

Town of Otsego Zoning Board of Appeals

Minutes – April 21, 2015

PUBLIC HEARING

15.03 – Otsego Apple Growers, LLC (Bill Michaels, Jon McManus, Les Sittler) – Interpretation, December 30, 2014 determination by Zoning Enforcement Officer Austin – 288 Goose Street (#98.00-1-30.00)

Chairman Greg Crowell opened the Otsego Apple Growers public hearing at 7:02 PM. He explained the purpose of the hearing.

Chairman Crowell and other Board members read aloud 26 letters or e-mails submitted in support of Otsego Apple Growers. Most of the letters were practically identical in content, and all were filed. They were from Vera & Bruno Talevi (April 9), M. Anne O’Connell (April 15), Matthew J. Sohns (April 11), Eric Hill (April 15), Darryl & Patricia Szarpa (April 20), Sherry Goodspeed (April 17), Stanley Hall (April 16), Hank & Dottie Phillips (April 11), Angela Harrington, Andrew & Flis Blum (April 19), Bev & Art Blessin (April 20 e-mail), Jim Howarth (April 14 e-mail), F. Russell Smith (April 18), Clyde & Margaret Yakos (April 21), Andrew & Melissa Marietta (April 18), Paul & Barbara Lambert (April 14), Steven Levin (April 15), Michael & Rahlene Welch (April 12), Ron & Susan Streeck (April 16), Sheila & Bill Ross (April 16), Mary E. Dunkle (April 16), Paul Kuhn (April 14), Gordon Clarkson (April 17), Ed Smith/Smith Ford, David & Jeannette Lyon (April 16), and Marion King (April 14 e-mail).

Secretary Bill Deane noted that six letters (mailed to alert neighbors about the public hearing) had been returned to sender due to incorrect address: ones to Justin P. Walsh, Eric Hill, James E. Peterson, Donald Olin, Norman Bachanas, and Eight Small Burial.

Chairman Crowell opened the floor for comments or questions at 7:29, asking that there be no interruptions.

Dennis & Nancy Tallman said they have no problems with the application or proposed project and he agrees with the letters, and said that the traffic on County Route 26 has improved since the parking was expanded.

Rob Boehm said he has no issues with the application or proposed project, and asked the Board to endorse it.

Joe Potrikus said he fully supports the application and proposed project.

John Phillips said he also fully supports the application and proposed project.

Dale Davidson said she is opposed to the application and proposed project, saying the Cider Mill has become “a commercialized small mall.”

Ed Landers said he supports the application and proposed project.

Christopher Hage said he opposes the application and proposed project. He said the letters of support are irrelevant; the question is whether the project requires a use variance. Hage quoted from the September 13, 2006 Town Board minutes relevant to the cider Mill's pre-existing, non-conforming status. He said the project represents an increased use (with an 82% increase of retail space, from 5,450 to 9,940 square feet) and in his opinion thus requires a use variance. Hage submitted a petition (filed) signed by 18 neighbors and citizens opposed to the application and project.

Tracy Lippitt asked to see the plans for the proposed project; those were shown to her.

Maggie Schneider asked whether the project would represent demolishing a historic building, and if there were any laws addressing that. Engineer Jon McManus responded that the historic aspect was irrelevant; the proposed project is designed to meet life safety and building code requirements. He said that the project would be an alteration, not an expansion.

Philip Hodgins asked if any traffic studies had been done. McManus said none had been done or necessary; the project is designed to better accommodate the customers already there rather than draw more customers. Hodgins asked what the acreage of the property is. Owner Bill Michaels said the lot is 5.91 acres, amid contiguous parcels totaling 14 or 15 acres.

Attorney Les Sittler said that the Zoning Enforcement Officer had okayed the parking accommodations and determined that no site plan review or area variances are required. He said the Board should focus on definitions and "what does the local *Land Use Law* provide?" Sittler said this project would represent an alteration of the building, but the use would remain the same. He said a height increase does not equate to a use change.

Dawn Hage said that she had counted 72 passing cars in a 20-minute span on Goose Street. McManus said that that was well below the Department of Transportation "trigger" of 150 cars per half-hour.

With no further comments or questions, Chairman Crowell closed the public hearing.

REGULAR MEETING

The monthly Town of Otsego Zoning Board of Appeals (ZBA) meeting was held on this date at the Town Office Building in Fly Creek, NY. Chairman Greg Crowell called the meeting to order at 7:53 PM and roll call was taken by Secretary Bill Deane. All Board members were present: Crowell, Meg Kiernan (Vice-Chairman), John Tedesco, Christopher Voulo, and

Michael Pelcer. Alternate members Nicholas Weir and Dean Robinson and Zoning Enforcement Officer Tavis Austin were also present.

