

## ZONING BOARD OF APPEALS

October 7, 2008

Present: Michael Dudick, Chairman, Dale Gleason, Robert Ritter, Gilbert Kortz,  
Brian Telesh, Chris Lemire, Deborah Ferro (alternate member)

Also Present: Joel Peller, ZBA Counsel  
Steve Myers, Director, Building & Zoning

Absent: Douglas Strother

Mr. Dudick called the meeting at 7:01 p.m. He introduced new members, Brian Telesh, who is attending his second meeting, and alternate member, Deborah Ferro. He stated that since one of the board members is not present, the alternate sits in to have as full a board as possible. He stated that Ms. Ferro is sitting in for absent member, Douglas Strother.

At this time, Mr. Dudick led the pledge of allegiance.

### **NEW BUSINESS:**

- 1. An application from Darren Herbinger, proposing a subdivision in a CR Zone. Variances requested from Section 208-16E(2)(c) – one time single lot exception allowed for subdivision of pre-existing lots. Variances requested: (1) Parcel required to be 10 acres, available = 3.77 acres, variance requested = 6.33 acres; (2) newly created lots to owned by family members only, only one lot to be family; (3) newly created lot to be a minimum of 2 acres, new lot = 1.86 acres, variance requested = .14 acres; and (4) newly created lot to be a minimum of 2 acres, new lot = 1.91 acres, variance requested = .09 acres. (Permit #80711 – revised)**

The secretary read the legal notice as it appeared in the Daily Gazette on October 2, 2008.

Mr. Dudick stated as a point of information, that old business on the agenda by Michael Belanger has been postponed at the request of the applicant. The secretary asked if it was postponed or withdrawn. Mr. Myers stated that it was postponed for now and asked Mr. Gilbert VanGuilder if that is correct, to which Mr. VanGuilder replied yes. Mr. Myers stated that the applicant has not let him know when they would like to appear again. Mr. VanGuilder stated that it was a requirement that they meet with ECC and they were not able to meet the ECC's meeting schedule. He said it would make sense get on their agenda first and then come back after that was satisfied. This was a condition of the review of this board. Mr. Dudick asked Mr. VanGuilder if they had a scheduled date for that meeting. Mr. VanGuilder replied no, that the applicant is considering some options.

At this point, Mr. Gilbert VanGuilder, project surveyor, presented this application on behalf of Darren Herbinger, the owner and applicant, who was also present. He stated that the overall

property lies on the southerly side of Grooms Road, about ¼ mile from the intersection of Sugar Hill Road and Grooms Road. The property consists of 3.77 acres, and lies in the CR zone. There is an existing house on the property occupied by the Herbingers. They would like to construct a new home on the northerly portion of the lot. They have occupied this house since 2001. It was an existing home on the property when they bought it. They would like to stay in close proximity. He provided a visual GEIS map and described the existing lots in the area, as well as the proposed lots, which he feels are consistent in size with the existing properties on Grooms Road. He stated that the infrastructure for the existing house is well contained within the proposed lot. The existing septic system lies behind the house; the well in front of the house. There is a driveway and a small shed. He stated that there is a small Army Corps of Engineers wetlands along the back of the property. The property generally slopes gently toward Grooms Road. The proposed lots exceed the frontage requirements. He feels that other than the 10 acre requirement, the individual variances requested are pretty small.

Mr. Dudick opened the discussion. He encouraged open discussion and stated this for the new members.

Mr. Ritter asked about the purpose of subdividing, was it to give it to their family? Mr. VanGuilder stated that they want to build a new home for his family on the lot next door. He has a party interested in this house. They have not gone to contract yet. Mr. Ritter asked if it was for a non-family member. Mr. VanGuilder said that this is why they need the variance. One of the lots will not be for a family member. The existing house will be sold. The new home will be built on the easterly lot.

