

**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 22nd day of June, 2016 at 7:00 PM.**

**ZONING BOARD MEMBERS PRESENT:**

Gerhard Endal, Chair

John England

Richard Kubis

Kevin Elms

Scott Fitzsimmons

**ZONING BOARD MEMBERS ABSENT: None**

Also Present: Atty. Malcolm O'Hara, Attorney for the Town; Atty. Dennis Phillips, Attorney for the Zoning Board, Tricia Andrews, Recording Secretary.

Chairman Endal called the meeting to order at 7:04 p.m. Minutes were reviewed for Sept 2015, January 2016, April 2016 and May 2016. Mr. Fitzsimmons motioned to accept the minutes for September, 2015 and Mr. Elms seconded. Roll call vote proceeded as follows: Mr. England, Yes; Mr. Kubis, Yes; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes. Motion carried 5-0.

Mr. Elms motioned and Mr. England seconded to accept the minutes of the January, 2016 meeting and roll call vote proceeded as follows: Mr. England, Yes; Mr. Kubis, Abstain; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Abstain. Motion carried. Motion to approved the minutes of April, 2016 was made by Mr. Fitzsimmons and seconded by Mr. Kubis. Mr. England, Yes; Mr. Kubis, Yes; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes. Motion carried 5-0.

The May minutes were corrected to show that the Board's attorney for the Blue Flame issue is Dennis Phillips, not Dennis Bills. Additionally on p. 2561 about halfway down Chairman Endal says the Board "were not" make a decision, minutes should read "will." p. 2563 halfway down regarding terminology in the future they may consider retail use should say not vs. "now". Motion was made by Mr. Elms to accept the May minutes as

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corrected and seconded by Mr. Kubis. Roll Call vote resulted as follows: Mr. England, Yes; Mr. Kubis, Yes; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes.

Motion carried 5-0.

**Old Business**

**No. 768**

Gardner Congdon, Individually and as Supervisor of the Town of Moreau, has filed a Notice of Appeal from the Town of Moreau Zoning Administrator's decision determining that the use of the property located at 1323-1325 Route 9, Moreau, NY 12828 as a propane distribution facility was a permitted use within the Town of Moreau Zoning Regulations and Comprehensive Land Use Plan.

Chairman Endal explained that they Board members have met with Attorney Dennis Phillips and Atty. Phillips has drafted a Resolution, which the Chairman asked him to read. That Resolution is an Interpretation of Zoning Ordinance, listing a summary of the various arguments and documentation submitted thus far, and a decision in favor of upholding the decision of the Administrator.

Motion was made by Chairman Endal to adopt the Resolution and associated findings. Mr. Elms seconded the motion.

Under discussion Mr. Kubis read into the record a letter he had prepared, as follows:

“During the course of these appeals we have heard a variety of arguments from the parties to the appeal, their lawyers, the public, and members of the board as to why this business is or isn't allowed in a C-1 zone. With all of those arguments it seems we have lost track of the question at hand.

We have two appeals that contend that the Zoning Enforcement Officer's determination that the Blue Flame project was “a business that serviced highway traffic such as restaurants, diners and bars” was incorrect. Considerations as to whether the location is safe for large volumes of propane or whether there is a need to promote business in town have no bearing on our final determination

When we make our decision we have to consider the criterion in the code as a whole. The Blue Flame project doesn't just have to be a business that services highway traffic, but one similar to restaurants, diners and bars. In everything presented to this board no

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one has made a logical, defensible argument that a business that stores propane and transfers it to delivery trucks is similar to restaurants, diners and bars. It hasn't been presented because except for the fact that they are all commercial enterprises, they are not similar at all and as a result, the Blue Flame project isn't allowed in the zone.

With that said, the board members need to use their common sense to reasonably justify that the project is similar to a restaurant, diner or bar. If they can, they should vote to deny the appeals. But if they can't, and I don't know how they could, they should put aside any considerations that don't pertain to the correctness of the Zoning Enforcement Officers determination and uphold the appeals. “

The Chairman said it's not exactly a fit with those businesses, but that times have changed since the Code was written and practices have changed, more Commercial uses have developed along that corridor and this use fits in with that. The Code is out of date. Mr. Kubis pointed out that Appeals have become much more detailed and interpretations more involved of late and the Board has generally tried not to make interpretations without talking to the Town Board about it, but this has been handled differently.

Chairman doesn't feel the Code is contradicted, but just doesn't address it.

Mr. Elms feels that they don't have to agree, but it is their job to make interpretations of the intent of the law. The situation is not clear.

Chairman would prefer to go by the letter of the law but that doesn't always work. This use does fit, in his opinion.

Mr. Kubis thinks the intent of the highway traffic list was that highway traffic businesses be similar to bars, restaurants and diners, and this isn't.

Mr. Elms would like to not drag out discussion. Chairman Endal referred to the Comprehensive Land Use Plan. According to Mr. Kubis when the two documents don't agree, the Code rules, but Chairman doesn't see how the two disagree.

To the motion: Mr. England, No; Mr. Kubis, No; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes. Motion carries 3-2.

**Appeal No. 770**

English Village, LLC has filed a Notice of Appeal regarding the Town's Building Inspector/Code Enforcement Officer/Zoning Enforcement Officer's determination

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regarding use of the property located at 1323 -1325 Route 9, Moreau, New York 12828 as a propane distribution facility was a permitted use within the Town of Moreau Zoning Regulations in a C-1, General Commercial District and Comprehensive Land Use Plan.

