

Town of Hamburg  
Board of Zoning Appeals Meeting  
May 6, 2014  
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, May 6, 2014 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 Bob Ginnetti, Commissioner Joseph Sacco, Commissioner Richard Dimpfl, Commissioner Louis Chiacchia and Commissioner Paul Eustace

Others in attendance included Supervising Code Enforcement Official Kurt Allen.

Chairman Rybczynski asked for a moment of silence in honor of our fallen troops.

Commissioner Eustace read the Notice of Public Hearing.

**Tabled Application # 5454** Mark Hummel – Requesting a use variance for a second dwelling unit above at a garage at 5923 Elmhurst

Mr. Allen stated that this a pending court matter because it is regarded as a violation of the Zoning Code. He stated that originally his department received a complaint about a second dwelling unit above the detached garage, which is a violation.

Attorney Dan Chiacchia, representing the applicant, stated that the applicant's son has a rare genetic disorder and he needs care and attention at all times, although he functions at a relatively normal level. Attorney Chiacchia stated that the detached garage was built in the 1990s and the character of the building has not changed. He noted that the son wishes to have independence but cannot live in his own apartment, and the applicant cannot afford to put his son in a group home.

Attorney Chiacchia stated that the space over the garage was used by the applicant's three (3) sons as a playroom, and it is basically a glorified "man cave".

Attorney Chiacchia stated that there is a stove in the living space over the garage, and the applicant is willing to remove it.

Attorney Chiacchia stated that the granting of this variance would not alter the character of the neighborhood in any way.

Attorney Chiacchia asked Commissioner Chiacchia to abstain from participating in the discussion because Commissioner Chiacchia is his uncle, his participation would be inappropriate and there could be an appearance of impropriety. Commissioner Chiacchia stated that the fact that Attorney Chiacchia is his nephew does not impede his thoughts on this case.

Chairman Rybczynski stated that it is Mr. Chiacchia's decision as to whether he recuses himself or not.

In response to a question from Mr. Chiacchia, Attorney Chiacchia stated that the court case will be settled amicably, but it has been adjourned because it was determined that a decision should be rendered by the Zoning Board of Appeals, which would be a better course of action.

Mr. Chiacchia stated that the usage of the space above the garage as a dwelling unit was a blatant disregard for the Town Code, and he feels that the Zoning Board of Appeals should not act on this request until the issue is settled in court.

In response to a question from Mr. Connolly, Mr. Allen stated that the prosecutor is relying on the outcome of the variance request as a means to resolve the issue.

In response to a question from Chairman Rybczynski, Mr. Allen stated that the definition of a dwelling unit is a habitable space independently capable of providing a place to live. He stated that he is not sure whether the removal of the stove would mean that the space above the garage is not considered a dwelling unit.

Attorney Chiacchia reviewed the use variance criteria as follows:

- The applicant is trying to accommodate a handicapped child by giving him a sense of independence, and he cannot afford to put the child in an assisted living situation.
- The hardship is unique because the child's medical condition is unique.
- Allowing a dwelling unit over the garage will not alter the character of the neighborhood. The appearance of the garage has not changed since it was built 22 years ago.
- The hardship was not self-created because the son's hardship was not created by the applicant.

In response to a question from Mr. Connolly, Mr. Allen stated that if a variance is granted, it stays with the property, no matter who owns it. He noted that it would be very difficult to impose a condition that the variance only applies to the applicant.

Attorney Chiacchia stated that it is his understanding that removing the stove from the living area would mean that the space would no longer be considered a dwelling unit.

Chairman Rybczynski stated that the Code Enforcement department is responsible for determining the definition of a dwelling unit, and the definition is the key component to the Zoning Board's decision in this matter. He stated that perhaps determining what course of action would be necessary to render the space over the garage as a non-dwelling unit would be appropriate at this juncture.

Mr. Connolly asked Mr. Allen if the Board could attach a condition to an approval stating that the variance is only for the current owner of the property. Mr. Allen responded that he would not object to that.

Mr. Sacco asked the applicant if a medical person has ever said that having his son living over the garage is the best option for him. Attorney Chiacchia responded that the applicant did submit documentation from a doctor confirming his son's condition.

Chairman Rybczynski stated that the Zoning Board of Appeals must deal with the zoning violation of the property and not with the particular situation of the applicant and his son.

### **Findings:**

Chairman Rybczynski stated that because the applicant has expressed a willingness to explore the possibility of removing the appliances from the area above the detached garage and get an opinion as to what constitutes a dwelling, he believes the application should be tabled for one (1) more month.

