Town of Hamburg
Board of Zoning Appeals Meeting
June 7, 2016
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, June 7, 2016 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 Louis M. Chiacchia, Commissioner Bob Ginnetti, Commissioner Nicole Falkiewicz, Commissioner Joseph Sacco and Commissioner Ric Dimpfl.

Others in attendance included Attorney Mark Walling, Board of Zoning Appeals Attorney and Sarah desJardins, Planning Consultant.

Chairman Rybczynski asked for a moment of silence to honor the anniversary of D-Day and the recent Memorial Day

Commissioner Chiacchia read the Notice of Public Hearing.

**Tabled Application # 5559** Jeanne Albert – Requesting that the Board of Zoning Appeals consider a re-hearing of an appeal of a determination made by the Supervising Code Enforcement Official that the business located at 5504 South Park Avenue is considered a permitted nonconforming use

Chairman Rybczynski confirmed that no members of the Board had any objections to rehearing this application.

Attorney Sam Alba, representing Ms. Albert, stated that Ms. Albert's appeal is that H. R. Dils Sales & Service, located at 5504 South Park Avenue, is not a non-conforming use anymore.

Chairman Rybczynski stated that the issue at hand is an appeal to the Board as to whether or not the Supervising Code Enforcement Official acted in a reasonable manner in determining whether this business was in existence continuously without a one-year or more stoppage.

Attorney Alba stated that the first issue is certainly rational basis analysis, and if the Board determines that the interpretation was not done on a rational basis analysis, the Board would remand to Mr. Allen.

Attorney Walling stated that the issue is whether there is rational basis for Mr. Allen's decision.

Attorney Alba stated that it is his position that there is no rational basis for Mr. Allen's decision.

Attorney Alba stated that there are two (2) reasons that Mr. Allen's interpretation was not rational. He stated that the first reason is Mr. Allen applied the wrong standard because he exclusively analyzed if there was physical removal of items from the premises or if the building was removed or abandoned. He stated that Hamburg Code Section 280-289 indicates that discontinuance of one (1) year of the active and continuous operation of a non-conforming use for such a period of one (1) year is considered and construed to be abandonment.

Attorney Alba stated that the applicant purchased her property next door to this property and did not know that there was a business there. He stated that therefore a heightened burden was placed on Ms. Albert because she now has to prove that this business has been obliterated, which is not the standard. He stated that the standard was that active operation was stopped at

this business for a period of one (1) continuous year. He stated that if that had been the issue interpreted by Mr. Allen, there would have been a lot more evidence considered, and therefore on that point alone, his interpretation was certainly unreasonable.

Attorney Alba stated that the second reason Mr. Allen's interpretation was not rational is that his interpretation is not based on any evidence. He stated that Mr. Allen indicates that there is no evidence that the business was abandoned and the owners continue to file corporate tax returns. He stated that he filed a Freedom of Information Act request and asked specifically for the corporate tax returns Mr. Allen relied on. He noted that the only thing he received from that request was the business's tax return from 2013, and the years at issue in this case are the years 2005 to 2010. He asked how Mr. Allen could conclude that a business was operating from 2005 to 2010 with a tax return from 2013.

Mr. Alba stated that from 2005 to 2010, the business's tax returns show zero gross receipts, zero gross profits and zero expenses in terms of electricity, heat, etc. for this business.

Mr. Alba asked the Board to remand this matter back to Mr. Allen for a reinterpretation.

Attorney Kevin Rautenstrauch from Attea & Attea, representing Kevin Dils (owner of H. R. Dils Sales & Service) stated that there is a rational basis for Mr. Allen to come to the conclusion he did for two (2) reasons. One is that during the time in question (2005-2010), Mr. Dils, although sick with cancer, was operating the business, and several witnesses can attest to that fact. He stated that the business was not operated consistently, probably, but the business was never not operated for a period of more than one (1) year.

