

**RUSH ZONING BOARD OF APPEALS
REGULAR MEETING
MINUTES OF DECEMBER 11, 2014**

A regular meeting of the Rush Zoning Board of Appeals was held on December 11, 2014 at the Rush Town Hall, 5977 East Henrietta Road, and was called to order at 7:00 PM.

PRESENT: Amber Corbin, Chairperson
Garry Koppers, Vice Chairperson
David Flass
Jillian Moore
Shivaun Featherman, Deputy Town Clerk

EXCUSED: Lee Hetrick

OTHERS: John Mancuso, Town Attorney
Dan Woolaver, Town Board Liaison
Karen Hopkins, Realtor
Francis Rapport, Realtor
George Conboy, Attendee
Charles Steinman, Esq.
Richard Updaw, Resident
Brian Eadie, Resident
Ronald Pearl, Resident
Gerry Kusse, Code Enforcement Officer

Chairperson Corbin welcomed all and called the December Zoning Board of Appeals meeting to order at 7:08PM.

PUBLIC HEARINGS:

Application 2014-08Z by Richard Updaw requesting a use variance to screen top soil for retail sale. Property is located at 7445 West Henrietta Road and is zoned Residential-30.

Mr. Updaw explained that his property at 7445 West Henrietta Road is a working farm within the agricultural district. There are 4.3 acres in the southeast corner of his farm that are unusable as farmland due to its use as a borrow pit during the construction of the bridge for Route 15 in the 1930's.

Mr. Updaw has a contract with Riccelli Enterprises where they bring topsoil to his property to store, screen and then transport to different job locations or sell to different contractors. In exchange, Riccelli Enterprises provides a percentage of the tailings that come off the screening process to Mr. Updaw. It's good tillable soil and Mr. Updaw uses it to fill the borrow pit to eventually restore it as tillable land.

Mr. Updaw is due to renew his contract with Riccelli Enterprises in May of 2015, and Code Enforcement Officer Kusse advised Mr. Updaw to submit an application for a use variance in order to continue the operation.

Chairperson Corbin asked Mr. Updaw if he has explored other options to bring the area up to grade other than using an outside contractor . Mr. Updaw replied that a possibility would be to purchase fill, but it would be normal filter, not suitable to create tillable ground. Mr. Updaw submitted to the Board a report with values of crops that his farm has produced over the past 12 years to show the potential increased production that his farm would realize by restoring the 4.3 acres to tillable land.

Chairperson Corbin pointed out that the operation is a commercial entity by a non-property owner in a residential zone, which makes it difficult for the applicant to satisfy all 4 requirements of a use variance. Chairperson Corbin added that the Board has taken Mr. Updaw's evidence into consideration.

Chairperson Corbin noted that Mr. Updaw has taken actual measurements of the area and the size has increased from 3.5 acres to 4.3 acres. Chairperson Corbin thanked Mr. Updaw for the recalculation.

Vice Chairperson Koppers mentioned that last month when Mr. Updaw submitted his application, he indicated that he would like to sell topsoil from that site and asked the applicant if that is still his intention. Mr. Updaw replied that Riccelli Enterprises brings topsoil from jobsites, stockpiles it and screens it before moving it to other job sites or selling it to other contractors. As part of the agreement, Riccelli Enterprises gives Mr. Updaw a percentage of topsoil for his own use. Currently Mr. Updaw is using it on his farm, but if the use variance is granted, he would like to sell it on his own.

Chairperson Corbin entered the following correspondence into the record:

- Monroe County Department of Planning & Development's review.
- The Fire Commissioner does not have any issues or concerns with Mr. Updaw's application.
- Mr. Updaw's contract with Riccelli Enterprises.
- Mr. Updaw's letter dated 12-4-14 with details clarifying the increase of acreage from 3.5 acres to 4.3 acres and the potential increased productions values.
- The Conservation Board is inquiring how the raising of the land will affect the drainage toward the linear trail.

