Town of Hamburg
Board of Zoning Appeals Meeting
April 10, 2018
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, April 10, 2018 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 Connolly, Commissioner Louis M. Chiacchia, Commissioner Bob Ginnetti, Commissioner Nicole Falkiewicz, Commissioner Ric Dimpfl and Commissioner Laura Hahn.

Others in attendance included Attorney Tamara Harbold, Board of Zoning Appeals Attorney, Sarah desJardins, Planning Consultant and Kurt Allen, Supervising Code Enforcement Official.

Chairman Rybczynski asked for a moment of silence to honor our fallen men and women in the military.

Commissioner Chiacchia read the Notice of Public Hearing.

Tabled Application # 5661 Leo Schifano – Requesting two (2) area variances to allow the subdivision of property located at 3183 Lakeview Road

Jack Schifano, applicant's son, stated that his father would like to subdivide his property in order to construct another house. He noted that the property his father would like to sell is not being used at this time. He submitted letters of support from the following property owners:

- Mark Waring, 3170 Lakeview Road
- Kim Longo, 3194 Lakeview Road
- Jeffrey Walker & Kimberly Steiner, 6324 Smith Road
- Jack Putnam, 3160 Lakeview Road
- Jamie Zablonski, 6350 Smith Road

Chairman Rybczynski noted that the applicant's property is zoned R-A and is slightly under two (2) acres in size. He stated that a one-acre variance would be required for each lot.

In response to a question from Mr. Connolly, Mr. Schifano stated that his father would like to subdivide because he is not using a portion of it, and he (Jack) has been discussing building a home on it. He further stated that within 1/4 mile of his father' property there are lots that are less than the required two (2) acres in size. He stated that when his father purchased the property, he was aware of the two-acre requirements for building lots.

Mr. Schifano stated that building a new house would mean that the Town would be receiving more tax revenues.

Chairman Rybczynski stated that the properties that are located near Mr. Schifano's father's property that are smaller than two (2) acres are in fact zoned R-1, which allows smaller lots that the R-A District does.

In response to a question from Mr. Dimpfl, Mr. Schifano stated that the property owners who signed the letters of support are located across the street, 100 feet and 75 feet away from his father's property, and on the corner of Smith Road and Lakeview Road.

Mike Jablonski, 3134 Old Lakeview Road, stated that his property is adjacent to the applicant's property. He stated that the area is zoned R-A and is getting a bit crowded. He stated that if the applicant is allowed to have one-acre lots, then that means that he (Mr. Jablonski) would be able to create 28 lots on 28 acres of vacant land he owes on Old Lakeview Road. He stated that he does not want to see the applicant's property subdivided into one-acre lots. He stated that the area is very wet and may not meet the requirements for a septic system.

John Scholl, 3174 Old Lakeview Road, stated that he lives directly behind the property where the new home would go. He stated that he does not want a home behind his property and is concerned that the applicant and the new property owner would only have one (1) acre, and two (2) acres is the requirement. He stated that the properties in this area are two (2) acres or larger, and that is why he lives there.

Mrs. John Scholl, 3174 Old Lakeview Road, stated that Lakeview Road is dangerous because people are parking on the street. She stated that she is worried that it will become more dangerous with the addition of another home.

Mr. Allen stated that the most recently subdivided parcels in this area have been fully compliant with the applicable R-A zoning area regulations.

The owner of 3095 Lakeview Road stated that he built in this area with the understanding that the minimum lot area allowed is two (2) acres. He stated that he is worried that the owners of the properties on either side of him will want to create substandard building lots as well if the applicant is granted this variance. He stated that Lakeview Road is flat, has water issues and is dangerous.

Findings:

Ms. Falkiewicz made a MOTION, seconded by Mr. Connolly, to deny Application # 5661.

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 – No.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – Yes, because the surrounding properties are at least two (2) acres in area.
3. Whether the request is substantial – Yes.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – Yes.

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

Application # 5662 Tara Wylie – Requesting an area variance for a second story addition at 3578 Abbott Road

Mark Wylie, applicant, stated that he would like to build an addition on his rear den for an upstairs bedroom. He submitted letters of support from the following property owners:

- Kimberly K., 3584 Abbott Road
- Norman Schiedel, 3560 Abbott Road
- Edward Brien Kucia, S-3574 Abbott Road

- Mitchell Kucia, 3568 Abbott Road
- Charles Gray, 3564 Abbott Road

Mr. Chiacchia stated that there would be no impact of the proposed addition on the adjacent home to the north, and the addition would enhance the applicant's property.

In response to a question from Mr. Connolly, Mr. Wylie stated that the addition over the den would be the same distance from the side property line as the den is.

Mr. Allen stated that there would be Building Code issues to comply with regarding the exterior wall if the variance is granted.

