

Town of Hamburg
Board of Zoning Appeals Meeting
January 4, 2011
Minutes

The Town of Hamburg Board of Zoning Appeals met for a regular meeting on Tuesday, January 4, 2011 at 7:00 P.M. in Room 7B of Hamburg Town Hall, 6100 South Park Avenue. Those attending included Chairman Brad Rybczynski, Commissioner Shawn Connolly, Commissioner Paul Eustace and Commissioner Chuck Morlock.

Others in attendance included Attorney Joseph Shaw, Attorney Timothy Quinlivan, Supervising Code Enforcement Official Kurt Allen and Planning Consultant Sarah desJardins.

Excused: Jack Rahill, Jim Sortisio

Mr. Allen read the Legal Notice of Public Hearing.

Tabled Application #5305 – Jeffrey & Pamela Murray for a use variance to allow for a caretaker's residence at 2989 South Creek Road. (Violates Section 280-24 B(4) – not an allowable use).

Attorney Jay Pohlman, representing the applicants, stated that the Murrays own approximately 100 acres that include approximately 35 acres of plowed land, as well as many gardens. He further stated that they would like to employ a full-time caretaker to live on the property in an existing building. He noted that they propose to build a loft in the upstairs one-fourth quadrant of the barn in the back of the property and put a small (20' X 40') residence in there that would house their permanent caretaker.

Attorney Pohlman stated that the only neighbors who can see the home are Mr. and Mrs. Kurt Allen, who have signed a letter indicating that they are in full agreement with the proposal provided that the Murrays keep the entrance and deck off the sight line from the Allen's property and that the Murrays put a living buffer of trees and bushes in that would help with the aesthetics of the barn from the Allen's property.

Attorney Pohlman submitted drawings from the Murray's architect to Board members showing the layout of the proposed loft.

Mr. Connolly stated that he did an on-site inspection of the property, spoke to the Murrays and received a tour of the property. He further stated that because the proposed loft residence would be within the building, it would not be visible from the outside.

Chairman Rybczynski read the use variance criteria:

1. Cannot realize a reasonable return – substantial as shown by competent financial evidence.

- Attorney Pohlman stated that the cost of bringing people in privately for security, lawn cutting, gardening, plowing, etc. would be approximately twice as much as the cost for hiring one permanent caretaker to do all of these jobs.
2. Alleged hardship is unique and does not apply to substantial portion of district or neighborhood - the property is really not in a neighborhood per se.
 3. Requested variance will not alter the essential character of the neighborhood.
 4. Alleged hardship has not been self-created.

Mr. George Laub, Berkeley Square resident, stated that Mr. Murray seems like the type of resident Hamburg should be pleased to have and that he hoped the Board would consider giving Mr. Murray what appears to be a reasonable request for a variance.

Mr. Connolly stated that when he spoke to Mr. Murray he asked him if he would ever consider renting the loft residence if the caretaker situation were to change. He further noted that Mr. Murray indicated that he would not do so. Attorney Pohlman stated that he can assure the Board that there would not ever be a situation where the loft is used as a rental.

Findings: Mr. Connolly read through the use variance criteria:

1. Cannot realize a reasonable return, provided it is substantial as shown by competent financial evidence – there is not a financial aspect to this situation.
2. The alleged hardship is unique and does not apply to substantial portion of the district or neighborhood – the size and location of the property is unique and the setting of the proposed caretaker apartment is enclosed and will not be visible to any of the neighbors.
3. The requested variance will not alter the essential character of the neighborhood – the character of the neighborhood will not be altered because of the unique location (distance from neighbors and the fact that it will be enclosed).
4. The alleged hardship has not been self-created – this could be argued one way or the other.

Mr. Connolly made a MOTION, seconded by Mr. Eustace, to approve application # 5305 for a use variance to allow for a caretaker residence at 2989 South Creek Road.

