

Town of Montgomery Zoning Board of Appeals Meeting
Held at the
Town of Montgomery Government Center
110 Bracken Road
Montgomery, New York 12549

November 16, 2020
Monday

7:00 PM

Present: John Fallon, Chairman
Georgianna Watson, Member
Darlene Provino, Member
John Cossa, Member
Robert Falk, Member

Also Present: Stephanie Tunic, Blustein, Shapiro, Rich & Barone, LLP - Town Attorney
Members of the Audience
Suzanne Hadden, Clerk

Agenda

7:00 PM Planning Board Interpretation/ Appeal of
Building Department's Determination regarding
Butler Construction - Dunn Road - Public Hearing

7:00 PM Redner - Smith Lane - Area Variances - Continuation of the Public Hearing

Approval of the October 19, 2020 ZBA Meeting Minutes

Chairman Fallon called the meeting to order.

Planning Board Interpretation/ Appeal of Building Department's Determination regarding Butler Construction - Dunn Road - Public Hearing

Chairman Fallon opened the Butler Construction Public Hearing and read the hearing notice into the record.

Richard Hoyt, Attorney for the Town of Montgomery Planning Board - Here on behalf of the planning board of the town, I don't know if your board has seen the proposed site plan. He displayed the site plan. I am here with Vice Chairman James Beaumont and Board Member Cheri Zahakos. This property is located on Dunn Road, the Frank Hoeffner farm is here, the Orange County Airport is here, and Route 211 is here. It is an 11-acre parcel, it is behind that old farmhouse that Mike Aiello Jr. fixed up. You go down Dunn Road, on the right, there is a restored farmhouse, that is right here. This lot is vacant and one of the issues is, there's a 30,000 square foot building proposed. There are about 7-acres of outdoor storage here and as I will develop in a minute, the planning board felt that the zoning in this area, it is I-1, Industrial Park. It is not I-3, which is heavy industry, it is not ID, which is interchange, it's I-1, just like Bracken Road. Bracken Road is I-1, and it is our position that the I-1 Zone was intended to be a cleaner industrial zone, if you will. Office Park, trying to replicate Westchester and that this would be absolutely permissible in the heavy zones. A majority of the planning board's position, that the I-1 is not where you want to have the outdoor storage and what happened is the planning board was unclear about what the applicant wanted to do, so we asked them for a narrative; it is attached to our appeal. Let me just highlight and this is from the applicant's engineer. We asked him, what are you going to put here because the plans just say outdoor storage and this is attached to the appeal; July 31st, 2020, Engineering and Surveying Properties letter. Twenty dump trucks, six tractor/trailers, 10 trailers for hauling materials, 20 miscellaneous trucks, such as pickups, over 30 pieces of construction equipment vehicles, such as excavators, bulldozers, loaders, backhoes, rollers, and sweepers. Storage of equipment, 18- conex boxes. I have to admit, I don't quite know what a conex box is, but I'm going to speculate it is one of those storage boxes, 4 offices, 4 site trailers. Don't forget this outfit is in the business of construction performance, so they need to bring a trailer perhaps to a job site and then traffic control equipment including approximately 500 barrels and cones. In addition, there will be the occasional need to stage materials. Construction materials such as pipe, catch basins, manholes, may need to be stored in the yard until the construction site is able to accept delivery. We understand a lot of these construction sites, they can't get all of this on the job site until they are ready to have it and then it has to get mobilized. So, that is kind of the setting. We are here because a ruling was made back on June 25th. Our Code has two definitions, one is a contractor office and storage and the other use is the word contractor storage and equipment yard and it is the planning board's interpretation, which they really are not allowed to do, which is why we are here. First the building department, then the ZBA, the planning board can't interpret the Code and then again, that's why we are here. The planning board recognizes that, but the planning board believes, if you look at the definition, the one says indoor and the other says outdoor and indoor is clearly allowed in the I-1, we believe. Outdoor, we believe is not allowed in the I-1, it's allowed in the 1-3, the 1-4, and in the ID. Again, the emphasize on storage.

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Mr. Hoyt - It has also been said by the building department that this use here is accessory to the principal structure and we submit that it is the opposite. This is about 7-acres and the building is only three quarters of an acre, 30,000 square feet. It is our position that this can't be accessory to this structure because the Code defines accessory as subordinate to the primary use, subservient, incidental to the primary use. If this were much smaller, I don't think we would be here. Every contractor we recognize has some equipment they need to store outside. I think it is the scale here, with the outdoor storage of 7-acres, totally dwarfs the structure and again I'd refer you to our appeal, we cite the definitions. The planning board thinks it is pretty clear, the use indoor on the one and outdoor on the other. The indoor use doesn't mention yard, and the outdoor use doesn't mention building. So, we think the drafters had it in mind that the I-1 should be basically indoors and not outdoors. Now, there is another section Mr. Farr cited, the site plan section, where it says that outdoor storage is allowed and regulated by the planning board. It is our belief that that site plan clause only applies where the use underlying is permitted. A site plan, we don't think can fill a void and if it is allowed on a site plan, suddenly it's allowed in the Zoning. We think that site plan section, 140-50-33, is only for uses that are allowed and then it allows the planning board to massage the storage screening, landscaping and typical things to occur. It is pretty simple actually, the board needs to look at the definitions, decide for itself what the plain meaning of the words used. I think you all know from past experience, really not allowed to put in words that aren't there or try to make it fit. The drafters of the Code, they probably knew what they were saying when they said indoor or outdoor, but that is for you to determine and certainly if the town board, with all the comp. plan review that is happening, believes that it's important to change this and allow these uses in the I-1, that would be completely fine and within their prerogative. It's our position though, that that's not what the Code says and if the town board wants to change it, they certainly could. A little bit of background though, just to help you with your decision, we did a little research and I'll pass out tonight and here's a copy for Mr. Farr. What we thought would be informative and it was helpful for me because although I've been for the town for more than a year or so, I didn't sit down and calculate the acreage in the town. If you look at the memo, the Town of Montgomery has about 30,000 acres of land outside of the three villages, by the way, this all came from the Town's Comp. Plan, dated from April of this year, so it is pretty current. The total lands zoned residential, 72% of the town, 21,500 acres. All the commercial zones are about 8,300 acres or 27.7 % of the town. Of that 8,300 acres, 2,700 of it is the I-1 or I-2 throughout. I think I said before, Bracken Road right here is I-1. A lot of the land around this property is I-1, there is quite a bit of I-1 around the town, more than I thought. What I've also attached is an excerpt from the 2010 Comp. Plan, which kind of talks about the three different types of industrial districts. The I-1 and I-2 and again I-2 is only major access, so the uses are similar. Then you have the B4, the IB, the OP and the OB, kind of transition zones, then you have the I-3 and I-4 and ID and those are what we call the heavier zones and again as I mentioned before, this use would certainly be allowable in the heavier zones. The question is, is it allowed in the I-1? And that is for the board to determine. In conclusion, if the town board decides to change this, that's their prerogative.

