

2020-081

Request of CSEA for renewal of the variance for property located at 7 Willowdale Drive to construct an LED sign located within 500' of residential zoning district (LED signs not permitted within 500' of residential zoning)

A representative from the CSEA stated the sign has been up for several years with no complaints and is used for the credit union's business.

Chairperson Hicks stated she did not see a reason to have the CSEA return every year unless there was a complaint filed with the Code Enforcement or Police Department.

Chairperson Hicks referred to the use variance balancing test: 1) Can a reasonable return be achieved by another method – yes but this would be cumbersome; 2) Is this a unique circumstance – yes, this is a busy intersection and would prohibit visibility; 3) Does the variance change the character of the neighborhood – no, this is a mixed use area; 4) Is this a self-created hardship - yes, but not the determining factor.

No comments were received from the public.

Motion by Hicks, seconded by Kapuscinski, to close the public hearing and renew the variance for property located at 7 Willowdale Drive to construct an LED sign located within 500' of residential zoning district; noting the applicant will no longer be required to return on a yearly basis.

Ayes: All

Noes: None

Motion Carried

2022-039

Request of Robert Jemiolo for renewal of a variance for property located at 3377 Clinton Street to allow live music (live music prohibited)

Mr. Jemiolo stated the current times and days are limiting to his business with potential bookings. Chairperson Hicks noted the strict guidelines have been put in place since Mr. Jemiolo has not been in compliance with the variance; this has been noted in previous minutes.

Mr. Jemiolo stated he is requesting the controls to be loosened and would like the opportunity to have live music daily. The upstairs tenant was calling the police and most of the time when the police department is called, it is found to be no problem. Chairperson Hicks stated live music is not allowed; variances for live music are always given restrictions on the allowable times and days.

Code Enforcement Officer Doug Busse stated there have not been any complaints filed with the Code Enforcement Office since the last time Mr. Jemiolo was before the Zoning Board of Appeals.

Mr. Jemiolo stated he would like to have the option of music from noon – 11:00 PM on Saturdays and on Fridays between 7:00 PM – 11:00 PM along with holidays. Mr. Busse stated a reasonable request from the applicant would be Friday evenings with a 7:00 PM start, Saturday and Sunday from midafternoon – evenings.

Chairperson Hicks stated there is a police report from October 12, 2022, for a suspicious person and the police found no reason for a complaint; there are no complaints relative to live music from August 2022 – today.

WEST SENECA COMMUNITY CENTER
1300 Union Road
West Seneca, NY 14224

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Ms. Greenan suggested Friday from 7:00 PM – 11:00 PM, Saturday from 4:00 PM – 11:00 PM and noted one of the elements being considered is the effect on the character of the neighborhood.

Mr. Kapuscinski stated he believed the end time should be 10:30 PM as this could possibly roll into 11:00 PM. Mr. Jemiolo stated he preferred 11:00 PM and would make this a firm cutoff time.

Mr. Jemiolo requested guidance for Sunday. Ms. Greenan stated at the present time she is opposed to music on Sunday due to the surrounding residents with work and school on Monday morning.

Brian Doster, 3361 Clinton Street, stated this started as people just getting together, then not having music became a hardship. At the last meeting it was stated music was not being used to bring people into the establishment so there is not a hardship. The problems have not changed and the noise is still a factor.

Wendy Doster, 3361 Clinton Street, stated there should be a hard stop at 10:30 PM and this frequently does roll into 11:00 PM; Ms. Doster stated she was not opposed to a day time start on the weekend.

Mr. Kapuscinski reiterated his concerns with an 11:00 PM stop time and would prefer a 10:30 PM stop. Mr. Jemiolo questioned if the music would be allowed to stop at 10:45 PM. Chairperson Hicks stated the music needs to stop at the cut off time.

Mr. Bedient stated he is a firm believer in following the rules and questioned if a 10:45 PM stop would be appropriate.

Ms Greenan suggested Friday from 7:00 PM – 10:30 PM and Saturday from 4:00 PM – 10:30 PM. This is a compromise that takes the neighborhood into consideration.

Mr. Doster acknowledged he would call the police if the music went later and questioned the music spilling over from the doors and windows. Mr. Busse stated if the noise ordinance is being violated the police should be called.

