

Town of Hamburg
Board of Zoning Appeals Meeting
May 12, 2015
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, May 12, 2015 at 7:00 P.M. in Room 7B of Hamburg Town Hall, 6100 South Park Avenue. Those attending included Chairman Brad Rybczynski, Vice-Chairman Shawn Connelly, Commissioner Joseph Sacco, Commissioner Bob Ginnetti, Commissioner Richard Dimpfl, Commissioner Paul Eustace and Commissioner Louis M. Chiacchia.

Others in attendance included Attorney Mark Walling, Board of Zoning Appeals Attorney.

Commissioner Eustace read the Notice of Public Hearing.

Chairman Rybczynski asked for a moment of silence to honor our troops who have paid the ultimate sacrifice.

Tabled Application # 5522 Suitable Energy Developments, Inc. on behalf of Mike Jablonski – Requesting two (2) use variances to allow two (2) wind turbines at 3134 Old Lakeview Road

Chairman Rybczynski stated that an individual was invited to attend the meeting but chose not to attend. He further stated that the question that the Board has is relative to SEQR.

Chairman Rybczynski stated that the Board must consider the effect the granting of these variances would have on noise, lighting, surrounding residences, bird migration, etc. He noted that much testimony had been given regarding noise, and it has been stated that residential wind turbines do not generate more noise than a running refrigerator would. He stated that residential wind turbines do not affect bird migration, water quality or soil quality. He stated that residential wind turbines do not cast a large shadow (lighting), and the aesthetics of residential wind turbines could be argued both ways. He stated that the effect of residential wind turbines on air quality could be considered positive because it is a clean source of energy.

Mr. Chiacchia stated that on May 11, 2015 the Hamburg Town Board scheduled a public hearing to be held on June 22, 2015 to consider the draft residential wind turbine law written by the Code Review Committee. He noted that the draft law indicates that residential wind turbines would be allowed in the RA District by Special Use Permit from the Planning Board. He stated that because of the planned public hearing, he felt the ZBA should not act on this application.

Chairman Rybczynski stated that the applicant has diligently appeared before the ZBA for several months and has been very cooperative and patient. He noted that the applicant has the right to due process and a quick hearing of his issue. He stated that it would be unfair to delay a vote any longer. He stated that the ZBA is legally bound to offer the applicant an opinion.

In response to a question from Mr. Dimpfl, Chairman Rybczynski stated that the scheduled Town Board public hearing has nothing to do with this matter before the ZBA. He stated that the ZBA has an obligation, and what is going on outside of the ZBA has no bearing on what goes on at the ZBA meeting. He noted that the draft law is good information to have, in that it indicates what the Town Board may feel is acceptable circumstances to have a residential wind turbine on one's property, but the ZBA has the responsibility to act upon the matter before it.

Chairman Rybczynski stated that for the Town Board to suggest what it wants in terms of wind turbines is improper, because the ZBA is a quasi-judicial Board.

Attorney Walling stated that at some point, it could become a denial of due process to not vote on this application. He noted, however, that if the Town Board is going to be voting on the draft law after the public hearing, which has been scheduled for a little over a month from now, that would not constitute a denial of due process if the ZBA were to vote to table this until after the Town Board votes on the draft law.

Attorney Walling stated that if the ZBA votes on this application, it would be voting on a standard that is very hard to meet.

Attorney Walling stated that the ZBA would not be violating due process by tabling this application. He further stated that there is a legal issue regarding what would happen if the ZBA approves this application and the Town Board approves the change to the law. He noted that this might be a reason to table this application, and then he will have time to research this and give the ZBA his impression of how approving this application would affect the new law of the Town.

Chairman Rybczynski stated that at this point the Town Board just has proposed legislation regarding the residential wind turbines, and there is no guarantee that anything will be approved. He stated that the ZBA should address SEQR at this point.

Mr. Chiacchia stated that in three months, the Code Review Committee has worked diligently to prepare a draft law and move it forward as quickly as possible. He further stated that he did not think the Board should address SEQR yet.

Chairman Rybczynski stated that he agrees with Mr. Chiacchia's comments regarding the work the Code Review Committee has done, but he would be overruling Mr. Chiacchia because he felt it was necessary. He stated that voting on SEQR would not impact the proposed law or any other parallel function that is going on.

Mike Jablonski, applicant, stated that his neighbors are in favor of his proposal, and his turbines would not cause anyone any problems.

Mr. Jablonski stated that he would like the Board to vote on his application.

Mr. Ginnetti asked what would happen if the ZBA were to approve this application and then the Town pass the new legislation. Chairman Rybczynski responded that at this time there is a current set of laws on the books that precludes anyone from erecting a wind turbine like the applicant is requesting. He further noted that if the ZBA offers the applicant relief from the Code, the applicant then has the opportunity to move forward and erect the wind turbines. He stated that this would not set precedence and would not change any Town law.