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Mr. Hoyt - The issue is, we have a determination that will apply to all the I-1, I-2 acreage in the town, which is as you can see is 2,700 acres of which almost 1,300 remain vacant as we speak. A little footnote to that, the Medline property is I-1 and that 100 acres probably is included in this as vacant and as we all know that 100 acres should probably come out. This is April data and here we are in November. The bottom line is, the planning board believes the bar should be raised in the I-1 and we believe or the majority of the planning board believes that with this proposal, if this goes through, in effect you have set the zoning rules for the entire I-1, I-2. I don't know how town officials would feel if this kind of facility were built right next to this building, that's for you to determine. Lastly, accessory use, the last issue used here, and again I mentioned it before, we don't see how this could possibly be named subordinate or incidental to. We think this is absolutely the primary use and the building is not an afterthought, but if anything, the building is accessory to the storage. So, that is our presentation, if you have any questions, I would be happy to answer.

Chairman Fallon - Were any of the member of the planning board for this proposal?

Mr. Hoyt - Yes, the vote was four to three, so it probably couldn't be closer. Four voting in favor of the appeal, actually at the special meeting, because the time of the 60-days was almost expired, the four members that voted yes, all attended the special meeting and the three members who had indicated that they didn't want to vote yes, declined to attend the meeting. So, the record vote was four to zero, but in fairness it would have been four to three, had all seven members shown.

Chairman Fallon - Were all given ample time to show up to the meeting?

Mr. Hoyt - Yes and as a matter of fact, we took a straw poll because there was no point in bringing planning board members out to a special meeting, to have the vote be not to appeal because obviously by default if there wasn't an appeal, then it just wouldn't have happened. It was done by email, and I kept a score card as I joked with the members and we knew where it was going and had the special meeting, literally at the 59th day. I think it is a 60-day window to appeal Jim's decision.

Attorney Tunic - Is this a general construction company.

Mr. Hoyt - I can't tell you much about Butler, I can tell you they are located presently right at the gateway to the Village of Montgomery, at 211 and 416. If you look to the right as your coming to that yield sign heading north to the village, they are the facility on the right. What's interesting is that parcel is in the Village of Montgomery and you would think it would be in the town because the village line bobs around there, but Butler is where Art Marcinak used to be, but that is Butler right now and that is all I can tell you.

Chairman Fallon - Any idea how big of a piece of property that is?

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Mr. Hoyt - I can't tell you that, I'm sorry I don't know.

James Farr, P.E. Town Engineer and Building Inspector/Code Enforcement Officer - To answer Stephanie, they are a general construction company, primarily doing site work. Water, sewer, roads, subdivisions; that's primarily what they do. So, for heavy equipment type, trucks, bulldozers.

Attorney Tunic - It was essentially indicated by the letter that was submitted by them, that they are holding bulldozers and construction trailers. Is the intention to have this all paved, that yard?

Mr. Hoyt - They just show us kind of a legend and I'm not sure if they give us a legend. I can tell you they have accented gravel, employee parking area here, which is why I didn't high-light that. In fairness to them, they claim that is going to be parking here, so I can't tell you the surface.

Chairman Fallon - The Hoeffner farm is up at the top of that?

Mr. Hoyt - Yes, the Frank Hoeffner farm, not to be confused with the Goodwill Road Hoeffner Farm, that acreage is here and of course the Hoeffner's sold a piece to the County to expand the County runway, but the Hoeffners still have 80 to 100 acres; also I-1 next to this property.

Chairman Fallon - Does that run along Route 211?

Mr. Hoyt - No, this key map may help you. He showed Chairman Fallon the location of the site on the provided site plan.

Attorney Tunic - The building proposed is proposed as their main offices, or for servicing vehicles? Have they indicated anything on that?

Mr. Hoyt - I assume that it's their main base of operation. By the way, the planning board has approved contractor's facilities in the I-1, and it is recognized that every contractor has a few vehicles. There is a cable company up on the end of Ridge Road, which was recently approved, and they had a couple of cable trucks and that was deemed to be accessory. Let's face it, every contractor has vehicles and or materials, I think it is the scale here that caused some concern.

Attorney Tunic - In your opinion, in terms of the planning board, what would be a permissible accessory use range for this use?

