

**Town of Charlton
Zoning Board of Appeals
Business Meeting Minutes**

October 16, 2012

Minutes of the Zoning Board of Appeals – October 16, 2012

Chairman Don Schermerhorn called the meeting to order at 7:00p.m. at the Charlton Town Hall, 758 Charlton Road, Charlton, New York 12019.

Present: Don Schermerhorn, Chairman, Ed Malis, Mark Chotkowski, Al Smith, Bob Van Vranken, Town Attorney, Jay Wilkinson, Planning Board Chairman and Kim Caron, Recording Secretary.

Business Meeting

Mr. Schermerhorn introduced new Zoning Board member Al Smith.

Roll Call attendance was taken.

Mr. Schermerhorn asked everyone to stand for the Pledge of Allegiance.

Mr. Schermerhorn stated that the draft of the June 12, 2012 minutes needed to be approved. Mr. Schermerhorn inquired if there were any comments from the Board. There were no comments.

Mr. Malis made the motion to approve the draft of the June 12, 2012 meeting minutes. Mr. Chotkowski seconded the motion. All were in favor.

USE VARIANCE

SITE PLAN REVIEW

Route 67 Café/Wasserman (226.-1-9)

Mr. Schermerhorn stated that the application is for a special exception use variance and previous granted variance amendments. Mr. Schermerhorn stated that the property is located in an Agricultural Zone.

Mr. Schermerhorn read the letter from Jay Wilkinson, Planning Board Chairman, dated September 22, 2012 into the record.

Mr. Schermerhorn gave a brief history of the property as cited in the attached Agenda.

Mr. Schermerhorn stated that the Planning Board's site plan review, at the request of the ZBA, is conclusions and recommendations on the foreseeable future and do not necessarily predicate ZBA approval for the Special Exception Use application. Mr. Schermerhorn stated that there still has to be compliance with the general regulations stated in Article 7, section 1 of the Zoning Ordinance which specifies the seven points that the ZBA has to address in granting a Special Exception Use. Mr. Schermerhorn stated that he is referring to page 55 of the Zoning Ordinance.

Mr. Schermerhorn asked Mr. Wilkinson for an explanation as to why the Planning Board is looking for the ZBA to make a use determination.

Mr. Wilkinson stated the classification of use determination by the ZBA will determine how the Planning Board moves forward with the site plan review. Mr. Wilkinson stated that the engineering consultant has indicated that there are problems with the septic and water separation distances. Mr. Wilkinson stated that they do not have enough information. Mr. Wilkinson stated that the use regulations are different for a restaurant than for a mercantile use. Mr. Wilkinson stated that clarification as to the use will allow them to move forward using the correct regulations. Mr. Wilkinson stated that it will also give the applicant a clear direction.

Mr. Schermerhorn confirmed that the current existing permitted uses for the parcel are fuel service, a convenience store and a residence.

Mr. Van Vranken stated that there is also some type of food service. Mr. Van Vranken stated that the retail store may or may not be associated with food service. Mr. Van Vranken stated that there was no specificity in the documentation in terms of what level that is. Mr. Van Vranken stated that the other use is residential. Mr. Van Vranken stated that there are four uses and according to the Zoning Ordinance, would usually require collectively a minimum of 8 acres and these 4 uses are sitting on acreage of about 2. Mr. Van Vranken stated that there are limited exceptional use permits with respect to the existing gas tanks. Mr. Van Vranken stated that is the 1991 reference in the agenda summary. Mr. Van Vranken stated that in the early 1980's there was a retail store and an authorization to rebuild it. Mr. Van Vranken stated that there was also an application to build a two-car garage attached to the house which was denied. Mr. Van Vranken stated that the Planning Board has asked the ZBA, per their authority on page 47, article 6, section 3a 1, where it says some of the powers and duties include an interpretation and review on request of an administrative board or agency. Mr. Van Vranken stated that the Planning Board has asked the ZBA to determine the meaning of a portion of the text in the Zoning Ordinance. Mr. Van Vranken stated that the text in the Ordinance that the Planning Board has asked the ZBA to interpret is on page 10. Mr. Van Vranken read the section aloud.

