

Town of Hamburg
Planning Board Meeting
March 15, 2017
Minutes

The Town of Hamburg Planning Board met for a Work Session at 6:30 P.M., followed by a Regular Meeting at 7:00 P.M. on Wednesday, March 15, 2017 in Room 7B of Hamburg Town Hall, 6100 South Park Avenue. Those attending included Chairman Daniel O’Connell, Vice-Chairman William Clark, Doug Schawel, Augie Geraci, Robert Mahoney, Dennis Chapman and Al Monaco.

Others in attendance included Town Planners Andrew Reilly and Sarah desJardins, Assistant Municipal Engineer Rick Lardo and Attorney Mark Walling.

WORK SESSION

Joseph Ball – Requesting Site Plan Approval of a proposed building addition at 3725 Jeffrey Boulevard

Andy Gow from Nussbaumer & Clarke, representing the applicant, stated that the applicant wishes to construct a 2,600 sq.ft. addition to the existing building. He stated that the addition would be in the rear of the building and would not be seen from the road.

Mr. Clark made a motion, seconded by Mr. Chapman, to schedule a public hearing to be held on April 5, 2017. Carried.

Engineering Department comments have been filed with the Planning Department.

REGULAR MEETING

Public Hearing – 7:00 P.M., Glenn Wetzi – Requesting Preliminary Approval of 45-lot cluster subdivision on vacant land bordered by Route 391, McKinley Parkway and Newton Road

Attorney Sean Hopkins, representing the applicant, stated that the Planning Board previously completed the Sketch Plan Review process and issued a Negative Declaration. He noted that the applicant recently received a wetland permit from the U.S. Army Corps of Engineers to authorize .47 acres of impacts to the federal wetlands, and the remaining wetlands will remain as open space. He further stated that the applicant recently received water quality certification from the New York State Department of Environmental Conservation (NYSDEC).

Attorney Hopkins stated that the applicant’s engineer has submitted plans to Erie County with respect to the drainage improvements proposed for Newton Road, and the applicant has committed to not only satisfy the NYSDEC storm water quality and quantity standards, but to go beyond the need to retain a 100-year storm event in recognition of the fact that historically there are flooding issues on Route 391 in the vicinity of the Johnson property.

Attorney Hopkins stated that the applicant has made a good faith effort and is willing to incur an additional \$100,000 in costs on a voluntary basis based on this drainage issue.

Attorney Hopkins stated that if the Planning Board grants Preliminary Plat Approval, the applicant will need to obtain all of the remaining outstanding approvals and the Town Engineering Department would have to finish its technical review.

Attorney Hopkins stated that oral arguments on the pending litigation were held recently, and he hopes a decision is received soon. He noted that legally there is absolutely nothing that would allow the Planning Board to not consider reviewing this application at this time. He stated that if the petitioners had wanted to, they could have gone to court and asked for a preliminary injunction, but they have not done so.

Mr. Schawel read the following notice of public hearing:

“Notice is hereby given that the Town of Hamburg Planning Board will conduct a public hearing on a 45-lot cluster subdivision proposed by Glenn Wetzl to be located on vacant land bordered by Boston State Road, Newton Road and McKinley Parkway. The public hearing will be held on March 15, 2017 at 7:00 P.M. in Room 7B of Hamburg Town Hall.”

Chairman O’Connell declared the public hearing open. The following people spoke:

- Mike Welch, 4437 Valleyview, stated that there is an Article 78 active because the Town took shortcuts, the case is still being reviewed and it would be highly unethical for the Planning Board to make a decision on this project whether an injunction has been filed or not. He stated that if the neighbors have to come up with more money to file an injunction to stop this until the Court renders its decision, then that is what they will do. He stated that the applicant knew from the beginning that this project would be an issue, the applicant has never had the neighbors’ consent and there are multiple documents in the Town’s file cabinet that still referenced rezoning the full 29 acres. He stated that he fears that if/when the applicant loses the court case, he will say that he has spent much time and money and ask the Town to allow him to move forward.

Chairman O’Connell stated that this rezoning request was reviewed by the Code Review Committee, and then the Planning Board issued a negative recommendation to the Town Board regarding the requested rezoning. He noted that the Town Board, by a vote of two (2) to one (1), approved the rezoning.

- Richard Lawrence, 4548 Newton Road, stated that his concerns are related to density and the water problems in the area. He stated that the detention basins in the Stonebridge patio home development do not work because water is not gradually released, and huge volumes of water come out of those detention basins. He stated that the density would be way too high with the addition of this development. He stated that if this project goes forward, he will see the backs and roofs of the new homes. He stated that his view of the Boston hills would be wiped out, and his property value would probably be reduced. He stated that the Town is jumping through hoops in order to let the developer, who does not live or vote in Hamburg, to make a lot of money. He stated that the neighbors are not against development, but they do not want this project because it will make the area look like Amherst.

