

A workshop was held by the Town Board of the Town of Moreau on August 4, 2009 in the Town of Moreau Office Building, 61 Hudson Street, South Glens Falls, New York, for the purpose of reviewing another draft law regulating Outdoor Hydronic Heaters in the Town.

Supervisor Jenkins called the meeting to order at 7:00 p.m.

The Town Clerk called the roll, which resulted in the following Town Board Members being present or absent:

Town Board Members Present

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| Bob Prendergast | Councilman |
| Gina LeClair | Councilwoman |
| Todd Kusnierz | Councilman |
| Preston Jenkins | Supervisor |

Town Board Members Absent

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| Tom Cumm | Councilman |
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Also Present: Jeanne Fleury, Town Clerk and Town Residents Ray Fischer and Adele Kurtz

Supervisor Jenkins began by stating this is a workshop and the Town Board is going to be discussing some issues they have regarding the new draft law. This draft law includes changes recommended at the last workshop in an attempt to allow uses of Outdoor Hydronic Heaters where we can.

The Town Board Members reviewed the new draft law then proceeded to go through the sections of the proposed law one by one and referred to a memo from Attorney Auffredou to Joe Patricke, Building Inspector dated July 8, 2009 in which he outlined comments and concerns he had over language in certain sections of the proposed law.

Supervisor Jenkins stated that unfortunately several of them relate to changes the Board made to accommodate people in certain zones who may have a lot of acreage and no neighbors. In this type situation why would we try to restrict them?

The first comment from Attorney Auffredou related to Section 76-2 "Legislative Intent" and how the word "economic" was presumptuous and in his opinion should be removed and the language replaced with the following: "Although Outdoor Hydronic Heaters, hereinafter "OHH", (e.g. outdoor wood burning furnaces) provide an economic alternative to conventional heating systems.....".

The Board didn't have a problem with this suggested wording.

In the same section, Attorney Auffredou also was of the opinion that the wording in Section 76-2 "concerns have been raised....." was insufficient. "What Concerns? Raised by Who?"

Councilman Kusnierz said we are only talking about legislative intent and Supervisor Jenkins said this was correct and it doesn't have anything to do with that.

Attorney Auffredou in his memo also commented that in 76-2 the language in the bottom of the section should be revised to read "insure that OHH are utilized in a manner that minimizes adverse impacts and is not detrimental to the public health, safety and welfare of the residents of the Town of Moreau".

The Board Members didn't have a problem with this suggestion.

Section 76-3E – Prohibited Fuels – Attorney Auffredou suggested the definition be rewritten to read as follows: "Notwithstanding that any of the fuels on the following list of fuels may be recommended for use by the OHH manufacturer, the following fuels are expressly prohibited from use in the operation of OHH

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Including....". He also removed from the list of prohibited fuels #18 "any fuel not recommended by the OHH manufacturer".

The Board Members didn't have a problem with this suggested wording and correction to 76-3E.

76-4A Permit Required – Attorney Auffredou in his memo asked what happens if for some reason the Phase II EPA Standards do not become effective, no one can get a permit. Also what happens between the time the law is adopted and the time Phase II becomes effective? There would be a void.

Councilman Prendergast stated it was a valid point. We could be sitting here a year or two from now and they may not adopt the standards.

Supervisor Jenkins stated that what we said was that our Building Inspector/Code Enforcement Officer can approve a permit and if the EPA Phase II standards become effective it will override our local law.

Councilman Kusnierz recalled that was an issue he brought up, because if you look at the language it is an effective ban until the Phase II EPA Standards are adopted.

Councilman Prendergast said he thought they were going to go with this law until Phase II is approved and then that would kick in.

Supervisor Jenkins stated that one of the things that were crossed out of the original draft legislation read that only the OHH that are certified by current EPA standards would be allowed and he thought that was left in for a reason.

Councilman Kusnierz suggested they add the wording "upon adoption of the EPA Phase II standards only those certified will then be eligible for a permit".

Supervisor Jenkins suggested they just put back in what was taken out saying that they have to meet current standards. He didn't have a problem with the way it was written before.

The Board was okay with this.

76-4B – Allowed Zones – Attorney Auffredou commented in his memo that as drafted this law would allow OHH in all zones except the R-1 Zone. So, in all other residential zones OHH would be allowed as a matter of right and OHH would also be allowed in commercial and industrial zones. He asked if this was the intent of the Board.

