

**TOWN OF SWEDEN**  
**Zoning Board of Appeals**  
**Minutes – December 17, 2020**

A meeting of the Zoning Board of Appeals of the Town of Sweden was held at the Sweden Courtroom, 18 State Street, Brockport, New York on December 17, 2020, commencing at 6 p.m.

Members present: Robert Carges; Kevin M. Johnson; Pauline Johnson (via conference call from home); Mark Sealy; Mary Ann Thorpe.

Absent: Nat O. Lester, III, ZBA Counsel – Excused.

Also present: Brent Bassi and Kathleen Spath; Keith O'Toole, Esq.; Brian Henner and Kristi Molisani; Orson Steele; Scott Arend.

Chairperson Thorpe called the meeting to order at 6 p.m. and asked everyone to say the Pledge of Allegiance. Mr. Kevin Johnson asked for a moment of silence for our first responders. Thank you!

Correspondence was passed to Members for review.

Application of Brian Henner, 30 Swamp Road, Brockport, New York, for an area variance of 35 ft. to construct a single-family home on approximately 70.63 acres, located southwest of the abandoned Redman Road by way of a 25 ft. wide and 200 ft. long access easement where 60 ft. of R.O.W. to a dedicated road is required. *Town of Sweden Ordinance §175-36 R1-2 One-Family Residential Districts. D. Lot and area requirements shall be as follows:* (1) Specific requirements. (a) Minimum lot size. [4] Road frontage: 60 ft. The property is owned by Scott T. Arend, tax account number 113.04-1-5.8.

**Redman Road (Abandoned)/Easement – Henner/Arend**

Chairperson Thorpe asked for comment regarding this application.

Keith O'Toole, O'Toole Law Firm, Rochester, NY – I represent the property owner, Scott Arend. Submitted is a letter dated December 17 of this year regarding our argument, which I would like to breeze through. I apologize for submitting it at this late moment, but it was a work just put together. As the letter states, there is approximately 70.63 acres, vacant land, subject to a contract of sale. For the sale to close, this variance is needed.

The variance is based on your zoning code. The Building Inspector looked at the land and the points of access from the land to the public highway. There is a history here about that. Back in 1980, Exhibit F, attached to my letter, the Sweden Town Board abandoned the southern portion of Redman Road. Redman Road still exists, but it used to be longer in terms of a public road. The southern portion was abandoned presumably due to low traffic, which is usually the reason.

It raises the question, what happens to all the property owners whose properties abut Redman Road, and if that was your only point of access to get into your land and get out of it on a public highway. Well, there is, implied in most cases, an easement over Redman Road, but most people do not want to hear that so at the time, the owner of this property, Regent Properties, imposed a 25 ft. wide and 200 ft. long easement, and put it in a deed, Exhibit D, attached to my letter. That easement, which

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you can see on the Maier map that is laid out on the table, is an access way that runs along the east side of the abandoned roadbed starting at the southern end of the public Redman Road and continues down 200 ft. and runs in front of the Arend property. That is the way in and the way out along the abandoned roadbed. That 25 ft. wide by 200 ft. long strip means my client can access his land all the way up to the public road and do so in a car or a truck.

The property is zoned R1-2 and the Building Inspector looked at the code and the standards. One of the standards is that the property must have frontage. Frontage is where private property meets a public road. Not the only way to do it, but the code states there must be 60 ft. of contact. This property does not have any contact anymore. Before the Town abandoned the southerly portion of Redman Road, there was 1,563 ft. of frontage, and now it has zip. The easement is there and allows access. There is a provision of State Town Law that if you do not have road frontage, you can apply for an area variance from the Zoning Board of Appeals. So here we are, and we are arguing that we do not need the frontage because we have the easement.