Mr. Hoyt - I think per the Code the accessory use has to be subordinate or incidental and I believe the word incidental is right in the definition to the primary use and again, but if there was some modest showing of an area to store some normal contractor vehicles.

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Mr. Hoyt - I think the issue here is, this isn't really your one man show contractor, plumber, carpenter, electrician, they all have a couple of trucks and maybe some vans. Butler's in the business of supplying construction services to the real world and they need a place to store all of their stuff and they were very honest in their July 31st list of exactly what they are going to do here. When I read the list and when the client read the list, it was even more than we had expected, which is why the planning board asked for the narrative. What are you actually going to do here? And they were very forthright, and that's attached to the appeal. The last thing, in the memo I just handed out, the very last page is the Zoning Table. I tried to highlight because the two uses are back to back, 70-10 E3 and 70-10 E4 and you have to go to the definitions section, which is attached to Jim's decision. So, you don't even need your Zoning Book, it is all here and read for yourself and make your own conclusions, but the E3 and E4 uses, one is allowed in the I-1 and one isn't and we think that's consistent with what we have been saying, but again that is for the board to determine. By the way, we believe reasonable minds can differ, this has nothing to do with Jim or his capabilities, this is just reasonable people can disagree and that is why you are here.

Chairman Fallon - Would anyone like to be heard from the audience?

Walter Lidner, audience - I'm a trustee in the Village of Montgomery and on behalf of the Village Board and Mayor Brescia, since we are a very interested party and the current Butler facility is as you mentioned the gateway into our village, not a particularly attractive gateway into our village and so we are very much in favor of the Butler operation moving to Dunn Road and there it would also be abutted to other village properties because there is village business right next to it and then behind it would be those businesses of properties. I believe Mayor Brescia has met with the Butler ownership and they have assured him that they would put in fencing and trees and whatever behind it to protect it from the property directly behind it. Again, on behalf of the Village Board and the Mayor, we are very much in favor of this property moving from its current location over to Dunn Road.

Chairman Fallon - And they wouldn't be using the property that they currently use?

Mr. Lidner - My understanding is they would not, they would be putting that current property up for sale and we have also talked to the Butlers about, we would be rezoning that, because it is currently an I-1 Zone, which really doesn't fit with what's coming in to the side of it. It is more residential, and we are looking to rezone that once they have moved.

RJ Smith, audience - I'm here on behalf of the property owner, Mike Aiello and as Mr. Hoyt has said there are two definitions, two use proposals permitted in the respective commercial zone and two definitions. The first one is contractor storage and/or equipment yard, outdoor storage varies for vehicles, equipment and materials used by a contractor in the conduct of their business. It does not say you need an office; it does not say you need a shop.

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Mr. Smith - You can have one acre, two acres, ten acres, twenty acres of contractor storage of just equipment out there, that is permitted in the B1 Zone, the B4 Zone, the IB Zone, the ID Zone the I-3 Zone and the I-4 Zone. In fact, in the I-3 Zone and the I-4 Zone, it does not even require a use permit, just a site plan approval. In the other four zones it requires a use permit. Where are those zones? The vacant land next to Shoprite, the outdoor storage of construction equipment. The land next to the high school, the chiropractor's office down to the high school, that is zoned B4, it's permitted. Next to Lake Vue, land across the street from Lake Vue and immediately adjacent to Lake Vue, is zoned B4, that's permitted. The entrance of Walden and 208 next to what was Wickes, that would be permitted there. Coldenham Road and 17K, all the way up and down Coldenham Road is zoned for that. Walden leaving Route 52, both east and west, down towards Amthor's and beyond and going west on 52, outside contractor's storage yard is permitted. Allard's Corners, 52 and Albany Post Road, we just saw a tremendous eyesore of trucks in the old Plymouth dealership and Corvette Specialty was purchased by a landscaper and cleaned up very nicely, but it is permitted there, permitted up Albany Post Road both ways and that is permitted there. Route 208 between Walden and Wallkill, if you go out of Walden heading towards Wallkill you can have a contractor's storage yard. Neelytown Road and Route 211 heading towards Middletown, Route 211 south from the airport down is going such that an outdoor storage yard without an office, without a shop and without any buildings, you could fence in 10-acres and have contractor's storage, that is permitted. The second definition is contractor's office and storage, building designed for a contractor office area with indoor storage of material supplies and vehicles including services of contractor's vehicles, that's permitted in the ID, the I-1, I-2 and the I-3, that's Neelytown Road, Bracken Road, Stone Castle Road, a section of Borden Road, Route 208 from Walden to Wallkill, Route 416, Dunn Road, which is the subject and Route 211. The opinion of the Zoning Officer was that the outdoor storage is an accessory use. The applicant or petitioner in this case have said that they have previously approved outdoor storage for a contractor in the I-1 Zone and it's a question of dimension, question of size. On accessory use, if you have a swimming pool, accessory use doesn't mean you can only have a small swimming, you can't have a larger swimming pool and as far as being the dominant use, the building is about 3 million dollars, the storage use is a couple hundred thousand dollars. So, the primary use is the building, that's a huge shop, a huge corporate office and a local contractor who is literally moving a half a mile to maintain and grow his business. We maintain there is some flexibility in the zoning, it is not intended to be... and the question is what's the purpose of the challenge? As Rich suggested not to prove the Zoning Inspector wrong. Is it to deny a local business the opportunity and right to expand locally? Or is it to preserve the integrity of the Zoning Ordinance. Clearly there are some deficiencies in the Zoning Ordinance because if we don't go at Dunn Road, we might go on Hawkins Drive next to Shoprite or we might go next to the high school on that property on this side of 17K that runs from the back of the high school all the way up and there are signs on there now you can see them. We might go on one of those two locations as opposed to going on Dunn Road, down behind Romers, which is allotted outdoor storage tucked in, totally invisible on a dead-end road would be appropriate to be located. As a petitioner I have said you will not find a contractor's office and shop that does not have exterior storage of equipment. Even the smallest contractors have trucks, vehicles that they don't park inside, they park outside.