Supervisor Jenkins stated that our reasoning for this was in the cases of people who own property larger than four acres and meet the requirements of the law and aren't offending any neighbors they would be allowed to have an OHH.

Attorney Auffredou stated in his memo "Allowing OHH in all residential zones may be in direct conflict with the minimum lot size and setback requirements contained in Section 76-4 C & D. Why allow OHH in residential zones when the Town knows that many of the lots cannot dimensionally support OHH? More troubling is the fact that by allowing OHH "as of right" in these residential zones places the ZBA in a precarious position when reviewing variances. The argument from the applicants will be, for example, "My property is located in a residential zone, the Town code allows me to have an OHH as of right, I cannot meet the lot or setback requirements, no one within several miles of my property can meet these requirements, therefore, I have practical difficulty and hardship and you must grant me the variance. In any given case, this could be a very compelling argument leaving the Zoning Board with no choice but to approve the variance or to deny the variance on arbitrary and capricious grounds. Allowing OHH in almost every zone would be viewed as conflicting with the legislative intent in Section 76-2".

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Supervisor Jenkins said he didn't understand why this would be a compelling argument and said he would talk with Attorney Auffredou about this.

Councilman Kusnierz said it wouldn't be "as of right". They would have to meet the setbacks and they would have to have the acreage.

Councilman Prendergast noted that he spoke with Joe Patricke on this and he agreed with Attorney Auffredou.

Supervisor Jenkins said he already told him that he didn't agree with. He is hitting all the changes made by the Board to protect the public and at the same time work with the public. Maybe it creates legal issues he doesn't understand.

76-4F – Months of Operation – Attorney Auffredou suggested the Board go back to the original approach for months of operation or scrap the months of operation idea all together. Including provisions about non-seasonal use exemptions or a vague standard such as "or as deemed necessary by the Town Board to avoid undue hardship on the owner of the OHH" it creates extra work for the Town Board and is problematic.

Supervisor Jenkins said we were going to allow exemptions for commercial uses like Toadflax who uses them to heat their greenhouses. We also had people who have no other hot water systems.

Councilman Kusnierz said we wanted a mechanism whereby under extenuating circumstances we had flexibility to address it.

Supervisor Jenkins said it was also going to require presentation to the Town Board from the Building Inspector.

Councilman Prendergast said they would still have to meet the other requirements of the law.

Councilwoman LeClair said the concern she has with this is in the neighborhoods where these units are already and where they cause problems already they would be able to heat their water all year long and what do we tell the people who complain?

Supervisor Jenkins said we would tell them to call the Consolidated Health Board and they would review the complaint and determine whether or not the unit should be used for health reasons.

76-4G – Height of Stack – Attorney Auffredou is of the opinion that changing the wording to those recommended by the manufacturer rather than a specific standard is problematic. Deferring to the recommendations of the manufacturer is also problematic because it can lead to inconsistent stack height throughout the Town or from neighborhood to neighborhood and create future problems for the Town. If the EPA and DEC regulate stack height, then the Town can simply defer to EPA and DEC. Also, stack height recommended by a manufacturer may be woefully inadequate as compared to what is required to protect the health, safety and welfare of the residents in Moreau.

Councilman Kusnierz said the reason for this is that different types of furnaces burn cleaner than others depending on the technology and that is why the majority of the Board decided to go with the manufacturer's recommendation.

Supervisor Jenkins concurred. He would take the position that somebody with a six foot stack height that is causing problems for neighbors then it is something we can address.

Councilman Prendergast liked the idea of going with the manufacturer's recommendation on stack height.

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Councilman Kusnierz said there would still be recourse for the people. They could ask the Health Board meet and review the complaint and issue a directive.

76-5 – Existing Hydronic Heaters – Attorney Auffredou stated in his memo that this section substantially weakens the law. As written, this would allow new installation of non-conforming OHH which would not otherwise qualify for a permit under Section 76-4. It would also allow piecemeal repair of the non-conforming OHH so that non-conforming OHH would never become compliant with the current, safe standards. He went on to write that he has never heard of a non-conforming use permit and the Planning Board does not have authority to grant variances. Under New York State Law, a pre-existing non-conforming use is just that, pre-existing and non-conforming which means, essentially that it has grand-fathered status under the law. Generally, pre-existing non-conforming use can continue in operation but it should not be allowed to be replaced with a non-conforming use. As drafted, anyone with a non-conforming OHH at the time the local law is enacted can replace the non-conforming OHH with another non-conforming OHH, and presumably, as written an OHH that is even more detrimental to the health, safety and welfare of the residents than the original pre-existing non-conforming OHH. He recommends returning to the original draft.

