

MINUTES OF THE REGULAR MEETING
OCTOBER 16, 2006

The Regular Meeting was called to order by Chairman Randy Bogar at 7:00 P.M. Board Members present were Fred Kiehm, Kristen Shaheen, Tim Tallman, John Montrose, and Bob Schulman. Board Member absent: Steve Welty. Also in attendance was Codes Enforcement Officer Jerry Back, Councilman David Reynolds and Dolores Shaw, Secretary.

Everyone in attendance recited the Pledge of Allegiance. Chairman Bogar introduced the Board Members and explained the procedures for tonight's meeting. He further stated that one (1) Board Member was absent this evening, which left six (6) Board Members to address the applications. Each applicant proceeded.

The application of **Mr. Michael Excell, 1 Westwood Lane, New Hartford, New York**, who is requesting to place a 6' high cedar fence on his property facing Tilden Avenue, which is his front yard (corner lot of Westwood Lane and Tilden Avenue). Town Code allows for a 4' high fence in the front yard, therefore, Mr. Excell needs a 2' height Area Variance for this fence. Tax Map #340.008-2-13; Lot Size: 170' x 200'; Zoning: Low Density Residential. Legal Notice was published in the Observer Dispatch on October 6, 2006 and residents within 500' were notified.

Mr. Excell appeared before the Board with pictures of his property and he had placed some stakes where the proposed fence would be located. He would like some privacy and safety for his family and the fence would also help control the debris from the road. The fence would be approximately 17' off the road, which is 32' from the center line. Mr. Excell feels a 4' fence would not give him the privacy he needs. He does not have a picture of the proposed fence but it would be a straight pattern red cedar with both sides finished the same. The support posts will be on the inside.

Chairman Bogar asked is there was anyone present to address this application:

-Mr. Norm Batty, 10 Sherman Circle. He wanted to know if the garage opening was on Tilden Avenue. Answer: there is no garage opening on Tilden – it is on Westwood. Mr. Batty does not feel the fence would interfere with anything.

-Mr. Alvin Hollmer, 2 Westwood Lane – a call was received with no objection.

There being no further input, the Public Hearing closed at 7:12 P.M.

Board Member Kiehm would rather see shrubs than a fence; Board Member Shaheen felt this is a nature-type area and is concerned about the integrity of the area. Board Member Tallman felt a 4' fence, which is allowed, and shrubs would look better.

The Board Members went through the criteria for the granting of an Area Variance.

- An undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the variance – response: difference of opinion.
- The benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than a variance – response: difference of opinion as it would be costly for shrubs.
- The requested variance is substantial – response: corner lots are unique – there was a difference of opinion.
- The proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district – the response: difference of opinion.
- The alleged difficulty was self created, which consideration shall be relevant to the decision, but shall not necessarily preclude granting the variance – response: yes.

Motion was made by Board Member Fred Kiehm to deny the application as presented as he felt the request is excessive and would not conform to the neighborhood; seconded by Board Member Tim Tallman. Vote taken:

Chairman Randy Bogar – yes	Board Member Fred Kiehm – yes
Board Member Tim Tallman – yes	Board Member John Montrose – no
Board Member Kristen Shaheen – yes	Board Member Bob Schulman – no

Motion to **deny** was passed by a vote of 4 – 2.

The application of **Mr. & Mrs. Joseph Talarico, 47 Arlington Terrace, Utica, New York (Town of New Hartford)**, who is requesting to construct a 22' x 26' attached two-stall garage onto their existing home. The existing garage will be converted to living space. The proposed addition will be 5'4" from the left side property line and 15' from the rear property line. Zoning in this area is Low Density residential, which requires a 15' side-yard setback and a 40' rear-yard setback. The applicant is requesting a 9'6" left side-yard Area Variance and a 25' rear-yard Area Variance. Tax Map #329.020-7-15;

Lot Size: 82' x 130'; Zoning: Low Density Residential. Legal Notice was published in the Observer Dispatch on October 6, 2006 and residents within 500' were notified.

Mr. Jamie Zalewski, contractor, and Mrs. Talarico appeared before the Board. Mr. Zalewski advised the Board Members that he modified the configuration of the garage – he and the applicant feel this is a much better plan for their property and the neighborhood. The garage is smaller which reduces the impact to the property. The new garage is 22' x 22' and the applicant will now need a 5' side yard setback Area Variance and a 17' rear yard setback Area Variance. Mr. Zalewski presented photos of other homes in the area that have attached garages. The existing garage will be converted into a new kitchen and mud room.

