

Town of Hamilton | 38 Milford Street | Hamilton, NY 13346
Zoning Board of Appeals Meeting - November 15, 2021
Town Office, Community Room

Board Members in Attendance: Acting Chair, Harvey Kliman, Lydia Slater, Jeff Schindler, John Pumilio. Absent: Harmon Hoff (recused). ZBA Secretary and Clerk: Elisa Robertson, CEO Mark Miller

Others Present: Braden Houston, Jordan Ashcraft, Kessa Schaeffer, Eric Schaeffer William Stull; Regina Silvestri; Grattan Johnson; Gair Meres; Carolyn Giles; Attorney Doug Zamelis

Acting Chairman Harvey Kliman makes some opening remarks. He asks each of the Board members to introduce themselves for the audience.

Mr. Harmon Hoff has sent an email to the Board recusing himself and will not be attending tonight's meeting.

Resolution 2021-6: Accept Harvey Kliman as Chairman of these proceedings.

Motion: Lydia Slater, Second: Jeff Schindler

Vote: Aye- 4 Nay - 0

Adopted: yes

Mr. Kliman also asks each person that chooses to participate in the public comment portion of the meeting to say who they are and their address. Each person will have up to 3 minutes to speak, if necessary, the time can be extended.

Mr. Kliman gives an overview of the case and mentions that the applicant had an application filed with the town for a Special Use Permit to allow seasonal accommodations. There is a current moratorium on seasonal accommodations in the Town of Hamilton. The applicant has also withdrawn their application for the Special Use Permit as of November 8, 2021.

The first order of business is to approve the minutes from October 26, 2021.

Resolution 2021-7: Approve the Minutes from October 26, 2021, with spelling and grammatical errors to be corrected.

Motion: Jeff Schindler, Second: Lydia Slater

Vote: Aye - 4 Nay-0

Adopted: yes

Application for an Area Variance: 2089 Spring Street, Hamilton, NY; Tax Map # 169.5-2-15

Chairman Kliman gives an overview of the application in front of the Board this evening. The original application is for a 12X48 foot deck with a triangular extension of 4 feet. This is what the Board will be considering with the revocation of the CEO's first building permit that was issued in error. He notes the address and the dimensions of the original deck (12'X24'). The house already encroaches on the 50-foot setback. These were the pre-existing conditions when the application for the 12'X48' along the back of the house, with the rough sketch plan showing an additional 4'X48' triangle that encroached further into the setback. Subsequent to that, the deck that was then built was 48 feet along the back of the house, with an 11X48 foot triangular extension that extended 11 feet into the

setback. The applicant is requesting that, since the deck is already built, it be granted a variance. The Code Enforcement Officer was mistakenly under the impression that the setbacks in this neighborhood were 25 feet at the time the building permit was issued. It is still the contractor and homeowner's responsibility to confirm the setbacks before building. Further testimony was presented at the last hearing and additional testimony has been submitted. At least four letters were received by the Town by Levitt, Rice, Martin, and Emerson. The use of the property is not a subject for this board to consider. Although the Board is aware of the testimony that was offered on that subject at the last meeting it should have no bearing on this hearing. The fact that the deck has already been built should not be a factor either. What is relevant is how the Board sees the appeal from the revocation of the building permit for a deck in light of the legal criteria that we have to apply. Those criteria are spelled out in the Zoning Law. The Chairman will go through those five criteria when deliberating this issue. He reads through the criteria for the audience. They are as follows:

10.1-3 Area Variances

B. In making its determination, the Zoning Board of Appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety, and welfare of the neighborhood or community of such grant. In making this determination the Board shall also consider:

- (1) Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;*
- (2) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;*
- (3) Whether the requested area variance is substantial;*
- (4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or land use area or overlay area; and*
- (5) Whether the alleged difficulty was self-created, which shall be relevant to the decision of the Board, but which shall not necessarily preclude the granting of the area variance.*

C. The Zoning Board of Appeals, in granting of area variances, shall grant the minimum variance that it deems necessary and adequate, while preserving and protecting the character of the neighborhood and the health, safety, and welfare of the community.

