

**TOWN OF BETHLEHEM
BOARD OF APPEALS
June 15, 2005**

A regular meeting of the Board of Appeals, of the Town of Bethlehem, Albany County, New York was held on the above date at the Town Offices, 445 Delaware Avenue, Delmar, New York. Michael Hodom, Chairman, presiding.

PRESENT: Michael Hodom
Robert Wiggand
Marjory O'Brien
Gilbert Brookins
Leonard Micelli

Michael Moore Attorney to the Board

Mark Platel Building Inspector

Chairman Hodom called the meeting to order at 7:30 p.m.

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Good evening Ladies and Gentlemen. This is a regular meeting of the Board of Appeals for the Town of Bethlehem. The first order of business this evening is continuation of a public hearing for a Use Variance under Article VI, Permitted Uses, Section 128-23, Rural Districts Unzoned requested by Betty Nolan for property at 1250 Route 9W, Selkirk, New York. The Applicant wishes to construct a canopy with 3-fuel pumps for retail sale including 2-10,000 gallon underground storage tanks at the premises 1250 Route 9W, Selkirk, New York 12158.

CHAIRMAN HODOM: Mr. Platel, would you give us the reason for the hearing, please?

MR. PLATEL: Yes, Mr. Chairman. This is a re-opening of a previously adjourned hearing. The applicant is proposing to install a 32-foot by 48-foot canopy with 3-fuel pumping stations in order to operate a motor fuel filling station. This is not a permitted use listed in the Town Code in Code in a Rural Not Zoned District. The existing structure is operated as a convenience market.

CHAIRMAN HODOM: Thank you, Mark. Ms. Guastella, would you please read the official call of the meeting?

Notice of Public Hearing. Notice is hereby given that the Board of Appeals of the Town on Bethlehem, Albany County, New York will hold a public hearing on, Wednesday November 3, 2004 at 7:30 p.m. at the Town Offices 445 Delaware Avenue, Delmar, New York to take action on application of Betty Nolan for a Use Variance under Article VI, Permitted Uses, Section 128-23, Rural Districts Unzoned of the Code of the Town of Bethlehem for construction of a canopy with 3-fuel pumps for retail sale including 2-10,000 gallon underground storage tanks at the premises of 1250 Route 9W, Selkirk, New York. Michael C. Hodom, Chairman, Board of Appeals. Attached to this Notice is notarized proof of its publication in the October 27, 2004 edition of the Spotlight, official paper of the Town of Bethlehem. All persons listed in the petition as owning property within 200 feet of the premises in question were notified by mail at least five days prior to this hearing.

CHAIRMAN HODOM: Thank you, Karen. We'll use the same procedures that we used previously. Victor please introduce yourself and...

MR. CAPONERA: Thank you Mr. Chairman, members of the Board, honored guests. I must say that since I first started coming here I've seen a full bloom come with these trees. The last time I was here on November 3rd it was dark and there weren't any leaves on the tree and then the next time in March it was getting a little lighter but it's very beautiful out there now. But anyway I'm Victor Caponera, I represent the owner of the property and the Applicant Betty Nolan. Betty Nolan is here with me, our esteemed engineer Bill Hennessy is here as well as the tenant who has been with us on all three trips to this Board, Ali Dawoodani and last time we were here in March the Board had asked us to go back and get various information, documents. It took us a little bit of time to do it, but we have succeeded and what I believe of answering all the questions that were raised by Mr. Chairman and perhaps other members of the Board and I submitted that on May 25th and through just dumb luck I had asked for June 15th and got June 15th to come back in my letter. We feel that everything that has been submitted in my book that I submitted to you on May 25th with all the documents as well as the previous meetings when put in it's totality in humble opinion meets the requirements under the Code for the Boards favorable consideration in our application. Thank you.

CHAIRMAN HODOM: Thank you Mr. Caponera. The Board does appreciate the efforts that you've made to comply with their requests. I think everything has been provided except perhaps the industry study supporting Mr. Sweetman's comments in reverse and that was part of a request that was made. If they're not available they're not available.