Mr. Chiacchia made a MOTION, seconded by Mr. Connolly, to table application # 5454. All members voted in favor of the motion. **TABLED.**

**Tabled Application # 5477** Native Development, Inc. – Requesting a use variance to allow outdoor entertainment and alcohol consumption at 5381 Abbott Road

Matt Brunner, manager of the Armor Inn Tap Room, stated that he is asking for a variance to continue the weekly Bike Nights in the main parking lot on the building site. He thanked the Board for tabling the request at its previous meeting.

Mr. Brunner stated that he would be willing to remove the live music from the parking lot on Bike Nights. He noted that although live music outside is vital to the business, it is more important to him that the neighbors are happy and potential customers. He stated that he would still like to have the concessions in the parking lot because he feels he has to have this in order to go forward with the Bike Nights.

Chairman Rybczynski stated that the Zoning Board received a petition signed by 176 surrounding residents indicating that they oppose any outdoor activities at the Armor Inn Saloon. He further stated that correspondence was received from Mr. Brunner, as well as from Cecilia Early and Richard & Marlene Rettig.

In response to a question from Chairman Rybczynski, Mr. Brunner stated that the Bike Night vendors sell motorcycle-related items, news-related items, beer, apparel, etc. He stated that usually there are only four to five small tents outside for vendors, as well as the beer tent and the barbeque trailer.

Mr. Brunner stated that the bikers are very responsible, and they do not drink too much.

In response to a question from Mr. Chiacchia, Mr. Brunner stated that during Bike Nights there is security at all entrances to the parking lot.

In response to a question from Mr. Connolly, Mr. Brunner stated that alcohol would be served outside between 6:30 PM and 9:30 PM, depending on the weather.

Mr. Allen stated that this established is located in a C-1 District, which does not allow outdoor activities. He further stated that commercial uses in the C-1 District are not to be overly intrusive to the surrounding residential area, generally include low noise levels and odor generation and unobtrusive lighting, and operate between 8:00 AM and 9:00 PM.

Mr. Allen stated that he believes that this is a permitted non-conforming use, which means that the Armor Inn is permitted to serve alcohol inside the building. He noted that part of the requested use variance would be to allow the alcohol to be served outside in the parking lot.

Mr. Brunner stated that he feels that agreeing to move the live music inside is a huge concession on the Armor Inn's part.

Chairman Rybczynski informed the members of the audience that, because the applicant had removed the request for outdoor entertainment, the discussion going forward would be solely related to whether the applicant should be allowed to serve alcohol outside.

The following people in the audience spoke regarding the requested variance:

- Mark Jay, 4784 Crestwood Drive, asked if music would be piped in to the parking lot from inside the building.

Mr. Brunner stated that the music would be piped in to the parking lot from the speakers on the patio, but the noise level would be lower than if the live music was outside. He further stated that no additional speakers would be installed in the parking lot.

Chairman Rybczynski stated that there is no Town ordinance that addresses decibel levels.

- Patrick O'Brien, 5165 Abbott Road, stated that he lives within a third of a mile of this establishment. He stated that the motorcycles make a lot of noise. He stated that children need quiet times to study and sleep, as do adults who have to get up early.

He stated that he learned that half of the calls received by the Hamburg Police Department regarding this establishment come in on Tuesday nights, one third are related to noise and a third are related to traffic issues. He stated that the applicants should have picked a location that allows outdoor activities when they decided to create this establishment because the noise level and disruption and traffic are a problem in the summer months. He stated that not all the bikers are responsible.

- A member of the audience stated that he also reviewed the police activity at this location between May and October 2013, and he found that there were six (6) complaints during those months. He stated that the average biker is 50 years old and is responsible.
- Marilyn Tischler, Burlbrook Drive, Orchard Park, stated that the residents did not think they had any recourse last year, so they probably did not make many calls to the Hamburg Police.
- Doug Darrell, 5382 Bayview Road, asked if the live music would only be on Tuesdays. It was confirmed that Bike Night (Tuesday nights) is the only night the applicant is asking for outside activities. He stated that he is concerned that if this variance is granted, other businesses will ask for the same variance. He stated that the applicant should have located the business in a C-2 District.
- A member of the audience stated she does not like to feel like she is living under siege when all of the motorcycles are at the establishment.

Mr. Sacco stated that the Zoning Board has received letters from people who support the live music and outside activities.