Mr. Kortz asked if the Herbingers have owned this property and have been living on it since before the CR Zoning law went into effect. Mr. VanGuilder said since 2001. Mr. Kortz asked if the previous zoning was R3 and Mr. VanGuilder stated yes. Mr. Kortz asked if this would have been okay without a variance in an R3, and Mr. VanGuilder stated yes, but there would have had to been 80,000 square feet. Mr. Kortz asked about the minimum lot size. Mr. VanGuilder deferred to Mr. Myers, but stated that if the Board is willing to grant the variance of 6.33 acres from the 10 acre required lot size (one time exemption), then it puts these lots at the required 2 acre minimum. Mr. Myers stated that the way it reads there are several different parts: If you have a pre-existing lot in a CR zone, you are allowed to subdivide it. The pre-existing lots that you subdivide in a CR zone are supposed to be a minimum of 10 acres. Once you do the subdivision you are supposed to develop lots that are a minimum of 2 acres each. Mr. Lemire asked if once you subdivide are the initial owners supposed to be family members, and Mr. Myers replied correct. Mr. Lemire asked if this is a variance on a variance on a variance. Mr. Myers replied that it is all in the same paragraph of the zoning law. There was discussion between Mr. Dudick and Mr. Lemire on this point. Ms. Ferro stated that this was bootstrapping because as she reads the zoning ordinance, an owner requesting this one-time division has to have more than 10 acres for the one-time division in order to apply. Mr. Dudick stated that this is why the variance is being requested and what we do as a board is in cases of hardship, such as in this case where the zoning change took place after the ownership took place, is the owner now in a position of hardship because of things that were beyond his control.

Mr. Myers stated that if this were still an R3, the applicant would not need a variance.

Mr. Dudick asked for public comments and there were none. Mr. Dudick made a motion to close the public hearing. Mrs. Gleason seconded. Approval unanimous.

Mr. Myers stated that he has no real problem with the application. He feels the applicant is not drastically changing the neighborhood. The lots are similar. The zoning was changed after he bought the property. Mr. Myers stated that he feels the applicant is requesting the absolute minimum in variances. The biggest issue is the 10 acres, but this is nothing that has not been addressed by the board before.

Mr. Lemire stated that this application flies in the face of the CR zoning law. He feels the applicant is asking for an exception to the exception, which is too much. He feels the Town Board took into consideration the exceptions that they wanted to provide, and we need to consider that. Mr. Dudick stated that this is a good point.

Mr. Kortz agrees with Mr. VanGuilder in that this particular section has lot sizes that are similar or smaller for residential use. He does not feel that this particular piece of land fits the use for CR zoning as there is not connection to any major open space land.

Mr. Telesh agrees that as the code is written, the town did not intend for this to happen with these lots, but when looking at the makeup of the adjacent lots, this seems like a reasonable use of the land. This would have been a permitted use when the property owner bought it.

Mr. Lemire stated that when a developer comes in and wants to increase the density, he feels that the town has set up a process by which a developer has to make accommodations, and he does not see any accommodations being made.

Mr. Kortz stated that he does not feel this changes the essential character of the neighborhood.

Mrs. Gleason stated that the map provided was helpful. She would like to vote in favor of the application and does not feel that the hardship was not self-created. She stated that the Town works with people who want to develop reasonably.

Mr. Kortz stated he would look at this a lot differently if it was about the open space to the south. Mr. Myers and Mr. Lemire discussed the zoning law. Mr. Myers stated that this section of the law is confusing and has multiple ways to look at it. He feels the intent is to try to find the best path that will not be a detriment to the Town and will also help residents.

Mr. Dudick stated that he perceives the Town's zoning change in this area is that they wanted less development in this part of the Town at this time because of density issues.

Mr. Lemire asked if this has gone to planning yet and Mr. VanGuilder said not yet. He asked if there was a parcel greater than 10 acres and both of the newly created lots were to be initially owned by family members, and the newly created lots were at least 2 acres and all other setbacks were met, would we be hearing this application. Mr. Myers said we would not. There was

further discussion about the lot size and the interpretation of the law. Mr. Myers feels that the law does not give direct guidance in this instance.