The easement is 25 ft. wide and is wider than the pavement section of the Town road. Per the Town Engineer, the pavement section of the Town road is 22 ft., and we have 25 ft. The whole 25 ft. does not have to be paved to build a house or two on this land, but certainly there is plenty of access. You do not need 60 ft. which is one of those rules of thumb which is nice. Sixty feet is wide enough where you can build an entire Town road, the road, the gutters, there is plenty of room, but you do not need that on this piece of land. If you look at the zoning standards, the lot size for a single-family house is 80,000 sq. ft., and if you do the math, you can build roughly 38 houses, max buildout.

Our contract to sell the property, which requires this easement, and is my understanding that the buyer will not build 38 houses, but a house. We are asking that you do not impose that as a condition as the area variance is just for the access. If the deal falls apart for any reason, we want to have a Plan B so it can be sold to the next person. In truth, it should not matter because the real issue is if there is sufficient access to access the land. There is a roadbed as it was built as a public road, and 25 ft. is big enough. One can build many private developments, condos, homeowner's association, and private roads which all work very well.

Just to review the standards for area variances:

The benefit sought by the applicant.

My client gets to sell his land. We are in the middle of a pandemic, and my client would like to raise money, which would be a great thing to sell the land. Without this variance, the deal falls apart. Even if there was another buyer, the next buyer would look at this issue and say the land is undevelopable, it is no good except for hunting maybe or planting. Its highest and best use per Sweden zoning code is single family housing. The zoning code also permits the construction of churches, not high in demand, but people would normally want to build houses on this land, R1-2, residential zoning. If it were not for this Redman Road abandonment, my client would not even be having this conversation.

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Statutory Factors:

Will the granting of this variance produce an undesirable change in the character of the neighborhood?

Again, the land is R1-2, and we are not changing the zoning or type of development. It is just how do we connect the land to the public R.O.W.

Is there a substantial detriment created to nearby properties?

Again, no. The Spath property was developed and approved by the Town Planning Board. The Planning Board saw this issue on the Spath map, Exhibit C attached to the letter. On the lower left-hand corner, you can see the abandoned R.O.W. meets the terminus of the public R.O.W. The easement, highlighted in yellow, runs right along what is now the Spath Subdivision. In regards that it was a farm road, the attached deeds, Spath and my client's deeds, Exhibit D and B respectively, there is no restriction to the R.O.W., it is just a R.O.W. for ingress/egress. So, there is no substantial detriment.

Is the area variance substantial?

No, it allows the public drive to be put into place. It is what it is, it is already there. This is a technical interpretation of the zoning code. The zoning code has a rule of 60 ft. as a rule of thumb, but if you look at this property, 25 ft. is wide enough to make it developable as it states in the zoning code.

Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood?

No, in fact, the width of the easement at 25 ft. is not far off the width of a Town pavement section. If the private driveway is built on the existing easement or roadbed then nothing changes.

Is the alleged difficulty self-created?

No, the Town of Sweden elected to abandon the southern portion of Redman Road. A Town decision that impacts my client, Arend, and all the other property owners along the road including past, present, and future. If this variance is approved, while more challenging, will still allow my client to develop his land.

Is the variance the minimum necessary?

Yes, it is. No change is requested, my client is stuck with what we have per the attached Spath deed. The easement is set at 25 ft. wide and is shown on the Maier survey, Exhibit A. It is what it is. The easement is located on the abandoned roadbed; and is the only point of connection for my client's property. The only frontage is on the abandoned roadbed.

We support this easement and would ask that the variance be granted without any limitations on the number of houses that can be built. I would be happy to answer any questions.

Mr. Sealy clarified that the application in front of him is for a variance to build one single-family home not 38 homes. The Clerk explained correct, and that 60 ft. of road frontage is required.

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Attorney O'Toole - The variance is not for 1 or 38 homes as it is the intention of the buyer. The variance is for the required 60 ft. of road frontage to a public road, which is the issue. If the variance is not granted, no houses can be built.

