

**RUSH ZONING BOARD OF APPEALS  
REGULAR MEETING  
MINUTES OF AUGUST 6, 2013**

A regular meeting of the Rush Zoning Board of Appeals was held on August 6, 2013 at the Rush Town Hall, 5977 East Henrietta Road, and was called to order at 7:00 PM.

**BOARD MEMBERS PRESENT:** Don Van Lare, Chairman  
Robert Weiler  
Amber Corbin  
Kelly Pruden  
Garry Koppers  
Pamela Bucci, Town Clerk  
John Mancuso, Town Attorney

**OTHERS PRESENT:** Dan Woolaver, Town Board Liaison  
Cathy Frank, Town Board Member, Resident  
David Sluberski, Resident  
Richard Updaw, Resident  
Julia Lederman, Conservation Board, Resident  
Kathryn Hankins, Resident  
Lee Hankins, Resident  
Jordan Kleiman, Resident  
Brian Eadie, Resident  
Carol Barnett, Resident  
Beth Hoak, Resident  
David Manning, Resident  
Karis Manning, Resident  
Patti Stewart, Resident  
Michael Stewart, Resident  
Marianne Rizzo, Resident  
Douglas Dumbleton, Resident  
Jayne Dumbleton, Resident  
Randel Lewis, Resident  
Sharyl Lewis, Resident  
Robert Turner, Applicant  
James J. Bonsignore, Attorney for Applicant  
Chris Giordano, Resident

Chairman Van Lare welcomed all to the August Zoning Board of Appeals meeting.

**WORKSHOP:**

**Application 2013-12Z** by Douglas Dumbleton requesting a side setback variance for a picnic pavilion. The proposed location does not comply with 120-19 of the Rush Town Code. Property is located at 801 Fishell Road and zoned R-30.

Mr. Dumbleton explained to the board that he has an existing concrete slab on his property and he would like to place a roof over the top leaving all sides open to create a picnic pavilion. Mr. Dumbleton stated that he is considering placing lattice on 2 sides. Mr. Dumbleton also stated that he is sure that the telephone pole in front is on the property line. According to the map submitted the cement slab is approximately 8 feet from the side property line. The measurement from the centerline to the cement slab is 103 feet. It was also noted that Mr. Dumbleton's nearest neighbor is a distance away.

Mr. Dumbleton was informed that 1 or 2 Board members would make arrangements to view the property prior to the public hearing.

The public hearing will be scheduled for Thursday, September 12, 2013 at 7:00 PM.

**Application 2013-013Z** by Randall and Sharyl Lewis requesting a side setback variance for a shed. The proposed location does not comply with 120-19 of the Rush Town Code. Property is located at 2461 Pinnacle Road and zoned R-30.

The Board discussed the location of Lewis's property and the surrounding properties.

Chairman Van Lare asked Mr. and Mrs. Lewis with over 2 acres, why is the proposed location of the shed within the setback. Mr. Lewis stated that there is a grade on the property and the proposed location is flat. Chairman Van Lare stated that the Board looks for the least amount of relief as possible for setback applications. The Lewis' stated that the proposed location is 16 feet from the side lot line and the proposed shed is 12 feet by 20 feet.

Mr. Lewis was informed that 1 or 2 Board members would make arrangements to view the property prior to the public hearing.

The public hearing will be scheduled for Thursday September 12, 2013 at 7:00 PM.

**TABLED APPLICATION:**

**Application 2013-11Z** by Robert Turner of Turner Underground Installations, 1233 Lehigh Station Road, Henrietta, New York, and property owner Henry Hansen, requesting a use variance for 7.83 acres of a proposed 24.65 acre lot for the purpose of the eventual construction by Mr. Turner of two (2) new 12,750 square foot buildings and approximately 20,000 square foot outdoor storage area. Property is located at 7566 West Henrietta Road and is zoned commercial.

Chairman Van Lare and Board Member Corbin took turns reading the Board motion in its entirety, as follows:

**WHEREAS**, this Board has examined Application 2013-11Z (the "Application") submitted by James Bonsignore, as attorney and authorized agent for the applicant Robert Turner of Turner Underground Installations, 1233 Lehigh Station Road, Henrietta, New York, and property owner Henry Hansen (collectively, the "Applicant"), for the proposed site at 7566 West Henrietta Road, Rush, New York (the "Property") located in a Commercial District.