Mr. Updaw explained that there is an existing ditch that runs on the north side of the Lehigh Valley Trail. The ditch is approximately 4' wide by 3' deep. Any runoff that occurs drains into the ditch. The same runoff will occur even after raising the ground 3-4'; it will drain into the ditch on the north side of the trail.

With no further comments or questions Vice Chairperson Koppers made a motion to close the Public Hearing.

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

Roll: Garry Koppers aye
 David Flass aye
 Jillian Moore aye
 Amber Corbin aye carried.

Application 2014-09Z by Ronald Pearl requesting a use variance to allow an existing pole barn to be used for storage. Proposed use does not comply with Section 120-8 of the Rush Town Code. Property is located at 500 Woodruff Road and is zoned Residential-30.

Mr. Pearl appeared with realtor Frances Rapport and explained that he has had his property for sale for the past 4 years. His property has a house with a 2 car attached garage, a 3 car detached garage, pole barn and horse paddocks. There are 2 driveways on the property, one for the house and one for the pole barn. He has not been able to find a buyer for the whole property, however, he currently has two potential buyers; one for the house and another for the barn. The potential buyer for the proposed lot with the barn would like to use the pole barn for storage, a use which is not permitted in the Town Code. Mr. Pearl is seeking a use variance to allow the barn to be used for storage.

Realtor Frances Rapport stated that from what she understands, part of the problem is the term “storage”. The potential buyer of the pole barn will be using the structure more for a recreational use rather than storage.

Town Attorney Mancuso stated “commercial uses are not permitted in a residential district. The use that has been described to me in terms of this application is more of an issue in that the use is typically found as an ancillary structure use in terms of the storage of the vehicles rather than a principle use of a single family dwelling. The way that the application was submitted, we are looking at this from whether this use of storing antique vehicles has been described as permissible in a residential district that only allows for a certain enumerated uses that don’t include that because that’s an ancillary use, that currently as it stands right now, supports your existing residence. When you subdivide the property, what you’re left with is a building that’s stand alone instead of what’s supporting your other structures, so it changes the analysis.”

Mr. Conboy, potential purchaser of the proposed lot with the barn, asked Mr. Mancuso that when one is talking about an ancillary structure to support the use of a residence, is a detached garage an example? Mr. Mancuso replied yes. Mr. Conboy stated that from what he understands from the history of the property, the barn has never been ancillary to the residence but was indeed ancillary to a commercial venture that Mr. Pearl had at a different location. Does that make a difference?

Mr. Mancuso stated “It would not. If the building was never used as an ancillary structure to the principle residence on this property then we would have to analyze whether that use in fact was permissible or not permissible as long as it was going on. Obviously that was never brought to the town’s attention so whether the use was allowed

or not, no one can opine on. What we do know is what you're proposing. We have to look at what the proposed use is going to be if you treat that building as being situated by itself without any other building associated with it. Under the residential district regulations the permitted uses are one family dwellings, public libraries or service buildings; or accessory uses supporting those primary uses and that doesn't fall under any of those numerations, so then the only other question is whether a special permitted use would qualify. There are 13 special permitted uses that would be potentially amendable to use in that district. In regards to the recreational element that you described, the ones that would only be available would be hunting cabins, which this is clearly not, or a recreational facility operated by a membership club or association for youths as a non-for-profit. As it stands right now, this application does not speak to those requirements and further, that's a Planning Board jurisdictional requirement in terms of a special permit. The Zoning Board is only able to give a use variance so automatically it's a non-permitted use. Their job is to decide whether they want to allow it in this zone."

Ms. Rapport stated that originally they went to the Planning Board and were told that they need a use permit from the Zoning Board because the Town of Rush does not allow an ancillary structure without a primary structure. That is why they are before the Zoning Board. Her understanding now is that it is not written in the code; that they may be able to subdivide without a primary structure and asked Town Attorney Mancuso to expand on that.

