

Town of Hamburg
Board of Zoning Appeals Meeting
February 7, 2017
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, February 7, 2017 at 7:00 P.M. in Room 7B of Hamburg Town Hall, 6100 South Park Avenue. Those attending included Chairman Brad Rybczynski, Vice-Chairman Shawn Connelly, Commissioner Louis M. Chiacchia, Commissioner Bob Ginnetti, Commissioner Ric Dimpfl, Commissioner Nicole Falkiewicz and Commissioner Laura Hahn.

Others in attendance included Attorney Mark Walling, Board of Zoning Appeals Attorney and Sarah desJardins, Planning Consultant.

Chairman Rybczynski asked for a moment of silence to honor our fallen soldiers and our armed service members.

Commissioner Chiacchia read the Notice of Public Hearing.

Tabled Application # 5605 Burke Homes, LLC – Requesting a use variance to allow an off-premise sign at 3833 Howard Road

Tabled Application # 5606 Burke Homes, LLC – Requesting an area variance for an off-premises sign at 3833 Howard Road

Mr. Daniel Flaherty, Comptroller for Burke Homes and DATO Development, stated that Mr. Burke was out of town and asked him (Mr. Flaherty) to attend on his behalf.

Chairman Rybczynski advised Mr. Flaherty that Board members received Mr. Burke's written response to questions raised at the Board's previous meeting relative to the requested use variance and financial hardship.

Mr. Flaherty stated that Ryan Homes has indicated that in their experience, projects without signage get half the number of contacts that drive their business. He noted that having a Ryan Homes presence on Southwestern Boulevard to make people aware of the new subdivision would double the realizable sales of those subdivision units. He stated that Ryan Homes expects to sell seven (7) lots per quarter with signage at Southwestern Boulevard and 3-4 lots without signage.

Mr. Flaherty stated that it is expected that the subdivision would be built out in four (4) years, but without signage to direct people to the project it would be twice as long. With respect to the apartment project, Mr. Flaherty stated that the Certificates of Occupancy will be obtained very soon for the next two (2) buildings, which contain a total of 18 units, and these units will rent for approximately \$1,100 per month. He noted that when these apartments are ready to rent, due to the heavily competitive market place in Hamburg, the applicant needs to have signage on Southwestern Boulevard to drive traffic to the project.

Mr. Flaherty stated that not having signage on Southwestern Boulevard will result in a financial hardship for the applicant.

Mr. Connolly stated that he consulted with the Town Planner about this situation where someone is coming before the Board before the financial problem arises. He stated that usually applicants come to the Board after they have already experienced financial hardship for relief from that hardship. He noted that the Town's Planning Consultant indicated that the Board cannot grant relief from a financial hardship before the hardship has occurred.

Mr. Flaherty stated that, having been involved in projects and development for a number of years, he has learned that signage is a driver in light of the competitive market place. He noted that a quality product is being developed, but it is off the beaten path, unfortunately. He stated that not having signage on Southwestern Boulevard to drive traffic to the applicant's product will drive a financial hardship virtually immediately. He stated that the applicant has units now that he is trying to lease, and every month that these units go unleased is a financial hardship.

Mr. Flaherty stated that the applicant has a large amount of time and money invested in the infrastructure and capital improvements associated with the build out of both projects, and this constitutes an active financial hardship. He noted that these are real out of pockets costs the applicant is incurring today.

Mr. Connolly stated that the Board knows that signage would help the applicant market the units and the Board would like to help the applicant, but if every business owner tried to obtain variances before even trying to work within the existing laws for businesses, the Board would be inundated with this type of variance request.

Mr. Connolly advised Mr. Flaherty that a variance is designed to alleviate problems after a project is underway and the applicants can provide financial data showing that they have actively marketed and advertised the project but have been unsuccessful and are now experiencing a hardship.

In response to a question from Chairman Rybczynski, Mr. Flaherty stated that the applicant is attempting to lease units currently.

