

**TOWN OF GUILDERLAND
ZONING BOARD OF APPEALS
MAY 19, 2010**

Members Present: Peter Barber, Chairman
Sharon Cupoli
Susan Macri
Allen Maikels
Mike Marcantonio
Tom Remmert
James Sumner
Charles Cahill, Alternate
Stephen Parker, Counsel

Chairman Barber opened the meeting and pointed out the emergency exits in the event they were needed.

CONTINUED CASES:

MATTER OF RONALD OTTMAN – 5 PINE KNOB DRIVE

Chairman Barber stated that Don Cropsy had went to the site and taken a look at where the fence was to be placed.

Mr. Ottman stated that they had taken a look at the part of the fence in question and thought about bringing it down to four feet but he did not think that would work because of the lay of the land; the way it slopes. Mr. Ottman stated that his dogs might even be able to jump the 4' fence.

Chairman Barber asked if there was a way of mitigating or reducing the variance a little bit.

Don Cropsy stated that he went out there again today and took some measurements. Don stated that two weeks ago Mr. Ottman's neighbor came in and suggested a particular location and that location would not need a variance. Don stated that the proposed location that Mr. Ottman has would be a 16' setback from the front property line. Don Cropsy stated that a compromise would be at the tree and that would be 27' from the front property line.

Chairman Barber stated that he had looked at other variances that were granted in that area and the compromise at the tree seems to be more consistent with them.

Mr. Ottman stated that he would like to keep it at the original mark but would take whatever he could get. Mr. Ottman stated that he thought it was unfair that a neighbor that was moving out of the area objected to it when he talked to her months before and she had no problem with the fence.

Chairman Barber stated that just because someone opposes the variance, it does not mean that it is a reason to move it. They just needed time to look at the site and review other variances in the neighborhood.

Mr. Ottman stated that the placement of the house on the lot makes it very difficult to use the yard.

Chairman Barber asked if there were any questions or comments from the residents. There were none. Chairman Barber made a motion to close the public hearing. Motion seconded by Sharon Cupoli.

There was discussion as to where the tree would be located; inside the fence or on the outside of the fence.

Don Cropsey stated that the fence would be outside the fence, it would not be in the enclosed yard.

Chairman Barber made a motion for approval of:

Variance Request No. 4206

Request of **Ronald Ottman** for a Variance of the regulations under the Zoning Law to permit: **the installation of a 6' high privacy fence in a required front yard on a corner lot. A 35' setback is required for privacy fences.**

Per Articles **IV & V** Sections **280-17 and 280-51** respectively

For property owned by: **Ronald Ottman**

Situated as follows: **5 Pine Knob Drive Albany, NY 12203**

Tax Map # **51.08-1-4** Zoned: **R15**

The Board makes the following findings of fact:

A public hearing was duly noticed. One resident had concerns with the placement of the fence.

This is a Type II Action under SEQRA, not requiring SEQRA review.

The Town Planner had no objections to the request.

The Board notes that because this is a corner lot it has two front yards and two front yard setbacks. As a result, the Board looks to provide some relief from one of the yards and allows the applicant to designate one of those yards to be treated more as a side yard.

The Board asked Don Cropsey to take a look at the location of the fence and to look at the proposed location of the fence and the proposed location that the neighbor preferred. The Board finds that the location preferred by the neighbor actually would not require a variance and is not a reasonable location. Mr. Cropsey however did propose a compromise that the fence could be moved further away from Patricia Lane by putting it in line with the 2nd tree on Patricia Lane which is approximately 42' from the pavement and results in an 8' variance.

The Board further finds that this compromise reduces the variance and also provides meaningful access and use of the back yard.

The Board finds that this variance will not have any adverse impact upon neighboring properties. The house sits diagonally across the property and rests only about 6' from the property line with the adjacent property on Pine Knob Drive. Due to this placement, the Board has granted similar variances particularly when the Board can find as it did here that it will not have any impact upon site line along the intersections.

The Board also finds that the fence is attractively designed and should enhance the appearance of the property and also the neighborhood.

For these reasons, the Board grants this variance of approximately 8' from the front yard setback requirement for the placement of the proposed fence.

In **granting** this decision, the Board imposes the following conditions:

Adherence to the plans as modified by this decision.