- A member of the audience stated that there is concern about alcohol being consumed in the parking lot, and there are always people who drink too much.
- Jim Tischler, Burlbrook Drive, Orchard Park, asked who runs the food truck.

Mr. Brunner stated that the food truck is run by the Armor Inn Saloon.

- Cecilia Early, 4717 Lilydale, stated that the Armor Inn Saloon has had live music on the patio deck.

Mr. Brunner stated that the variance being requested was for live music in the parking lot. He stated that he does plan to have two-man acoustic bands on Saturday and Sunday early afternoons on the outdoor patio.

In response to a question from Mr. Connolly, Mr. Brunner stated that there were approximately 14 Bike Nights in 2013 where the live music was in the parking lot. He further stated that in 2013 the establishment had one (1) other event with live music in the parking lot.

In response to a question from Mr. Connolly, Mr. Brunner stated that it would be possible to have live music inside the establishment and not have the music piped to the outdoor patio.

- A member of the audience asked if the speakers on the outdoor patio would be turned up on Tuesday nights.

Mr. Brunner stated that the speakers on the outdoor patio would not be turned up on Tuesday nights. He noted that no special speakers would be utilized, and the level of the volume of the music would not be increased on the patio.

Mr. Chiacchia stated that 20 days is less than one (1) percent of the number of days the Armor Inn is open. He stated that he does not see how that minimal percentage of days can be so important to the survival of the business.

- Mike Winkleman, 5441 South Abbott Road, stated that the bikers rev their motors excessively, and he asked if that could be eliminated. He also asked if there could be more police presence on Tuesday nights.

Mr. Brunner stated that he does not allow burn-outs, and anyone who does that sort of thing is removed from the premises.

- Dawn King, 4710 Edgewood Road, asked how many letters were received in favor of the variance request. She stated that when she moved to the area, it was quiet, and this establishment was a restaurant initially and now it has changed to more of a bar.
- Shirley Sardino stated that the Armor Inn's Facebook page indicates that there are 15 events planned in the month of May, and nine (9) of them involve live music.

Chairman Rybczynski stated that these events will be held inside the building, and therefore are not germane to this discussion.

Mr. Sacco stated that three (3) letters were received in favor of the variance request.

Mr. Allen stated that the current local law pertaining to noise level only speaks to noise that is sleep-interrupted between the hours of 11:00 PM and 7:00 AM.

- Patrick O'Brien stated that his concern is if the motorcycles are parking in the parking lot and the vendor tents are also there, that leaves little room for people who want to go to the restaurant to park, and that creates a safety hazard.
- Ron Hojnacki, 4758 Edgewood Drive, stated that the biggest issue is the noise, but the parking lot issue could be a problem if places like the Fire Company decide the Armor Inn patrons cannot park in their lot.

Mr. Connolly thanked all the residents who came out and expressed their opinion regarding this variance request. He stated that the residents' emails, letters, etc. allow the Board members to really know how the neighborhood feels, which is very helpful to the Board.

Mr. Connolly stated that most of the issues the neighbors have are issues the Zoning Board cannot address, but if the neighbors want to continue pursuing these issues, they should contact the Police Department and the Town Board.

Mr. Connolly stated that if a business is on one side of an issue and the nearby residents are on the other, the Board generally likes to try and find some middle ground. He noted that the fact that the applicant has withdrawn the request for outdoor live music is a positive one.

Mr. Connolly stated that the building sat vacant for nearly five (5) years, and what the applicant has done to the property is positive. He noted, however, that the neighbors' concerns are very valid.

### **Findings:**

Chairman Rybczynski made a MOTION, seconded by Mr. Dimpfl, to amend the request, as per the applicant's direction, to exclude outdoor entertainment and/or music. All members voted in favor of the motion. **CARRIED.**

Chairman Rybczynski stated that the request is now to allow outside alcohol sales and vendors on the premises. He stated that if Board members are considering proposing reasonable conditions associated with any motion, they must keep in mind the ability of the Building Department and/or Police Department to enforce such conditions.

Mr. Eustace stated that he would be in favor of reducing the number of hours the outdoor alcohol sales and vendors would be allowed in the parking lot.

Mr. Connolly stated that if there is a stipulation associated with a motion that the approval would only be for 2014, that the outside beer sales in July and August would end at 9:00 PM, and that the outside beer sales in May, June and September would end at 8:00 PM, he would be comfortable. He stated that the rationale for these stipulations would be that kids are in school during the months of May, June and September.

Chairman Rybczynski asked if Mr. Connolly would agree with an ending time in May, June and September of 8:30 PM. Mr. Connolly stated that he would be comfortable with the ending time being 8:30 PM.