Mr. Connolly stated that as a member of the Code Review Committee, he wanted to speak to the members of the public in attendance, but Chairman Rybczynski stated that there would be no discussion regarding anything specific to this proposal. He stated that the item before the Board relative to SEQR is all that would be discussed.

Findings:

Chairman made a MOTION, seconded by Mr. Sacco, to issue a Negative Declaration for Application # 5522.

As there were six (6) ayes and one (1) nay (Mr. Chiacchia), the motion passed.

Chairman Rybczynski stated that Mr. Chiacchia had some very salient and poignant remarks about this application, and he agreed with everything Mr. Chiacchia said except for the point

that the Board should table this application. He noted that the applicant had asked for a vote, and there is no feasible reason to further table this item.

Chairman Rybczynski stated that there is no question the Board needs answered at this point and it may seem that the Town is close to approving a new residential wind turbine law, but he has seen items with less heft to them and seemingly the best thing for a community go on practically infinitely.

Chairman Rybczynski stated that he has not read the draft residential wind turbine legislation, and he does not want to read it until the ZBA is done with this application. He noted that from what he understands, it is pretty restrictive. He stated that based on any comments received at the public hearing, there may be some revisions to the draft law, possibly another public hearing, etc.

Mr. Chiacchia made a MOTION, seconded by Mr. Connolly to deny Application # 5522.

On the question:

Chairman Rybczynski stated that he would hope that the reason for denial is not because of the proposed legislation.

As there were three (3) ayes and four (4) nays (Chairman Rybczynski, Mr. Ginnetti, Mr. Eustace and Mr. Sacco), the motion failed.

Mr. Ginnetti made a MOTION, seconded by Mr. Eustace, to approve Application # 5522.

On the question:

Mr. Chiacchia stated that there will be an effect on the environment from these wind turbines. He stated that this hardship is self-created, and it will produce a change in the neighborhood. He stated that the ZBA should not approve this application, and the criteria for a use variance have not been satisfied.

Mr. Sacco reviewed the use variance criteria as follows:

1. Cannot realize a reasonable return – substantial as shown by competent financial evidence – The applicant showed evidence with his electric bills and how much it costs and how much he will be able to save in the future.
2. Alleged hardship is unique and does not apply to substantial portion of district of neighborhood – This is a unique hardship, and no one has come forward to complain about this. This could be debated.
3. Requested variance will not alter the essential character of the neighborhood – No, because there is no one behind this applicant.
4. Whether the alleged difficulty is self-created – This could be debated.

Mr. Sacco stated that because this is new territory, there are a lot of questions, but he feels that no one has said anything against this proposal.

Mr. Connolly stated that there was a resident who spoke against this proposal.

Mr. Chiacchia stated that the Towns of Clarence and Sheldon have recently denied proposals for residential wind turbines. He noted that if the ZBA approves this application, it will be skipping over the Town Board and the residents of the Town of Hamburg.

Chairman Rybczynski stated that if the Town Board wanted a moratorium placed on residential wind turbines, it would have done so.

Mr. Sacco stated that he is concerned about what neighbors think, but he does not feel that there have been enough complaints from neighbors about this request. He stated that society wants green energy, and it can't have it both ways.

Chairman Rybczynski stated that the testimony about the Power Company changing the rules on the applicant made an impression on him. He stated that the applicant is now put in a position that to continue in the manner that he is is difficult at best and quite possibly not feasible in the future.

Mr. Connolly stated that the ZBA's job is to look at four (4) criteria for a use variance and the criteria are very strict. He reviewed the use criteria as follows:

1. Cannot realize a reasonable return – substantial as shown by competent financial evidence – A reasonable return is the applicant being able to continue to stay in his residence, continue to operate his business, etc. The applicant has been at this location for a long time, and it is not as if without this variance he will not survive there, there are hundreds of families in the area that survive without lower electric bills, and probably 40,000 or 50,000 Hamburg residents would like to have lower electric bills. The question is whether the reasonable return is enough to veer from the established Code of the Town in order to have the applicant save money on electric bills.
2. Alleged hardship is unique and does not apply to substantial portion of district of neighborhood – It applies to almost all of the applicant's neighborhood because the houses are similar.
3. Requested variance will not alter the essential character of the neighborhood – A wind turbine that has not been on this property could be possibly considered as altering the essential character of the neighborhood.
4. Whether the alleged difficulty is self-created – This hardship has been self-created.

Mr. Connolly stated that if this request was for an area variance and it was a balancing test, he could see an argument for the applicant and he would be very open to it. He noted, however, that the request is for a use variance where there are set criteria. He stated that the ZBA went out of its way three meetings ago to indicate that since the Board is in unchartered territory and the Town has asked it to wait for the new residential wind turbine law, it would table this request.