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Mr. Smith - An electrician has a boom truck he parks outside; a bigger contractor has more equipment. Outdoor storage is an accessory use to a contractor's office and that was the determination of the Zoning Inspector. Obviously, there are some deficiencies in the zoning because I don't think that it is the town's intention to have a contractor storage yard next to Shoprite on Hawkins Drive, or next to the high school on 17K, or in Coldenham or on Allard's Corners; I don't think that is the intent. The intent is to have it at places and lastly the use of outdoor storage as an office and a shop, an accessory use in that use where if we go to as is being argued here, we go to Hawkins Drive and we design on the 9-acre parcel that we have there, that backs up to 84 and Old Neelytown Road, we go to that site as a backup site. We are going to say that the primary use is a storage yard and the accessory use is, as has been suggested, is the office and shop, but conversely if that is good, why is not an office and shop, the primary use an accessory use being the yard? On behalf of the property owner, Michael Aiello, who is contracted to sell this to the Butlers, it is just a company that wants to expand. I think there is adequate flexibility in the Zoning, and you have the opinion of the Zoning Officer. You have a partial board on the planning board, for whatever reason has decided that this should be challenged and lastly, I think that this board and the planning board wants to say, hey listen, there's some deficiencies here comprehensive plan committee. We don't want to have a storage yard on Hawkins Drive or on 17K, or in Coldenham on 17K, that's not where we want it, we want it on Dunn Road, where it is out of sight and out of mind. Thank you.

Mr. Hoyt - If I just shortly in an inverse order, Mr. Smith is correct where this use is allowed around the town, but that is not what's before you or before the planning board. We are talking about this 11-acres and any other places in the town where this use could pop up, that's not an issue right now. You don't have an application. Regarding Mr. Linder's comment, all I would say is the towns aren't supposed to listen to objections from the public, nor from other municipalities. This Code is Montgomery's Code and I appreciate the village taking the time to come out and express their support for the project, but to a certain extent the village and it was admitted tonight, has an interest in seeing the Butler company leave that area, so it's not surprising that the board of trustees would be in favor of this proposal and they were quite honest tonight admitting that that's a wonderful piece of property for the village to rezone. It's a gateway to the village, I'm sure they would rather have the Butler facility in the town, kind of out of the way. Again, I would just say, this is a town zoning matter, not a village zoning matter and I would ask you to keep that in mind.

James Farr, audience - Building Inspector, I'm the one that made the zoning determination. Both of these gentlemen gave you a pretty good overview about what the two sides of the argument are. My opinion stays as it is, I think it is a permissible use in the Zone. I don't know why when they wrote the Code back when it was written that they had a differentiation between contractor's office and storage and contractor storage and equipment yard. To me it doesn't make a lot of sense because if you are going to have storage at some place you would probably have an office there too. I do believe that the equipment storage would be an accessory use.

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Mr. Farr - The Code does provide the planning board with a lot of leeway to restrict what kind of storage they can have, what type of screening they can have, how many trucks they can have, whatever the planning board wants to do, that is the planning board's decision to do. Also, this Zone does allow warehouses there. As we all know, we are all familiar with the warehouses here. All of the warehouses have outside storage, there are hundreds of tractor trailers outside all of these facilities and they could put a warehouse here, which would have as many pieces of equipment as the equipment that they are proposing to have. So, my professional opinion, I do believe this use would be permitted, subject to whatever stipulations the planning board wants to put on it, if you have any questions.

Chairman Fallon - You think this is a contractor's office with storage, is that what you are saying?

Mr. Farr - Yes.

Chairman Fallon - Then why are we here.

Mr. Farr - Because the planning board appealed my decision to the zoning board.

Mr. Hoyt - And again to reiterate, the definitions 30-20 and I ask you to read them again, they are attached to Jim's ruling.

Mr. Farr - The contractor's office and storage says buildings designed for a contractor's office area with indoor storage of materials and supplies and vehicles including servicing of contractor's equipment, however, it does not prohibit outdoor storage. There is also another definition for contractor's storage and equipment yards and outdoor storage areas for vehicles, equipment and materials used by contractors in the conduct of their business. I don't know and I don't pretend to know what the definitions of the authors were at the time. Typically, if you are going to have equipment stored on site, you are going to be conducting some type of a business. Typically, people don't store all of their stuff in one place and maybe you're a tree guy that we see that temporarily stores their equipment some place. Typically, they are going to have their equipment there, and you are going to have some type of an office there to manage your business. Again, I don't want to interpret why they decided on these two different definitions. I interpreted it the way that I see it, if you are going to have an office, you are going to have a storage yard, I believe the storage yard is accessory. I believe the section of the Code, 140-50-33 that allows for outside storage parking, allows the planning board plenty of latitude to do whatever type of screening that they would deem necessary. In the use if someone went out to a warehouse, or some of the other uses in the industrial zone, this isn't something that they are requesting in a residential zone or a business zone, this is in an industrial zone. Again, just my opinion, as Rich said, we have a difference of opinion on this and that is fine and that is why you are volunteering your time to be the arbitrators.