D. Imposition of Conditions: The Zoning Board of Appeals shall, in granting area variances, impose such reasonable conditions and restrictions as are related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of this law, and shall be imposed for the purpose of minimizing any adverse impact the variance may have on the neighborhood or community.

Chairman Kliman wants to make sure that everyone is heard. He reminds participants to please state their name and address for the Board before their comments.

Resolution 2021- 8: Reopen public comment section of the meeting

Motion: Lydia Slater, Second: Jeff Schindler

Vote: Aye - 4 Nay - 0

Adopted: yes

Kessa Schaeffer, 2089 Spring Street, Applicant

She thanks the Chairman for reminding the Board that this hearing does not have to do with the Special Use Permit application before the Planning Board. They have withdrawn their application for a Special Use Permit to simplify things. Ms. Schaeffer and her brother-in-law are in attendance. They are a close-knit family with strong ties to Colgate University. They bought the house on Spring Street when it came available as a potential retirement residence. The idea of a house on the golf course was very appealing because of its tranquility. They plan on using it as a single-family home. When they started work on the house it became obvious that the deck was not only an eyesore but also unsafe. They contacted a reputable builder, looked at the other decks on Spring Street. They wanted to go with something that was consistent to the neighborhood. They did not want to affect or ruin anyone else's view. The variance that had been approved for this lot was an enclosed structure and they felt an open deck was more in keeping with the neighborhood. They believe the deck is attractive, but for every letter that is positive there is one that is not. She understands that they are there to discuss the zoning law and what the Board believes is reasonable. They have reviewed the criteria for granting a variance and they feel that if it were not granted that it would incur costs for them. They felt like they hired a reputable builder, who made a mistake. The Code Enforcement Officer also made a mistake. People make mistakes. The fact that they are here for a second night arguing over seven feet...She understands that the Board does not want to set a precedent, and that the board takes its job very seriously. But one of the criteria is that they did not create this situation for themselves. They thought that they were doing the right thing. They could have looked up the code themselves, however they requested the building permit and they received it. They thought that they were going by the rules in the Town. Ms. Schaeffer feels that they were characterized at the last meeting as someone who was trying to 'trick' the Town. They were very upset by this because they consider themselves to be straight-forward people. They ask how others would feel in this situation. They want to be respectful of the laws. Ms. Schaeffer asks if anyone has any questions of her.

Grattan Johnson, 2149 Spring Street, neighbor

He has a few questions. The first is, what is the setback, and would it be different if it were not on the golf course? The setback is 50 Feet and is established by Town Zoning Law, it is not different because it backs up to the golf course. Ms. Schaeffer states that the golf course has no problems with their deck.

Would this be a something that could set a precedent? The Board's answer is yes. There is some discussion about another variance that was granted last meeting. Other properties have asked for a variance but none as great as this. Mr. Eric Schaeffer asks the Chairman to quantify that. Mr. Kliman asks the Codes Officer. The CEO states that he is unaware of any push out that far. Mr. Schaeffer asks about the one at the previous meeting. The previous application was for a rear and a side yard variance. Mr. Schaeffer points out that the Board approved it but does admit that it does not encroach as far into the setback. The question emerges about how much is too much when it comes to increments? Mr. Kliman goes on to illustrate that most variances are along the order of 10-15%, this is considerably more. This Board must balance everything, that is why they have the standards to follow.

Is this structure a 'place holder' for some other more elaborate structure that could become part of the house in the future? Ms. Schaeffer states that is not their intention. Chairman Kliman states that if they wanted to do that in the future they would have to come back before this Board. A building permit would be denied and they would have to come before this Board again.

Regina Silvestri, Spring Street, neighbor

She is confused and has a basic question. She asks if they are asking for this permit to build what is already there? Or are they asking for a permit to rebuild a deck? Chairman Kliman answers that it is to allow the current deck that they have now.

Carolyn Giles, Preston Hill Road, concerned citizen

She used to live at the address that is the subject of this hearing. She confirms that the deck that was on the house previously was an eyesore. She understands the concerns having just gone through the process in another state. She can see both sides of the issues. She is concerned about incursions on privacy. This seems like a large extension into the setback. It is important for people to take the neighborhood into consideration. It is important for people in town to feel that their concerns are being addressed. And it is very important for someone who wants to do something like this to check the laws, so they do not make a mistake that is upsetting to everyone including the applicant. She also believes that the deck is too large for the comfort of the neighborhood and that maybe a compromise can be reached. She feels that privacy is a real concern. She feels that the deck is extreme from the standpoint of space.

