

**A Meeting of the Zoning Board of Appeals for the Town of Moreau, Saratoga County, State of New York was held at the Moreau Town Hall, 351 Reynolds Road, Moreau, NY 12828 on the 26<sup>th</sup> day of August 2015 at 7:00 PM.**

**ZONING BOARD MEMBERS PRESENT:**

Chairman Gerhard Endal

Kevin Elms

John England

Richard Kubis

Scott Fitzsimmons

**ZONING BOARD MEMBERS ABSENT:** None

Tricia Andrews, Recording Secretary, absent. Minutes done from recording.

Chairman Endal called the meeting to order at 7:00 p.m.

The Board reviewed the minutes of the July 22, 2015 meeting. The Chairman stated for the record that the minutes had been approved before the recording started with no additions or corrections.

**Appeal No. 757**

A request of Atherton's Auto Sales, LLC of 88 Hudson Street, South Glens Falls, New York, 12803 for a Special Use Permit pursuant to Chapter 149, Article V, and Schedule of Regulations for a C-1, General Commercial District. Applicant is requesting to operate an Automobile Sales Office at 1378 Route 9, Gansevoort, New York, 12831. This property is designated as 77.1.1.2 on the Town Assessment Map.

Chairman Endal stated that this is a request for a Special Use Permit.

Atty. Joshua Silver, Murray Law firm representing Mr. Atherton stated that the Applicant is looking for an interpretation. They believe that even if the Board decides that the Special Use Permit should not be allowed because of the size of the lot, that the use is a pre-existing non-conforming use, and should therefore be allowed to continue as a used car dealership. The owner of the lot had purchased it at least a month before the Town enacted their Zoning Law, on February 27<sup>th</sup>, 1989. Additionally it was operated as a used car dealership before that as well. It has operated without interruption up to leasing it to Atherton's. They would like the Board to determine that they are entitled to pre-existing non-conforming status.

Mr. Patricke told Atty. Silver that although the current Zoning Law is dated 1989, there was a prior Zoning Law in place since 1973.

Atty. Silver argued that the ordinance states when it was adopted (1989), and doesn't state that it supersedes any other code. He asks that the Town maintain the status quo, that no one driving by would

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think anything had changed on the lot, and reminded the Board that the only reason this issue has come up is because of his clients' desire to do everything by the book.

Chairman Endal stated that the issue is that there can't be two permitted uses on one lot.

Mr. Patricke confirmed that that is the Code, with the exception of shopping centers which are treated differently in the Code.

Atty. Silver said that he thought that the Board didn't have to get into that issue if the Board granted the requested pre-existing status.

Mr. Elms asked what the previous Code had said, and what changes were made. Mr. Patricke explained that there was no book of Code such as the Board uses currently, but rather a collection of pamphlets addressing certain issues, such as swimming pools, etc.

Chairman Endal asked for details about the continuous operation of a used car dealership on the site and Atty. Silver said that the current owner has maintained his license to sell used cars the entire time and has used it at least at the required minimum number of cars sold per year. Atty. Silver also noted that this is something that has been part of the Town since at least 1988 and likely before that, which the applicant would like to clean up and continue to run to support his family, and that no one in the Town would object to the continued operation.

The Chairman asked what is there now and was told that the landowner still has his car dealership there. The sign for the previous dealership was taken down and they signed a lease about a month ago. The south side of the property was cleared.

Mr. Atherton explained that he will bring cars back from the auction and Mr. Combs will get them ready to sell and do NYS inspection. He said that he hired Atty. Silver because he wanted help navigating all the requirements of the DMV to establish his business.

The Chairman questioned how Combs Automotive got there. Mr. Atherton and Atty. Silver didn't have that information. He did have an affidavit from the owner confirming the dates of ownership, which he gave to the Board.

Mr. Kubis stated that since Mr. Patricke and the Town website mention 1973, the Board needs to know how far back this goes in order to make an interpretation. Mr. Elms added that he would like to know whether the lot was non-conforming under what was in place before 1989. Mr. Patricke didn't have all those details available.

Atty. Silver stated that since it's not on the Code portion of the website, they should be able to rely on the 1989 date.

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David Deeb, the owner, was available to give some history of the site. He stated that he had operated a Chevrolet dealership on the property which he then rented out so that he could operate the garage instead. He's never had a problem in 26 years.