MR. CAPONERA: We couldn't get them and in fact they didn't have anything on the reverse side.

CHAIRMAN HODOM: Okay.

MR. CAPONERA: So we explored that and found that the only way we could provide it to you was the way that we did and they didn't have the reverse.

CHAIRMAN HODOM: Thank you. Page 2 of your May 25th and I've numbered them, your cover page and then page 2...

MR. CAPONERA: Correct.

CHAIRMAN HODOM: You refer back to, it's my belief that we have also established financial hardship and in the five years of the information that you've provided to us, 1999 through 2003 the financial data that was provided in everyone of those years there was not a loss. There was a – in fact a progressive increase in income for the property. Is that correct?

MR. CAPONERA: I'm looking for the revised letter that my client submitted. My sense is that what my client presented initially and what she's presented now, which was the articulation of the expenses shows that there was a small profit and I think my client gave testimony that without this tenant she would realize a substantial financial loss and in fact I believe gave testimony that when she lost the previous tenant she had established financial problems by not having any income and not being able to rent the property. So that's pretty much what the testimony was and I think it still is the same. In other words without this tenant, without the success of this tenant she cannot and will not be able to realize a reasonable financial return as evidence by her testimony the last time and the documents that we've submitted.

CHAIRMAN HODOM: Okay. Also on page 2 you refer to a length of time that Mrs. Nolan – Ms. Nolan has owned the property that the hardship was certainly not self created and I would point out to you and perhaps ask the question again that I believe that Ms. Nolan has owned the property for 20-plus years.

MR. CAPONERA: Yes.

CHAIRMAN HODOM: And certainly during that time frame there was opportunity to request while the Code was still in it's former position to add the gasoline station, that request wasn't made until after the Code changed so you don't think that's a self created hardship?

MR. CAPONERA: Absolutely not. I have had the opportunity to do these kind of cases for 30 years and I've had the opportunity to appear in many, many higher courts and argue this very issue on self created hardship and it's my humble opinion and understanding and your counsel can comment on this is that a self created hardship is a situation where Ms. Nolan or I buy this property from Ms. Nolan tomorrow knowing what the zoning is and knowing that it precludes at this moment the gasoline station or I should say the gasoline sales and then I come before this Board and I ask you to consider my application. That's a self-created hardship. I've created my own hardship when I knew that the zoning didn't allow it and I knew or should have known that I was buying the property with full knowledge of what this is or should have full knowledge. On the opposite, you hit the nail right on the head she's owned this property for many, many years and during the time she owned the property she could have come in had there been

a tenant that wanted it and probably been successful in making that application. The fact that the zoning has changed in the Town does not put the onus on her to make it a self-created hardship. I state to you that it's just the opposite that by virtue of the length of time that she's owned the property and the use to which she has put the property to, it's in my opinion established by case law that it can't be a self-created hardship.

CHAIRMAN HODOM: Okay. The ITE land use documents that you provided, both number 852, which is the convenience market open 15 to 16-hours and also the land use number 853, which the convenience market with gasoline pumps. Those studies were done in the 1980's and they were done in Pennsylvania and Oregon. Are there not more recent studies that were available to your consultant and also are there not studies that were available in New York State?

MR. CAPONERA: Let me turn that over to eminent Bill Hennessy for his expertise on that.

MR. HENNESSY: Frankly no. This is the manual that the consultants use. This is the manual that the industry's use and they update the manual periodically. I have the 1991 version available to me. My consultant had the newer version, which is the 9th edition published – I don't know if it was published within the past few years. It's in that document, but this is the manual that is used and it documents several different uses and it utilizes studies done over the years from several different uses as noted in the table of contents for the ITE manual. I'm not aware of any other studies or manuals that are presently used for this type of work. This is the manual that I believe is normally used for this type of work.

CHAIRMAN HODOM: This manual is the 7th edition, now you...

MR. HENNESSY: 7th?