Mr. Flaherty asked the Board at what point in time a financial hardship would be acceptable and what would constitute financial hardship. He stated that he can quantify the hardship based on available units very easily once those units have Certificates of Occupancy.

Mr. Connolly stated that once the applicant's units have Certificates of Occupancy and are being actively marketed, the applicant could begin to financially quantify the hardship.

Mr. Flaherty stated that these units are being actively marketed now online, etc.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl to deny Application #5605.

On the question:

Mr. Connolly stated that the project has not even really started and the developer is just beginning to market the units. He stated that the applicant cannot say that he cannot realize a reasonable rate of return because he has not had enough time to even attempt to realize a reasonable return. He stated that on that criterion alone, the application should be denied.

All members vote in favor of the motion. **DENIED.**

It was determined that Application # 5606 is moot because it was dependent on Application # 5605.

Mr. Ginnetti made a MOTION, seconded by Mr. Dimpfl to deny Application #5606.

All members vote in favor of the motion. **DENIED.**

Application # 5607 Camp Road Animal Clinic – Requesting an area variance for a proposed addition at 5576 Camp Road

Dr. Tonia Hite, owner of the animal clinic, stated that she has owned the business for approximately ten (10) years, and she now needs to make some improvements to the clinic building. She stated that she would like to construct a 20-foot addition to the front of the building that would infringe on the front yard setback by ten (10) feet.

Dr. Hite stated that she cannot construct the addition in the rear of the property because that is where her parking is, and that is already limited. She noted that she does not want to put parking in front of the building because she would like to keep the existing green space there.

John Schaaf, designer of the addition, stated that only constructing a ten-foot addition to the front of the building does not make much sense, and the proposed 20-foot addition would be substantially better in terms of laying out the inside of the new space.

Dr. Hite stated that the addition would primarily be for a larger waiting room so that it can have a nicer flow, and she can then keep animals from coming face to face if needed.

Mrs. desJardins stated that this project has been reviewed preliminarily by the Planning Board, and if the applicant receives the variance, she will return to the Planning Board for further review.

In response to a question from Mr. Chiacchia, Dr. Hite stated that this addition will allow for an expansion of her client base, but making more profit is not her primary goal. She stated that she guesses she might increase her clients by 10-25%. She further noted that the addition would allow her to feel more comfortable having more people and animals at the clinic at the same time.

In response to a question from Mr. Chiacchia, Dr. Hite stated that she plans to demolish the existing garage on the property, which will add another two (2) parking spaces, and she is considering having the staff park behind one another in the location of the existing garage.

Mrs. desJardins stated that if the variance is granted, Dr. Hite will have to discuss the issue of parking with the Planning Board during its review process.

Findings:

Mr. Dimpfl made a MOTION, seconded by Ms. Falkiewicz to approve Application #5607.

On the question:

Mr. Dimpfl reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No, additional space is needed in the front of the building.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No.
3. Whether the request is substantial – No.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – It could be argued either way, but the balancing test is in favor of approval.

All members voted in favor of the motion. **GRANTED.**

Application # 5608 Barclay Damon LLP - Requesting an appeal of a Code interpretation made by the Supervising Code Enforcement Official

Chairman Rybczynski referenced the following letter sent to Barclay Damon LLP by the Chairman of the Planning Board and noted that he has been advised by legal counsel that any

action on this item at this point would be premature:

“Dear Mr. Auerbach:

Please be advised that the Town of Hamburg Planning Board has elected to reconsider its determination of subdivision approval regarding the above named matter. Upon the discovery and presentment of new information and evidence, it is believed that the initial approval may have been granted in error.

You are hereby notified that this matter will come to be heard at the next regular Planning Board meeting to be held on March 1, 2017 at 7:00 p.m. in Room 7B of Hamburg Town Hall, 6100 South Park Avenue, Hamburg, New York 14075.

If you should have any questions, please feel free to contact me.

Thank you for your time and attention to this matter.

