

Attorney Replansky thanked the Board for adjourning the hearing until this evening and went over his submission to the Board.

Attorney Replansky said this submission amends Mr. Sperry's application to the ZBA and that the application is an appeal from the Notice of Violation and OTR issued by the Village CEO Clark Kimble, dated December 11, 2020; and alternatively seeking a variance from the ZBA to allow for the continued existence of the deck and railings over the carport, which was constructed several years ago. Attorney Replansky gave a history of the file advising in 1986 the then owners of the property made application to the CEO for the construction of a carport over the driveway on the east side of the residence and application was denied because the installation would violate the 15 foot setback of the Code and the owners filed for an area variance, which is included in his submission as Exhibit "A" and the area variance was granted by the ZBA allowing for the installation of the carport within the 15 foot side yard; the property was purchased by Mr. Sperry in 12/2004 and Mr. Sperry made application to the building inspector for a renovation of the residence to include substantial renovations of the interior and exterior of the residence but also to allow for the installation of a deck and railings and the actual construction of the carport; the original carport installed by previous owners had substantially deteriorated and was in need of replacement and Mr. Sperry found that it was installed with a slight encroachment on the Wheeler property so the plans that were submitted (in his submission as Exhibit "E") included the plans for the carport for the deck and for the railings all of which was approved by Mr. Harkins, the then CEO; then original permit was issued in 2009 (2009-055) and prior to the issuance of the permit, as evidenced by Mr. Sperry's affidavit, and the affidavit of Mr. Harkins, there was a series of meeting conducted in which they went plans and he believes the 2009 plans were drafted by Mr. Wheeler, and those plans were insufficient so another set of plans were prepared and submitted in 2012 (attached to Exhibits) and the plans of the deck is clearly called out in the plans with the railings; and Mr. Harkins in reviewing the plans felt the revised plans would not increase the setback non-conformity and the non-conformity of the carport is the fact that it is constructed within the 15 foot side yard of the Zoning Code. The carport is a permitted accessory use and the deck and railing meet all of the bulk requirements and all other requirements of the Code as evidenced by Mr. Harkin's affidavit. The only variance from the Code provision is the fact that the deck and the railings being above the carport also within the 15 foot side yard of the property. Mr. Harkins determined, and very significant, that the new deck and the construction of the railings would not increase the setback non conformity of the original carport approved by the ZBA and as a result a building permit was issued at that time and the carport was constructed in or about 2013 and deck and handrails installed in or about 2017; the reason for the delay was Mr. Sperry was involved in a serious auto accident which left him with several handicap and health problems which held him up for several years; and Mr. Sperry made application to the building inspectors, which changed over time, for extensions (all permits attached as Exhibit "B") and one permit dated 1/4/2017 referenced the 12/7/2009 and 12/2012 plans to it is clear that the extensions were based on those plans and submitted to the CEO in 2009 and 2012. Mr. Sperry has appealed this notice of violation issued on 12/11/2020, 3 years after the installation of the deck and railings, and unsure of what prompted this violation, but appears it is based on a complaint of the neighboring property owner Daniel Wheeler who was denied an area variance for the location of shed on his property in or about May, 2020; and they suspect that was the reason for the notice of violation; there is no evidence of other complaints by neighboring property owners and it is his understanding that 2 neighbors submitted letters to the Planning Board in support of the deck and railings and a positive addition to the neighborhood;