Mrs. Talarico said she needs the attached garage for security as her husband travels and they need the additional space for their cars and storage. Mr. Talarico said she contacted her neighbor to the side and she was not in opposition..

Chairman Bogar asked if there was anyone present to address this application:

-Mr. Eugene Hutchinson. He lives behind the applicant and was not notified, however, he heard about this. He feels this is becoming a mega house and he doesn't feel it will enhance the neighborhood. Although, he feels the revised plan is a better design.

-Mrs. Kathryn Cummins, 49 Arlington Terrace. She wanted to know the difference between attached and detached garages. Codes Enforcement Officer Back explained the difference.

-Mr. Chris Whalen, 43 Arlington Terrace. He has no objection.

Secretary Dory Shaw stated she received a call from 45 Arlington Terrace who was concerned about the color of the garage. She was concerned that it would not match the existing home or neighborhood. Mr. Zalewski stated that it would certainly conform with the existing house and neighborhood, no bright/bold colors.

There being no further input, the Public Hearing closed at 7:40 P.M.

The Board went through the criteria necessary for the granting of an Area Variance:

- An undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the variance – response: no.

- The benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than a variance – response: no.
- The requested variance is substantial – response: no.
- The proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district –response: no.
- The alleged difficulty was self created, which consideration shall be relevant to the decision, but shall not necessarily preclude granting the variance – response: no.

The Board Members reviewed the new application and all agreed that it was a much better plan. Motion was made by Board Member John Montrose to grant the application as presented with the new/revised plan; that it meets the criteria; that the structure conform with the existing structure, i.e., materials; the color be consistent with the neighborhood; and that a Building Permit be obtained within one (1) year of approval date; seconded by Board Member Bob Schulman. Vote taken:

Chairman Randy Bogar – yes

Board Member Tim Tallman – yes

Board Member Kristen Shaheen – yes

Board Member Fred Kiehm – yes

Board Member John Montrose – yes

Board Member Bob Schulman – yes

Motion was **approved** by a vote of 6 - 0.

The application of **Benderson Development** who is proposing a restaurant to be located at the retail building on **Commercial Drive behind Eckerd's Drugs**. Tax Map #317.013-3-18.4; Lot Size: approximately 2.3 Acres; Zoning: Retail Business 1. (This application was tabled to be addressed further at the October 16, 2006 meeting for an Area Variance for the number of parking spaces requested). Teresa Bakner, Esq. and James Boglioli, Esq. from Whiteman, Osterman & Hanna, LLP; Mr. Eric Recoon/Leasing Agent of Benderson Development Co., LLC and Mr. Steve Aldrich, P.E./Traffic Engineer from FRA Engineering, appeared before the Board. Also, Mr. Larry Wilson of Moe's Grill.

Attorney Bakner addressed the Board stating that they are seeking an Area Variance for eleven (11) parking spaces for Moe's Grill, a proposed restaurant at the Benderson retail complex behind Eckerd's Pharmacy. This project requires 93 spaces and they are providing 82. They reduced the seating by eight (8) seats and restricting ,000 square feet of the remaining square footage of the plaza to office space. Town Code provides for a different ratio for office as opposed to retail parking. She presented a proposed Declaration of Covenants and Restrictions and would welcome any restrictions or

conditions. They also are proposing that this variance would be only for Moe's Grill, and restaurants are a permitted use at this site. If this changes, they would have to come back before this Board. She referred to Area Variances that run with the land, but they are willing to come back and seek any approvals for any other use in this location.

Board Member Shaheen asked what would happen if Benderson didn't own the property any longer. Attorney Bakner said we can file a restricted covenant of the property, which would be a part of the deed restriction.

Chairman Bogar and Board Member Shaheen have a difference of opinion on her statement regarding restricted covenant. Board Member Shaheen felt it is incumbent on the homeowners to hire a lawyer to enforce it. Attorney Bakner said she has done this type of work for many years and the Town can enforce it and explained – it is a tool for planning. She gave examples of other areas where this is applied. Also, the Town's ability to condition approvals have been interpreted very broadly by the courts, hours of operation, etc. Board Member Shaheen disagrees.