Supervisor Jenkins stated he recalled they changed it saying again we would bring in the code enforcement officer. He used the example of a person who has an existing unit that doesn't meet the stack height and has nobody around them and doesn't impact somebody else's health. He didn't understand what Attorney Auffredou was saying and he didn't think it had that big of an impact.

Councilman Prendergast thought that what Attorney Auffredou was saying was if somebody repairs a unit it should have to be replaced instead with a new unit. What Attorney Auffredou is saying is that they would be able to come in and argue that they wouldn't have to replace it according to the law.

Supervisor Jenkins said that if all a person has to replace is a stack and it creates no detriment to anybody around them then why would we put an economic hardship on them and make them replace the unit.

Councilman Prendergast said the question is how would we define "major replacement"?

Councilwoman LeClair asked how we would even know a major replacement was made.

Councilman Prendergast asked why they should even deal with repairs and maybe we should only deal with replacements.

Supervisor Jenkins said he would discuss this with Attorney Auffredou.

Councilman Kusnierz stated that he has a problem with the section dealing with fines Section 76-8. In particular the sentence that reads "each day that a violation occurs shall constitute a separate offense". He said typically we ask for voluntary compliance and normally there is a time period for this to occur and normally that is 10-14 days. He suggested we add in a time period for a person to correct the situation such as 10-14 days.

Councilwoman LeClair said she could live with 10-14 days.

Supervisor Jenkins said he would review it with Joe Patricke.

Councilwoman LeClair was concerned that if a person has 10-14 days to comply they could get rid of a lot of hazardous materials in that time frame by burning them.

Supervisor Jenkins said that if a situation occurs whereby a contractor is burning construction debris and he gets caught and is cited then we should be able to shut it down.

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Councilwoman LeClair said she wouldn't have a problem with 10-14 days if the situation to be corrected would be something like stack height.

Councilman Kusnierz said the way it is written now in five days the fine would total \$1,100.00 and that is no matter what the violation is and this is something he can't live with.

Councilwoman LeClair stated that in the R-2 & R-3 zones there are some big lots.

Supervisor Jenkins stated that they would still have to meet the setback regulations. He said he needs input from Attorney Auffredou in regards to his comment about "My property is located in a residential zone, the Town code allows me to have an OHH as of right, I cannot meet the lot or setback requirements, no one within several miles of my property can meet these requirements, therefore, I have practical difficulty and hardship and you must grant me the variance." He didn't know how that could legally happen. It doesn't make sense to him.

Councilman Prendergast stated that if it turns out that this could happen then his feeling is they should restrict them in every zone, but R-3, R-4, R-5 and RP. They would still have to meet the setback requirements.

Supervisor Jenkins stated that the proposed law before them is what the board decided on. It may create additional problems for the Board, but it is unlikely we would have fifty people come in and apply for a permit before the Zoning Board of Appeals. If that occurs then we would probably need a new law.

Ray Fischer asked if the way the law is written now they would only be allowed in R-1 and R-2?

Councilwoman LeClair said they needed to check with Attorney Auffredou. If the attorney is correct and everybody can come in and get a variance then we would have adopted the law for nothing. We need to make sure we have a law that protects those neighborhoods.

Ray Fischer asked if the way the law is written now he would be allowed to apply for a permit to install a new unit if his needed replacing.

Councilman Prendergast replied that the way it reads now yes. However, the attorney is saying we need to look at that again, because he has some concerns about it. The Supervisor is going to review this with him.

Supervisor Jenkins said he recalled that any replacement would have to meet the setback requirements of the law.

Supervisor Jenkins stated he would get together with Joe Patricke and Attorney Auffredou and get a revised draft law out to everyone, because a Public Hearing is scheduled for August 25th at 6:30 p.m. in Town Hall on a proposed local law.

Councilman Prendergast asked that copies of the draft law be made available to the public in advance of the public hearing.

A motion was made by Councilman Prendergast and seconded by Councilwoman LeClair to adjourn the workshop at 7:58 p.m.

Roll call vote resulted as follows:

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| Councilman Cumm | Absent |
| Councilman Prendergast | Yes |
| Councilwoman LeClair | Yes |

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Councilman Kusnierz
Supervisor Jenkins

Yes
Yes

Workshop adjourned.

Respectfully submitted,

Jeanne Fleury
Town Clerk