Chairperson Hicks referred to the use variance balancing test: 1) Can a reasonable return be achieved by another method – the applicant states no and this is needed to return a profit; 2) Is this a unique circumstance – no, many bars have requested live music; 3) Does the variance change the character of the neighborhood – no, this bar has been in existence and in the same location since the early 1900's; 4) Is this a self-created hardship - yes, but not the determining factor.

Motion by Hicks, seconded by Kapuscinski, to close the public hearing and grant a temporary variance valid until May 24, 2023, for the property located at 3377 Clinton Street to allow live music with the following conditions: 1) indoor music only; 2) Friday's from 7:00 PM – 10:30 PM; 3) Saturday's from 4:00 PM – 10:30 PM; 4) Sunday's from 3:00 PM – 7:00 PM; 5) the applicant will return on May 24, 2023, to reevaluate.

Ayes: All

Noes: None

Motion Carried

2022-047

Request of Amanda Lanyzs for a variance for property located at 88 Lyndale Court to allow raising chickens on property (raising of poultry/farm animals not permitted)

Ms. Lanyzs stated she has six chickens living in coops in the yard; there are no roosters.

Code Enforcement Officer Doug Busse stated there have been no complaints filed in his office and there are no complaints with the Police Department.

No comments were received from the public.

Chairperson Hicks referred to the use variance balancing test: 1) Can a reasonable return be achieved by another method – the applicant states no as the chickens are pets that provide food; 2) Is this a unique circumstance – yes; 3) Does the variance change the character of the neighborhood – no; 4) Is this a self-created hardship - yes, but the family uses this for food and this is not the determining factor.

Motion by Kapuscinski, seconded by Bedient, to close the public hearing and renew the variance until January 2024 for property located at 88 Lyndale Court to allow raising chickens (six hens and no roosters) on property.

Ayes: All

Noes: None

Motion Carried

2022-057

Request of Miladul Islam for a variance for property located at 53 Marann Terrace to erect a 6' fence in front and side yard (maximum 4' height allowed)

Mr. Islam's son was present on behalf of his father and stated his father would like a 6' fence in the front and side yard for privacy and safety.

Chairperson Hicks referred to the survey and questioned if just the back corner of the lot is to be enclosed. Code Enforcement Officer Doug Busse stated this is correct; there are no projection concerns.

Chairperson Hicks stated neighbor signatures with no objection to the variance were obtained from residents at 469 and 398 Casimer Street and 47 Marann Terrace. The applicant stated the resident at 460 Casimer Street was not available.

No comments were received from the public.

Chairperson Hicks referred to the area variance balancing test: 1) Is there an undesirable change to the neighborhood - no, this is around the house and does not extend; 2) Is there an alternative – the fence is needed for privacy and safety; 3) Is the request substantial – this is not substantial; 4) Does the variance have an impact on the environment – there is no impact on the environment; 5) Is this a self-created difficulty – yes, but this is not the determining factor.

Motion by Greenan, seconded by Kapuscinski, to close the public hearing and grant a variance for property located at 53 Marann Terrace to erect a 6' fence in front and side yard.

Ayes: All

Noes: None

Motion Carried

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Chairperson Hicks referred to the use variance balancing test: 1) Can a reasonable return be achieved by another method – the applicant states no and this is needed to return a better profit; 2) Is this a unique circumstance – yes, there are no residential properties adjacent and the adjacent businesses will be closed; 3) Does the variance change the character of the neighborhood – no, there is a lack of residential neighborhoods; 4) Is this a self-created hardship - yes, but not the determining factor.

Town Attorney Chris Trapp referred to the financial statements made and noted there should be documentary evidence shown to show the economic repercussions.

Ms. Greenan questioned if the documentation request should be part of the application. Mr. Trapp replied this should be part of the application.

Chairperson Hicks questioned if there were forms in existence which request the financial information. Mr. Trapp stated the state does not have a form that relates to what kind of economic evidence will be presented; this is for each applicant to provide. General statements do not show evidence and applicants should be providing more.

Motion by Hicks, seconded by Kapuscinski, to close the public hearing and grant a one-year variance for the property located at 1780 Orchard Park Road to allow live music with the following conditions: 1) indoor music only; 2) Thursday, Friday, and Saturday from 7:00 PM – 1:00 AM.