Mr. Patricke asked Mr. Deeb about a Special Use Permit application that had been made on behalf of the automobile repair shop on the site in the past, went before the Board, got some advice and never came back. Mr. Deeb didn't know anything about the application and Mr. Patricke didn't have the name of the applicant available, but it would have had to involve Mr. Deeb because it was during the time that he stated he was operating the business there. Mr. Patricke said that all businesses involving cars need permits.

Atty. Silver asked again that the Town maintain the status quo.

Mr. Kubis stated that he disagrees and that the Board can't make a decision without more information about which year's law applies and just how long this use had been in place. Mr. Elms stated that he feels that this has been going on forever and that the Town needs business and sales tax revenue, and knowing what the rules were from 73-89 is not relevant.

Mr. Kubis stated that the decision can't be based on what's best for the Town in each situation but on what's right according to the Code. That being there a long time is not how you decide something is right. The only way to determine that is to know all the details that have been mentioned, in order to know whether the pre-existing, non-conforming status us a valid argument.

Mr. Patricke stated that he could provide copies of the 1973 code for review. He also mentioned that the affidavit was new, but Atty. Silver said that was in his letter to the Board.

Mr. Atherton said that the DMV will be contacting him soon looking for his sign out front, his phone etc. to be hooked up, and that he has waited a long time trying to get the site ready.

Mr. Elms said he didn't think it was in the Town's best interest to split hairs over what the law was 30 years ago. Chairman Endal said that he didn't have a problem. This is just a change in ownership of a pre-existing use (non-conforming or not being irrelevant). Not a two- year pre-existing use, but one that's been there for 30 years with no problems, and this is just a name change. He asked whether there had been any correspondence about the issue.

Mr. Patricke stated that there had not been any correspondence. He also said that the Zoning Board's task isn't to oversee what kinds of businesses come into the Town. They are to look at how our law applies to the site. The topic tonight is really the Appeal of Determination, and whether the Board are going to allow two uses on one lot, that don't meet the Code.

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Chairman Endal stated he's hearing that it's been allowed thus far, for thirty years.

Mr. Patricke reminded the Board that their decision will apply to the entire Town.

Atty. Silver argued that it would not apply to the whole Town. Some discussion followed over whether there were other lots in Town that would be affected by the decision.

Mr. Kubis said that to be fair, they should ask of this applicant all the proofs required from others.

The Code reads that there is to be one "permitted principal use" per lot. Some discussion ensued over the definition of a principal use. Mr. Elms said that he thought the Town ought to talk to their counsel. The Board indicated to the applicant that they regret any delay in his progress. Atty. Silver indicated they prefer to schedule a public hearing. Mr. Elms wanted to motion to table the issue to get advice from counsel. Mr. Atherton asked if the Board would indicate which way they are leaning, but the Board members were not willing to do that. Atty. Silver stated that the Code should be considered to have been adopted on the date published on the website. He reiterated his position that the issue of two uses on one property would become moot if the lot was found to be pre-existing non-conforming. He stated that the Code does not expressly forbid two uses on one lot, and that if the law doesn't clearly state that, the Board can't use 5 steps to get that interpretation. He would like a chance to review the 1973 Code before the next meeting, and Mr. Patricke told him he could do so the next day.

Mr. Elms motioned to table Appeal 757 until the next meeting. Motion carried. The date of the next meeting is September 23, 2015.

**Appeal No. 758**

A request of Shawn McKenna of 570 West Road, West Fort Ann, New York 12827 for a Special Permit pursuant to Chapter 149, Article V, and Schedule of Regulations in an M-1, General Manufacturing and Industrial District. Applicant is requesting to subdivide a parcel of land at 19 Sisson Road into three residential building lots. This property is designated as 50-2-25.2 on the Town Assessment Map.

Shawn McKenna and Kristen Darrah from Darrah Land Surveyors appeared to discuss this Appeal. The issue before the Board is Mr. McKenna's desire to subdivide a large lot that lies partially in an M-1 District and partially in R-3. They have already visited the Planning Board more than once. He wants a residence and a garage to store his business equipment. There has been significant debate regarding the multiple Zoning designations and they would like to find a way to use the property.