Findings:

Mr. Dimpfl made a MOTION, seconded by Ms. Hahn, to approve Application # 5662.

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.
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 that it is self-created, but the balancing test is in favor of granting the variance.

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

Application # 5664 David Manko, Armor Inn Holdings, LLC – Requesting a use variance to allow a digital sign at 5381 Abbott Road

David Manko stated that he is one of the new owners of the Armor Inn. He stated that he took over the Armor Inn in October 2017 and would like to put up an electronic board on the side of the building by the intersection of Abbott Road and Sowles Road. He stated that digital signs are not allowed in C-2 Districts, and this property is zoned C-1.

Mr. Manko stated that he would like to activate the sign between the hours of 6:00 AM and 11:00 PM. He further stated that since he has owned the business, he has tried building signage, impact signage and advertising to market it. He stated that impact signs did not work because they were hit by plows in the winter, and building signage and impact signs cannot be seen after dark. He noted that he feels that a digital sign would help get the product out to the public and advertise current events.

Mr. Manko stated that he feels the digital sign will help the business entice people who drive by to enter the building and try the new products and activities that are planned for inside. He stated that the business was sold because it was losing quite a bit of money.

In response to a question from Chairman Rybczynski, Mr. Manko stated that he plans to show pictures of new food products and advertise coming events.

Mr. Chiacchia stated that the intersection in front of the Armor Inn is very tricky, and a digital sign could be distracting for motorists. Mr. Manko responded that Mr. Chiacchia had a valid

point. He noted, however, that motorists sit at that intersection for approximately 45 seconds, which would give them enough time to take in the information on the digital sign.

Mr. Allen stated that he believes that Mr. Manko's intended purpose of the sign is more of a static display subject to operational restrictions.

In response to a question from Chairman Rybczynski, Mr. Manko stated that he would be amenable to a restriction that the message on the digital sign cannot change more than three (3) times per minute.

In response to a question from Mr. Chiacchia, Mr. Manko stated that if the variance is denied, the business could probably continue operating for six (6) months without him (Mr. Manko) having to take money out of his pocket to keep it going.

Mr. Manko stated that he has spent $650,000 to get the business going since purchasing the property, and the business is bleeding money at this point in time. He noted that when he purchased the property, the business was losing approximately $30,000 per month, and since then the business has been losing between $8,000 and $9,000 per month.

In response to a question from Mr. Chiacchia, Mr. Manko stated that he does feel that the additional advertising would increase the net income.

In response to a question from Mr. Connolly, Mr. Manko stated that currently he is spending approximately $1,000 per month on advertising.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Chiacchia, to approve Application # 5664 with the following condition:

- The digital sign will be illuminated only between the hours of 7:30 AM and 9:30 PM.

On the question:

Mr. Connolly reviewed the use variance criteria as follows:

1. Cannot realize a reasonable rate of return provided that lack of return is demon strated by competent financial evidence - Applicant provided the financial evidence, and this is not the first time the Board has received financial evidence from this establish ment, so the Board has a reasonable basis to realize that there is a financial hardship.

2. The alleged hardship related to the property is unique and does not apply to a substantial portion of the district or neighborhood - It is unique because across the street is another commercial property that does have signage, and this is the only business on that section of that side of the street.

3. The requested use variance, if granted, will not alter the essential character of the neighborhood - The condition regarding the hours of illumination will resolve any concerns about altering the character of the neighborhood.

4. The alleged hardship has not been self-created - This could be argued either way, but based on the testimony given, it was not self-created.

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

Application # 5665 Wegmans Food Market, Inc. – Requesting an area variance for wall signage at 3740 McKinley Parkway

It was determined that the applicant withdrew this application.

Chairman Rybczynski made a motion to receive and file.

Application # 5666 Edward & Michele Wright – Requesting an area variance for an addition to the existing home at 5129 Lakeshore Road

Patricia Bailey, architect, representing the applicant, stated that the applicant proposes a one-story addition on the side of the property. She stated that because of the way the building is situated on the property, one portion of the addition would be 13.86 feet from the side property line, and 15 feet is required.

In response to a question from Mr. Dimpfl, Ms. Bailey stated that she advised the applicant to make the surrounding property owners aware of the proposal, and because the applicant did not attend the meeting, she assumed that the applicant did not think there would be any issues.

Ms. Bailey stated that the house is not in direct line with the neighbors' homes and does not obstruct their views.

Findings:

Ms. Falkiewicz made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5666.

On the question:

Ms. Falkiewiczi reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No.
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 –Yes .

