



Town of Gates

1605 Buffalo Road
Rochester, New York 14624
585-247-6100

Meeting Minutes

December 14, 2015

MEMBERS PRESENT: Christine Maurice, Chairperson; Don Ioannone; Mary Schlaefler; Bill Kiley; Don Rutherford

MEMBER(S) NOT PRESENT: Christopher Dishaw; Ken Cordero

ALSO PRESENT: Frank M. Cassara, Esq., Board Attorney
Christopher DiPonzio, Councilman

A public hearing of the Gates Zoning Board of Appeals was called to order by **CHAIRPERSON MAURICE** at 7:30 p.m. at the Gates Town Hall. **CHAIRPERSON MAURICE** explained the purpose and procedure of the Zoning Board.

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MOTION - MR IOANNONE to accept minutes from October 14, 2015 meeting as presented - **MS SCHLAEFER** - Seconds

All in favor, Mr. Kiley abstains due to absence at the October meeting, the October, 2015 meeting minutes are approved by a vote of 4 - 0.

Tabled From October Meeting

RE: THE APPLICATION OF FRANK ZAMIARA REQUESTING A USE VARIANCE FROM ARTICLE XXIV, SECTION 190-133 TO SELL PROPERTY TO BE USED FOR THE SALE OF USED CAR SALES ON PROPERTY LOCATED AT 795 HOWARD ROAD.

DANIEL BRENNAN - from law firm of Woods Oviatt, Gilman, attorney for applicant, Frank Zamiara. Was not at last meeting, but has reviewed minutes. Made submissions in response to requests from Board with supplemental letter of intent with supporting documentation.

One of the questions was about the assessed value of the property, whether the price in the contract with Dave Hoffman was reasonable. States that it is reasonable, the property has been assessed at \$90,000 by the Town of Gates since 2006. From 2000 to 2005, the property was assessed at \$75,000. Prior to 2000 there was a different way to assess property with fractional values, so that is not helpful. The assessment from 2000 to 2005 is relevant to show that the price on the contract, which is a little over \$100,000 including some of the improvements to the use if the property for a car lot, this is a reasonable and fair price. There are really no comparable properties. Talked to two brokers to find out the history of the listing and whether this is an appropriate use for the property. In deciding if the price is appropriate, we would look at both the assessed value and any comparable properties, but there really are none. If you look at number two on supplemental letter of intent, it touches on it. There is one piece of vacant property at 1795 Buffalo Road, that is not comparable, it is a different size and went for \$60,000. Believes it was purchased by the town. It is not similar in many ways and it sits on Buffalo Road as opposed to Howard Road, which is a different type of road. Do not really have a comparable property to look at.

The applicants have not had any income from the property since 1988 when the tenants moved out. Since then he has had the obligation to pay taxes and maintain the property. Has ongoing expense but no tenants. Ongoing expenses for maintenance and taxes but has no income. If you look at hardship from the prospective of internal rate of return, which is what an investor would use, it is a negative. Purchase price of \$75,000 back in the early 80's, had little to no appreciation, taking into account inflation, on value of the asset itself and the asset does not return any income and in fact returns expenses.

Enclosed a copy of the purchase contract, the difference between the purchase price and the assessed value, the asking price, \$89,000, and the contract price of \$105,000 represents some improvements that the seller agreed to make essentially to make to build the property to the buyer's site plan. Includes some landscaping, fencing and parking. Right now the property is completely vacant and there are no structures.

The Board asked for copies of broker's listing agreements since 2012. They do not have that information as the applicants was not able to find them. The applicant is an older gentleman and may have misplaced the documentation. Points attention to the letter from Douglas Burkhardt, one of the real estate brokers, states in his letter that the property was listed continuously since 1993. Two broker's letters submitted with this application talk about the history of this property as well as whether or not this property works for any other permitted use within the district which is an important part of the application. Need to look at the permitted uses in this district because we have to show that the applicant cannot make a reasonable rate of return using the property for any of the permitted uses. In a neighborhood business district we have several types of offices permitted, laundromats, bakeries, hardware stores, barber shops, banks. Also have as a conditional use, a sit down restaurants, gas stations. Uses that Doug Burkhardt states in his letter submitted initially that are not going to work here because the costs would be too high. A conditional use variance is not going to work as the property is not big enough to accommodate some of the other uses such as a grocery store, pharmacy, ect. Also if you look at the location, it is unique, unlike where most want to be, this is midway down the block and most of those uses would want or need to be at the intersection where visible. That explains in part why Frank Zamara has been marketing the property for over twenty-five years and it has yet to sell until this applicant came along.

