

**VILLAGE OF ELLICOTTVILLE  
ZONING BOARD OF APPEALS  
MEETING MINUTES, AUGUST 2, 2022**

**PRESENT:** Fred Musolff, Chairman  
Dan Mergenhagen, Member  
Michael Painter, Member  
Harry Weissman, Member

**ALSO PRESENT:** Gregory Keyser-Village Planner, Richard Stanton- Village Attorney, Craig Winters, Michelle Winters-Applicants, Alexander Basinski-Attorney Phillip Vogt-Applicant's Representative, Jack Kramer, Greg Cappelli, Charlie Coolidge, Sean Lowes, Tom & Joanne Arunski,

Mr. Fred Musolff, Chairman called the meeting to order at 5:30 p.m. and opened the public hearing for **VZBA-2022-071, Winters, 7-9 Elk Street, a Use Variance**, to allow the applicants to renovate the existing living unit to create a full basement and a 20' x 14' foot rear addition.

He asked for comments from the people attending.

Mr. Greg Cappelli of 47 Elizabeth Street spoke in opposition of granting the variances. He supports the zoning regulation that this is a non-conforming accessory building and can be repaired but cannot be expanded. The applicants should find a way to repair with a new foundation and crawl space without a full basement and rear addition.

Mrs. Joanne Arunski of 11 Elk Street stated that she has been a resident since 1989. The zoning code needs to be applied to this application. The dwelling unit has been remodeled and is in violation of the stated code. She has a concern that the structure is unsafe. Excavation will affect her structure which has a 4 foot crawl space and currently remains dry. She is opposed to any area variances or a use variance. The Board has rejected the previous request for variances and should do so again.

Mr. Sean Lowes of 13 Elk Street stated that he has lived in the Village for 45 years and even served on the Zoning Board of Appeals. He hopes that whatever the ZBA decides, we all remain friends. The Wintes' need to fix the foundation to the structure and I am in favor of a more substantial foundation but not to an addition that will make the structure bigger. He suggested the applicants move to the unit in the house at 7 Elk Street which he understands will be available in the future. He trusts that the ZBA will make the right decision for the quality of the Village.

Jack Kramer of 7 Rockwell Avenue stated that we should all remain neighbors and friends. The zoning code was updated in 1991. The history of problems with the building need to be

corrected. We should not look at the zoning merits only and need to have a compromise to allow for renovation of the structure.

A resident of Van Buren Street noted that raising the structure 22 inches is not an issue. It appears the applicants have addressed all issues including mold and drainage that will not affect the neighboring property. Extending the structure in the rear is not a big issue. What happens internally in a structure is not anyone's business. She stated that when she built her house on Van Buren neighbors expressed concerns about the driveway and the size of her house and that it would affect the value of their property and opposed the construction. These issues never happened after the house was built.

Greg Keyser advised that he received 5 letters in response to the public hearing notice which was published in accordance with local law. He read the letters for the record:

1. Bruce Wattle, a visitor to the Village is in favor of the project to improve the structure.
2. Jill and Jason Andersen of 12 Elk Street wrote that the Winters' house needs work to be safe. They are in support of the project to meet the safety needs.
3. Elizabeth Lowes of 13 Elk Street wrote that she reviewed the application materials and feels that the safety issues can be addressed without a 7.5 foot basement and a 16 foot rear addition. Granting the variances would set a precedent.
4. Jack Kramer of 7 Rockwell is in favor of the project as it appears to meet the zoning law.
5. Brenda and Victor Muratori of 6 Elk Street wrote that the renovations to 9 Elk Street will enhance the property and neighborhood and they are in favor of granting the variances.

Michelle Winters stated that 7 Elk Street has two long time renters/residents with 9 Elk for our use. We recognized the issues immediately after purchasing and have worked with specialists to resolve the problems. Raising the house and installing a basement allows us to address the water and heating issues and the 20'x 14' addition will allow for a staircase to the loft for fire egress. We just want to make the building safe. We never rent our unit and the tenants in 7 Elk have rented for more than 10 years. We feel this is a single-family dwelling not a garage or accessory apartment.

Mr. Alexander Basinski, Attorney for the applicants presented a powerpoint plan for renovations that meets the zoning. Initially we were told we need to apply for area variances and then for a use variance. The issues have been going on for over 10 years. The electric panel needs to be relocated, stairs need to be created for ingress/egress to the loft area, and heating ducts need to be replaced under the structure. The applicants have provided documentation of the approximately \$30,000.00 they have spent so far to correct the issues. This is a y-shaped lot with 2 structures and variances are needed for the front yard, side yard and rear yard setbacks.