Mr. Van Vranken stated that there has been documentation provided by the applicant in which there is a statement from a State Agency talking about mercantile and how you define mercantile and the number of seats being 48 and so on. Mr. Van Vranken stated that the State Agency rules do not apply to this situation because the definition of the restaurant under local legislation. Mr. Van Vranken stated that Towns can make more restrictive regulations. Mr. Van Vranken stated that there is a simple request from the Planning Board and a simple decision by the ZBA. Mr. Van Vranken stated does the proposed expansion create a situation where the principal purpose on that site, from a commercial standpoint, is that a restaurant or is it not a restaurant. Mr. Van Vranken stated that if the ZBA should find that it is a restaurant, then according to the chairman, then the Planning Board will move in that direction. Mr. Van Vranken stated that if the Board determines that it is not a restaurant, it is something else, then what is that something else and what direction do you want to give the Planning Board.

Mr. Chotkowski stated that in regards to the Special Use Permits, our documentation says that the ZBA cannot issue more than two uses for any given property. Mr. Chotkowski inquired if the ZBA was allowed to break that rule.

Mr. Schermerhorn inquired where that was cited in the Ordinance.

Mr. Van Vranken stated that page 68, item 11 cites the requirements for more than one use. Mr. Van Vranken read the section aloud.

Mr. Wasserman appeared before the Board.

Mr. Wasserman stated that the business name is not Route 67 Café but Route 67 Country Store and Café. Mr. Wasserman stated that he did not ask or request a use variance. Mr. Wasserman stated that his request is to extend the existing usage or the expansion of the existing usage very similar to what took place in 1980. Mr. Wasserman stated that he wants an extension of the non-conforming use of an existing business. Mr. Wasserman stated that things have changed and Mr. Chotkowski is looking at some plan that is irrelevant at this time. Mr. Wasserman stated that due to correspondence between the Town Engineer, a series of inspections was done and data is still being collected. Mr. Wasserman stated that the project has evolved. Mr. Wasserman stated that the NYS building department stating a certain seating capacity was for the purpose of what NYS requires for defined as a mercantile. Mr. Wasserman stated that he did not specify what the number of seating is due to the fact that he needs to determine what the systems are capable of, as far as the number of seating plus the residential plus employees. Mr. Wasserman stated that he received another letter after submitting some data and this was on June 24th. Mr. Wasserman stated that as a result, the Planning Board has agreed to an extension. Mr. Wasserman stated that as a result, the project itself evolved and what determines the principal usage of the property whether it's a restaurant or an ancillary food preparation. Mr. Wasserman stated that the question is what is the primary usage of the property and how do you define the principal usage of the property. Mr. Wasserman stated that the principal use of the property based on plan or vision of the plan would be roughly 25% for seating area and 75% for the retail space.

Mr. Wasserman stated that this does not fall under the restaurant on page 10 which requires that the principal usage of the property is for restaurant or food serving. Mr. Wasserman read from page 3, section 2 of the Zoning Ordinance. Mr. Wasserman stated that it is the allocation of both the square footage area as well as the revenues which remains that the primary usage of this property would be the same, gasoline and retail with ancillary food service. Mr. Wasserman stated that the only change that he is requesting is the expansion of both the retail space and the seating area within the constraints of what the septic and well systems can accommodate. Mr. Wasserman stated that this is crucial input as to the decision that will be made regarding the usage of the property. Mr. Wasserman stated that he is not adding any usage rather expanding the existing usage.

Mr. Van Vranken inquired if the applicant was withdrawing his application to expand by the 40 by 50 patio and the additional 48-50 seats originally requested.

Mr. Wasserman stated that he is not sure of the meaning of withdrawing that.

Mr. Van Vranken inquired what has changed on the plan.

Mr. Wasserman stated that the seating capacity has changed to 36 based on the existing data. Mr. Wasserman stated that they are still trying to finalize the data.

Mr. Van Vranken inquired if that plan was in front of the Planning Board.

Mr. Wilkinson stated no.

Mr. Wasserman stated that Mike McNamara first paragraph called for "this project is somewhat unusual and that its review has been made greatly subject to interpretation of the proposed use and consequently which set of design standards are to apply". Mr. Wasserman stated that the definition of the usage of the property puts it whether the Planning Board will require satisfying criteria B or criteria A.

Mr. Van Vranken stated that the ZBA could also determine that based on the section that Mr. Chotkowski has referred to, that there is no further expansion allowed because the property is over authorized at this point. Mr. Van Vranken stated that the request in front of the ZBA is to determine the use of the proposal, however this Board is not sure of the proposal since it has changed and neither Board has the corrected seating information.

Mr. Wasserman stated that is why he was surprised he was asked to attend this meeting prior to the Planning Board completing their work. Mr. Wasserman stated that he understands that there is ambiguity about the process at this time.