Re: English Village LLC Appeal No 770, Resolution of Zoning Ordinance Interpretation was read into the record. That Resolution is an Interpretation of Zoning Ordinance, listing a summary of the various arguments and documentation submitted thus far, and a decision in favor of upholding the decision of the Administrator.

Mr. Elms motioned to approve the Resolution and Mr. Fitzsimmons seconded. Mr. Kubis wants to go on the record that everything he said in his letter regarding Appeal No. 768 also applies to Appeal No 770.

The attorney for Mr. Congdon asked that Jim Martin's decision of June 22, 2016 be read into the record and considered. Chairman Endal replied that everyone has read it, but it's not germane, and Mr. Martin's opinion was already noted in decisions. A previous opinion from Mr. Martin that was basically the same was already included. The attorney argued that since Mr. Martin is now formally working for the Town, his opinion should carry greater weight than perhaps it did before. Chairman Endal said that the public hearing is closed, but that finding is in the documentation. Also, that opinion was written regarding Appeal 768, which has already been voted on. The present Administrator's opinion of the past Administrator's decision is not that relevant. His letter doesn't say anything different, his position has not changed since he wrote before. To the motion: Mr. England, No; Mr. Kubis, No; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes. Motion carries 3-2.

**APPEAL NO. 774**

English Village, LLC has filed a Notice of Appeal from the Issuance of a Building Permit (permit # 2016-121, Blue Flame Gas). Pursuant to Chapter 149, Article XII, Section 149-76 and 149-86 of the Town of Moreau Zoning Law and New York State Law 267-1 and b. Blue Flame Gas was issued a building permit for 1323-1325 Route 9, Moreau, NY 12828.

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Atty. O'Hara read a Resolution regarding this Appeal into the record. That Resolution stated that this Appeal No. 774 is also dismissed. Attorney Tom Shepardson for English Village asked why the issue didn't get a public hearing.

Atty. O'Hara says the Appeal is dismissed as a matter of law. The previous decision on Appeal 770 makes the argument pointless. Atty. Shepardson wanted to argue the point anyway because he felt that he had new facts to present. The Board heard him as a courtesy.

Atty. Shepardson referenced the 1982 Blais case, in which he said that this Board had granted a Special Use Permit for a propane facility of some kind and called it a fueling station. It was a similar use and it wasn't allowed in C-1 District, only in a C-2 District. The Chairman felt that this was an argument about the Zoning Administrator's Decision which had already been upheld, but Atty. Shepardson stated he was still arguing the issuance of the building permit.

Atty. Shepardson argued that the Board ought to be aware of the precedent that a similar use was relegated to the C-2 and this is the same. Special Use Permit should be required. He believes that Permit was issued to the company that is now run as Suburban Propane, having been Pertrolane at the time and Amerigas in the time since. Atty. Phillips pointed out to Mr. Shepardson that it is the Board's authority to interpret the Code, and the Board has decided that this project is allowed. Building permit controversies should not be addressed at ZBA, but should be an Article 78 proceeding. This doesn't belong before this Board.

Atty. O'Hara said that the issuance of a building permit is a ministerial act, and Board has nothing to do with it.

Atty. Shepardson further argued that the June 22<sup>nd</sup> decision of the new Zoning Administrator should be included and is significant because he has been hired. Mr. Martin disagrees with Mr. Marcantonio's decision.

Chairman Endal said that the building permit flows naturally from the decision which was just upheld, and Mr. Marcantonio had to give it.

Atty. Shepardson said that the December Planning Board minutes say that Blue Flame indicated that they had to do a fire safety analysis and in February the Board asked for a operational training plan and a safety plan, etc. The Town was not able to show that

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they had received these things (when Atty. Shepardson asked to see them at the Zoning Clerk's office, she was not able to immediately produce them), so the permit should not have been issued.

Atty. Shepardson argued that Mr. Marcantonio should have made sure that the conditions of the Site Plan approval were met before he gave the building permit.

Chairman Endal says this isn't proof that the docs aren't there, the clerk only asked for more time to find them.

Representatives from Blue Flame were present (Mr. Ruggiero and Atty. Naughton) and affirmed that those items were supplied, and they had spoken to Mr. Marcantonio about it all before the permit was issued.

Chairman Endal closed the public hearing at 8:09pm.

Mr. England, Yes; Mr. Kubis, Yes; Mr. Elms, Yes; Mr. Fitzsimmons, Yes; Chairman Endal, Yes. Motion carried 5-0.

**Appeal No. 772**

A request of John Clear of 10 William Street, South Glens Falls, NY 12803 for an Area Variance pursuant to Chapter 149, Article V, Section 149-59(A) and Town Law 267-b. Applicant is proposing to construct a garage that will not meet the required side yard setback in an R-1, One Family Dwelling Residential District. This property is designated as 50.1-1-1 on the Town Assessment Map.

Mr. Clear was present previously and was asked to apply for a Special Permit rather than an Area Variance. The Board did not have the application and it did not appear that the Appeal had been advertised as a Special Permit Application as required. The Board can't hear the Appeal because the public has to be notified. With apologies to the applicant the Board asked him to come back next month.

Mr. Elms motioned to adjourn the meeting at 8:15 p.m., Mr. England seconded and the motion passed unanimously.

Respectfully submitted,

Tricia S. Andrews