Mrs. Pauline Johnson (via telephone) asked to identify who asked the question. The Clerk stated Mr. Sealy. Mrs. Johnson asked if Mr. Arend was able to purchase land from the Spaths.

Attorney O'Toole - No contact with the Spaths in that regard has been done.

Mrs. Pauline Johnson (via telephone) asked the Clerk if there was anyone present at the meeting or that called with an opinion on the proposed variance application. The Clerk responded yes, there were several calls from the two neighbors who are both here tonight.

Chairperson Thorpe stated in the submitted material, Opposition to Conditions, it reads that you are requesting the Board not to impose any condition on the number of houses and allow the lot sizes and your planning review process to determine how many homes can be built.

Attorney O'Toole - Yes, the zoning code is what it is.

Mr. Sealy added that when the Board considers the character of the neighborhood, there is a big difference in building one house and many, right?

Attorney O'Toole - That is correct, but why does the zoning code permit more houses. If you look at Exhibit E, Town of Sweden Zoning Map, it shows that the property is surrounded by identically zoned property. There are a few exceptions, but most of the southern portion of Sweden is R1-2 zoning. The minimum acreage for that zoning is 80,000 sq. ft. or roughly 38 houses. This is highly unlikely though with stormwater measures and if there are wetlands on the property. Even if 38 houses could be built, it would be a low-density development consistent with the zoning and the comprehensive plan. This is an odd way of connecting, but not the only way it is done. The beauty of leaving frontage is it leaves you access to have a road and room for utility connections.

Attorney O'Toole gave an example of how a private drive is done in Ogden with a required 16 ft.

Mr. Carges noted that looking at the zoning map, there are a lot of lots divided up south of the property down Reed Road.

The Board thanked Attorney O'Toole and invited the next person from the public to speak.

Brent Bassi, 6580 Redman Road – My wife is Kathleen Spath. I own the property that the R.O.W. goes across.

Chairperson Thorpe clarified that the property is on the same side as the R.O.W.

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Mr. Bassi - Correct, the R.O.W. is across our property, Spath property. I would like to introduce some information into the record. Here is an information packet for each of you. I will try to be brief.

Unfortunately, due to the short notice of this meeting, my attorney, Mr. Roach, was not able to be here tonight. Mr. Roach did have some requests for me to ask the Board.

1. To leave the public hearing open in case he has some other things to add at some point. We did not get the notice in the mail until yesterday. It was sent out on the 10<sup>th</sup>, but we did not receive it until last night.
2. Because the decision of this Board will affect our property, we ask that we are made aware of the final decision by mail. We would appreciate it.

The last page is a satellite photo of the property in question. The red lines are the property lines as outlined by Monroe County GIS. At the top inside the “goal” is the end of Redman Road. If you follow the centerline down to where it goes to the right that is the corner stake in question. The property to the south of the horizontal line is Mr. Arend’s property, and the property to the north is ours. The R.O.W. runs from the vertical line, 25 ft. Mr. Arend’s property is over 150 ft. from the legal end of Redman Road.

To counter a couple of points stated by Mr. O’Toole, the Town did not abandon Redman Road in the 1980s. Mr. Sealy had stated the same.

Mr. Sealy confirmed that it was abandoned in 1980. The Clerk stated it was May 14, 1980.

Mr. Bassi - My point is that when Kathleen Spath and her husband at the time bought this property, it was one of three lots available. The other two lots were purchased by Arend’s father after Ms. Spath bought her property with the full understanding that he only had a R.O.W. to cross to get to his property. The Arends were fully aware that the Town had abandoned the road and they bought the property anyway.

Mr. Henner and Mr. Arend are asking the Board to approve an action on our property. We are paying the taxes on the R.O.W. and never, ever told them they cannot use the R.O.W., we never tried to block their access, but that is not an old roadbed. It is an old roadbed, but anyone that goes off that roadbed is going to wreck their vehicle, which has happened multiple times. In September, a kid just went off the end of the road and flipped his car, destroying the car, not sure how he did not get killed. It is not an old roadbed as you would think of an old roadbed. Basically, it is for tractor access, which is all it has been for since 1980.

