

Town of Hamburg
Board of Zoning Appeals Meeting
May 1, 2018
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, May 1, 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 and Sarah desJardins, Planning Consultant.

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

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

It was determined that the applicant withdrew these applications.

Application # 5672 Kellie Lynn Boyd – Requesting two (2) area variances for a proposed detached garage at 1768 Lakeview Road

Kellie Boyd, applicant, stated that she and her husband have equipment, five (5) summer cars and a Class C motor home they would like to store indoors.

Jeff Boyd stated that no one would see the building much from the road. He stated that the property the garage is proposed to be located on has been merged with the adjacent property on which their home is located.

In response to a question from Mr. Connolly, Mr. Boyd stated that he spoke with the owner of 1764 Lakeview Road, who has no objection to the requested variances.

In response to a question from Mr. Connolly regarding the fairly significant percentages being requested for the variances, Mr. Boyd stated that he cannot adhere to the 1,500 sq.ft. requirement because he would only want to put one (1) door on the building, and that would require a 12.5' door to get the motor home in.

In response to a question from Mr. Connolly, Mr. Boyd stated that the motor home is 12' 6" high.

In response to a question from Mr. Connolly, Mr. Boyd stated that he could put two (2) doors on the building, but he does not want to. He stated that he wants the building to look as nice as the house does.

In response to a question from Mr. Connolly, Mr. Boyd stated that 1,500 sq.ft. will not accommodate all of the items he wishes to store in the building.

In response to a question from Mr. Connolly, Mr. Boyd stated that he has not spoken to any of the residents on Hewson Road whose homes back up to the property on which the building is proposed. He stated that he cannot touch the last 50 feet of his property that backs up to Hewson Road, so he did not contact any of those property owners.

In response to a question from Mr. Dimpfl, Mr. Boyd stated that the building would be located more than 100 feet from the rear property line of 1780 Lakeview Road (the most affected neighbor).

Mrs. desJardins stated that the plans submitted to the Building Department indicate that the building would be located 45 feet from the rear property line of 1780 Lakeview Road. Mr. Boyd responded that the building would be further back than what is shown on the plans.

Danielle McCarthy, 1780 Lakeview Road, stated that she does not want the storage building to be an eyesore for her family. She stated that she does not want the existing trees between the rear of her property and the new building removed.

Mrs. McCarthy stated that she has a huge drainage problem at the rear of her property, and her biggest fear is that the building will go up and her drainage problem will get worse. She stated that she does not want that to happen.

Mr. Boyd stated that his property is virtually surrounded by a moat. He stated that he would not be raising the land to construct the building, so the excess water should not affect Mrs. McCarthy's drainage problem.

Mrs. desJardins stated that she recommended that Mrs. McCarthy visit the Building Department, if the variances are granted, to alert the inspectors about her drainage problems so that they are aware of them before the applicant begins construction.

In response to a question from Mrs. desJardins, Mr. Boyd stated that the new structure would be located approximately 80 feet from Mrs. McCarthy's rear property line.

Findings:

Mr. Connolly made a MOTION, seconded by Ms. Hahn, to approve Application # 5672 with the following conditions:

1. The applicant will make all reasonable efforts to locate the structure at least 70 feet from the rear property line of 1780 Lakeview Road.
2. The applicant will not remove the existing trees between the structure and the rear property line of 1780 Lakeview Road.
3. The applicant will work with the Building Department to alleviate via grading any drainage issues that would further contribute to the existing drainage problem.

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 – It can be achieved by other means, but the alternatives available to the applicant that affect not only the applicant but also the property owner of 1780 Lakeview Road would be even more detrimental than if the variance is granted.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – The testimony provided that this will not be the case, and any undesirable change has been addressed by the conditions placed on the approval.
3. Whether the request is substantial – Yes.

4. Whether the request will have adverse physical or environmental effects – The conditions imposed will put in place will not have any adverse physical or environmental effect.
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.

Chairman Rybczynski commended both parties for working together to make things as reasonable and amicable as possible.