Ayes: All

Noes: None

Motion Carried

2022-061

Request of the Broadway Group for the following variances for property located at 3030 and 3036 Seneca Street: 1) 9' front setback (40' front setback required); 2) 45 parking spaces (63 Parking spaces required); 3) six parking setbacks at 0', 1', 2', 3', 3', 5' (10' parking setback required)

Mark Romanowski and Tara Benet were present from the Broadway Group and stated the following points:

- The project has been before the Planning Board who has made a preliminary recommendation
- The site has a triangular shape requiring the variances
- Changing the layout would create more challenges and the Planning Board agreed
- The first variance is for the setback from Center Road; the buildings across the street are commercial.
- The parking variance is needed due to the town having a very high parking requirement; the high ratio is not needed for this type of store.
- The parking area setback depth is along Seneca Street; there is nothing there now and greenspace will be provided.
- None of the requested variances will have a negative impact on residents
- Mailings were done to every neighbor with return receipt and approximately 30% responded they were unopposed to the variance requests.

Chairperson Hicks questioned if there would be an impact on the bus stop and if Seneca Manor provided any feedback. Mr. Romanowski stated Seneca Manor did not provide any feedback on the project. Ms. Benet stated she spoke with the facility administrator of Seneca Manor and Ms. Benet stated she will work with the metro system to ensure the bus stop is available to the residents.

Chairperson Hicks stated correspondence was received from the Erie County Division of Environment and Planning stating they have no objection to the variance as this is of local concern.

Chairperson Hicks questioned if the NFTA was consulted during the SEQR process. Mr. Romanowski stated he believed the NFTA was not identified as an involved agency; the bus stop will not be eliminated, and this project will improve pedestrian access to the bus stop.

Chairperson Hicks stated the Code Enforcement Office required the applicant to contact residents within five houses of Center Road be notified and Ms. Benet has satisfied this requirement.

No comments were received from the public.

Chairperson Hicks referred to the area variance balancing test: 1) Is there an undesirable change to the neighborhood - no, this is consistent with the existing character and will compliment and improve the street scape along Center Road; 2) Is there an alternative – no; 3) Is the request substantial – no, as there is not a disturbance to adjacent properties; 4) Does the variance have an impact on the environment – there is no impact on the environment and will have a positive impact; 5) Is this a self-created difficulty – no, the lot is a triangular shape.

Motion by Kapuscinski, seconded by Greenan, to close the public hearing and grant a variance for the property located at 3030 and 3036 Seneca Street: 1) 9' front setback; 2) 45 parking spaces; 3) six parking setbacks at 0', 1', 2', 3', 3', 5'.

Ayes: All

Noes: None

Motion Carried

2022-062

Request of Dan Warren for an appeal and interpretation of the Code Enforcement Officer issuance of a permit for property located at 2448 and 2885 Clinton Street.

Chairperson Hicks recused herself from the interpretation and left the meeting room.

Mr. Warren stated his belief that Town Attorney Chris Trapp has represented the Code Enforcement Officer and the Planning Board in a position that is adversarial to Mr. Warren. The Zoning Board of Appeals is an independent statutory body that is entitled to a conflict free counsel. Mr. Warren requested Mr. Trapp not take part in the deliberation on this appeal. Mr. Trapp stated there is no legal basis for this request and he is not a voting member.

Mr. Warren stated he has previously referenced a prior litigation between himself and the Code Enforcement officer over this appeal. This appeal should have been in front of the Zoning Board of Appeals in August or September and was not due to the Code Enforcement Officer refusing to accept the appeal. Mr. Warren stated he obtained a court order requiring the Code Enforcement Officer to do his ministerial duty. In that proceeding Mr. Trapp was the counsel for the Code Enforcement Officer and raised objections why this appeal should not be heard. Mr. Trapp stated that Mr. Warren lacked standing; when Phase 1 of this project was being challenged in the courts both the Supreme and the Appellate Division found on an appeal from an interpretation from the issuance of a building permit that Mr. Warren had standing and proceeded to address the merits.

When this issue was in court over the challenge of the actions of the Planning Board, the town and the Planning Board raised a challenge to the standing that was denied (a letter dated September 2, 2022, was provided electronically. The Zoning Board of Appeals was a party to the 2006/2007 litigation where Mr. Warren was found to have standing, and it is Mr. Warren's belief he has standing to challenge the next phase of the project.

In prior litigation, the Code Enforcement Officer and Mr. Trapp raised the concern that this is a rehearing, and the rules prohibit a rehearing. However, the 2006/2007 challenge was to a building permit issued on March 26, 2007, and was issued in relation to 2885 Clinton Street. This is in relation to a building permit issued on July 25, 2022, for 2448 and 2885 Clinton Street.