Also worth looking at the purpose of neighborhood business district which is to provide retail and commercial uses on a neighborhood scale, within walking distance. Given the location of the property, this is not possible. There is not a residential neighborhood close to this property. There is the mobile park behind it but there is no pedestrian connection to this property. The substantial residential neighborhoods are farther to the north and to the south. For that reason, this property is never going to need a neighborhood use like a bakery, barber shop or beauty shop. We do not have any sidewalks on the street. The code talks about the purpose of the neighborhood business district being that there is pedestrian use but that is never going to happen here because there are no sidewalks. Other business already in the district are not neighborhood business use. Two large industrial uses, the Dolomite plant and Concrete Pipe plant to the south are not neighborhood businesses. You have a gas station on the corner and a leather shop across the street which are not neighborhood use as they do not provide daily needs. A lot of pre-existing, non-conforming conditional uses which may have had use variances in the past, but you do not have a lot of businesses that have the specific use permitted in the district. Since the last meeting in addition to the supplemental letter of intent, we have drafted a map of 795 Howard Road which lists other business in area.

Presents to Board members with consent of Attorney Cassara

Map gives some perspective to what we have talked about. Shows where the other uses are in relation to our property. Can see how many are non-conforming uses.

ATTORNEY CASSARA - asks that since this a public meeting that the map be circulated so that everyone has a point of reference. **ATTORNEY BRENNAN** - distributes copies of the map to audience

ATTORNEY BRENNAN - States that they labeled a few things and most are non-conforming uses. Red markers on map show single family residences, which is not a permitted use in this district. There are several houses that have been converted into businesses but there are not a lot of businesses in the district that comply with the code. One of the points of contention at the last meeting was whether determining the financial hardship was a self created hardship. Thinks that is was not because even when the house was demolished in the 80's that that constitutes a self created situation. Even if there was a single family house on the property, we would still have a financial hardship. The cost of the renovation of a single family house for any of the permitted uses in the district would be cost prohibitive. In the letter by Doug Burkhardt, he talks about the location of the property really being a hindrance, not so much that there is no structure at all, as opposed to a structure that was intended for a single family use. If you look at some of the other single families on the street, there are not very large houses, they are smaller houses that were build mid century that probably are not conducive to meeting modern commercial building codes. Assuming there was still a single family, the house was in poor condition, that is why it was demolished by the fire department, but even if that house was still there, there would still be a financial hardship.

There is a condition on purchase contract stating that the contract is contingent on obtaining zoning approval. The condition expired in November. Contract is still in effect, just because the condition expired does not mean that the buyer cannot go forward with the sale. Buyer wants to move forward and wants to build business if Board grants approval. Reminds Board that if they grant the variance, can put condition on approval. Submitted site plan and can put a condition that they will comply with the site plan. If the Board has other concerns we can establish conditions that were set out in letter of intent. Believes that they have met all of the requirements for the use variance.

CHAIRPERSON MAURICE - states that the applicant's responses satisfied the Board's desire for an answer. They are part of public record in the building department. There is no need to go through them tonight.

PUBLIC HEARING

DAVID T. STOTT - 30 Winter Hazel Court - property owner of single family residence just south of there, address is 815 Howard Road, purchased property last spring in a foreclosure. He made subsequent improvements to the property and rented it to the Allchin family who currently reside at the property. Ms. Allchin spoke at the October meeting in opposition to the application. He is here in support of them and does not find that a used car lot is in the best interest of the town, the neighborhood, the other residents, to the family or to himself as an investor and tax payer. He spoke to the Ulchins about their intent to purchase and they have made improvements to the house. They want to make the house directly adjacent to the property in question their long term residence where the plan to raise their young family. Respects position of counsel, however, does not see how a used car lot adds quality of life to those on Howard Road and specifically to the Ulchin family. He is opposed to the request.

