TOWN OF PAWLET, VERMONT
DEVELOPMENT REVIEW BOARD

In re: Variance Application – Lands of Banyai

Applicant:	Daniel Banyai
Property Address:	541 Briar Hill Road, West Pawlet, Vermont
Application Date:	April 1, 2018
Hearing Date:	June 20, 2019

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

INTRODUCTION AND PROCEDURAL HISTORY

This is an order on an application for a variance filed by Daniel S. Banyai on April 1, 2018. Based on the evidence presented at a public hearing held on June 20, 2019, the Development Review Board ("Board" or "DRB") makes the following findings of fact.

Daniel Banyai owns approximately 30 acres of land located at 541 Briar Hill Road in West Pawlet, Vermont, which he acquired in 2013 ("Property" or "Banyai Property"). The Property does not have any direct road frontage, and is accessed by a 30-foot-wide right-of-way. In 2011, the Town amended its Bylaws to require that rights-of-way accessing lots undergoing land development must be at least 50 feet wide. (Bylaws, Article V, § 4).

In late 2017, Mr. Banyai began operating a firearms training facility on the Property under the name Slate Ridge. This was a new use of the Property. Prior to this new use, the Property had been unimproved and vacant. In furtherance of this use, Mr. Banyai erected a 500-square foot structure to service the facility without first acquiring a permit. In addition to the structure, the training facility is comprised of outdoor shooting ranges.

On December 5, 2017, Mr. Banyai filed an application for a zoning permit with the Town. The application was for a permit for a structure and to gain approval for his use of the Property. In this application, Mr. Banyai defined the existing use as "Land" and the proposed new use as "School." Mr. Banyai supplemented his application by email on December 18, 2017. The email contained a sketch with two concentric rectangles, representing the structure and the Property, which included the structure's dimensions.

On January 2, 2018, the Zoning Administrator denied the application. The basis of the denial was that the "ROW [right of way] needs to be 50' (30' ROW)." No timely appeal followed the Zoning Administrator's Decision.

On April 1, 2018, Mr. Banyai submitted a letter to the DRB, which stated "Reference: Zoning Appeal." In the letter, Mr. Banyai described the reason for the ZA's denial of his permit and his goal of operating "a school/training business venture" on the Property. The letter also stated, "I would like to insert [sic] my right(s) to appeal the denial of the zoning permit dated January 2018 . . . due to a pre-existing nonconforming situation."

The DRB held a hearing on April 25, 2018. The hearing warning described the purpose of the hearing as "[t]o discuss the application for a Variance Permit . . ." for the Property. Following a public hearing and a deliberative session, the Board concluded that the 30-foot right-of-way predated the 50-foot requirement in the Bylaws, rendering the Property a preexisting nonconforming lot.

Neighboring property owners appealed the decision to the Environmental Court, and in an Order dated January 4, 2019 ("Order"), the Court found that Mr. Banyai's April 1, 2018 submission was not an appeal, but was an application for a variance, and that because Mr. Banyai did not timely appeal the Zoning Administrator's January 2, 2018 permit denial, his argument that his right-of-way is a preexisting nonconforming use was an impermissible collateral attack on that unappealed determination. (Order, at 7). However, because the Court found that the Board had not addressed the merits of Mr. Banyai's variance application at the April 25, 2018 hearing, the Court vacated the decision and remanded the matter to the DRB to "evaluate the merits of Mr. Banyai's variance application in the first instance." (Order, at 8–9).

FINDINGS OF FACT

Mr. Banyai's variance application seeks relief from the 50-foot minimum right-of-way requirement set forth in Pawlet's Bylaws.

The Town contacted Mr. Banyai by mail in March of 2019, and inquired whether Mr. Banyai would like to supplement his April 1, 2018 variance application with any additional information. Mr. Banyai did not respond to the Town's inquiry. Thus, the Town scheduled a hearing on Mr. Banyai's initial variance application for June 20, 2019, and warned the hearing in the local newspaper. The Town also mailed the warning on May 28, 2019 to Mr. Banyai at his address of 541 Briar Hill Road by first-class and certified mail. 541 Briar Hill Road is the mailing address Mr. Banyai has previously provided to the Town, the Court on his "Information for Self Representation" form file in October 2018, and the Vermont Secretary of State. The Town also mailed the hearing notice by first-class and certified mail to a neighboring property owner, Rebecca Cooper, believed to be in a long-term relationship with Mr. Banyai, as further assurance that Mr. Banyai would receive the notice. By email Mr. Banyai supplied the Town with a photograph of the envelope directed to Rebecca Cooper (n/k/a Rebecca Cooper Banyai) with the name crossed out and a handwritten notation: "No such Persons/Return to Sender/Wrong Address." The Town received back the two mailings directed to Ms. Cooper's address, but not the two that were directed to the 541 Briar Hill Road address. Although effective service by mail had already occurred on May 28, 2019, the Town also arranged for the Town Constable to hand deliver the notice to Mr. Banyai on June 11, 2019.

