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JUN 29 2012

Town of New Hartford

To: Members of the Town of New Hartford Zoning Board of Appeals

Subject: Interpretation Request by Larry Adler in the Planned Highway Business District

Date: June 29, 2012

Mr. Adler's "paperwork" and proposed use of the Seneca Turnpike – Woods Road area as Retail/Accessory Fuel Use is not supported both as to substance and to form. He is asking the ZBA to determine that gas pumps are an allowable accessory use in the Planned Highway Business District.

In determining whether gas pumps would be considered an accessory use in the Planned Highway Business District, one would first have to look at the definition of Retail Store in the Town of New Hartford Codes.

Ms. Teresa Bakner, Esq. (Attorney for Mr. Lawrence Adler) authored a May 19, 2012 letter stating, "As you know, the PHB district expressly permits the use of my client's land as a retail store..." Attorney Bakner incorporated into letter references to five (5) court decisions [**Attch A**]. Court cases cited appear to have no reference to the instant matter. However, we have taken the liberty to provide your board with additional insight to each court decision.

Attorney Bakner is correct that a retail "store" is a permitted use in the PHB District; however, overlooks the fact that the Town of New Hartford Codes, Article II, "Definitions and Word Usage" is controlling. It states:

RETAIL STORE:

Any building where the primary occupation is the sale of merchandise in small quantities, not for resale.

Retail sales establishments shall not be interpreted to include automobile-oriented uses, convenience stores and service establishments.

§ 118-5 C. states: "The words "shall" and "must" are **mandatory** and not optional."

Since retail store uses the word "**shall not include automobile-oriented uses**", one would have to come to the conclusion that the term Retail Store as used in Town of New Hartford Code *prohibits* gas pumps and other automobile uses as a retail use. Mr. Lawrence Adler's proposed use does **not** qualify under any of the other permitted uses under the Planned Highway Business (PHB) District. Under the Town's current Zoning Regulations, Mr. Adler would need a "Use Variance" or "Zone Text Amendment."

Furthermore, one needs to take into consideration § 118-11. Application of regulations of the Town of New Hartford Code (as follows):

H. Within each district, the regulations set forth by this chapter shall be considered **minimum** regulations and shall apply uniformly to each kind of building, structure or land.

I. Only those uses specifically **identified** as permitted principal uses, permitted accessory uses, permitted special use permit uses and permitted site plan review uses shall be permissible in their respective zoning districts. **All other uses are expressly prohibited unless granted a use variance by the Zoning Board of Appeals, pursuant to Article XIII.**

Mr. Adler's building permit is void of any details for his proposed project. Attorney Bakner, in her May 19, 2012 letter, makes reference to a possible BJ's, however, this point was overshadowed when Mr. Adler, during the course of the June 18, 2012 ZBA meeting, gave multiple scenarios as to what was being proposed.

It is a well-known fact that BJ's Wholesale stores include a tire center and some also include a Monro Muffler shop on-site where automobile maintenance and repair work is performed.

The Town of New Hartford Code strictly prohibits a Retail Store with automotive-oriented uses as a permitted principal use. If gas pumps are excluded in the Town's definition of Retail Store as a principal use, how can the ZBA determine they are permissible in the Planned Highway Business Zone as an accessory use to a Retail Store?

It is interesting to note that all other districts in the Town of New Hartford that do include Retail as a permitted use with or without site plan review also include uses that would permit gas pumps. Such is not the case in the Planned Highway Business District.

RBI, R132, R133, and PDMU all include other uses besides retail such as convenience stores, automobile service station, shopping center, car wash, shopping mall, and automobile/boat sales/service where one could reasonably expect gas pumps to be allowed.

It is clear, the New Hartford town code was not written to keep gas pumps from being an allowed use in all non-residential zones; however, the intent was to keep them out of the Planned Highway Business District.

Further evidence underpins the notion that gas pumps should not be allowed as an accessory use in the Planned Highway Business District. The NYS Dept. of State in a booklet titled "Zoning Board of Appeals" states:

The Court of Appeals has held that a zoning board of appeals performs a "quasi-judicial" function when it renders an interpretation of a zoning provision, and, as such, should act according to its own precedent.

Where there are no prior ZBA decisions to rely on, the board of appeals should attempt to determine the governing board's original intent in enacting the provision in question. In arriving at this determination the board should consider prior documentation such as: minutes of governing board meetings; testimony of local officials; and planning advisory documents which may have accompanied the enactment.

(Source: [http://www.dos.ny.gov/lq/publications/Zoning Board of Appeals.pdf](http://www.dos.ny.gov/lq/publications/Zoning%20Board%20of%20Appeals.pdf))

It is well documented in the New Hartford town board minutes that other applicants have applied for zone text amendments allowing for gas pumps in the PHB district and were denied by the New Hartford town board (See ATCH B, C & D). The New Hartford Town Planning Board in January 2008 (ATCH E) also recommended that gas pumps not be permitted as a use in the Planned Highway Business. Members of the town board and planning board who were involved in the GEIS for the Seneca Turnpike area are quoted in planning board minutes as stating that the intent was to keep gas pumps out of the PHB district. The minutes (record) from those meetings are attached. (ATCH F)

The question to be first answered is not whether gas pumps are an accessory use to a Retail Store in the Planned Highway Business District, but rather, whether Mr. Adler's project fits within the definition of Retail Store as defined in Town of New Hartford Code. That question can only be answered by Mr. Adler filing a complete building permit to include "one complete set of plans showing proposed construction" as required as part of the Town of New Hartford *Application for Building, Zoning and Demolition Permit*.