Page 3 is a letter that my attorney sent to Scott Arend back in August of 2019. This is a position letter in terms of the R.O.W. Mr. Roach outlines some legal precedent in the letter that the R.O.W. has only been used for an agricultural access for the past 40 years. There has never been a house on the property which was bought knowing that they did not have road frontage.

I hope that you will read through the packet because I am not the best public speaker. The biggest issue we have right now is with the way the Town of Sweden maintains the road and clears the snow. The Town pushes the snow beyond the legal end of Redman Road with our blessing. The

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trucks come down and push snow onto the R.O.W. and turnaround, and back into our driveway to turn around and clear the other lane. There is no cul-de-sac at the end of Redman Road, there is no designated turnaround, but we have always graciously allowed the Town, school buses, and garbage trucks to use our driveway to turnaround or push snow back up or go past. If the Board allows them to put a driveway in that changes the dynamic. Our neighbor, Mr. Steele, who is present tonight, has expressed to us that he does not want the Town to push all the snow on his property which becomes a serious issue for Town vehicles, school buses, garbage trucks.

Anyone that wants to turn around at the end of Redman Road with a driveway there will have a problem as to where to put the snow. The Town is not going to come down daily with a front loader to remove snow. It is also an issue for fire, EMS or other vehicles that need to get down the road. That is one of the biggest issues for us. We want to keep the property as it is. We are not telling Mr. Arend or whoever buys the property you cannot access it, but we do not want to change the character of our property, we do not want the area paved or turned into a permanent driveway.

We are opposed to the granting of this variance across the property.

Chairperson Thorpe acknowledged that the Board has a lot of information to read.

Mr. Bassi – Are there any questions?

Mrs. Pauline Johnson (via the phone) asked if he said he just got the notice last night.

Mr. Bassi - Yes, it was postmarked the 10<sup>th</sup> the same as the neighbors, but the postal service did not deliver the mail until last night. Because of this, my attorney already had obligations he could not get out of.

Chairperson Thorpe thanked Mr. Bassi as there were no further questions.

Orson Steele, 6615 Redman Road – I live across the street from Brent and Kathy.

Mr. Sealy confirmed with Mr. Steele that his property is across the street from both the Spath property and Arend property.

Mr. Steele – I feel that if they do not have access to the road, they should not be building a house there; it does not make sense. Scott should be able to sell the property.

Attorney O'Toole - Mr. Bassi is indicating that the easement runs on his property and it does not. Exhibit C, which is an excerpt from the Spath Subdivision map. In the lower left-hand corner, the easement, 25 ft. wide, runs just on top of the old public R.O.W. which used to be the southerly section of Redman Road, not on top of the Spath Subdivision. The comment, that we do not want to see the Arend property used for houses which is an interesting comment because the Spath property was approved for a house through subdivision approval. Exhibit C shows the footprint of a proposed house, septic system, etc. One might ask why is it that my client cannot have land to use for houses, after all it is zoned for it. Plus, Mr. Arend's parents have been paying taxes on this land

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for some 40 years only to be told now they cannot build on their own land. They paid the freight, they bore the burden, there should be no reason they cannot go forward and build houses themselves or sell to someone who wants to build a house and extract some of the value from that land and get back some of the money they have graciously provided to the Town, County, and school district. Regarding the farming issue, referring to who bought what when. Attached to my letter is a copy of the Spath deed which states clearly the Spaths bought the property subject to the R.O.W., 25 ft. wide and 200 ft. long. There is nothing in there about farming, there is no limitation, no restriction. Whether my client decides to drive his car, SUV, ATV, or farming vehicle, it is up to him because the easement is not restrictive in any way. He has an easement for ingress and egress to and from Redman Road as it presently exists across the former roadbed of abandoned Redman Road.