**WHEREAS**, the Applicant is requesting a use variance for the construction and operation of two (2) new 12,750 square foot buildings and approximately 20,000 square foot outdoor storage area for the indoor and outdoor storage of construction equipment and the associated business on 7.83 acres of a proposed 24.65 acre lot as shown on the map included with the Application;

**WHEREAS**, the Applicant is requesting a variance for a use not listed in the commercial district zoning classification set forth in the Code of Rush, Chapter 120-12A(1) (the "Town Code");

**WHEREAS**, a public hearing on this application was held on July 11, 2013 and notice was posted as required by law; and

**WHEREAS**, all persons at the hearing desiring to speak on the matter were heard, all correspondence on the matter was read and these statements were considered by this Board;

**NOW THEREFORE**, upon consideration by this Board of the Application and other materials submitted by the Applicant, and this Board having given the submitted matter due consideration, it is

**RESOLVED** that this Board makes the following Findings of Fact, and that Application 2013-11Z is denied for the following reasons:

#### **FINDINGS OF FACT**

1. Mr. Hansen owns unimproved property at 7566 West Henrietta Road, Town of Rush, New York, in the Town's Commercial District. The Property is approximately 81.224 acres in size, and is located along West Henrietta Road, in between Lehigh Valley Trail and Fishell Road, and adjacent to Honeoye Creek. Although the Property is located in a Commercial District, the Property abuts residential properties immediately to the east zoned R-20 Residential. The closest neighboring business to the Property consists of an automotive garage and collision shop which is located immediately west of the proposed development area.
2. In 1983, Mr. Hansen made an application to the Town Board for the Town of Rush requesting that the property be rezoned to commercial, which application was granted by the Town Board. The property is currently located in a Commercial District. Presently, Mr. Hansen rents a portion of the property for farm purposes and

has been doing so for the past several years. According to the Applicant, Mr. Hansen receives a yearly rental for the Property in the amount of approximately \$3,000.00. According to the Applicant, Mr. Hansen pays in excess of \$10,000.00 to maintain the Property.

3. Mr. Hanson has received an offer from Mr. Turner and Turner Underground Installations to purchase a 24.65-acre portion of the Property. To facilitate the transaction, the project proposed by the Applicant includes the subdivision of Mr. Turner's property into two lots. Upon completion of the subdivision, Lot 1 will include 47.45 acres and Lot 2 will contain 24.65 acres. Lot 2 is the lot Mr. Hansen proposes to sell to Mr. Turner.
4. Turner Underground Installations is engaged in the business of horizontal directional drilling and pipeline installation. Mr. Turner proposes to eventually construct two (2) new 12,750 square foot buildings and an approximately 20,000 square foot outdoor storage area consisting of a gravel parking area on the 7.83 acres of Lot 2 for the indoor and outdoor storage of construction equipment and the associated business. The purpose of the Application is to accommodate the current business of Turner Underground as well as reasonable business growth, which would include the outdoor storage area and second 12,750 square foot building. In particular, Mr. Turner would utilize 7.83-acre proposed site for office space, the storage, cleaning and maintenance/repair of his trucks, and related construction equipment. On this basis, Mr. Turner seeks a use variance to allow the proposed use on 7.83 acres of Lot 2 as shown on the map included with the Application.
5. Section 267-b of the New York State Town Law establishes the criteria that the Board must use in deciding on a use variance application. An applicant must meet each of the following criteria in order to obtain a use variance:
  - (a) For each and every permitted use in the Core Residential District, that it allegedly cannot realize a reasonable return, as "demonstrated by competent financial evidence;"
  - (b) Its hardship related to the property is "unique and does not apply to a substantial portion of the district or neighborhood;"
  - (c) The variance, if granted "will not alter the essential character of the neighborhood;" and
  - (d) The alleged hardship related to the property has not been "self-created."
6. The Applicant has failed to meet its burden of proof because the Application fails to meet each of the required criterion set forth in Section 267-b of the New York State Town Law.
7. The Applicant has failed to provide sufficient proof demonstrating that Mr. Hansen cannot realize a reasonable return. The only information provided by the Applicant

in support of this first criterion is that in the last four years, between taxes and other maintenance costs, Mr. Hansen has paid in excess of \$10,000 to maintain the Property while realizing a return for farm rental of less than \$3,000. Accordingly to the Applicant, this represents over a seventy (70%) percent loss on the Property. This is insufficient proof to establish an inability to realize a reasonable return. The figures submitted by the Applicant merely constitute a present operating loss rather than an inability to earn a reasonable return for each and every permitted or nonconfirming use. In other words, the Applicant has not provided any financial data establishing whether the present nonconforming use or any other allowable use for the Property would actually yield a reasonable return.