CHAIRMAN HODOM: Yes and you just mentioned there was a 9th edition?

MR. HENNESSY: Then I misspoke; I apologize. Maybe the one in 1991 was the 7th edition that we've have, but the manual that Vollmer Associates utilized is the most recent addition.

CHAIRMAN HODOM: Okay. Also on the signage you've made a dramatic change in the signage as far as the...

MR. CAPONERA: I was thinking significant, but dramatics good.

CHAIRMAN HODOM: Dramatics good, if it had been better I would have used significant but that 119.5-square feet of signage on the pole sign is right at the limit of the 120-square feet.

MR. CAPONERA: Right.

CHAIRMAN HODOM: And the most recent drawings that you've submitted; am I to assume that there is no signage on the canopy?

MR. HENNESSY: Yes sir there is no signage on the canopy. We eliminated - - we did eliminate as shown by the drawing the Exxon lettering on the canopy. We've eliminated - we're also going to have to eliminate the Subway on the side of the building in order to bring it down to 120.

CHAIRMAN HODOM: That was my next question. There will be no signage on the building either?

MR. HENNESSY: We'll have to take it out, yes.

CHAIRMAN HODOM: Good. It was dramatic.

MR. CAPONERA: Forgive me for saying substantial.

CHAIRMAN HODOM: That's fine, no you said significant.

MR. CAPONERA: Oh, significant.

CHAIRMAN HODOM: Is there anyone else on the Board who has any questions?

MR. WIGGAND: The only question I would have here, you show rear parking behind this door. Are you going to have rear entrance to this door?

MR. HENNESSY: Yes sir.

MR. WIGGAND: I'm a little confused on that. I think that's something new it was never used as a rear entrance store was it?

MR. HENNESSY: Currently the rear entrance is used by employees and we are going to modify that entrance for assessibility. Right now there is a door large enough for public access, but we will now utilize this for a rear entrance. We presented this at the last meeting not the first meeting but the last one we presented this and the first one we did not. That is our proposal at this time.

MR. CAPONERA: It's wide open I've gone in there and there's nothing there, it just brings you right into the main counter.

MR. WIGGAND: Is that also going to be a fire entrance, a fire controlled entrance to?

MR. HENNESSY: This is the second means of egress as required by the Code, yes.

ATTORNEY MOORE: I have a question. Mr. Caponera page 2 of your letter, lets see,

1,2,3,4th full paragraph you say the fact that the current convenient store can only operate pursuant to a New York State SPEDS permit?

MR. CAPONERA: Right.

ATTORNEY MOORE: I'm not sure what you mean by that.

MR. CAPONERA: All I'm saying is that this is a very unique piece of property. I think you have the documentation to establish that. This would be the journey that we've taken over the last 6-months, 7-months. The only way this property can operate is under a SPEDS permit, S-P-E-D-S, which is a permit that's granted only by the State of New York to allow this use. So what I'm saying is that this building which is the convenient mart which is what it's been all the time is operating there pursuant to this permit. That was my intent of saying that. If anything else were to change there would have to be amendments and considerations made and it's our opinion that that may not go as favorably as what we have there now.

CHAIRMAN HODOM: But that's based on your effluent leaving the building, that's the only basis a SPEDS permit is...

MR. CAPONERA: Correct.

ATTORNEY MOORE: For the septic right?

MR. CAPONERA: Yes that's exactly right.

MR. WIGGAND: Did we discuss that one exit there on 9W – the one going on 9W that one way out? Mark is that the area that we discussed or were we going to get that further away from that intersection? Wasn't that something we mentioned?

MR. CAPONERA: That was moved.

CHAIRMAN HODOM: And the Applicant has submitted a letter from DOT...

MR. CAPONERA: Correct.

CHAIRMAN HODOM: That has reviewed this site plan and has acknowledged that the entrances and exits from the property are acceptable to DOT at this point in time.

MR. WIGGAND: Well the plan I'm looking at here is not the plan that - - is that the one that was showing, is that the one we're dealing with?

