

Town of Clarence  
 One Town Place, Clarence, NY  
 Zoning Board of Appeals Minutes  
 Tuesday April 14, 2015  
 7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:05 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik	Vice-Chairman Ryan Mills
David D'Amato	Patricia Burkard
Gregory Thrun	

Zoning Board of Appeals member(s) absent: Richard McNamara

Town Officials present:

Junior Planner Jonathan Bleuer  
 Councilman Robert Geiger  
 Councilman Bernard Kolber

Motion by Gregory Thrun, seconded by Ryan Mills, to **approve** the minutes of the meeting held on March 10, 2015, as written.

Gregory Thrun	Aye	Patricia Burkard	Recuse
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Recuse		

MOTION CARRIED.

Other interested parties present:

Don Rugg	Robert Sackett	Charlene Spoth
Patrick Spoth	Matt Vanderbrook	Richard Rockford
Ken Thompson	Dawn Trippie	Erich Fischer
Lois Daigler	Jim Gugi	Cory Damon
Kathleen Damon	Jacqueline Damon	Gary Damon
Tom Webb	Philip J. Silvestri	Mike Metzger
James Dentinger	David Von Derau	

## New Business

### Appeal No. 1

Don Rugg  
Residential Single Family

Requests the Board of Appeals approve and grant an 18'3" variance to allow for a 26'9" setback for an addition to the principle structure located at 4240 Shimerville Road.

Appeal No. 1 is in variance to §229-52(3): established front yard setback of 45'.

### **DISCUSSION:**

Mr. Rugg is present and submitted neighbor notification forms. He explained that he is looking to add square footage to his existing house because they now have four (4) foster children. The children have been with them for just over a year and it is cramped. Mr. Rugg said he has to go out his front because his septic tank is right off his back patio. It would be too expensive to re-relocate the septic tank. The addition will make his bedroom, the upstairs bedrooms and the living room bigger, he is basically adding more square footage.

Mr. Thrun asked if the applicant could build anything smaller than what is being proposed. Mr. Rugg said after a few discussions with the Town's building inspectors, he decided that the best use of space would be to have the housing addition at 12', there will be 6' open, but covered, patio, as well. His lot is only 65' wide and with the garage and the driveway there it would not be enough room to build-out on either side. Mr. Rugg has owned the property for 20 years. Neighbor notification forms are on file. Mr. Rugg confirmed that the house will remain a three-bedroom house, he is just making the rooms bigger. The ages of the children are 5, 8, 10 and 12. He does not know how long the children will be with them, the agencies they deal with are uninformative. When they started the process they were told to prepare to have the children forever, the proposed addition was their only option. They looked at selling the house and buying a new one in Clarence, but it would have cost \$300,000. He likes his house and wants to stay there, it is in a good location and is centrally located for shopping and to the children's schools.

Mrs. Burkard asked if the porch in the front will have open sides, Mr. Rugg said yes. She also asked if he will be the only house that comes out this far on the street. Mr. Rugg said there are other houses that come out but not as far as his. Mr. Thrun said there are houses that extend closer to the street to the north of the applicant's home. Mr. Rugg spoke to both his neighbors and they have no problem with his request.

Mr. Rugg said it was an emergency situation and if they did not take the children, who are siblings, the agencies would have split them up. He explained that they have home inspections every month whether it is Child Protective Services (CPS) or Gateway.

Mr. Mills asked if the new front façade will have brick on it. Mr. Rugg said no it will be vinyl, he will strip the entire house down and re-side it so it doesn't look like it is an addition, he wants it to look like it's always been built like that. He will do a lot of the work himself as he has been a carpenter for over 37 years. He has everyone lined up and ready to go. The one bedroom is larger because, per CPS, they have to keep the boy separate from the girls, there will be three girls in one room. There is the option of putting in an additional bathroom in the future. In response to Mr. Mills' question about the possibility of reducing the size of the addition, Mr. Rugg said would like to keep the size as requested. In terms of the rear yard, to add on to the back is not feasible because of the septic system and a covered patio that is located there.

It is clarified that the variance of 18'3", in terms of two-story construction, is really 12' 3" because the plan includes a 6' front porch.

**ACTION:**

Motion by Gregory Thrun, seconded by Patricia Burkard, to **approve** Appeal No. 1, as written with the condition that the siding will match the house.

**ON THE QUESTION:**

Mr. Mills said it appears that the evidence the applicant has presented distinguishes this appeal from some others similar variances in that there is no feasible alternative for the addition, there is a septic system, a garage and a covered porch in the rear yard. The variance of 18'3" is effectively a 12'3" variance because of the covered porch, it is not a full two-story variance.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**Appeal No. 2**

Matt Vanderbrook/Patrick Spoth  
Agricultural Floodzone

Requests the Board of Appeals approve and grant:

- 1.) Two (2) turbines located on one parcel.
- 2.) A 94' variance to allow for a 154' tall turbine.
- 3.) A 94' variance to allow for a 154' tall turbine.