Truly yours,

Daniel O’Connell
Planning Board Chairman
Town of Hamburg”

Chairman Rybczynski stated that he has been advised by legal counsel to table this item until the Planning Board acts.

Attorney Jeff Palumbo from Barclay Damon asked Chairman Rybczynski which attorney gave him the above advice. Chairman Rybczynski responded that the Board of Zoning Appeals’ attorney, Mark Walling, advised him on this item.

Attorney Palumbo stated that he sees the item before the Board of Zoning Appeals and the issue the Planning Board has with the subdivision as two (2) completely different issues. Attorney Walling stated that he does not share Attorney Palumbo’s view at all.

Attorney Walling presented into the record the following Subdivision Information Sheet submitted to the Planning Board when application was made for the Pleasant Creek Subdivision:

TOWN OF HAMBURG PLANNING DEPARTMENT
MAJOR SUBDIVISION INFORMATION SHEET

Subdivision Name: Pleasant Creek Development

Location: _____ SBL# 182.00-2-32.11 & 182-2-33

Township: 9 Range: 8 Farm Lot 20

Type of Development: Residential lots for detached single family home/apartments

Developer Name: Pleasant Development LLC Engineer: Nussbaumer & Clarke, Inc.

Address: 3710 Milestrip Road, Blasdell, NY 14219 Address: 3556 Lakeshore Road

Phone: 716-913-8497 Phone: Buffalo, Ny 14219

Zoning: R2 & RB R3 Subdivision Acreage: 88.9 Acres

School District: Frontier Central District #4 Fire District: Lake Shore

Sewer District: Master Sewer Water District: ECWA Lease Manage

Type, Size and Ownership of Recreation Area: _____

36+/- Acres of Conservation Land

Homeowners' Association: Yes No _____

Wetland/Floodplain Involvement: Federal Wetlands

SEQRA: Unlisted _____ Type I CEA: Yes or No

Special Features/Other Information: Attach as necessary

Will the project involve the formation of a "condominium"? Yes ___ No

***Note: Condominiums in accordance with the Town's Zoning Law are only allowed in the R-3 zoning district. By application for subdivision or site plan approval, the applicant hereby waives the benefit of RPTL Section 339-Y and 581.

Robert Spidaniuk
Signature of applicant
As Agent for Pleasant Development, LLC

Attorney Walling noted that the above form refers to the Town's zoning laws.

Attorney Corey Auerbach from Barclay Damon stated that Barclay Damon has made application to the Board of Zoning Appeals under Section 267 A of the New York State Town Law seeking review of the Supervising Code Enforcement Official's determination on a discreet issue related to permitted uses in the Town's R-2 District.

Attorney Auerbach stated that the Planning Board has not taken official action on anything yet, and a Board can only act at a duly constituted meeting that has been noticed pursuant to the Open Meetings Law. He stated that he did receive the letter from the Planning Board indicating its inclination to reconsider the subdivision approval.

Attorney Auerbach stated that the question of the underlying subdivision is a matter of discretion that will be before the Planning Board on March 1, 2017 to consider and review. He stated that separate and distinct from that is a determination that has been rendered by the Supervising Code Enforcement Official, Kurt Allen, and served upon him (Attorney Auerbach). He stated that he has duly filed an application, the public hearing has commenced and whether or not the Planning Board elects to reconsider the subdivision approval has no bearing on the very simple question that is before the Board of Zoning Appeals.

Chairman Rybczynski asked Attorney Auerbach if he would be in front of the Board of Zoning Appeals if not for what is going on with the Planning Board. Attorney Auerbach responded that those two (2) issues are unrelated. He stated that he would still be in front of the Board of Zoning Appeals regardless of any action before the Planning Board.

Attorney Walling stated that he agrees that Barclay Damon would still be in front of the Board of Zoning Appeals regardless of any action before the Planning Board, but he feels that the current issue before the Board of Zoning Appeals is in no way separate and distinct from what the Planning Board is contemplating. He noted that in his view they are completely connected, and it is his advice to the Board of Zoning Appeals that it is premature to consider this matter until after the Planning Board has acted on the issue it is going to be considering March 1, 2017.