Mr. Morlock stated that everything about this situation is unique and asked if a condition could be placed on the variance that only a caretaker or someone privately employed by the owner of the property be allowed to live in the apartment.

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to amend Mr. Connolly's motion to include the following conditions:

1. The use of the apartment will be restricted to someone in a property care-taking capacity ("care-taking" being defined as landscaping, farm, etc.)
2. There will be no rental of the caretaker's apartment.
3. Use of the caretaker's residence is restricted to an occupant whose primary purpose is to serve as a caretaker of the property or to provide any other services incidental to the primary uses of the property.
4. The caretaker's apartment will not be used as an in-law apartment.

All members voted in favor.

All members voted in favor of Mr. Connolly's original motion as amended with Mr. Morlock's additional conditions. **GRANTED.**

Application #5306 – Enterprise Rent-A-Car for a detached oversized, over height sign at 5160 Camp Road. (Violates Section 280-261 F(2) – code is 40 sq.ft., variance needed is 22 sq.ft. and Section 280-190 C(11) – code is 12', variance needed is 2.5'.)

Jerry Noworyta from Graffiti Graphix & Signs showed Board members a picture of the proposed sign, noting that Enterprise Rent-A-Car would like to install it on top of the existing Overstock Outlet sign on the property. He further stated that the Overstock Outlet sign blocks the line of sight to the Enterprise Rent-A-Car business.

Chairman Rybczynski confirmed with Mr. Allen that there is currently signage on the building. He asked Mr. Noworyta why the applicant wouldn't just square the new sign up with the existing sign so that it doesn't stick out on either end. Mr. Noworyta responded that Enterprise maintains a 1:5 ratio for their signs (the proposed sign is 2.5' X 12') and the proposed sign is the smallest sign they have.

Attorney Quinlivan stated that a variance was granted to Enterprise previously for the sign on the side of the building.

Chairman Rybczynski confirmed with Mr. Allen that the property is located in the Camp Road Overlay District, which restricts ground signs to twelve (12) feet in height.

In response to a question from Mr. Connolly, Mr. Noworyta stated that the applicant would love to install a separate sign for the business but understands that that would also require a variance because only one detached sign is allowed on a parcel. He further stated that if the variance is not granted, Enterprise probably would abandon the thought of installing a sign at all.

Chairman Rybczynski stated that he does not like the look of the proposed sign and noted that perhaps allowing Enterprise to have its own ground sign would be a better solution.

FINDINGS: Chairman Rybczynski stated that he cannot approve the proposed sign as presented, noting that he feels it would be unattractive, an eyesore and completely out of character with the area in which it is located. He further stated that it would be wise of the applicant to look in to requesting a variance to allow a second ground sign on the property.

Mr. Connolly made a MOTION to table this request with the recommendation that the applicant come up with a new proposal regarding the size of the sign.

Chairman Rybczynski stated that the applicant indicated that there is no alternative and that this is the smallest sign Enterprise would consider.

Chairman Rybczynski read through the area variance criteria:

1. Whether benefit can be achieved by other means feasible to applicant – the applicant does have another option (asking for a second sign on the property).
2. Undesirable change in neighborhood character or to nearby properties – the sign is unattractive.
3. Whether the request is substantial – the request is not substantial.
4. Whether the request will have adverse physical or environmental effects – it will not.
5. Whether alleged difficulty is self-created – it is self-created.

Chairman Rybczynski made a MOTION, seconded by Mr. Eustace, to deny application #5306 for a detached oversized, over height sign at 5160 Camp Road.

Mr. Morlock stated that a smaller sign is an option for the applicant and suggested that the Board table this application to give the applicant the opportunity to consider a smaller sign.

Mr. Connolly stated that along the Camp Road corridor in the vicinity of this property there are signs that are as tall, if not taller, than the proposed sign. He further stated that the Board should work with the applicant by offering him the opportunity to propose a sign that adapts to what the Board wants to fit the criteria. He noted that he does not want to deny the proposal on its first attempt without working with the applicant.