We respectfully ask that the Zoning Board review the attached minutes and the Town of New Hartford Code and make the determination that gas pumps are not an allowed principal use in the Planned Highway Business (PHB) District and therefore cannot be allowed as an accessory use.

We request that this letter, together with attachments, be made part of the permanent record.

Respectfully submitted:

Catherine R. Lawrence

Catherine R. Lawrence
67 Imperial Drive
New Hartford, N.Y. 13413
315-37-5278

Edmund J. Wiatr, Jr.

Edmund J. Wiatr, Jr.
2 Sylvan Glen Road
315-525-4251

Encs. (as stated):

Cc: Mr. Randy Bogar, Chairman
New Hartford Town ZBA w/atchs.

Ms. Dory Shaw, Secretary
New Hartford Town ZBA w/atchs.

Mr. Joseph Booth, Codes Officer
Town of New Hartford

Five cases cited by Ms. Bakner with her comments in black are followed by Mrs. Lawrence and Mr. Wiatr's comments in blue.

Dellwood Dairy Co., v City of New Rochelle, 7 N.Y. 2d 374, 375-376 (1960) - recognizing the flexibility afforded by the term "accessory use" to permit presence of a milk vending machine in the basement of an apartment building.

The Court of Appeals Decision was *limited* to use of a milk vending machine in the basement of an apartment house which was **not accessible to the general public**.

Matter of Genesee Farms v Scopano, 77 A.D.2d 784, 786 (4th Dept 1980) (Callahan, J., dissenting -"The majority take[s] too restrictive a view of the "accessory use" provision, which must be interpreted flexibly to accommodate developing commercial practices.")

The court decision in this case states:

"Most zoning ordinances require special permits for service stations (see, generally, 1 Anderson, New York Zoning Law and Practice [2d ed], §§ 11.15-11.25), thus recognizing that the sale of gasoline, whether pumped from a traditional service station or from a relatively modern self-service gasoline island, is inherently different from the sale of other products. It is that difference which leads us to conclude that the sale of gasoline is wholly unrelated to the sale of dairy goods and thus may not be viewed as an accessory use of petitioner's property."

Attorney Bakner chooses to ignore this part and instead cites the opinion of the only dissenting judge. The dissenting opinion of Justice J. Callahn was not controlling in this Appellate Division – 4th Department ruling. The majority Court stated, "...it does **not** appear from the record that Petitioner applied for a special permit." Thus the record before the Court was inadequate.

However, the Court did further state, "...we direct that a full record of fact finding and reasons for board action be made upon the new hearing so that in the event of any future judicial review the court will be enabled to make a final determination of the matter. (**People ex rel. Fordham Manor Ref. Church v Walsh**, 244 N.Y. 280; **Matter of Larkin Co. v Schwab**, 242 N.Y. 330).

Matter of Citizens Against Sprawl-Mart v. Planning Bd. Of City of Niagara Falls, 8 A.D.3d 1052 (4th Dept 2004) - noting that the City had approved a Sam's Club with associated gasoline fueling pumps.

The Appellate Court ruled (stated the following):

"We note that petitioners therein appeal from a judgment that dismissed the petition challenging the negative declaration under the State Environmental Quality Review Act ([SEQRA] ECL art 8) and resultant site plan approval."

*We agree with petitioners that the failure of the Planning Board to complete Parts 2 and 3 of the full EAF nullifies its SEQRA negative declaration (see 6 NYCRR 617.6 [a] [2]). **"[W]here a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified"** (**Matter of***

New York City Coalition to End Lead Poisoning v Vallone, 100 N.Y.2d 337, 348 [2003].
Consequently, we **reverse the judgment and grant the petition to nullify the negative declaration.**

In this case, there was **no** actual zoning controversy!

Court Cases cited by Attorney Bakner

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Matter of Oates v Village of Watkins Glen, 290 A.D.2d 758, 762-763 (3d Dept 2002) – holding that a Tire Lube Express in Wal-Mart was a permitted use in the zoning district and rejecting “petitioners” reliance on cases where other zoning boards, in applying different zoning ordinances to sharply distinguishable facts, have disallowed mixed retail and automotive uses as constituting automobile service stations with an incidental retail use”.

Contrary to the assertion made above, the Court stated, “we perceive no basis for disturbing the ZBA's determination that the *Tire Lube Express* was a **permitted** use in the *Canal Development District*. Under the Village's Local Law No. 1-1994, permitted uses within the Canal Development District include “[s]pecialty retail and personal service uses,” “[d]iscount retailing operations” and “[l]ight industry.” The *Comprehensive Plan for the Village of Watkins Glen*, as revised in July 1995, permits “a variety of uses” that “include, but are not limited to: light industrial, commercial, recreational, residential, agricultural, professional and water related uses.”

No such similar rationale exists within the New Hartford Town Code or elsewhere.

Matter of Exxon Corp. v Board of Stds. & Appeals of City of N.Y., 128, A.D.2d 289, 296-299 (1st Dept. 1987) – holding that a convenience store was an accessory use to a gasoline station, lv denied 70 N.Y. 2d 614 (1988).

The fact pattern established by the Appellate Court, 1st Department stated, “the evidence demonstrates that the specific use proposed by petitioner is a **qualified** accessory use in that the type of **convenience store** intended by Exxon is commonly and customarily found in connection with, and incidental to, the principal use of an automotive service station. Thus, Exxon's proposal to modify its existing use, in part, with the addition of a small retail convenience store clearly satisfies the definition of accessory use contained in section 12-10 of the New York City Zoning Resolution...”