All requests apply to 9300 Wolcott Road.

Appeal No. 2 is in variance to §173-5(B)(1) and §173-4(C).

**DISCUSSION:**

Patrick Spoth and Charlene Kelkenberg-Spoch are present. Mrs. Kelkenberg-Spoch explained that they are Kelkenberg Farm of Clarence, it is a second generation horse and livestock farm. They are an educational agri-tourism destination for school field trips, community and youth organizations and families. Their farm reaches thousands of urban and suburban consumers and provides them with agricultural information and resources through direct interaction, a guided farm tour, u-pick pumpkins and lots of activities. The visitors learn about raising livestock, training horses, producing eggs and more. A hay ride through the woods and fields shows their method of production. They learn how the New York farmer impacts their life for the food and products they provide. Additionally, through their educational youth summer programs they give families a real connection to daily farm life. Their goal is to keep the NYS residents informed and connected to the agricultural industry that is vital to the economic success of NYS. They are still growing and changing and hope to keep their bottom line as tight as they can. Her ultimate goal is to make it appealing so that her kids come back to take it over. She is trying to keep the farm viable, attractive and successful for the next generation. Mr. Spoth said the electrical utility bill is between \$700 and \$900 a month, by installing the wind turbines they are looking to cut that cost. It is not often that the price of a utility goes down and to be able to lock into a fixed price for the electric it would allow them to do more of what Mrs. Kelkenberg-

Spoth explained previously. They are providing a great service to the community and they would like to keep doing that, in order to do that they need to stay competitive and cut costs where they can.

Five (5) neighbor notification forms are on file.

Matt Vanderbrook is representing Sustainable Energy Developments (SED), who will be the installer of the wind turbine. He explained that the reason for two (2) turbines is because of the amount of the farm's energy consumption. The amount they use justifies the need for two (2) turbines. Mr. Vanderbrook said by installing a 140' turbine it will maximize the production and make the most of the economic benefit to the farm operation. It is the same height as the wind turbine that was installed at the Maple Row Farm. Mr. Spoth said they are in the process of putting up a new structure on the farm and there will be a 14' x 12' cooler in there which will cost \$300-\$400 a month to run. This cooler will be used to store apples, apple cider and produce.

Mr. Thrun asked what the distance between the tower and any structures need to be. Mr. Bleuer said it is a 1:1 ratio, the total height has to equal the setback to any structure. Mr. Thrun said the setback is 95'. Mr. Vanderbrook clarified that the tower is 95' from the property line to the east, that property is owned by the applicants. It is clarified that both turbines will be 154'+ from all structures.

Mrs. Burkard asked what crops the farm grows. Mrs. Kelkenberg-Spoth said they grow 2500 bales of hay a year for the horses, part of the farm is pasture and there is 12-15 acres to grow pumpkins. The major purpose of the farm is for education. Some of the power generated from the wind turbines will be used for their house. It will not be used for their neighbor's homes. The neighbors across the street were notified and had no issues with the request. Mrs. Burkard voiced her concern about the noise level, she visited a nearby turbine and said it was very noisy; she is concerned about what two (2) will sound like and that it will annoy the neighbors. Mr. Vanderbrook said they have installed 36 of these turbines with many of them being much closer to neighboring residences than this one. Very few, if any, issues have arisen from them. He asked which turbine Mrs. Burkard visited and she told him it was the Maple Row Horse Farm, Mr. Vanderbrook explained that the turbine there is not fully operational yet and will be louder, when it is fully operational it will be quieter. Mrs. Burkard asked if the applicant considered solar power. Mr. Spoth does not think it is a viable alternative for his farm. He knows many people who lost roofs, green house operations and dairy farms to snow this past winter. It would be an issue if he had to shovel off his roof and there were solar panels there.

Mr. D'Amato said he went to a farm in Akron that has a wind turbine and you can hear the animals of the farm more than you can hear the wind turbine. He then asked about a ground shadow, Mr. Vanderbrook said the blades are not big enough to cast that big of a shadow. Mr. D'Amato thinks people are comparing these wind turbines to the larger turbines and that is where the issues come into play. Mr. D'Amato said an airplane is a lot louder than these types of wind turbines. He asked if there have been any incidents of the blades flying off and impaling somebody. Mr. Vanderbrook said no one has been impaled or injured from these blades. Of the 10,000 small types of wind turbines, this type of wind turbine is the most installed in the world. There are few and far between mechanical failures. They have been around since the 1970's and they are continually being updated with improvements. The width of each blade is 2'-3' and their length is 12'-14'. Mr. Vanderbrook said the rotor speed is up 400 RPMs. Mr. Spoth said they are designed to go fast to generate power. If the wind gets above a certain speed it kicks the tail out and throws the propeller out of the wind, this is what prevents it from going too fast. In the worst case scenario these towers are designed to collapse. This property is rural, the applicants own 45 acres and rent another 115 around them, they also own 20 acres down the street.

