

**Town of Hamburg
Board of Zoning Appeals
Meeting - March 23, 2010**

The Town of Hamburg Zoning Board met for a regular meeting on Tuesday March 23, 2010 at 7:00 p.m. in Court Room to discuss the following applications. Those attending included:

Chairman Vincent Gugliuzza
Vice-Chairman Brad Rybczynski
Secretary Jack Rahill **Excused**
Commissioner Shawn Connolly
Commissioner Paul Eustace **Excused**
Commissioner Chuck Morlock
Commissioner Jim Sortisio
Attorney Joseph Shaw
Building Inspector Roger Gibson **Excused**
Recording Secretary Laurie Wutz

Vice-Chairman Brad Rybczynski read the following Legal Notice of Public Hearing:

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Application # 5276 - Benderson Development for a set back variance for the proposed Walgreens off-street parking at 6199 South Park Avenue. Violates 280-229 B (2) - code requires 10', actual 2', variance required 8'.

Attorney for Benderson Development, James Boglioli, thanked the Board for having a special meeting. He reviewed the history of the project explaining the requirements for the dual municipalities. The Town Zoning Board of Appeals granted the required variances in November of 2009, and on March 1, 2010 construction started.

On March 9, 2010 New York Electric and Gas (NYSEG) submitted a letter to the Town, Village, and Benderson outlining their position on the 10' setback requirement for utility poles, which run in front of the proposed Walgreens site. The utility line can not be relocated, as originally thought. On March 11, 2010 Benderson and NYSEG met with Kurt Allen, the Building Inspector for the Town and Village. He advised shifting the building 8' to the west, reducing the green space from 10' to 2', one parking space was moved to the other side. There are no other changes to the site (maps attached).

Mr. Boglioli referred to the balancing test used by the Town to weigh the benefit to the applicant against the detriment to the community (letter to Zoning Board referencing the balancing test attached) He stated that there is a big benefit to the applicant, since they are in the middle of construction. If the foundation is not in by April 15, 2010 they face significant penalties, as well as their contract with Walgreens being in jeopardy.

There is no detriment to the community since the project has already been approved. The green space being lost is on the Walgreens side of the 6' high fence, it is not visible to the adjoining neighbors. The changes being made have been reviewed with the neighboring property owner (Mr. & Mrs. Boardway, 4181 Walker Place), and they are okay with the change. The pine trees have been removed at Mr. Boardway's request.

Mr. Boglioli further stated that according to court case *Matter of Easy Home Program v. Trotta*, 276 A.D. 2d 553 (2d Dept. 2000), that the fact that a variance may seem substantial on paper does not justify the denial of an application if there is no demonstrated harm to the community (Page 3 of attached letter).

The project will not have an adverse effect on the environment, it has already been subject to an environmental review conducted by the Planning Board which resulted in a negative declaration.

Mr. Boglioli concluded by stating that the hardship is not self created, NYSEG is unable to move the utility lines as originally thought.

Mr. Connolly asked Mr. Boglioli if their contract with Walgreens didn't have some clause which would take into account any unforeseen delays. Mr. Boglioli stated nothing that would cover this type of delay.

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Mr. Gugliuzza questioned Mr. Boglioli about any drainage problems or any others issues the Boardway's might have in the future. Mr. Boglioli stated that the changes have been reviewed with the Boardways, and that they signed off on them and that they were okay with the changes. Benderson did agree that in the future if the Boardways were to have any problems they would be addressed, they also agreed to send an arborist over to trim their trees. Mr. Gugliuzza stated that he did not want the Boardways to be left hanging. Mr Boglioli assured the Board they would not leave the Boardways hanging.

Mr. Rybczynski asked what would happen if the variance was not approved. Mr. Boglioli stated they would lose Walgreens, the site would then be covered with gravel and left in that form.

Rachael Buchanan from NYSEG was present to explain that they have no place to relocate the lines. The transmission line in question is a main feeder, it goes from one end of Hamburg to the other, moving the lines even if they could, would be cost prohibitive. They could not get the proper easements, or highway permits, there is literally no place to move the lines to.

Several residents were present to express concerns about drainage problems, parking concerns, dissatisfaction with the project, and store hours. Mr. Gugliuzza, Mr. Rybczynski and the Town legal counsel informed the residents that the Board can only address the issue before them, which is a front yard setback variance.

No other Board members or residents had any questions regarding the requested variance.

Findings: Mr. Rybczynski reviewed the area variance balancing test, stating that the applicant has made testimony to the size and scope of the plans, the footprint for this building is the smallest one available. That leaves no room to scale back the building. The applicant also stated that they would face penalties if the foundation was not poured by 4/15/10.

The applicant also stated that the footprint stays the same, there is a reduction in green space, and one parking space will be moved. The affected neighbor was consulted, they had no issue with the change, and were happy work will be done in his yard. No undesirable change to the neighborhood

Mr. Connolly stated it is important to note, that in his opinion, that the change would have a significant undesirable change. A 10' buffer would be pretty tight, but a 2' buffer is extremely tight in his opinion. Mr. Connolly wanted to remind everyone that their job was to look at the entire area, the entire community, and not only the resident who live there currently, but how it may effect all future homeowners.