Chairman Rybczynski reminded the Board that the applicant indicated that a smaller sign would not be an option. Mr. Connolly responded that when the Board asks an applicant if it is feasible to change something, often the applicant says no because he wants the Board to approve the request as presented.

As the vote on the motion was 3 ayes and 1 nay (Mr. Connolly) the motion failed.

Application #5308 – Benderson Development for an off-street parking and parking setback variance on a proposed plaza expansion at 4250 McKinley Parkway.

(Violates Section 280-219 D – code requires 512 spaces, variance needed is 64 spaces and Section 280-229 B(1) – code requires a 35 foot setback, variance needed is 10 feet.)

Attorney James Boglioli from Benderson Development described the plaza expansion project to Board members, noting that Tops proposes to add an additional 18,000 sq.ft. to the existing store at this location, as well as gas pumps, a convenience store and additional retail space. He stated that 448 parking spaces are proposed. He noted that SRF Associates performed a Shared Parking Analysis for the project that concluded that more than enough parking would be provided per the proposed plan. He stated that Benderson also looked at actual parking counts for the existing Tops on the site and again concluded that sufficient parking is proposed.

Regarding the requested setback variance, Attorney Boglioli stated that he feels the variance is justified for the following reasons:

1. This is a redevelopment project and the applicant has to work with what is currently on the site.
2. The property is unique in size (triangular) with two front yards, making it more difficult to comply with setback requirements.
3. The New York State Department of Transportation took .5 acres along Southwestern Boulevard, which impacted the applicant's ability to comply with the setback requirements.

Attorney Boglioli reviewed the area variance criteria:

1. Undesirable change in neighborhood character or to nearby properties - this is an existing commercial area that will be improved with this development, which includes an enhanced landscaping plan.
2. Whether benefit can be achieved by other means feasible to applicant - the benefit cannot be achieved in any other way.
3. Whether request is substantial - he does not feel the request is substantial, noting that the requested parking space variance is only 12% and the parking setback variance is only 15%.
4. Whether request will have adverse physical or environmental effects - that this would be an improvement to an existing commercial site.
5. Whether the alleged difficulty is self-created - he feels the difficulty is not self-created because of the shape of the site and because the applicant has to work around the existing infrastructure.

Attorney Boglioli stated that Benderson did receive a positive recommendation on all three variance requested from the Planning Board.

In response to a question from Chairman Rybczynski, Attorney Boglioli stated that if the variances are not granted, it is quite possible that Tops would leave the site and it would become vacant.

In response to a question from Mr. Connolly, Attorney Boglioli stated that the only existing parking to be removed will be where the gas pumps will go and that the building on the southern side of the site is proposed to be retail in nature. He further stated that the retail buildings will not be built until tenants are secured.

In response to a question from Chairman Rybczynski, Mr. Allen stated that the Code Review Committee is working on reconfiguring the requirement for the number of parking spaces but they are not far enough along in the process to know whether this project would conform to any new requirements.

Mr. Kim Fiedler from Benderson Development stated that Benderson has not discussed the disposition of the existing Goodwill truck on the site with Tops but that if it impacts Tops' operation in any way, it will be removed.

In response to a question from Mr. Connolly, Attorney Boglioli stated that SRF Associates is one of the most well known traffic consultants in Western New York and that Benderson has probably used them 50 times to do studies for various projects.

Lalaine Podkulski, adjacent neighbor, stated that her family has come to a favorable resolution with Benderson regarding this project and asked the Board to grant Benderson's request for the variances.

FINDINGS: Chairman Rybczynski stated that he is happy to see that Tops wants to stay at the same location. He read through the area variance criteria:

1. Whether benefit can be achieved by other means feasible to applicant – no.
2. Undesirable change in neighborhood character or to nearby properties – this is a positive change.
3. Whether the request is substantial – no.
4. Whether the request will have adverse physical or environmental effects – no.
5. Whether alleged difficulty is self-created – no.

