

Town of Hamburg
Board of Zoning Appeals Meeting
August 4, 2015
Minutes

The Town of Hamburg Board of Zoning Appeals met for a Regular Meeting on Tuesday, August 4, 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 Paul Eustace, Commissioner Ric Dimpfl and Commissioner Louis M. Chiacchia.

Others in attendance included Attorney Mark Walling, Board of Zoning Appeals Attorney and Kurt Allen, Supervising Building Inspection Official.

Chairman Rybczynski asked for a moment of silence to honor the men and women currently serving in the armed forces.

Commissioner Eustace read the Notice of Public Hearing.

Scheduled rehearing of 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

Attorney Walling stated that if the Board denies this application, the applicant can then apply to the Planning Board for a Special Use Permit for a wind turbine. He further stated that the Town of Hamburg's new local law concerning residential wind turbines only permits a maximum of one (1) wind turbine for each legal lot, and if the Planning Board allows the applicant to have one (1) wind turbine, he could possibly seek approval from the Zoning Board of Appeals for the second wind turbine.

Chairman Rybczynski stated that the correct steps will be taken regarding this application, and he feels the Board has enough information to act.

Mike Jablonski, applicant, stated that no one in the Town has returned his phone calls, including the councilmen and the Supervisor. He stated that he has been up front and honest, and he is very upset and disappointed. He stated that the State has assured him that these wind turbines will go in. He stated that the proposed wind turbines are not obtrusive or a danger to the public. He stated that he feels he has been treated with dishonesty.

Chairman Rybczynski stated that he does not know of any members of his Board who have a personal vested interest in or vendetta against this project. He stated that his members have been fair in dealing with Mr. Jablonski, and listening to Mr. Jablonski's testimony is disheartening.

Chairman Rybczynski stated that the application would be left on the table until the Board's next meeting.

Mr. Allen stated that if the Board does not act on this application this evening, it will make it much worse for the applicant because the Article 78 proceeding will continue and this will drag out. He suggested that the applicant hold off and make application to the Planning Board for a Special Use Permit, as required by the newly enacted Residential Wind Turbine law. He stated that the applicant has not been rejected – he has not gone through the Planning Board review process yet.

Mr. Sacco stated that when the applicant first applied for the variances, there was no residential wind turbine law in place. He noted that now there is a residential wind turbine law in place, and now the applicant can be advised as to what direction to move in.

Attorney Walling recommended that the Board recess so that he can explain to the individual members the steps the Board should take at this point.

Chairman Rybczynski stated that the Board would take a five-minute recess so he could speak to the Board attorney.

Chairman Rybczynski asked the remaining Board members to accompany him to speak to the Board attorney regarding litigation. Board members left the room and returned 16 minutes later.

Chairman Rybczynski made a motion to re-adjoin the meeting at 7:16 P.M. into a short business session in order to handle Mr. Jablonski's application out of order. He stated that this is highly unusual, but it is the least the Board can do for the applicant.

Mr. Connolly made a **MOTION**, seconded by Mr. Chiacchia, to deny Application # 5522 without prejudice.

On the question:

Chairman Rybczynski stated that this vote will unencumber the applicant's request from any court proceedings or further litigation. He stated that this will in effect create a "clean slate" and is the most practical way to proceed. He stated that the applicant can now meet with Mr. Allen and get in writing what he needs to do to proceed with the Planning Board and seek its approval. He stated that he believes the applicant deserves better, but there is no other choice.

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

The Board recessed and re-adjoined into the public session again.

Application # 5538 Diane Markovich – Requesting an area variance for a detached garage at 5820 West Lane

Mr. Tim Hoelzle stated that he is a builder and a personal friend of Ms. Markovich. He stated that the applicant is elderly, and her garage was built many years ago and has deteriorated. He noted that the proposed new garage would be built in the same footprint as the existing deteriorated garage, and the applicant has nowhere else to place it. He stated that the existing garage was conforming when it was built but would not be conforming if it were built now.

Chairman Rybczynski stated that the existing garage is considered to be existing non-conforming.