The Zoning Administrative Office is hereby authorized to issue the permits necessary to implement this decision.

If this variance is not exercised within one year of date of issuance, it is hereby declared to be null and void and revoked in its entirety.

Motion seconded by Sue Macri. Vote 7 – 0.

MATTER OF FREDERICK WAGNER III – HURST ROAD

Al Maikels recused himself from the case.

Sue Macri read the legal notice:

"Notice is hereby given that the Zoning Board of Appeals of the Town of Guilderland, New York, will hold a public hearing pursuant to Articles **II, IV & V** of the Zoning Law on the following proposition:

Interpretation Request No. 4208

Request of **Frederick L. Wagner III** for an interpretation under the Zoning Law **to determine if an excavation business is an existing nonconforming use and if said use can operate from a 23+/- acre parcel of land.**

Per Articles **II, IV & V** Sections **280-5, 280-31 and 280-56** respectively

For property owned by: **Frederick L. Wagner III & Frederick L. Wagner Jr.**
Situated as follows: **Hurst Rd. Altamont, NY 12009**
Tax Map # **38.00-3-27** Zoned: **RA3**

Plans open for public inspection at the Building Department during normal business hours. Said hearing will take place on the **19th of May, 2010** at the Guilderland Town Hall beginning at 7:30pm.

The file consists of the mailing list to 5 neighboring property owners, the Town's required forms for an interpretation of the Zoning Ordinance, a narrative in support of the interpretation with exhibits and some letters.

Peter Lynch, attorney for the applicant, presented the case. Mr. Lynch stated that there were some questions raised about the operation of the construction business at this site so he and his applicant met with Don Cropsey and Rodger Stone to discuss the concerns. Mr. Lynch stated that they decided to seek an interpretation from the Zoning Board based upon the record and the history of this site as to what they are doing and as to what they would like to continue to do as a nonconforming use.

Mr. Lynch gave a history of the property. Mr. Lynch stated that Fred acquired the property with his dad in 1994. His dad acquired the property in 1982 and in the 1982 deed the source of title was another Fred and Florence Wagner who were Fred Wagner III's grandparents; they acquired the property in 1968, six years before the enactment date of the Zoning Ordinance. Mr. Lynch stated that a couple of other deeds were included for reference purposes; Mr. Audi's deed dated 2008 references a prior right-of-way from a 1933 deed. The 1933 deed that was included references the private road which is the access road to the site as being the site of the gravel mine that existed back there. Mr. Lynch stated that this site has a history since at least 1933 of being a gravel mine site. Fred's grandfather used this site in conjunction with his construction business; he kept equipment on the site, he would stockpile materials on the site, he would screen the materials on the site to separate them in order to be reused in their construction business. There presently are two large screening machines; one of which is the old one that Fred's grandfather used and a newer one. Fred's father continued that use and Fred III has also continued that same use.

Mr. Lynch stated that the stockpiling of materials for the most part includes soils, rock, sand, gravel, leaves, manure, blacktop and the like. Mr. Lynch stated that Fred takes this material onto the site, stockpiles it in a pile and use the screening machine to separate it

for reuse such as for a base for driveways, roads and the like. Mr. Lynch stated that there is nothing about this particular use that goes beyond that. Mr. Lynch stated that there is a construction building on site and a number of construction vehicles on site also.

Mr. Lynch stated that the Zoning Ordinance was adopted in 1974 and it provides the definition of a nonconforming use; a use which had been in existence prior to the enactment date of the ordinance.

Chairman Barber asked Mr. Lynch if he was contending that there was no zoning prior to 1974.

Mr. Lynch stated that the applicable Zoning Ordinance is 1974.

Chairman Barber stated that he thought the use started in 1968.

Mr. Lynch stated that use through his grandfather started in 1968 but the gravel mine operation of the use began in 1933.

Chairman Barber asked Mr. Lynch if he was contending that the code in 1974 is applicable to the use in 1968.

Mr. Lynch replied absolutely not. This particular code came into existence after 1968.

Chairman Barber asked that if there was a code in 1968 and if there was a provision in that code that dealt with the uses that were allowed at this site wouldn't you have to show that the use conformed with the code in order to get a conforming use?

Mr. Lynch replied that when he asked Don Cropsey when the code went into existence he told him it was 1974.