JOSEPH W. JACEK - attorney, states that he was at the October meeting to speak against this particular use variance. Represents J&D Bike and Leather, client is also here tonight. Reviewed additional submissions and they do not offer anything new. The objections he had in October are still relevant. Particularly the fact that this is a self created hardship that the applicant had. It is conjecture as to whether or not the applicant would be in the same position. There are people who have rental properties that keep them in good condition but he applicant walked away from property. What is important to this new material is that he has not addressed some very important concerns that were brought up by the Board such as the market value data, history of sales price and no appraisal has been submitted. All of this is what he believes to be a plan by the applicant to get the Board to adopt his strategy of marketing. Market property at \$90,000 for ever and when it does not sell, market for more money if he could just get a use variance. Nothing in the record to indicate that he has attempted to adapt the new conditions which he has created, that is to say he has gone from a single family house to a vacant lot, to adapt the market conditions of a vacant lot. Has not changed the price and has not given indication that the price could be adapted and sold to a person who could use the property for a neighborhood use. He changed the character of property and made vacant and is still trying to say it is the same as before. Has not shown if the property might have had a viability at different price. The big issue is that there has been no attempt to sell the property at a price that might be more market related. All applicant has done today is to prove that he cannot sell it at \$90,000, no other price points that this property is viable to the potential purchaser as a neighborhood business. In the package of materials with Zoning Board, there is a petition with thirty signatures, from manufactured home community in opposition to the application.

MR STOTT - states that he has had conversations with his tenants that Ms. Allchin called the broker who said price was not negotiable.

ATTORNEY CASSARA - states that this is a third party communication

CHAIRPERSON MAURICE - states she recalls tenant telling the Board about the phone call.

FRANK SURACE - 102 Crimson Woods Court, states that he and his wife owns property at 775 Howard Road, a beauty salon. States that he also called about the vacant lot and was told that the price was not negotiable. He talked to owner several times and was told that he

could rent the property for \$2,000 per month for parking, but if he wanted to pay \$2,000 per month, he would have just paid the \$90,000. Goes to type of person we are dealing with here. He made a bad decision, financial suicide and wants the Board to bail him out. If that is the case when he goes to sell his property and he is having trouble, he hopes that the Board bails him out.

Public Hearing Closed

CHAIRPERSON MAURICE - states that she is going to make a motion to deny the application because none of the four criteria necessary for a use variance have been met.

1. Proof of financial hardship - to support the claim of financial hardship, the applicant has provided detail of his financial costs involved in owning the property and has also shown that the property cannot be sold at the price that is offered for a use in that zone. For the past three years it has been offered at \$90,000 with no offers. Over those three years the price has not been adjusted. This has not satisfied the criteria for proving that this property cannot yield a reasonable rate of return if used as any of the allowed uses in the neighborhood business zone. The mere fact that the owner may suffer a reduction in value because of zoning regulations, or the fact that another permitted use may allow the sale of the property for a better price, or permit a larger profit, does not permit the granting of a variance on the grounds of unnecessary hardship. A mere showing of present loss is not enough. In order to establish a lack of reasonable return, the applicant must demonstrate that the return from the property would not be reasonable for each and every permitted use under the ordinance.
2. Uniqueness - from other properties being used as zoned or grandfathered in as single use residences. The uniqueness related to the land and not to the personal circumstances of the owner. There is no evidence that this land cannot be used as a neighborhood business use.
3. Self creation criteria - Applicant purchased property in 1983 and for the next five years rented it to different tenants during which time the house was allowed to fall into disrepair. It should be noted that the property owner does not relinquish responsibility for the upkeep of the property to a tenant. It was then left empty from 1988 to 1994. By 1994 the repairs needed to make it inhabitable were considerable and the decision was made to burn the house down rather than to incur the cost of repair. Allowing the disrepair of the house and creating the empty lot caused the situation that the applicant now faces in marketing the property. The surrounding properties prove that it could have continued to be used as zoned if the house had been maintained. There are houses that are still used as residential rental properties and other houses that have been transitioned into neighborhood business uses.
4. Essential character to the neighborhood - The town of Gates zoning code specifically limits used car sales to be allowed only in conjunction with new cars sales and only then in a general industrialized zone. Stand alone used car lots are now an allowed use in the town of Gates in any zone. The Zoning Board of Appeals cannot overstep its administrative powers and allow a use that is proscribed by the town. The Zoning Board of Appeals does not have the authority to rewrite the code. Furthermore, if the Board were to disregard that constraint on their authority and consider approving this use, it is noted that new car sales, which is the most similar to this proposed use, are allowed only in general industrial zones. While the applicant has provided a plan for buffers and setbacks, to the dimensions that are required when a neighborhood business zone borders a residential one zone, that is not adequate when allowing a general industrial use to border residential zones. This property is boarded by an R-1 district, which is residential on the west, along with another that is partially on the north and boarded by neighborhood business