8. The alleged hardship is not unique to the Property, but rather applies to a substantial portion of the district or neighborhood. Under Section 120-12 of the Town Code, permitted uses in a Commercial District include retail and personal services business, offices, and office buildings, gasoline filling stations, and public utilities or communications installations. The Applicant and their representatives have not submitted any proof that any substantive effort went into determining the local demand and availability for all these permitted uses under the current zoning, nor was any economic analysis performed of all permitted uses under the current zoning.
9. The hardships identified by the Applicant, namely, the size and lack of sufficient utilities, are not unique to the Property. For example, an approximately 109-acre parcel of vacant property to the north of the Property is also located in a Commercial District. This parcel is larger than the Property and similarly situated to the Property as it relates to utility access. In addition, the Property and the 109-acre parcel to the north represent a substantial majority of commercially-zoned property in the Town of Rush. Thus, the Applicant's rationale would apply generally to not only the Property, but to several other parcels throughout the Commercial District affected by the restriction. In other words, the hardship conditions identified by the Applicant are generally applicable throughout the Commercial District, leading to the conclusion that if all parcels similarly situated are granted variances on that basis, the zoning of the Commercial District would be materially changed.
10. The use variance requested by the Applicant, if granted, will alter the essential character of the neighborhood. Although one of the neighboring properties is an automotive garage and collision shop, the Property is adjacent to several residential properties located in an R-20 Residential zone on West Henrietta Road and Fishell Road. The proposed use of the 7.83-acre proposed site includes plans for outside parking of commercial trucks and vehicles, and future unspecified buildings, some of which would be located in the 100-year flood plain and immediately adjacent to Honeoye Creek. The applicant also plans for a 20,000 square foot gravel parking area, which is not permitted in a Commercial District. The proposed use, including the noise, odors, diesel exhaust, visual and other impacts generated by Mr. Turner's business operations could have a detrimental effect on the environmentally sensitive areas of the Property, including Honeoye Creek, as well as the residences in close proximity to the Property. Thus, proposed use, including the addition of substantial outdoor storage of industrial

drilling vehicles and commercial equipment, would alter the essential character of the neighborhood.

11. The alleged hardship has been self-created. Mr. Hansen, the current owner of the Property, requested and was granted a rezoning of the Property by the Rush Town Board to its present Commercial status in 1983. The character of the property has remained unchanged both before and after the rezoning, including: (i) the non-existence of public utilities; and (ii) the existence of wetlands. Therefore, Mr. Hansen voluntarily requested a rezoning of the property to its present Commercial status notwithstanding the existence of these conditions in what the Applicant described as a “misguided effort to make the property more marketable.”
12. The Applicant is essentially requesting a rezoning of over seven acres of a 24 acre subdivision which has no pre-existing non-conforming commercial or industrial use. Mr. Hansen’s request that the Property be rezoned to its present Commercial status is a self-created hardship. If Mr. Hanson has been unsuccessful in some thirty years in selling this parcel for Commercial uses, he might consider again requesting a rezoning from the Rush Town Board.
13. Based on the above, the Board concludes that the Applicant: (1) has not proven that it cannot realize a reasonable return, nor that lack of return is substantial as demonstrated by competent financial evidence; (2) the alleged hardship relating to the property in question is not unique, but rather applies to a substantial portion of the district or neighborhood; (3) the requested variance, if granted, will alter the essential character of the neighborhood; and (4) the alleged hardship has been self-created.
14. This action denying the Applicant’s request for a use variance is not one having a significant effect on the environment. Therefore, it is not necessary for the Board to undertake a review pursuant to the New York State Environmental Quality Review Act.

Board Member Corbin seconded the motion and the Board Members polled.

Roll:	Don Van Lare	aye	
	Robert Weiler	aye	
	Amber Corbin	aye	
	Kelly Pruden	aye	
	Garry Koppers	aye	carried.

**Application 2013-11Z** by Robert Turner of Turner Underground Installations, 1233 Lehigh Station Road, Henrietta, New York, and property owner Henry Hansen has been denied

**APPLICATION ASSIGNMENTS:**

Board Members Pruden and Corbin have been assigned to Application 2013-12Z.

Board Member Koppers and has been assigned to Application 2013-13Z.

**REPORTS:**

Councilman Woolaver had no report.

**APPROVAL OF MINUTES:** July 11, 2013

Chairman Van Lare made a motion to approve the Minutes of July 11, 2013 as written.

Board Member Weiler seconded the motion and the Board Members polled.

Roll:	Don Van Lare	aye	
	Robert Weiler	aye	
	Amber Corbin	aye	
	Kelly Pruden	aye	
	Garry Koppers	aye	carried.

**BOARD BUSINESS:**

Chairman Van Lare reminded the audience that the next Zoning Board meeting would be Thursday, September 12, 2013 at 7:00 PM.

The Board discussed providing the applicants Robert Turner of Turner Underground Installations and Henry Hansen written notification of the Boards decision.

Town Clerk Bucci informed the Zoning Board that the Public Hearing for Town Law #3 regarding hydrofracking will be held Wednesday, August 28, 2013. Supervisor Anderson has requested any input to be submitted prior to the hearing.

With no further business, a motion was made by Chairman Van Lare and agreed by common consent that the meeting be adjourned at 7:30 PM.

Respectfully Submitted,

Pamela J. Bucci  
Town Clerk