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

Application # 5667 Leonard Iwanenko – Requesting an area variance for a fence at 4699 Camp Road

Leonard Iwanenko, applicant, stated that he owns a towing and recovery business. He stated that all of his impounded vehicles are stored inside the existing fence on the property, which is six (6) feet high. He noted that the Town's requirement is that a fenced-in area used for towing and recovery must be eight (8) feet high.

Mr. Iwanenko stated that it would be very expensive to put up an eight-foot high fence. He further stated that the fence was erected approximately four (4) years ago, and it looks quite nice.

In response to a question from Mr. Connolly, Mr. Iwanenko stated that the property owner to the east of this property informed him that he (the adjacent property owner) has no problems with the fence remaining six (6) feet high, as it has been there for years and has never bothered him.

Mrs. desJardins explained that the applicant has been in front of the Planning Board for the past few months attempting to obtain a Special Use Permit, which is required in order to operate a towing and recovery business. She noted that he cannot be approved for the towing and recovery business at this point because of the Town Code requirement of an eight-foot fence, and if

the requested variance is granted, the applicant will return to the Planning Board to finalize its review.

In response to a question from Chairman Rybczynski, Mrs. desJardins stated that the height of the fence is the only outstanding issue as far as the Planning Board is concerned.

Mr. Allen commented that the fence is in good condition. He stated that the applicant made an earnest attempt to elevate it, but it made the aesthetics worse. He noted that the fence as it is provides an adequate visual barrier for its intended purpose.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5667.

On the question:

Mr. Connolly reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – Yes, but the effect on the neighborhood would not be substantial, and the cost would be prohibitive.
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 that it is self-created, but the new law was enacted after the fenced-in area was established, so the difficulty is not self-created.

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

Application # 5668 Richard DeLotto – Requesting an area variance for a new home on vacant land on Taylor Road (SBL# 196.00-2-10)

Richard DeLotto, applicant, stated that he plans to construct a home on this property, and the zoning requires that the property be 200 feet wide at the building line. He stated that he intended to abide by that requirement, but upon hiring a builder and doing additional investigation, he found that there is a significant amount of fill from the previous owner in the rear of the property where the home was planned. He further stated that there is a significant drainage problem in that area, as well.

Mr. DeLotto stated that because of the existing fill, he cannot place his home as far back as he had hoped and now must place the home closer to the road where the width of the property is 185 feet.

Mr. DeLotto stated that he has heard no objections from any nearby property owners.

Mr. Allen confirmed that the rear portion of Mr. DeLotto's property was used as a dump site. He noted that the Building Department ordered that the previous owner cease and desist those activities.

Findings:

Mr. Dimpfl made a MOTION, seconded by Ms. Falkiewicz, to approve Application # 5668.

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.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, this is an odd-shaped lot.
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 – This could be argued either way, but the balancing test is in favor of granting the variance.

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

Application # 5669 Joseph Mazur – Requesting two (2) area variances for a proposed attached garage at 3246 Nash Road

Joseph Mazur, applicant, stated that he would like to construct a garage on the side of his house. He stated that he wants to build almost to the property line, but the land on the other side of that property line is a privately owned 50-foot wide area containing a paper street that cannot be developed. He stated that the road can never be developed because of the utilities that run underneath it.

Mr. Mazur stated that he would like to build the garage eight (8) feet forward of the existing home, and that would put his garage approximately one (1) foot closer to the road than the adjacent home. He noted that he needs to put the garage where it is proposed because he needs a 21-foot by 28-foot area to store his one (1) vehicle.

Mr. Connolly noted that the applicant's lot is very oddly shaped.

In response to a question from Mr. Connolly, Mr. Mazur stated that he could not purchase the adjacent property because the owner could not produce proper title to the 50-foot area adjacent to his home, so his attorney advised him not to complete the purchase.

Mr. Mazur stated that he tried to purchase the adjacent property last year so that he could build a garage. He further stated that he received a letter from the owner of that property indicating that he was going to go in a different direction, so Mr Mazur assumed the owner was selling the property to someone else.

Peter Genovese stated that he owns the property adjacent to Mr. Mazur's property and noted that it is a paper street. He stated that he objects to Mr. Mazur placing any building so close to his property line. He noted that he is working to sell the property next to Mr. Mazur's property, along with seven (7) acres in the rear. He stated that the 50-foot wide paper street could be developed in order to access the land behind the homes on Nash Road, and if Mr. Mazur constructs a garage one (1) foot from the shared property line, it would affect the future of that paper street.

It was determined that within the 50-foot area, there is a 15-foot wide easement containing utilities.

Mr. Genovese stated that if the requested variance is granted, it could affect the value of the land he is currently attempting to sell.

Mr. Allen stated that he is not sure that an improved driveway or road can be constructed over the 15-foot wide easement that exists within the 50-foot area owned by Mr. Genovese.