Chairman Barber stated that there was a zoning code dating back to the 1950's.

Mr. Lynch stated that this 23-acre site that is a gravel mine and when you actually go out there you can see the configuration of this site and it is clearly a previously disturbed site. Mr. Lynch stated that grandfather starts at 1968; and until 2010, the question of whether or not this site can be used for this purpose was not an issue. The only physical operations that exist on the site are the trucking of the materials to the site, the trucking of the materials from the site and once the materials are on the site, the screening of the materials and the separation of the materials so that they can be placed in identifiable stockpiles. Mr. Lynch stated that they are asking the Board to consider whether or not they can continue this use. Mr. Lynch stated that they believe they can because it preexisted the 1974 ordinance and it is a use that has been continuous in this family business. Mr. Lynch stated it was their contention that when you have a nonconforming use the change in the intensity of the use does not necessarily change the use itself. Whether or not you are stockpiling block, gravel, dirt, manure, leaves or blacktop materials that are going to be screened, separated and used as a base for driveways and

roads is consistent with the nonconforming use. Mr. Lynch stated that for years the Town has used the site for dumping of leaves and other materials but that has stopped.

Chairman Barber asked what type of proof they had regarding the type of operation the Wagner family was engaged in back in 1968.

Mr. Lynch replied that Fred was familiar with his grandfathers operation because he worked with him and also with his father.

Chairman Barber asked if there were any records, such as business records or tax returns that would show a construction business use back in 1968.

Mr. Lynch stated that they could search for some type of records.

Chairman Barber stated that he wanted to make certain that the Board has an understanding of what Mr. Lynch contends to be the prior conforming use. Chairman Barber stated that he would need to know the scope of the use back in 1968 which he assumes is the date he wants to go by.

Mr. Lynch stated it is the date they want to go by that it was in the family.

Chairman Barber stated that if they want to role it back to an earlier date they would have to get some kind of documentation or affidavit that would demonstrate that earlier use.

Mr. Lynch stated he would only want to role back to an earlier date after he reviewed the provisions of the Zoning Ordinance of 1953.

Counsel Parker asked when Fred III acquired the business.

Mr. Lynch replied that if you look at the deeds, Fred III acquired title in 1994 from his father Fred Jr.

Counsel Parker asked when Fred Jr.'s construction business started.

Mr. Lynch replied that he would have to answer that in a later submission.

Mr. Lynch stated that they allege in their narrative that not only did Fred Sr. acquire title in 1968 but that he purchased the property for the purposes of engaging in his business.

Counsel Parker asked about the screeners on the property and if there is any documentation as to when they were purchased.

Mr. Lynch replied that they would have to look into that.

Counsel Parker asked what year the building was built.

Mr. Lynch replied that they would look into that and would answer that in a later submission.

Chairman Barber asked if he could assume that part of the problem is that there are trucks driving over a road that makes things rattle.

Mr. Lynch replied that if you look at Exhibit 3 there is a gravel road and that road is a road that in their deed they have deeded access rights over to get to the applicant's property. The gravel road is immediately adjacent to the property of Mr. Audi. Mr. Lynch stated that the issue is not whether or not trucks make noise when they drive over the road but rather or not whether this use is a preexisting nonconforming use under the ordinance.

Chairman Barber asked what the source of the problem is; if it is a neighbor's concern, it could be addressed.

Mr. Lynch replied that one of the problems is that they just got finished with a criminal proceeding in which a chain was bolted to trees and placed across the road blocking access. Mr. Wagner was charged with criminal mischief for taking down the chain so that he could exercise his access rights. Mr. Lynch stated that Judge Randall dismissed that case last week because it was their motion that was filed that they have an easement for usage of the road and it cannot be obstructed. Mr. Lynch stated that the only access to the site is over the gravel road.

Counsel Parker asked when the Town started dumping leaves and grass there.

Mr. Lynch stated that he did not know.

Mr. Lynch stated that the whole purpose for bringing materials in and stockpiling and screening is for reuse in furtherance of their construction business.

Chairman Barber asked about the tires on site.

Mr. Lynch replied that they also store their construction vehicles and parts there and there are a few small piles of tires on the site.

Chairman Barber asked if there were any questions or comments from the residents.