Mr. Sacco stated that the existing garage is in very bad shape.

Findings:

Mr. Dimpfl made a MOTION, seconded by Mr. Chiacchia, to approve Application # 5538.

On the question:

Mr. Dimpfl reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No.

3. Whether the request is substantial – No.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – This difficulty is self-created, but on balance it sways in favor of approval.

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

Application # 5539 MaryAnn Wisniewski – Requesting two (2) area variances for a new detached garage at 5415 Maelou Drive

Mary Ann Wisniewski, applicant, stated that in November 2014 someone drove into her detached garage that had been there for years. She further stated that the garage was deemed unsafe, so she had to tear it down. She stated that she would like to build a new garage in the same spot where the old garage was, but rather than rebuild a 20' X 20" garage, which was the size of the old garage, she would like to build a 24' X 24" garage to better accommodate two (2) cars. She noted that because of the odd shape of her property, she cannot move the new garage further away from the road.

Ms. Wisniewski stated that she has spoken to all of the property owners surrounding her property, and none of them has any objections to what she would like to do.

Chairman Rybczynski confirmed with the applicant that the new garage would be placed four (4) feet closer to the road than the previous garage was.

Chairman Rybczynski stated that letters were received from the following property owners indicating that they do not object to the granting of this variance:

- David F. Wilson, 5411 Maelou Drive
- Sharon & Tom Matheny, 5427 Maelou Drive
- Linda Watkins, 5414 Maelou Drive
- Judy Bedard, 5420 Maelou Drive

In response to a question from Mr. Sacco, Ms. Wisniewski stated that work was begun on the new garage over a month ago, but she then was advised by the Town that she needed a variance.

Mr. Chiacchia stated that it appears that Ms. Wisniewski's contractor did not inform her that she needed a Building Permit to construct the new garage. He further stated that this garage seems to be out of place relative to the rest of the properties on Maelou Drive. He noted that he believes that the applicant could place the garage further back from the road.

Mr. Sacco stated that he agrees that the garage would be very close to the road, and he is worried that it might get hit again.

Mr. Connolly stated that the difference in square footage between the old garage and the new garage would be 176 square feet.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Eustace, to approve Application # 5539.

On the question:

Mr. Chiacchia stated that he believes the garage is out of character with the rest of the area, and the applicant has enough room to put the garage further back.

Mr. Connolly reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – To put the garage in the similar location she had it, there is no other way than to receive a variance.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, this is a little traveled area, and the structure will be similar to the structure that it is replacing.
3. Whether the request is substantial – No.
4. Whether the request will have adverse physical or environmental effects – There could be adverse effects, but it was there previously and there were no issues.
5. Whether the alleged difficulty is self-created – No.

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

GRANTED.

Application # 5540 R Johnson Inc. – Requesting an area variance for an expansion of the existing vestibule at 4046 Lakeshore Road

Daryl Martin, architect, and Bob Johnson, applicant, appeared on behalf of this application. Mr. Martin stated that Peg's Place would like to update the vestibule and add a waiting area. He stated that many of the clientele needs more room in the vestibule, and there is no waiting area currently.

Chairman Rybczynski confirmed with Mr. Martin that any work that is done will have to be ADA compliant.

Mr. Chiacchia stated that this will be a great improvement to the business and a benefit to the property.

Findings:

Mr. Sacco made a MOTION, seconded by Mr. Dimpfl, to approve application # 5540.

On the question:

Mr. Sacco 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, and it might actually enhance the property.
3. Whether the request is substantial – No.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – This could be argued either way, but it is not enough to sway the decision.

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

Application # 5541 909 Hertel Avenue Inc. – Requesting two (2) area variances for a proposed building and parking lot expansion at 4151 Lakeshore Road

Chairman Rybczynski stated that he had been informed that this project must be reviewed by the Planning Board before the variances can be considered.