Findings:

Mr. Ginnetti made a MOTION, seconded by Mr. Chiacchia, to approve Application # 5669.

On the question:

Mr. Ginnetti reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No.
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 – This could be argued either way, but the balancing test is in favor of granting the variance.

As the vote on the motion was six (6) ayes and one (1) nay (Ms. Hahn), the motion passed. **GRANTED.**

Application # 5670 People Inc. – Requesting an area variance for lot size to allow the subdivision of property located at 5235 Roberts Road

Application # 5671 People Inc. – Requesting an area variance for a proposed new home on vacant land located at 5235 Roberts Road

Jocelyn Bos, Vice-President of Housing Development for People Inc., stated that People Inc. owns a lot on Roberts Road that was donated to them a number of years ago. She noted that People Inc. has not been able to use the existing home on the property because of its condition. She stated that People Inc. applied for funding to renovate the home, but it was discovered that the home contains asbestos, lead and some mold, and since People Inc. is an agency, it is much more restricted due to regulatory mandates regarding what it must do to remedy those problems. She further stated the the funding source informed People Inc. that the price to remedy those problems would be exorbitant, and the only way it would allow funding is if People Inc. came with a different approach.

Ms. Bos stated that at that point, she met with Mrs. desJardins and Mr. Allen to discuss the possibility of constructing a new home on the property and subdividing the parcel to be able to sell the existing home to a private buyer who could remediate the problems in the house much more cheaply.

Matt Long, architect, representing the applicant, stated that a private homeowner could abate the asbestos, lead and mold himself, but an agency cannot.

Mr. Long stated that neither newly created lot would be large enough to comply with the Town Code regarding area (15,000 sq.ft. is required), and the new home would be too close to a side property line, which would also require a variance. He noted that the home is planned so as to allow the residents a rear yard that can be used.

Ms. Bos stated that People Inc. plans to construct a three-bedroom 2,000 sq.ft. home for individuals who are ready to move out of their parents' home and live together, and they will not require 24-hour service.

Mr. Long stated that the existing home is not optimal for People Inc.'s needs in terms of layout of rooms.

Ms. Bos stated that she has received numerous calls in the last year from potential purchasers of the existing home, but at that time People Inc. was not considering selling it. She noted that if the variances are granted, the plan would be to sell the existing home.

In response to a comment from Mr. Dimpfl, Mr. Long stated that he is aware of the existing sewer line in the vicinity of where the new home would be located.

Fred Platek, 5265 Roberts Road, stated that he does not object to People Inc. He stated that when People Inc. acquired the home, he assumed it would be rehabbed or demolished and a new home would be constructed. He stated that he would have no objections to either scenario, but he does object to the creation of two lot that do not conform to the Town Code.

Mr. Platek stated that the property People Inc. owns currently is approximately 25,000 sq.ft. in area, which is comparable to the other properties in the area. He stated that if the lot is divided and a new home is constructed, the existing house will remain a zombie home. He stated that he cannot imagine who would purchase the existing home on such a small lot with no possibility of having a rear yard.

Mr. Platek stated that granting the requested variances would result in a decrease in the surrounding neighbors' property values. He stated that he worries that constructing a new home would affect the area storm drainage.

In response to a question from Mr. Connolly, Mr. Long stated that the cost to demolish the existing home would be extremely high and not financially feasible.

Mr. Long stated that he believes that the existing home could be sold at a low cost, and the new owner could then abate the mold, lead and asbestos and still not have spent too much on the property.

Eric Privateer, 5244 Roberts Road, stated that he does not want to have to deal with back-up beeping from buses, traffic and deliveries, which is what happens now at a nearby group home.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl, to table Application # 5670 and 5671.

On the question:

Mr. Connolly suggested that the applicant look at other opportunities or options, knowing that the existing home could be taken down to accommodate building the new home. He suggested that the applicant return to the Board with firmer information as to why that is not feasible.

Chairman Rybczynski stated that one of Mr. Platek's concerns seem to center around the existing home and whether it will become a zombie home. He stated that a letter of commitment or public acknowledgement of interest in the home might allay Mr. Platek's fears.

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

Application # 5663 Attorney Leonard Berkowitz – Requesting an interpretation of a determination made by the Supervising Code Enforcement Official regarding Town Code Section 280-70 A

Attorney Leonard Berkowitz stated that he represents Gerald Miller, as well as the Russo, Privateer and Schutz families, all of whom live near the site of the proposed Tim Hortons in Lake View. He stated that it is his position that this use with a drive-in window is not a permitted use in the C-1 Zone and that the Town Board did not make it a permitted use in the C-1 Zone be-

cause, at least in this instance, the C-1 Zone is immediately adjacent to residential homes where there are children and people moving about the street.