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Mr. Hoyt – Just to pick back up what I was saying before, the indoor versus outdoor, it's right in the definitions. One says indoor, one says outdoor. I don't think that was a mistake and the last point because Jim just brought it up again, our Code has a bunch of sections that says, if it is not allowed it is prohibited. So, to say that outdoor storage is allowed because it is not prohibited in that section, well that could be every section of the Code would have to say except the following uses are prohibited. No, the Code drafters took care of that in several places, it says what I said, that if it is not permitted, it is not allowed. So, I don't think the argument holds water, that because this definition says outdoor is not prohibited, therefore it is allowed. Heck, Zoning wouldn't mean much if that were to apply across the board, thank you.

Michael Aiello, Jr., audience – Owner of the property, here speaking as property owner and half for Butler Construction. They are not here, they are kind of exasperated by the whole process, but the issue of primary use versus accessory use. I can say that Butler Construction is bursting at the seams. I've gotten to know the guys, they don't have the garage space right now to maintain their fleet and their office building is a job trailer behind their facility, which as everybody knows by now is Artie Marcinak's old shop on 211 at 416. They need a new facility both for their office and for garage space for additional maintenance of their vehicles. It is to be determined, but I see that as a primary use, and they are trying to get the most benefit out of the remainder of the property as possible. Stephanie, you brought up if after will it be paved or gravel, surface will be gravel because if that were paved the post construction run-off would be too great to treat the stormwater run-off. They are going to make as much effort to reduce the amount of stormwater run-off as possible.

Cheri Zahakos, audience – I am a member of the planning board, but I wanted to speak to the resident and the importance of the words in our documents and I quote. Words matter, that the covenant between us, the applicant as well as the residence. Though we can't justify nor say why particular words were chosen or not chosen in our Zoning Law, it is law and words in law matter. The words indoor and the words outdoor are very distinct. The primary use versus an accessory use is also very distinct. Nothing says that in a storage yard in my mind and reading the book as a resident, that doesn't say you can't have a garage there, but what I do believe it clearly defines to me as I read the law, and long before I joined the planning board was where it showed you what could and could not be done. What has been given before you are a bunch of locations that are readily available for this business to approach, they are not limited in finite to this land, I would like to point that out. Also, that the positioning of these is not necessarily in anybody's hands, other than the town board when they make the zoning changes, should they choose to. I live in a residence, it's a beautiful residence with a school down the way and I have a warehouse coming outside my house. So, for people to stipulate well we don't want it here or we don't want it there, that's not of the issue. The issue is are we legally allowed in your zone. To be an accessory it means to me, to be a lesser component of. Yes, they want a garage there, they do want to repair in 30,000 square feet. The conex boxes they are talking about I believe are shipping containers, those are very large. What are there 40 of them in the list?

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Mrs. Zahakos - There are over 108 pieces of property and I think as a resident, I would stand here and ask you to think, would business be a business without this machinery, without the use, because that is the business. The business isn't in the garage, the business isn't just the bookkeeping. I believe the business is when you look at it, it is the construction business and without the equipment they cannot be that construction business as they are. So, to determine what is accessory or what is a majority, I think that is part of what is the question before you this evening and to me words are a covenant. Words matter, you can't read into things the way you wish. I think of this even as myself coming before the board and trying to deal with this. It is what it is, there are I-1 Zones with permissions, there are I-2's, I-3's, I-4's. I-3 happens to be across from me, I get a warehouse. The very fact that all those locations were pointed out, it is up to you to determine what is accessory and what isn't, and I think that is what is before you. What do those words mean and do they mean anything? I thank you for your time.

Chairman Fallon - Is there anyone else who would like to be heard? Hearing from no one he asked were there mailings on this?

Clerk Hadden - I gave them to Stephanie, I did them.

Attorney Tunic - The mailings are all set.

Chairman Fallon - Would any of the members like to look at this property?

All members were familiar with the property and did not want to do a site visit.

Chairman Fallon - Is there a motion to close the public hearing at this point?

Member Cossa motioned to close the Planning Board Appeal of the Building Department's Determination Public Hearing, seconded by Member Provino. All in favor, all ayes, motion carried.

Redner - Smith Lane - Area Variances - Continuation of the Public Hearing

Chairman Fallon - You saw the letter from the town, right?

Stanley Redner, applicant - Yes.

Chairman Fallon - Did the tax assessor come out and look also about whether it is already a five- bedroom apartment?

Mr. Redner - No, I went over to the assessor's office because the original assessor's card said it was a five-bedroom, one bath house. I bought it a few years ago as a three-bedroom, two bath house. I went over to the assessor's office and I spoke with them and they came over and spoke to Walt as well and they are going to switch it on my card, but they said they won't have anybody come out because of COVID. They said they won't go into the house. So, they are going by when I originally bought it, it was a three-bedroom, two bath house, so the cards never been updated from the original card.

Member Falk - How did we go from five-bedrooms to three-bedrooms? Where's the discrepancy there? I don't understand that.

Mr. Redner - I don't know when it got switched.

Member Falk - It switched; it originally was listed as a five-bedroom house?

Mr. Redner - Yes, not when I bought it. I didn't know anything about the assessor's card when I bought it. When I bought it, it was listed as a three-bedroom, two baths.

Member Falk - How are the bedrooms broken down, downstairs verses upstairs?

Mr. Redner - There's one upstairs, two downstairs. On that assessor's card it said it's a one and $\frac{3}{4}$ floor house.

Member Watson - It was five-bedrooms originally and they were supposedly there?

Mr. Redner - I have no idea how they got five-bedrooms there in the house the way it is laid out. There are not five rooms with closets in them that are bedrooms, I'm not sure.

Member Watson - If they all have closets, does that make a difference whether it's a bedroom or not?