Mr. Connolly stated that the point of tabling this request three months ago was to think this through and have the Code Review Committee review this and come up with guidelines so that the public, the applicants and the energy companies can take these guidelines as a set criteria to move forward.

Mr. Connolly stated that since he took the time and made the effort to be a part of the Code Review Committee, he believes it is worth noting that the whole reason this applicant was tabled was to allow the Code Committee to draft a new law regarding residential wind turbines.

As the motion to approve was four (4) ayes and three (3) nays (Mr. Chiacchia, Mr. Dimpfl and Mr. Connolly), the motion passed. **GRANTED.**

Application # 5527 Will Maher – Requesting two (2) area variances for a proposed accessory building at 6201 Old Lakeshore Road

Will Maher, applicant, stated that he purchased this property in 2006. He noted that he has a home business permit to operate his lawn care business at this location while living on the property. He stated that he recently purchased vacant land adjacent to his current location, and he would like to build a 2,700 sq.ft. garage to store his equipment (F 350 trucks, trailers and lawnmowers) and personal items.

In response to a question from Chairman Rybczynski, Mr. Maher stated that the amount of daily activity coming in and out of the garage will depend upon the season, as his business is seasonal. He further stated that currently he stores four lawnmowers and two trucks on the property, and there may be additional lawnmowers stored on the property if the garage is approved. He stated that he no plans to store heavy equipment.

Mr. Maher stated that he takes great pride in his property, and someone driving by would not know there is a home business there.

In response to a question from Chairman Rybczynski, Mr. Maher stated that he owns approximately four to five acres of land.

In response to a question from Mr. Connolly, Mr. Maher stated that the two trucks he currently stores on the property are stored outside in the back. He further stated that the 25.5' high garage is needed because of the planned pitch to the building. He noted that the top of the roof would be 25.5' high and the edges of the building would be 12' high.

In response to a question from Mr. Connolly, Mr. Maher stated that he could build a smaller garage, but he would prefer the larger one so the trucks will fit inside better.

Mr. Connolly stated that the Town Code allows for 750 sq.ft., and this proposal is for a 2,760 sq.ft. garage, which is a substantial difference. He noted that if the applicant does not need that substantial height and size, but he can still achieve his goal of having a storage area that is more than what is allowed but not as substantial, that would help his cause.

Mr. Maher stated that he merged the two pieces of property, and he was under the impression that he is allowed a 1,500 sq.ft. structure because he owns more than two acres.

Chairman Rybczynski explained that Mr. Maher is allowed 750 sq.ft. in storage area for the home business and 1,500 sq.ft. for personal items.

Mr. Maher stated that he would be storing both personal items and the home business items in the same building. He noted that instead of having two structures, he would like to combine the two.

Mr. Chiacchia stated that there already is a 10' X 10' structure on the property, and he feels that the request for the 2,760 sq.ft. structure is excessive. He further stated that it appears that the applicant has several employees who park on the property. Mr. Maher stated that the 10' X 10' structure would be removed.

Chairman Rybczynski stated that the applicant's business falls into the definition of small business, but the neighbors may not appreciate it if ten or twelve employees park on the site.

Mr. Paul Balbierz stated that he owns vacant land within 100 feet of this property, and he intends to build a home on the land eventually. He stated that the request is substantial, and if it is built, it will not be far from his home and he will be able to see it, especially with the proposed height. He feels this structure would adversely affect the character of the neighborhood. He asked how the Town would enforce the amount of storage used for the home business versus

the personal items. He stated that he is worried that the business will grow. He has concerns about drainage in this area, as well.

Shelia Lombardo, 6193 Old Lakeshore Road, stated that she does not have a problem at all with what Mr. Maher is requesting to do.

Lisa Geier, 1406 Schoellkopf Road, stated that her property is adjacent to Mr. Maher's property, she feels that the size of the proposed structure is excessive, and in the winter time she would be looking at this building. She stated that she is concerned about the vehicles for Mr. Maher's business, and she does not feel this is the neighborhood for a large business that is growing.

A resident of 6207 Old Lakeshore Road stated that she is not opposed to what Mr. Maher is proposing.

Mr. Maher stated that if he does not receive the variance, he could build three (3) homes on the property he recently purchased.

Findings:

Mr. Ginnetti made a MOTION, seconded by Mr. Eustace, to approve Application # 5527 with the condition that the existing accessory building on the property be removed.

On the question:

Mr. Connolly stated that he feels that the Board is looking at a residential area and a very substantial increase in the height and the size of the proposed building. He stated that even with the removal of the existing accessory structure on the property, this new building would be larger than the applicant's home. He noted that this would be like adding another home and a half to the site. He further stated that the height would be 2 ½ stories, which is like a residential home, and this is excessive, especially since there seem to be residents who have stated they are opposed to this request.