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

Application # 5673 Waterford Pines Community, LLC – Requesting an area variance for a home under construction at 4993 Waterford Lane

Mr. Mike Perry from David Homes stated that he oversees the construction of all of David Homes' properties. He stated that construction was begun on this new home, and the home was staked out. He stated that David Homes uses pre-cast foundation walls that are set directly on stone, and the surveyor leaves offsets there that are ten (10) feet off the hole. He stated that David Homes then uses those offsets to lay the home out inside the excavation, but one of those offsets was not in the correct location.

Mr. Perry stated that he checked the foundation at the request of the home owner and ordered a foundation location, and he found that one corner is 8" too close to the road. He stated that he then brought this problem to the attention of the Building Department.

Mrs. desJardins stated that she received a phone call from the adjacent property owner, who had no objections to the granting of the requested variance.

In response to a question from Mr. Connolly, Mr. Perry confirmed that he has overseen over 200 new homes being built, and this is the second time this has ever happened.

Mr. Connolly commended Mr. Perry for bringing the problem to the attention of the Building Department.

Findings:

Ms. Falkiewicz made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5673.

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 – 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 # 5674 5054 Lake Shore Road, LLC – Requesting a use variance to allow for a second dwelling on property located at 5054 Lake Shore Road

Attorney Ryan McCann, representing the applicant, stated that the property is surrounded by Lake Erie, Route 5, two (2) properties that are owned by the DeMarco family and a parcel that is owned by Thomas & Patricia Bender. He noted that a letter of support for the proposed variance was submitted by Mr. Bender.

Attorney McCann stated that the property comprises 1.2 acres, and there are two (2) structures on it currently. He stated that one (1) is a single-family dwelling, and the other is a structure that is technically two (2) units, but if the use variance is granted, it would be converted back to a single-unit carriage house.

Attorney McCann stated that when the DeMarcos acquired this property in 2000, it contained the dwelling and a dilapidated carriage house with full utilities. He stated that because of complaints from the Benders and because of a rat infestation problem, the DeMarcos received approval from the Board of Zoning Appeals to demolish the carriage house and construct a new garage, which he did.

Chairman Rybczynski stated that correspondence was received from Kurt Allen, Supervising Code Enforcement Official, recounting what has occurred since 2000 and indicating that recently it was revealed that the garage was allegedly converted into second and third dwelling units, which was done unlawfully and without necessary approvals and permits. He stated that Mr. Allen also indicated that the illegal conversion of the garage into a second residence in the R-1 District is a violation of the local law.

Chairman Rybczynski stated that the second residence is a prohibited use, and the Board of Zoning Appeals takes that very seriously.

In response to a question from Chairman Rybczynski, Attorney McCann stated that there would be a way to convert the building back to its original intent (garage), but it would be a costly endeavor. He further stated that the DeMarcos are in a position where they are selling the property, and they have a sales contract with their son. He noted that when the approval for the loan was received, the appraiser went to look at the property and noticed the alleged illegal use of the property.

Attorney McCann stated that Mr. McCann converted the garage into the two (2) units for purposes of accommodations for his family members, similar to what is allowed in the R-E District (Residential Estate). Attorney McCann submitted a map showing that this property is in close proximity to two (2) properties that are zoned R-E, which allows caretakers homes.

Attorney McCann stated that the garage is located at the exact location where a caretaker's home was, and the utilities were all there when the garage was built. He noted that Mr. DeMarco converted the garage to living space without knowledge that it was in violation of the Town Code.

Attorney McCann stated that Mr. DeMarco is at a significant disadvantage relative to other properties in the R-1 District that are on the Lake. He stated that there are multiple properties along the Lake with carriage homes, and it is commonplace along the shores of Lake Erie.

In response to a question from Attorney Harbold, Mr. James DeMarco, applicant, stated that the garage was converted to living space in 2006 or 2007 because his daughter needed a place to live. He noted that he was not using the garage, and all of the utilities were there.

In response to a question from Mrs. desJardins, Attorney McCann stated that in order to convert the existing two-unit building into a one-unit building, he would take down a bedroom wall.

In response to a question from Attorney Harbold, Mr. DeMarco stated that a bathroom was put in the building when the garage was built in 2000.