Mr. Schermerhorn stated that the Planning Board has asked the ZBA to make a determination so that they can continue with the process.

Mr. Wasserman stated that the Planning Board has the updated information as far as seating capacity and the square footage that would be assigned for retail space and for seating area.

Mr. Schermerhorn stated that the Planning Board does not have a definition to go by to classify it.

Mr. Wilkinson stated correct.

Mr. Malis inquired what the choices were.

Mr. Schermerhorn stated that there currently exists a retail store and as defined on the Ordinance a retail store is a mercantile establishment conducted wholly within the principal structure carrying a closely related line of merchandise and in which sales are made to clientele by one or more sales people, does not include self service establishments with checkout registers as principal point of monetary transactions or Laundromats.

Mr. Van Vranken stated that there is no clarity as to what the number is going to be and the Board cannot be expected to render a decision based on the fact that the number of seats is not determined.

Mr. Van Vranken stated that the applicant is saying that since the number of seats has decreased the principal use definition doesn't apply.

Mr. Wasserman stated that the definition of whether it is a restaurant or not is whether food is the principal business that is being conducted and also by the zoning rules and guidelines. Mr. Wasserman stated that he is referring to two main criteria's, one being the square footage that is assigned and two revenues that are being generated. Mr. Wasserman stated that they are both based on retail which is the Country Store and the gasoline. Mr. Wasserman stated that the food by any of the two criteria's does not fall as primary.

Mr. Van Vranken stated that the definition says any structure having as "a" principal use, not "the" principal use. Mr. Van Vranken stated that by the statements of the applicant, food is one of the principal uses of that site. Mr. Van Vranken stated that there is gasoline, retail store and a principal use which could be interpreted as food sales which is restaurant. Mr. Van Vranken stated that this Board has the ability to make that determination. Mr. Van Vranken stated that the question is, again, is what is in front of the Planning Board, a restaurant in terms of the definition in the ordinance.

Mr. Wilkinson stated that in front of the Planning Board is a patio that is 40 x 50.

Mr. Wasserman stated that the patio in the final drawing will be divided into retail space and seating space where the total seating space, 480 square footage, where the rest will be for retail space and storage.

Mr. Wilkinson inquired how the outdoor patio could have retail.

Mr. Wasserman stated that the proposed patio area is to the west of the existing building, roughly 40 x 50. Mr. Wasserman stated that where the seating area will be facing Route 67 and portion of this patio will be divided by railing for a retail space with kiosks. Mr. Wasserman stated that they will be uncovered and only for seasonal use.

Mr. Chotkowski stated that over the summer there was a car show. Mr. Chotkowski inquired of all if the vehicles that came to show had been registered.

Mr. Wasserman stated yes.

Mr. Chotkowski inquired how many cars were there.

Mr. Wasserman stated that there were close to 50 cars.

Mr. Chotkowski stated that if two people came in each car, there would be 100 people there.

Mr. Wasserman stated that he does not know. Mr. Wasserman stated that previous years he had 122 cars. Mr. Wasserman stated that they had roughly 250 people on the facility which includes spectators.

Mr. Chotkowski inquired if food and soda was served.

Mr. Wasserman stated that last year they had a vendor come in and serve food outside.

Mr. Chotkowski inquired if there was outside music.

Mr. Wasserman stated that they had a DJ.

Mr. Chotkowski inquired how that fit the definition of a retail store.

Mr. Wasserman stated that it does not.

Mr. Chotkowski stated that what is being proposed for the property does not fit the definition of a retail store.

Mr. Wasserman stated that the words have been taken out of context. Mr. Wasserman stated that he is not asking to have an event or events.

Mr. Chotkowski inquired if the events would no longer be held there.

Mr. Wasserman stated that was correct.

Mr. Van Vranken stated that is a good decision on the applicant's part because those shows were never authorized and in violation of the exceptional use permit.

Mr. Chotkowski stated that the proposal is to expand the store by adding a patio that is 40 x 50.

Mr. Wasserman stated yes.

Mr. Chotkowski inquired if that was 2000 square feet.

Mr. Wasserman stated yes.

Mr. Chotkowski stated that the existing building is approximately 1200 square feet. Mr. Chotkowski stated that according to Charlton's zoning, a retail store cannot be more than 2000 square feet.

Mr. Wasserman stated that is true but it does not include seating capacity.

Mr. Schermerhorn stated that the applicant is defining that, the ordinance does not define that.