Mr. Mills asked if the turbines can go further back on the parcel. Mr. Vanderbrook noted that there comes a point where a higher gauge wire would be needed, ultimately the applicants have a say in where they want the turbines located. Mrs. Kelkenberg-Speth asked what the reasoning would be to set them back further. Mr. Mills said there is a safety concern because there have been mechanical failures, if it was setback further the turbine would be further back from any neighboring residences. It may also help with the visual impact. Mr. Vanderbrook said moving it back 20' is not going to change how it looks. With regards to the safety aspect, Mr. Vanderbrook said they are working with the industry standards. The fields that the turbines will be located in are pastures, only animals will be in there. Pastures need to be connected to the barns to they are limited on where to locate them. Mr. Thrun referred to document S-1 and asked for an explanation. Mr. Speth said they raise pumpkins on a field for 2 or 3 years and then they rotate the fields and use it for a hay field. Mr. Mills suggested the applicant put one of the turbines on another parcel instead of having two turbines on one parcel. Mrs. Kelkenberg-Speth referred to document S-1 and explained the layout of the farm and why the proposed location is the best. If she located the turbines elsewhere she would have to take some of her best fields out of crop rotation.

Mr. Speth said, personally, he does not like the way solar panels look. They just put up a beautiful barn with beautiful cupola's and that's the last thing he would want on the roof is solar panels. All their gable roofs are perpendicular to the road and that is not optimum for solar power. Chairman Michnik asked if there are more energy credits with the wind power as opposed to solar. Mr. Vanderbrook said they are similar, just calculated differently. His company installs solar panels as well, they are a different footprint. The two wind turbines will generate between 25,000 and 30,000 kilowatt hours a year. A similar sized solar panel system would need at least 100 modules. Then the question is where are they going to be located and will it match with what the applicant is trying to achieve at the farm. Mr. Speth said the piping, the plumbing work, the maintenance and service work that has to be done is a lot and he has enough work to do now. Mr. Speth went on to explain that there is a 20 year lease for the wind turbine, then United Wind has the option to take it down or the Speth's can own it outright. SED will be responsible for all the maintenance on the turbine for that 20 year period. Mr. Vanderbrook explained that it is a yearly maintenance check. Chairman Michnik asked what guarantee the Town and the homeowner has that SED is still in existence 19 years from now. Mr. Vanderbrook said there are agreements in the lease agreement that speak to that issue, for example there is bonded money that is set aside for the dismantling of the turbine. Chairman Michnik asked if the applicant needs the full 154', Mr. Speth said yes. Mr. Vanderbrook explained that the wind speed changes drastically the higher you go. Chairman Michnik voiced his concern regarding safety and asked if a fence will be put around the turbine to discourage people from climbing it. Mr. Vanderbrook said a fence is not required but if requested they can do. He explained that they remove the climbing pegs 12' up from the ground. Chairman Michnik asked how much footage the Speths own on Wolcott Road. Mr. Speth said about 1,200'. Chairman Michnik asked if there is any intention for this property to be used for anything other than farming. Mr. Speth said no, that is one of the reasons they are asking for this variance. Chairman Michnik asked again if they need the 154' height. Mrs. Kelkenberg-Speth said their business is still growing, she thinks they will still be buying from the power company. Mr. Speth said the turbines will not provide enough power at the 154' height, there will still be a shortage of power to run their entire operation so it doesn't make sense to shorten the height. His neighbors have no issues with the turbines, he showed the pictures of what it would look like. Chairman Michnik asked if the applicant floated anything to see how high it really is. Mr. Speth said he has seen them, his brother has one in Akron and he has seen Hans Mobius' at Maple Row Farm. Mr. Speth said when his dad was a kid almost every farm had a wind turbine up to 120' tall, it was common, and was used strictly to pump water. He thinks it is a great thing that something can generate power without dirtying anything up or putting out any emissions.

Mr. Mills asked if the applicant explored parceling off SBL #18.00-1-17.1, if they legally divided that into two (2) parcels, then they would not need the one request for two (2) turbines on one parcel. Mr. Spoth said he looks at his property as one (1) farm, with one owner. Mr. Mills does not want to set a precedent for others to ask for multiple turbines on one (1) parcel. Mr. Spoth said they currently have an agricultural assessment on their property. He said they are good with reference to their setback and he doesn't think it should be an issue. To have to go through the tax assessors and separate it out and to get into the whole agriculture assessment thing would be an issue. He feels that if the Board was uncomfortable with an applicant's positioning of the windmills they could and would deny it.

Chairman Michnik asked if the turbine setback at 295' can be moved further back. Mr. Spoth said it would depend how far back the Board is suggesting. Chairman Michnik said the further back the better it will look. Mr. Vanderbrook said it is an option to put that turbine even with the other, Mr. Spoth does not have a problem with moving it back.

Mr. Mills said if the applicant wants more time to explore the option of parceling off the property, they could ask the Board to table the request. Mr. Spoth is not interested in pursuing this.