Attorney McCann stated that although this property is located in an R-1 District, it is unique because it is on the Lake. He noted that it is commonplace for properties on the Lake to have carriage houses.

Attorney McCann stated that if the use variance is granted, the applicant will have to go back through the permit application process, pay all the necessary fees and get all the necessary approvals.

Chairman Rybczynski stated that his concern is safety because there are different building requirements for garages and living spaces. Attorney McCann stated that the applicant is willing to do whatever it takes to bring the building up to code if it is not already code compliant.

In response to a question from Mrs. desJardins, Mr. DeMarco stated that there is a kitchen in the building, along with a sink and small refrigerator.

In response to a question from Mr. Connolly, Attorney McCann stated that the applicant has a valid sales contract with his son for the entire parcel. He further stated that the property has not been marketed because the applicant wants to keep it in the family.

Attorney McCann stated that absent the use variance being granted, the sales contract will not be able to move forward because the financing cannot be obtained by the purchaser. He noted that the applicant would then be forced to put the building back the way it was (garage).

In response to a question from Attorney Harbold, Attorney McCann confirmed that no certificate of occupancy was sought by the applicant after the garage was converted to living space, and no inspections were made by the Building Department.

Findings:

Chairman Rybczynski stated that Attorney Harbold had requested that this application be tabled for further research.

Application # 5675 5272 South Park Avenue, LLC – Requesting five (5) area variances for a proposed apartment development to be located at 5200 and 5272 South Park Avenue

Attorney Sean Hopkins, representing the applicant, stated that this site is zoned R-3, and the proposed project involves the construction of attached upscale apartment buildings. He stated that the project does comply with the required front yard setback (50 feet), the units along Sowles Road would face inwards in order to avoid each of the buildings having a separate curb cut onto Sowles Road and a berm and landscaping is proposed along Sowles Road.

Attorney Hopkins stated that there are several instances where the proposed buildings do not comply with the required 50-foot setback from all property lines. He stated that buildings 1, 2 and 3 do comply with the required 50-foot setback, but the following buildings would require a setback variance:

- Building 7 would be 43 feet from the east property line, although it would be 53.3 feet from the internal driveway.
- Building 8 would be 31.12 feet from the east property line, but as measured from the pavement of the internal driveway it would be 51.27 feet.
- Building 11 would be 30 feet from the east property line and 30 feet from the north property line, although it would be 51.99 feet from the internal driveway.

- Building 9 would be 29.23 feet from the west property line.
- Building 10 would be 22.15 feet from the west property line and 30 feet from the north property line.

Attorney Hopkins stated that the property to the north and west of this site is owned by the applicant and will be developed in the future. He stated that in every instance, these variances are measured from either property the applicant is purchasing from Hilbert College or property the applicant owns and plans to develop.

Attorney Hopkins stated that the sole reason for doing this is for financing purposes. He noted that this project will be Phase I of a larger redevelopment project.

Attorney Hopkins stated that none of the requested variances deals with property the applicant does not own or is not planning to purchase.

Attorney Hopkins stated that if the variances are not granted, the applicant could propose three-story buildings instead of two-story buildings and increase the density of the project substantially, although that is something the applicant would rather not do.

Attorney Hopkins 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 – The granting of the variance would result in a better project and there would be no detriment to nearby properties because the buildings on Sowles Road would be set back the required 50 feet from the roadway.
3. Whether the request is substantial – It is not enough to just quantify the deviation from the underlying Code requirement, and no harm will result.
4. Whether the request will have adverse physical or environmental effects – The granting of a setback variance for a residential building is a Type II Action under SEQR, and therefore it is exempt from an environmental review. The Planning Board will conduct an environmental review to make sure the project complies with standards in terms of lighting, landscaping, drainage, traffic, access, etc.
5. Whether the alleged difficulty is self-created – The hardship was self-created, but that cannot be the sole basis for decision making.

In response to a question from Mr. Chiacchia, Attorney Hopkins stated that a passive recreation area is proposed.

In response to a question from Mr. Connolly, Attorney Hopkins stated that the property was purchased in 2016, and the developers are Nick Sinatra and Essex Homes.