In this case, Exxon Corp. was located in a commercial district and gas pumps were an allowed use. The court case revolved around whether or not a convenience store is an accessory use to a gas station.

Footnote 1 to the court decision stated:

1. “Since the subject premises is presently in a C2 zoning district, a variance is no longer necessary for the operation of a gasoline station. A special use permit is all that is required.”

Simply stated, the Town of New of New Hartford Board Minutes, Planning Board and Zoning Board of Appeals (ZBA) contains language that both defines and **denies such uses as being contemplated by Mr. Lawrence Adler.**

REGULAR TOWN BOARD MEETING

March 5, 2003

PLANNER:

Proposed Zone Text Amendment – PHB District (Special Use Permits) – 239 Review

The following Resolution was introduced for adoption by Councilman Woodland and duly seconded by Councilman Backman:

(RESOLUTION NO. 91 OF 2003)

WHEREAS, Town staff have recommended that self-storage units and a gas station be included as Special Use Permits in all Planned Highway Business (PHB) Districts in the Town's Zoning Law;

NOW, THEREFORE, BE IT RESOLVED that the New Hartford Town Board does hereby refer this proposed Zone Text Amendment to the Oneida County Planning Department and to the Town Planning Board for their review and written recommendation pursuant to General Municipal Law and the Town's Zoning Law.

The Resolution was voted upon as follows:

Councilman Waszkiewicz ; - 9; Aye

Councilman Woodland - Aye

Councilman Butler - Aye

Councilman Backman - Aye

Supervisor Humphreys - Aye.

The Resolution was declared unanimously carried and duly adopted.

May 7, 2003

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PUBLIC HEARING

**8:13 P.M. LOCAL LAW INTRODUCTORY NO. "B" (AS #9; AMENDED) OF 2003;
CODE CHAPTER 118,**

SPECIAL PERMIT USES IN A PHB DISTRICT

The Deputy Town Supervisor opened the Public Hearing at 8:13 P.M. and the Town Clerk presented the Notice of Public Hearing, Affidavit of Posting, and Proof of Publication (April 23, 2003 edition of The Observer Dispatch). The purpose of the Hearing is to consider ***Local Law Introductory No. "B" (As Amended) of 2003*** which, if adopted, would amend the Code of the Town of New Hartford, Chapter 118 thereof entitled ZONING, by amending Section 118-6 [Definitions], Section 118-31 [Specific Special Use Permit Standards], and the Schedule of Use, Area and Bulk Regulations for a ***PHB – Planned Highway Business District***. This legislation provides ***definitions*** of "mini- and self-storage units", specific standards for such "storage units" and ***shall add "self-storage units" and "gasoline station" as special permit uses, together with the applicable area and bulk regulations, subject to Town Planning Board approval.***

Town Planner Schwenzfeier distributed a chronological list of correspondence and procedures relating to this matter.

Deputy Town Supervisor/Councilman Backman acknowledged that some people were present thinking the Town Board is voting on a traffic light for the intersection of Seneca Turnpike and Applewood Boulevard. John Barkett, Jr. of The Barkett Group, owner of the Applewood Community, explained his reasoning and application for ***rezoning*** the rear portion of a parcel on Seneca Turnpike (***Local Law Introductory No. "D" of 2003***), hoping that the number of motor vehicles would generate the need for a traffic signal, as defined by the NYS Department of Transportation (DOT). Deputy Supervisor Backman then asked those who were in favor of ***Local Law Introductory No. "B" (As Amended) of 2003*** to come forward; those ***in favor*** included:

- George Engel, 10 Applewood Boulevard
- Thomas Hayes, 322 Matthew Drive

- Mary Tettamont, 500 Patricia Drive

Attorney Rossi explained that zoning laws are for rational development of a municipality and the Town Board is responsible for zoning; this particular Public Hearing is to determine whether it makes sense to have gasoline stations and/or self storage units in these areas (Planned Highway Business zoned areas) – not the traffic light – but the thinking behind this is if the zoning is liberalized, that by allowing gasoline stations and storage units, the number of motor vehicles will increase and perhaps **DOT** will change their minds.

Those continuing in favor included:

- Arlene Engel, 10 Applewood Boulevard
- Linda Czerkies, whose parents live in Applewood
- John Trzeciak, 512 Patricia Drive
- Howard Lowenkopf,
- Richard Kimball, Applewood Community

Lois Humphreys of Tibbitts Road, New Hartford asked "...isn't this (zoning text amendment) for the entire Planned Highway Business corridor, not just near the Applewood area/intersection?" Deputy Supervisor Backman responded affirmatively, that if this local law were to be adopted, gasoline stations and self-storage units would be permitted, if approved by the Town Planning Board, *in all PHB* districts in the Town.

The Deputy Town Supervisor then inquired if anyone opposed the legislation for a zoning text amendment; those who **opposed** and spoke were:

- Colin Kerley, 629 Barbara Avenue
- Robert White, 8080 Seneca Turnpike; while he would like the traffic signal, he opposes gasoline stations and storage units – believes it would ruin the Applewood Community; he's talked to neighbors who don't want the traffic signal
- Jean Maziarz, 516 Patricia Drive
- Rob Sanderl, 529 Patricia Drive
- Lisa Bishop, 713 Heloon Drive, opposed gasoline stations and storage units
- Charlene Greco, Applewood Community, said the area already has a gasoline station and convenience store
- Elaine Martin, Applewood Community; wants the speed limit reduced in front of Cherrywood-Applewood
- Waldemar Lemponen, 7 Partyka Road; don't need any more gasoline stations and noise – do something about speed limit and enforce it.
- Christine Nielson, Applewood Community

Police Chief Philo apprised the residents that the Town has tried to address the speed reduction with the NYS DOT along that stretch of Seneca Turnpike (NYS Route 5), which has become a lateral highway with increased traffic; he agreed that speed reduction is needed, however, the Town doesn't have jurisdiction over this state highway.