It is clarified that if the turbines are in line with each other, the setback will be 465' from the road.

Chairman Michnik is concerned with two (2) wind turbines on one (1) property.

Mrs. Kelkenberg-Speth said they are a good business trying to do the right thing.

Mr. Bleuer explained that to split the property the applicant would apply for a lot line adjustment, potentially the County could require the entire property be re-surveyed. The cost could be well over \$1,000 to survey the entire property.

Mr. Spoth said the Board has the opportunity to look at each case on its own. He is not interested in spending thousands of dollars to have the property surveyed and split.

Mrs. Burkard asked if the applicant would take a month to explore how much it would cost to resurvey the property. Mr. Spoth is in the construction business and knows how much it will cost, it is approximately \$800 to survey a one (1) acre residential lot. He and his wife do not think the lot split is necessary. With the wet heavier soils up north, they have a small window to get this project done, they would like it done by this Fall, which is their busy season.

Ken Thompson of 8820 Clarence Center Road said the sun only shines during the day but wind blows all the time, the wind can be shared.

Dawn Trippie of 8820 Clarence Center Road and of Thompson Brothers, said she currently has a turbine request before this Board and she would like the record to show that they are only asking for one (1) turbine on their property, they are not interested in two (2).

Mrs. Kelkenberg-Speth said the hayride will not be near the wind turbines, they would do nothing to endanger their customers.

**ACTION:**

Motion by David D'Amato, seconded by Gregory Thrun, to **approve** Appeal No. 2, as written with the following conditions:

- the most easterly proposed turbine is to be moved back in line with the most westerly proposed turbine for a total setback of 465' from the front property line; both turbines will be equal distance from the front property line.
- the climbing pegs are to be removed 12' up on the wind turbines, for safety reasons.
- the fields are to stay in pasture and not used to grow pumpkins where anyone will go and pick.

**ON THE QUESTION:**

Mr. Thrun said what makes this parcel unique is that there are 115 usable acres that the applicant's either rent or own, this makes it a sizable lot. The purpose is an ongoing agricultural basis. The fields where the turbines are to be located are pasture and will remain pasture for the farm. The frontage of the property is about 1200'. It is not in a designed residential area nor is there one prominently nearby. There have not been any neighbor complaints regarding this request. With regards to splitting the property, in looking at the size of the property and to incur that extra cost just to circumvent the size in the law, seems unnecessary. This is a unique situation.

Mr. Mills said this particular parcel can be distinguished from others in that it isn't a very dense residential area. The number of residential homes around it is nowhere near what it is for other applicant's or what it may be for other applicant's in the future. In terms of the two (2) turbines on one (1) parcel, the applicant has presented testimony that they own or lease a great deal of acreage, approximately 115 acres. While they could easily subdivide it, but for the cost, the potential is there to alleviate that second variance. The property would have to be resurveyed.

Mr. Mills referred to the Short Environmental Assessment Form (SEAF), which is on file, and suggested the motion be amended to note that the Board move to accept Part 2 and Part 3 of the form as prepared by the Town Planning Department and pursuant to Article 8 of the Environmental Conservation Law to issue a Negative Declaration on the proposed Spoth small wind turbines located at 9300 Wolcott Road. This Unlisted Action involves the installation of two (2) turbines in the Agricultural Floodzone. After thorough review of the submitted site plan and the Environmental Assessment Forms it is determined that action will not have a significant negative impact on the environment. The SEAF Part 2 notes that the proposed action will create a material conflict with an adopted land use plan or zoning regulation and a moderate to large impact may occur. Mr. D'Amato agreed to add this to the motion, Mr. Thrun agreed as well.

Mr. Mills suggested the following be added to the motion: he referred to the SEAF Part 3 and noted that the proposed action exceeds the maximum allowable height for a wind driven device as permitted in Clarence Town Code §173-4(D). The proposed action also exceeds the maximum allowable number of wind driven devices on a given parcel as permitted by the Town of Clarence Code §173-5(B)(1). While both of these actions will create a moderate to large impact on the existing code the agricultural nature of the surrounding area will support such a proposal. It has been shown to have no negative affect on the community character, health and safety for this particular agricultural area. The proposed action will result in no impact for questions 2-11. The proposal would allow energy to be produced on site rather than fully supplied from the grid. There has been testimony from the applicant's in terms of how it will benefit the agricultural farm area. The amount of land they have and the additional setbacks all come into play as well

as the character and nature of the surrounding environment. Mr. D'Amato agreed to add this to the motion, Mr. Thrun agreed as well.

Mrs. Burkard added other reasons for the Board's decision noting that it is because of the size of the property, it is really unfeasible to subdivide and add another parcel, and there are no neighbors complaining about it.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

### **Appeal No. 3**

Richard Rockford  
Residential Single Family

Requests the Board of Appeals approve and grant a 179.2 square foot variance to allow for an 899.2 square foot detached accessory structure at 4780 Ransom Road.