Mr. Brunner stated that he would agree to ending at 8:30 PM during the months of May, June and September.

Mr. Connolly stated that the residents' concern is what is happening outside, because of the noise that is generated.

Chairman Rybczynski stated that the noise issue has been largely addressed through removing the outside music.

Mr. Connolly stated that if the music being piped from inside to the patio could be turned off at a certain time, this might address the residents' noise concerns.

Chairman Rybczynski asked who would have to enforce a condition that the music being piped from inside to the patio must be turned off by 8:30 PM. He further stated that the fact that the applicant has agreed to not have outside live music will make a great majority of the people that had concerns happy.

Chairman Rybczynski stated that he wants the Board to be very careful not to put a restriction on an event that does not also apply to the other six (6) days of the week.

Mr. Chiacchia stated that he would want a condition imposed that there can be no speakers on the patio piping the live music during Bike Nights.

Chairman Rybczynski stated that Mr. Chiacchia's condition would be difficult to enforce.

Mr. Brunner stated that if alcohol sales end at 9:00 PM, the patrons will just go inside to drink. Mr. Connolly responded that this would be the point, because the patrons will be quieter inside a building than outside.

Mr. Allen stated that the Town Code states that no outside activities or events are allowed that are obtrusive to the surrounding neighborhood between the hours of 8:00 AM and 9:00 PM. He noted that what Mr. Connolly is proposing would be consistent with that regulation.

Mr. Connolly stated that if a condition of approval is that the approval is only valid for 2014, it gives the applicant the opportunity to have the Bike Nights, and then next year the applicant can return to the Zoning Board and it will be determined how well they worked and how well they were received by the neighbors.

Mr. Brunner asked if he could not have to return to the Zoning Board unless there is an issue in 2014.

Mr. Connolly asked if the variance is granted and all the issues than were addressed are not adequately solved, or if there are additional problems, whether the neighbors would have any recourse. Mr. Allen responded that if there are issues remaining that are unaddressed or unfulfilled, and there is a condition that the applicant must re-apply for the 2015 calendar year, 2014 could be viewed as a probationary period, and the unresolved issues would have to be addressed in 2015.

Chairman Rybczynski stated that the applicant has shown a real concern and a real willingness to work with the community. He further stated that making the applicant come back in a year to re-apply is giving people the opportunity to cause trouble where none exists.

Mr. Ginnetti made a MOTION, seconded by Mr. Sacco, to approve Application # 5477, with the stipulation that alcohol sales and vendor sales will stop at 9:00 PM.

On the question:

Chairman Rybczynski reviewed the use variance criteria as follows:

1. Cannot realize a reasonable return – substantial as shown by competent financial evidence - The applicant exhibited that there is a \$60,000 investment in twenty weeks of Bike Nights, and a loss of ability to conduct business in this fashion would be detrimental to the health of the business.
2. Alleged hardship is unique and does not apply to a substantial portion of district or neighborhood - This property is the only one of its kind in the District.
3. Requested variance will not alter the essential character of the neighborhood – There has been a bar/restaurant at this location for a long period of time. The essential character of that corner has changed for the better. The business owner has shown a willingness and eagerness to work with the opportunity that he has to ensure that it is as safe as they can possible affect.
4. Alleged hardship has not been self-created – Just because the applicant started this business three (3) years ago does not mean that there won't be bumps in the road that were not foreseen.

Chairman Rybczynski stated that he believes the issue of noise has been largely mitigated.

In response to a question from Mr. Allen, Mr. Brunner stated that as long as he is able to continue the Tuesday night Bike Nights, he is willing to eliminate all other events and live music held in the parking lot.

Mr. Allen stated that he views the outdoor patio as part of the general dining experience, but not in the context of music. The enclosed building would serve to buffer the live music, and no live music would be allowed on the patio except the acoustic two-man bands previously referenced by the applicant.

As the vote on the motion was five (5) ayes and two (2) nays (Mr. Chiacchia and Mr. Connolly), the motion carried. **GRANTED.**

Mr. Chiacchia stated that there was a very large amount of disapproval among the neighbors, and they have to be considered. He further stated that he does not believe that the business would fail without the Bike Nights. He stated that it will be very difficult for the Police Department and Building Department to enforce the condition of approval.

Mr. Chiacchia stated that he feels the Board is setting a precedent, and more businesses are going to ask for outdoor entertainment.