Application # 5542 Christopher Mattiolo – Requesting an area variance for a proposed covered “outdoor kitchen” at 257 South Shore Drive

Mr. Brian Lewis, architect, representing the applicant, stated that the applicant would like to have an outdoor grilling area that is situated out of the elements so that his guests are more comfortable. He noted that the yard is surrounded by the break wall, and often the waves crash over the break wall, so the applicant would like the area where he is grilling to be protected from the water. He further stated that the applicant would also like to protect himself from the unwanted guests that are often found on the vacant lot south of his home.

Findings:

Mr. Dimpfl made a MOTION, seconded by Mr. Ginnetti, to approve application # 5542.

On the question:

Mr. Dimpfl reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, it might actually be an improvement.
3. Whether the request is substantial – No.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – This could be argued either way, but it is not enough to sway the decision.

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

Application # 5543 Will Maher – Requesting two (2) area variances for a new detached accessory structure at 6201 Old Lakeshore Road

Attorney Sean Hopkins, representing the applicant, stated that the applicant has received several letters of support for his project since appearing before the Zoning Board of Appeals previously. He stated that the proposal is slightly different from what the applicant previously proposed in that the size of the structure has been reduced by 60 sq.ft. to 2,520 sq.ft. He further noted that the division of use of the structure is shown on the plan as far as how much of it would be used for personal storage and how much would be used for his business.

Chairman Rybczynski stated that the following residents signed a letter indicating that they are aware of the project being proposed by Will Maher on the back portion of his property and have no objection to granting the requested variance:

- Joanna Lana, 6190 Old Lake Shore Road
- Deborah Ovac
- David Byrne
- Doug Cichocki
- Francis Geier

Chairman Rybczynski further stated that a letter of support was received from Candice Cichocki.

Attorney Hopkins stated that Mr. Maher previously appeared before the Zoning Board of Appeals on May 12, 2015 and presented plans for an accessory structure on a four-acre parcel. He noted that the variance application was denied on a split vote.

Attorney Hopkins stated that the proposed accessory structure would be located far back on the applicant's property. He further stated that Mr. Maher has a Home Business Permit to operate his landscaping business and has always been a good neighbor. He noted that the applicant would like to keep items for his business such as equipment, lawn mowers and a fairly large truck with a trailer in the new building. He stated that this would serve to make the property look better and also would protect the equipment from possible looters.

Attorney Hopkins stated that the applicant does not envision the building being enlarged, and he noted that the applicant is a full-time teacher and has a young family. He further stated that this structure would take up approximately 1.5% of the total site.

Attorney Hopkins stated that the benefits to the applicant are substantial because he would be able to store personal and business-related items inside the new building. He noted that the height variance is needed to accommodate some of the business equipment. He stated that the applicant plans a pitched roof for appearance and functionality.

Attorney Hopkins reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No, this is the space the applicant needs.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – This would actually be an improvement to the character of the area.
3. Whether the request is substantial – Given that the lot coverage of the structure would be 1.5%, it is not a substantial request.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – This cannot be the sole criteria for a decision, and in this instance whether it is self-created would be debatable.

In response to a question from Mr. Connolly, Will Maher, applicant, stated that he has no intention to expand the business or add employees. He has had this business since 2005 but also is a teacher, and he has no plans to run heavy equipment out of the property or being a distributor of any kind. He noted that he respects his neighbors and would not want to bother anyone.

In response to a question from Mr. Connolly, Mr. Maher stated that he has no intentions of renting out part of the space in the new structure, nor will he ever convert it to an apartment.

In response to a question from Mr. Chiacchia, Attorney Hopkins stated that when the applicant previously requested the variances for this structure, there were two (2) neighbors who

objected. He stated that one (1) of those neighbors has submitted a letter of support, and the other was in attendance this evening.

Mr. Doug Cichocki, adjacent property owner, stated that he has never had a problem with Mr. Maher, and he believes the Town should support its small business owners and veterans. He further noted that the applicant hires veterans and has a great work ethic.

Mr. Bruno Lombardo stated that he lives next door to the applicant, and Mr. Maher is a wonderful and respectful neighbor.