Mr. Kortz stated that we need to balance out the land uses in the town. There are always exceptions where it just does not make sense and the board needs to evaluate that.

Mr. Ritter stated that he agrees with Mr. Lemire 100%. What is disappointing to him is that the applicant was honest in stating that he is going to sell ½ of this parcel to another individual, but before he does he wants to subdivide it and keep it in his family before sells. He does not feel this is in the spirit of this board. He is having more of a problem on the fact that the applicant is trying to sell the property. Mr. Dudick and Mr. Ritter discussed this point.

Mr. VanGuilder again stated that the lots that Mr. Herbinger is attempting to create are consistent with the surrounding lots.

Mr. Lemire stated that this section of the code specifically states that this exception should be allowed only at the discretion of the planning board. He feels that planning should hear this first. Mr. VanGuilder stated that they did meet with the planning department and that the planning department directed the applicant to the ZBA first.

Mr. Ritter stated that in light of Mr. Lemire's findings he would feel more comfortable to refer this application to planning first. Mr. Peller thinks this is a literal interpretation of what the code states. The applicant has the choice of board, whether he wants to come here or planning first.

There was discussion between Mr. Dudick and Mr. Peller regarding approving variances contingent on planning board approval. Mr. Myers stated that we have considered variances for these types of applications in the past and the question about planning board approval did not come up.

Mr. Kortz talked about the section of the law that Mr. Lemire was referring to which discusses single lot exemption. His interpretation is that the planning board cannot even look at it until the zoning board makes a decision.

Mrs. Gleason stated the fact that there are no neighbors here to speak negatively is another reason why she would consider voting yes.

Mr. VanGuilder stated that a neighbor did call him and had questions about the procedure but she stated that she was in favor of it.

Mr. Kortz asked Mr. Herbinger if the family wanted to downsize and was that the reason they want to build another house. He asked if the family members would be moving to the house and how long have they lived in the current house. Mr. VanGuilder stated that the existing family has owned the property and lived there since 2001. Mr. Kortz stated that he feels this is the best thing for the family to finance a house that better meets their needs. He does not feel that this really violates the spirit of the law or changes the character of the neighborhood.

Mr. Dudick stated that he went to the property and asked Mr. Herbinger to explain the downsizing. Mr. Herbinger stated that he wants to hold onto the whole piece of land, but cannot. He is a small business owner. He is going to lose the whole piece of property and house and needs to subdivide it and move to the other side in order to sell the existing house and pay off some debt and be able to afford to stay in the community.

Mr. Ritter made a motion to accept the application as submitted. Mr. Telesh seconded. Ayes: Gleason, Ritter, Dudick, Kortz, Telesh. Noes: Lemire, Ferro.

**2. An application from Stewart's Shops Corp., proposing a restaurant in a B-3 Zone. Restaurant is a permitted use but no part of building where a restaurant is located can be within 300' Building is 86 feet from residential boundary, variance requested = 214 feet. The property is located at 641 Grooms Road, Clifton Park. (Permit #80712)**

The secretary read the legal notice as it appeared in the Daily Gazette on October 2, 2008.

Christopher Cannucciari, of the real estate group representing Stewart's, presented this application on behalf of Stewart's. He stated that they would like to have a pizza tenant in the easternmost building. They split the mail center into two and are seeking relief from the 300-foot buffer to have a pizza restaurant in that location. Concerning practical difficulty, it is a marketability issue. It is part of the problem with the build-to-suit lot that is still vacant. In addressing self-creation, the building was there before the houses were built. He does not see any detriment in that it is a permitted use.

Mr. Lemire asked if they have split the building. Mr. Cannucciari stated that they have split the building in half. It is a 4,000 square foot building, so each portion will be 2,000 square feet. The pizza restaurant would be in the northern part. Mr. Dudick asked if it would be the part of the building closest to the house. Mr. Cannucciari replied yes.