The Spath deed is telling us exactly where it is. It is across the former roadbed; it is not on the Spath property. We are not encroaching on the Spath property, but do not trust me as there is before you a signed, sealed survey map from Richard Maier showing the easement located on the former Redman Road. It is confusing as you have the Redman Road that is public and the Redman Road that is private. The easement is on top of the former Redman Road roadbed. The survey map is brand new, dated December 15.

Please keep in mind that we are trying to make a real estate deal and people do not wait forever. We would respectfully urge you to make a decision this evening if you could, my client really needs the money. Thank you.

Chairperson Thorpe stated she can understand your client's position, but we have a lot of material to read. I am not saying we are not going to decide tonight as it is possible. She also asked Mrs. Pauline Johnson (via telephone) if she had any additional questions. Mrs. Johnson would like the opportunity to review the information submitted tonight by the attorney and neighbor. Possibly the Clerk could scan me the information or Mr. Kevin Johnson could drop off the information to my house.

Chairperson Thorpe made a recommendation to adjourn the meeting and reconvene when we have all reviewed the information. The ZBA, after a meeting, has 62 days to decide. She is not saying that is how long it will be, but she would like to have time to go over the material submitted. Mr. Kevin Johnson agreed and maybe run some things by Counsel. Mr. Sealy agreed due to conflicting points stated tonight that it would be nice to run by Counsel. For example, who owns the R.O.W. which the survey map shows abutting up to the Spath property line.

Mr. Bassi - Last year, the Town Highway Department and Town Counsel attempted to buy an extension of the Town's R.O.W., which you can bring this up with the Highway Superintendent and Town Counsel. An attempt was made to purchase an extension to the R.O.W. from us and we turned them down. They sent us a legal letter asking us to sell the Town the R.O.W. for one dollar and we refused as did Mr. Steele.

This is not the first time the Town has come to us to buy an extension to the R.O.W.

Mr. Carges – I was on the Town Board for 24 years and do not remember that happening.

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Mrs. Kathleen Spath - It was about 30 years ago.

Mr. Bassi - I could probably find the original letter from Mr. Bell. I believe Mr. Bell is the Town Attorney. They sent us a legal contract asking us to sell them an extension to the R.O.W. just beyond the end of our driveway. So, if that is not my R.O.W., why would the Town come to me and ask me to sell them a R.O.W. for one dollar.

Attorney O'Toole's point regarding the development of the Spath parcel or subdivision. We were able to do that because the property is 600 ft. wide with 400 ft. of it on Redman Road, the public piece of Redman Road. So, there was plenty of frontage when my wife, Mrs. Spath, built that house in 1985. So, you can talk to the Town Attorney, as it is a public record. I am sure we could come up with the proposed contract they sent us. Again, they did ask us last year to sell them an extension to the R.O.W. for one dollar which we refused at that time. So, if we are not paying taxes on it, why would the Town come to us and ask us to sell it to them; not once but twice within a 30-year period.

Chairperson Thorpe stated thank you and that is another reason why she would like to adjourn the meeting. Mr. Carges stated we need more information, but if we could make an effort to meet before the end of the calendar year it would be nice. We would not want to take a month to decide. Chairperson Thorpe stated that is not what she is saying to take a whole month, but we have a lot of material and need Counsel to make the best decision that we can. The Board agreed they could not do that tonight. Mr. Sealy stated we need to review the information and have Counsel help us with some of the points brought up.

Mrs. Pauline Johnson (via telephone) would like to adjourn to review the information presented by the attorney and Spath residences, and needs clarification on what was just conveyed about the Town wanting to purchase additional land, the 25 ft. or is it beyond the 25 ft.

Mr. Bassi - I do not remember how much land off hand, just that they were looking to buy additional land from us. Mr. Bell can clarify.

