

**TOWN OF SWEDEN  
Zoning Board of Appeals  
Minutes – May 7, 2009**

A regular meeting of the Zoning Board of Appeals of the Town of Sweden was held at the Town Offices, 18 State Street, Brockport, New York on Thursday, May 7, 2009, commencing at 7:00 p.m.

Members present: Pauline Johnson, Ken Reid, Peter Sharpe, Mary Ann Thorpe

Absent: Frank Fisher (recused)

Also present: Kris Schultz, Attorney Betsy Brugg, Rich LeFrois, John LeFrois, Craig McAllister, Jim Hamlin

Chairman Reid called the meeting to order, introduced the Board members and read the notice of public hearing for:

Application of LeFrois Builders and Developers, 1020 Lehigh Station Road, Henrietta, New York, for two (2) area variances to construct a 5,839 sq. ft. commercial building at 1000 Transit Way, Brockport, New York, with a side setback from the west property line to the proposed building of nine (9) ft., and a side setback from the south property line to the proposed building of twenty (20) ft. Town of Sweden Ordinance Chapter 175-41, Section E(4)(b), Required setbacks, states the required side setback is twenty-five (25) ft. The property is owned by Daniel C. Hogan, tax account number 084.01-1-1.113.

**1000 Transit Way**

Mr. Kris Schultz addressed the Board and introduced Attorney Betsy Brugg, Fix Spindelman, Brovitz & Goldman, P.C.

Mr. McAllister, Planning Board Chairman, asked for clarification regarding the two variances read in the legal notice. It was explained that the applicant was seeking approval for only the first two variances granted for a 5,610 sq. ft. building because the last two variances granted were for a 5,839 sq. ft. building.

Attorney Brugg addressed the Board and clarified the above by stating she reviewed all the minutes and found that the two variances granted in February 2007 are valid. There are no conditions whatsoever on those variances and they run with the land. Attorney Brugg added these two variances are good for the amended site plan application, and doesn't understand why the applicant is before the ZBA again. More recently, two additional variances were granted, but have not been brought into question or before the Board tonight. Attorney Brugg summarized by stating that all of the variances are good per her review of the minutes and knowledge of applicable New York case law, and the applicant should be able to move forward with the amended site plan approval. A letter was submitted for the record.

Attorney Brugg stated that even if the two variances were to be entertained, the law is on the applicant's side because the two site plans are very similar. The original applicant had essentially the same site plan as now, except for a difference of approximately 200 sq. ft. in building size.

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There's really nothing different about this project that the Board could justify reaching a different conclusion on these variances. Even if the Board had never granted these two variances, the applicant could demonstrate the criteria has been met for granting of the variances.

Mrs. Johnson clarified, for the record, Attorney Brugg was referring to the two variances granted in February 2007.

Mr. McAllister asked if Attorney Brugg was aware of the referencing of the two different building sizes. Attorney Brugg stated yes there is a building size difference, but there are no conditions that limit the approved variances to any specific site plan. There are no conditions that limit it in time so it hasn't expired. There are no limitations that specifically address the size or footprint of a building.

Chairman McAllister read the decision granting the two variances as follows:

*At a meeting of this Board on Thursday, February 1, 2007, your application for the following two area variances to construct a 5,610 sq. ft. commercial building at 1000 Transit Way was **granted**.*

- 1. Side setback from the west property line to the proposed building of nine (9) ft.*
- 2. Side setback from the south property line to the proposed building of twenty (20) ft.*

Attorney Brugg stated with all due respect, it is not a condition on the approval. Chairman McAllister stated that's why it was rejected at the Planning Board and the applicant is before the ZBA. If the applicant came back to the Planning Board, the Board would reject it. An Article 78 would follow. Attorney Brugg stated the Town Attorney, who could not make it to tonight's meeting, should address this issue. The Board agreed that the advice of the Town Attorney was needed.

Attorney Brugg stated the charge of making interpretations of variances and codes does not lie with the Planning Board Chairman, who may be very knowledgeable. She further added who's interpretation is the applicant dealing with.

Mrs. Johnson explained that the Board originally met five times when reviewing the original applicant's request for a 7,140 sq. ft. building with seven variances, which was a ridiculous request for that size parcel. With comments from the Planning Board and Town Engineer, the building size and number of variances were reduced. As you know, even though it's the same parcel with the same type of businesses, each application is unique. Throughout all of this, the Board asked the original applicant to show financial hardship, and he wasn't able to. The most recent applicant was able to show documentation for financial hardship, which made the request different.