Mr. Peller asked if they have a proposed tenant. Mr. Cannucciari stated that they do, through their Jonesville shop. They have had a pizza shop and they have been in business for quite awhile. The manager is Mark Ashman of Brooks Pizza. Mr. Peller asked Mr. Myers if we have the same situation in Jonesville. Mr. Myers replied that he believes that house is closer.

Mrs. Gleason stated that over the years there has been some difference between sitting down and eating and taking out restaurants. She asked if there would be seating. Mr. Cannucciari stated he is sure there would be some seating. Currently there is no floor plan so he does not know exactly how it would be set up.

There was discussion regarding what is considered a restaurant. Mr. Myers stated we had we had this discussion about Cumberland Farms and he considered it a restaurant even though they only had carry-out. In this case, he does not think it matters. It is going to be a restaurant. Mr. Peller clarified that the definition of a restaurant has more to do with the food being prepared and not as much with seating. Mr. Peller read the definition of a restaurant. Mr. Lemire stated that a restaurant is permitted use so even if there is a distinction it does not matter. Mr. Dudick stated

the question is not whether the restaurant is a permitted use but that it is within 300 feet of a residence.

Mr. Dudick opened up the meeting for public comment. Mr. Robert Mackey stated that he and his son live near Brooks Pizza and it is the best pizza they have had. He approves of the proposal. Mr. Eric Mackey spoke in favor of the proposal as well.

Mr. Dudick made a motion to close the public hearing. Mr. Ritter seconded. Approval unanimous.

Mr. Kortz asked about the current use of the mail center. Mr. Cannucciari explained that there is a new owner.

Mr. Kortz stated that the building is 86 feet from the residential line which is still less than the 100 feet that is required for most of the uses other than restaurants. He asked if there was a variance for that before. Mr. Myers stated he would have to look. That plaza was built under B3. The houses were not there when they built it. Also, they did adjust the line after the fact. 4,400 square feet was conveyed to Stewart's. He is sure there were variances when the plaza was built. Mr. Kortz asked if this variance go with the building or to the business. Mr. Myers stated that the business stays with the property. Mr. Kortz asked if that would apply to any building on the parcel and Mr. Myers said yes, but referred the question to counsel. Mr. Peller stated that the variance would run with the parcel.

Mr. Dudick referred to the vacant piece in the middle. Mr. Cannucciari stated that this is a build-to-suit and they have not built anything there.

Mr. Kortz that he thinks we have done this before at exit 8. The reason that restaurants are further from residential areas are due to concerns about odor, noise, how late they are open, and issues like that. He asked Mr. Cannucciari how he plans to vent, because this may impact the neighborhood. Mr. Cannucciari stated that this is a concern. The biggest concern Mr. Kortz has is giving a blanket variance where any kind of restaurant can go in any of these buildings without it being evaluated as to it being a detriment to the neighborhood.

Mr. Ritter remembered some variances given for a specific business. He recalled a pizza restaurant in Jonesville. It closed and months later a new one came in but had to come to the ZBA for a variance. Mrs. Gleason stated that the reason they had to come back was because they wanted to stay open later. Mr. Cannucciari stated that it was discussed that Monday through Thursday closing time would be 9:00. Friday and Saturday would be 9:30 and Sunday would be 8:00. The store would open at 11:00 a.m. every day except Sunday, which would open at 2:00 p.m.

Mr. Dudick asked for Mr. Myers' comments. Mr. Myers stated that this is probably a little closer than other restaurants we have granted variances to. It may be useful in that area to the local residents, but he cannot speak to what the neighborhood would think.

Mr. Lemire asked what other buildings are in the other two spaces presently built. Mr. Cannucciari said there is a spa, a dentist and Allstate Insurance.

Mr. Ritter stated to Mr. Kortz that if he feels comfortable, we can put a restriction on the variance that we issue. Mr. Kortz said he would not even consider it if we did not put a restriction on it. He also wants an evaluation regarding the impact on the neighbors. He does not feel he has the expertise regarding this. He would like some input from planning, but again, would not even consider it if we did not put a restriction on that business in that location.

