

Zoning Board of Appeals Minutes
October 22, 2014

Present: Robert Whitman, Chairman
Douglas Hooper
Thomas Danielson
Richard Nygren
Tim Young

Also present: Attorney Joel H. Seachrist, Nick Bradish, Edward Chambers, Ron Hicks, John Francisco, Roger Anderson, Gary Starr, Mary Jo Bradish, Bill Wright, Scott Bradish, Linda Eckman, Don Erickson, Ronald Kohl, Anne Kohl, Karl Kellgren, Brian Conklin, Diane Starr, James Kinsler, Beverly Kinsler, Thomas Myers, Beverly Myers, Town Clerk Darlene Nygren, Code Enforcement Officer Jeff Swanson.

A public hearing before the Zoning Board of Appeals of the Town of Busti was held on Wednesday, October 22, 2014 at 7:00 p.m. at the Busti-Lakewood Recreation Center, 9 W. Summit Avenue, Lakewood, New York, to consider the following applications:

Application of Nicholas S. Bradish, 2397 Keller Road, Ashville, New York for an area variance to build a deck. Property is owned by him, and is known as Section 367.20, Block 1, Lot 52 of the official tax map of the Town of Busti. Property is in the Multi-Family Residential District. Attorney Joel Seachrist noted that since the last meeting, Mr. Bradish did submit to the Board a document titled "Similar Variances Granted on Canals since 2005", which contained excerpts from minutes dating back to 2005 of applications related to the spoils area. Robert Whitman made a motion to close the public hearing carried over from the September 24, 2014 meeting. Seconded by Tom Danielson. All aye. Carried. Attorney Joel Seachrist then summarized the written decision, below, on Mr. Bradish's application. Tom Danielson made a motion to accept the decision as written. Seconded by Doug Hooper.

**ZONING BOARD OF APPEALS
TOWN OF BUSTI, CHAUTAUQUA COUNTY, NEW YORK**

In the Matter of the Application of
Nicholas Bradish

AREA VARIANCE FINDINGS & DECISION

Nicholas Bradish seeks Area Variances that would permit him to construct a deck between the rear of his house at 2397 Keller Road and the Vukote Canal, mostly within the spoils area that runs along the canal. The property is designated on the official tax map of Chautauqua County as Section 367.20, Block 1, Lot 52.

FACTUAL BACKGROUND

1. Nicholas Bradish, hereinafter the "Applicant", has submitted an application for Area Variances that would permit him to construct a deck attached to his house at 2397 Keller Road and running in a terraced manner to the edge of the Vukote Canal. The Applicant began construction of the deck and completed a significant portion of it before he applied for a

building permit and learned that certain variances would be required. For purposes of this analysis, the Zoning Board of Appeals (“ZBA”) will treat the application as if construction had not begun without the necessary permits.

2. The subject property is located within the Multifamily Residential (MR) District. The relevant lot limitations within that district are contained in Section 405-16(F) of the Town of Busti Zoning Code, and are as follows:

Limitation	Code Requirement	Proposed by Applicant	% Variance
Minimum Lot Area	30,000 sq. ft.	6,000 sq. ft.	80% (24,000 sq. ft.)
Minimum Lot Width	125 ft.	50 ft.	60% (~75 ft.)
Maximum Lot Coverage	25%	~12.5%	None
Minimum Front Yard (canalside)	50 ft.	~25 ft.	~50% (~25 ft.)
Minimum Side Yard	15 ft.	North: 16’ 4” South: 9’ 6”	North: None South: 36% (5’ 6”)
Minimum Rear Yard (roadside)	50 feet	~15 ft.	~70% (~35 ft.)