MR. HENNESSY: That was part of this package. That's the plan, yes that has been reviewed and approved by DOT. The current entrance is approximately 20-feet to the right on your drawing. There is an existing catch basin right there, which is right on the north edge of that driveway and were moving it approximately 20-feet, maybe 25-feet to

the south away from that intersection.

MR. WIGGAND: Okay so there would be room to pull out behind one car or a couple of cars, because that's a pretty busy highway?

MR. HENNESSY: Yeah, that's probably - - there will be a lot more room than there is now because we will be landscaping - - the significant paved area here is roughly 10 feet wide so that's another car. The length of this is approximately 30 feet, 2 cars so there's enough for stacking for 1 car there approximately whereas right now there's no room.

MR. WIGGAND: I see. So you're saying to me that it's adequate for the exit for that area?

MR. HENNESSY: Yes.

MR. CAPONERA: Which was looked at, reviewed by DOT and...

MR. HENNESSY: DOT and Vollmer Associates our traffic consultant.

MR. WIGGAND: That was my next question, did DOT approve that?

CHAIRMAN HODOM: Yes.

MR. CAPONERA: Yes they did. We have a letter in my package.

MR. WIGGAND: Oh we do?

CHAIRMAN HODOM: Yes.

MR. WIGGAND: We can't go any further than if they've approved it. It just seems to be awful close to that corner, that intersection for me.

MR. HENNESSY: There is a slight, a slight alignment arrangement on this drawing that's different than the last application just because I modified this based on DOT's specification for this right out, but you can barely tell unless you had that other drawing. The alignment is just slightly modified to match DOT's specification for a right turn out only. The signage that's on there is DOT's required signage for that right turn out.

CHAIRMAN HODOM: They do mention that in their letter of April 19th to you however the detail wasn't part of your submittal.

MR. HENNESSY: No, that is a design detail that was just submitted - just a normal design drawing detail.

CHAIRMAN HODOM: So any signage that you would propose then...

MR. HENNESSY: I can submit that to the Zoning Board, the Planning Board if they want.

CHAIRMAN HODOM: So any signage you would propose there would meet – as long as it would meet the DOT requirement.

MR. HENNESSY: Yes. For us to get a permit to do this from DOT once again they'll have to look at this and give us a permit so I'll have to make sure that my signs match their requirement.

MR. MICELLI: So now when you're going south approaching the convenient market you can make left going past the pumps, come in the back way or take a left at the traffic signal light on 396....

MR. HENNESSY: Exactly.

MR. MICELLI: And then take a right.

MR. HENNESSY: You will not be allowed to turn in to this...

MR. MICELLI: Right because it's going to be just north only.

MR. HENNESSY: Yes.

MR. CAPONERA: Right out only which is a big improvement to what's there now.

MR. MICELLI: Right exactly.

MR. HENNESSY: There is a 1-way sign, that 1-way out that already – the curbing is not as desirable now as it should be and the curbing as proposed will now be more conducive to not allowing that left turn in.

MR. MICELLI: Thank you.

CHAIRMAN HODOM: Mr. Caponera just to clarify and I'm pretty sure that it's a typo, but it's after the convenience market with gasoline pumps, number 853 where you go into the discussion about the other allowed uses in the district. The second page of section 128-23 (b), uses number 4 through 8 the last sentence there where it says would make the use cost prohibitive.

MR. CAPONERA: Prohibitive.

CHAIRMAN HODOM: Prohibitive and that also occurs down on 14, 15, 16, and 17 in the second sentence.

MR. CAPONERA: Right.

CHAIRMAN HODOM: This should be prohibitive?

MR. CAPONERA: Right.

CHAIRMAN HODOM: Okay.

MR. CAPONERA: Thank you for pointing that out.

MR. HENNESSY: May I ask the lawyers present is probative a word?

ATTORNEY MOORE: I don't think so.

MR. CAPONERA: It should have been prohibitive.

