**ZONING BOARD OF APPEALS OF THE TOWN OF ORCHARD PARK**, Erie County, New York, minutes of the November 19, 2019 meeting held in the Municipal Center Basement Meeting Room, S4295 South Buffalo Street.

MEMBERS PRESENT: Kim Bowers, Chairwoman

Lauren Kaczor

Robert Lennartz

Dwight Mateer

EXCUSED Robert Metz

Barbara Bernard, Alternate

Len Berkowitz, Deputy Town Attorney

OTHERS PRESENT: John Bailey, Town Attorney

David Holland, Code Enforcement Officer

Rosemary Messina, Recording Secretary

The members recited the Pledge of Allegiance and the Chair called the meeting to order at 7:02 P.M., stating that if anyone appearing before the Board was related through family, financial or a business relationship with any member of the Board, it is incumbent upon him to make it known under State Law and the Town Code of Ethics.

The Chair stated that all persons making an appeal before this Board would be heard in accordance with the Town Laws of the State of New York, Article 16, Sections 267, 279 and 280a, Subdivision 3, and the Town of Orchard Park Zoning Ordinance. Any person aggrieved by any decision of the Board of Appeals may present to a court of record a petition, duly verified, setting forth that such decision is illegal, specifying the grounds of the illegality. Such petition must be presented to the court within 30-days after filing of the decision in the office of the Town Clerk.

At tonight’s meeting we do not have full Board representation. In these circumstances it will require (3) votes to approve any motion that is presented. If a vote results in a two/two tie, the motion will be defeated. As a result we offer petitioners the following three options:

1. We can vote on the petition and the petitioner must accept the Board’s decision.

2. We can hear the case and postpone the vote until the next meeting of the Board when a full Board is present. The absent member of the Board will review the testimony and all appropriate documents prior to the meeting.

3. The petitioner can postpone making his presentation until the next meeting of this body.

**APPROVAL OF MINUTES:**

The meeting minutes for October 15, 2019 are not available, and will be voted on at our next meeting.

The Chairman stated that Site Inspections of all cases presented tonight were made by:

**BOWERS, AYE/KACZOR, AYE/LENNARTZ, AYE/MATEER, AYE**

**NEW BUSINESS**

1. ZBA File #30-19, Burke Development LLC, 6455 Lake Avenue, Zoned B-2 (Part of Farm Lot 18, Township 10, Range 7; SBL#152.16-3-19). Requests a Use Variance to allow (2) Apartment Units within this Commercial Office Building. Only one use shall be permitted on a lot, § 144-20D.

APPEARANCE: Brian Burke, Burke Development LLC

Mr. Burke distributed information to the members, and explained that the building was constructed in the 1970’s at the corner of Lake and Southwestern Boulevard. He presently leases space to five (5) businesses, and his own office is located here. The lower level of the building has been vacant for a three-year period creating a financial hardship. Previous to this, the space had been occupied by a dental firm for twenty years. He explained his efforts to lease the space to a commercial business have been unsuccessful. Businesses do not desire to locate in this portion of the building as there is no drive-by exposure or elevator accessibility.

Ms. Bowers confirmed with Mr. Burke that five (5) tenants are located on the second floor of the building, and he is one of them. He feels the proposed two units will be very marketable, as they will be upscale, and have their own dedicated parking space.

Ms. Kaczor questions how Mr. Burke knows that the renters will not need an elevator.

Mr. Burke explained that the rental agreement will include that the stairway is to be used to access each unit.

Ms. Kaczor, also, questions what would happen if an upper level tenant moves out; would he then make the entire building apartment rentals?

Mr. Burke stated that he does not foresee that happening. He has been renting to his tenants for over thirty-years and they are very happy with the environment.

Mr. Mateer noted that a Use Variance requires strict criteria to be considered by the Board in order for it to be granted. He feels that Mr. Burkes’ loss of $2,000 each month for the last three (3) years is a substantial hardship.