Another issue raised was this body already determined this issue and was upheld by the courts in 2006/2007 and the original decision should be adhered to. There have been changes to the use of the property and that determination was based on what Canisius would use the property for. It is Mr. Warren's position that Canisius did not use the property for the intended purpose. Even if there is an educational academic use on the property the increase of the non-academic athletic portion renders it a non-principle academic use. Mr. Warren referred to the Town Board minutes from 2005 and the different uses. There is no academic use that is a principle use on the property. There is no educational use being conducted on the property. Canisius High School only references this property as athletics.

Mr. Kapuscinski noted that none of the current Zoning Board of Appeals members were on the board in 2005 – 2007. Mr. Kapuscinski stated he would like time to go through the paperwork.

James Cosgrove attorney for Canisius High School provided the following history:

- Recently an order has been proposed in front of a NYS Supreme Court Justice that states that this matter be remanded to the Town of West Seneca Code Enforcement Officer to accept the application and fee to seek an interpretation from the Zoning Board of Appeals.
- 15 years ago, the Town of West Seneca and Canisius High School were involved in a lawsuit brought by Mr. Warren to stop the construction of the football field on Clinton Street.
- Mr. Warren argued the purpose of a football field was not education but recreation. The lower court and the appeals court both held this was education and allowed the project to move forward.
- Mr. Warren at the time did not appeal to the NYS Court of Appeals and therefore the issue has been decided and cannot be relitigated.
- Now Canisius would like to build a baseball diamond; Mr. Warren filed a petition and the judge decided proper procedures were not followed by the Town of West Seneca. The judge remanded back to the town and provided a procedure on how this should be dealt with. The town followed the procedure, and the project was allowed to move forward.
- Mr. Warren was unhappy and filed a temporary restraining order and after oral argument, the court denied the motion.
- Canisius started construction and Mr. Warren has filed a petition and is seeking a ruling from the Zoning Board of Appeals with regards to the need for a variance.
- Canisius was allowed to build a football field and Mr. Warren is arguing a baseball diamond is different.
- With this application, Mr. Warren is not on time. The actions were started 18-months ago and has now decided to go back to the Zoning Board of Appeals.
- Mr. Warren failed to include the landowners in the proceedings. Mr. Warren is not an aggrieved party who is abutting the property. The courts have ruled he is not within the zone of interest; he is not affected by the property.

- Judge Ward asked for this to return, and an affidavit was filed from Code Enforcement Officer Jeffrey Schieber that states the actions of issuing the permit were an administrative act. Once the court refused to give Mr. Warren a temporary restraining order, thereby allowing Canisius to continue the project, the issuance of a permit was part of his job, consistent with the decision of the court.
- Canisius only received notice of the meeting this morning
- Objects to any adjournment tonight; a delay would result in an automatic stay on work the being completed. If an adjournment is granted, Canisius requests the board waive the stay on the provisions so his client may continue the work.

Mr. Trapp explained when the initial petition was filed in 2020 with regard to the first determination by the Planning Board, the judge did send the matter back to the Planning Board on the basis the proper procedure had not been followed in terms of SEQR determination, sending the materials to the Erie County Department of Environmental Planning for review and then a site plan determination; that process has been followed. In July 2022 Mr. Warren filed for a temporary restraining order and an injunction seeking to have the SEQR determination and site plan review by the Planning Board stopped and reversed. At the end of August 2022, the temporary restraining order was not granted, and this was in response to a second order to show cause filed by Mr. Warren because construction had started, and permit given. On the initial review the judge stated there would be no restraining order and allowed construction to continue but did allow the Article 78 proceeding which was scheduled for oral argument on September 28th. In the interim, Mr. Warren filed another motion for default and sought a review by the Zoning Board of Appeals on the issue of use of the property as an education institution.