Mr. Basinski said he would like to address the comments given. The opposition comments are in regard to legal interpretation of the zoning. No practical concerns were expressed. There is currently no water under the dwelling and the plan is to divert runoff away from 11 Elk Street which has a zero lot line setback. By rotating the building there will be more space between the dwellings and the structure will align with other houses on the street. He presented pictures of pooling water between 9 and 11 Elk Street. Elk Street has no stormwater drainage and the street is higher than the houses.

Mrs. Winters said she contacted Mr. Chudy and Mr. Slotman of the Public Works Department on how to correct the drainage issue. They advised that she would have to dig a dry well and run a pipe to the stormwater drain on Elizabeth Street. This would require an easement to cross the church property and would not be cost effective.

Alexander Basinski noted that the ZBA has criteria to follow. This proposal is not changing the intensity of use, the structure will not be rented and the changes will meet the height and aesthetics of the neighboring homes. The applicants are being deprived of the safe use of their home. The ZBA should grant the variance under Section 7.5 which governs repairs and alterations to non-conforming uses: 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 fifty (50) percent of the market value of the building or structure. The proposed work does not constitute "substantial improvement" under the Ordinance, but constitutes "normal maintenance" under Section 7.5. Documentation of the code and safety violations has been provided to the Village Planner and the Code Enforcement Officer. The dwelling at 9 Elk Street is not subordinate to 7 Elk Street and is not an accessory building but single-family dwelling. Because 9 Elk Street is a single-family detached dwelling, a basement is permitted at this location.

A Use Variance is defined as "the authorization by the Zoning Board of Appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations". The applicants do not propose a change or modification of the use- 9 Elk Street is utilized as a single-family dwelling and will remain as such.

Mr. Basinski presented the 5 criteria the ZBA must consider in making a determination and the applicant's analysis of the criteria:

1. The proposed renovations and addition will not change the character of the neighborhood and the structure will be in line with the other houses on the street.
2. There is no other feasible way to address the health and safety issues. The basement will allow for a proper heating system and the addition will allow for proper stairs for ingress and egress.
3. The variance requests are not substantial. The rear setback variance is only needed because of the y-shaped lot. The front setback variance lines the dwelling with the others on the street.

4. The renovation plans will not environmentally or physically affect the neighbors. The drainage plan will take water away from their property.
5. The difficulty was created when the non-conforming use was established prior to the zoning. The applicants purchase the property as is and need to address the health and safety issues in the structure.

The applicants provided financial information on the costs to repair the issues. There is no reasonable return and this is not a use variance. The proposal supports the Village goals for health and safety of the neighborhood and long term plans. Strict compliance to the Village code is physically impossible.

Mr. Mergenhagen asked how big is the deck off the rear of the dwelling?

Mrs. Winters said it is 6 feet wide.

**Moved by Mr. Painter to close the public hearing for VZBA-2022-071, 7-9 Elk Street. Variance requests. Seconded by Mr. Weissman. Ayes all. Carried.**

Mr. Musloff opened the regular meeting.

The Minutes of the July 5, 2022 meeting were read.

**Moved by Mr. Weissman to approve the Minutes of July 5, 2022 as read. Seconded by Mr. Mergenhagen. Ayes all. Carried.**

Mr. Musloff presented VZBA-2022-071, 7-9 Elk Street variance requests for discussion.

Mr. Richard Stanton, Village Attorney, stated that it is his duty to advise the Zoning Board of Appeals on the legal aspect of the zoning code which authorizes the ZBA to grant relief to an applicant. In his legal opinion the application is a use variance because there are 3 dwelling units on the property making it non-conforming. He sighted court cases and decisions to support his opinion. A use variance is needed to expand a non-conforming condition and the applicants have to show hardship requiring a review of income and expenses associated with the property.

Mr. Basinski referred to his July 15, 2022 letter and documentation to Mr. Stanton outlining his legal opinion of the application of the zoning code. He sighted court cases and decisions where area variances were granted for non-conforming uses and exceptions to the law.

Mr. Weissman noted that the New York State Department of State requires proof of loss of income of the property to be considered in a use variance. We do not have any financial data to consider. Not every non-conforming use is the same. The ordinance states that a non-conforming use cannot be expanded. However there are properties in the Village that have multiple-dwellings and you can find code violations in any home. I am not in favor of the addition with second story deck. The applicants have the option to renovate and repair

without an addition and full basement. The Wildflower Subdivision units have standard staircases within the footprint. The spiral staircase can be replaced and a crawl space could house the utilities. The building does not have to be rotated. The crawl space can be raised up to 5 feet with exterior doors for access. The zoning allows for repair in kind and the ability to address the issues but does not grant the expansion of the footprint. The best option is to raise it with a new foundation which would not need a variance.