Mr. Myers stated that this may be a case where you want to poll the neighborhood or put the 500 rule in effect which is allowed by the board for this particular variance. Mr. Dudick feels that this is a good suggestion, particularly for the neighbors within 500 feet.

Mrs. Gleason asked for clarification about the 500 foot rule. Mr. Myers explained that this an option available to the zoning board for area variances. It is not a requirement like in a use variance.

Mr. Lemire asked if the Stewart's shop is within 300 feet of a residence. Mr. Myers replied that it could be. There is a house on Vischer's Ferry that is possibly within 300 feet. It is also possible that the houses across the street could be within 300 feet. These are newer houses.

Mr. Kortz stated that he is seeking some input from people, like planning, who have more expertise on the impact of this on the neighborhood.

Mr. Peller asked Cannucciari if he is comfortable notifying neighbors. It was discussed who should be notified and it was agreed that notification would be given to neighbors within 500 feet and the entire street of Heavenly Way. Mr. Cannistrari stated yes.

Mr. Kortz would like there to be a letter from planning, or at least a discussion with planning, providing details regarding hours of operation, and other issues. Mrs. Gleason also addressed the issue of dumpster pickup.

Mr. Dudick stated that he or Mr. Myers will try to contact planning to see if we can get a letter of opinion.

At this time, Mr. Dudick made a motion to table this matter to November 18<sup>th</sup>. Mr. Ritter seconded. Approval unanimous.

Mr. Cannucciari waived the 61 days.

At this time there was a short recess.

When the meeting resumed, Mr. Dudick stated that the next application to be heard is out of order to accommodate an applicant's work schedule.

- 3. An application from Robert P. Mackey, requesting variances from Section 208-12 for accessory structures as follows: (1) 80-foot front setback required for garage, actual setback = 61 feet, variance requested = 19 feet; and (2) 80-foot front setback required for carport, actual setback = 36 feet, variance requested = 44 feet. The property is located at 40 Male Drive, Clifton Park, New York. (Permit #80715)**

The secretary read the legal notice as it appeared in the Daily Gazette on October 2, 2008.

Robert Mackey presented this application. He owns 43 acres on a dead end road. There are only 4 houses on this road. He would like to construct a garage / workshop on the property. He has an outside woodstove that he would use to heat his house and garage / workshop. The carport would be to cover the wood next to the woodstove. To the north, power lines are sloped toward the building. He would like to move the building a little farther away in order to provide better drainage away from the building. He would be in line with his house, so it would look better aesthetically. All of his equipment could then be stored in the garage.

Mr. Dudick asked why he does not want the proposed garage connected to the home. Mr. Mackey replied that the septic system is on the side of the house. He also wants to make a rock garden next to the house.

Mr. Dudick asked about the storage of wood in the carport. Mr. Mackey replied that it would be right next to the woodstove, which would be close to the garage / workshop, but far enough away to meet the fire code requirement. It would provide easier access to the wood.

Mr. Dudick asked if the woodstove is there currently and Mr. Mackey replied yes. Mr. Dudick asked if the proposed carport was up the hill and attached to the side of the garage would it still be close to the woodstove. Mr. Mackey replied that the National Grid power lines go at an angle down so that would not satisfy the setback requirements.

Mr. Kortz asked what the woodstove heats. Mr. Mackey stated that it heats his house.

Mr. Dudick stated that he saw the property and did not notice the wood stove. There was discussion about the wood around his property and how Mr. Mackey heats his home.

Mr. Ritter made a motion to close the public hearing. Mr. Dudick seconded. Approval unanimous.

Mr. Myers stated that he does not have a problem with the application. It is an isolated piece of property. There will not be a lot of development back there due to considerable wetlands. The neighbors Mr. Mackey has now are probably going to be the only neighbors he will ever have.

Mr. Kortz asked if the front yard faces Male Road and Mr. Mackey replied yes.

Mr. Dudick stated that this is a fairly rural, large piece of property. It is secluded with wetlands and he does not see any problem from a zoning standpoint.