Gair Meres, 2142 Spring Street, neighbor

He states that many people have decks and porches and that they enjoy them in different ways. As they start looking into the use of the deck. If it is to be used in the evenings there may be concerns about lighting and safety, the CEO would know best. Considering that it is larger than originally intended. He also has concerns about ingress and egress. Time of use is an important factor to him. He does not want a nighttime event area. He asks if there are any rules or regulations or safety requirements regarding lights for evening use for a deck that large.

Ms. Schaeffer replies that there is no egress from the deck. The only way on to the deck is from in the house. Steps would seem unsafe and may be a way for uninvited guests onto the deck.

Mr. Meres states concerns over egress and safety if people need to get off the deck in an emergency. Board member Schindler reminds the audience that safety and those other issues are not what this board is meeting about. This Board's concern is over the setbacks and the size. That is why the Special Use application was dropped to concentrate on these issues. All those other concerns are handled by codes. Lighting is covered in the Zoning Law as well. Ms. Schaeffer also comments that they changed the fixtures but did not add more lighting. Lighting and use can have some impact on character of the community, but it is a collateral consideration.

Doug Zamelis, Cooperstown, Attorney for Mr. Stull

He has prepared some short statements and has brought a second submission to be entered into the record. He hopes the Board had a chance to review it. He contends that the moratorium bars this Board from considering this application. They would like their objection noted for the record. He reminds the board that they must consider this appeal as if the deck has not been built. Their idea that the Town must take some responsibility for the error is incorrect. He states that this hardship is

entirely self-created. He was going to ask the Chair (Harmon Hoff) to recuse himself, but he has already done so.

He would like to speak to the Board about the story they were told at the last meeting about having to move the deck out to 23 feet to avoid bedrock. He has provided a sworn affidavit, from his client, with dated photographs, showing that he never saw any excavation other than the post holes that were dug. He also is skeptical of the email from the golf course Superintendent that Mr. Ashcraft provided because he was not consistent with his exchange with Dr. Stull and then with Mr. Ashcraft. Both exchanges have been provided for the record. He argues that there is minimal benefit to the applicant. They must weigh the benefit to the applicant against the health welfare and safety of the community. He agrees that a 54% variance is substantial. He reminds the board that they have letters in the record by nearby neighbors that show how they believe this deck will affect them, compared to letters from realtors and landscapers. They also believe that it would be a significant detriment to this community. Granting variances as large as this one is a detriment. The applicant has not established why they are entitled to a variance. They ask that the application be denied as submitted.

Kessa Schaeffer, 2089 Spring Street, Applicant

She would like to make a comment. There has been a lot of talk about the moratorium, she thinks that it has been established that this is not about that; and that they pulled their SUP application to avoid any confusion. It was too muddy an area for the Board to work through, it would be for anyone. They removed that confusion so the Board could decide on the size of the deck. She feels that much of the other issues that were brought up were made to be distracting and disrespectful to the Board. There is an exchange between Ms. Schaeffer and Mr. Zamelis about the moratorium and how it applies to this case.

Mr. Zamelis states, as he has in the past, that this case should not even be considered because of the moratorium. However, the applicant has withdrawn the SUP application, so it no longer applies. Mr. Kliman asks for the specific section of the laws where this application would be included. Mr. Zamelis points out the section in the law. It is included in exhibit C, page 2, section 4, paragraph A of the Town's moratorium law. He shows some frustration with the Board however Board member Schindler points out that the board is slow because they are trying to consider all factors. It takes some time finding the proper paperwork for the Chairman. They discuss the local law that imposes the moratorium and how it may relate to this application. The question is asked if it applies at all any longer. Mr. Zamelis states that they believe it does because they had an application in for seasonal accommodations and that the applicants advertising heavily featured pictures of the deck. Mr. Zamelis reads the section that he feels is pertinent to this application.