Mr. Paul Balbierz stated that he was one of the neighbors who were opposed to the structure previously. He stated that he understands what Mr. Maher wishes to do and supports businesses in Hamburg, but he (Mr. Balbierz) purchased his two-acre vacant property to potentially build a home on. He stated that he is concerned about the value of his vacant property because the applicant's structure would be visible from the vacant property. He stated that there are several criteria for being considered a Home Business, and the applicant employs 14 people.

In response to a question from Chairman Rybczynski, Mr. Maher stated that he has six (6) full time employees and the rest are part time. He further stated that all of his employees are seasonal.

Mr. Balbierz stated that in the Home Business section of the Town Code, it states that the business can only have one (1) piece of equipment related to the business on site.

Mr. Allen stated that if the variance is granted, a condition should be imposed that the variance will not violate any of the provisions, limitations or restrictions that are part of the Home Business Permit.

Findings:

Mr. Connolly made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5543.

Mr. Connolly made a MOTION, seconded by Mr. Sacco, to reconsider the previous motion.

All members voted in favor of the motion to reconsider the previous motion. **GRANTED.**

Mr. Connolly made a MOTION, seconded by Mr. Sacco, to amend the original motion to include the following conditions:

1. The structure cannot be leased to any third parties.
2. All the provisions of the Home Business Permit will still be maintained.

All members voted in favor of the motion to amend the original motion. **GRANTED.**

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 – This could be debated, but based on what the applicant provided to the Board, it would be hard to store his equipment any other way than with this structure.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, because it would not be visible, and all but one (1) neighbor approve of the requested variance.

3. Whether the request is substantial – This could be argued, but with the size of the property, the location of the property and the fact that the structure would cover less than 2% of the property, this is not substantial.
4. Whether the request will have adverse physical or environmental effects – No, because of its location, and it will actually enhance the neighborhood since the equipment will now be store inside and will be safe.
5. Whether the alleged difficulty is self-created – This could be debated, but on balance it warrants passage of this request.

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

Application # 5543 Matthew Cassel – Requesting an area variance for a new fence on vacant land on West Arnold Drive

Attorney Sean Hopkins, representing the applicant, stated that the applicant proposes to erect a four-foot high decorative picket fence around the property he leases at 1225 West Arnold Drive. He noted that the home the applicant is leasing is located at 1225 West Arnold Drive, and the vacant parcel adjacent to it also is being leased by Mr. Cassel. Attorney Hopkins stated that the Town Code allows the fence on 1225 West Arnold Drive because that property is not vacant, but accessory structures are not allowed on a property without a primary use, and a fence is considered an accessory structure, so Mr. Cassle cannot erect the fence on the adjacent vacant lot per Town Code.

Attorney Hopkins stated that Mr. Cassel would like to erect the fence around the entire property (both parcels) because he has young children, there is a steep cliff and drop off down to Eighteen Mile Creek that is concerning, and he would like to let his dogs run outside.

Attorney Hopkins stated that the property leased by Mr. Cassel is owned by an entity owned by Michael Churchill. He noted that Mr. Cassel has signed a one-year lease with a one-year option, and if/when he leaves the fence will be removed within 30 days.

Attorney Hopkins stated that the benefits to the applicant outweigh any detriments. He further stated that if Mr. Churchill's two (2) lots were not separate, the variance would not be required.

Attorney Hopkins reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – No, the applicant has no other way to achieve his goal. Mr. Churchill acquired these parcels in this configuration and sees no reason to merge them.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – No, This would be an aesthetically pleasing fence.
3. Whether the request is substantial – No, if the two (2) properties were not separate, a variance would not be required.
4. Whether the request will have adverse physical or environmental effects – No the fence would only be four (4) feet tall.
5. Whether the alleged difficulty is self-created – This cannot be the sole criteria for a decision, and in this instance whether it is self-created would be debatable.

Mr. Bill Maher stated that he and his neighbors have had problems with Mr. Churchill, who has not been a good neighbor to the community. He stated that he would want assurances that the fence will be removed by Mr. Cassel when he vacates the property. He stated that there is litigation between Mr. Churchill and the residents of this area that is still not resolved.