on the south and north. The ZBA would require the setbacks and buffers that are required by code 190-161A which are the buffers and setbacks required by the town when a general industrial use borders neighborhood business and residential. Allowing a general industrial use to be situated in a neighborhood business and R-1 zone without sufficient buffers would have a detrimental effect on the essential character of the neighborhood.

In response to the applicant's comment that the neighborhood is not what you would characterize as a walk able neighborhood, therefore neighborhood use businesses do not really apply here, that is a rezoning issue and not an issue that you can solve through the use of variances.

MS SCHLAEFER - states that neighborhood is walk able because there are other businesses, Dunkin Donuts, a coffee shop, funeral home and dry cleaner all within walking distance.

MOTION – CHAIRPERSON MAURICE – Motion to deny application as presented
MS SCHLAEFER - Seconds Motion

Member Vote Tally

Mr. Kiley - yes
Mr. Rutherford - yes
Ms Schlaefer - yes
Chairperson Maurice - yes

Application denied 4-0

The denial was based upon the following:

- 1- The applicant, did not demonstrate a financial hardship, particularly that the property could not yield a reasonable rate of return for a permitted use as the subject property is zoned;
- 2- That the property was determined to not be unique or physically different from the surrounding properties which are engaged in permitted uses;
- 3- That the applicant had created the purported hardship by permitting the original structure to fall into disrepair and then having it, in effect, having it demolished;
- 4- That the application proposes a use which is contrary to the essential character of the neighborhood. The ZBA determined that the proposed variance as submitted would have an adverse effect upon the neighboring areas that surrounding the subject property;
- 5- That the proposed usage was contrary to the Town of Gates legislative intent when it enacted the Zoning Code. The ZBA held that given that the Town Code specifically prohibits standalone used car lots in any zone, it was beyond its administrative authority amend or modify the Town Code to permit a use which is prohibited use.

THE APPLICATION OF TONY KIRIK - YARO ENTERPRISES, REQUESTING AN AREA VARIANCE FROM ARTICLE IV, SECTIONS 190-17 AND 190-14(a) TO ALLOW PARKING WITHIN THE REQUIRED FRONT SETBACK; AND, WITH FEWER PARKING SPACES THAN REQUIRED ON PROPERTY LOCATED AT 25 PIXLEY INDUSTRIAL PARKWAY.

BOB WINANS - Costich Engineering, 217 Lake Avenue, for applicant - representing Yaro Enterprises

CHAIRPERSON MAURICE - application was written by the town as one area variance, but it is really two area variances, need to separate. There is an area variance required to allow parking within the front setback and a separate second area variance required to have fewer parking spaces than required. For the variance for the few parking spaces than needed, the Board found, when studying before the meeting, that we cannot say that you actually need the variance because talked to Mr. Wall, who said that the plans were very preliminary when you came before Planning Board. Concern is that we should not be voting on a variance for fewer than required spaces tonight because you require 138 spaces per the square footage of the building and then you have all of the proposed asphalt in the back. This Board needs to see what parking you can put in the back. Need to show on a plan because it is evident to us that you do have room for more parking than what you are asking and the ZBA cannot issue a variance where one is not needed. For that part of the variance, asking that you withdraw that part, work with Planning Board to show where parking would be and if you still need the variance, you can come back.

MR WINANS - focusing on the amount needed for employees

CHAIRPERSON MAURICE - asking because variance is to property, not owner of building, looking towards future and if we were to grant 34 parking spaces, that would stay forever and it may not be the right number for another building.

MR WINANS - withdraws that part of application. Going back to Planning Board and will work out final details of site plan and can work on parking.

ATTORNEY CASSARA - if sufficient parking spaces are designated, no variance is needed

MR RUTHERFORD - asks what type of business is going in there

MR WINANS - tenant for larger portion of the building is a container and pod construction and transport.

MR RUTHERFORD - manufacturing?