**Application # 5480** Leonard and Lisa Carriero – Requesting two (2) area variances for a proposed addition to an existing home at 6418 Schultz Road

Leonard Carriero, applicant, stated that he wishes to construct a 575 sq.ft.addition on to the rear of his house, and the lot is misshapen (triangular).

Chairman Rybczynski stated that this is a unique situation, given the shape of the lot.

Mr. Sacco stated that he visited the property, and there are woods behind and beside it. He further stated that he sees this affecting anyone adversely. Mr. Chiacchia concurred.

Chairman Rybczynski stated that there are no access issues to the rear yard.

**Findings:**

Mr. Ginnetti made a MOTION, seconded by Mr. Eustace, to approve Application # 5480.

On the question:

Chairman Rybczynski stated that this is an existing non-conforming piece of property and is odd- shaped and unique.

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

**Application # 5481** Vanderbilt Homes – Requesting two (2) area variances for a proposed two-lot subdivision to be located at the end of Woodland Drive

Attorney Sean Hopkins, representing the applicant, stated that the applicant previously obtained a variance to allow the property to be developed as one (1) building lot. He noted that since that time the entire property has been marketed, but no one has wanted to purchase it in its entirety because of the existence of wetlands on a majority of the site.

Attorney Hopkins stated that the applicant is now proposing to sell a two-acre lot to a prospective homeowner, and the applicant would retain ownership of the remainder of the property and has no plans to develop it because of the wetlands.

Attorney Hopkins stated that the existing foundation that was put in by the applicant a number of years ago is located in the 100-foot adjacent area to a New York State Department of Environmental Conservation (NYSDEC) wetland. He noted that the applicant's wetland consultant has been working with the NYSDEC and the Army Corps of Engineers (USACE) regarding the off-site mitigation required because of the filling of the NYSDEC 100-foot adjacent area. He stated that the paperwork has been submitted to the NYSDEC and USACE, and the applicant is hopeful that will be finalized in the near future.

Attorney Hopkins reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No, because the R-A District requires that every lot have at least 100 feet of frontage on a public road, and a total of 60 feet exists for the entire property.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No.
3. Whether the request is substantial – Two potential homes on this large parcel is not substantial.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – No.

Attorney Hopkins stated that if this variance is granted, his client would be able to proceed with the sale of the building lot, and the remainder of the parcel would be reserved for hopefully a home someday.

In response to a question from Chairman Rybczynski, Attorney Hopkins stated that the applicant is communicating with Mr. O'Neill (owner of property adjacent to the applicant's land) about the possibility of granting Mr. O'Neill an easement so that he (Mr. O'Neill) can access the roadway in front of his property that is owned by the applicant. Mr. Hopkins noted that Mr. O'Neill would have to share in the cost of putting in the driveway if an easement is granted.

Dr. Cyril Bodnar, 6841 Woodland Drive, stated that he owns property and a home on the east side of Woodland Drive, just north of the applicant's property. He stated that correspondence from the NYSDOT indicates that the proposed one (1) house is buildable and the applicant's violation has been mitigated, but the rest of the property is not buildable. He stated that his concern is that the applicant might disturb the balance of the property he is not selling now, and the result will be that water will back up on to his property.

Dr. Bodnar stated that he is concerned that the applicant will attempt to do something on the remainder of the property without a permit, since he has done that before.

### **Findings:**

Chairman Rybczynski stated that the prospective buyer of this property does not want to be ham-strung by the remaining twelve acres of wetlands. He noted that if the variance is approved, the new two-acre building lot would have 25 feet of frontage along the end of Woodland Drive, and the remaining wetlands would have 35 feet of frontage.

Mr. Connolly made a MOTION, seconded by Mr. Chiacchia, to approve Application # 5481.

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 – No, this is a unique piece of property.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No,
3. Whether the request is substantial – It could be argued that the request is substantial.
4. Whether the request will have adverse physical or environmental effects – As indicated, the approval is subject to the NYSDEC signing off on the wetlands issues.
5. Whether the alleged difficulty is self-created – No, because of the unique situation.

Mr. Connolly made a motion, seconded by Mr. Dimpfl, to amend the above motion to include the condition that approval is contingent upon the applicant obtaining all necessary wetland permits.

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

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

Mr. Ginnetti made a MOTION, seconded by Mr. Dimpfl, to approve the meeting minutes of April 1, 2014. All members voted in favor of the motion.

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

The meeting was adjourned at 9:45 p.m.

Respectfully submitted,

Paul Eustace, Secretary  
Board of Zoning Appeals

DATE: May 19, 2014