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Mr. Elms asked Mr. Patricke for his take on the issue and Mr. Patricke explained that they had submitted an application to build two single-family homes in a Manufacturing District, and that is no longer what the applicant intends to do. If you build in an M-1 District you must have a Special Use Permit to build a residence. He pointed out that Mr. Clear is doing something similar up the road because his property was grandfathered.

Mr. McKenna said that he would like to build the garage back there away from everything else. There are power lines etc. Ms. Darrah explained how the topography affects the decisions they had made. Mr. Elms summarized that they would like to consider it all one big lot, and get permission to build a house.

Chairman Endal asked where the lot had road frontage. Ms. Darrah clarified for him the points of contact with the road. Mr. McKenna would like an isolated building without the expense of a \$50,000 driveway. There were other lines on the plans which caused confusion, because the ideas had changed after visiting the Planning Board.

Chairman Endal asked whether this issue was finished at the Planning Board. Mr. Patricke explained that the Planning Board assessed this to be one lot. Any building that goes up in an M-1 zone will be subject to Site Plan Review by the Planning Board. The question that was raised at the Planning Board, which he has not heard adequately addressed tonight, was the question of access. A point will not suffice as access.

Mr. McKenna said that his attorney is working on it but he's not willing to commit more funds to the issue if he is not going to be able to do what he wants with the site. There had been a discussion with Town's counsel. Mr. Patricke explained that he needed to raise the issue for the Board. Mr. Elms wanted to know whether they were basing their ingress and egress on the easement, and Mr. Patricke pointed out that there has not been legal proof furnished that the easement exists on the deed for the property that is crossed. Ms. Darrah said that there is documentation on the deeds for these properties that meets the descriptions, but that an attorney is looking for it on the other. Mr. McKenna's attorney is confident that there is deeded access but his finding haven't been submitted to the Board yet. Mr. McKenna further indicated that a formal legal update process is costly and he is not willing to pay for it until he know that he has an acceptable use arranged for the property.

Mr. Patricke explained that any Special Use Permit that is issued will remain with the property, and that it can't be issued without access. Additional discussion followed regarding the dimensions of the property. Chairman Endal had a letter from the Planning Board regarding subdivision, but Mr. Patricke referred him to one received that day from the Attorney.

Mr. Patricke was asked to clarify the access question and stated that the Code required 40 ft. of frontage on a public road in order to issue a building permit. Mr. Elms argued that the applicant has that, but Mr. Patricke said that the Town's Attorney has asked for a title search to prove that it's true access. Mr. Elms

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argued that if a Special Use Permit was granted, but it still had to go to Site Plan Review, it might be stopped there because of the lack of proof of access, but that the ZBA could still grant the Use. Mr. Patricke argued that the Board could not give a Special Use Permit for a lot that doesn't comply.

Ms. Darrah pointed out that the Applicant did not create this problem and asked how this lot had been subdivided in this manner. Mr. Patricke explained that the subdivisions and sales of parcels were not ones that came before the Town for consultation for various reasons. He reviewed for the Board the proceedings at the Planning Board that led to the Applicant being here. The Town's Attorney was not comfortable with the descriptions on the deed being what the Applicant thought they were.

Chairman Endal said that the Town's Attorney was basically advising against issuing any permits until the question of access is settled, and Mr. Patricke suggested that the Applicant might like a poll to establish whether what he wants will be allowed if the title search is completed and confirms that access. Mr. Elms said that he thought the request was reasonable and the Board members concurred that they would be comfortable with proceeding once the proof was furnished. Mr. McKenna still wants to have his home and his storage for his commercial vehicles on the same parcel.

Mr. Fitzsimmons asked about comment from the public, and though there were people present last month who were curious, there had been no formal comment made on the record.

Mr. Elms said again that if he found the proof of his easement, it would be a different Appeal and Mr. Patricke confirmed that it is necessary to do something with the current Appeal, whether approve, deny or have it withdrawn.

The Chairman pointed out that residential and business uses on one lot is different from allowing two business uses on one lot (as per the previous appeal), and that the Board has denied dual uses of that nature before. Mr. Elms argued that the Board has also approved dual uses, but then he realized that the applicant had not been entirely honest that time.