Tom Wrzosek, 1175 West Arnold, stated that Mr. Churchill assured the residents of this area that he would not obstruct their portion of the road, and he did obstruct the road. He stated that he does not believe Mr. Churchill when he says he will remove the fence when Mr. Cassel leaves.

Mr. Allen stated that the issue between the residents and Mr. Churchill that Mr. Wrzosek referred to has been settled for some time.

Mr. Richard Petrie, 1281 West Arnold, stated that he agrees with Mr. Wrzosek.

Debbie Kaczmarek, 1185 West Arnold, reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – Yes, the applicant could erect a smaller fence only encompassing a play area for the children. The applicant could purchase an invisible fence for the dogs.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – Yes, all of the nearby residents agree that the fence will have an adverse effect on the area.
3. Whether the request is substantial – The variance is required to do what the applicant wants.
4. Whether the request will have adverse physical or environmental effects – Yes, the fence would adversely affect the neighbors' environment because they enjoy the scenic view of the Lake, and the fence would be very intrusive and obtrusive.
5. Whether the alleged difficulty is self-created – If the applicant chooses to live on a cliff where there is a danger to his family, he should have considered this before agreeing to lease the property.

Ms. Kaczmarek stated that the residents of this area do not trust Mr. Churchill to do what he says he will do.

Attorney Hopkins stated that he would be willing to ask Mr. Cassel if he would agree to move the fence back 30 feet from the west property line.

Mr. Chiacchia stated that the residents speaking in opposition to the fence are talking about Mr. Churchill more than the fence. He stated that the Board cannot address the issues the residents have with Mr. Churchill.

Mr. Tripp, 1258 West Arnold, stated that he opposes the erection of the fence because it would block the scenic view of the lake, it would further narrow the road in the winter, which will make it harder to plow the private road, and it would affect the aesthetics of the area. He stated that Mr. Churchill says he owns property that he does not own.

Attorney Hopkins stated that the following conditions of approval would be acceptable to the applicant:

1. The fence would be a four-foot tall picket fence.
2. The fence will be removed within 30 days of the current tenant vacating.

3. The fence would be pulled back 30 feet from the west property line of the vacant parcel.

A resident stated that if the fence goes in, it would be opposite an existing fence along the private road, and that would make it very difficult to plow the road, store snow and allow fire and emergency vehicles through that area of the development.

Attorney Walling stated that is difficult to ascertain where private road are specifically located.

Mr. Connolly stated that he noticed that two (2) cars cannot pass each other on that private road without one (1) car pulling over to allow the other by.

Mr. Michael Churchill, owner of the property, stated that there is a natural green hedge along the road on his property, so the suggestion of pulling the fence back from the road to allow better plowing, etc. would not improve the situation. He further stated that the residents who have spoken against this variance do not live near the property in question with the exception of Mr. Tripp, so they do not have the scenic views they are concerned about losing with the erection of this fence.

Mr. Churchill stated that during the November 2014 snow storm, he personally saw to it that a wheel loader was brought in to dig the neighborhood out well ahead of the County digging out Old Lakeshore Road. He noted that he is responsible for the private road.

In response to a question from Mr. Connolly, Attorney Hopkins stated that the hope is to erect the fence only while Mr. Cassel is leasing the property.

In response to a question from Mr. Connolly, Mr. Churchill stated that it is his understanding that Mr. Cassel plans to be on the property during the entire Buffalo Bills season.

Attorney Corey Auerbach from the law firm of Barclay Damon, representing the property owner at 1211 West Arnold Drive, stated that his client owns the adjacent parcel to the east of 1225 West Arnold, as well as vacant land across the street that is commonly referred to as the "park". He presented an exhibit marked with a blue circle representing his client, as well as every resident present at this meeting who had spoken.

Attorney Auerbach stated that the applicant is seeking to use a parcel of land in a manner that is otherwise proscribed by the Town ordinance. He stated that the home at 1225 West Arnold has nothing to do with the application before the Board, but rather it is the vacant parcel that is the subject of the variance request.

Attorney Auerbach stated that uses that are not specifically permitted in the District are prohibited, and therefore the applicant should be seeking a use variance instead of an area variance. He noted that the applicant wishes to use this property in a way that is proscribed by the Zoning law. He stated that there is a much more rigorous hardship analysis that is required to use a property in a manner that is otherwise prohibited.