Town Attorney Mancuso replied "The Planning Board was technically accurate. They probably oversimplified the explanation. The explanation that you can't subdivide with an ancillary structure separate from the primary structure is that because once they subdivide you have to look at the uses that are being employed for both parcels as separate parcels. The question that needs to be asked is – is the use of each of those permitted in the R-30 district after the subdivision. Right now everything is fine because because those 3 buildings are treated as ancillary to the main residence which is being utilized in accordance with the Code. Once you split it, the ancillary building, as the Planning Board described, is now stand alone. The next step is what is the use of that. That's why the Planning Board said you have to go to the Zoning Board to answer that question of the permissible use because the proposed use is not permitted."

Ms. Rapport stated that her fundamental question is can the Planning Board allow a subdivision without a primary residence.

Town Attorney Mancuso replied "Yes, fundamentally they could if the use is permitted. They would not need Zoning Board approval for the use. For example, if the application for subdivision approval was to split those parcels and the pole barn was being used for a farming activity; that would fall under a permitted use."

Ms. Rapport asked "If we can show that the pole barn will be used for one of those uses; we may be able to get permission to subdivide?"

Town Attorney Mancuso replied “Yes. The Planning Board is able to grant Special Permit uses. The Planning Board would be able to decide both of those applications without the Zoning Board’s involvement. The only thing the Zoning Board can do is give you the ability to use it in a way that is not permitted by the current zoning regulations. That is why you are here.”

Chairperson Corbin read into the record that Monroe County’s Department of Planning and Development has deemed this Application a local matter. The Conservation Board has review the Application and does not find any aspect of the project to significantly impact the environment. Chairperson Corbin noted that there is not a response from the Fire Commissioner yet as they will be reviewing the Application at their December 16th, 2014 meeting.

With no further comments or questions, Board Member Flass made a motion to close the Public Hearing.

Board Member Moore seconded the motion and the Board polled.

Roll: Garry Koppers aye
 David Flass aye
 Jillian Moore aye
 Amber Corbin aye carried.

APPROVAL OF MINUTES:

Vice Chairperson Koppers made a motion to approve the Minutes of November 13, 2014 as written.

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

Roll: Garry Koppers aye
 David Flass aye
 Jillian Moore aye
 Amber Corbin aye carried.

BOARD DECISIONS:

Chairperson Corbin made a motion **WHEREAS, Application 2014-08Z** was submitted by Richard Updaw (the “Applicant”) for property located at 7445 West Henrietta Road, Rush, New York (the “Property”), requesting a use variance from the requirements of the Rush Town Code, Chapter 120-8, R-30, for screening of top soil for retail sale by a non-owner of the Property, as described in the maps and other materials submitted in the application; and

WHEREAS, a Public Hearing on this application was scheduled 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 material was read and these statements were considered by this Board; now therefore;

BE IT RESOLVED, that this Board makes the following Findings of Fact, and that **Application 2014-08Z** is denied for the following reasons:

FINDINGS OF FACT

1. The Applicant owns the Property at 7445 West Henrietta Road, Rush, New York, which is located in an R-30 residential zone. The Property is utilized as a farm, but approximately 4.3 acres in the southeast corner of the Property is unusable as farmland as the result of its historical use as a marshalling burrow pit during the Route 15 bridge construction in the 1930s. Mr. Updaw seeks a use variance to permit a third party to store, screen and distribute top soil/stone on the 4.3 acre site in order to eventually “reclaim” the parcel for farming purposes. The requested use is commercial in nature.
2. 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 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.”
3. 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.
4. The Applicant has failed to provide sufficient proof demonstrating that he cannot realize a reasonable return. The only information provided by the Applicant is that a use variance is necessary to allow a commercial operation to allow the Applicant to realize a reasonable return of reclaiming the land as tillable. This is insufficient proof demonstrating an inability to earn a reasonable return for each and every permitted or nonconforming use of the 4.3 acre parcel. The Applicant purchased the property with the existing burrow pit, and has never farmed this area. Therefore, the Applicant has not shown a substantial loss. The Applicant has not provided any financial evidence establishing whether any other allowable use for the Property in question would actually yield a reasonable return.
5. The use variance requested by the Applicant, if granted, would alter the essential character of the neighborhood. Having a commercial business being operated by a non-owner of the Property will alter the neighborhood. The Property is residential and a farm is currently in operation by the Applicant. There is a linear park trail on

the southern boundary of this Property. Thus, the Applicant's proposed use of a commercial activity related to the storing, screening and distribution of top soil/stone will alter the essential character of an otherwise predominant residential/agricultural neighborhood.