Appeal No. 3 is in variance to §229-55(D).

### **DISCUSSION:**

Richard Rockford is present and explained that he will be taking an existing 400'+ structure and adding another 20' by 24'. Currently it is a two-car garage, they will build out the back and it will be the same width. It will be slightly doubled in size. Mr. Rockford has an antique business on Main Street just past the flea market which he is ready to retire from. He has accumulated a lot of supplies and creates art work out of old elements. He would like to continue creating and needs additional space, this proposed structure would provide that space.

Mrs. Burkard asked if the applicant will be running a business out of the proposed structure. Mr. Rockford said no, he will make art work that will be occasionally shown and sold, but it is not a business anymore. The material of the proposed structure will match the existing structure. The roof will match as well.

Mr. D'Amato asked if it is acceptable to the applicant if there is a condition placed on the approval that there be no business operated from the structure. Mr. Rockford said people will not come in and out of the structure, he went on to clarify that there is a component of his proposal that would be considered an art studio.

Mr. Rockford pointed out that the drawing calls for 14' of wall height for the addition, he has reduced that 10'. This reduction will make the structure more blended with the existing structure. He has lived at this address for 37 years. He rents the warehouse on Main Street and will be selling everything there, and then he will be done with that business.

Three (3) neighbor notification forms are on file.

Mr. Mills asked if there is a second floor proposed on the structure, Mr. Rockford said no. It will be vinyl clad and he would like to have a window out the back of the structure.

Mr. Thurn asked for confirmation that there will be no art sold out of the structure. Mr. Rockford confirmed and said it will all be taken to a gallery. He said there will be no signage, no hours, and no clients. A gallery owner may want to come out and look at what he has made but that is the extent of it.

Chairman Michnik asked if Mr. Rockford rents the property where the structure is. Mr. Rockford said it is a duplex and he owns it. He lives in one side and rents out the other side. Mr. Rockford said the roped area on the property is slightly bigger than what they will build because he did it when the snow was deep. Mr. Rockford said he is fine with the condition that there be no retail operated out of the structure.

**ACTION:**

Motion by David D'Amato, seconded by Daniel Michnik, to **approve** Appeal No. 3 as written with the condition that the structure will not be used as retail space.

**ON THE QUESTION:**

Mr. Thurn said with the nature of the other structures, the outbuildings, adjacent properties and down the street, this is within the character of the area and would not be a detriment to the neighbor.

Gregory Thurn	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**Appeal No. 4**

Michael Metzger, PE/McGuire Development  
Commercial

Requests the Board of Appeals approve and grant a 22.5' variance to allow for a 22.5' greenbelt between a proposed commercial use and an existing residential use at 5989 Transit Road.

Appeal No. 4 is in variance to §229-87 (C)(4).

**DISCUSSION:**

There is one (1) neighbor notification form on file.

Michael Metzger, of Metzger Civil Engineering, is present along with the president of McGuire Development Jim Dentinger, project manager David Von Derau and project architect Phil Silvestri. Mr. Metzger said the property is 1 and ¼ acres and is zoned Commercial.

A representative of the Damon family said he has had preliminary discussions with McGuire Development and he asked for the request to be tabled for a couple of weeks. Chairman Michnik said it would be up to the applicant to decide if they want the request tabled to provide time for discussions between the representative and the applicant. Mr. Dentinger said he does not want to table the request. He has been unable to talk to the neighbors about the project.

Mr. Metzger continued, the properties on either side of the project site are zoned for business. The project is a 10,700 square foot retail facility. On one end it will be anchored by a Tim Horton's on the other end