Mr. Kubis argued that the question at hand is really whether you can build a residence on a Manufacturing lot. Mr. McKenna asked for clarification on what it means to be running a business on a lot, because his intended use is really not any different from having a horse barn. Aren't residents in the Town allowed to bring a business vehicle home to their own driveway? Because it's a tractor it suddenly becomes a business?

Mr. Patricke stated that the first question is, can Residential use be in a Manufacturing Zone, which can't be answered until title clarification is received. At that point Mr. Elms suggested that the Appeal be tabled. Ms. Darrah said that they would not have come tonight if they had known about the Town's

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attorney recommending no decision be made at this time. Mr. Patricke thought that the Board was indicating they were comfortable with the Residential Use. If all goes well Ms. Darrah will put the defined easement on the map and remove the lines regarding subdivision that had caused confusion.

Mr. Patricke addressed for Mr. McKenna the questions about the difference between collecting cars, which are not driven and have to be garaged, and operating business vehicles from a residence, which drive in and out regularly with equipment, trailers, etc. Mr. McKenna agreed to have the Appeal tabled.

Motion to table Appeal No. 758 was made by the Chairman and seconded by Mr. Kubis and was unanimously approved. The next meeting is September 23<sup>rd</sup>.

**Appeal No. 759**

The Board reviewed Appeal No. 759, a request of DMMH Corp of 53 Lamplighter Acres, Moreau, New York 12828 for a Special Use Permit pursuant to Chapter 149, Article V, and Schedule of Regulations for a C-1, General Commercial District. Applicant is requesting to use the building at 1433 Route 9 for Indoor Recreation. This property is designated as 63.3-1-1 on the Town Assessment Map.

This is an application for a Special Use Permit to have Indoor Recreation. This is a broad definition that the Applicant could not pinpoint just what he would do. The Drop teen night club was the start of it, and it came up that there should have been a permit in place 5 years ago for the YMCA that was there. Mr. Rogge might use this Permit in a number of ways. He mentioned a personal trainer who has inquired about it as well as the open possibility of using it for The Drop.

Chairman Endal said that the Town's Attorney had recommended asking for a traffic study and Mr. Rogge said that one was done 5 years ago.

Mr. Elms expressed a concern that with such a large variety of uses, it would be impossible to know whether traffic and parking were adequate for some uses. Mr. Rogge said that the traffic patterns are established and so is the parking. They would not allow people to park on Route 9.

Mr. England asked what the max. occupancy is on the location, and Mr. Rogge said that the established 700 is not a number that he feels could ever be accommodated on the site with the bathrooms, etc. Engineers have looked at it and said no more than 300. Any user who needs more than that will have to make changes to the building on their own dime.

Mr. Rogge can have the mercantile use now because no permit is required, but wants this Permit so that he can offer the building for a number of different uses. He can't guess at what potential uses might come up, and the Permit allows him to investigate many potential uses.

Mr. Kubis felt that the Indoor Recreation Use is so very broad, that the Board will have to evaluate as if prepared for a worst-case scenario.

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Mr. Patricke pointed out that this is a unique situation, since the need for a permit was missed previously. He feels that any actual use that gets put in place will go before the Planning Board for evaluation of concerns like parking, etc. Mr. Rogge would just like the permit in place for marketing purposes, but new businesses get Site Plan review if it is different from the current use- mercantile, for instance, doesn't need that.

Chairman Endal asked whether this is substantially the same as the YMCA was and that use had been evaluated when it was created. A few changes have been made to open up the space for the mercantile use. The Chairman wondered how a traffic study could be done without knowing what the potential use was. Mr. Elms asked whether if they approved a use it would have to go to the Planning Board, and Mr. Patricke said that it should, but the Board could add that as a condition on the Permit to make sure that it didn't get missed.

Mr. Patricke pointed out that if Mr. Rogge doesn't have the Permit in place, he could miss a potential tenant who doesn't want to wait the two months required to go before the Board(s). He suggested a condition stating that any use involving public assembly should require review. That would include fundraisers, sporting events, etc. He pointed out that the building is prepared for a high level of use because it has sprinklers, many points of egress and ingress, etc. A convenient definition of public assembly could not be readily found in the Code for inclusion in the Permit.

Mr. Patricke mentioned that there was no County approval with the Appeal, but that the County had indicated that it will be addressed by staff there.