Attorney Auerbach stated that it is premature to table this item before giving him an opportunity to present to the Board of Zoning Appeals the very reason why he is here. He stated that he is asking Board members to do what they are statutorily required to do.

Attorney Auerbach stated that Natale Builders applied to Mr. Allen for a building permit for a single family home in the Pleasant Creek subdivision. He stated that prior to this, the developer of the Pleasant Creek Subdivision submitted an application to the Planning Board for approval of a 34-lot subdivision, and the Planning Board eventually approved the 34-lot subdivision. He stated that the Chairman of the Planning Board signed the Plat Map approving the 34 single family homes, and it was filed at the Erie County Clerk's office. He stated that subsequently Natale Builders applied for a Building Permit to construct one (1) of those 34 homes, and it was during that time period that Mr. Allen learned that the builder planned to offer these homes as condominiums.

Attorney Auerbach stated that condominium form of ownership is just the way one owns one's home. He stated that it means that one not only owns one's home but also owns a percentage of the common areas in the development.

Attorney Auerbach read the definition of 'condominium' from the Hamburg Town Code as follows:

"an apartment house or houses, the apartments or dwelling units of which are individually owned, each owner receiving a deed enabling them to sell, mortgage or exchange his

apartment independent of other apartments in the building or buildings.”

Attorney Auerbach stated that the land use condominium references a multi-family development land use of condominium under the Hamburg Town Code (“apartment house or houses”). He stated that Mr. Allen misunderstands the discreet legal distinction between the Department of Law allowing owners to own their single family homes under the condominium form and the land use apartment or apartments as defined in the Hamburg Town Code.

Attorney Auerbach stated that Mr. Allen conflated the meaning that if the Department of Law approves condominium ownership, that would constitute apartment house or houses as defined in the Hamburg Town Code.

Attorney Auerbach stated that Mr. Allen determined that pursuant to the definition in the Hamburg Town Code, condominiums are not permitted in the R-2 District.

Attorney Auerbach stated that New York State Town Law requires him to come to the Board of Zoning Appeals if he disagrees with any determination of the administrative official charged with the enforcement of the Code. He asked Board members to look at the definition of condominium in the Code and tell him if a single family home that is sold to one person or family constitutes an apartment or apartments as defined in the Code.

Mrs. desJardins stated that the Pleasant Creek subdivision is comprised of 109 building lots, not 34.

Attorney Sean Hopkins, representing Pleasant Development, stated that the applicant seeking the Code interpretation is not the developer of the subdivision. He noted that the developer is Pleasant Development (Michael Bevilacqua and Joe Russo), and any attempt to take away their subdivision approval because a third party purchaser of the lots is seeking condominium status would be unfair and unjust. He stated that this would violate a very basic premise of vested rights, and as a result of that subdivision approval Pleasant Development has spent a large amount of money putting in roads, sewer, water, etc. He stated that everyone has known about the form signed by the representative of the developer indicating that condominiums will not be part of the plan for more than a year. He stated that it was after that form was signed that Pleasant Development proceeded with reliance on that subdivision approval.

Attorney Hopkins stated that the Planning Board does not have the ability to rescind that subdivision approval.

Findings:

Chairman Rybczynski stated that the Board heard testimony from the applicant and has a recommendation from its attorney to leave this item on the table.

Mr. Chiacchia made a MOTION, seconded by Mr. Connolly, to table this item.

All members voted in favor of the motion to table. **TABLED.**

Application # 5609 Peter Liberatore, Jr. – Requesting an area variance for a proposed apartment building to be located at 5683 South Park Avenue

Attorney Sean Hopkins, representing the applicant, stated that a ten-unit apartment building is proposed on a .7 acre parcel on the northwest corner of South Park Avenue and Knoll Drive. He stated that Mr. Liberatore is the owner of the adjacent apartment development to the north of this parcel and just sold the Lincoln Square apartment development, which is located adjacent to this parcel’s western property line.