Attorney Berkowitz referred Board members to Town Code Section 280-70 (Permitted Uses and Structures in the C-1 Local Retail Business District) and specifically Section 280-70 A (2) (c), which states as follows:

"The following uses, when conducted entirely within an enclosed building; Eating and drinking establishments"

Attorney Berkowitz stated that a Tim Hortons is clearly an eating and drinking establishment, and clearly it is not all within the building. He noted that there is a window where customers order food or drink from outside the building, pay for the food or drink outside the building and receive the food or drink outside the building. He stated that Tim Hortons is not a restaurant where the entire use is within the building.

Attorney Berkowitz referred Board members to Town Code Section 280-342 (Definitions) wherein a drive-in restaurant is defined as "A restaurant wherein all patrons thereof are not required to be seated to be served". He stated that Tim Hortons is an operation where there is a drive-in window and customers do not have to be seated to be served.

Attorney Berkowitz stated that the above section of the Town Code further supports the fact that this is not a restaurant use where everything is done within the building.

Attorney Berkowitz referred Board members to Town Code Section 280-81 A (12) (Permitted Uses and Structures in the C-2 General Commercial District), which states as follows:

" Principal uses and structures: Drive-in restaurants"

Attorney Berkowitz stated that the above permitted use is not permitted in the C-1 District.

Attorney Berkowitz stated that he believes that the Town Board, in it wisdom, decided that C-2 Districts were where it wanted to have cars driving around because, at least in this instance, the C-1 District is immediately adjacent to residential uses all over the place, and that is why it wanted to prohibit drive-in type restaurants.

Attorney Berkowitz referred Board members to Town Code Section 280-15 (Classification by Use Groups) which states the following:

"Use Group 9: uses first permitted in the C-1 District

Use Group 10: uses first permitted in the C-2 District"

Attorney Berkowitz referred Board members to Town Code Section 280-16 (Interpretation), which states the following:

"When a use is first included in any use group, such use shall be interpreted as being excluded from any use group with a lower number".

Attorney Berkowitz stated that a drive-in restaurant in a C-2 District is found in Group 10, and accordingly a drive-in restaurant is excluded from those uses in the Group 9 District (C-1).

Attorney Berkowitz stated that based upon the Hamburg Town Code, this is a drive-in restaurant, which is not permitted in the C-1 District, especially in this situation where the former post office building was close to a residential District, and that is why drive-in uses are prohibited.

Mr. Allen stated that this is a challenge to his interpretation, and the Board reviewed his findings as documented that support his determination, contrary to Mr. Berkowitz's presentation. He stated that he stands on his documentation and correspondence to the Planning Board on January 16, 2018 and March 5, 2018 with respect to the permitted use at this location.

Mr. Allen stated that there are many C-1 Districts in Hamburg that are adjacent to residential Districts.

In response to a question from Mr. Connolly, Attorney Berkowitz stated that in regards to the correspondences from Mr. Allen, his only response is that he (Mr. Allen) is wrong. He stated that the ordinance is clear that a drive-in restaurant is not a permitted use in this District.

Attorney Berkowitz stated that he feels that Mr. Allen's interpretation does not hold water when the other sections of the Code that apply here are taken into account. He noted that outside service is not permitted at all in that District.

Attorney Berkowitz stated that it makes perfect sense to not allow drive-in restaurants in C-1 Districts immediately adjacent to residential Districts because of the children and people walking, biking, etc.

In response to a question from Chairman Rybczynski, Attorney Berkowitz stated that Chapter 301 of the 2015 International Building Code does not supercede the Town Code. He stated that the Board of Zoning Appeals is controlled by the Town's Zoning Ordinance and not by the International Building Code in this particular instance.

Mr. Allen stated that the Town Code consists of many ambiguities, and other references must be used to resolve those ambiguities, which is why he referenced the State Building Code.

Attorney Berkowitz stated that he respectfully disagreed with Mr. Allen's statement.

In response to a question from Mr. Connolly, Mr. Allen stated that the fact that drive-in and drive-thru banks are allowed in the C-1 District entered into his determination. He noted that he believes that the authors of the Town Code would have explicitly omitted drive-thru eating establishments if they did not want them in the C-1 District.

Attorney Berkowitz stated that the authors of the Town Code could have designated "banks and any other drive-in tellers" as permitted uses. He stated that the authors limited it to drive-thru banks because they thought that banks and the business done at a banking window would not be as intrusive as a drive-in window where people are buying food and food is being handed out the window.

Mr. Allen stated that he would construe the drive-thru aspect of the eating establishment as an accessory use and not a non-permitted principle use.

Attorney Berkowitz stated that per Section 280-70, eating and drinking establishments are permitted when conducted entirely within an enclosed building.

Mr. Allen responded that Section 280-70 refers to a principle use and not an accessory use.