Mr. Dudick made a motion to accept the application as presented. Mr. Ritter seconded. Ayes: Gleason, Ritter, Dudick, Lemire, Kortz, Telesh, Ferro. Noes: None.

- 4. An application from Eric Holt, PE, requesting a change of use from R-1 residential with a SUP for 25% business use (granted 1989), modified to be both residential and business space rented 10/20/03, rather than owner occupied as originally required, to a full (100%) business use. (Essentially is a request for a change of zone), for a professional medical / chiropractic office. The property is located at 140 Lapp Road, Clifton Park, New York. (Permit #80713)**

The secretary read the legal notice as it appeared in the Daily Gazette on October 2, 2008.

Mr. Dudick recused himself due to conflict of interest since he is a chiropractor. Mr. Kortz chaired this application.

Eric Holt presented this application on behalf of Richard and Kathereine Herbolt. The Herbolts have owned the property since 1988 and used it partially as residential and a portion for chiropractic purposes. Over the years business has expanded and Mr. Herbolt has been forced to lease other space on Route 9 for additional space. He explained the surrounding neighborhood as containing businesses and residences. They would like to utilize 100% of the building for business use. Right now they are utilizing 25%, which is about 640 square feet on the first floor. The business would be set up to utilize the entire first floor for exam / therapy rooms, and the second floor for office space. Prior to this application there were 13 parking spaces. They reconfigured the parking so that they could add one more common space and put one in the front of the building for handicapped parking. There is about 40% green space on the lot. Mr. Holt stated that Mr. Herbolt went to his neighbors and has received positive feedback from all except one. The neighbors within 500 feet have been notified.

Mr. Lemire asked about the floor plan and the front of the building, as well as the picture submitted with the application and Mr. Holt explained. He stated that there will be no exterior change to the building or appearance to the neighborhood. The Herbolts have put screening on the back.

Mr. Herbolt stated that he has created a visual buffer to the neighborhood, starting in 1992. They have planted arborvites which are now 25 feet tall. He feels he has done everything he could to make sure that the neighborhood was comfortable. He mentioned Peter Campisi, neighbor, who could not be here tonight but submitted a letter which he feels is supportive. He stated he has had no negative feedback. He said that they have been shot down a number of times, but feels that the B3 surrounding this area is changing the face of Lapp Road. He feels it is reasonable to use his property for business use. Currently he is experiencing financial hardship involved. He cannot operate his business out of 600 square feet of space.

Mr. Kortz asked for documentation regarding financial hardship, as this is a use variance. He asked why Mr. Herbolt cannot sell this as a residence as he is leasing property on Route 9 for his business. Mr. Herbolt stated that he had this on the market for awhile, around the first time he

appealed, but with what they invested they could not get a reasonable return. He also stated that he does not want to move. If anything, he wants to move back. Currently he is renting it. He stated that if we did not want to grant 100% business use, he would like to maintain a residential rental with 1,000 square feet of business space, which would require only an additional 400 square feet.

Mr. Kortz asked if anybody was currently using the 600 square feet for business, and Mr. Herbolt said no. Mr. Kortz stated he remembers a similar request to this board before, which the board denied. Mr. Kortz asked if this was a substantial change from the last variance request. Mr. Myers replied that as far as he can tell from the records, Mr. Herbolt came in looking for a transfer to a business occupancy in 2001. It was tabled and there was never a decision made. He returned a year or two later and asked for an expansion to 25%, which would require an SUP from planning. He got that. The step he has now is to change the use in order to expand beyond the 25%. He then came back and got his SUP modified to allow him to rent the office space at the 25% level, and that was granted as well.

Mr. Lemire asked what an SUP is. Mr. Myers replied that it is a special use permit.

Mr. Herbolt pleaded to the board because of his financial hardship, that if they wanted to limit the utilization he is fine with that. But he wants to get back to his building so he can operate his business. The 25% is not enough.

There was discussion about what rooms would be expanded.