the CEO issued a building permit to Mr. Sperry and no appeal was taken from that issuance of a building permit 3 year ago and to date the actual building permit has never revoked by the building inspector and has been extended on several occasion, including by the current CEO, and submit for this reason alone the Notice of Violation was improperly issued and should be squashed by this Board; as noted before Mr. Harkins, support by his affidavit, made a determination that the reconstruction of the shed, deck and railing did not increase the non-conformity of the original carport and therefore was legally permitted; the deck, railings and carport are legally permitted accessory structures in the Village of Red Hook by virtue of the definition of an accessory structure set forth in Section 200-5; and there is no indication that the carport, deck and railings violate any other bulk requirement of the Village Code; so the issue is the installation of the deck and railings, as approved by the original CEO, an invalid extension of the nonconforming use and submit that issue has already been determined and binding on the current CEO; and the determination of Mr. Harkins is consistent with the decisions along the State of New York (cited cases in his submission and feels Village council will review that) but notes that the NY Courts had held that Zoning Code are in derogation of the Common Law and as a result have to be strictly construed against the enacting Municipality and in favor of the property owner; and additionally any ambiguities in the ordinance must be resolved in favor of the property owner; and cited 2 cases on page 6 that are directly on point; and cited several other cases to support the notion that additions to conforming uses which do not otherwise violate the bulk requirements of the Code do not constitute impermissible expansions of non-forming use; and for these reasons we feel the case should be decided on the basis of the 1st arguments made that the building permit issued by Mr. Harkins is still in full force and effect and not revoked and that the permit previously issued by the CEO did not require the issuance of an area or amended area variance and the notice of violation should be vacated by this Board; alternatively they are arguing that in event you find an area variance for the deck and railing is required that by application of the statutory balancing of interest tests the variance should unquestionable be granted; and noted the Village Code appears to have an outdated standards for denial of an area variance as a result the Board is required to apply Village Law Section 7-712-b and cited a case to support that; and the real substance of the balancing test is for the ZBA to engage and attest in which it takes into consideration the benefit to the applicant that the variance is granted as weighed against the determinant of the health, safety and welfare of the neighboring Community by such grant; and the salient issue that this Board needs to decide in this area variance; spoke on tests and that these are all criteria in making a final determination and cited a practice commentary quote which supports that; and that the Board should only deny the variance if it rationally concludes that the approval would be destructive of the character of the neighborhood or create any impacts; and thinks it is clear in this case it will not; and they provided a photograph to view that the deck and railings fit into the character of the building and neighborhood and do not present a harmful impact on the surrounding neighborhood and a deck with a railing over a carport is not unusual and they showed an example-similar structure.

Attorney Replansky said by application of the other criteria, cited in Case Law provided, even if one or more of the criteria is not met, the ZBA should grant the variance if variance does not cause a detriment to the Community and there is no evidence that the deck and railings would in any way adversely impact the physical and environment conditions or otherwise result in a detriment to the health, safety or welfare of the Community; and evidenced the fact that these have been in existence for 3 years; and the only complaint was from Mr. Wheeler and this complaint was only submitted in 2020 after he was denied an areas variance for a shed on his property; it is not self-created and Mr. Sperry did the appropriate things, plans reviewed and approved; and Mr. Sperry constructed at a considerable cost and expense and the removal of

the deck and railings will cause his client a substantial economic hardship and would work to the detriment impacts of the structure; and to please take this into considerations; spoke on the letters submitted;

Secretary Hart advised there were a total of 4 letters received.

Attorney Replansky said 3 are in favor and reflects on the severity of the impact in the neighborhood.

Attorney Replansky said as far as Mr. Wheeler is concerned, he has read what was submitted to date and finds nothing substantive in any of his oppositions and he erroneously refers to plans and felt he has not read the revised plan because they clearly shows the deck and railings and access to the deck on the second floor; and the Courts have held consistently in NYS that conclusory allegations of opposition by a neighboring property owner is simply not sufficient to deny an area variance; and on the point that was raised by Mr. Wheeler that the carport encroached on his property and found, by foiling the submissions made by Mr. Wheeler in conjunction with his 2020 application, and it was a survey that he submitted in conjunction with that application which clearly indicated that the carport as constructed at that time, including deck and railings, which were in existence, did not encroach on his property, so is not sure why he raised that issue.

Chair Cuthell thanked Attorney Replansky.

Attorney Polidoro said we have been talking a lot about the roof of the carport and the railings and asked when was the door that would allow someone to stand on the carport roof added to the building plans – was it part of the packet that Mr. Harkins looked at. Attorney Replansky said it is in the plans and shows the access on the second floor and in the 2012 plans.

Mr. Sperry said this was also in the plans that Mr. Wheeler drew up as well and illustrates a door opening stating a “door to carport”.

Chair Cuthell said in looking through the plans he finds them lacking in detail and found it difficult to determine initially in looking that the first plan did not include the foundation for the carport nor any structural details; and the 2nd set of plans from 2012 the only details are for flooring and does not recall seeing anything that shows railings and said they have not reviewed the submission and will review.

Attorney Replansky copied the plans in his submission and admits they are a little hard to read, but the deck is shown, the dimensions of the deck are shown and the railings are shown on the plans and on the 2nd floor there is the entrance that is shown; the extent of whether they meet the other criteria is not before this Board;

Attorney Polidoro said she has not had a chance to review all of the cases cited but they are for non-conforming uses and asked Attorney Replansky to explain why he believes the patio is non-conforming use even though it had a variance.