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Attorney Brugg stated once a final decision is made, the Board does not get another chance to decide, especially with no conditions. Had there been conditions, the Board might be here with different circumstances. Mr. McAllister stated clarification is needed whether the size of the building is tied to both sets of variances, which appears to be a condition.

Mrs. Johnson asked for clarification regarding the Planning Board's concern. Mr. McAllister stated the concern is that there is a set of variances that is okay for a building up to 5,610 sq. ft. Those two variances are also required for the 5,839 sq. ft. building, which application has been made. The Planning Board advised the applicant that the application would be rejected because the first set of approved variances, which are required for the 5,839 sq. ft. building are capped at a 5,610 sq. ft. building. This was discussed with Attorney Bell and he agreed. Mr. Schultz was made aware of this and that's why the applicant is back before the ZBA.

Mr. Schultz explained that the amended site plan went as far as the public hearing to see if there was any other input. The application was put on hold until the outcome of tonight's meeting. His understanding is the application for tonight's meeting was based on the two original variances only, and getting the same relief that was granted for the 5,610 sq. ft. building for the 5,839 sq. ft. building. Attorney Bell's opinion was that this was the best way to proceed.

Mr. Schultz stressed his concern for the timing of this project and that because Attorney Bell wasn't at this meeting, a second meeting of this Board must be held so that Attorney Bell can attend. The applicant is losing valuable time that he could be spending on getting a permit to construct the building. The next Planning Board meeting isn't until June.

Mr. Sharpe stated that Mr. Shultz' comments regarding timing is not sitting very well with him. This Board has heard many times before from different applicants regarding how a decision has to be made tonight or the applicant won't be able to build because of timing. There's a brand-new building that was approved, and suppose to be built in the spring by this very same applicant. Timing will not pressure this Board. Mr. Hogan, owner of the property, is a great person and well respected in the community. Mr. Sharpe would like to step back and review the record and have the Town Attorney involved. Mrs. Thorpe agrees with Mr. Sharpe.

Mr. Richard LeFrois, developer, explained that he does have a problem because Verizon was suppose to be in the building the first of the year, but he was able to postpone construction for a little bit. The reality is Verizon will go somewhere else if they can't start building soon. He added the variance should go with the land. Mr. McAllister stated no one on this Board disagrees with that.

Mrs. Thorpe summarized that the applicant is before this Board for the same variances approved for a different size building. Mr. Shultz stated that the specific building size was called out in the decision when approved.

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Mr. McAllister stated that the capped building size of 5,610 sq. ft. was never mentioned when the applicant was seeking approval for the two variances for a 5,839 sq. ft. building. Attorney Brugg stated the Board had the opportunity to make that decision in the manner it chose, and there are no conditions. She added identifying a building by a square footage does not restrict that building to that size.

Mr. McAllister stated if the building exceeds what has been approved it must go back before the ZBA. Attorney Brugg disagreed.

Attorney Brugg suggested if a decision isn't going to be made tonight, the Board should reconvene as soon as possible next week. A new legal does not need to be published. The Clerk stated Attorney Bell could be available Wednesday, May 13 or Wednesday, May 20.

Mrs. Johnson asked for clarification regarding Mr. McAllister's issue with this application. Mr. McAllister stated he only had one issue and that is the difference in the square footage of the building. There are two sets of variances with different building sizes. Mrs. Johnson stated this Board needs a determination from Attorney Bell whether the variances granted in 2007 for a 5,610 sq. ft. building are valid if the building size is increased.

Moved by Mr. Sharpe, seconded by Mrs. Thorpe to table the discussion until the Board can reconvene on either Wednesday, May 13 or Wednesday, May 20, whichever date the Town Attorney can be present.

Mrs. Johnson – Aye  
Mr. Sharpe - Aye  
Mrs. Thorpe – Aye  
Chairman Reid - Aye

Moved by Mrs. Johnson, seconded by Chairman Reid, to approve the March 19, 2009 minutes.

Mrs. Johnson – Aye  
Mr. Sharpe - Abstain  
Mrs. Thorpe – Aye  
Chairman Reid - Aye

The meeting was adjourned by motion at 7:45 p.m.

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Clerk to Zoning Board of Appeals