will be a business called My Corner Pub, which is owned by a local Clarence businessman. In between is just over 5,000 square feet of retail space that can be flexed to fit anything. There are two entrances, one on Transit Road as far away from the intersection as possible, an another entrance on Clarence Center Road as far away from the intersection as possible. There is parking, sidewalks and plenty of landscaping planned. There is a drive-thru along the back and the side of the property for the Tim Horton's, this location is in accordance with the Town's regulations. An analysis has shown that there will be ample queuing. There is pedestrian access out to the sidewalk along Transit Road, they are also proposing a sidewalk along Clarence Center Road. The architectural style incorporates a lot of stone work with a Mansard roof, it is a single story building. The setting of the site itself is commercial. To the south of the site is a building owned by Benderson, the Mash Facility, there is a NOCO station across the street, there are a few other structures along with a contracting yard. The applicant has worked with the Town Board and the Planning Board, they have made significant changes to the plan to accommodate their concerns relative to the site plan. The size of the building has been decreased, the number of parking spaces have been increased, the building has been moved in two different directions. There is an 8' stockade fence that is proposed along the east property line to provide visual and audio buffering. They plan on a dense landscape feature along Clarence Center and Transit Roads. The dumpster location has been tweaked so that it is at the south end of the property. Interconnectivity and shared access has been incorporated into the plan. They have an arrangement with Benderson for interconnectivity, the letter stating this is on file. Originally there was a much smaller greenbelt, but they have increased it to the maximum amount possible. They are reducing the height of the size of the light fixtures to 8', the same height as the stockade fence, to prevent light spillage off the site. The property was re-zoned to commercial years ago. The Town Board referred the project to the Planning Board. The Planning Board thoroughly reviewed the project and at their April 1, 2015 meeting they made a recommendation to approve the Concept Plan, they also made a recommendation to issue a Negative Declaration under SEQRA and a recommendation to the Town Board to grant the Special Exception Use Permit, which is required for the "Plaza" designation as well as the drive-thru facility. The recommendations were made with the condition that the applicant obtain a variance for the greenbelt. Mr. Dentinger puts a lot of emphasis on being a good neighbor. McGuire Development has owned the property since 2012. The property adjacent to the project site to the east was sold around that time as well, with the intention of commercial development on that property. The applicant made contact with the neighbor to the east, in order to work with them, back in November 2014 when they starting planning for the site. There was very little contact after that until most recently when the neighbors attended a Planning Board meeting to voice their concerns. There has been discussion regarding the purchasing of the neighbor's property but the two parties have not been able to reach an agreement. Mr. Dentinger said when they bought the property in 2012 the Damon's offered their property to McGuire Group for \$160,000, but McGuire had no plan yet so they declined the discussion. A site plan was drawn up and sent to the Damon Family and a meeting was scheduled to discuss it. The Damon Family's lawyer cancelled the meeting and never rescheduled. McGuire kept sending the Damon's site plans, moving forward but they said McGuire should have called the attorney instead of the Damons. The Damons never communicated to their attorney that McGuire had continued to send them updates to the plan for their input. So McGuire continued with their plans and now have signed leases for the property, and now they are stuck. They have to move forward or cancel leases, he does not want to do that. Mr. Dentinger noted that the same process they used for this proposal was used for the Tronconi building on Main Street, and everyone is very pleased with that building. Despite the time that lapsed where there was no communication from the Damon's, McGuire offered \$145,000 for their property or to buy 21' as a permanent easement that they (Damon's) would have rights to and \$35,000. The easement would be behind the fence. The Damon's countered with \$194,000, which is an increase of \$34,000 from the \$160,000 they offered two years ago. McGuire Development had done their fair share in trying to make this work for the Damon's. Mr. Metzger noted that even if McGuire purchased the Damon's property, that property does not add any value to the proposed

project. The project is set assuming that the variance is approved. Mr. Dentinger said it is disingenuous and offensive for a neighbor to come in last minute and ask for a premium.

Mr. D'Amato asked if the applicant has any interest in re-discussing the situation with the neighbors. Mr. Dentinger said he needs approval on this variance tonight in order to meet their time-line, they still have two (2) public hearings left on this project. They have had substantial offers on the table in good faith to work with the neighbors but to no avail. Mr. D'Amato pointed out that the applicant would not need the variance if they would have come to some agreement and purchased the property. Mr. Bleuer said any adjoining parcel being used as residential requires a 45' greenbelt. The variance would need to be granted no matter what because of the adjoining property at 8041 Clarence Center Road.

Chairman Michnik said if the Board was to table this request to provide the opportunity for further discussion between the applicant and the neighbors, they would be the first item on the next agenda and they would only lose 30 days. It could make the project better. Mr. Metzger said the process of discussions with the neighbors was attempted to be started last year, with no response until such time a meeting came up on April 1, 2015. Since then there was a strong effort on both parts but an agreement could not be reached, Mr. Metzger does not see that changing with another month's time. Mr. Dentinger said he feels that they are being pressured and in his experience he has never been pressured like this before.

Mr. Thrun said he understands the time-frames and the issues between the applicant and the neighbor but this discussion needs to move forward.

Mr. Metzger said the project is compliant with, and in many cases exceeds, all setbacks. The greenbelt requirement was put in place to protect homesteaders, which are people who will live in their home long term, not for those who are biding their time until a commercial project comes up in a commercially zoned area, such as this. He explained that in an area variance the Board has to weigh the benefits to the applicant against the detriment to the public. He noted the five (5) questions the Board looks at when reviewing a request. The applicant has evaluated those questions and can show that the request is compliant and meets the criteria. Mr. Metzger said the benefit cannot be achieved by other means feasible to the applicant. He went on to explain that with the zoning classification being commercial, there is a certain type of structure that needs to go in there to make it financially feasible, and other zoning requirements such as parking. The project will not cause an undesirable change in the neighborhood character or nearby properties, it is on Transit Road at a major intersection and in an established commercial area. The request is not substantial in reference to what is around it. The request will not have an adverse environmental affect. The alleged difficulty is not self-created, the property dimensions are what they are. The applicant feels that this variance is justified.

Mr. Dentinger said another month's delay would push them into the end of December, which means they can't do blacktop until May.