6. The alleged hardship is self-created by the Applicant. The Applicant knowingly purchased the Property with the burrow pit already there. The Applicant has stated that the burrow pit was dug in the 1930s. At the time the Applicant purchased the Property, the commercial use now proposed was not permitted in an R-30 Residential Zone. The Applicant has not provided any proof demonstrating that the current condition of the Property is any different than at the time he purchased the Property.
7. Based on the above, the Board concludes that the Applicant has not proven that it cannot realize a reasonable return, nor that lack of return is substantial as demonstrated by competent financial evidence; the requested variance, if granted, will alter the essential character of the neighborhood; and the alleged hardship has been self-created.
8. 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.

Vice Chairperson Koppers seconded the motion and the Board Members polled.

Roll:	Garry Koppers	aye	
	David Flass	aye	
	Jillian Moore	aye	
	Amber Corbin	aye	carried.

Mr. Updaw stated that he has a question. Chairperson Corbin responded that the Public Hearing is technically closed. Town Attorney Mancuso advised that it's at the Board's discretion if they would like to entertain any questions from the Applicant. The Board members decided they will allow questions at this time from the Applicant.

Mr. Updaw understands that the Application is denied, however, he has a contract with Riccelli Enterprises through next year. Does he need to tell Riccelli Enterprises that they cannot continue the operation?

Chairperson Corbin deferred to Code Enforcement Kusse. CEO Kusse stated that he had advised Mr. Updaw to come before the Zoning Board for a permit so that he would not have to become involved in any kind of enforcement action. This Board has denied the Application. At this point, if CEO Kusse sees trucks dumping topsoil or if someone complains, he has a responsibility to act on it.

Mr. Updaw asked will he have to tell Riccelli Enterprises that they can no longer continue the operation?

CEO Kusse answered yes.

Board Member Flass asked the Applicant if he considered rezoning the parcel. Town Attorney Mancuso informed Mr. Updaw that rezoning would be a Town Board decision. Mr. Updaw stated he would not attempt to. It is a small area and not worth the process.

Town Attorney Mancuso advised Mr. Updaw that CEO Kusse can provide a list of uses that may be allowable for that area.

Mr. Updaw thanked the Board for their time.

Board Member Moore made a motion **WHEREAS, Application 2014-09Z** was submitted by Ronald Pearl (the "Applicant") for property located at 500 Woodruff Road, Rush, New York (the "Property"), requesting a use variance from the requirements of the Rush Town Code, Chapter 120-8, R-30, for the sole purpose of storing antique vehicles by the potential future owner of subdivided 3.81 acres, George Conboy, as described in the maps and other materials submitted in the application; and

WHEREAS, a Public Hearing on this application was scheduled 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 material was read and these statements were considered by this Board; now therefore;

BE IT RESOLVED, that this Board makes the following Findings of Fact, and that **Application 2014-09Z** is denied for the following reasons:

FINDINGS OF FACT

1. The Applicant owns the Property at 500 Woodruff Road, Rush, New York, which is located in an R-30 residential zone. The Property is 11.195 acres and is utilized as a primary residence with 3 accessory structures. Mr. Pearl currently has an application pending before the Rush Planning Board to subdivide the Property into two lots. The first lot, depicted as "Lot 1" on the map submitted with the application, is proposed to be 3.805 acres containing the "Metal Barn" (or pole barn as referred to in these findings). The second lot, depicted as "Lot 2" on the map submitted with the application, is proposed to be 6.771 acres containing the primary residence and two accessory structures. Mr. Pearl seeks a use variance for the proposed future owner of Lot 1, Mr. Conboy, to store antique vehicles in the "Metal Barn" on Lot 1. This use is not an allowable use in an R-30 residential zone.
2. 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 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.”