Attorney Bakner said she would like to pass this by the Town Attorney for his input. At this time, she presented a traffic analysis by FRA Engineering/Mr. Stephen Aldrich (along with Mr. Aldrich's resume). Mr. Aldrich stated FRA Engineering conducted a parking demand assessment for the proposed Benderson retail development.

Board Member Montrose asked if all the retail space is rented – it was not known at this time. Attorney Bakner referred to certain ratios for the space and they have agreed to restrict the remainder of office to 4,000 sf forever. Board Member Montrose referred to the original plan which was strictly retail use.

Board Member Tallman wanted to know how they went from retail to restaurant and has it been marketed for strictly retail as it isn't finished yet. Attorney Bakner said Moe's Grill came to them wanting to come to New Hartford and this created a change. Mr. Wilson (Moe's Grill) pointed out that he met with Benderson and stated he wanted to come to New Hartford and it's been marketed for about nine (9) months.

Board Member Shaheen referred back to the Declaration of Covenants and Restrictions #1 (which has been made a part of the file). Included in this is conducting the affairs of a business, profession, service, industry or government or like activity that may include ancillary services for office workers such as a restaurant, coffee shop, newspaper and/or candy stand. Attorney Bakner said they have taken the definition of office space from the Town Code. They are happy to entertain a different definition. If they wanted to impose a different definition, they are fine with that.

Reference was made about not having a restaurant at this location, retail only, boutique shops. Chairman Bogar said when he asked about this at the last meeting, he was told they found Moe's Grill. Mr. Wilson said he worked with Benderson on other projects. He likes this spot, they signed the lease, they hired a store manager, and they never thought this was a problem – he has spent a lot of money trying to open his business.

Codes Enforcement Officer Back said Benderson was told that a restaurant would not fit at this location. Attorney Bakner is aware of this because it is in the minutes. However, Town Planner Schwenzfeier told Mr. James Rumsey from Benderson that if they wanted to have a restaurant at this location, there isn't enough parking and they would need a variance. They appeared before the Planning Board in November 2005.

Chairman Bogar has a concern about the time from November 2005 until now. Mr. Wilson reiterated that he did not know about this problem, and he pestered Benderson about getting his business into this site, about nine (9) months ago.

Mr. Eric Recoon recognized that there seems to be a concern about their marketing for this space. He would provide written communication from brokers on this property to give this Board a comfort level about their efforts to lease to retailers. There two (2) leases signed and two (2) others pending but he is not at liberty to say at this time for the record.

Discussion ensued again regarding the time frame for marketing this site for retailers. Attorney Bakner said the reality is the approvals were granted on a retail building, the people who did the leasing weren't given the specific problem for parking, but the use of a restaurant is permitted as long as they have parking for the rest of the complex. She said Mr. Rumsey, the architect, went to the Planning Board meeting with the Town Planner. Mr. Rumsey knew they needed more spaces but the leasing agents weren't aware of it. This is an error and they are trying to put an application together for a variance for the parking spaces. They have done this type of variance regularly and she feels there is nothing about this particular variance that is unusual.

At this time, Mr. Aldrich addressed the shared parking and parking generation (refer to the submitted Declaration of Easements which has been made a part of the file). Board Member Tallman asked if this report included employee parking. Discussion ensued regarding shared parking with Eckerd's Pharmacy on the site, peak times, etc.

Codes Enforcement Officer Back explained to Attorney Bakner the parking requirements in the Town's Ordinance and he believes there is a discrepancy wherein they don't come up with the same number of parking spaces needed. Attorney Bakner said she will take another look at it.

Board Member Tallman said Moe's Grill has tables located outside. Are tables going to be placed outside at this site? Mr. Wilson said it is against his lease without permission from the Town for outside seating.

Attorney Bakner referred to an erroneous statement made last month. Eckerd's is owned by Benderson at this time. They have subdivided it but it is still owned by Benderson. She stated that there is a cross access parking agreement that goes with the deed so whoever Benderson sells it to they will be aware of this. Codes Enforcement Officer Back doesn't agree with this, but Attorney Bakner said the law provides for it, i.e., Consumer Square. Attorney Bakner said part of this property is in the Village of New York Mills and that is another reason why they wanted to do the subdivision.

Mr. Aldrich referred to a study done in another area of the State for comparisons, i.e., Henrietta. They did not do a study at this particular Eckerd's. He cannot tell us the parking ratio at this site in New Hartford, they tried to use comparables. He said the one big user is Eckerd's. Board Member Tallman said it is broken apart from this complex – it is two (2) different sites.