Mr. Banyai acknowledged receipt of the hand-delivered notice by email to the Zoning Administrator dated June 19, 2019. Mr. Banyai posited that he felt the notice was insufficient, but did not indicate that he was unavailable or otherwise unable to attend the duly warned hearing on his variance application.

The hearing proceeded on June 20, 2019. The Board considered the substance of Mr. Banyai's variance application and the Environmental Court's decision, and heard evidence from various members of the public who attended the duly warned hearing.

CONCLUSIONS

Because the Environmental Court concluded that the preexisting nonconforming use issue was an impermissible collateral attack on the Zoning Administrator's January 2, 2018 permit denial, the matter at hand is limited to addressing Mr. Banyai's request that he be relieved of the 50-foot right-of-way requirement. The analysis is limited to those criteria set forth in 24 V.S.A. § 4469(a), and incorporated in the Town's Bylaws by Article X, § 9, addressed in turn below.

The Board notes that, under the Town's Bylaws, there is no authority for the Board to grant a standalone variance application outside of the context of an appeal. This is apparent from Pawlet's Zoning Bylaws Article IX, Section 9, which states:

> On an appeal, as discussed in Article [IX}, Section 8 of these Bylaws, wherein a variance from the provisions of the Zoning Regulation constitutes the relief requested by the appellant, the Development Review Board may grant such variances, and render a decision in favor of the appellant, if all [the variance criteria are met].

(emphasis added). The Bylaws provide no other basis upon which to grant a variance. Because the January 2, 2018 denial was not timely appealed, and the variance application alone was before the DRB, the Board is without authority to now grant a standalone variance.

Even if the variance application were properly made, Mr. Banyai is not entitled to the variance for which he applied. In order for the Board to grant a variance, the Board would have to find all of the following facts, based on sufficient evidence:

1. That there are unique physical circumstances, including irregularity, narrowness or shallowness of lot size of shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions and not the circumstances generally created by the provisions of the Zoning Regulations in the neighborhood or district in which the property is located.
2. That as a result of such physical problems, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Regulations and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
3. That such unnecessary hardship has not been created by the appellant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, and
5. That such variance, if authorized, represents the minimum that will afford relief, and provide the least modification possible of the Zoning Regulations and of the comprehensive plan.

(Bylaws, Article IX, Section 9). The applicant bears the burden of providing evidence sufficient to support a finding with respect to each of the five criteria. *In re Mutschler, Canning and Wilkins*, 2006 VT 43, ¶ 9. The Vermont Supreme Court states that "[v]ariances have historically been employed as an escape hatch from the literal terms of an ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to

confiscation." *In re Mutschler*, 2006 VT 43, ¶ 7, 180 Vt. 501, 904 A.2d 1067 (quotations omitted) (emphasis added).

(1) Criteria 1:

With respect to the first criteria, Mr. Banyai's variance application stated:

> *The unique physical condition associated with the property which results in unreasonable hardship is that the entire 30' wide by 267 long driveway to access my land is currently developed and is existing and there is no further property to develop to meet the present zoning code elements.*

First, the applicant's assertion in support of a finding on the first criteria amounts to nothing more than a pre-existing nonconforming use defense, which the Environmental Court ruled in its Order to be an impermissible collateral attack on the unappealed January 2, 2018 permit denial.

Second, the size of the driveway right-of-way is not the same as the "unique physical circumstances" enumerated in the Zoning Bylaws and the statute, nor is a driveway right-of-way a condition peculiar to the particular property. *Accord Sorg v. North Hero Zoning Bd. Of Adjustment*, 135 Vt. 423, 425 (1977). The applicant provided no further evidence in support of a finding that with respect to the first criteria.