SECTION 4

D. Under no circumstances shall the failure of the Town Board of the Town of "Hamilton, the Zoning Board of Appeals of the Town of Hamilton, the Planning Board of the Town of Hamilton, or the Code Enforcement Officer for the Town of Hamilton to take any action upon any application for a permit, zoning permit, special permit, zoning variance, building permit, operating permit, site plan approval, subdivision approval, certificate of occupancy, certificate of compliance, temporary certificate, or other Town-level approval constitute an approval by default or an approval by virtue of expiration of time to respond to such application."

Mr. Chairman States that this is not to be applied to any property in the Town, only ones that are being used for seasonal accommodations.

Mr. Zamelis contends that it is, that they want this deck to help rent this property out for seasonal accommodations. The application for the SUP has been withdrawn so that no longer applies. There is some arguing among the audience members.

This Board is to only be looking at the size of the deck. Mr. Zamelis contends that they should not even be doing that because of the moratorium. Chairman Kliman States that the Board has heard that already. One Board member states that they cannot look into the future or make decisions based on what may or may not happen in the future.

Ms. Giles would like to discuss more about the 54% exception and reminds everyone that this is not about the SUP application but the size of the deck and its impact on the neighborhood. She personally believes that it has a negative impact. She asks why the deck was built so far out to begin with. Why so large, especially if there is nothing comparable? She understands that they cannot know the measurements of all the decks in the area however this one is sizeable, it is considerably within the setbacks. She is curious why it was built so large. It does seem extreme.

Ms. Schaeffer replies that she has two daughters that go to Colgate and they wanted to have a place for them, and there is also a fire pit, and a table. They wanted to make sure, for safety reasons, that there was enough room for all these things. Mr. Eric Schaeffer states that it is important to remember that they were modeling after the deck that was already there so, it is not a straight rectangle. Ms. Giles comments that privacy seems to be a very important issue now that the deck is so large.

Board member Pumilio agrees with Ms. Giles that this is an important issue because the explanation that the Board got at the last meeting was that there were structural issues. They were hitting bedrock and it had to be extended out to be secure and safe. That doesn't appear to be true with Dr. Stull's Photos and evidence. They are getting caught up on use and space, one can have tiny little deck and still have a huge party at your house. That does not mean a whole lot to him. He keeps asking himself why would a permit allow a variance of that size? He explains why he can see both sides of the issue. He thinks that it would be pretty clear if the only issue was the bedrock.

Mr. Zamelis states that he believes that it was all for design, for the fire pit and grill etc.

Chairman Kliman interrupts and states that they are just rehashing stuff and no new information has come to light He has brought a google aerial photograph google images that show the old deck. The deck was 12X24 feet and it tapered back to the house to about 6 feet on one side. This deck previously existed before this application became relevant. So, the starting point is that we are starting with a house that was already encroaching on the setbacks. Their starting point is the original deck on this property. They looked at the dimensions. If the deck were to be changed to 12X46 it would be twice as large as the deck that was previously proposed; and 3 1/2 times as large as the original deck.

Chairman Kliman asks if there is anything NEW from the audience.

Ms. Giles asks again how it came to be so large and the Chairman states that it really is not important to the Board how it got there. This Board does have the option of saying that it cannot be any larger than the original deck or something larger or as it stands. They can set conditions for approval. The Board could insist that it be totally removed. That is not necessarily where this Board is headed, they will be reasonable. Mr. Stull comments about the size of his deck in comparison with the Schaeffer's. CEO Mark Miller had to leave the meeting unexpectedly.

Resolution 2021-9: Close the public comment portion of the meeting

Motion: Jeff Schindler, Second: Lydia Slater

Vote: Aye - 4 Nay - 0

Adopted: yes

The Board begins to review the five criteria for granting a variance.

The Board starts with:

Number 3: Whether the area variance requested is substantial. The question is asked if it means substantial from the original deck or from no deck? The house sits on the setback line but because there was a deck there previously it was "grandfathered" in. They could replace the old deck in the same footprint. The deck, as built is 812 Square feet. The original deck was approximately 212 square feet. This new deck is 4X the size of the original deck. The drawing for the permit was 644 square feet. The existing deck is 170 square feet different between the drawing and the final product. The Board is in agreement that it is substantial.