Attorney Hopkins stated that the building would consist of a townhouse unit with attached garage on each end and traditional apartment units in the interior. He stated that the variance requested is for the property setback distance on the west side of the proposed building and noted that a building setback requirement of 50 feet is required from all property lines. He stated that the distance to the western property line from the proposed building would be 6.85 feet.

Attorney Hopkins stated that there is significant vegetation along Knoll Drive, as well as along South Park Avenue, that the applicant would like to preserve. He stated that the applicant is also not proposing any curb cuts on either of these roadways, and he is proposing the building at a setback of at least 50 feet from both roadways. He stated that the applicant feels that the proposed location of the building makes the most sense because he feels it is important to retain the vegetation and keep the building back from both roadways.

Attorney Hopkins stated that the other potential layout that would be permitted without any variances would be to construct five (5) or six (6) duplexes on the property, which would mean that there would be several driveways onto both Knoll Drive and South Park Avenue, and the required setbacks would be reduced from 50 feet to 30 feet.

Attorney Hopkins stated that the Board of Zoning Appeals must consider whether the benefits realized by the applicant outweigh any resulting detriments to the health, safety and welfare of the surrounding community. He stated that he believes the answer to this question is yes. He noted that the benefits of the proposed project versus what would be permitted as of right (five (5) or six (6) townhomes) are substantial.

Attorney Hopkins reviewed the area variance criteria as follows:

1. Whether there will be undesirable change to the character of the neighborhood or a detriment to nearby properties – The closest building is 130 feet from the proposed building.
2. Whether there are feasible alternatives – There is a feasible alternative, but it would not allow the applicant to receive the benefits he is seeking.
3. Whether the request is substantial - It is not enough to simply quantify the deviation. Case law indicates that the Board of Zoning Appeals should be focusing more importantly on whether there will be any resulting harm, and there will not be any resulting harm because Mr. Liberatore owns the adjacent property and the closest principal building is 130 feet away.
4. Whether there will be any adverse physical or environmental impacts – No.
5. Whether the alleged hardship is self-created – This cannot be determinative with respect to the Board's decision.

In response to a question from Mr. Connolly, Attorney Hopkins stated that reducing the number of units in the proposed building would not allow the applicant to receive the benefits he is seeking.

Attorney Hopkins stated that the project does not require a variance for its density, and the applicant could in fact put more units on the property than what is proposed.

Findings:

Ms. Falkiewicz made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5609.

On the question:

Ms. Falkiewicz reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – This could go either way, but the current proposal is more in character with nearby buildings.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, the proposed building is in character with nearby apartment buildings.
3. Whether the request is substantial – Yes, but the proposed building would be in character with the rest of the neighborhood.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – It could be argued either way, but the balancing test favors approval.

Chairman Rybczynski made a MOTION, seconded by Mr. Connolly, to amend the above motion to include the two (2) following conditions:

1. There will be no curb cuts onto South Park Avenue or Knoll Drive.
2. The existing vegetation along Knoll Drive and South Park Avenue will be preserved.

All members voted in favor of the motion to amend the original motion.

Mr. Connolly made a MOTION, seconded by Mr. Ginnetti, to amend the motion to extend the area variance for 18 months.

All members voted in favor of the motion to amend the motion to extend the variance for 18 months.

All members voted in favor of the original motion with the two (2) conditions and extending the variance for 18 months. **GRANTED.**

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Mr. Chiacchia made a MOTION, seconded by Mr. Dimpfl, to approve the minutes of January 10, 2017. All members voted in favor of the motion.

Mr. Dimpfl made a MOTION, seconded by Mr. Chiacchia, to adjourn the meeting. All members voted in favor of the motion.

The meeting was adjourned at 8:20 p.m.

Respectfully submitted,

L. Michael Chiacchia, Secretary
Board of Zoning Appeals

DATE: February 12, 2017