(2) Criteria 2:

With respect to the second criteria, Mr. Banyai's variance application stated:

> *No reasonable use can be made of my property for two specific and very critical reasons. (1) here is no further property to develop in the current 30 x 267 portion (2) without this variance the ability to access and utilize my property is not possible because the pre-existing non-conforming issue.*

Again, the applicant's assertion in support of a finding on the second criteria presents an impermissible collateral attack on the unappealed January 2, 2018 permit denial in that it presents a pre-existing non-conforming use defense.

Moreover, reasonable use can be made of the Property in conformance with the Zoning Bylaws. There are already existing permits allowing reasonable use of the Property. There is a 2012 Wastewater and Potable Water Supply Permit (WW-1-2370) for a two-bedroom, single-family dwelling; there is a 2012 construction permit for a 24x24x structure, issued to the prior owner but never built; and there is a 2018 construction permit authorizing construction of the same structure that was approved in 2012. Mr. Banyai himself filed the application for this permit, which the Zoning Administrator approved. These permits allow reasonable use of the Property in accordance with the Bylaws, in the absence of a variance. Accordingly, a variance is not necessary to enable the reasonable use of the property.

(3) Criteria 3:

With respect to the third criteria, Mr. Banyai's variance application stated:

> *The hardship on page 1 is not self created because when I purchased the property the 267' x30' driveway was already approved and developed under the current zoning laws and septic, electric, and all building permit was additionally approved for the property.*

Once again, the assertion Mr. Banyai makes in support of a finding on criteria three is an impermissible collateral attack on the unappealed January 2, 2018 permit denial. In addition, any hardship that exists is of Mr. Banyai's creation by not timely appealing the January 2, 2018 denial along with a request for a variance.

(4) Criteria 4:

With respect to the fourth criteria, Mr. Banyai's variance application stated:

> *This request will not alter or impair the essential character of the neighborhood because the approved 267' 30' driveway access of my property will remain in its present state. It has been the same for over 10 plus years threw [sic] several transfers of ownership.*

Mr. Banyai's submission in support of criteria 4 states simply that the property will "remain in its present state." Were that actually the case, then it would be unnecessary for Mr. Banyai to seek a variance. Without reviewing the underlying proposed use, as to which Mr. Banyai presented no evidence in connection with the variance application, the Board would not be able to reach a finding as to what the ultimate impact of the variance would be.

The proposed new use itself—as a firearms training facility—was already denied in the Zoning Administrator's unappealed January 2, 2018 permit denial. However, neighboring property owners who attended the hearing provided evidence that established that the unpermitted use is ongoing.

With respect to the use, the neighbors described a significant change in the character of the neighborhood, including: constant gunshot noise intruding on a sense of well-being; increased safety and security concerns; a reduced feeling of safety with respect to children and family pets (in particular dogs and horses); the destruction of past businesses (rental property and a horse farm); property value concerns; the loss of use of some adjacent areas of property for recreational purposes; and a tremendous increase in traffic in an otherwise quiet area.

Assuming that the purpose of the proposed variance is to allow Mr. Banyai to operate a firearms training facility, there can be no doubt that such use would alter the essential character of the neighborhood, and would substantially and permanently impair appropriate use and development of neighboring property—and in fact it already has done so.

(5) Criteria 5:

With respect to the fifth criteria, Mr. Banyai's variance application stated:

> *This variance request is the minimum necessary to allow reasonable use of the property because the variance would preserve the existing essential character of the neighborhood. The property is landlocked and any further changes would disrupt the [illegible] and character of the neighbor's land. Approval would allow my full utilization of my property without excessive disruption and integrity.*

Vermont courts have consistently held that "variances justified in terms of personal convenience or maximizing the profitable use of the property were not the minimum necessary for relief." *In re Mutschler, Canning and Wilkin*, 2006 VT 43, ¶ 11. The substance of Mr. Banyai's submission seems to falls within this vein, however Mr. Banyai has not provided evidence sufficient for the Board to make a finding in his favor with respect to this criteria.

ORDER

The Pawlet Zoning Bylaws do not authorize submission of a standalone application for a variance. Based on the evidence presented in this proceeding to date, Mr. Banyai has not established that he satisfies any of the five criteria for a variance under either the Pawlet Zoning Bylaws or 24 V.S.A. § 4469(a). The application for a variance for 541 Briar Hill Road is hereby **DENIED.**

July 11, 2019

Approved by the Development Review Board:

(CHAIR)

NOTICE: This Decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceedings before the Board. Such appeal must be taken within 30 days of the date of this Decision, pursuant to 24 V.S.A § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.