Councilman Butler stated that the Town had a GEIS done for the Seneca Turnpike-Commercial Drive corridor, with input from the police, highway, county agencies, etc. and they did not include gasoline stations and self-storage units in the Planned Highway Business (PHB) districts. The Town also has rezoned the Seneca Turnpike area and a private consultant reviewed the zoning for the Town and did not recommend these uses in PHB districts. The Town Planning Board did a 239-review this Spring and recommended storage units in a PHB district, *but not gasoline stations*. Councilman Butler didn't think the Town Board should overlook professional planners recommendations.

Deputy Supervisor Backman noted that, because the Town Planning Board had rejected gasoline stations as special permit uses in PHB districts, the Town Zoning Law provides the Town Board would need a *supermajority to adopt* Local Law Introductory No. "B" (As Amended) of 2003. The Oneida County Planning Department had recommended approval of the two (2) additional special permit uses.

There being no one further to speak in the matter, the Public Hearing was declared closed at 8:50 P.M.

SEQR Negative Declaration – Local Law Introductory No. "B" (As Amended) of 2003

The following Resolution was offered for adoption by Councilman Woodland and seconded by Councilman Backman:

(RESOLUTION NO. 162 OF 2003)

RESOLVED that the Town Board of the Town of New Hartford, as Lead Agency in the matter of the proposed Zoning Text Amendment to permit self storage units and gasoline stations in a Planned Highway Business district as special permit uses subject to final approval of the Town Planning Board, does hereby unanimously adopt the determination and findings set forth in the Negative Declaration (SEQR), Notice of Determination of Non-Significance, prepared by Town Planner Schwenzfeier, a copy of which will be filed in the Town Clerk's Office.

Upon roll call, the Town Board voted as follows:

Councilman Waszkiewicz - Aye

Councilman Woodland - Aye

Councilman Butler - Aye

Councilman Backman - Aye

Supervisor Humphreys - ABSENT.

The Deputy Town Supervisor declared the Resolution unanimously carried and duly adopted.

Action on Local Law Introductory No. "B" (As Amended) of 2003 (DEFEATED)

Councilman Woodland moved that Local Law Introductory No. "B" (As Amended) of 2003 be adopted as Local Law No. Five of 2003, in the following format; seconded by Councilman Backman:

Town of New Hartford, New York

Proposed Local Law No. Five of 2003 (*Defeated)

A Local Law to amend the Code of the Town of New Hartford, **Chapter 118** thereof

entitled ZONING, by amending Section 118-6 (Definitions), Section 118-31 (Specific special use permit standards), and the Schedule of Use, Area and Bulk Regulations for a PHB – Planned Highway Business District and specifically, the list of Special Permit Uses (Page 11939).

BE IT ENACTED by the Town Board of the Town of New Hartford as follows:

SECTION 1. Chapter 118 of the Code of the Town of New Hartford is hereby amended as follows:

Section 118-6. Definitions:

Add:

SELF-STORAGE UNITS - a building containing individual self-storage units divided from floor to the ceiling by a wall with an independent entrance from exterior of the building, designed to be rented or leased on a short-term basis to the general public for private storage of personal goods, materials and equipment.

MINI-STORAGE UNITS – See Self- Storage Units

Section 118-31. Specific special use permit standards:

Add:

- A. Self- storage units facility.

All self- storage units facilities shall conform to the following additional standards:

1. The use shall be limited to individual storage compartments/units, not to exceed 200 square feet.
2. All self- storage units shall be screened by a 50 foot wide landscaped strip and earthen berm consisting of a dense deciduous and evergreen barrier of a height sufficient to obscure the self- storage units from adjoining uses, properties, and roads.

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3. The exterior walls of the proposed structure shall conform to the requirements of the New York State Uniform Fire Prevention and Building Code.
4. All storage units shall be of neutral tones, which harmonize with the surrounding area.
5. No self- storage units shall exceed one story in height.
6. No outside storage is allowed.
7. No electrical outlets shall be allowed in individual units.
8. No self- storage facility shall exceed five (5) acres in size. The facility size shall be calculated by the units, roadways/paved surfaces, fencing, as well as the landscape buffer, and all other associated items.
9. No self- storage facility shall be located within 5,000 feet of another self-storage facility.

Section 118-93. Schedule of Use, Area and Bulk Regulations

PHB – Planned Highway Business District

Add:

Special Permit Uses: Gasoline Station

Minimum Lot Size (Area): 1 acre

Minimum Lot Size (Minimum Width): 200 feet

Maximum Lot Coverage: 40%/50%

Minimum Percent of Lot to be Permeable: 33%

Maximum Building Height: 35 feet

Minimum Yard Dimensions – (Front) #9; #9; 50 feet

- (Each Side) *2 25 feet

- (Rear) *2 50 feet

Special Permit Uses: Self storage units

Minimum Lot Size (Area): 5 acres

Minimum Lot Size (Minimum Width): 200 feet

Maximum Lot Coverage: 20% *3

Minimum Percent of Lot to be Permeable: 33%

Maximum Building Height: 15 feet

Minimum Yard Dimensions – (Front) 250 feet

- (Each Side) *2 50 feet

- (Rear) *2 50 feet

NOTES: *3 Maximum lot coverage for the total lot is 40%/50%. Only

20% of the total lot shall be used as self- storage units. The

remaining 20%/30% of lot coverage may be used for other permitted site plan review uses, and/or special permitted uses as deemed appropriate by the Planning Board.