TONY KIRIK - VP of Yaro Enterprises, owned building since 2007, used to be a refrigerated plant, one in back was converted to dry storage. Own about 600,000 square feet in various states. Family owned business. Regarding parking spaces, it is easier to bring a tenant in with adequate parking. We are building primarily a distribution facility. Being a thirty foot clear height, sprinkler system. One building is in Greece, the former Kodak building, is 2200 square feet with eleven employees. Pod containers for storage or to move across country. Presently have five employees. Used by college students frequently. We are not going to outgrow the space as there is a location in several cities. Planning on adding one or two more employees so seven parking spaces is adequate. Primarily the space is used for distribution versus manufacturing. It is cheaper to go elsewhere and build bigger space. Vehicle traffic is concentrated up front.

MR KILEY - want variance because parking is in front.

CHAIRPERSON MAURICE - do you agree to withdraw parking portion?

ATTORNEY CASSARA - goes with land and you may want to increase later. Board can accept or deny therefore if you wish to withdraw application, this Board has offered you the ability to do so at the hearing. Cannot rule on withdrawing application.

MR WINNANS - withdraws voluntarily

CHAIRPERSON MAURICE - lets talk about the front setback

MR WINNANS - due to combined access, trying to get their parking in the front of the building where the front door is going to be. Trying to get enough space to get trucks to loading docks. Trying to mimic what is across street with a front setback of sixty feet and the asphalt ends up within 35 feet. Can spaces will actually be at thirty-five feet or beyond. Map shows cars along path, plan to install landscape to buffer that area.

CHAIRPERSON MAURICE - spoke with Mr. Wall and with new construction, it is not far enough along for the Planning Board to make a recommendation. Do show the length to be eighteen feet, but do not show the width.

MR WINNANS - yes, nine by eighteen

CHAIRPERSON MAURICE - if the Board were to approve this setback variance, it would be contingent on final Planning Board approval.

MR WINNANS - considering the zoning is industrial it seems to fit in

MR IOANNONE - where is egress in and out?

MR WINNANS - gray area is parking

MR IOANNONE - how are you going to access this building?

MR WINNANS - down onto Pixley Industrial Parkway

MR KIRIK - planning on two office spaces, shows on map, do not have all shown on map yet. Because of how tall it is, we can only do so much. Want to make it more up to date. Regarding the parking space in the back because of the pod storage of empty containers.

CHAIRPERSON MAURICE – states that is the potential

ATTORNEY CASSARA - potential, if a pod gets removed or if snow takes away, remains part of parking and you have it designated and ready.

CHAIRPERSON MAURICE - where the proposed landscaping is, will you have some sort of barrier that will prevent people from actually parking on that landscaping?

MR WINNANS - states they will have full landscaping

ATTORNEY CASSARA - Planning Board will give suggestions on what is required for entire parcel

CHAIRPERSON MAURICE - Public hearing closed, no one to speak for or against.

MOTION - MR IOANNONE - Motion to approve for the required setback of 190-17, the application for the few parking spaces than required has been withdrawn by the applicant. Approval is contingent upon final approval from the Planning Board.

Second - **MR RUTHERFORD**

Member vote tally

Mr. Ioannone - yes

Mr. Kiley - yes

Mr. Rutherford - yes

Ms. Schlaefer - yes

Chairperson Maurice - yes

All in favor, Variance approved 5-0

This approval is based upon the following findings of fact, which adequately demonstrated the standards applicable to granting an area variance, as defined by Town Law §267-B (3)(b):

1. The Applicant desires to seek a variance to permit parking within the front setback within the front its building;
2. There was no party in attendance who objected to the Applicant's plea before the ZBA;
3. The requested area variance was not viewed as being substantial given the minimal encroachment into the setback. Furthermore, the proposed parking lot and related landscaped buffer was deemed to be consistent with the neighboring businesses in the area. Additionally, it was demonstrated that there was no other viable means to achieve applicants the desired outcome other than to permit the variance.
4. This application involves a Type II action under the State Environmental Quality Review Act (SEQRA) and requires no further proceedings under SEQRA.

MR RUTHERFORD - MOTION to lift the table from October meeting for application for 795 Howard Road at 7:30
Second - **MS SCHLAEFER**
All in favor.

MOTION to adjourn - **MR RUTHERFORD**
Second - **MR KILEY**

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Respectfully submitted,

Clare M. Goodwin, Secretary
Gates Zoning Board of Appeals