In response to a question from Mr. Connolly, Mr. Allen stated that there are other examples of restaurants in the similar situation where they are operating as drive-thru establishments in a C-1 District.

Attorney Sean Hopkins stated that there is a Wendy's drive-thru restaurant at 3521 McKinley Parkway that is located in a C-1 District.

Mr. Gerry Miller, 6525 Hackberry Drive, stated that a Tim Hortons drive-in window generates 60%-70% of its business, and it is not an accessory use. He stated that without the drive-in window, Tim Hortons would not be able to operate, and the drive-in window is the principle use.

Mr. Miller read from Mr. Allen's letter of March 5, 2018 to the Planning Board as follows:

"I would also assert that with the drive-thru as proposed, the specific business transaction taking place is conducted entirely within the enclosure of the building identical to that of a drive-thru bank transaction as provided in the Code."

Mr. Miller stated that Section 280-70 A (2) states "the following uses, when conducted entirely within an enclosed building". He stated that Mr. Allen is referencing Section 280-70 A (4), which is not limited to being within an enclosed building, and banks and bank drive-thru banks are outside of the building.

Attorney Sean Hopkins, representing Randy Schmitz, owner of the property to which this request for a Code interpretation pertains, stated that Mr. Allen, in his supplemental letter issued on March 5, 2018, noted that the drive-thru window is an accessory use. He stated that to make the argument that the drive-thru window has become the principle use of the property defies common sense. He stated that if that logic was taken to an extreme, then someone could argue that a parking space, a light pole or a fence is a principle use.

Attorney Hopkins stated that the principle use of this property is the restaurant.

Mr. Connolly stated that he has a hard time thinking that the drive-thru is not the principle use, since at Tim Hortons, the bulk of the employees are in the drive-thru area, the bulk of the cars are in the drive-thru area and the bulk of the revenue comes from the drive-thru area. He stated that he cannot imagine how someone could come to the conclusion that the drive-thru area of a restaurant is not primarily the principle use.

Attorney Hopkins asked Mr. Connolly if therefore the accessory use would then be considered the rest of the building. Mr. Connolly responded that the rest of the restaurant is there but the usage of the actual production of the business, which would be the most important part of the business, would be very significant.

Attorney Hopkins stated that Attorney Berkowitz wants to speculate about what the intent of Section 280-70 (Permitted uses and structures in the C-1 District) was when it was adopted, but that is not relevant. He stated that the Town Code itself must be relied upon.

Attorney Hopkins stated that when one looks at the list of permitted principle uses, eating or drinking establishments are included. He stated that that list of permitted principle uses also includes banks and drive-thru banks, where the sole purpose of a drive-thru bank would be to service customers who drive up to the window. He stated that there is some confusion between a drive-thru bank as explained above and a Tim Hortons restaurant with an accessory drive-thru window.

Attorney Hopkins stated that Section 280-70 A (2) (c) does not prohibit a restaurant with a drive-thru window.

Attorney Hopkins stated that in the Town Codes of some municipalities, drive-thru windows with restaurants are prohibited, but they are not prohibited in the Town of Hamburg Town Code.

Attorney Hopkins stated that Section 280-70 B (2) defines the term"accessory uses and structures" in the context of C-1 accessory use and states that "unless otherwise provided, accessory uses and structures customarily incidental to permitted principle uses". He noted that it is customary for most restaurant that are national chains to have a drive-thru window.

Attorney Hopkins referenced Section 280-342 wherein "accessory use" is defined as "A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except as otherwise provided for off-street parking." He noted that the small window is an accessory use and is associated with the restaurant.

Attorney Hopkins stated that the Wendy's restaurant located at 3521 McKinley Parkway is located in a C-1 District. He noted that the restaurant is the principle use, and it has a drive-thru window as the accessory use. He stated that if the Board were to reverse Mr. Allen's determination, then the Wendy's would not be legal and would not be entitled to non-conforming status, and it would have to be closed down.

Attorney Hopkins stated that in terms of the context of this appeal, the standard of review is that Mr. Allen, who is the designated Code Enforcement Officer and has years of experience, has indicated that there are nuances when one looks at these individual questions, but the grand context must be looked at, which is what he has done. He stated that the standard of review in terms of this applicant is whether or not Mr. Allen's interpretation is one of the following:

- arbitrary and capricious
- Illegal
- irrational
- unsupported by the record

Attorney Hopkins stated that it is clear that Mr. Allen's interpretation is none of the above.

Attorney Hopkins stated that Mr. Allen made the important point that sometimes when making determinations there is some ambiguity. He noted that there are court cases, which he cited in his documentation to the Board, that say that if there is ambiguity in the Code, the ambiguity gets interpreted in favor of the property owner. He stated that that case law is binding on the Board of Appeals in connection with this appeal.