A member of the public was present and raised the example of a rock-climbing wall, would that require review. The Board agreed it would not. Mr. Rogge said that if he were not sure, he would come to Mr. Patricke and asked.

Chairman Endal moved to approve the Special Use Permit for Appeal No. 759 with the condition that any use involving public assembly will require Site Plan Review by the Planning Board. Determination of public assembly is to be made by the Zoning Administrator. This approval is conditional on approval by the County, and the Chairman would like to note that the requirements included in the Code have been reviewed previously. Mr. Elms seconded. Roll call vote resulted as follows: Mr. Fitzsimmons, Yes; Mr. Elms, Yes; Mr. Kubis, Yes; Mr. England, Yes; Chairman Endal, Yes.

**Appeal No. 760**

The Board reviewed Appeal No. 760, a request of Russ Faden of 29 Lizann Drive, Saratoga Springs, NY



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12866 for an Area Variance pursuant to Chapter 149, Article X, Section 149-59(A) and Town Law 267-b. Applicant is requesting to subdivide a parcel of land into two parcels that will not have the required minimum lot width. This property is owned by Daniel Linehan of 41 Ferry Blvd., South Glens Falls, NY 12803 and is located at 1296 Route 9, Gansevoort, NY 12831 and is designated as 77.1-1-37 on the Town Assessment -Map.

Daniel Linehan appeared and explained that he is in conversation with Mr. Faden about the parcel. Mr. Faden owns several Subway establishments including the one at the truck stop, and would like to establish a free-standing restaurant. Mr. Linehan and Mr. Faden have not signed a contract. The building in the center will go away. He will have 132 ft. of frontage. The parcel is just under two acres and it meets all the setbacks and size requirements. He has mentioned some numbers regarding the size of the planned building but that will be going before the Planning Board. He will demolish the remaining two buildings and build two. The issue before the Board is the lack of road frontage. The lots will be above 1 acre as per the Code. The Variance will be 68ft.

Mr. Kubis asked whether there will be one complying lot and one non-complying, but this is not what is being proposed. The Applicant(s) wanted to split it evenly and that is why they proposed it this way. Mr. England stated he thought that one of the lots has to comply and Mr. Patricke agreed. The second lot would then have 64 ft. of frontage.

Chairman Endal asked why they had decided to subdivide like this. Mr. Elms asked whether some provision in the Code had forced this, and it had not.

The Applicant explained that to make one complying lot, the other lot would be so small that they could not have a business on it at all, so they thought that it would be better to make two that were non-conforming. The potential buyer feels 132 ft. is big enough for his purposes. The total area is conforming. Chairman Endal asked what the harm is in reducing the frontage. Mr. Patricke pointed out that it also reduces the width requirement at the building line. The Chairman felt the lot is big enough to provide adequate parking and movement. He wondered what the negative impact to the community would be and about traffic on Route 9.

The Board reviewed the criteria for granting an Area Variance and found as follows:

1. That the strict application of dimensional requirements would result in a specified practical difficulty to the applicant;
2. That the difficulty cannot be alleviated by some practical method feasible for the applicant to pursue;
3. That the variance is not substantial;
4. That there would not be substantial change in the character of the neighborhood or a detriment to the adjoining properties; and
5. That the alleged difficulty is not self-created.

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Because this application is on Route 9, it needs to be reviewed by the County. It was received late, so it has not gone to the County. The Board did not feel comfortable approving anything without the opinion of the County. There will need to be two decisions, one for each lot. There was some discussion about the advertisement and Mr. Patricke agreed that it should be clarified and re-advertised as creating two undersized lots.

Mr. Linehan asked for a poll so that he could tell the buyer what direction it had gone, and the Board members shared their assessments, but not all were willing to give an opinion under the circumstances. Mr. Patricke pointed out that the proposed business will still go to Planning Board for Site Plan Review. SEQR will be reviewed at the next meeting. The County Planning Board meets on the 3<sup>rd</sup> Thursday of the month and will review this in September. It would be helpful to schedule ZBA meetings before the County Board meets in order to expedite things for applicants. That is up to the Town Board. This applicant will need to submit his application to the County Board the week after Labor Day.

Motion was made and approved to table this Appeal pending an opinion from the County.

Respectfully submitted,  
Tricia S. Andrews