Chairman Rybczynski made a MOTION, seconded by Mr. Connolly, to approve application #5308 for an off-street parking and parking setback variance on a proposed plaza expansion at 4250 McKinley Parkway. All members voted in favor. **GRANTED.**

Application #5309 – Benderson Development for an area variance on fencing/screening on a proposed plaza expansion at 4250 McKinley Parkway.
(Violates Section 280-277 C(1) – code is six (6) feet, variance needed is two(2) feet.)

Attorney Boglioli stated that as part of the Tops expansion project, Benderson proposes to install a 336-foot long fence to screen the Podkulski residence and the Podkulskis have asked that the fence be eight (8) feet tall rather than six (6) feet, which is what is required.

Chairman Rybczynski read the Planning Board's positive recommendation to the Board of Zoning Appeals regarding the variances requested by Benderson.

FINDINGS: Chairman Rybczynski made a MOTION, seconded by Mr. Morlock, to approve application #5309 for an area variance on fencing/screening on a proposed plaza expansion at 4250 McKinley Parkway. All members voted in favor. **GRANTED.**

Application #5310 – William Ciaravino for a building setback at 4214 Howard Road.
(Violates Section 280-85 A – code requires 40 feet, variance needed is 22.5 feet)

Mr. William Ciaravino stated that he proposes to construct a storage building on his property, noting that the Planning Board granted Conditional Site Plan Approval contingent upon his receiving the variance from the Board of Zoning Appeals. He further stated that the building would be located the same distance from Howard Road as the existing home on the property.

Chairman Rybczynski stated that the Planning Board forwarded a positive recommendation to the Board of Zoning Appeals regarding the requested variance. He further noted that the applicant submitted letters of support from three neighbors.

FINDINGS: Mr. Morlock read through the area variance criteria:

1. Whether benefit can be achieved by other means feasible to applicant – no.
2. Undesirable change in neighborhood character or to nearby properties – no.
3. Whether request is substantial – no.
4. Whether request will have adverse physical or environmental effects – no.
5. Whether alleged difficulty is self-created – no.

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to approve application #5310 for a building setback at 4214 Howard Road. All members voted in favor. **GRANTED.**

Application # 5311 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 8. (Violates Subdivision Regulations - code 20', variance needed 20')

Application # 5312 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 9. (Violates Subdivision Regulations - code 20', variance needed 20')

Application # 5313 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 10. (Violates Subdivision Regulations - code 20', variance needed 20')

Application # 5314 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 11. (Violates Subdivision Regulations - code 20', variance needed 20')

Application # 5315 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 12. (Violates Subdivision Regulations - code 20', variance needed 20')

Application # 5316 - New Berkley Square III, LLC for a rear yard variance on Tisbury Lane Lot 13. (Violates Subdivision Regulations - code 20', variance needed 20')

The Board discussed the above six (6) applications simultaneously.

Andrew Romanowski, current builder/developer of Berkley Square III, stated that he is in the process of finishing the last phase of Berkley Square, which consists of 13 homes. He further stated that seven (7) are built and the remaining six (6) lots are the subject of the requested variances. He stated that he would like to build the same homes on these six (6) lots that he has been working with within Berkley Square.

Mr. Romanowski stated that approximately a year ago he entered into an agreement with the Berkley Square Board of Directors whereby he would purchase a twenty-foot strip of the park in order to increase the depth of the six lots. However, it was determined by the Berkley Square Homeowners' Association (HOA) attorneys that every lien holder of property in Berkley Square would have to sign off on the property purchase. He noted that the agreement was then revised so that the HOA would grant

him a permanent twenty-foot easement to achieve the original goal of increasing the depth of the six lots. He stated that in return for the easement, he has agreed to make certain improvements to the park and to place the six lots into the HOA.

Mr. Romanowski stated that the lots are buildable lots now but, because of their shallow nature, he would have to build a smaller home than what has been built in the development. In response to a question from Mr. Eustace, Mr. Romanowski stated that the lots in question are currently approximately 70' by 78' in size.