Attorney Rautenstrauch cited case law that suggests that if an owner of a business operates just one (1) day a year, this would stop the clock of the discussion of discontinuation of use. He stated that there has been no evidence presented suggesting that Mr. Dils did not operate the business at least one (1) day every year.

Attorney Rautenstrauch stated that the second reason that there is a rational basis for Mr. Allen's interpretation is that there was no heightened burden placed on the Ms. Albert because she asked for a determination from Mr. Allen, which was provided.

Chairman Rybczynski read a letter from Mr. James D. Fox, Jr., who indicated that H. R. Dils Sales & Service has been in existence for many, many years.

Chairman Rybczynski stated that the Board's responsibility was not to determine if the business was open or not open, and therefore taking testimony from individuals was not appropriate.

Chairman Rybczynski read the following pertinent portion of the original determination made by Mr. Allen regarding the Dils business:

"H.R. Dils Sales & Service was incorporated on 12/28/79 prior to the adoption of the present zoning and continues to file corporate tax returns to this day. The corporation has exclusively maintained its business operation at the premises without any evidence of abandonment. There never has been shown any indication of abandonment, physical removal of buildings, structures, machinery or equipment on the premises to consider that discontinuance ever occurred over a period exceeding one year. My interpretation would conclude that H. R. Dils Sales & Service is considered a permitted non-conforming use and can continue conducting business on the premises pursuant to Articles XLI and XLII of the Hamburg Zoning Code."

Mr. Chiacchia asked when the last time was that a customer did business with Mr. Dils. Attorney Alba responded that he is certain that when Ms. Albert purchased her property adjacent to this business in 2004, there was no business next door. He stated that the business's tax returns show a small profit in 2005 of $354, so it is possible that Mr. Dils helped one or two people during that year.

Mr. Alba stated that there is no evidence that Mr. Dils even helped one (1) customer per year. He stated that if a friend of Mr. Dils went to his shop for repairs and Mr. Dils did not charge the friend, that would not constitute a commercial business operating in a residential zone, but rather a friend helping a friend.

Kevin Dils, owner of H. R. Dils Sales & Service, stated that sometime between 2006 and 2010, Ms. Albert called her about a problem she had with a piece of equipment. He stated that he told her he would get back to her when he was done with what he was working on, and in the meantime she called again to say that her husband had gotten the equipment working.

Attorney Walling stated that the record is not what Mr. Dils would say or what Ms. Albert would say, but rather the record is the documents, and the Board has to make its decision based on the record.

Chairman Rybczynski confirmed with Attorney Alba that Ms. Albert's position is that Mr. Allen used the wrong standard. Attorney Alba stated that he is referencing Hamburg Town Code Section 280-289.

Attorney Rautenstrauch stated that Mr. Allen, in his interpretation, does indicate that he is aware of the standard, which is discontinuance for a period of more than one (1) year. He stated that he does not believe there was any other evidence that was established at the Board's prior hearings on this matter that would have led Mr. Allen to any different conclusion.

Ms. Albert stated that this issue also involves an additional property she owns adjacent to the Dils' property. Chairman Rybczynski stated that the Board will take that under consideration.

A member of the audience stated that she has lived on the north side of the Dils' property for her entire life, and any time she has needed something fixed, the Dils have helped her with repairs and parts.

Chairman Rybczynski stated that nine (9) people were in attendance in support of the Dils family. No one in the audience was in support of Ms. Albert.

**Findings:**

Mr. Sacco made a MOTION, seconded by Mr. Dimpfl, that the Board of Zoning Appeals makes the finding that there was a rational basis for Mr. Allen's determination regarding Application # 5559.

On the question:

Mr. Sacco stated that based on the records throughout the years, he believes that Dils Sales & Service has been a continuing and operational business that has never ceased operating. He stated that therefore he feels that Mr. Allen's decision has a rational basis.

Chairman Rybczynski stated that in his letter, Mr. Allen does cite the Code and explains his interpretation. He stated that he does not see what would be a more rational or pragmatic approach to determining whether or not a business continued.