Attorney Replansky said the decision along NY is that when a use variance is granted it becomes a conforming use and when an area variance is granted it still retains its status as a non-conforming use. Attorney Polidoro said she does not know if that is the case and is why she is asking why you are citing nonconforming. Attorney Replansky said he felt those cases cited were on point and decisive arguments and when going back to the original issue, whether properly issued or not, the building permit was issued by Mr. Harkins in 2012 and no dispute over that and does not know how you can issue a notice of violation when a building permit has been issued with plans and where the original building permit is in place; and in fact the current CEO on several occasion extended the building permit which referred back to the 2021-2009 plans.

Attorney Polidoro asked if he was suggesting he should revoke it. Attorney Replansky said if he wants to do that it is up to him but right now for purposes of this appeal it has to be dismissed on this basis alone and he does not give the Village building inspector legal advice and if he does he will counter it.

Chair Cuthell said he sees a need for more review and accounting from Mr. Kimble on the series of events that led him to conclude there was an issue here and we need to follow up on. Chair Cuthell said he cannot speak for Mr. Kimble but knows there was a question about an exterior staircase from the 3rd floor down to this deck and it raised red flags, but the previous application in front of us at one point involved added a staircase and changing the use this space and feels what might have triggered this. Attorney Replansky said the notion of an exterior set of stairs and did not understand the minutes from the first meeting and he thinks this is best solution in terms of visual impact on the neighborhood with a set of exterior stairs, whether spiral or to the rear of the deck, which would also require an area variance, and the best solution and admits the plans do show the door to the deck. Chair Cuthell said it lacked detail and left questions and said the Affidavit from Mr. Harkins was informative.

Member Reilingh asked Attorney Replansky to repeat what are the questions you are asking this Board to say yea or nay on. Attorney Replansky said he is amending Mr. Sperry's application for an area variance/interpretation and feels you will find there is no such thing for an appeal on an interpretation but the ZBA has the power to interpret a Code when it decides an area or use variance but the appeal is from the determination of the CEO, so the first question to be resolved is: 1) given the fact that the building permit is still in existence and issued by Mr. Harkins and not been revoked whether the OTR has to be dismissed on that basis; 2) whether the current CEO made the correct determination based on all the facts and circumstances of this case and to determine whether to squash and vacate the building inspector's determination on that basis that there is no violation of the Code because the addition to the carport is not an impermissible extension of the existing nonconforming use; 3) in the alternative that should you decide against my client on the 1st two points whether an area variance should be granted by this Board for the deck and railings which has been in existence now for 3 years.

Chair Cuthell said it was the increased use of the deck that raised the question has the project exceeded the intention of the original area variance which was for a carport and that variance was granted for a carport - subsequently it's not just a carport anymore and now a carport with a deck which is now living space and a place for people to go out and be right to the property line and a different use form the original area variance application; and the question is ... is this

acceptable and we were asked originally how to interpret this original area variance and if the interpretation changes will it need a new area variance. We can be asked for an interpretation of Zoning Code and based on the 1st meeting we suspended the area variance with the idea we may not need that and work on what is being asked for here and with the possibility it may need to be reassessed as area variance based on different usage from what was originally granted; and has gone back and forth as to whether something has arrived or whether it is subject to one person's critical eye as opposed to another; and out Agenda id not to punish anyone or throw anyone under the bus on what maybe should have been flagged earlier but we have something here where it is front of us and we need to figure out what to do.

Attorney Replansky said he understands and said the appeal now as it stands, with his amendment, is an appeal from the notice of violation and the interpretation is part of your decision making process of the appeal, and didn't research the Law, (and Village Attorney can and feels there is no such thing as an interpretation appeal but the nonconformity is not the use the carport or the deck or railings and the nonconformity is the intrusion of the 15 foot and not a use variance issue.

Attorney Polidoro said they were not considering it a nonconforming structure but a structure that had approval but only to be used as a carport, but the question isan appeal has to be filed within a certain number of days of a notice of violation being issued and asked if he could provide some case Law indicating that you can now at this state amend your application to include a new basis on your appeal. Attorney Replansky said he can research it and asked If you are saying because they are amending the basis for the appeal that it is now untimely.

Attorney Polidoro said either she will have to do it, or you. Attorney Replansky said he will look into that.

Chair Cuthell asked the Board for comment.

Member Appenzeller asked about the size of the structure and particularly the replacement structure and the original structure and goes back to the ZBA decision in 1986 and talks about a 12x20 foot structure and it mentions in the fact section of that document that the carport will be within 1 ½ feet of the property line and somewhere along the line this carport which is now on and even (one part of it) 3 inches over the property line, seems to have expanded and wants to understand this and establish about what the implications of that means. .