Attorney Auerbach stated that the application documents presented by the applicant inaccurately state that this is a Type II action under the State Environmental Quality Review Act (SEQR), thus not requiring a specific environmental review. He noted that the improper Short Environmental Assessment Form (EAF) was used by the applicant. He stated that if the applicant had submitted the correct EAF, it would have been noted that the location of the proposed application is not only in a Critical Environmental Area (CEA), but also is located in an archeologically sensitive area, for which the Board has been provided no information regarding potential impacts to either the CEA (Eighteen Mile Creek) or the archeological sensitivity area.

Attorney Auerbach stated that in order for an application to be considered a Type II action under SEQR, it must be on the list of Type II actions or have been determined to be a Type II action by

the local municipality. He noted that this application is not on the list of Type II actions and therefore should be considered an Unlisted action, which requires review under SEQR.

Attorney Auerbach stated that there will be an undesirable change in neighborhood character or to nearby properties because all of the nearby residents feel that the fence will be a detriment to their community. He stated that a fly-by-night lessee has come into this well established neighborhood, and the Board has heard the residents state that this fence will destroy the essential character of their neighborhood. He noted that the neighborhood is typified by its openness and invitingness. He stated that that segregating this portion of the development that is utilized the most to enjoy the beautiful scenery will completely destroy the park-like setting the residents have become accustomed to.

Regarding whether the benefit can be achieved by other means feasible to the applicant, Attorney Auerbach stated that the applicant could erect a fence only on the parcel that contains the home (1225 West Arnold), or Mr. Churchill could merge the parcels.

Regarding whether the request is substantial, Attorney Auerbach stated that the Board has heard direct testimony from the surrounding residents that this would be a giant change to their community. He noted that there is not a single home in this community that is fenced in this way.

Regarding whether the request will have adverse physical or environmental effects, Attorney Auerbach stated that this property is located in a CEA, as determined by the Hamburg Town Board in 1992, and is archeologically sensitive.

Regarding whether the alleged difficulty is self-created, Attorney Auerbach stated that this cannot be the sole consideration in undertaking the balancing test. He noted that it appears that Mr. Cassel is already leasing the space, so this is the definition of a self-created hardship.

In response to a question from Chairman Rybczynski, Mr. Churchill stated that there was discussion before Mr. Cassel agreed to lease the property about fencing the property. He further stated that Mr. Cassel did not think it would be unreasonable to have additional room within the fenced area for his children to play.

Attorney Auerbach asked why Mr. Churchill's parcels cannot be merged in order to avoid the need for a variance, since this is a feasible alternative for him.

Chairman Rybczynski stated that merging the parcels is not a feasible alternative for the applicant, nor does he have the right to do so.

Attorney Auerbach asked the Chairman how he knows that the applicant can put up a fence when the applicant does not have the authority to merge the parcels.

Attorney Hopkins stated that Mr. Cassel has the right to put up the fence subject to receiving the variance.

Attorney Auerbach stated that it is convenient that the applicant is the lessee and not the property owner. Attorney Hopkins responded that Mr. Cassel is the applicant because he is paying for the fence.

Attorney Auerbach stated that Town Law Section 267 B (C)(3) states that the Zoning Board of Appeals, when granting area variances, shall grant the minimum variance deemed necessary and adequate, and at the same it shall preserve and protect the character of the neighborhood and the health, safety and welfare of the community. He noted that the applicant retreated "with the snap of a finger" from the originally requested variance.

Attorney Hopkins stated that the applicant has always been willing to make reasonable concessions.

Attorney Auerbach stated that the residents are willing to make concessions and have no problem with Mr. Cassel fencing in the play structure that has been placed in the yard.

Chairman Rybczynski stated that he believed the two (2) sides could come to a reasonable compromise.

Attorney Auerbach asked Attorney Hopkins to explain why he feels this variance request is a Type II action under SEQR. He also asked why the property owner could not accommodate his tenant and avoid this hearing by simply merging the parcels.