Mr. Lennartz, whose background includes experience in commercial real estate banking, established that Mr. Burke is offering the office space at, or below, the current market rate. He discussed the proposed two residential units, and established that they will each be 1,200-sq.ft. in size, and leased individually for $1,000 per month. The building is grandfathered-in and it is not required to meet the standards of the ADA Compliancy Code. Therefore, an elevator is not required in this building. Mr. Burke told the members it would cost in excess of $400,000 to have one installed. The empty space is 1/3 of the building. Mr. Lennartz feels a hardship is demonstrated with the loss of $2,000 per month for 36-months; the building does not have cash flow.

The Chair inquired if Mr. Burke had thought of moving his own offices to this floor, and leasing the space here

The Board feels the lack of an elevator is a huge issue in leasing the space at this site.

The Chair then asked if there was anyone in the audience who would wish to speak in favor of granting the Variance.

(Twice) NO RESPONSE

The Chair then asked if there was anyone in the audience who would wish to speak against the granting of the Variance.

(Twice) NO RESPONSE

The Chair then asked if the Secretary had received any communications either for, or against, granting the Variance. The Secretary stated no other communications were received.

Board Discussion:

Mr. Lennartz discussed the cash flow issue for the last three-years, noting that he feels losing $2,000 per month supports our hardship criteria.

Mr. Mateer does not feel the granting of the Variance will change the essential character of the neighborhood, as the building is adjacent to residential property.

Ms. Kaczor is not comfortable with granting the variance. If any of the upper tenants move out we may have the same request before us.

Code Enforcement Officer David Holland noted that this a specific request for only two-units.

Chairwoman Bowers feels if this were to occur, and Mr. Burke felt he wanted residential units, he would need to return to this Board.

Mr. Lennartz made a **MOTION**, seconded by Mr. Mateer, to **GRANT** the Use Variance request based on the following:

1. The Applicant has demonstrated that the zoning has caused an unnecessary hardship.

2. Strict application of the regulations will deprive the applicant of a reasonable return on the property; that lack of return is substantial, as demonstrated by competent financial evidence.

3. It’s been stated that there is no cash flow without the space leased-out, creating a hardship of $2,000 per month loss, for the last three-years.

4. The hardship is unique, and does not apply to a substantial portion of the district or the neighborhood.

5. The variance will not alter the essential character of the neighborhood.

6. The alleged hardships is self-created, but that does not preclude the granting of the Variance.

THE MOTION BEING:

BOWERS AYE

KACZOR NAY

LENNARTZ AYE

MATEER AYE

THE **MOTION BEING (3) THREE IN FAVOR** AND **(1) ONE AGAINST**, THE **MOTION TO GRANT** THE REQUEST IS **UNANIMOUSLY PASSED**.

2. ZBA File #31-19, Heathwood Assisted Living, V/L Webster Road, Zoned B-3 (Part of Farm Lot 15, Township 10, Range 7; SBL#162.05-2-2.11). Requests (2) Area Variances for a proposed Assisted Living Facility. First, to allow a 3-story structure with a 36-ft. – 2 inch height. The height of a building in this B-3 Zone shall not exceed 2-1/2 stories nor 35-ft., §144-9B, Supplemental Schedule of Height, Lot, Yard & Bulk Regulations. Second, to allow Front Yard Parking. Vehicle parking in the front yard is prohibited in this B-3 Zone, § 144-29A (4).

APPEARANCE:Mr.James Bammel, Bammel Architects

Bethany, co-worker at Bammel Architects

Chairwoman Bowers stated that at the request of the Planning Board we will table the Board’s decision until next month.

Chairwoman Bowers stated that the request is for two variances; one for ‘Front Yard Parking’, and the other is to, “Not exceed 2-1/2 stories or 35-ft., for the Height of the Building”. She noted that the Zoning Board has no control of anything else regarding this project other than the two requested variances. When the Applicant is back in front of us, those are the only two positions we will be taking a vote on. The Planning Board is in charge of the other items for review. She invited those present to listen and ask questions in regards to those two items.

Chairwoman Bowers asked Mr. Bammel to present his case.