Redner - Smith Lane - Area Variances - Continuation of the Public Hearing

Mr. Redner - I don't know how they were broken out originally because I didn't see the layout. I would think they would have had two upstairs because there are only two rooms that you could have a bedroom in and there would have been three downstairs and one of the rooms is the kitchen room to the house that they would have considered a bedroom. Right now, there are only three rooms that have closets that I would consider bedrooms.

Chairman Fallon - Have you consulted with any architect or engineer?

Mr. Redner - Yes, they said in order to do an accurate reading I would have to rip all of the ceilings out on the first floor so they could see all of the ceiling joists. Right now, I am just trying to refinance the house and put a roof on it, I don't have money to rip everything down. My feeling is too, the second floor was there, it is not like I added anything to the second floor.

Member Falk - What was the second floor being used for before you had your cousin move in?

Mr. Redner - I used it for storage. It was just my son and I who lived there before that, so I didn't use the second floor for anything.

Member Watson - You're not closing off the entrance to the second floor permanently?

Mr. Redner - No, I'm not going to take the stairwell out or anything, I just want to block it off to give him privacy.

Member Watson - That's not really a two-family type setup if you don't take the access to them both, where you can access both floors.

Attorney Tunic - They're not separate accesses, meaning when you enter your dwelling, is there one door for both of the upstairs and the downstairs?

Mr. Redner - No, upstairs has an outdoor access.

Attorney Tunic - So, it does have a separate access.

Mr. Redner - Yes, and the first floor has two accesses.

Member Watson - But if you're inside and you use the stairwell that he wants to close off, you could really go up without going outside.

Attorney Tunic - If he didn't close it off.

Chairman Fallon - If you weren't seeking to close it off, you could continue using the property as you are using it?

Redner - Smith Lane - Area Variances - Continuation of the Public Hearing

Mr. Redner - Yes, basically if this doesn't go through, they won't refinance because of the stove upstairs and since the assessor already has seen the stove upstairs, she said she cannot see it now. So, if it doesn't go through, I am just going to rip the stove out and leave it as is.

Chairman Fallon - Because one of the problems is, the building department is saying it may not meet the code heights and everything.

Mr. Redner - The ceiling height meets it, but the one window does not.

Chairman Fallon - And also the septic system.

Mr. Redner - That's what I don't get either because if it was originally assessed for a five-bedroom house, that would be five occupants there. Now there are only three occupants, so it should be less sewer being used and one of them is a ten-year-old kid, that is only there half of the time.

Chairman Fallon - The other thing is that it is three times the size of what is allowed by the building.

Mr. Redner - Honestly, I wouldn't even have my cousin upstairs, but with my heart transplant and everything I need help around the property. It's not big, but it is still cutting grass and everything.

Member Cossa - Part of the problem we run into, you have your situation, which would be wonderful for us to help, but then what you are asking for adds to the property and that is where we are caught, that's the problem. If this was just for you and that was it, it would be a different story, it doesn't work that way unfortunately.

Chairman Fallon - When you bought the property, was the stove upstairs then too?

Mr. Redner - No, I put that up there so he could cook and everything because he was coming down and using mine all the time.

Chairman Fallon - But the second bathroom was there, that is upstairs?

Mr. Redner - Yes.

Member Watson - The gas line to hook up the stove was there, right?

Mr. Redner - No, I had a plumber come in, my buddy's a plumber, he came in and put it in for me and I even had Chris from Chili Gas, he came over and looked at the line before they put their tanks in and he said he saw nothing wrong with it.

Chairman Fallon - So, you are not going to get an architect or an engineer then?

Redner - Smith Lane - Area Variances - Continuation of the Public Hearing

Mr. Redner - I think I am going to have to get a building permit, Walt said, or something from the building department also. I've got to get somebody over there to see what they want to do because I called up one of the architectural engineers in Middletown, they said you are going to have to rip down the ceiling. If it comes to that, I am just going to scratch this whole idea because it is sheetrock and dust, I can't have that in my house anyway.

Member Falk - What you are proposing as a permanent setup. If you're going to block that stairwell off, you're not going to throw something on the floor, you are going to have to have somebody draw up a set of plans and it is going to have to meet Code. Is it really worth going through all of this? I understand you want your cousin to have some privacy, but it seems like every time you make another move, you are opening up another can of worms.

Mr. Redner - The way I look at it is it's stairs, it's an access that comes through the floor. It's 2 by 8's in the ceiling, I was going to frame it out with 2 by 8's put 5/8th's plywood on it and carpet over top of it.

Member Falk - This is going to be a permanent situation though, you are not just doing this to help your cousin out, while he helps you around the house. This is going to be basically a two-family dwelling is what you are going to end up with.

Mr. Redner - Yes, but it could be taken out because I'm not sheetrocking the stairwell underneath, it's only plywood and 2 by 8's. It's not like I'm pouring a floor on top of it or anything.

Chairman Fallon - Does anyone else have any questions? Hearing from no one further, he asked for a motion to close the public hearing.

Member Cossa motioned to close the public hearing, seconded by Member Watson. All in favor, all ayes, Member Provino as recused, motion carried.

Redner - Smith Lane - Area Variances - Decision Discussion

Member Provino is recused from this application.

Chairman Fallon - Do we have a motion to approve or disapprove Mr. Redner's application?

Attorney Tunic - I can read the factors for the board to consider. Take into consideration the benefit to the applicant if the variance is granted as weighed against the detriment to the health, safety, and welfare of the community by such grants and making such a determination, the board shall also consider. One, whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the area variance. Two, whether the benefits sought by the applicant can be achieved by some other method feasible for the applicant to pursue, other than an area variance. Three, whether the requested area variance is substantial or whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and Five, whether the alleged physical need was self-created, which consideration shall be relevant to the decision of the zoning board of appeals, but shall not necessarily be the granting of the area variance. Do you want to go through one through five, as to what the board feels?