Attorney Replansky said it is confusing because the carport was constructed and was constructed over the adjoining property line, but does not know as constructed was consistent with the application but there was nothing in the variance which limited the size of the carport. The variance is simple, which allowed the carport to be constructed within the 15 foot setback and did not prescribe a size or impose any limitations and did not say you cannot build a roof, deck or with railings on it, and it is a very simple variance application and his client constructed The carport within the footprint of what was there except for that it was brought back from the property line and a little bit less than the carport that was there when he purchased the property.

Attorney Polidoro asked Attorney Replansky if he seen the application because it does say, at least in the application, the roof will be 10 feet high, the one submitted in 1986. Attorney Replansky said there is no prohibition on the height and the height of the building according to the Code.

Chair Cuthell said he agreed with Member Appenzeller and found it surprising that there are references within a foot & ½ to the property line and now the issue is whether it is on the line, and we don't know because the plans do not include locating the footings of the carport in 2009 or 2012, so we have to just take it as the carport as it exists today was located right where the old one was wh9ch apparently if that is the case, was built in the wrong place to begin with because that is not what the original area variance was for and says it was within a foot ½ of the property line.

Attorney Replansky said we don't have the benefit of those minutes. Chair Cuthell said there are minutes on record. Attorney Replansky said in their decision they didn't limit the size or prescribe the size of the carport. Chair Cuthell said hard to blame the Board for all the possibilities of what might have been done.

Attorney Polidoro asked that we clear up the issue the deck encroaching and referenced the survey prepared by Mr. Wheeler. Chair Cuthell said he did receive it. Attorney Polidoro said she believes it does not show an encroachment and says the deck is .1 inch clear and one corner at the property line. Attorney Replansky said there is a notation of a concrete footing, which is not part of the current deck, which indicates encroaches .3 inches. Attorney Polidoro shared a screen showing the survey.

Chair Cuthell asked Mr. Sperry presumably the concrete footing being pointed out is not part of the deck and something previously there. Mr. Sperry said he does not know what it is, maybe grass. Chair Cuthell said something is there because a surveyor located it. Mr. Sperry said you are welcome to come by and look and said he sees nothing; and Mr. Harkins came here when the old deck was here and took measurements to make sure everything was up-to-snuff and part of him granting the building permit. Mr. Harkins check existing and he looked at the plans to where they were going and the original carport deck was further out than now.

Attorney Polidoro said she wanted to show the survey to the Board, to show according to the neighbor's survey the deck is on Sperry's property.

Chair Cuthell asked the Board for any other comment. No Comments.

Chair Cuthell asked Attorney Speranza for comment. Attorney Speranza said he would, but since only receiving Mr. Replansky's submission today and not having submitted a written response is asking for a continuation of the Public Hearing and meeting, to fully submit a response in writing.

Chair Cuthell said it is the intention to continue this public hearing and ZBA meeting and that this Board needs more time to review as well.

Attorney Speranza said he will not comment tonight and wait for next month's meeting.

Attorney Replansky asked that he have a reasonable opportunity to review Attorney Speranza's submission and have time to respond and asked to schedule a briefing date. Chair Cuthell asked Attorney Speranza if he could submit 10 days prior to next meeting. Attorney Speranza said yes. Chair Cuthell said the next meeting will be May 27th.

Attorney Polidoro asked that it be a week earlier so Attorney Replansky could provide his comments.

Attorney Speranza said is May 17th ok. Chair Cuthell said the earliest the better so all can review. Attorney Speranza said he will have done by May 14th. Attorney Replansky asked Attorney Speranza to send directly to him. Attorney Speranza said sure.

Chair Cuthell advised of the 4 letters received in response to the public hearing:

1. Muriel Norman
2. Robin Cherry
3. David Dul
4. Dan Wheeler

And letter will be read in to record at the May 27th meeting.

Chair Cuthell made a Motion to continue/table the Application and Public Hearing for 28 Prince Street listed under Tax Parcel ID 6272-10-337721 to May 27, 2021 at 7:00pm. Motion seconded by Member Appenzeller.

ROLL CALL:

Chair Cuthell – yes
Member Reilingh – yes
Member Javsicas – yes
Member Appenzeller – yes
Member Ou-Yang – yes
All in favor. Motion approved.

Chair Cuthell announced that the next regularly scheduled ZBA meeting will be held on May 27, 2021 at 7:00pm.

Chair Cuthell made a Motion to close the April 22, 2021 Meeting at 8:00pm. Motion seconded by Member Ou-Yang. All in favor. Motion approved.

Lara Hart,
Secretary
Village of Red Hook ZBA