Mr. Basinski referred to Section 7 noting that the proposed renovations do not meet the definition of “substantial improvement” but repair of safety issues.

Mr. Mergenhagen asked if the rear setback is measured from the corner of the deck or the house?

Mr. Winters said from the corner of the deck.

Mr. Mergenhagen asked, is the deck allowed to be built on as part of the structure?

Mr. Stanton said this would be 6 feet versus 16 feet. Building on the deck is expanding the footprint of the existing building. We would need to see historical aerials of the site prior to 1991 when it became non-conforming. In 1964 there were 2 Village zoning districts (Residential 1 and Residential 1).

Mrs. Winters said we need the basement so we can work on the issues with the lines that are not installed correctly. We cannot leave the building jacked up that long.

Mr. Weissman said you can do that work while the new foundation is being built.

Mr. Winters said we need the 7.5 foot basement for the water tank and heating system.

Mr. Weissman noted there are water tanks and heating systems designed for crawl spaces. The rain garden would take care of the drainage issues.

Mrs. Winters said we need the staircase for fire code egress from the loft area.

Mr. Mergenhagen said there are windows designed for fire code egress from the loft area.

Mr. Musloff asked, if we act, what will be the result?

Mr. Weissman noted that the applicants have a right to maintain their property. We received mixed responses from the neighbors.

Mr. Keyser advised that following the close of the public hearing the Board has 62 days to act on the application. He noted that the proposal is an Unlisted Action under SEQR Regulations. A short EAF has been provided for review and a Determination of Significance should be made prior to taking action on the variance request.

Mr. Keyser stated that the following tests must be met for the issuance of a use variance:

1. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by component financial evidence.

2. The applicant must demonstrate 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. The requested use variance, if granted, will not alter the essential character of the neighborhood.
4. Is the hardship self-created?

Mr. Musolff noted that the applicants showed documentation of the expenses so far to address the issues.

Mr. Keyser asked if they are creating hardship by what they are proposing? Do they have other solutions?

Mr. Mergenhagen referred to the legal opinion from the Town Attorney.

**Moved by Mr. Weissman that the proposed variance request is an Unlisted Action under SEQR Regulations and based on the review of the Short EAF there are no significant environmental impacts and to prepare a Negative Declaration. Seconded by Mr. Mergenhagen. Ayes all. Carried.**

**Moved by Mr. Mergenhagen to deny the request for a use variance as per application materials and documentation submitted in VZBA-2022-071 for 7-9 Elk Street. Seconded by Mr. Painter. Ayes all. Carried.**

Mr. Musolff presented VZBA-2022-128, 6 Greer Hill, area variance request for proposed elevated deck.

Mr. Keyser presented his staff report on this application for an area variance to Section 3A.3(C)(4) to allow the construction of a 16'x32' elevated deck less than the required minimum setback from the rear property line. The proposed deck will be situated 9-feet above the existing brick patio and encompass approximately 512 s.f. The single-family structure is located in the low-Density Residential District. The variance request is to the Minimum Rear Yard Setback where 35 feet is required and 29 feet is proposed for a variance of 6 feet.

The proposed deck is greater than 300 s.f. and will require Architectural Design Review and approval by the Planning Board.

If the Zoning Board of Appeals feels it has enough information for a meaningful public review a public hearing can be set for the September meeting.

This project is not within the 500-foot threshold to trigger a zoning referral to the Cattaraugus County Planning Board.

The granting of an area variance for the construction of a deck does not exceed any Type 1 thresholds and appears to meet the definition of a Type 2 action under Section 617.5(c)(16) of SEQRA Regulations. The ZBA should classify the project as a Type 2 Action before taking action on the application.

Mr. Phillip Vogt, representing the applicant, advised he was hired to build the deck off the main floor of the kitchen/living room area with sliding glass doors. The 16 foot wide deck will extend into the rear yard setback.

Mr. Painter asked, if the deck is between the garage and the patio?

Mr. Vogt said no it is over the lower patio area and will not be wider than the patio which has access from the basement level. The neighbors have not expressed any concern or objection to the project which backs up to their property but is screened with trees.

Mr. Musloff asked Mr. Vogt to bring in photographs of the existing house for the next meeting so the Board will have a better understanding of the project. He agreed to do so.

**Moved by Mr. Mergenhagen to set a public hearing for VZBA-2022-128, 6 Greer Hill, area variance for rear yard setback to construct a deck. Seconded by Mr. Painter. Ayes all. Carried.**

**Moved by Mr. Mergenhagen to adjourn. Seconded by Mr. Weissman. Ayes all. Carried.**

The meeting was adjourned at 7:40 p.m.