Mr. Bammel stated that they have reduced the height of the building to be in compliance with the Town Code. The building is now 34-ft. 3” high, however, they still need a Variance for Front Yard Parking.

Chairwoman Bowers stated that the Planning Board is concerned with the number of stories proposed for this building.

Mr. Bammel stated that he understood they were researching “what is the difference between height and the number of stories”. He told the members that a 30-day delay will impact this project; he would like to have the variance request for Front Yard Parking reviewed this evening.

Attorney John Bailey stated that they eliminated the variance for the height of the building, however we are still looking toward the Planning Board for help with the number of stories. The Planning Board has requested the ZBA table their decision this evening so that further research could be achieved in this matter.

Mr. Bammel established that:

⦁ The height of the building will be 34-ft. 3-in. (the code allows 35-ft.)

⦁ They are proposing three (3) stories (the code allows for 2-1/2 stories)

⦁ The building will be placed 500-ft. back from Webster Road, where the topography drops 8-ft. down from the road, making the building appear to be 23-ft. tall from the roadway.

⦁ Most of the building is one-story to the setbacks, with an additional 30-ft. back before it is three-stories.

⦁ The setbacks are 100-ft. from the properties located on Woodhaven Road, with an additional buffer, 20-ft. deep with heavy woods and existing trees that will remain.

⦁ There will be 14-parking spaces located at the front of the building that will not be seen from the roadway, over 500-ft. back, with an additional 54-parking spaces at the site. There will be no traffic issues as most tenants do not drive. Six to eight vehicles per hour will park here, in addition to employees.

Mr. Mateer established that they are proposing to locate 14-parking spaces at the front of the building. He questions if the building placement can be changed to eliminate the Front Yard Parking Variance. It was learned that the setback requirements will not be met if the Building is moved.

Ms. Kaczor established that this will be an adult home with residential care. She asked why it had to be three-stories. Mr. Bammel explained that studies performed for these type of residences have shown that if the number of stories is lowered, more sprawl is created impacting the care of patients.

Ms. Bowers established that there will be 110, one or two bedroom units, with a portion of the building three-stories high. Mr. Bammel indicated on the presented plan where the three-story portion is located.

Those in attendance were given the opportunity to ask questions. Some residents that came mistakenly believed the project was located close to their homes. Mr. Merle Whitehead, Owner/Developer of the project explained that the project is behind a car wash and laundry business located on North Buffalo Road, and that it can be accessed from the north side of Webster Road.

In summary, the questions and comments from those present involved concerns for the water shed, flooding, a cemetery, the proposed three-stories and lighting issues.

Ms. Bowers made a **MOTION**, seconded by Ms. Kaczor to **TABLE** this case until the December meeting.

THE MOTION BEING:

BOWERS AYE

KACZOR AYE

LENNARTZ AYE

MATEER AYE

THE **MOTION BEING FOUR (4) IN FAVOR**, THE **MOTION** TO **TABLE** IS **UNANIMOUSLY PASSED.**

3. ZBA File #32-19, Buddy and Jean Campbell, 37 Kathryn Drive, Zoned R-1, (Sub Lot #11, Map Cover 2303; SBL#162.14-3-16). Requests an Area Variance to construct a covered porch with a 35-ft. side setback. Minimum side setback per Map Cover 2303 is 50-ft.

APPEARANCE: James Mulka, Architect

Mr. Mulka explained that the Campbell’s would like to construct an open air, covered porch. The front of the residence faces the side of the house. It is suspected that at one time a street was planned to be constructed here. Presently their entrance is hidden with the garage, and they would like a better entryway. It is felt the white porch with the flat roof top and railing on top will fit the character of the neighborhood and not obstruct views. The side setback is 50-ft. per the deed, and not the Town Ordinance. The other residential homes here have setbacks of 10 to 15 feet. The Campbell’s are asking for a 35-ft. side yard setback, which exceeds all the other districts in the Town.

Ms. Bowers established that the railing at the top is to add decorative character; there will be no second story porch added. Power will be available to have a fan operate or lights.