ATTORNEY MOORE: We make up words all the time right Victor?

MR. HENNESSY: It might have passed spell check on a lawyer's computer.

ATTORNEY MOORE: It sounds like a word.

MR. WIGGAND: One other question is there is a shed shown in the back, is that going to be removed?

MR. HENNESSY: It will be relocated.

MR. WIGGAND: It's relocated; it doesn't say that on the plan here that I'm looking at.

MR. HENNESSY: It's currently right here and it's going to be moved around in the back.

MR. WIGGAND: So it's getting out of that traffic area?

MR. HENNESSY: Yes.

MR. WIGGAND: You've got a parking area there and you show a shed in the middle of it.

MR. HENNESSY: Well it showed it as a faint existing condition.

MR. CAPONERA: It's going to be removed.

MR. HENNESSY: And I've noted down here, new shed location. I can put on there relocate shed. I have no problem with that.

MR. WIGGAND: Okay. I can write that on my own plan here so we're all right. It just

looked like a funny location there in the middle of the parking lot.

CHAIRMAN HODOM: And Mr. Caponera I would suggest that probably those two changes from probative to prohibitive are significant changes.

MR. CAPONERA: Thank you.

CHAIRMAN HODOM: Also on page 2 of your letter of May 25th and I would just like to get on the record the next to the last paragraph where you – in speaking with the supervisor of the Town of Bethlehem, which has been confirmed by your counsel Mr. Michael Moore, I'm also advised that the Town is in the process of re-zoning my clients property, which would allow after the re-zoning occurs the proposed use, which is that of a convenience store with gas pumps and I would just ask counsel address that issue if in fact you can confirm that.

ATTORNEY MOORE: I guess I'd change after to if, other than that I have no problem with it. There's no guarantee – the current proposal for that zoning district would allow, that's correct but it's, you know it hasn't happened yet and may or may not but change after to if I would say it's accurate.

CHAIRMAN HODOM: But currently with the re-zoning it would allow the convenience store with gasoline pumps. Thank you.

MR. MICELLI: I don't have any.

CHAIRMAN HODOM: Any other presentations?

MR. CAPONERA: No I'm done.

CHAIRMAN HODOM: Mr. Lessee, any comments?

MR. DAWOODANI: Just do the answers.

MR. CAPONERA: He has no more – nothing to add.

CHAIRMAN HODOM: Now he hasn't hit you up too much has he?

MR. CAPONERA: Not yet.

MR. BROOKINS: As you began your presentation the next time you come back when the leaves are turning...

MR. CAPONERA: Oh please.

CHAIRMAN HODOM: Boards all set? Applicants all set?

MR. CAPONERA: Yes.

CHAIRMAN HODOM: Hearing no further questions or comments we'll declare the hearing closed and we'll notify you in a timely manner. Thank you very much for your time.

MR. CAPONERA: Thank you very much I appreciate it.

Hearing closed 8:00 p.m.

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The next order of business was to consider the application of Theresa & David Harvey, 2 Alden Court, Delmar, New York. The application was found to be in order and Mr. Brookins made the following motion:

An appeal having been filed with the Board of Appeals of the Town of Bethlehem, Albany County, New York by Theresa & David Harvey for Variance under Article XVI, Front Yards, Section 128-66, Required Depths for the construction of a front porch addition, which will encroach into the front yard setback requirement at premises 2 Alden Court, Delmar, New York, it is hereby ordered that a public hearing on this matter be held July 6, 2005 at 7:30 p.m., at the Town Offices, 445 Delaware Avenue, Delmar for the purpose of hearing all those interested in this matter.

Mr. Wignad seconded the motion and it was unanimously carried by the Board.

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The next order of business was a discussion of the previous public hearing held in the matter of Joseph Rappazzo, 126 Smultz Road, Glenmont, New York. The following points were brought up by the Board members: It had come to the Boards attention that a neighboring property owner may not have been properly notified and decided to reopen the hearing. On a motion made by Chairman Hodom, seconded by Mrs. O'Brien, and unanimously carried by the Board, the hearing was re-opened to a date uncertain.