Chairman Crowell asked if anyone had a potential conflict with tonight's applicant. No one reported a conflict.

The Board reviewed the minutes of March 17, 2015, e-mailed to the members. Voulo moved to approve them as written. Kiernan seconded the motion and it was approved, 5-0.

Chairman Crowell distributed copies of correspondence received since the last meeting: the March/April 2015 issue of *Talk of the Towns & Topics* (Volume 29, Issue 2), and an updated ZBA Directory prepared by Deane.

The Board moved on to the application.

APPLICATION

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Otsego Apple Growers, LLC co-owner Bill Michaels was present, along with his wife, children, and parents. Also present were authorized representatives: engineer Jon McManus, and attorneys Les Sittler and Doug Zamelis.

Chairman Crowell said he had studied the application, and feels that the pertinent sections of the *Land Use Law* are 1.04, which says “Non-conformities of lots, buildings, or uses of land or buildings may not be increased, expanded, or exchanged for other non-conformities,” and 1.05, which says “Pre-existing uses shall not be altered in such a way as to create a non-conformity or to increase the degree of non-conformity.”

Meg Kiernan asked how that would apply if it were adding a second story to a house. Chairman Crowell said that a house is a permitted use in the hamlet residential district, whereas a commercial enterprise is not.

McManus said the Board should focus on the *Land Use Law* definition of “alteration,” which is, “As applied to a building or structure, change or rearrangement in the structural parts or in the exit facilities or an enlargement, whether extending a side or by increasing in height...”

Zoning Enforcement Officer Austin said that nobody questions the positive elements of the Cider Mill or the proposed project, but that the increased floor area represents an

expansion. He said the fault is in the zoning laws, and wondered why the Town Board hadn't changed them.

Chairman Crowell said that the ZBA does not make the laws, only interprets them, taking into consideration of the intent of the law. He said the definition of "alteration" does not address use.

Attorney Sittler said that the law does not make it clear that a use variance would be required. He again said that ambiguity must be interpreted in favor of the land-owner. He challenged the Board to "Show me the language" which says that this would require a use variance, and said that "If you can't find it (in the law), you're in trouble if you interpret it that way." Attorney Zamelis said that New York courts have consistently enforced land-owners' rights in cases of ambiguity.

Christopher Voulo said that he had no argument with the letters of support, but said that the ZBA typically wants to find methods which require the least need for variance; e.g., to upgrade the handicap-access without increasing retail space. Voulo also noted that the proposed project will not increase the building footprint.

Sittler said that this is the project before you, and the Board has to make a decision based on it. He said he does not envy the ZBA for that responsibility. Sittler said that the Board's decision, if contrary to his client, would be legally reviewed.

Chairman Crowell said that the Martins vs. Marcellus case in the application packet does not address use. Sittler said that it was not about use, just a building, same as the Otsego Apple Growers project. Zamelis said there would be no change in use.

Chairman Crowell said that definition of alteration includes enlargement, and thus the project would effect an increase in the degree of non-conformity. He said that change of use and increase in degree of use are two different things.

Kiernan cited *Land Use Law* section 1.04 and the definition of alteration, which includes enlargement.

Sittler said he did not know what the intent of the law was, but he knows what it says, and that is all the Board can go by. He said that the Town Board wanted to change "existing" to "conforming" in 1.04 because they know there is a problem with the current wording.

John Tedesco focused on the "may not be increased" language in 1.04, saying it has nothing to do with the different definitions of "alteration." He said he would like to see the project done, but does not see how it fits into the law. Tedesco said that the *Land Use Law* language should be straightened out.

Sittler said he shudders to think of the precedent which would be set by the ZBA if they interpreted this project as requiring a use variance. He said he would sue the Board if they made such a decision affecting his local business.

Chairman Crowell said that the proposed project is commendable, and he doesn't doubt the accolades listed in the support letters; but that is not the question before the Board.

Secretary Bill Deane reminded the Board that they did not have to make a decision tonight; they have 62 days. Chairman Crowell moved to table the application to the May 19 ZBA meeting. Tedesco seconded the motion and it was approved, 5-0. Austin said that the Board should remember to "take it back off the table" on May 19.

Sittler said that he appreciates the Board's efforts.

OTHER BUSINESS

Tavis Austin distributed copies of his April 7 Zoning Enforcement Officer report. He said that the Bissells have submitted another ZBA application for May.

With no further business, at 8:29 Chairman Crowell adjourned the meeting.

Respectfully submitted,

Bill Deane, Secretary