3. The Applicant has failed to meet its burden of proof because the application fails to meet each of the required criteria set forth in Section 267-b of the New York State Town Law.
4. The Applicant has failed to provide sufficient proof demonstrating that he cannot realize a reasonable return. The Applicant has indicated that from 10/2008 to 9/2014, he was “unable to obtain an acceptable purchase” for the sale of the entire Property. Applicant originally listed the property for sale in 2008 at \$475,000. Price reductions were taken. Last price for property was 12/2013 for \$359,000. Current assessment of property is \$257,800. The Applicant also states that he has incurred \$50,000 in property taxes and additional costs of maintaining the property. This is insufficient proof to establish an inability to earn a reasonable return for each and every permitted or nonconforming use. The Applicant has not provided any financial data establishing whether any other allowable use for the Property would actually yield a reasonable return.
5. The alleged hardship is not unique to the Property in relation to the neighborhood. There are large and small acreage properties surrounding the Applicant’s property. The property is in an agricultural district. There are farms, single family residences, single family residences with accessory buildings and vacant lots, within a mile radius of the applicant. There are several properties in the Town of Rush containing accessory buildings. The Applicant’s rationale that a use variance is necessary to permit the subdivision and sale of the Property could apply to numerous other parcels through the Town of Rush. If all parcels similarly situated are granted variances on the basis identified by Applicant, the zoning of the R-30 residential zone would be materially changed.
6. The alleged hardship is self-created by the Applicant. When the pole barn was built in 1979 the town did not require a use variance because the pole barn was built on a lot that had a primary residence on 500 Woodruff Road. The Applicant can still subdivide the property in the future to a new owner and build a primary residence on the lot. The market sale price (asking) was well above the assessed value of the property when the property was put up for sale. The real estate agent for the Applicant incorrectly indicates that the Applicant could not foresee the changes in subdivision requirements and zoning regulations when he built the pole barn. The use proposed by the Applicant on Lot 1 (the storage of vehicles) has not been a permitted use in an R-30 residential zone since at least 1973, several years prior to the construction of the pole barn.

7. Based on the above, the Board concludes that the Applicant has not proven that it cannot realize a reasonable return, nor that lack of return is substantial as demonstrated by competent financial evidence; has not proven that the hardship relating to the property is unique to the particular property and not shared by other properties located in the neighborhood; and the alleged hardship has been self-created.
8. 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.

Vice Chairperson Koppers seconded the motion and the Board Members polled.

Roll:	Garry Koppers	aye	
	David Flass	aye	
	Jillian Moore	aye	
	Amber Corbin	aye	carried.

BOARD BUSINESS:

Chairperson Corbin stated that since there were Applications tonight with final decisions made, at the next meeting there will be a report of the 2014 Applications with decisions.

Chairperson Corbin asked which Board Members currently have a hard copy of the Code Book. Vice Chairperson Koppers has one, as well as Board Member Flass and Chairperson Corbin. Board Member Moore does not. Chairperson Corbin stated that she is having some discussions with the Town Officials regarding a new Town Board regulation favoring the online version over hard copies. Chairperson Corbin is very much in favor of all Zoning Board Members having a hard copy along with updates. She will be meeting with the Town Clerk on Monday.

Chairperson Corbin stated it's her understanding that the Town Board voted against continued distribution of hard copy Town Code Books. Chairperson Corbin would prefer all Zoning Board Members have a hard copy of the Town Code.

Vice Chairperson Koppers agrees with Chairperson Corbin. For example, many hours were spent on these two motions, both on the phone and in meetings to come up with the right solutions. Without having the Code book in front of him while on the phone, it would have been impossible.

Board Member Flass added that if they don't have printed copies of the addendums in front of them, they may not include current laws in their decisions.

ZONING BOARD OF APPEALS
DECEMBER 11, 2014

With no further business, it was agreed by common consent that the meeting be adjourned at 8:08 PM.

Respectfully Submitted,

Shivaun Featherman
Deputy Town Clerk