Mr. Thrun asked what material the 8' fence will be made of, Mr. Metzger said it will probably be a solid wooden stockade fence. The detention pond is required not only by local standards but also by the State storm water requirements due to the size of the site. Mr. Thrun asked if there has been a study done on traffic. Mr. Metzger said SRF Traffic Consultants prepared an evaluation of the site and provided a report, which was reviewed by the Planning Board. It was determined that the maximum queuing will be 14-15 vehicles. Mr. Thrun said that will add substantially to the noise level and emissions from the cars, this would have an adverse physical or environmental impact. Mr. Metzger asked the Board to consider the surrounding commercial area when looking at the traffic.

Mrs. Burkard asked if cars will exit onto Clarence Center Road. Mr. Metzger explained that the end of the drive-thru lane is on site so people will have the option of going to Transit Road or Clarence Center Road.

Mr. Mills clarified that McGuire will own the whole parcel and will rent to Tim Horton's and other retailers. It is clarified that Dryvit will be used. Mr. Mills referred to document A-201 dated March 24, 2015, it shows a split face concrete block. The tower will have stone, Dryvit and asphalt shingles, continuing on to the rear of the building is the decorative face block. Mr. Mills asked if the applicant explored anymore decorative elements along the D4 North Elevation. Mr. Dentinger said he could consider putting Dryvit there. Mr. Mills asked if the applicant thought of any other mitigation options. Mr. Dentinger said they discussed planting pine trees on the other side of the fence, with a bed. It would be on the neighbor's property but at the applicant's cost. The applicant clarified that the building size cannot be tailored down any further otherwise the numbers just don't work. Mr. Mills suggested something more substantial than a fence such as a decorative block wall. Mr. Dentinger said they make vinyl fencing with sound dampening that he would be willing to look into.

Chairman Michnik asked the applicant what his next step would be if the Board denied this request. Mr. Dentinger said they would lose their two leases and they would be back where they were last October. Chairman Michnik asked about deliveries at the proposed site. Mr. Dentinger said they are limited to deliveries no later than 7:00am on one side of the building and no later than 11:00am on the other side and no truck deliveries at the front. This is in the record from the last Planning Board meeting. Small trucks are allowed to back in, small retailers will have FedEx or UPS deliveries. These restrictions are in the lease agreements and a copy has been provided to Deputy Town Attorney Steve Bengart. Mr. Mills clarified further and noted that Steve Bengart has copies of the lease agreement noting that the time frame is limited for the project. Chairman Michnik asked if the access onto Clarence Center Road will be designated "right only"? Mr. Dentinger said there will be a sign directing northbound Transit Road traffic to use the other driveway turning right, they think the issue will only be on the morning commute. Chairman Michnik said the corner can get bottled up if someone is making a left turn. Mr. Metzger said they don't think it is appropriate to prevent someone from using the traffic light in order to head south. They feel, from a safety standpoint, it is a better maneuver to have someone use the traffic light to head south. Mr. Metzger noted that there was not a specific traffic study done on Clarence Center Road, the project site and Transit Road were assessed.

Tom Webb said he has had good communication with McGuire Development, they have been very forthright. Mr. Webb said it is disingenuous for McGuire to say they are being squeezed. They paid \$230,000 for a half acre, comparable to what the Damon's have, when this project was envisioned. He contacted McGuire Development in December, announced who he was to whomever he cancelled the meeting with and he had not heard anything from them since until about 10 days ago. The Damon's are under no obligation to help McGuire Development build a bigger development that encroaches on their land. Mr. Webb thinks it is asking a lot to put a drive-thru 25' from the property line instead of 45'. This dramatically affects how the Damon's live. Nobody would want that type of setback. Perhaps McGuire should plan a smaller project or buy more land when they started. They should not encroach on two young people starting out who bought the house as a duplex and have converted it to a single family and that is where they want to live. The Damon's advised McGuire of their intention a year and a half ago and told McGuire if they want to purchase the home they should contact them (the Damon's). Currently, the roadway where people will order their coffee is closer to the Damon's house than the existing structure, it seems inappropriate. He does not think the variance should be granted.