Mr. Connolly stated that the letter of November 12, 2015 from a very experienced and veteran seasoned Code Enforcement Officer, Mr. Allen, should be noted in the record. Mr. Connolly read the letter as follows:

"I have reviewed your correspondence dated October 15, 2015 asserting that the continued operation of the business on the premise is illegal. My determination in contradiction to your opinion is based on the applicable provision as specified in Section 280-289 of the Hamburg Zoning Code. H. R. Dils Sales & Service was incorporated on 12/28/79, prior to the adoption of the present zoning, and continues to file corporate tax returns to this day. The corporation has

exclusively maintained its business operation on the premises without any evidence of abandonment. There has been shown no indication of abandonment, physical removal of buildings, structures or machinery equipment on the premise to consider that this discontinuation ever occurred over a period of exceeding one (1) year. My interpretation would conclude that H.R. Dils Sale & Service is considered a permitted nonconforming use and can continue conducting business on the premises pursuant to Articles XLI and XLII of the Hamburg Zoning Code."

Mr. Connolly stated that the above letter from Mr. Allen is verification of a rational decision.

All members voted in favor of the motion.

**Tabled Application # 5577** Robert Wolfe – Requesting three (3) area variances for a new home on vacant land on Holly Place

Kevin Wolfe, son of the applicant, stated that he was asked at the last meeting to summarize what he discussed at that meeting and supply supporting documentation in writing, and he did that on May 21, 2016. He stated that he mailed it to Mr. Connolly, and it arrived on May 24, 2016. He asked if each Board member had an opportunity to read the information mailed to Mr. Connolly.

It was determined that Mr. Wolfe's correspondence was only mailed to Mr. Connolly, and therefore the other members had not read it.

Mr. Wolfe stated that he would like each member to have read the documentation he provided before making a final decision on this application.

Board members agreed that they need more time to review Mr. Wolfe's correspondence.

**Findings:**

Mrs. Falkiewicz made a MOTION, seconded by Mr. Ginnetti, to table Application # 5577 until all Board members have the opportunity to review the supporting documentation provided by Mr. Wolfe.

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

**Application # 5578** Robert Riehle – Requesting an area variance for an in ground pool at 2675 North Creek Road

Mr. Robert Riehle, applicant, stated that he would like to install an in ground pool too close to the top of the bank of Eighteen Creek. He noted that the minimum distance allowed is 60 feet from the top of the bank, and he would like to install the pool between 20 and 25 feet from the top of the bank.

Mrs. desJardins stated that Conservation Advisory Board (CAB) members were asked to visit this site, and a memo was issued by the CAB Chairman regarding this variance request.

Mr. Riehle stated that in the vicinity of his home, on Old Lakeview Road, there is a pool that is approximately ten (10) feet from the top of the bank of Eighteen Mile Creek. He stated that that pool was installed between 2010 and the present. He further stated that an addition was recently put on a home not far from his that is approximately 20 feet from the top of the bank.

Chairman Rybczynski read the following memo from CAB Chairman Doug Nichols:

"We examined the site and met with Mr. & Mrs. Riehle. We explained the concept and purpose of a CEA (Critical Environmental Area). They were disappointed that we would not approve an exemption but accepted the fact and thanked us for coming out. As a side note, a portion of the house is in the CEA, as is a gazebo at the bank. We informed them that the gazebo is in the CEA, and their response was "it was there when we bought the house". While we haven't checked it out, we believe that only the New York State Department of Environmental Conservation (NYSDEC) can waiver the setback requirements. Their own requirement is 50 feet from the top of the bank. P.S. The Riehles are looking at an alternative plan".

Mr. Riehle stated that when he purchased his home two (2) years ago, there was nothing in the deed or survey that indicated that there was this restriction on building near the top of the bank. He stated that if he had known this would be a problem, he may not have purchased the property.