Attorney O'Toole - First, my client is asking for a variance for a point of connection by way of an easement, not by frontage. We are not asking the Board to approve a road, an easement or housing whatsoever. The only thing we are asking you to do is to allow that connection there where it connects 25 ft. That is all! It really does not matter who owns the land or anything else. We do have an easement, I have shown it to you in their deed, they knew about it. How could they not, it is on their subdivision map. That aside if you are key on adjourning this meeting, I would ask that you make a motion and adopt it to close the public hearing. My client moved heaven and earth and he hired me and paid a good buck to get me to be here and I dropped everything so I could be here, and we need to get this wrapped up. If you keep the public hearing open, then we just keep going and going so that more people come up, more stuff is entered, arguing it to death. My client really needs a decision on this, he is counting on this deal closing. He really, really needs the money.

Chairperson Thorpe stated she understands, but on the other side, we need to know exactly what we are doing. It may be one or two days, but not 62 days.

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Attorney O'Toole - I agree, I just want the public hearing closed, not your consideration of the project, just the public hearing portion of it where the public can keep adding more and more stuff to the record and dragging it on.

Mr. Sealy asked would that prevent anything submitted from the attorney that Mr. Bassi mentioned about the Town wanting to purchase land. Would that be prevented from being entered if we close the public portion of the meeting? So basically, you do not want any more information coming in, just review the material, and have our attorney review it and make a decision.

Attorney O'Toole - Your attorney can advise you at any time. He can read any public records at his leisure regarding ownership or non-ownership of that easement area. Again, I have yet to hear why ownership of that land changes whether a variance is appropriate. Mr. Spath complains about it, but he does not seem to tell us why it harms him. My client has the right to use this easement today even by his own argument it can be used for farm vehicles. If we can use it for farm vehicles, then we can use it. So, why is it different if we use a car instead of a tractor? All that aside, we need to wrap this up. If you close the public hearing, you then have two months to make a decision. I am hoping you do not take two months, but you have time to decide and time to hear back from your Town attorney. Thank you.

Mr. Bassi – I would be opposed to closing the public hearing if it meant that the purchase offer for the R.O.W. from the Town of Sweden and Mr. Bell was not allowed to be offered up as consideration in deciding on this variance.

Attorney O'Toole - I would not object to Mr. Bassi submitting that one item if that is all he is talking about. That is the only issue here because if it is the only issue, it is part of Town records anyway. It is in your Town Clerk's hands.

Moved by Mr. Carges, seconded by Mr. Sealy, that the public hearing be closed.

**Vote:**      Chairperson Mary Ann Thorpe - Aye  
                  Member Kevin M. Johnson – Aye  
                  Member Pauline Johnson – Aye  
                  Member Mark Sealy – Aye  
                  Member Robert Carges – Aye

Chairperson Thorpe thanked everyone. The Board will review the material and notify those in attendance when a final decision has been made.

Moved by Mrs. Pauline Johnson, seconded by Mr. Kevin M. Johnson, to approve the minutes of August 13, 2020.

**Vote:**      Chairperson Mary Ann Thorpe - Aye  
                  Member Kevin M. Johnson – Aye  
                  Member Pauline Johnson – Aye  
                  Member Mark Sealy – Abstain  
                  Member Robert Carges – Abstain

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Chairperson Thorpe reviewed the correspondence folder containing copies of past decision letters and a legal notice for the ZBA's 2021 meeting/workshop schedule to be printed in the Westside News.

Chairperson Thorpe asked if there is anything else to discuss. There was not.

Moved by Chairperson Thorpe, seconded by Mr. Carges, to adjourn the meeting.

**Vote:**      Chairperson Mary Ann Thorpe - Aye  
                  Member Kevin M. Johnson – Aye  
                  Member Pauline Johnson – Aye  
                  Member Mark Sealy – Aye  
                  Member Robert Carges – Aye

Respectfully submitted,  
Phyllis Brudz  
Zoning Board of Appeals Clerk