Cory and Jacqueline Damon live at 8035 Clarence Center Road. Mr. Damon said McGuire contacted them in December and he and his wife were going to talk to them but they felt it was outside of their scope and they were concerned and uncomfortable with the variance so they consulted with Mr. Webb. Mr. Webb contacted McGuire, so the Damon's expected further communication to be through Mr. Webb, but there wasn't any until two (2) weeks ago. Mr. Damon said the particulars of negotiations are irrelevant to the Zoning Board of Appeals members. They have put extensive rehab and renovations into their home, so to accept an offer for \$145,000 they would be coming out behind. Their intention is to come out whole, they want to preserve their lifestyle, be able to live their lives in peace and do what they like to do. They don't want to stop any projects but they feel that this would be a burden for them to live next to. It is imposing to have a roadway right there. They can't think of a more inappropriate place for there to be a roadway with cars using it at all hours of the day and into the night and early in the morning. They are not opposed to development and he suggested a brick wall so that the project would not impinge on their lifestyle so much. Mrs. Damon said she feels as though they are being squeezed too, this is her home. She is happy to work with McGuire but she does not know where to go with this. There is minimal traffic there now and she does not know how she is going to get out of her driveway in the morning if people are turning in and out of Tim Horton's especially with the size of the road, it is tiny. 45' should be a minimum for how immeasurable devastating this would be for her and her husband. They've work very hard for the past three (3) years to make this property their home, and this is where they want to live. They do not want to live next to a drive-thru and she does not know how they will sell the house if the drive-thru is there. They will lose so much money and hard work that they put into the house. Other concerns include the possibility that Tim Horton's will be a 24 hour operation, deliveries, smells of the food and exhaust, dumpsters that attract rodents and insects, light pollution. They are losing privacy, they will lose the trees that line their property. The de-valuing of their property is very upsetting. They have no desire to develop the property as a business or use it as commercial. They would like to come to a mutual agreement. They paid \$130,000 for the house and put in over \$15,000 in materials, not counting labor. They are doing the work themselves.

Gary Damon, Cory's father, said the property was extremely distressed, his son has brought it back and made it a livable clean place. He has put in 1,000's of hours of labor. Gary Damon provided further details of the renovations that have been done to the house. For the applicant to depreciate these efforts saying this is just another home is truly wrong. If this is the applicant's attitude then Gary Damon respectfully requests the Board to refuse the variance.

The Damon's said their desire is to come to a mutually beneficial agreement with McGuire, so they are not stuck next to a drive-thru, they do not want to see it. Mrs. Damon said they want communications to be fluid going forward.

Mr. Dentinger said they need the variance for their time table, he said if there is leverage still on McGuire to negotiate in good faith, there is. He would like to come to an agreement with the Damon's but he is not sure they are close to that. Chairman Michnik said if the variance is granted it stays with the property, there is no recourse. Chairman Michnik suggested Mr. Dentinger and the Damon's take a few minutes to talk with each other to see if they can come to an agreement now.

Mr. Mills asked who the legal owner is of 8035 Clarence Center Road. Corey Damon said he and his father are the legal owners of 8035 Clarence Center Road. Mr. Mills asked Corey Damon if he was aware that the property was zoned commercial when he purchased it. Mr. Damon said they were aware. Mr. D'Amato said since they knew what it was zoned then they were aware that something of this nature could go there. They had a realtor when they purchased the house. Mrs. Damon noted that there is a house on the other side of their property.

The Damon's, Mr. Webb and Mr. Dentinger stepped out of the meeting to discuss possible negotiations.

The Damon's, Mr. Webb and Mr. Dentinger returned to the meeting. Mr. Dentinger said an agreement has been reached. He said the number is \$167,500, the Damon's can stay in the house 6 months from April 1, 2015, after the deal closes, they can live there rent free until they find something else. In reality, if McGuire Group loses this approval tonight, the deal with the Damon's is off. They must have "good faith" in that they shook hands and will finalize the contract in the next couple of days.

Mr. Webb confirmed that the agreement is that McGuire Development will purchase the home from Mr. and Mr. Damon and allow Mr. and Mrs. Damon to live there 6 months' rent free, the 6 months commence on April 1, 2015. Mr. Webb would like to close as soon as possible. All parties involved agree to this. Mr. Mills said the Board can approve the variance contingent upon this agreement going forward.

Mrs. Daigler of 8041 Clarence Center Road, voiced her concern with the 60' long fence and the detention pond on the other side is only 2' from the fence. The ground is sandy soil there. Mr. Metzger confirmed that he will take care of the soil concerns and will work with the Town Engineer. Mrs. Daigler said she wants the fence set in concrete, down and wired at the bottom. She needs a strong fence there, she does not care about the color. McGuire Development will work with Mrs. Daigler to make sure the fence does not allow critters to come in and out of her property. She wants to be notified whenever anyone touches that fence.

#### **ACTION:**

Motion by Ryan Mills, seconded by Patricia Burkard, to **approve** Appeal No. 4 as written with the following conditions and contingencies:

- McGuire Development move forward with the purchase of 8035 Clarence Center Road for a purchase price of \$167,500.
- The current owners be allowed to stay there for 6 months, commencing April 1, 2015 and ending October 1, 2015, rent free.
- That both parties work mutually together to close the transaction as soon as possible.
- McGuire Development is to work with Mrs. Daigler, the owner of 8041 Clarence Center Road, to alleviate any concerns she has regarding the fencing, including but not limited to, a strong foundation for the fence and animal control and mitigation, perhaps some netting towards the base of the fence to keep her animals intact.
- McGuire Development is put on notice regarding the soil conditions there and that they take appropriate engineering steps to alleviate any of those soil erosion concerns.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

**MOTION CARRIED.**

Meeting adjourned at 10:07.

Carolyn Delgato  
Senior Clerk Typist