Mr. Connolly reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – Clearly the applicant can reduce the size of the accessory structure or he can create a separate place for his business in a business zone.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – The Board heard testimony from two (2) neighbors who feel this would be an undesirable change. Also, given the size of the structure and the number of employees the applicant employs at this time is concerning.
3. Whether the request is substantial – When one looks at what the Code allows for height and compares that to what is being proposed, this request is clearly substantial.
4. Whether the request will have adverse physical or environmental effects – This could be debated.
5. Whether the alleged difficulty is self-created – This is self-created.

Mr. Ginnetti reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – It could be achieved by other means, but the bigger the pitch of the roof, the safer the roof will be.

2. Whether there would be an undesirable change in neighborhood character or to nearby properties – The property is wooded.
3. Whether the request is substantial – Yes it is substantial, but half of the new garages being built are bigger than the homes on the properties.
4. Whether the request will have adverse physical or environmental effects – I have no idea what effect this would have on the environment.
5. Whether the alleged difficulty is self-created – This could be debated.

Mr. Chiacchia stated that this is not a small business, and there are other properties in the commercial zones the applicant could move the business to.

Mr. Ginnetti stated that the definition of a “small business” is one that employs 50 people or less.

As the vote on the motion was two (2) ayes (Mr. Ginnetti and Mr. Eustace) and four (4) nays (Mr. Connolly, Mr. Sacco, Mr. Dimpfl and Mr. Chiacchia), the motion failed. **DENIED.**

Application # 5528 Charles Taft – Requesting an area variance to house livestock in a barn that is too close to the property line at 3404 Old Lakeview Road

Audrey Taft, applicant, stated that they own a nursery and have owned it for many years. She stated that the barn is not visible from the road. She noted that a family is interested in purchasing this property from her and her husband, and a variance is needed to house animals in the barn. She stated that she believes that the family has two (2) horses.

Chairman Rybczynski stated that five (5) letters of support were received regarding this request.

Mrs. Taft stated that all of the neighbors she has spoken to are in favor of this request.

Mrs. Taft confirmed with Mr. Sacco that her children had livestock in the barn years many years ago.

In response to a question from Mr. Chiacchia, Mrs. Taft stated that she and her husband own 11.5 acres.

William McKeever, 3397 Old Lakeview Road, stated that he lives across the street from the Taft’s and they have been wonderful neighbors. He stated that the Taft’s property has been an agricultural enterprise for many years, and he is 100% in support of their request.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5528.

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

Application # 5529 Morgans Natural Foods, Inc. – Requesting a use variance to allow for an open air market at 4923 Lakeshore Road

Chairman Rybczynski stated that the owner of this property has indicated that per the lease the applicant has for this site, he has use of the building and the adjacent parking lot only. He

further stated that the property owner has requested that the Zoning Board of Appeals table this item.

Findings:

Chairman Rybczynski stated that this item would remain on the table.

Application #5530 John & Roberta Hoffman – Requesting an area variance for a proposed new detached garage at 3911 Sheldon Road

John Hoffman, applicant, stated that he would like to construct a pole barn behind his house. He stated that he recently purchased adjacent property and merged it with his land. He stated that he needs the storage for personal items such as a camper and approximately four (4) classic cars, but it is larger than what is allowed.

Mr. Hoffman stated that he spoke with his adjacent neighbors, all of whom support his request. He further stated that the pole barn would be in the rear of the property.

Chairman Rybczynski stated that four (4) letters of support were received regarding this request.

In response to a question from Mr. Chiacchia, Mr. Hoffman stated that the two (2) existing accessory structures on the property will be removed.

Mr. Connolly stated that the size of the property structure fits the applicant's needs, but in the future the structure will still be there and this area is surrounded by houses.

Findings:

Mr. Dimpfl made a MOTION, seconded by Mr. Eustace, to approve Application # 5530.

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 – There have been many applicants who want to store personal items like automobiles, and I can see the balance there.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – I can see the balance there, considering the location and size of this proposed accessory structure.
3. Whether the request is substantial – This is a 68% increase over the allowed square footage, so this is substantial.

Mr. Connolly proposed decreasing the size of the structure to 1,300 sq.ft.

Mr. Dimpfl stated that, although he agreed with Mr. Connolly regarding the size of the proposed structure, he felt that the balancing test had been met.

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

Mr. Dimpfl made a MOTION, seconded by Mr. Eustace, to approve the minutes of April 7, 2015. All members voted in favor of the motion.

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

The meeting was adjourned at 9:030 p.m.

Respectfully submitted,

Paul Eustace, Secretary
Board of Zoning Appeals

DATE: May 25, 2015