 4 variance for a non-conforming property. It is a weird shaped lot but would require a setback. He asked that the variances not be granted.

Mr. Mergenhagen asked if the Winters had ever lived in 7 Elk Street?

Michelle Winters said no.

Ms. Winters said that the alternative would be to rotate the structure 14% and make it parallel with Elk Street which would not require variances. We need to correct the mold and mildew issues for health reasons. We would be improving the property which drains well in normal weather. She noted that the zoning refers to the health and safety of the neighborhood which would happen with this substantial improvement.

Mr. Palumbo read the zoning code for information. Section 7.5: Normal maintenance of a non-conforming building or structure is permitted. However, unless changed to a conforming use, such building or structure may not be reconstructed or substantially improved to an extent exceeding in aggregate cost 50% of the market value of the building or structure. (Market value shall be determined by dividing the assessed value by the equalization rate).

Mr. Weissman said one way to assess market value of the unit is not relevant.

Mr. Palumbo said the VR District only allows 1 principal and 1 accessory use. The property is already an unlawful use.

Mr. Alianello said the issue is accessory versus principal. The front and side yards will not encroach further into the setbacks than currently exists. If classified as an accessory unit it is subject to the 1 foot rear yard setback.

Mr. Palumbo said whatever you call it, it fails some of the 5 criteria (tests).

Mr. Alianello said we are not asking for greater than exists. The height is needed to house the staircase to the second floor. With regard to the floor area ratio we are not increasing the number but just expanding the dwelling unit.

**Moved by Mr. Mergenhagen to close the public hearing for VZBA-2021-079, 9 Ek Street. Seconded by Mr. Painter. Roll call vote: Mr. Mergenhagen-aye, Mr. Painter-aye, Ms. Saunders-aye, Mr. Weissman-aye. Carried.**

Mr. Musolff opened the regular meeting. The minutes of the April 6, 2021 meeting were read.

**Moved by Mr. Mergenhagen to approve the Minutes of April 6, 2021 as read. Seconded by Mr. Weissman. Ayes all. Carried.**

Mr. Musolff presented VZBA-2021-079, 9 Elk Street area variance requests for discussion.

Mr. Palumbo advised that prior to granting an Area Variance, the ZBA must weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance were to be granted. Section 19 of the Village Zoning and Section 7-712-b of NYS Village Law required that the ZBA consider five criteria. NYS Village law also requires the ZBA grant the minimum relief necessary.

He offered the applicant/s answers and his analysis of the five tests for the Board to consider:

**1. Will the variance produce an undesirable change in the character of the neighborhood or a detriment to nearby property owners?**

Applicant's answer: Proposal will improve building and lot with proper elevation, land grading, drainage and landscape improvements.

Staff analysis: The total 3 dwelling units pre-exist the current zoning, which is what makes them non-conforming uses. Non-conforming uses may continue, but their expansion is limited by the provisions in Section 7 of the Village Zoning. The neighborhood is characterized by single-family homes with no more than 1 accessory structure on each lot. The subject lot has 2 houses, and the applicants wish to increase the size of the accessory structure further blurring the distinction between principal structure and accessory(smaller subordinate) structure. Section 1.9 would only allow more than 1 principal use on a given lot if all the dimensional standards are met, as if each structure were on its own individual lot. The increases to the existing non-conformities in the floor area ratio, rear yard and height must be considered, as well as the extension of the non-conforming side yard. The criteria is not met.

**2. Can the applicant achieve similar results through another feasible method? Are there alternatives to the variance request?**

Applicant's answer: No, we have explored other heating options and blocking vents, as well as other design changes, that just do not offer a similar comfort level to existing forced air furnace.

Staff analysis: This criterion, should look at repair/alteration of the existing 20'x20' structure separately from the proposed 2-story 20'x14' addition. While the ZBA may determine the alteration is permissible under Section 7.5, I do not believe the applicant has shown that the criterion is met for the addition. The addition (new work) further exceeds standards for FAR, side yard, rear yard and maximum height for an accessory structure.

### **3. How substantial is the requested variance?**

Applicant's answer: The proposed changes will get this building to scale with the neighborhood.

Staff Analysis: To gauge how substantial the variance would be, the impact from the encroachment should be considered, not just the numerical results. Or, how substantial are potential impacts to the neighbors from the variance, if it is granted? The applicant's desired benefit should be considered in parts; repairs to the existing structure at 9 Elk, and the proposed addition. Repairing the home including a minimal increase in height will not result in as substantial impact as constructing the addition, which changes the lot coverage, encroaches further into the side and rear yards, increases the height ratio, and further increases the floor area ratio. This criterion is not met.