Chairman Bogar stated that Codes Enforcement Officer Back was notified by the Town Engineer at 4:00 PM today that there is a discrepancy in the approved plan. The Town Engineer went over the plan and went to the site – they are suppose to have 239 feet of parking and there is only 189' so they are 40' feet short. The pavement is all curbed and complete and it was done wrong. Codes Enforcement Officer Back displayed the stamped and approved plan. With the 40' shortage, this creates more of a problem. Attorney Bakner said she would look into this and stated that they have a Building Permit, and no Certificates of Occupancy yet.

Discussion took place regarding the amount of parking spaces actually needed. Mr. Reoon said he is comfortable with the 82 spaces that exist today. Attorney Bakner said she understands the new concern and will look into it. She also understands that a decision will probably not take place tonight. She will also contact the Town Attorney.

Attorney Bakner also addressed a list of deficiencies at this site which were given to them by the Town Planner. They have responded to those issues as shown on the list (this has also been made a part of the file).

Chairman Bogar asked if the residents wanted to comment:

-Mr. Ken Bart, Royal Brook Lane. He has had problems trying to get Benderson to respond to the problems that exist at the site. He mentioned a few items that needed to be addressed and he has tried for thirteen (13) months to get action. Attorney Bakner

said she doesn't want anyone to be unhappy and for him to contact her or Mr. Recoon to get these problems corrected promptly.

Chairman Bogar said construction is taking place at this time. The driveway behind the building is blacktopped and now it is being dug up. Attorney Bakner will look into this and she doesn't know about it.

-Mrs. Joan Malewski, 16 Royal Brook Lane. She presented pictures of the storm in July of this year and how bad it was. She talked to the Town Planner and the Town Engineer about banks eroding. Are they planning on moving the catch basin back? She also presented a letter from Oneida County Soil & Water Conservation District addressing this issue (Attorney Bakner asked for a copy of this letter to be sent to her).

-Christine Krupa. She referred to the traffic study done in Henrietta (near Rochester). Is that a Benderson property – it was stated no. She asked if they knew what their sales were for Eckerd's as how would those sales affect Moe's Grill. Mr. Recoon they used this as an example and traffic counts change day by day.

Mr. Wilson addressed the Board stating that he wants 20% more from what they get from the Moe's Grill in Henrietta. He feels peak would be 18 or 19 – it is not a place where you sit for an hour – it is a quick turn around type business.

-Robert M. Maciol, Mayor of New York Mills. He presented a written speech which has been made a part of the file. He has heard from people not from this area that advertising has been taking place that a Moe's grill was coming to New Hartford – he doesn't know how this got started, perhaps a job fair, and this bothers him. Mr. Wilson said there has been no job fair. Mr. Maciol believes a restaurant in this complex brings no positives to the impacted neighbors – only problems. He remembers that it was a clear message from Benderson that no restaurant would be in there. He is also concerned about shared parking as he has seen people walking in the complex and with traffic coming into and out of the site, it is a hazard.

Mr. Wilson said again that he hired a supervisor, hired contractors, and has spent a lot of money coming to this site. He stated he will sue Benderson if he has to. If he thought this was going to occur, he would have never come here. But now he has a lot of money invested and he contacted Benderson continuously about opening at this site. He does not feel it is Mr. Recoon's fault, he feels it is a lack of communication.

-Mrs. Joan Malewski presented a newspaper clipping from the observer Dispatch regarding Moe's Grill coming to New Hartford (which has been placed in the file).

-Mr. Ken Bart, Royal Brook Lane. He feels there is total confusion here – he feels the complex was built for boutique purposes and no restaurant and now a restaurant is there. Things always change after the fact and this bothers him. He is also concerned about the adjacent residents and property values. He feels the variance request is significant. He asked where the grease dumpster would be for the restaurant – the side closest to Eckerd's – the pads are already there and built. The grease will be recycled.

Attorney Baker reassured the neighbors that she would look into all the concerns addressed this evening and would come back to this Board at the November meeting.

Chairman Bogar discussed the November meeting with the Board Members. It will be held at the regularly scheduled date of November 20th.

There being no further business, the meeting adjourned at 9:30 P.M.

Respectfully submitted,

Dolores Shaw
Secretary/Zoning Board of Appeals.

dbS