Mr. Rybczynski continued with the balancing test, stating that the applicant argued that on paper it seems to be a substantial request, but considering the footprint stay as it is, there is not a substantial impact. Also, considering that there is a zero line setback in the Village, a 40' setback in the Town, testimony was not offered by anyone in the audience as to whether it is substantial or not.

The fourth criteria, whether effect will have adverse environmental effects; the applicant gave testimony that the property is commercial zoned, this would be the lest impact for this parcel of land, SEQR report has been completed, Planning issued a negative declaration, have Engineering approval, all

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allowing the project to move forward.

Mr. Connolly stated that the negative declaration was issued for the original plan, it is inaccurate to use the negative declaration on the changed site plan. In his opinion it is a significant change and it should be reviewed by the Planning Board to determine if it is still applicable. They gave a negative declaration on something that is totally different.

Mr. Rybczynski stated that it was noted, and it could made an amendment to the approval, to bring notice to the Planning Board.

Mr. Rybczynski stated that in all his years on the Zoning Board of Appeals, he had not seen an alleged difficulty that was not in some way, shape or form self-created. In and of itself, if the difficulty is self-created does not carry enough weight. In this case, with all due respect to NYSEG, it was NYSEG's fault. The applicant was under the understanding that it wouldn't be a problem, and at this point it is. This closely fits as not being self-created, as he sees it.

Mr. Gugliuzza stated the Board has weighed the balancing test based on the applicant and the homeowner that is directly affected by the project. Speaking with the homeowner (Mr. Boardway) he had no objection to the changes.

Mr. Morlock read from the following case law with regards to Mr. Connolly's concern:

In the instant case, the zoning board had found on three prior occasions that the requested variance would not produce an undesirable change in the character of the neighborhood, nor would it be a significant detriment to nearby properties. Further, the board had determined that the requested variance was not substantial, that the benefit sought could not be achieved by other methods and that it would not produce an undesirable or adverse effect on the neighborhood. Therefore, the zoning board's action in subsequently denying the application on the same facts without explanation lacked a rational basis and was arbitrary and capricious. *Bassano v. Town of Carmel Zoning of Appeals*, 2008 WL 4936831 (N.Y.A.D. 2 Dept. 11/18/2008).

The appellate court upheld the trial court's determination, noting that administrative agencies must either adhere to their own prior precedent or indicate reasons for reaching a different result on essentially the same facts. The Court said, "*Where, as here, a zoning board is faced with an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result.*" The trial court found that the zoning board's reasons differentiating the current matter from a 1991 variance denial for essentially the same thing did not support a determination that there was a material change in circumstances to justify a different result. *Lucas v. Board of Appeals of Village of Mamaroneck*, 2008 WL 5263692 (N.Y.A.D. 2 Dept. 12/16/2008).

Mr. Morlock made a MOTION to approve Application #5276 for an 8' setback variance at 6199 South Park Avenue. Mr. Sortisio seconded.

Mr. Connolly on the question, requested the Board to amend the motion to submit to the Planning Board first, that they consider the impact on drainage, as in other projects when the amount of

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green space is reduced it could have a negative impact on drainage if we grant this variance. As a condition of Mr. Connolly granting this variance that would have to be one of the conditions.

Mr. Rybczynski asked legal counsel if the Board can make a requirement of the Planning Board as part of their approval. Legal counsel stated that the Board can request the drainage to be looked at. Mr. Quinlivan stated they could make it a condition of the granting of the variance that the drainage can not have a negative effect on the neighbors.

Mr. Rybczynski made a MOTION to amend the motion on the floor to add the condition that the variance be dependent on a further review of the impact this change will have drainage issues if needed.

Mr. Connolly requested another stipulation, notifying neighbors of Planning Board meeting regarding change to neighborhood. Mr. Quinlivan stated that the Planning Board publishes their meeting, Mr. Shaw stated it would be inappropriate to require the Planning Board to notify neighbors. Mr. Connolly withdrew his second amendment.

A roll call vote was taken to amend the motion was taken:

Mr. Rybczynski - yes

Mr. Morlock - no

Mr. Sortisio - yes

Mr. Connolly - yes

Mr. Gugluizza - no

Amendment **DENIED**

A roll call vote was taken to approve Application #5276 for an 8' parking setback variance at 6199 South Park Avenue:

Mr. Rybczynski - yes

Mr. Morlock - yes

Mr. Sortisio - yes

Mr. Connolly - no

Mr. Gugluizza - yes

GRANTED

MOTION to ADJOURN was made by Mr. Gugluizza, seconded by Mr. Rybczynski. Motion carried. The meeting adjourned at 8:15 pm. The next Zoning Board of Appeals meeting will be held April 6, 2010.

Respectfully Submitted,

Jack Rahill, Secretary
Board of Zoning Appeals

Date: 3/31/10