On September 28th, the judge denied Mr. Warren's motion and granted the town's motion to dismiss the action. An order has been provided to the court and are awaiting the transcript. In the interim, Mr. Warren did file another case with the Supreme Court raising the issue of whether the Code Enforcement Officer acted within his ability to determine if something should appear before the Zoning Board of Appeals. What the judge decided was not the merits of the ultimate question, but rather procedurally if the Code Enforcement Officer had the authority to say no. The court decided the Code Enforcement Officer did not have the authority to say no and was simply to perform the administrative act of accepting the paperwork. Reserving the rights from Canisius and the town's perspective to raise any arguments as to the merit or if it could be heard by the Zoning Board. This goes to issues described by council as to the standing. The initial standing regarding SEQR issues was dealt with. There was another matter in 2006 with other plaintiffs who are not involved in this case and the lower court tossed the case and the appellate division made a decision. The appellate decision addressed the educational issue and stated, "the determination of the ZBA that the proposed high school athletic facilities constituted a permissible educational use under the town code within the subject's zoning district was neither unreasonable nor irrational." What we are here for is the interpretation of the specific property and if it is being used for an educational use. Based on this decision, the Zoning Board has heard it, decided it, went to the courts in an Article 78 proceeding, and the appellate division decided an athletic field is an educational use and permissible under the zoning. The zoning has not changed and is also residential. There were court cases submitted that basically state the standing with respect to the SEQR, anyone can be involved with. The zoning code specifically refers to an individual being an aggrieved party. If you refer to Mr. Warren's form, he has listed "other" as he is not a contractor, property owner, tenant, or an abutting landowner. The courts determine aggrieved purposes for Zoning Board determinations are you must be a party, your land, or an abutting landowner, or someone within the zone. To be within the zone you must live close, not across the creek 2,500' away. The code provides it must be an aggrieved person and the courts have determined what constitutes an aggrieved person.

The courts and the Zoning Board of Appeals has decided this is an education purpose and Mr. Warren is now asking this board to overturn the prior decision of the former board on what constitutes and educational purpose.

Ms. Greenan noted, the only difference was a football field and a baseball field. Mr. Trapp stated this is correct.

Mr. Kapuscinski questioned if Mr. Warren was not an aggrieved person, should this continue. Mr. Trapp stated the board will decide this; the determination needs to be made if Mr. Warren is an aggrieved person within the zone of interest. Mr. Warren is attempting to use the earlier decision regarding standing, but this was under a different context. The previous dealt with procedure and SEQR versus a zoning code with a specific reference. There is the other issue of whether this board should decide something differently than the prior board and in essence overturn what the appellate decision. Mr. Trapp does not believe this board has the authority to overturn the appellate division.

Mr. Kapuscinski questioned the reason Chairperson Hicks was recused. Mr. Trapp stated there were issues raised with a potential bias based upon a predetermination prior to hearing the evidence submitted by both parties. If you hear all the evidence and have concerns and opinions, that is acceptable. You are not supposed to have them in advance.

Mr. Kapuscinski stated he has two children who previously attended Canisius and questioned if he should recuse himself. Mr. Trapp stated they are former students who are not financially affected, and Mr. Kapuscinski does not need to recuse himself.

Ms. Greenan stated if a family member or relative worked at Canisius or benefited financially there would be a case for recusal.

Ms. Greenan stated there has been a lot of information and she is clear on the facts. Ms. Greenan questioned Mr. Trapp if he would advise to table the request for further review. Mr. Trapp stated the question is if the board feels there is sufficient information to make a determination.

Motion by ~~Greenan~~ **Kapuscinski**, seconded by Greenan, to table the determination until the January 25, 2023, meeting waiving the automatic stay provisions.

Ayes: (3) Greenan
Kapuscinski
Bedient

Noes: None

Motion Carried

TABLED ITEMS

2020-049

Request of New Hope Methodist Church for renewal of a variance for property located at 2846 Seneca Street to construct a LED sign within 500' of residential property (LED signs not permitted within 500' of residential zoning)

The applicant was not present.

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Motion by Hicks, seconded by Kapuscinski, to table the item until the January 25, 2023 meeting.

Ayes: All

Noes: None

Motion Carried

2022-055

Request of Paul Daley for a variance for property located at 800 Reserve Road to allow raising of a goat and chickens on property (Raising of farm animals/poultry not permitted)

The applicant was not present.

Motion by Hicks, seconded by Greenan, to table the item until the January 25, 2023 meeting.

Ayes: All

Noes: None

Motion Carried

ADJOURNMENT

Motion by Hicks, seconded by Kapuscinski, to adjourn the meeting at 8:25 P.M.

Ayes: All

Noes: None

Motion Carried

Respectfully submitted,

Amy M. Kobler
Town Clerk/Zoning Board Secretary