Mr. Riehle stated that the requirement to stay 60 feet from the top of the bank really refers to structures, and he questioned the interpretation of the Town Code that an in ground pool constitutes a structure.

**Findings:**

Chairman Rybczynski stated that whenever the NYSDEC is involved, it causes him to see a huge red flag. He stated that before the Board acts on this request, he would like to know what the NYSDEC's involvement is in this case and whether that agency has an opinion regarding what the applicant is proposing.

Attorney Walling stated that the issue is whether the NYSDEC has special rules for CEAs.

Chairman Rybczynski made a MOTION, seconded by Mrs. Falkiewicz, to table Application # 5578.

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

**Application # 5579** Boston State Holdings Co. LLC – Requesting a use variance for outdoor storage at 4233 Lake Avenue

Attorney Sean Hopkins, representing the applicant, stated that a designated storage area is proposed by American Freight, who would like to occupy the vacant building on the property. He submitted a handout regarding competent financial information relative to the purchase of the site and the applicant's non property tax holding costs since the date of acquisition on December 31, 2012.

Attorney Hopkins stated that the applicant's property is 2.8 acres in size, and an existing 35,000 sq.ft. building is on the site.

A representative of American Freight stated that he has a location in North Tonawanda and has been there for over 15 years, and he would like to put another location in the Buffalo area. He stated that when he began with American Freight, there were six (6) stores, and now there are 125 stores.

Attorney Hopkins stated that it is essential to American Freight that seasonal outdoor storage be allowed at the site. He stated that company receives a lot of inventory during the first three (3) months of the year, and they need a location for that inventory to be stored.

Attorney Hopkins stated that although outdoor storage associated with furniture sales is not allowed in the C-2 Zone, American Freight would enclose the outdoor storage area with a sold fence, as well as landscaping, if a use variance is granted. He stated that the outdoor storage containers are eight feet tall, eight feet wide and approximately 40 feet long and would not be visible.

Attorney Hopkins stated that a sold fence of eight or ten feet in height would be installed around the storage trailers, and landscaping could be installed along the south side of the fence enclosure for additional buffering.

Attorney Hopkins stated that he spoke with Supervising Code Enforcement Official Kurt Allen, and Mr. Allen indicated that if a use variance is granted, this project would be reviewed by the Planning Board.

Attorney Hopkins stated that this property is zoned C-2, and there are a wide range of permitted uses in that Zone. He stated that the following uses are allowed in the C-2 Zone, provided that they are conducted in a completely enclosed building or within an area enclosed by a solid wall or fence at least eight (8) feet in height:

- Building materials & building materials supply
- Public utility storage
- Service buildings and yards
- Small animal hospitals
- Machine tool sales, rentals and services
- Storage and sales of solid fuel
- Storage and sales of feed for livestock

Attorney Hopkins stated that the entire parking area of this site could be used for outdoor storage per the Town Code and the above list, and furniture sales is not listed as a permitted use for outdoor storage. He stated that clearly the Town Code contemplates outdoor storage, and some of the permitted uses for outdoor storage would be worse than storing furniture in terms of the scope and intensity.

Attorney Hopkins stated that the property has been vacant land it was purchased by the applicant in 2012. He stated that when the applicant purchased the property, he envisioned his business relocating there, but because of unrelated economic circumstances, that did not occur. He stated that since that time, there has been a concerted effort to lease or sell that property.

Attorney Hopkins submitted a letter from Alan Hastings, realtor, indicating that he has had four (4) inquiries from brokers (none from developers), and the only party that looked at the property in detail was American Freight.

Attorney Hopkins reviewed the use variance criteria as follows:

1. Cannot realize a reasonable rate of return – substantial as shown by competent financial evidence – The initial investment in this property was $614,721.89, and the non-property

taxes expenses incurred since then was $148,505.10. The applicant has maintained the property in good order since 2012. Property taxes since the purchase have totaled $71,922.12. The costs the applicant is incurring on a monthly basis total $5,376.28. The total investment made in this property is $835,149.11. Under the terms of the lease with American Freight, American Freight would be paying $4.00 per square foot triple net on an annual basis for a five-year lease. Therefore, American Freight would be paying the applicant $140,000 per year. Although the applicant will not recoup the entire investment in the property during the five-year period of the lease, they hope American Freight will continue to lease the property after five (5) years.