Ms. Kaczor established that they spoke to their neighbors and no objections were made regarding the variance request.

The Chair then asked if there was anyone in the audience who would wish to speak in favor of granting the Variance.

(Twice) NO RESPONSE

The Chair then asked if there was anyone in the audience who would wish to speak against the granting of the Variance.

(Twice) NO RESPONSE

The Chair then asked if the Secretary had received any communications either for, or against, granting the variance. The Secretary stated no other communications were received.

Board Discussion: Ms. Kaczor stated that she does not feel she supports the closeness; and does not know if there is another way to accomplish this. Several members thought it was a cute porch area.

Mr. Mateer made a **MOTION**, seconded by Mr. Lennartz, to **GRANT** the Variance request based on the following:

1. There will be no undesirable change in the character of the neighborhood, or a detriment to nearby properties.

2. The benefit sought cannot be achieved in another way, other than the granting of the Variance.

3. The request is not substantial.

4. There will be no adverse effect or impact on the physical or environmental conditions of the neighborhood or district.

5. The difficulty is self-created, but that does not preclude the granting of the Variance.

THE MOTION BEING:

BOWERS AYE

KACZOR NAY

LENNARTZ AYE

MATEER AYE

THE **MOTION BEING THREE (3) IN FAVOR** AND **ONE (1) AGAINST**, THE **MOTION TO GRANT** THE REQUEST IS **UNANIMOUSLY PASSED**.

4. ZBA File #33-19, Jack Bertsch, 3911 North Buffalo Road, Zoned B-3 (Part of Farm Lot 16, Township 9, Range 7; SBL#162.13-1-1.1). Requests an Area Variance to install a freestanding sign with a front setback of less than 10-ft. Minimum front setback for this freestanding sign is 10-feet, § 144-38B.

APPEARANCE: Mr. Tim Bertsch, Representing his father.

Mr. Bertsch distributed information and explained that the available property between the R.O.W., the building, and the utility lines makes it impossible to meet the Town Ordinance. He told the members that he does not feel the variance will reduce or impinge on the appearance of the nearby properties.

Mr. Mateer asked for clarification of where the property line is located. Code Enforcement Officer Dave Holland indicated on the survey where the property line was, and also explained that an incorrect drawing was in the file. He located the correct drawing.

Ms. Kaczor established that Mr. Bertsch did not speak to their neighbors.

Chairman Bowers stated that the sign will be located close in-line with the other existing business signs. She established that the sign will be illuminated, and that others in the area are as well.

The Chair then asked if there was anyone in the audience who would wish to speak in favor of granting the Variance.

(Twice) NO RESPONSE

The Chair then asked if there was anyone in the audience who would wish to speak against the granting of the Variance.

(Twice) NO RESPONSE

The Chair then asked if the Secretary had received any communications either for, or against, granting the variance. The Secretary stated no other communications were received.

Board Discussion: The members feel the sign is attractive and in-line with others in the area.

Ms. Kaczor made a **MOTION**, seconded by Mr. Lennartz, to **GRANT** the Variance request based on the following:

1. There will be no undesirable change in the character of the neighborhood, or a detriment to nearby properties.

2. The benefit sought cannot be achieved in another way, other than the granting of the Variance.

3. The request is not substantial.

4. There will be no adverse effect or impact on the physical or environmental conditions of the neighborhood or district.

5. The difficulty is self-created, but that does not preclude the granting of the Variance.

THE MOTION BEING:

BOWERS AYE

KACZOR AYE

LENNARTZ AYE

MATEER AYE

THE **MOTION BEING FOUR (4) IN FAVOR**, THE **MOTION TO GRANT** THE REQUEST **IS UNANIMOUSLY PASSED.**

There being no further business to be presented to the Board at this time Chairwoman Bowers adjourned the meeting at 8:06 P.M.

DATED: December 13, 2019

REVIEWED: December 17, 2019 Zoning Board of Appeals Rosemary Messina, Secretary

Kim Bowers, Chairwoman