Number 5: Was the alleged difficulty self-created? It was a request to build a deck that encroaches on the setback. One Board member feels that the self-created part is that they made it so much bigger than the original drawing for the permit. Anything larger than the original deck would be considered a self-created hardship.

Number 2: Whether the benefit sought by the applicant can be achieved by any other feasible alternative. The benefit for the applicant is having the deck that has full access across the whole house. The neighbor to the south has that. The board needs to consider what the minimum size would be to satisfy the applicant and satisfy the neighbors. If they were to grant this what would the dimensions be? They need to minimize the impact on the setback and meet the desires of the applicant.

Number 1: Whether an undesirable change would be produced in the character of the neighborhood or a detriment to nearby properties. Board member Schindler went to the property and viewed it from all sides and due to the open space around it, it does not look out of character. This criterion is challenging because it does get into intent. Chairman Kliman does not believe that the dimensions provided in the application are applicable, the apparent future use of this house is a residence. The access from the different rooms seems attractive and reasonable. The Board is struggling with this criterion. Board member Pumilio's thoughts keep coming back to the safety issue. He feels that this is not related to the old deck, this is its own project.

Chairman Kliman offers up two observances there is a roughly 12 ft square concrete pad under where most of the previous deck was located. He believes that the original deck was sitting on that pad. Which is not to code. Corners were cut out of that pad so that footings could be set in. A row of footers were put in across the 12 foot width across the entire house. They are all straight and equally spaced.

Board member Pumilio asks if they had to build the deck where they did. Mr. Jordan Ashcraft the builder states that they made decisions on site based on what they were finding, like water. They had

an auger there on site and that they had to adjust as they were digging the holes for the piers. He must adhere to code and make a sound structure.

Chairman Kliman states that from his observation the 12-foot distance from the house is secure and that would be a deck 2 1/2 X bigger than the original. This relates back to #2 where there needs to be that balance. To go around the house to the side would not really meet the desire of the applicant. Access to the view is important. The answer to #2 is likely to be no; there do not seem to be other solutions unless the Board has some ideas. There is some discussion about the size and possible design changes, and locations. Ultimately the best place for the deck is at the back of the property, it provides some privacy and for the view.

Number 4: Would the variance have an adverse impact on the physical or environmental conditions in the neighborhood. Board member Schindler asks what environmental impact there could be. Deputy Clerk Robertson talked with the Town Attorney about the SEQRA form earlier in the day and was informed that A variance on a single-family home in a residential district is the type II action, which means there is not any environmental review. Considering that there is no SEQRA review there is no environmental considerations.

The physical impact is that there is a structure that was not there before. There are 5 or 6 posts that are there now that were not before. There was a bench on the previous deck and there are cables on the new deck for greater visibility. Many of the houses in the neighborhood have decks so it fits in that way however because of its size being a next-door neighbor it could have a physical impact. The Board agrees that here is no real physical impact either.

Board member Slater has a comment about #2 before they move on. She asks if there is a way to find a compromise? What sized deck would be big enough and lovely enough and minimize the incursion, satisfy the applicant and also set a reasonable precedent.

Number 1: The Board circles back to Number 1. Whether an undesirable change would be produced in the character of the neighborhood or a detriment to nearby properties. Many of the properties in this neighborhood have decks. A deck is not a detriment, the size is the question. There is much discussion about the size. An eight-foot deck is discussed. There is also discussion about a 12X48 foot deck. It is agreed that the detriment is really to the nearby properties. There is a certain sense of privacy in this neighborhood, and if the deck were not built and this application came in it may be deemed an undesirable change in the neighborhood. Dr. Stull is consulted about the length of the deck. He states that his objection is with how far the deck comes out. It is different if you buy the house, and the deck is already there than if it is built later. The board needs to take into consideration that they received a letter from other neighbors as well that are not happy with the deck. In addition, they need to disregard what the deck may be used for in the future, that is not part of the Boards consideration.