3. The subject property also lies within the Vukote Drainage District Spoils Area, which is subject to the Town of Busti’s “Vukote Drainage District Spoils Area Law”, adopted in 2005. In the late 1990’s the Town of Busti acquired title to land known as the “spoils area” and designated as such on the original allotment maps that created the Vukote Allotment. The spoils area runs along much of the canal at a width of 25 feet from the water’s edge so as to provide access to the canal for maintenance, including dredging. In the decades between the creation of the allotment and the acquisition of title by the Town many homeowners had built decks and house additions and other structures that encroached into the spoils area. The Spoils Area Law gives a blanket license to property owners within the Drainage District to maintain and replace those existing structures and to build newly-encroaching structures as long as they meet certain design requirements, found in Section 392-14 of the Town Code, which provides as follows:

B. *Design requirements. No part of any encroaching structure may intrude into the water of the canal, nor be designed to permanently hang over the water, nor be of such a permanent nature that it cannot be moved should the Town need to perform dredging or other maintenance of the canal. Permissible encroaching structures would include a sidewalk, a canal-side deck or boardwalk, or a boathouse not on a permanent foundation. Impermissible encroaching structures would include an addition to a house, including a permanently attached porch, a garage, or any other structure on a permanent foundation. No concrete structure of more than six feet in depth may be located in the Spoils Area. Should the Town require that any encroaching structure be removed in order to access the canal for maintenance and other municipal purposes, such removal shall be made at the owner's expense.*

4. This law further requires that any person wishing to construct a new encroaching structure must obtain a variance from the ZBA.

5. The ZBA opened the public hearing on the application on September 4, 2014, and continued it over to September 24, 2014 and again to October 22, 2014. Generally speaking, most attendees at the hearing spoke in favor of the project. Both owners of the properties immediately adjacent to the Bradish parcel attended the meeting, with the neighbor on the north supporting the application and the neighbor to the south, Ed Chambers, at 2393 Keller Road, expressing concerns that the deck is a detriment to his property and is inconsistent with the Spoils Area Law.

6. The record includes all oral arguments, letters and submissions made to the Zoning Board of Appeals, including those made or submitted at the public hearing and any other documents incorporated by specific reference during the hearing or herein.

AREA VARIANCE FINDINGS

7. The Zoning Board of Appeals ("ZBA") in acting on this variance application is obliged to reach its decision by applying the facts found in the record against the Town of Busti Zoning Code and Sections 267-a and 267-b (1) (3) and (4) of the Town Law and their prodigy cases.

8. New York Town Law §267-b(3)(b) and Town of Busti Zoning Code §405-84 require that the ZBA perform a balancing analysis of any application for area variances that considers the benefit to the applicant if the variances are granted, as weighed against the detriment to the health, safety, and welfare of the neighborhood or community the variances would cause.

9. As part of this balancing analysis, the ZBA must consider the following questions:
- (a) Whether an undesirable change would be produced in the character of the neighborhood or a detriment to nearby properties would be created by the granting of the area variance;
 - (b) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
 - (c) Whether the requested variances are substantial;
 - (d) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
 - (e) Whether the alleged difficulty was self-created.

10. In the paragraphs that follow we will address each of those five factors with regard to the requested variances. Rather than analyze each variance individually (side yard, lot width, etc.) we will take a holistic approach and look at what effects a completed deck would have on the neighboring properties.

11. It should be noted at the outset, however, that with regard to the variances required for minimum lot area, lot width, and yard setbacks, the subject property fares much better than a

significant percentage of other properties within the Vukote Canal area for which this board has granted variances in the past. We recognize that the current lot size requirements for this area, if strictly enforced, would prevent virtually all development because very few of the lots are big enough to meet the minimum dimensional requirements.

12. We have, however, taken a particularly strict view on side yard setbacks, in most cases requiring that structures be set back at least five (5) feet from boundary lines, to give unimpeded access to emergency vehicles and first responders. In this regard the Applicant does not propose to build the new deck outside of the current side yard setbacks except for the section of the deck nearest the water where it flares into a boardwalk along the water's edge.

13. **Character of Neighborhood.** The deck is similar to other structures in the neighborhood. It is well-designed and visually appealing. We do not believe that the deck will change the character of the neighborhood.

14. **Detriment to Nearby Properties:** The neighbor to the south, Mr. Chambers, has expressed some concern that the deck will create a detriment to his property due to its scale and size. While we accept those concerns as legitimate and heart-felt, we do not find them persuasive given the low-slung nature of the deck. We believe it will have a minimal effect on Mr. Chambers' view of the canal running to the north of his property, which is already impeded by other structures along the canal.