Victor Caponera, attorney for Mr. & Mrs. Audi spoke on behalf of his client.

Mr. Caponera stated that there is no question that there is a right to get from the public road back to the Wagner parcel. Mr. Caponera stated that in reviewing the interpretation in comparison to the special use permit granted in 1987 there are some obvious inconsistencies that was never brought up in the permit for mining.

Mr. Caponera discussed the cable that was put up. Mr. Caponera stated that his client believed that there were other people using the gravel road other than Mr. Wagner and his associates. Mr. Caponera stated that it was put up by Mr. Wagner but moved by Mr. Audi and brought closer to his house.

Mr. Caponera spoke about the special use permit and minutes from 12-17-86. Mr. Caponera stated that the minutes stated that Mr. Wagner explained his reclamation project and according to this estimates would result in a total reclamation of his site within 6 years. The minutes stated that if this was accomplished, the site would be returned to a natural state after four decades of mining operations. The minutes also stated that Mr. Wagner estimated that up to 15 trucks would use the existing access on a given day. They also stated that the applicant carries on a soil mining operation at the site and that he apparently has met the requirements of ENCON for a mining permit. Mr. Caponera stated that the minutes also stated that Mr. Wagner intends to rehabilitate the mined pit in accordance with ENCON's directives and possibly use the land for low-density residential development in the future.

Chairman Barber asked Mr. Caponera if he was trying to suggest that because there is no mention of construction in the minutes that therefore there was no construction activity taking place.

Mr. Caponera replied he just wanted the record to show what was going on at the property during that time.

Chairman Barber stated that the permit back in 1986-1987 was for the mine and the Board back then was very clear to say that for example on the hours of operation were for ONLY the mining operation which may imply that there are other things going on at the property.

Mr. Caponera stated that there was no mention in any of the meetings about what was mentioned in the application for interpretation.

Chairman Barber asked if the explanation for that might possibly be that if this is a nonconforming use; in 1986 and 1987 why would they even have to mention construction; there is no permit needed at that point.

Mr. Caponera that the property appears to be a mining operation. Mr. Caponera spoke about the minutes of 2-18-87 and stated that Mr. Wagner's attorney at that time stated that a large percentage of this property is grandfathered as it was mined prior to the existence of bonding or anything else, but in good faith they have agreed to restore the whole area. Mr. Caponera stated that one of the conditions of the special use permit stated: "The reclamation plan for the approximately 24 acre site is that five acres will be reclaimed in 1987, five more acres in 1988, and five more acres in 1989 and it is contemplated at that time the applicant would come in for an extension to his special use permit, at which time it is contemplated that the gravel pit would essentially cease operation ending with the total reclamation by the end of 1991.

Chairman Barber stated that it discusses only 15 acres of the 24-acre site, so what is taking place on the other nine acres?

Chairman Barber stated that one of the conditions in the special use permit discusses screening, which may refer to either the mining operation or the construction business.

Mr. Caponera stated that Section 280-31G of the Code speaks of cessation of nonconforming uses.

Mr. Caponera stated that there is a high volume of traffic going in and out of the site and unfortunately his client's house is probably about 6' from that road. Mr. Caponera stated that the idea of the cable was to slow the traffic down.

Chairman Barber asked Mr. Caponera if there was certain conditions that could lessen or mitigate in some way the impacts of the road on his client.

Mr. Caponera stated that he has ideas but would rather discuss it further with them to see if something could be done.

Chairman Barber asked if he was contending that this use has aged out in some way; if this use has constitutes a use that has a number year limitation on it.

Mr. Caponera stated that under the Code that is what it seems to say and very well might be applicable to this use.

Counsel Parker asked Mr. Caponera if his clients have made any inquiries to the previous owners to what the use of the property was at the time they acquired it.

Mr. Caponera replied that he could certainly find out.

Mr. Lynch stated that the operation of the gravel mining operation is not what the interpretation is for. Mr. Lynch stated that they would like an opportunity to gather some of the records requested and if any members of the Board would like to view the site that would be agreeable.

Chairman Barber asked Mr. Lynch how much time he would need to get information together.

Mr. Lynch stated he would like at least three weeks.

Chairman Barber stated that the first meeting in July would be tentatively scheduled to hear this case again.