Mr. Chotkowski stated that it does not matter whether it is seating, storage or sales floor, it says 2000 square feet. Mr. Chotkowski stated that the proposal will bring the building to over the 2000 square feet. Mr. Chotkowski stated that the proposal also infringes on the setbacks for a second time. Mr. Chotkowski stated that the original Zoning Board, when they replaced the building, was because there was a fire and the place burned to the ground. Mr. Chotkowski stated that it is not any different than when the Charlton House burned to the ground. Mr. Chotkowski stated that they replaced what was existing. Mr. Chotkowski stated that the other issue is that when you are in the agricultural district, the side setbacks are the same as the front setbacks. Mr. Chotkowski stated that it becomes 60 feet for a corner lot. Mr. Chotkowski stated that the whole patio going on that side of the building has multiple issues with zoning. Mr. Chotkowski stated that if the building is classified as a restaurant the building can be 5000 square feet.

Mr. Wasserman stated that the classification of a restaurant is not feasible as far as the costs associated with bringing the building up to code. Mr. Wasserman stated that the prior expansion included expansion of the fuel services.

Mr. Chotkowski stated that was because of the change of leaded and unleaded fuel, a company came in and replaced the tanks.

Mr. Wasserman stated that he is not prepared to discuss the details of the setbacks. Mr. Wasserman stated that the Board is there to determine what will be the usage of the property.

Mr. Schermerhorn stated that the Board will make a decision as to how the building is classified.

Mr. Van Vranken explained principal use.

Mr. Schermerhorn read page 31 of the Zoning Ordinance pertaining to setback requirements in the agricultural district for a corner lot.

Mr. Chotkowski read the requirements for gasoline filling stations on page 60 of the Zoning Ordinance. Mr. Chotkowski stated that the front setback requirement is 60 feet and the side is 150 feet minimum.

Mr. Van Vranken stated that one of the issues there is that when they were considered back in 1991 the documentation was not as nice as we would like to have it but that consideration was made and implied that the setback would be granted a variance as part of the approval process. Mr. Van Vranken stated that you cannot take what is there that is not regulation and shrink it more.

Mr. Schermerhorn read from the 1991 ZBA minutes.

Mr. Schermerhorn read page 65 section 7 of the Zoning Ordinance.

Mr. Schermerhorn stated that this is an unusual circumstance as there are existing multiple uses on this site. Mr. Schermerhorn stated that there is a residence, there are three other granted uses. Mr. Schermerhorn stated that be it either ancillary or expansion, there is additional human occupation at different times. Mr. Schermerhorn stated that means there would be similar infrastructure requirements as there would be with a small restaurant. Mr. Schermerhorn stated that the site itself is 2.1 acres and the constraints are there to have to look at the responsibilities we have as citizens in the Town for the safety and welfare of our citizens. Mr. Schermerhorn stated that his opinion is that with the extra capacity being considered for this site, that should be given due consideration. Mr. Schermerhorn stated that he feels that this should fall under a restaurant classification since it is beyond a normal retail classification. Mr. Schermerhorn stated that there is food being served and there will be increased attendance and site limitations.

Mr. Chotkowski stated that he is in agreement. Mr. Chotkowski stated that the uses there that are going on have been going on for years. Mr. Chotkowski stated that it was not an issue until the talk of expansion. Mr. Chotkowski stated that the building should be brought up to another principal use and all of the requirements that go with it. Mr. Chotkowski stated that the proposed expansion will result in another principal use as a restaurant.

Mr. Smith reserved comment.

Mr. Malis stated that he agrees that is should be classified as a restaurant.

Mr. Chotkowski made the motion that the ZBA classifies this expansion project as a restaurant giving direction to the Planning Board for their site plan review to consider it under such auspices. Mr. Malis seconded the motion. All were in favor.

Roll Call Vote was taken:

Mr. Chotkowski - aye
Mr. Smith - abstain
Mr. Schermerhorn - aye
Mr. Malis – aye

Mr. Schermerhorn will draft a letter to the Planning Board advising them of the Board's determination.

Business

Mr. Schermerhorn stated that the Board is short on alternates. Mr. Schermerhorn stated that if anyone knows of someone that would be interested to let him know.

Mr. Chotkowski made a motion to close the meeting seconded by Mr. Malis. All were in favor.

Meeting was adjourned at 7:53 p.m.

Respectfully Submitted,

Kimberly A. Caron
Recording Secretary