In response to a question from Mr. Connolly, Attorney Hopkins stated that Mr. Auerbach is correct that merging the properties would have avoided the need for the variance. He asked why the owner would have to merge parcels just to erect a fence.

Attorney Auerbach stated that it is his opinion that the owner does not want to merge the properties because he will want to sell the vacant lot at some point.

Attorney Auerbach asked Mr. Allen whether the requested variance should be a use variance. Mr. Allen responded that fences are permitted in this district, and the request is to erect a fence on a vacant parcel that is contiguous to a parcel with a home. He further stated that a fence is not considered a building.

Attorney Auerbach stated that it is his opinion that this is, in fact, a use variance and not an area variance.

Attorney Auerbach stated that the detriment to all of the residents who oppose this variance far outweighs the proposed benefit for a short period of time to be able to run roughshod over this neighborhood's design. He stated that perhaps a community meeting with the applicant may be appropriate, as it appears there may be some opportunity for compromise which has yet to be reached at this meeting.

Attorney Hopkins stated that whether this is a Type II action or an Unlisted action does make much difference. He noted that if the Board wishes to issue a Negative Declaration on a fence, that is fine. He further stated that he is trying to reach a consensus, understanding that there are neighbors who have concerns. He reminded the Board that this is simply a request to erect a fence.

In response to a question from Mr. Connolly, Attorney Hopkins stated that the applicant can fence the 20,000 sq.ft. parcel that contains the home without a variance and still keep his children and dogs safe.

Attorney Hopkins stated that the applicant wants a larger play area, and he is leasing both parcels. He further stated that if Mr. Churchill did merge the parcels and no variance was needed, the applicant could fence in the entirety of both parcels instead of attempting to reach a compromise with the neighbors, and in that case the fence could be six (6) feet high and stockade.

Attorney Auerbach stated that if he had three (3) young children and was worried about those children and his dogs, why would he lease a house on a precipitous cliff?

Mr. Chiacchia stated that in this country we have freedoms. He asked what is wrong with this applicant deciding he wants to live in this particular house for one (1) year.

Findings:

Mr. Connolly made a MOTION to deny Application # 5543. There was no second made.

Mr. Sacco made a MOTION, seconded by Mr. Dimpfl, to approve Application # 5543 with the following conditions:

1. The fence will be a four-foot tall picket fence.
2. The fence will be removed within 30 days of the current tenant vacating.
3. The fence will be pulled back 50 feet from the west property line of the vacant parcel.

On the question:

Mr. Sacco reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – These have all been discussed.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – This is debatable, but there will be no undesirable changes.
3. Whether the request is substantial – The request is substantial, but the applicant has made substantial concessions to try and appease the neighbors.
4. Whether the request will have adverse physical or environmental effects – No.
5. Whether the alleged difficulty is self-created – No

Chairman Rybczynski reviewed the area variance criteria as follows:

1. Whether the benefit can be achieved by other means feasible to the applicant – The applicant has certain restrictions by virtue of being the applicant. The benefit being sought is the protection of his children. This means is the most feasible to him, considering the opportunities he has.
2. Whether there would be an undesirable change in neighborhood character or to nearby properties – A six-foot stockade fence could be erected if the parcels were merged. The applicant chose to go the more difficult route, which involved community input.
3. Whether the request is substantial – The original application was substantial, but the applicant making concessions makes it less so.
4. Whether the request will have adverse physical or environmental effects – This is a temporary four-foot high fence, and it will not be anywhere near Eighteen Mile Creek.
5. Whether the alleged difficulty is self-created – Most applications that come before the Board are self-created.

As the vote on the motion was six (6) ayes and one (1) nay (Mr. Connolly), the motion passed.
GRANTED.

Mr. Sacco made a MOTION, seconded by Mr. Connolly, to approve the minutes of June 30, 2015.

All members voted in favor of the motion.

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

The meeting was adjourned at 10:15 p.m.

Respectfully submitted,

Paul Eustace, Secretary
Board of Zoning Appeals

DATE: August 25, 2015