SECTION 2. All other provisions of the Code of the Town of New Hartford, and amendments thereto, are hereby affirmed except to the extent that this Local Law shall modify or amend.

SECTION 3. This Local Law shall become effective immediately upon its filing in the Office of the Secretary of State in accordance with Section 27 of the Municipal Home Rule Law.

Discussion followed:

- Councilman Waszkiewicz inquired of Town Planning Board Chairman N. Joseph Yagey what the Planning Board's reasoning was for not including gasoline stations; he responded that the people who spoke tonight mirrored the exact reasons, including comments of Councilman Butler, as to why the Town Planning Board rejected this legislation. Discussion was adequately outlined....the Planning Board said "yes" to storage units but **NO to gasoline stations**.
- Zoning Board of Appeals Chairman Gerald Green stated that the experts allowed for specific uses in certain sections of town.
- Highway Superintendent Roger Cleveland commented that The Barkett Group was trying to put a development up front as a service to their Applewood Community residents – for fewer trips out onto Seneca Turnpike; he believed a gasoline station would increase some traffic but not a great amount.

The Town Board then voted upon roll call, which resulted as follows:

Councilman Waszkiewicz - Nay

Councilman Woodland - Aye

Councilman Butler - Nay

Councilman Backman - Aye

Supervisor Humphreys - ABSENT.

Thereafter, *Local Law Introductory No. "B" (As Amended) of 2003* was declared ***DEFEATED***.

Councilman Woodland then moved that Local Law Introductory No. "B" (As Amended) of 2003 be adopted as Local Law No. Five of 2003, ***adding self-storage units*** as a special permit use ***but excluding gasoline stations*** as a special permit use in PHB districts; seconded by Councilman Backman.

The Town Board then voted upon roll call, which resulted as follows:

Councilman Waszkiewicz - Nay

Councilman Woodland - Aye

Councilman Butler - Nay

Councilman Backman - Aye

Supervisor Humphreys - ABSENT.

Thereafter, *Local Law Introductory No. "B" (As Amended) of 2003* [to include self- storage units, but to exclude gasoline stations in PHB Districts] was declared **DEFEATED**. -

PUBLIC HEARINGS (CONT'D)

9:08. P.M. LOCAL LAW INTRODUCTORY NO. "D" OF 2003;

BARKETT ZONE MAP AMENDMENT APPLICATION, LDR TO PHB

Before the Public Hearing was opened, John Barkett, Jr. of The Barkett Group, Inc. *withdrew his Zone Map Amendment Application* to rezone 2.71 acres fronting Applewood Boulevard/Seneca Turnpike, from Low Density Residential (LDR) to Planned Highway Business (PHB). The Town Board unanimously agreed and declared the Application withdrawn and terminated.

REGULAR TOWN BOARD MEETING

April 9, 2008

ATCH D

PUBLIC HEARING

6:02 P.M. LOCAL LAW INTRODUCTORY "A" OF 2008

At 6:02 P.M. the Town Supervisor opened the Public Hearing. The Town Clerk stated that the Public Hearing related to Local Law Introductory "A" of 2008, an application by Mr. Ahn to amend the Planned Highway Business (PHB) classifications in the Town's Zoning Law to allow convenience stores (with or without gasoline service), as a site plan use or special permit use, according to certain criteria. The Town Board had:

- referred the application to the Oneida County Planning Department and Town Planning Board in August 2007
- received recommendation of approval from the Oneida County Planning Department in August 2007
- the Town Planning Board declared itself Lead Agency (State Environmental Quality Review) in this matter in August 2007
- Town Board received the Town Planning Board recommendation in January 2008 not to endorse this proposal.

The Town Clerk had available the Notice of Public Hearing, Affidavit of Posting and Proof of Publication (March 27, 2008 edition of the Observer Dispatch).

Town Clerk Young then invited Donald Ehre, P.E. and his client, Young-Duck Ahn to make their presentation; however, neither was in attendance at this time.

Supervisor Reed then invited comments from the audience:

- **Town Planner Schwenzfeier** stated that during the 1995 comprehensive plan process for rezoning, PHB districts were for more professional office uses rather than convenience stores
 - in their review of Mr. Ahn's 2007 request to change the Zoning Law, the Planning Board voted unanimously to reject this application
 - a rezoning application for a convenience store by Applewood Community was turned down around 2003 or 2004
 - Mr. Ahn has purchased the Feketa property on Seneca Turnpike (far western end) and is trying to see what he can do with the property
- **Unidentified resident** inquired whether Mr. Ahn had plans for a convenience store on Seneca Turnpike near the Sangertown-Yahundasis area
 - Town Planner explained there are four (4) separate PHB zoned districts in the Town, three (3) along Seneca Turnpike and one (1) small area on Burrstone-French Road

[NOTE: At 6:09 P.M. Donald Ehre, P.E. and his client, Mr. Ahn, arrived at the meeting.]