Attorney Hopkins stated that it appears that Attorney Berkowitz and Mr. Miller are trying to argue that the drive-thru window is the principle use of the property. He stated that that line of thought is contrary to the definitions in the Town Code and to previous land use determinations in the Town of Hamburg.

Attorney Hopkins stated that the drive-thru window is a permitted accessory use based on the definitions in the Town Code. He stated that in order for Mr. Miller's argument to be correct, the drive-thru window (accessory use) would have to be converted to the primary principle use, and perhaps that would make the rest of the building the accessory use. He stated that the language in the Town Code says that the accessory use must be in an enclosed structure, which this is. He noted that the employees are located inside the building, food and beverage items are prepared inside the building and a window is opened to serve customers.

Attorney Hopkins stated that a claim has been made that this is a drive-in restaurant, which is not a use first permitted until one looks at the C-2 Zoning classification. He stated that a drive-in restaurant can be distinguished from a restaurant with an accessory drive-thru window. He stated that a drive-in restaurant is defined by Webster's Dictionary as "an establishment, such as a theatre or restaurant, so laid out that patrons can be accommodated while remaining in their automobiles." He further noted that examples are as follows:

"A drive-in restaurant is a facility where customers can park their vehicles and be served by staff who walk or roller skate out to take orders and return with food, encouraging customers to remain parked while they eat." He stated that the typical drive-in restaurant was one that had no space inside the building for customers to eat.

Attorney Hopkins stated that the Board does not have any choice but to affirm the interpretation issued by Mr. Allen in light of the information he provided and the fact that this is based on the actual language of the Code rather than speculation as to intent. He stated that it is Mr. Allen's interpretation that is at issue, and he is entitled to deference and recognition of his experi-

ence. He further stated that, recognizing that there can sometimes in any Zoning Code be ambiguity, if there is ambiguity Mr. Allen is entitled to deference, and the property owner is entitled to the benefit of that ambiguity.

Mr. Connolly asked Attorney Hopkins if there is other case law that would allow the Board to go in the other direction. Attorney Hopkins stated that yes there is, because this is an appeal. He stated that he is not saying that the Board must automatically affirm Mr. Allen's decision just because he (Mr. Allen) has a great deal of experience.

In response to a question from Mr. Connolly, Attorney Hopkins stated that he is not certain if there are other restaurants with drive-thru windows in the C-1 District besides the Wendy's.

Mr. Allen stated that it is clearly understood that most of the fast food drive-thru operations are generally located in the C-2 District because that is the preferred location where there is the most traffic and activity. He further stated that there are more C-2 District properties in Hamburg than C-1 District properties.

Mr. Miller stated that the act of getting the food is done outside, which is not an enclosed structure.

Attorney Hopkins responded that the food and beverages are prepared inside, and the employees are inside.

Mr. Connolly stated that if a customer does not order at the speaker, which is outside, nothing happens.

Mr. Miller stated that usually there are very few people working at the counter during prime time, and several others are attending to the drive-thru because that is, in fact, the main portion of the business.

Chairman Rybczynski stated that Mr. Miller's argument makes sense rationally, but legally speaking he does not know if it holds true. He stated that it could be argued that a restaurant's primary purpose is to make and serve food, and of course the food must be ordered.

In response to a question from Mr. Miller, Mr. Allen stated that his determination regarding occupancy load was arrived at based on the information provided by the applicant.

In response to a question from Mr. Miller, Mr. Allen stated that he used the Code provisions as a reference to define the use classification. He noted that in the State Code, it is not considered a restaurant but rather a B business occupancy. He further noted that the entire building will not be occupied by this particular specified use.

Mr Miller referenced the Group B occupancy in Section 304.1 as follows:

"Business occupancies shall include, but are not limited to, the following…"

He stated that therefore restaurants are not listed under Group B occupancy, but that does not mean that a restaurant cannot fall under the Group B occupancy.

Mr. Allen stated that it is based on the amount of occupancy. He stated that if the occupancy is less than 50 persons, then it would be classified as a Group B occupancy.

Mr. Miller stated that the drive-thru window is not incidental and subordinate to the principle use.

Attorney Berkowitz stated that Tim Hortons is an eating and drinking establishment. He stated that perhaps allowing the Wendy's on McKinley Parkway in a C-1 District was a mistake, and the fact that it exists does not mean the Town should make the same mistake again.

Attorney Berkowitz referenced the following Webster's Dictionary definition of "drive-in" for English language learners:

"A restaurant at which people are served in their cars".

He noted that the above is what happens most of the time at Tim Hortons restaurants, and it defies logic to say that the drive-thru window is an accessory use.