- Aaron Adoff, 4493 Valley View, stated that he very recently purchased his home, and he just heard about this proposal three (3) days ago. He stated that approving this development would result in a significant change to the character of the neighborhood and would destroy any pasture and any hope of Hamburg growing in an organic way. He stated that he is an attorney, and if there needs to be an injunction filed, he is more than happy to file it. He stated that an Article 78 brought to challenge the decision of a governmental body should be treated in much the same way that a motion should be treated in any court proceeding, and there should be a stay until that proceeding is resolved so as to avoid unnecessary waste of resources by the Town, the applicant and the neighbors. He stated that the neighbors do not want to see their neighborhood and its character changed to a place akin to Amherst, Clarence or Lancaster. He stated that Hamburg, Orchard Park and East Aurora have village-like communities and are small towns where people can walk, live and be engaged.
- Walter Rooth, 4481 Grandview, stated that if he was a member of the Planning Board, he would be insulted that it turned this project down and then the Town Board approved it so that the Planning Board now has to review it again for approval. He stated that the neighbors are not against development, and they do not want to be the last houses in Hamburg, but they want development to be consistent with their homes and this project is not.
- Judith Day, 4491 Grandview, stated that when she was considering purchasing her home 18 years ago, she researched the applicant's property before she decided to buy. She stated that she was told at the time that the Town's Master Plan did not include any cluster housing.
- Donna Lawrence, 4548 Newton Road, stated that she came to Hamburg to live in a rural area, and these clustered homes will make this area not rural anymore. She stated that the density of the development is not consistent with what the neighbors want, and she is disappointed with the Town that it disregarded the Planning Board's negative recommendation on the rezoning.
- Jane Johnson, Boston State Road, stated that the water comes from so many places, and now the developer wants to add the runoff from all of the new homes. She stated that the golf course flooded twice in January in the area near her home, and she asked Board members if the Town will do something about the flooding problems at the golf course if this project is approved.

Chairman O'Connell declared the public hearing closed.

Mr. Clark made a motion, seconded by Mr. Geraci, to table this project. As the vote on the motion was six (6) ayes and one (1) abstention (Mr. Monaco because he was out of the room), the motion carried.

Engineering Department comments have been filed with the Planning Department.

Peter Liberatore – Requesting Site Plan Approval of a proposal to demolish the existing home located at 5683 South Park Avenue and construct a 10-unit apartment building

Attorney Sean Hopkins, representing the applicant, stated that the following revisions have been made to the site plan:

- Screening has been added on the east side of the building.
- Trees have been added to the interior parking islands, and additional interior islands have been added.
- Plantings have been added around the footprint of the building.
- The trees along South Park Avenue and Knoll Drive have been identified as being preserved.
- Additional colors, as well as more vertical and horizontal relief, have been added to the proposed building, and windows have been added to the east and west sides of the proposed building. Architectural shingles have also been added to the top portion of the building.

In response to a question from Chairman O'Connell, Chris Wood (engineer for the project) stated that the residents of this building would share the dumpster with the existing apartment development. He noted that the developer does not want to have a dumpster exclusively for this building.

Mr. Lardo stated that he has not seen information regarding the storm sewer or sanitary and noted that the project's design has not been completed.

In response to a question from Mr. Monaco, Attorney Hopkins stated that there will be no new curb cuts on either South Park Avenue or Knoll Drive. He stated that because the applicant owns the adjacent parcel, he will record an easement that will give the residents of this building access to the existing driveway for the Park Square apartments.

Mr. Chapman stated that he would like information on how far the dumpster is from the proposed building.

Attorney Hopkins stated that two (2) parking spaces per unit are proposed.

Mr. Clark made a motion, seconded by Mr. Mahoney, to authorize the Planning Department to prepare resolutions for the Board's next meeting and to table this project. Carried.

Engineering Department comments have been filed with the Planning Department.

Pleasant Creek Subdivision – Analysis of revisions to Phase I

Attorney Sean Hopkins, representing Pleasant Development, LLC (developer of the subdivision), stated that the issue before the Zoning Board of Appeals (ZBA), which it has not taken action on yet, is the use of the condominium form of ownership by those lots that are under contract with Natale Homes.

Attorney Hopkins stated that the infrastructure for Phase I (34 lots) has been completely installed. He stated that three (3) of those lots are not part of the contract with Natale Homes and are not included in the condo application. He stated that in addition to the 31 lots in Phase I, Natale Homes also has 20 lots under contract with Pleasant Development.

Attorney Hopkins stated that his client is interested in proceeding in the near future with the next phase of the subdivision.