- **Donald Ehre, P.E.**, briefly explained his client's two-part proposal to change the Zoning Law text to allow convenience stores with and without gasoline service, and to limit such stores to a minimum of one (1) acre lots. He defined the four (4) PHB areas:
 - One (1) at French and Burrstone Roads
 - Appears that the existing convenience store at this location may be a "grandfathered" use
 - One (1) starts on Seneca Turnpike, at the Killabrew property westerly to the Sangertown Square Mall property
 - One (1) starts on Seneca Turnpike, at the intersection of Middle settlement Road, westerly to Seneca Mobile Manor
 - One (1) starts on Seneca Turnpike, west of Homestead Road West to the Kirkland town boundary

Mr. Ehre stated that PHB zoning districts allow a grocery store but not a convenience store. His client proposes that the same minimum lot size and characteristics for grocery stores be allowed for convenience stores, contending that the product line is essentially the same. The second aspect is to permit convenience stores with gasoline service but the parcels would have to be twice as large, a minimum of one (1) acre of land because this type of use would require some buffer from neighboring lots. Gas stations take up space, and if permitted as a site plan review use or special permit use – because gas islands and access to islands take up more room and parking has to be there, his client has asked for slightly larger permeable area...same amount of green space but the parcel would be larger...more pavement and roof but the same amount of green space. The French-Burrstone Road PHB district is pretty much surrounded by other businesses; other than taking down some businesses, a person would have to take several lots or businesses to meet the minimum lot size – he wouldn't expect any action in that area. Also, the stretch of PHB district from the Yahnundasis-Killabrew area westerly to Sangertown ... those are all small lots, existing residential and he would dare to say it would take seven (7) parcels of contiguous land to get a one (1) acre parcel. Also, a certain amount of lot depth is needed.

Mr. Ehre had been informed that as part of the Town Master Plan process, the group (committee) decided to exclude this type of use (convenience stores); however, although he's asked for proof of this, he's received none.

Supervisor Reed apprised Messrs. Ehre and Ahn that calls to the Town Offices from the affected areas were pretty much against Mr. Ahn's request for a Zoning Law text amendment. The Supervisor then invited more comments at which point Mr. Ehre asked to speak with his client and determine whether Mr. Ahn wanted to proceed. Mr. Ahn gave his approval to proceed.

Speaking ***in opposition*** to the proposal were:

- **Wayne Saddlemire** - he was against the proposed zoning text amendment, citing the existing east/westbound traffic on Route 5 (Seneca Turnpike). He suggested the Town take a thorough study of traffic flow east and west for better flow of traffic. He lives on Route 5 and has to negotiate getting onto Route 5. He said there are convenience stores on both sides of him, one in the Town of Kirkland and one in New Hartford.

Donald Ehre interjected that his client would like to address the Town Board. Mr. Ahn said he's been in the United States since 1974. He compared the price of gasoline in Virginia, where he resides, to the much-higher gasoline cost in New York State. Why should he have to have \$3.57 a gallon in New York? He questioned why the Planning Board would deny his request for a Zoning Law text change

for PHB districts. He said he's not just talking about New Hartford people, but the convenience of people traveling through the area. Supervisor Reed responded, "... you are seeing democracy" ...people are here because they may not like the proposal. Mr. Ahn said that New Hartford must approve **gas** pump business for the people. He bought the land two (2) years ago and he asked the Board to think about the people.

- **John Shaw** – a thirty (30) year resident of Seneca Turnpike, asked if this Zoning Law text proposal is approved, what does it do to the rest of the PHB districts in the Town. Town Planner Schwenzfeier responded that anywhere in a PHB district, if a convenience store meets the criteria, a convenience store could be built. Mr. Shaw has seen commercial development and he has lots of it across the street from his home and next to his home, and he doesn't want one of these (convenience stores) next to his house. He said he's pro-development and this [proposal] isn't about the people, it's quality of life. He was against the proposal.
- **Unidentified woman** – said there's enough commercial activity on Commercial Drive and Seneca Turnpike....it's ruining our life because there are already two (2) convenience stores with **gas** service. She's lived on Seneca Turnpike for 52 years and she has a nice home with a beautiful view near the Yahnundasis Golf Club. She was in opposition to the subject matter.

Councilman Reynolds referred to the first gentlemen who said the Town needs a study. The Town has a Planning Board and Planner that address these issues. The Town is concerned how growth takes place within the town and the dominance of retail and commercial that takes over residential/agricultural areas. Councilman Reynolds acknowledged that Seneca Turnpike is still a two-lane highway and also understood the argument of "...why can't we put a convenience store on Route 5" and that a similar rezoning request (as reported by the Town Planner) has already been turned down once.

Show of hands **in favor** of the adoption of Local Law Introductory "A" to amend the PHB Districts to include convenience stores (with or without **gasoline** service):

- John and Patricia Feketa
- Young-Duck Ahn and his wife
- Donald Ehre, P.E.

Show of hands **in opposition** of the adoption of Local Law Introductory "A" to amend the PHB Districts to include convenience stores (with or without **gasoline** service):

- An estimated 35 – 40 people raised their hands.

Councilman Woodland informed the public that the Town has approached the NYS Department of Transportation about reduced speed but to no avail – the Town has to continue to push its representatives to look at this corridor.

An unidentified man inquired why notice of the public hearing wasn't sent to more people on Homestead Road. Planner Schwenzfeier explained that, in accordance with the Zoning Law, property owners from the edge of PHB districts for a distance of 500 feet were notified, which explains why not everyone was notified on Homestead Road.

After further speaking with his client, Mr. Ehre stated that rather than the Town Board vote and go through this process, Mr. Ahn withdraws his application for a Zoning Law text amendment.