David Gerstner, President of the Berkley Square HOA, stated that most of the Berkley Square residents are in favor of this request. He noted that they do not want smaller homes on these lots and would like the homes in the HOA so that there would more money to maintain and enhance the park.

Jim Voy, resident of Berkley Square, asked if the agreement between Berkley Square and Mr. Romanowski has any bearing on the Board's decision. Chairman Rybczynski responded that he would like to see the agreement and make sure it is in hand before any construction begins.

Mr. Romanowski stated that his intention would be to make the conditions that are placed on the easement area match what the HOA architectural guidelines are right now. He further stated that the owner of any one of these six lots adjacent to this easement would be responsible for his portion of the easement.

Margaret Fisher, Berkley Square resident, stated that building homes on these six lots that are consistent in size and design with the existing homes in the development will maintain the value of the existing homes. She further stated that placing the six new homes in the HOA would give the residents who use the park assurance that the homes will be restricted to the guidelines of the HOA.

George Laub, Berkley Square resident, stated that he believes that the variance request is reasonable and is in keeping with the character of the units in the development.

David Bellissimo, Planning Board member, stated that he visited the site and believes that this is a good idea.

Ron Basalyga, Berkley Square resident, stated that he is in favor of the request and noted that people who bought in this development did so with the idea that all of the homes would have the same restrictions in place regarding fences, etc.

FINDINGS: Chairman Rybczynski stated that the test case applies for each of the six (6) requests because the variance requested is the same for each application. It was determined that each application would be treated separately but that the Findings would apply to all.

Mr. Morlock read the area variance criteria:

1. Whether benefit can be achieved by other means feasible to applicant – no (applicant attempted to purchase the property but that is not feasible).
2. Undesirable change in neighborhood character or to nearby properties – no (residents of the neighborhood are in favor of the project).
3. Whether request is substantial – no (the easement would be permanent).
4. Whether request will have adverse physical or environmental effects – no.
5. Whether alleged difficulty is self-created – no (every attempt was made to comply).

Mr. Morlock made a MOTION, seconded by Mr. Connolly, that the balancing test be applied to all six (6) applications (#5311 through #5316) and to approve application #5311.

Chairman Rybczynski stated that this is a very unique solution to a problem and noted that the Board of Zoning Appeals should see the easement agreement before a Building Permit is issued for any of the homes.

Attorney Shaw suggested that a condition of approval be that the easement be perpetual and that a copy of the recorded document be presented to the Building Department for its records.

Mr. Morlock made a MOTION, seconded by Chairman Rybczynski, to rescind his motion. All members voted in favor.

Mr. Morlock made a MOTION, seconded by Mr. Connolly, that the balancing test be applied to all six (6) applications (#5311 through #5316) and to approve **application #5311** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to approve **application #5312** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

Mr. Morlock made a MOTION, seconded by Mr. Connolly, to approve **application #5313** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to approve **application #5314** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to approve **application #5315** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

Mr. Morlock made a MOTION, seconded by Mr. Connolly, to approve **application #5316** with the following conditions:

1. The easement between Berkley Square LLC and the Berkley Square Homeowners' Association will be perpetual and a copy of this recorded document will be presented to the Building Department for its records. The agreement must be satisfactory to the Board's review consistent with its decision.

All members voted in favor. **GRANTED.**

OTHER BUSINESS

Chairman Rybczynski reminded the Board that its next meeting will be held on February 1, 2011.

Mr. Connolly made a MOTION, seconded by Mr. Eustace, to approve the minutes from December 7, 2010. All voted in favor.

Mr. Morlock made a MOTION, seconded by Mr. Eustace, to adjourn the meeting. All members voted in favor. The meeting was adjourned at 9:25 p.m.

Date: 1/14/11

Respectfully submitted,

Jack Rahill, Secretary
Board of Zoning Appeals