### **4. Will the grant of a variance have an adverse impact on the physical or environmental conditions of the neighborhood or community?**

Applicant's answer: Variance is requested to improve indoor air quality, site drainage, landscaping, elevation of building, scale of building, improved flushing.

Staff analysis: The property is located in an existing built-out area and no additional environmental impacts are anticipated.

### **5. Is the difficulty self-created? If yes, this by itself is not sufficient reason to deny the variance request.**

Applicant's answer: The difficulty is inherently an unsafe condition, based on how this dwelling was designed prior to our purchase of the property.

Staff analysis: This criterion relates to difficulty in meeting the zoning, not the mechanical problems inside the house, even though serious and significant. The structure was purchased with the non-conformity and wishes to now expand it to a greater nonconformity. This criterion is not met. Failing this test by itself is not a sufficient reason alone to deny the request.

Mr. Palumbo advised that granting a setback or lot line variance is typically a Type II SEQR Action, pursuant to Section 617.5(c)(12) of NYS SEQR regulations. The ZBA should move to formally classify the project a Type II Action before it acts on the application.

If the ZBA grants variances and approves the proposed modifications, the project is subject to Site Plan and Architectural Design Review by the Planning Board.

Mr. Palumbo stated that it appears that tests 1,2, and 3 are not met and based on the information provided, on balance, the benefit to the applicant does not outweigh any potential detriment to the neighborhood or community if the requested variances are granted. Granting variances for the addition would be allowing a non-conforming use to be expanded. He recommended that the variance not be granted.

Regarding repair and alteration of the existing structure, if the ZBA agrees that the criteria in 7.5 are met, then the applicant can raise, rotate and repair in the existing structure on the same general footprint, provided the following are met:

- a. Existing floor area ratio, front yard, side yard and rear yard non-conformities are not increased.
- b. The maximum height of the reconstructed building does not exceed 19.4 feet (75% of the principal structure).

**Moved by Mr. Weissman that the variances requested are a Type II SEQR action, pursuant to Section 617.5(c)(12) of the SEQR regulations. No further review under SEQR is required. Seconded by Mr. Painter. Roll call vote: Mr. Mergenhagen-aye, Mr. Painter-aye, Ms. Saunders-aye, Mr. Weissman-aye. Carried.**

Ms. Lisa Saunders asked is there a basement or crawl space under the building?

Ms. Winters said a 12 inch crawl space.

Ms. Saunders asked, will a basement be constructed under the whole building or just the addition?

Ms. Winters said the whole building.

Ms. Saunders asked will you be rebuilding the structure?

Mr. Palumbo said the proposal is to raise the existing 20'x20' with a new foundation and add a 20'x14' addition.

Mr. Mergenhagen said he considered a new foundation and rotating the structure as a new build.

Ms. Saunders said she is not sure the Board can act on this. Does the moratorium apply?

Mr. Musloff asked will the building remain the same?

Mr. Weissman said the rotation was to make a lesser setback for the addition.

Mr. Palumbo stated that if they are not changing the footprint of the structure Section 7.5 allows the building to be repaired with no side yard setback required.

Mr. Palumbo confirmed the allowed height of the accessory structure as 75% of the principal house (25.9 feet) or 19.4 feet measured to the midpoint of the slope of the roof.

Mr. Alianello said that since they did not have the staff report in advance, perhaps the Board should table the application so they can review and address issues.

**Moved by Mr. Mergenhagen to table VZBA-2021-079, 9 Elk Street. Seconded by Mr. Painter.**

Mr. Palumbo stated that if the applicant wants to table to create a plan that works. This new plan would require a new public hearing.

Mr. Alianello said they want to address the Village's definition of principal and accessory.

**Mr. Mergenhagen withdrew his motion. Mr. Painter withdrew his second.**

Mr. Weissman asked, if they decide to repair the structure with a new foundation under Section 7.5 do they need to reapply at all?

Mr. Palumbo said he will check with the Village Attorney to see if the applicant meets all the requirements in the zoning the CEO can issue a building permit.

Mr. Alianello said they want to prepare an application for a principal structure not an accessory structure. The applicant is withdrawing the application at this time.

**Moved by Mr. Weissman that the Zoning Board of Appeals acknowledges that Michelle and Craig Winters are withdrawing their application as submitted under VZBA-2021-079, area variances for 9 Elk Street and therefore the meeting is adjourned. Seconded by Mr. Mergenhagen. Ayes all. Carried.**

The meeting was adjourned at 7:20 p.m.