The Public Hearing was closed at 6:36 P.M. after which Councilman Woodland introduced the following Resolution for adoption, seconded by Councilman Reynolds:

(RESOLUTION NO. 86 OF 2008)

RESOLVED that the New Hartford Town Board does hereby accept Young-Duck Ahn's withdrawal of his application for an amendment to PHB districts in the Town Zoning Law, specifically for the inclusion of convenience stores with/without gasoline service, and does hereby declared the application terminated.

Thereafter, the Town Board voted upon roll call, resulting as follows:

Councilwoman Krupa	-	Aye
Councilman Reynolds	-	Aye
Councilman Woodland	-	Aye
Councilman Payne	-	Aye
Supervisor Reed	-	Aye.

The Resolution was declared unanimously carried and duly **ADOPTED**.

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Chairman Arnold asked if it would be preferable to block it off or sign it. Police Chief Philo said he would sign it to make sure people understood it is not a public walkway. But to just endorse it without these safety concerns he felt would be a liability to the Town. Chairman Arnold felt the Town should take some proactive steps when these lots are sold to make sure it is not a public walkway until it is.

Mr. Ehre said a sign would be erected and he would put it on the plans also. Mr. Grates was asked if he would need a bigger right-of-way to accommodate the walkway – Mr. Grates said no.

Young-Duck Ahn - Zone Text Amendment, Planned Highway Business (former Feketa site on Seneca Turnpike). Update. Mr. Donald D. Ehre, P.E., appeared before the Board.

Town Planner Schwenzfeier stated this application was sent out for SEQR, and that the Town Board recommended the Planning Board be Lead Agency. The Planning Board could declare a Negative Declaration if all comments came back showing there was no impact or no future concern. This would still have to go to the Town Board with the decision the Planning Board makes – it would require a Public Hearing (the hearing is scheduled by the Town Clerk).

Chairman Arnold asked if there is something else the Planning Board wants to see or some outstanding issues. Board Member Imobersteg said this is not a variance request or Site Plan. It is a request to the Site Plan Review uses for the ability to allow a convenience store/gas station. We already turned down a similar request across the street.

Mr. Ehre referred to lot sizes for a gas station and what he feels is an added use to the zone. Mr. Ehre questioned the lot size requirements and maybe this Board could suggest another lot size as this Board has the ability to do it. He feels there is only a limited number of properties within the Planned Highway Business zone where one acre or larger lot could exist.

Chairman Arnold stated that this would be a new use permitted in that district – the real change is a service station coupled with a store. He asked the Town Planner - this becomes a town-wide issue wherever a Planned Highway Business zone is located – Town Planner Schwenzfeier said yes. Chairman Arnold stated that a lot of thought went into the review of these zones. So when you have a Zoning Law that is not enacted for certain uses, he disagrees with Mr. Ehre’s assessment – this is a big change. You are adding a new use to a district in the Town.

Mr. Ehre said he is simply saying it is not the same request as Applewood's and if it would pass, it would allow other people to come in also.

Board Member Donovan asked, what prevents someone from buying two (2) parcels adjacent to each other and coming in to apply – that is the danger of this. When this district was developed, the planners and consultants looked at this type of use and made the determination. Perhaps a public policy was made not to populate this artery with gas stations.

Board Member Rotton is concerned because a gas station was not approved on the other side within the Town of New Hartford. It is her impression that the Town was trying in the development of this zone to not have gas stations listed.

Board Member Donovan referred to the Applewood request and the request/need for a traffic light. Town Planner Schwenzfeier then referred to the areas along Seneca Turnpike and Burrstone Road which is zoned Planned Highway Business. He feels the Board has made their concerns clear.

Board Member Imobersteg feels there would be an increase in traffic and the Comprehensive Plan does not call for this use.

Discussion ensued regarding the Planned Development zone and how it is enforced – Mr. Ehre said in a PD zone you would need a minimum of five (5) acres. Town Planner Schwenzfeier said gas stations are allowed in a Retail Business 2 zone. It was stated that a request like this would be spot zoning.

Mr. Ehre read a letter from his client who could not attend (this letter was not submitted for the file).

Town Planner Schwenzfeier said this Board, as Lead Agency, needs to address the Town Board with their advisory opinion.

Motion was made by Board Member Peggy Rotton to close SEQR with a Negative Declaration; seconded by Board Member Bob Imobersteg. Vote taken:

Chairman Hans Arnold – yes	Board Member Bob Imobersteg – yes
Board Member Ellen Rayhill – yes	Board Member Jerome Donovan – yes
Board Member Peggy Rotton – yes	

Motion to close SEQR with a Negative Declaration was passed by a vote of 5 – 0.

Motion was made by Board Member Jerome Donovan to recommend to the Town Board that the Town Planning Board does not endorse the Zone Text Amendment as this would impact all properties in the Planned Highway Business Zone; the Town has not had the opportunity to study this proposed amendment comprehensively as it affects other areas of the Town that are also zoned PHB; and the Board does not feel comfortable to ask a private developer do an Environmental Impact Statement based on the discussion;

seconded by Board Member Bob Imobersteg. Vote taken:

Chairman Hans Arnold – yes Board Member Bob Imobersteg – yes
Board Member Ellen Rayhill – yes Board Member Jerome Donovan – yes
Board Member Peggy Rotton – yes

Motion of recommendation to not endorse was passed by a vote of 5 – 0.

Planning Board Secretary Dory Shaw will notify the Town Board.