Board member Schindler offers the suggestion of making the deck 12X48. It gives access to the whole house, it is substantial, it is not egregious. It would be a couple times larger than the original deck. Mr. Zamelis makes a suggestion about procedure. There is some discussion about procedure and whether the Board must deny the application as submitted and then come up with a remedy or whether they can do both in one resolution.

Resolution 2021-10: motion to deny the Schaeffer application, as it stands right now, for the variance due to its excessive incursion into the setback.

Motion: Jeff Schindler, Second: Lydia Slater

Vote: Jeff Schindler - Aye
 John Pumilio - No
 Lydia Slater – Aye
 Harvey Kliman - No

Adopted: NO - Motion is defeated.

There are more deliberations about the size of the deck. Board member Slater asks Mr. Ashcraft if there is the ability to safely construct the deck with the point going out to 16 feet? The answer is yes. She was hoping to change the area to the dimensions on the building application. It would echo the design but would be smaller making less of an incursion into the setback. That would be nearly 3x the size of the original deck. 12X48 is only 2 1/2 size, that would be even less of an incursion, and they are trying to minimize the incursion. Mr. Ashcraft is asked if the deck can be built to 12X48 feet safely now? He states yes because it is already there. It would just be taking the point off. Chairman Kliman measured when he was there and the first set of posts are at 11 feet, so the deck could be 12 feet if they were to use those posts. Mr. Ashcraft states that that is true.

Resolution 2021-11: Motion to approve the Schaeffer application with a deck that is no larger than 12 feet by 48 feet.

Motion: Jeff Schindler, Second: Lydia Slater

Vote: Jeff Schindler - Aye
 John Pumilio - No
 Lydia Slater – No
 Harvey Kliman - Aye

Adopted: NO – Motion is defeated

Resolution 2021-12: Motion to approve the Schaeffer application with the deck to have the same dimensions as the building permit rendering, which is 12X48 feet with the 16-foot point.

Motion: Lydia Slater, Second: John Pumilio

Vote: Jeff Schindler - No
 John Pumilio - Aye
 Lydia Slater – Aye
 Harvey Kliman - No

Adopted: NO – Motion is defeated

There will be more discussion about the size of the deck. Chairman Kliman argues that 12 feet is the width of the original deck and that it would be the least amount of variance. He feels that that size would meet the needs for the applicant. Board member Lydia Slater agrees that that satisfies the minimum variance, however, is that the design was accepted...even though in error. Once the error was discovered it would have come before this Board anyway. Board member Schindler states that

the design is not a factor that needs to be considered, and that a deck this size (12X48) would be sufficient enough to meet the needs of the applicant. He continues to state that there are posts already located at the point where the deck can be shortened without too much extra work. The supports are all there. Mr. Kliman states that they can add another design feature without including the point, such as tapered edges.

Mr. Schaeffer asks if the board can open the discussion up to the two most effected parties. Mr. Kliman states that they have all the information and that they have all been to the site. This seems to just be a difference of opinion of what constitutes a significant incursion into the setback. He feels that they can still provide the benefit to the applicant with a smaller deck.

Board member Pumilio understands that this is a small neighborhood and that they all must live together but he doesn't feel that this deck is offensive. Everyone agrees that it is attractive however that is not the issue. He still feels that taking it back to the permit drawing size would be sufficient. Chairman Kliman reminds him that the starting point for consideration is not what is built but the original deck. There is not to be consideration of what has already been built. He is reminded of the impact on the neighbors. He is reminded of the 5 criteria, though they are not weighted. There is continuing discussion about the 5 standards. They discuss the balancing of the benefit to the applicant and the detriment to the community.

Resolution 2021-13: Approval of Schaeffer Application, 2089 Spring Street, Tax Map # 169.5-2-15, for a rear setback variance for a deck attached to the house, no larger than 12 feet X 48 feet.

Motion: Jeff Schindler, Second: Harvey Kliman

Vote: Harvey Kliman - Aye

Lydia Slater-Aye

John Pumilio- Aye

Jeff Schindler- Aye

Adopted: Yes – Motion is approved.

Resolution 2021-14: Adjourn 9:20 PM.

Motion: Jeff Schindler, Second: Lydia Slater

Vote: Aye - 4

Nay - 0

Adopted: yes