Chairman Fallon - Yes, let's go down each one.

Attorney Tunic - Whether an undesirable change will be produced in the character of the neighborhood or nearby properties.

Chairman Fallon - It's a sub-sized lot to start off with.

Attorney Tunic - To remind the board, there are two variances for this application. One would be for the lot's width and accessory dwelling permit, which is what Mr. Redner is asking for. It will require a minimum lot area of 87,120 square feet and a variance of 59,495 square feet is required. He is on a 27,625 square foot lot. The area variance is about 59,495 square feet.

Chairman Fallon - That is fairly excessive.

Attorney Tunic - So, we feel it is substantial.

Chairman Fallon - Plus the accessory use he is seeking, that's the second variance.

Attorney Tunic - The Town of Montgomery Code has it as an accessory dwelling unit is to equate 33.33% of heated living space of the primary residence. So, in this case it is becoming 699 square feet, he is seeking the 846 square foot accessory dwelling unit, meaning that 147 square foot variance is required.

Chairman Fallon - That is excessive also.

Redner - Smith Lane - Area Variances - Decision Discussion

Attorney Tunic - Both being substantial. Mr. Chairman would you say that you feel that the substantial size would create a detriment to the neighborhood?

Chairman Fallon - Yes, this is all on Lake Osiris, so yes.

Attorney Tunic - Can the benefits be achieved by some other method useful to the applicant?

Chairman Fallon - Yes, he could.

Attorney Tunic - Meaning somebody is already living there.

Chairman Fallon - Apparently his reason for it is to get a mortgage, it won't affect the living situation that exists there now.

Attorney Tunic - The bank is requiring that he gets the variance?

Chairman Fallon - No, the bank waived because they see a stove on the second floor and is saying that it has to be a two-family house.

Member Falk - He is trying to cure violations here.

Chairman Fallon - He is not supposed to have a second stove in the house.

Attorney Tunic - I understand that, I didn't realize he was here because of an order to remedy.

Chairman Fallon - As an order to remedy, it's an order to get some money. There is nothing wrong with him wanting to get a mortgage with interest rates what they are, but the problem is when the bank's appraiser came there, he saw the second stove and that means something to the appraiser.

Attorney Tunic - We already said it was substantial and will have an adverse impact on the physical or environmental conditions in the neighborhood or district.

Chairman Fallon - I just think it creates an unhealthy situation or having a variance of that size, both on the size of the property and the size of the dwelling.

Attorney Tunic - Also, because of the concern with the septic to handle it permanent.

Chairman Fallon - And whether it meets the building code for the windows and what have you.

Redner - Smith Lane - Area Variances - Decision Discussion

Attorney Tunic - Unfortunately for Mr. Redner even if his variance were to be granted at this time, it doesn't look like he would be able to get a building permit because he does not meet Code at the top level.

Chairman Fallon - No.

Attorney Tunic - And lastly, whether the alleged difficulty was self-created?

Chairman Fallon - Yes.

Attorney Tunic - He admitted to putting the stove in.

Chairman Fallon - Yes. Is there a motion to deny the application?

Member Cossa motioned to deny the Redner application requesting two Area Variances, seconded by Member Falk. All in favor, all ayes, Member Provino as recused, motion carried.

Planning Board Interpretation/ Appeal of Building Department's Determination regarding Butler Construction - Dunn Road - Decision Discussion

Chairman Fallon - In regard to Butler Construction.

Attorney Tunic - Did somebody say they wanted to view the property first?

Member Watson - I did, but no.

Attorney Tunic - There was new information by memo presented to the board tonight, so if the board does need time to do a review or confer with counsel, that is always an option.

Chairman Fallon - The problem that I have is that the applicant is saying it is two different things, one of which is permitted and one of which is semi-permitted.

Attorney Tunic - Which one?

Chairman Fallon - The first is the office with indoor storage.

Attorney Tunic - You mean it's permitted because it is a special exception?

Chairman Fallon - Yes, so then the question is, are we to assume because it says indoor storage, that it does not mean outdoor storage? Because if it is the contractor storage, it isn't permitted. So, basically the building inspector is taking the interpretation that indoor storage doesn't exclude outdoor storage and the planning board is saying indoor storage means indoor storage and not outdoor storage.

Member Watson - If it says in I-3 and I-1, it says two different things, one's indoor and one's outdoor, and if it were all the same, why would they have a statement that says one word, indoor and one with outdoor? They are saying the other part of it is lesser than the indoor area. If it is in an I-1, then it changes what I-1 is, but if it affects all of the other I-1's?

Member Cossa - They are right, the deficiency with the Zoning, but that's not for us, if the town wants to change that, they can change that, but as it stands now, you use the phrase the way it is. I think the planning board, their concern was, not so much that there was some outdoor storage, but it was the size of the situation.

Member Provino - And I think that it was between whether the accessory use, that storage on the property is accessory to the building.

Attorney Tunic - Right, and that is exactly the interpretation, and that is why they have to refer to you because it is not differentiating the factor, that is Code interpretation; if it would make a difference of a smaller scope.

Member Provino - Regardless of whatever business is there, there's going to be not necessarily equipment, but there is going to be cars, whether it's one person and equipment.

Planning Board Interpretation/ Appeal of Building Department's Determination regarding Butler Construction - Dunn Road - Decision Discussion

Attorney Tunic - Would it help the board if I work with the building department to develop a scope of what's there, to see if there are other construction yards and their relativeness size compared to the offices that are there? So, you could have a feel for what the Zone is like currently?