Attorney Hopkins stated that the drive-thru window is incidental and subordinate to the permitted principle use. He stated that whether or not a use is considered accessory or principle is not based on a business's financial information. He stated that the Tim Hortons restaurant is the principle use, and it does not make sense to twist things around to say that the restaurant is the accessory use and the drive-thru window is the principle use.

Mr. Chiacchia stated that Mr. Allen gets a great deal of training per year from the State of New York regarding interpretation of the laws and code enforcement. He stated that Mr. Allen is an expert in the code because of his training.

Attorney Berkowitz stated that if Mr. Chiacchia is correct, then the Board of Zoning Appeals does not need to exist, because its job is to make a determination as to whether Mr. Allen is correct or not.

Attorney Hopkins stated that there is a case that is directly on point. He stated that he represents the owner of a proposed Tim Hortons in the Town of Orchard Park, and the lower court ruled that the drive-thru window is an accessory use. He stated that when the case went to the appellate division, it affirmed that the drive-thru window is an accessory use. He stated that the Town of Orchard Park appealed that ruling, and the Court of Appeals chose not to take the case.

Neal Russo, 6519 Hackberry Drive, stated that he met with Mr. Allen two (2) months ago and asked him about his determination that this is a permitted use in the C-1 District. He stated that Mr. Allen advised him that his determination is his opinion and his interpretation. Mr. Russo stated that this is not a permitted use because the use is not conducted entirely within an enclosed building. He stated that people being served in their cars is not business being conducted inside the building.

Mr. Russo stated that Tim Hortons' busiest time is between 5:00 AM and 9:00 AM for the drive-thru. He stated that if 100 cars per hour are anticipated, that means 400 cars would go through the drive-thru during those four (4) hours. He stated that serving 400 cars does not constitute an accessory use. He further stated that allowing the Tim Hortons would be a traffic concern because there is only one (1) way in and out of the site onto the side road.

Mr. Russo stated that the property should be rezoned to C-2, and the Wendy's is the only drib-thru restaurant in a C-1 District. He stated that this use is not permitted in the C-1 District and this is not the correct zoning for this type of use.

Mr. Miller stated that he believes the Wendy's was built in 1998, and there are three (3) different buildings on that property. He noted that the Wendy's only represents 37% of the site. He stated that Mr. Allen has noted in the past that when an error occurs, it should not be repeated.

Attorney Hopkins acknowledged that listed under "principle uses" of properties zoned C-1 are banks and drive-thru banks. He stated that a drive-thru bank, which is an expressly permitted principle use, is a bank where no business is conducted inside the building.

Attorney Berkowitz stated that whether it is a principle use or an accessory use, the proposed Tim Hortons is an eating establishment where everything has to be within the building. He stated that an accessory use that is outside the building is not permitted in the C-1 District.

Chairman Rybzynski asked if the discussion revolves around whether one agrees or disagrees with Mr. Allen's interpretation or whether he was arbitrary and capricious or did anything illegal, irrational or unsupported by the record.

Attorney Berkowitz stated that Mr. Allen's interpretation was irrational and not logical based on the Sections of the Town Code he referenced earlier. He stated that he agrees that the Board must consider whether the interpretation was arbitrary and capricious, illegal, irrational or unsupported by the record, but the Board can disagree with the Code Enforcement Official.

Attorney Hopkins stated that the word "enclosed" only applies to principle uses.

Mr. Connolly stated that in all the years of fast food drive-thous being built in the Town, if the Wendy's is the only one to be found in a C-1 District and is located in the biggest commercial area of the Town, he wonders what the argument would be that this fast food drive-thru establishment is appropriate where proposed.

Attorney Hopkins responded that he is not saying that because a Wendy's is located in a C-1 District, the Board must ignore the Code and allow the Tim Hortons. He stated that his argument is based upon the language of the Code.

Findings:

Mr. Connolly stated that Board members must remember that they are not being asked to make a decision as to whether they agree or disagree with the end result, but rather they must decide if Mr. Allen was arbitrary or capricious, if something was done illegally, if he came to his decision illogically or if he had a firm basis in his determination.

Chairman Rybczynski stated that he can see both sides of the argument. He stated that he does not see Mr. Allen's determination being made arbitrarily and there is a rational basis behind it.

Ms. Hahn made a MOTION, seconded by Mr. Dimpfl, to affirm Mr. Allen's determination.

Alll members voted in favor of the motion. **AFFIRMED.**

Ms. Falkiewicz made a MOTION, seconded by Mr. Dimpfl, to approve the minutes of March 6, 2018. All members voted in favor of the motion.

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

The meeting was adjourned at 10:30 p.m.

Respectfully submitted,

L. Michael Chiacchia, Secretary
Board of Zoning Appeals

DATE: April 24, 2018