Attorney Hopkins stated that while there is an issue the ZBA is dealing with relative to the purchaser's use of the condominium form of ownership, the Planning Board would not have any justification to consider rescinding the subdivision approval.

Attorney Hopkins stated that Pleasant Development LLC is not the applicant seeking condominium status, and as such the form that was signed by Rob Pidanick from Nussbaumer & Clarke during the review phase of this subdivision would not provide any basis for the Planning Board to consider rescinding the subdivision approval.

Attorney Hopkins stated that his client is willing to change the contract language relative to any future phases. He stated that with respect to future phases, his client would agree via contract with any prospective home builder that there would be language in the contract indicating that the purchaser cannot seek condominium status.

Attorney Hopkins stated that his client has a tremendous investment in this property, and if the Planning Board was inclined to consider rescinding the subdivision approval, it would have severe negative impacts for Mr. Bevilacqua.

Attorney Hopkins stated that while there was a discussion of this issue two (2) weeks ago, he did not hear anyone advance any sound legal reasoning why the Planning Board could consider rescinding the subdivision approval. He stated that before the Planning Board could consider rescinding the subdivision approval, there would have to be some justification from a legal perspective.

Attorney Hopkins asked Board members to vote not to rescind the subdivision approval with the understanding that the applicant is in a dilemma until the issue before the ZBA is resolved. He noted that until the ZBA acts and Natale Homes decides how to proceed relative to that ZBA action, Phase I cannot proceed.

Mr. Chapman asked who was responsible for not relaying to the builder that condominiums are not allowed in this zoning district. Attorney Hopkins responded that Rob Pidanick from Nussbaumer & Clarke signed the form during the review phase for this subdivision indicating that condominiums would not be pursued. He noted that neither he nor Mr. Bevilacqua was provided a copy of that form until approximately one (1) year ago when Mrs. desJardins made them aware that there was an issue relative to condominiums being advertised by Natale Homes. He stated that the form signed by Mr. Pidanick waived the right of the applicant (Mr. Bevilacqua) to build condominiums, and because Mr. Bevilacqua is not proposing to construct condominiums he is not out of compliance with that form.

Mr. Chapman stated that when he is purchasing a house, the seller must provide full disclosure relative to the property. He stated that he cannot believe that a builder of Natale Homes' status did not know that condominiums were not allowed on the public road. He stated that he does not think that an error on the part of Mr. Bevilacqua (not relaying to Natale Homes that condominiums are not allowed in this subdivision) should fall back on the taxpayers. He noted that condominiums status for these homes would give those homeowners a tax break of approximately 40% and asked who would maintain the public road that would serve those condominiums. He stated that the Town would not maintain the public road if condominiums are built on it.

Attorney Hopkins stated that Mr. Chapman's questions are precisely the issue that is before the ZBA currently.

In response to a question from Mr. Chapman, Mrs. desJardins stated that the form signed by Mr. Pidanick has always been in the Planning Department file.

In response to a question from Mr. Chapman, Attorney Hopkins stated that he and Mr. Bevilacqua did not have the form in their files because Mr. Pidanick did not provide them with a copy of it.

Chairman O'Connell stated that Attorney Hopkins and Mr. Bevilacqua should have had the form in their files.

Mr. Chapman stated that the Hamburg taxpayers are not going to be responsible because someone else did not do his due diligence.

Attorney Hopkins stated that the Town's Zoning Code prohibits condominiums in the zoning district in which this subdivision is located. He stated that this does not mean that the prospective purchaser has to agree with the Town Code, and Natale Homes has the right to challenge it.

Attorney Hopkins stated that the only two (2) ways to resolve this issue would be for Mr. Bevilacqua to break his contract with Natale Homes, which would result in Natale Homes suing Mr. Bevilacqua, or for the Planning Board to rescind the subdivision approval, which would result in Mr. Bevilacqua's bank knocking on his door.

Mr. Monaco stated that he is concerned that the condominiums would be located on a public street that would be plowed by the Town, and that scenario would cause a lot of dissension. He stated that someone dropped the ball and wants the Town to now pick the ball up.

Mr. Geraci stated that when the Planning Board approved this subdivision in 2014, Mr. Bevilacqua was the only developer in question. He stated that if he was considering purchasing one of the homes in the subdivision that are not considered condominiums and realized that other homeowners in the subdivision are paying lower taxes than he would be, he would not purchase the home because of that fact.

Attorney Hopkins stated that Mr. Bevilacqua is volunteering to relinquish any right for any future home builder to seek condominium status for any lots beyond the boundary of Phase I.

Mr. Chapman confirmed with Attorney Hopkins that if things go the way Natale Homes wants, Natale Homes will get condominium status on the lots in Phase I, and the Town will maintain the road. He asked if, in that situation, the Homeowners' Association would reimburse the Town for the maintenance of the road.