Chairman Fallon - That might be good if there are other contactor's offices.

Attorney Tunic - I'm not per se familiar and also in relation to the other industrial zones where equipment yard is allowed to see if there is anything. I can develop that, make up a list for the board for the next meeting. There might be nine or this may be a case of first impression, in which case that is fine and then the board would understand that this determination would then hold water for every other application that would be asking and would come in, to an extent. Obviously, everything is fact specific, but that's how interpretations always work. It can be applied and certainly argued to be applied to other applications. So, if you want to see what's there to get a feel for the Zone to see if this type of use as proposed would be appropriate there in comparison to what is already there; you can do that.

Member Watson - Would that also show if there were others there in violation of this?

Attorney Tunic - Yes, that gets tricky and I wouldn't look at it for that reason and I'm not going to go around with the building department to do inspections or anything like that.

Member Falk - You mean to see if there are other similar instances like that in the I-1 Zone sections?

Chairman Fallon - Basically, they should be treated fairly if it has been allowed elsewhere. On the other hand, if it hasn't been allowed, if we allow it here, then we are allowing it every place; that's the problem.

Attorney Tunic - As Jim was saying, some of the warehouses that are coming in are allowing extensive vehicle storage and if that is true and if that can be comparable, that might affect the board's decision.

Mr. Smith - If I may, I think Jim's point was, Medline is in the same Zone and it will have about 700 trucks parked on their property at any given time. How is that different? That is what Jim's point was. An example would be Smith Brothers on Albany Post Road, the contractor there has big pump machines, and racking machines for concrete and there is outdoor storage and that is in a B4 Zone and that is where outdoor storage is permitted, but it doesn't permit the office there or the shop. The office and shop are an accessory use to the outdoor storage.

Chairman Fallon - The thing is there is not necessarily a consistency of why somethings are allowed. For a contractor, the B1, the B4, and two interchanges and General Industry, for some reason just the I-1 and I-2 they wanted to keep free of contractor storage.

Planning Board Interpretation/ Appeal of Building Department's Determination regarding Butler Construction - Dunn Road - Decision Discussion

Attorney Tunic - I haven't had a chance to read the section of the Comprehensive Plan, which might be of help to the board.

Chairman Fallon - The Comprehensive Plan is going to be discussed Wednesday, so I can get an idea from that what they want.

Member Falk - What are they going to be looking at John?

Chairman Fallon - Doing the whole Comprehensive Plan for the entire town.

Attorney Tunic - I don't think the future consideration would be applicable to this application as it is today, unless they were to change Zoning tomorrow.

Chairman Fallon - No, it is not going to be changed immediately.

Mr. Smith - Just another example, Russin Lumber across the street is in I-1, outdoor storage of construction equipment, piles and piles of wood are loaded to delivery trucks.

Chairman Fallon - It seems to me that if we find that that is the case, that is better for you. Why don't we put it off for a month?

Member Falk - Not that it is really relevant, but I didn't realize the equipment being stored as you get into Montgomery is the same contactor, but I have looked at the site and it certainly would behoove everybody to get that back where they are proposing it. It would be out of sight, and you don't see it as you come into the Village. I can understand the Village's take on it, but their hands are tied.

Chairman Fallon - As long as it is in an industrial zone in the Village, and I think they are trying to develop that area right next to it to residential and retail.

Member Falk - So, what are you proposing Steph, to look at other locations in the area to see if they have been consistent with what they are proposing?

Attorney Tunic - Right, so the board can properly gage whether or not, as the planning board claimed tonight whether or not this site plan as proposed would actually be intensifying this particular Zone or whether it has been an accepted practice within the Zone. Because I think Planning Board Attorney Hoyt was explaining, as I understood it, the Zones in his memo, B4, IB, OP, OB, I-3, I-4, ID, has been used as intensified industrial zones, for the board to be able to gage whether in fact how it has been applied. Our next meeting is December 21st.

Chairman Fallon - I think if we are leaning towards granting it, I think we are much better off having proof that this is being allowed throughout the town, so that we are not just creating something for one particular person.

Planning Board Interpretation/ Appeal of Building Department's Determination regarding Butler Construction - Dunn Road - Decision Discussion

Attorney Tunic - I do believe that is a valid consideration to see what has been allowed in the past.

Chairman Fallon - Is there a motion to adjourn our decision for this matter until December 21st, our next ZBA meeting?

Member Cossa motioned to adjourn the decision for the application of the planning board's appeal of the building department's determination regarding the Butler Construction application, to the next ZBA meeting, seconded by Member Watson. All in favor, all ayes, motion carried.

Mr. Smith - I have no objections and we are happy to help you identify some of the...

Chairman Fallon - We would be happy to accept it.

Mr. Smith - And I do think there are some deficiencies that the Comprehensive Plan could look at, because obviously you don't want to have this business on Hawkins Drive where it is permitted and you don't want to have it next to the high school; there are some deficiencies in the Zoning Law.

Member Falk - Two wrongs don't make a right, but if there have been other instances where something similar has been approved.

Chairman Fallon - What you are doing though is proving that if we turned it down and you came before us for a variance, there are so many other properties they could go to that we couldn't grant you the variance.

Mr. Smith - Yes, probably there are lesser intensive zones, the B1 and B4.

Approval of the October 19, 2020 ZBA Meeting Minutes

Member Cossa motioned to accept the October 19, 2020 ZBA meeting minutes as presented, seconded by Member Watson. All in favor, all ayes, motion carried.

Member Provino motioned to adjourn the meeting to December 21st at 7:00 p.m., seconded by Member Watson. All in favor, all ayes, motion carried.