2. Alleged hardship is unique and does not apply to a substantial portion of district or neighborhood – This property is unique because it contains a 35,000 sq.ft. building that has been vacant for many years, it is 2.8 acres in size and there is a business that needs accessory outdoor storage. The outdoor storage would be screened based on any condition the Board believes to be reasonable and approval by the Planning Board. The hardship is also unique because in this zoning district, many uses can have unlimited outdoor storage, but American Freight does not fall into any of those categories.

3. Requested variance will not alter the essential character of the neighborhood – If this variance is granted, this would actually improve the character of the neighborhood. There are other vacant parcels in the surrounding area, and putting this property back to economic use would be good for community character. The outdoor storage would be screened, and it would only be necessary a few months a year as a result of American Freight's business model.

4. Alleged hardship has not been self-created – This hardship was not self-created because when the property was acquired in 2012, outdoor storage would have been permitted via the issuance of a temporary use permit. Subsequent to that date, the zoning code was changed, and it is no longer possible to get a temporary use permit. If it was possible, the applicant would have requested a temporary use permit from the Board of Zoning Appeals. Therefore, the applicant has no choice but to ask for a use variance.

In response to a question from Mr. Connolly, the representative from American Freight stated that even at its business times, American Freight would not have more than 20 vehicles in the parking lot for customers at any given time.

In response to a question from Mr. Connolly, Attorney Hopkins stated that the outdoor storage would be screened by a sold fence with sliding gates, and landscaping could be installed along the souths side of the fence. He stated that the screening (fence and landscaping) would be there as long as American Freight occupies the building. He stated that the outdoor storage would be needed for the first three (3) months of the year.

In response to a question from Mr. Connolly, Attorney Hopkins stated that a reasonable rate of return, in case law in the context of use variance decisions relating to real estate, is approximately 10%. He stated that if one takes the approximately $800,000 investment and allocate a 10% rate of return to those funds, that would be approximately $60,000 per year, so it would take at least $1,000,000 for the applicant to break even.

In response to a question from Mr. Connolly, the representative from American Freight stated that in twenty years he has only had to close one (1) store because it was not profitable.

**Findings:**

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5579 with the following conditions:

- The project will be reviewed by the Planning Board with the idea of having at minimum an eight-foot solid fence and landscaping on the south side of the outdoor storage.
- Outdoor storage will be allowed from January 1 through May 31.

On the question:

Mr. Connolly reviewed the area variance criteria as follows:

1. Cannot realize a reasonable rate of return – substantial as shown by competent financial evidence – The applicant did an outstanding job of providing detailed financials, which made it very clear that the applicant has struggled to realize a reasonable return. Documentation was also submitted from a well-established realtor that also demonstrated that he has tried to sell the property with no success.

2. Alleged hardship is unique and does not apply to a substantial portion of the district or neighborhood – This property is unique in this district, and this use will be ideal.

3. Requested variance will not alter the essential character of the neighborhood – This use will not alter the essential character of the neighborhood, especially with the restriction of an eight-foot high fence and landscaping on the side facing the school and the restriction that the outdoor storage will only be allowed for the first five (5) months of a year.

4. Alleged hardship has not been self-created – This hardship was not self-created because the applicant experienced extenuating circumstances that led them to this point.

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

Mr. Sacco made a MOTION, seconded by Mrs. Falkiewicz, to approve the minutes of May 3, 2016. All members voted in favor of the motion.

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

The meeting was adjourned at 9:15 p.m.

Respectfully submitted,

L. Michael Chiacchia, Secretary
Board of Zoning Appeals

DATE: June 24, 2016