Mr. Chapman asked why Hamburg taxpayers would have to subsidize the condominium owners living on a public road who would be getting such a tax break. He stated that he does not understand how a developer and a builder did not know that the road was public and that public roads do not have condominiums.

Attorney Hopkins stated that it is not uncommon to have condominiums on public roads.

Attorney Hopkins stated that he still has not heard a legal argument justifying the Planning Board rescinding the subdivision approval.

Attorney Walling stated that there is a legal argument, and it is based on the fact that there is a material change in circumstance because condominiums are now being planned for the subdivision.

Mr. Mahoney stated that he believes Mr. Bevilacqua when he says that he did not reveal the fact that condominiums are not permitted in this zoning district to Natale Homes. He questioned how long Natale Homes has been in business and noted that it seems hard to imagine that Natale Homes did not know what can and cannot be done in that zoning district.

Mr. Mahoney stated that if Natale Homes did not know that condominiums are not permitted in this zoning district, then they either did not do their due diligence or are trying to get something without disclosure.

Attorney Hopkins stated that at the time Natale Homes entered into the contract with Mr. Bevilacqua, they were not aware that Rob Pidanick had signed the form regarding condominiums.

Mr. Clark stated that he does not believe that Natale Homes was not aware of the zoning of the property.

Attorney Jeff Palumbo from Barclay Damon, representing Natale Homes, stated that this is a legal issue and has nothing to do with whether or not Mr. Natale knew or did not know. He stated that the Town of Hamburg has no right to dictate a form of ownership, which is what a condominium is. He stated that if the ZBA does not overrule Supervising Code Enforcement Official Kurt Allen's interpretation and side with Natale Homes, then Natale Homes will sue the Town, and the Court will decide.

Attorney Palumbo stated that the fact that the road on which the condominiums are planned is public does not change things. He stated that the Town will still plow the road and get taxes; it just will not get as much in taxes as it would from typical single-family homes.

Attorney Palumbo stated that there will be no reimbursement to the Town from the Homeowners' Association.

Mr. Mahoney stated that he is concerned about disclosure and who knew what when.

Attorney Palumbo stated that Mr. Natale did not know about the form signed by Rob Pidanick when he signed the contract with Mr. Bevilacqua.

Mr. Clark stated that Mr. Natale did know about the Town's Zoning Code.

Mr. Reilly stated that the Town of Hamburg will not take ownership of the rest of the road that is not yet built associated with Phase I.

Mr. Clark stated that this project was represented as one with typical single-family homes.

Mr. Geraci stated that when this subdivision was reviewed and approved, nothing was said about condominiums. He further stated that ignorance from the law does not free someone from a mistake.

Mike Bevilacqua stated that he wishes that the fact that Mr. Pidanick signed the form about condominiums was brought up during the review of the subdivision. He stated that he has developed two (2) subdivisions, and if he had been aware that the form had been signed, he would have pushed the contract with Natale Homes in a different direction.

Mr. Bevilacqua stated that when he was negotiating the contract with Natale Homes, a representative from Natale Homes met with the Town Assessor, who indicated that condominiums are allowed in Hamburg. He stated that based on that statement from the Assessor, he did not question the issue any further.

Mr. Clark made a motion, seconded by Chairman O'Connell, to rescind the Site Plan Approval for Pleasant Creek Subdivision unless Pleasant Development LLC requires Natale Homes and any other purchasers of lots in the subdivision to include restrictive covenants in the deeds for these lots requiring that the homes to be constructed not be under a condominium form of ownership. As the vote was four (4) ayes (Chairman O'Connell, Mr. Clark, Mr. Chapman and

Mr. Mahoney) and three (3) nays (Mr. Schawel, Mr. Geraci and Mr. Monaco), the motion carried.

Attorney Hopkins stated that the Planning Board cannot rescind subdivision approval without a public hearing. Attorney Walling stated that he does not know if this is the case or not, but if a hearing is required, then one should be held.

Chairman O'Connell withdrew his second of Mr. Clark's motion.

Mr. Clark withdrew his motion regarding rescinding the subdivision approval.

Mr. Clark made a motion, seconded by Chairman O'Connell, to schedule a public hearing on this matter to be held on April 5, 2017. Carried.

In response to a question from Attorney Palumbo, Mr. Mahoney confirmed that he voted to rescind the subdivision approval.

OTHER BUSINESS

Mr. Schawel made a motion, seconded by Mr. Monaco, to approve the minutes of March 1, 2017. Carried.

Mr. Schawel made a motion, seconded by Mr. Monaco, to adjourn the meeting. The meeting was adjourned at 8:00 P.M.

Respectfully submitted,
Doug Schawel, Secretary
Planning Board

Date: March 22, 2017