Mr. Connolly stated that these developers have been in the business for a long time and knew the regulations when they purchased the property. He asked Attorney Hopkins why they are requesting variances now.

Attorney Hopkins responded that in 2016 the developers did not know what the exact layout would be.

Mr. Connolly stated that when the developers put this plan together with five buildings requiring variances, they must have been aware of the Town's regulations.

Attorney Hopkins stated that the applicant owns the property to the north and west, and these property lines are drawn simply for financing purposes. He stated that from an impact perspective, the requested variances are relatively meaningless. He stated that the applicant is pur-

chasing property to the east from Hilbert College because it is needed due to the grading of the property and the need for drainage facilities. He noted that this fact was not known to the applicant when the property was purchased.

Attorney Hopkins stated that the applicant tried to purchase the property to the east all the way to the internal driveway, but Hilbert College wanted to retain some of the green space west of the driveway.

In response to a question from Mr. Connolly, Attorney Hopkins stated that 60 units are proposed on this parcel. He stated that the applicant has not figured out exactly what to do with the rest of the property.

Mr. Connolly stated that if the applicant eliminated five (5) of the 60 units, no variances would be needed.

In response to a question from Mr. Connolly, Attorney Hopkins stated that the proposed buildings have been built in other places, which is why they have the proposed number of units in them.

Steven Ross, 4251 Sowles Road, stated that his main concern is the applicant's property area is very wet. He asked how the buildings would be buffered from the residents on Sowles Road and how far the buildings would be from Sowles Road.

Phil Riggs, 4273 Sowles Road, asked about the traffic patterns and curb cuts associated with the project.

Findings:

Mr. Connolly made a MOTION, seconded by Ms. Falkiewicz, to deny Application # 5675.

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, the applicant can still have 55 units.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No.
3. Whether the request is substantial – Yes, the requests range from over 30% up to as high as 86%.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – Yes, and this was admitted by the applicant's counsel.

Chairman Rybczynski stated that the variances being sought are on his own property. He further stated that the requested variances are "paper" in nature, and this development might help to alleviate some of the drainage problems in the area.

As the vote on the motion was three (3) ayes (Mr. Connolly, Ms. Falkiewicz and Mr. Ginnetti) and four (4) nays (Chairman Rybczynski, Ms. Hahn, Mr. Dimpfl and Mr. Chiacchia), the motion failed.

Mr. Chiacchia made a motion, seconded by Mr. Dimpfl, to approve Application # 5676.

On the question:

Mr. Chiacchia stated that the presentation by the applicant's attorney was very significant, and the Planning Board will have the opportunity to review the project's landscaping, recreation, etc. He stated that this area is zoned for multi-family, and this project would be an improvement and increase town taxes.

Mr. Dimpfl stated that, although the balancing test was close, he felt that it leaned toward approval. He stated that an important part of his decision was the fact that the variances have to do with property that either the applicant owns or plans to purchase.

Mr. Connolly stated that two of the most active builders in Western New York are before the Board who went out of their way to purchase 7.6 acres knowing very well what they can and cannot do, as well as what the rules are and what they are not. He stated that in less than two years, they are working on the first phase of the development and are basically saying that they were not aware of the rules and they do not need to follow the criteria that the Town has taken a lot of time and effort to identify. He stated that as the Board makes these decisions, it must think it through. He stated that Mr. Chiacchia's comments about landscaping are not relevant, and as Board members made decision they should listen to what is proposed and think things through, because some of the rationale given is not fact.

As the vote on the motion was four (4) ayes (Chairman Rybczynski, Ms. Hahn, Mr. Dimpfl and Mr. Chiacchia) and three (3) nays (Mr. Connolly, Ms. Falkiewicz and Mr. Ginnetti), the motion passed.

GRANTED.

Mr. Dimpfl made a MOTION, seconded by Ms. Falkiewicz, to approve the minutes of April 10, 2018. All members voted in favor of the motion.

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

The meeting was adjourned at 8:25 p.m.

Respectfully submitted,

L. Michael Chiacchia, Secretary
Board of Zoning Appeals

DATE: May 15, 2018