15. **Benefit By Other Means:** Given the nature of the lot sizes within Vukote and the applicable dimensional requirements, it is nearly impossible to build any structure there that does not require one or multiple variances. The Applicant could construct a flat patio of pavers or flagstones without a variance because that would not be considered a structure under our zoning code, but it would not provide him the same utility as the typical deck for which he has applied.

16. **Substantiality:** The requested variances, taken together, are substantial, as they are with nearly every application from Vukote if viewed solely on paper and not with the context of the rest of the neighborhood.

17. **Environmental Conditions:** We do not believe the deck will have any impact on the physical or environmental conditions in the neighborhood. No such concerns were raised by any neighbors.

18. **Self-Created Difficulty:** The alleged difficulty was self-created by the Applicant in that he purchased the property in the summer of 2014, long after the applicable zoning rules were in place.

SPOIL AREA VARIANCE FINDINGS

19. The ZBA hereby finds that the submitted application is minimally consistent with the requirements of the Spoils Area Law for newly-encroaching structures. A canal-side deck is a permitted encroaching structure and, as partially constructed, the deck does not hang over the water. We generally would prefer that an encroaching structure be more easily removable than this deck, but the Applicant has stated that he is willing to cut the posts if necessary and he is

aware that his license may be revoked at any time and any part of the structure impeding maintenance of the canal would need to be removed.

DETERMINATIONS

20. NOW, THEREFORE, BE IT RESOLVED that the Zoning Board of Appeals adopts the following conclusions of law, with regard to the requested variances:

- a. No undesirable change will be produced in the character of the neighborhood nor will a detriment to nearby properties be created by the granting of the area variances.
- b. The Applicant has sufficiently demonstrated that the benefits sought cannot be achieved by some method other than the requested area variances.
- c. The variances, viewed in aggregate, are substantial.
- d. The variances will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood.
- e. The alleged difficulty was self-created.
- f. Taken in the whole, the benefit to the Applicant from the variances and the deck they would permit outweighs any detriment to the health, safety, and welfare of the neighborhood or community the variances might cause.
- g. Accordingly, for the foregoing reasons, the application of Nicholas Bradish for the area variances necessary to permit construction of a deck at 2397 Keller Road that encroaches into the Vukote Canal Spoils Area is approved.
- h. While it is not a condition of this approval, we do recommend that the Applicant finish the deck with the nautical rope railings he stated he intended to use during the hearing, so as to minimize the profile of the deck and its effect on neighboring properties.

Dated: October 22, 2014

<u>Robert Whitman</u>	Voting	<u>aye</u>
<u>Doug Hooper</u>	Voting	<u>aye</u>
<u>Tim Young</u>	Voting	<u>nay</u>
<u>Richard Nygren</u>	Voting	<u>aye</u>
<u>Tom Danielson</u>	Voting	<u>aye</u>

Application of Michael Boardman, 904 Southwestern Drive, Jamestown, New York for an area variance to build a garage. Property is owned by him and known as Section 420.19, Block 1, Lot 38 of the official tax map of the Town of Busti. Property is in the Highway Commercial District. Applicant was not in attendance. The Board reviewed the balancing test and determined that the benefit to the applicant outweighed any detriment to the neighborhood. Tom Danielson made a motion to grant the application of Michael Boardman to build a new garage, not to exceed the dimensions and height of the existing garage being replaced, and to be no closer than 12.1' from the southeast boundary. Seconded by Richard Nygren. All aye. Carried.

Application of Brian Conklin, 1875 Shadyside Road, Lakewood, New York, for an area variance to build an addition to an existing garage. Property is owned by him and known as Section 402.00, Block 2, Lot 69 of the official tax map of the Town of Busti. Property is in the Conservation Residential District. Mr. Conklin was in attendance. After discussion with the Board and upon hearing from neighbors opposed to his plan, Mr. Conklin withdrew his application.

Upon motion made by Robert Whitman and seconded by Doug Hooper, the meeting was adjourned at 7:49 p.m.

Respectfully given,

Susan Huffman
Deputy Town Clerk