Sue Green of Rt. 158 asked why the property has not been reclaimed. Ms. Green discussed the Larned operation on Stitt Road and how it affected her quality of life.

George Audi of 200 Maeosta Lane stated that when he purchased the property 2 years ago he was told by Don Cropsey, neighbors and the previous owner that any activity that was being done on Mr. Wagner's property was minimal. Mr. Audi stated that he was told that he would not notice anything. Mr. Audi stated that yesterday alone 28 dumptrucks came by his house, within 6' of his home. Mr. Audi stated that he has several hours of footage that was submitted to the Town of illegal debris coming onto the property, such as stumps, chipper shreddings, etc. Mr. Audi welcomed the Board members to come to his property and look over the banks that claim to be reclaimed.

Fred Wagner III of 603 Rt. 146 stated that he spoke to Mr. Audi personally before he purchased the property and told him that there was more traffic there than he would like. Mr. Wagner stated that nothing has changed in the past 30 years on his facility and invited the Board members to come and look at the site.

Chairman Barber asked Mr. Wagner when he started in the business.

Mr. Wagner III replied that he started in 1987. Mr. Wagner stated that he did pave the entrance to the roadway last year.

Chairman Barber asked Fred Wagner III when he acquired his father's business.

Fred Wagner III stated that there was not really a date, he just got involved in the business and took it over; probably around 1987.

Chairman Barber asked what type of business was being operated at the site in 1987.

Fred Wagner III stated that the same as is being done now, excavations, sand, gravel and topsoil.

Chairman Barber asked about the dumping of leaves.

Fred Wagner III stated that the Town of Guilderland did dump leaves there, not sure of when that began.

Sharon Cupoli asked if they use the material at all from the leaves.

Fred replied that they mix it with sand, clay and different soils, screen it and make topsoil out of the leaves.

Counsel Parker asked if 28 dumptrucks going by a day was an accurate estimate.

Fred Wagner III replied that that is possible.

Counsel Parker asked if the truck traffic was the same back in 1987.

Mr. Wagner replied that it was probably more back then.

Chairman Barber asked if the trucks are going to different sites for the most part or are they going to a common location.

Mr. Wagner replied that most of the time they are on one site working on one project.

Mr. Wagner stated that there is a speed limit on the road of 15mph.

Chairman Barber asked when was the last time the road was improved.

Mr. Wagner replied it is graded a couple of times a year.

Counsel Parker asked if the road were paved, how would it change the use of the road.

Mr. Wagner replied that the trucks would not go any faster, but it may cut down on the noise.

Barbara Wagner, sister of Fred Wagner stated that Fred has worked at this business since he was a kid and has two children of his own and would not put anyone in danger.

Jim Sumner asked for an explanation of what an excavation business was.

Don Cropsey replied that an excavation business entails a whole bunch of different things; extraction and deposition of materials at various sites, grading, digging cellars, building roads, putting driveways in, digging swimming pool holes, etc. It entails using a lot of heavy equipment such as bulldozers, dumptrucks, backhoes, etc.

Jim Sumner asked if the business was restricted to that location or can he move in and out.

Don Cropsey replied that an excavating contractor goes from site to site and often times they use their yard as a base for storage of their equipment and possibly stockpiling material.

Chairman Barber asked where would an excavation business be allowed in town.

Don Cropsey replied that the current law is not specific to an excavation business.

Chairman Barber asked where a construction business would be allowed.

Don Cropsey stated in an AG zone, IND zone or possible a GB zone.

Chairman Barber stated that this was an AG zone, so why is this nonconforming.

Don Cropsey replied because an excavation business is not specifically listed as a use in an AG zone.

Chairman Barber asked what the closest thing to an excavation business would be.

Don Cropsey stated most likely a construction business.

Chairman Barber made a motion to continue this hearing to the first meeting in July. Motion seconded by Sharon Cupoli. Vote 7 – 0.

SIGNS:

The Board approved a temporary banner to be placed on the façade of the building for Berkshire Bank at 20 Mall for three weeks only. Vote 7 – 0.

The Board approved 2 signs for Bella Design Hair Studio, one building mounted and one freestanding sign. Vote 7 – 0.

The minutes of 11-4-2009 were approved.

The meeting adjourned at 8:20pm.