Board Member Donovan suggested asking the Town Board in their review of the Zoning Law to look at uses in terms of particular corridors.

Montessori School, Chapman Road. Tax Map #340.000-4-7; Lot Size to be used – approximately ½ acres; Zoning: Residential/Agricultural 1. Update. Chairman Arnold stated that Ms. Karen Bradley had contacted the Planning Board Secretary today withdrawing her interest at this site.

OTHER

Chairman Arnold explained to the Board that Murphy Excavating on Chapman Road would be on the February 11, 2008 agenda. They will be appearing at the Zoning Board for a Use Variance at their January 28, 2008 meeting. They want to expand their office space, but it is one of the uses that isn't identified in the Zoning Law. He asked the Town Planner if this would generate more traffic – he said no. The addition will be two (2) stories with approximately 1,020 sf per floor. The use is not in any zoning district in the Town.

Wal-Mart Subdivision – Update. We have been advised by the Town Attorney to not act on this pending the resolution of traffic improvements inside Consumer Square. To not do that could be splitting that access road creating one owner on one side and one on another. We now have a traffic scope of engineering services that the Highway Superintendent and the Town Planner received to do a final evaluation of that and a

recommendation of a fix for that road. Town Planner Schwenzfeier said we are going to be use a part of the retainer from Benderson to pay for it, but that our traffic consultant will look at the existing situation for a long term fix. It would take about six to eight weeks at a maximum to address this.

Chairman Arnold said he was informed that Consumer Square wasn't built according to Final Approval Plans.

Business Park – Update. Chairman Arnold said the developer is going forward on the next phase of the Business Park. This would be possibly a hotel/motel and doctor's office. There is a question on the storm water management and connection to the road we required by Lowe's. There is a 1500' gap between Hartford and Lowe's and they are still working on the Woods Highway alignment with Route 840. Chairman Arnold will meet with the Town Planner, the Highway Superintendent and Mr. Adler before the next Planning Board meeting to discuss this.

There being no further business, the meeting adjourned at 7:30 P.M.

Respectfully submitted,

Dolores Shaw
Secretary/Planning Board

dbbs

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Town Board referral for a **Zone Text Amendment, Planned Highway Business (former Feketa site on Seneca Turnpike)**. Planning Board review and recommendation. Town Board is requesting Planning Board to declare itself Lead Agency for this application. Mr. Donald D. Ehre, P.E., appeared before the Board.

Town Planner Schwenzfeier stated that this amendment would include any Planned Highway Business district throughout the Town – it is not just for this property. Most of the Planned Highway Business zones are located on Seneca Turnpike, Burrstone Road, French Road and Clinton Road. This amendment would allow for convenience stores within this zone. According to the Town’s Zoning Code, convenience stores would also include gas stations which isn’t currently allowed in the Planned Highway Business zone.

The Town Planner was asked if convenience stores are in that district now – the answer is no. Board Member Imobersteg referred to a previous application for a gas station and storage units in that same area which was turned down. He sees a problem with this request as it affects the whole zone, not just this property and he referred to a Byrne Dairy store/gas station up the street from there. He further stated that gas stations were purposely omitted from this zone and Public Hearings were held when this zone was created.

The Town Planner was asked to read the allowed uses in this zone, which there were a large number of uses for this property. The Town Planner stated that a convenience store is different than a grocery store because of the gas station. He also stated that County 239 was already done on this and they recommended approval.

Chairman Arnold referred to memorandums from the Codes Office where they referred to the Comprehensive Plan of 1995 which took into account all feasible uses and gas stations were not considered suitable for this zone. The intent of this zone was to use the guidelines for a Professional Office zone and they also referred to an application previously at the Town Board meeting of May 7, 2003 where a similar but not identical use was suggested and defeated (these memorandums are a part of the file).

Chairman Arnold feels this Board needs to look at every piece of property zoned Planned Highway Business, not just one property. He further stated that the Town Board has asked the Planning Board to be Lead Agency on this.

Town Planner Schwenzfeier stated that SEQR Agencies are Oneida County Planning, Oneida County DPW, NYSDOT, Herkimer-Oneida Solid Waste Authority, NYSDEC, Oneida County Health, City of Utica and Town of Kirkland.

After further discussion, motion was made by Board Member Peggy Rotton to declare the Planning Board Lead Agency for SEQR for this Zone Text Amendment application; seconded by Board Member Ellen Rayhill. Vote taken:

Chairman Hans Arnold – yes	Board Member Peggy Rotton – yes
Board Member Bob Imobersteg – yes	Board Member Ellen Rayhill – yes
Board Member Rodger Reynolds – yes	

Motion was approved by a vote of 5 – 0.

Secretary Dory Shaw will notify the Town Clerk as to the action taken tonight on this application.

CORRESPONDENCE

OTHER

-Subdivision Update – Town Planner Schwenzfeier updated the Board as to the status of the revised Subdivision Regulations. The Town Planner said the Subdivision Regulations are ready to refer to the Town Board.

Motion was made by Board Member Bob Imobersteg to send the newly proposed Subdivision Regulations to the Town Board; seconded by Board Member Rodger Reynolds. Vote taken:

Chairman Hans Arnold – yes	Board Member Peggy Rotton – yes
Board Member Bob Imobersteg – yes	Board Member Ellen Rayhill – yes
Board Member Rodger Reynolds – yes	

Motion was approved by a vote of 5 – 0.

There being no further business, the meeting adjourned at 8:30 P.M.

Respectfully submitted,

Dolores Shaw
Secretary/Planning Board

dbS