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The next order of business was to consider the proposed resolution of Ayoub & Sheryl Dounane, 1 Evelyn Drive, Delmar, New York.

The following proposed resolution was presented by Attorney Moore for the Board's consideration.

RESOLUTION

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WHEREAS, an application has been filed with the Zoning Board of Appeals of the Town of Bethlehem, Albany County, New York (“the Board”) seeking a Variance under Article XVI, Front Yards, Section 128-68, Corner Lot Required Depths requested by Ayoub and Sheryl Dounane for property at 1 Evelyn Drive, Delmar, New York; and,

WHEREAS, the Board of Appeals, acting on said application, duly advertised in the Spotlight and sent written notice to all persons listed in the petition as owning property within 200 feet of the premises in question and held a public hearing on said application at the Town Hall, 445 Delaware Avenue, Delmar, New York on June 1, 2005; and,

WHEREAS, Members of the Board are familiar with the area in which the proposed construction is to be done and the specific site of same; and,

WHEREAS, all those who desired to be heard were heard and their testimony duly recorded at the above hearing; now therefore,

BE IT RESOLVED, that the Board of Appeals makes the following Findings of Fact and Conclusions of Law in this matter:

FINDINGS OF FACT

The Applicants are proposing to construct a 48-square foot covered porch to the existing main structure that will create a front/side yard setback of 19 feet, which is one foot shy of the 20 feet required for a corner lot.

The existing structure is occupied as a single-family dwelling and is located in an “AA” Residential District.

The Applicants propose to replace the existing front steps, porch and metal awning with new wooden steps and a covered porch. The new steps will face Evelyn Drive, instead of the driveway at the home, and a new walkway from the driveway to the steps will be constructed.

The steps on the existing porch are poorly designed, of irregular height, and present a safety issue.

The new covering over the porch area will also keep precipitation off the steps.

The Applicants have submitted to the Board two written statements from neighbors in support of the project.

At the public hearing, two additional neighbors provided statements in support of the project.

There were no written or oral statements made in opposition to the proposed project.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, and after reviewing the application, sketches and plans submitted, testimony at the hearing, and other documents submitted by the Applicants, the Board determines that the proposed variance will be granted.

The Board has determined that the requested variance will be a benefit to the Applicants and will have no detrimental impact on the health, safety or welfare of the community and the neighborhood.

The benefit sought by the Applicants cannot be achieved by some method other than a variance.

The requested variance will have no adverse affect on the physical or environmental conditions in the neighborhood.

The requested variance is minimal, and is the minimum variance that is necessary and adequate to the Applicants' needs while still preserving the character of the neighborhood.

The alleged difficulty necessitating the requested variance has not been created by the Applicants.

The requested variance is granted, on the following conditions:

1. The proposed construction will be completed in accordance with the plans, specifications, testimony and exhibits given by the Applicants at the June 1, 2005 hearing;
2. In the construction of the new porch, the Applicants shall match, as nearly as possible, the existing roofing on the home;
3. The project shall be completed within two (2) years of the date of this Resolution.

June 15, 2005

Michael Hodom
Chairman
Board of Appeals

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Mr. Brookins made a motion that the Resolution be adopted, Mrs. O'Brien seconded the motion and it passed by the following vote:

YES	NO	ABSENT	ABSTAINING
Michael Hodom Robert J. Wiggand Gilbert Brookins Marjory O'Brien Leonard Micelli	None	None	None

(Resolution filed with the Clerk of the Town of Bethlehem on June 20, 2005.)

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On a motion made by Mr. Micelli, seconded by Mrs. O'Brien, and unanimously carried by the Board, the minutes of the June 1, 2005, meeting were approved.

The meeting was adjourned on a motion made by Mr. Wiggand, seconded by Mr. Micelli and unanimously carried by the Board.

Meeting Adjourned: 8:40 p.m.

Respectfully submitted,

Secretary