Mr. Ritter asked Mr. Herbolt if he brought any financial documentation showing the hardship. He said he did back in 2001. Mr. Ritter said he is viewing this for the first time. Mr. Herbolt said it was described back in the application. He will be moving from his current business space and has to be out by March 1<sup>st</sup>. If that information is required, he can get a letter from the landlord. Mr. Kortz stated he could find another place to lease, is there documentation showing that he could lose his business. Mr. Herbolt asked how he would provide that. Mr. Ritter stated that we have required other applicants to provide documents regarding profits and losses, rate of return on investment, etc. He needs to demonstrate his need to the board with documentation. Mr. Ritter does not feel that there is not enough information.

Mr. Herbolt asked if the B3 character around him means anything. Mr. Kortz explained that by law, we are required to review use variances by using four guidelines, one of which states that an applicant cannot realize a reasonable return providing that the lack of return is substantial as demonstrated by competent financial evidence.

Mr. Lemire stated that on page 3 of the application, there are questions that set forth the elements that the board needs to consider before approving a use variance. Mr. Lemire asked Mr. Myers if this is a change of zoning question, or is this just a use variance. Mr. Myers replied that as far as the board is concerned it is a change of use because he wants to put a non-permitted use in an R1 zone. What the applicant is asking to do is change the parcel to a business use.

Mr. Telesh stated that this not cut and dry. Although there is some B3 in the area, there is a lot of R1 surrounding this property. Mr. Herbolt stated that there was a 500 foot notification already and nobody objected to it. Mr. Kortz read a letter submitted by neighbor, Richard Shakerley, dated November of 2003, which stated that he would like to be in front of the planning if he sells his house and may like to sell it as a business, too. Mr. Myers stated that Mr. Shakerley called him today to express his opposition. He referenced the letter stating that he opposed the SUP when it was granted, but his opinion that he wants commercial status for his property when he sells it stands as well. He could not be here tonight but asked that his letter be submitted for tonight's meeting.

Mr. Herbolt stated that he understands the position and concerns of the board, but having owned this property since 1988 he would like to run a business out of his property.

Mr. Ritter asked Mr. Herbolt if his practice is growing. He stated that it is containable within 1,000 square feet.

Mr. Ritter asked about the size of the space rented on Route 9, and Mr. Herbolt replied 5,000 square feet, which is choking him. He is only using a small percentage of that, about 1,500 square feet.

Mr. Lemire asked if when we consider hardship and reasonable return we considering the property in question or the practice. Mr. Peller replied the property.

Mr. Ritter stated that he would generally agree with Mr. Lemire on the hardship, but other use variances have expanded to a more liberal use of beyond the property.

Mr. Lemire stated that if he were losing money on the property, that would be what we are looking at, if the property were not being used at all and he was losing money. If he was losing money because his rent was too high on another piece of property we do not need to be looking at that. Mr. Peller replied that he did not know if we had a use variance that was not at the property, so Mr. Lemire's point that we need to look at the property with the requested change not necessarily the fact that his practice is located elsewhere.

Mr. Telesh referred Mr. Herbolt's statement that he tried to market the property in 2001 and asked how it was marketed, as a residence, or a building with partial residence and business attached to it. Mr. Herbolt stated it had the option as having the business and it was marketed with Century 21. He said he was unable to sell it. Now he does not want to sell it; he wants to move back in.

Mr. Myers stated that he has a few issues with the parcel, more so with the site than with the expanded use. When he went back and looked at all of the details he had available, last year we found him filling the property with stone and expanding the parking area. He got the site plans when showed the difference in the site from 2001 and now. We tried to stop the work but they continued on. Because it was not a strict commercial property it was a gray area. What it has done is exacerbate an existing drainage problem in this area, to both the neighbors to the south and west that have not been developed. He does not believe anything should be granted for this

property until such time as these issues are corrected. It is evident that the slopes have been pushed out toward the property lines significantly. Mr. Myers was made aware of the drainage problems before this started, because of the development potentially coming to the south.

Mr. Peller asked Mr. Myers if he ever issued a red tag. Mr. Myers said he believes so but thinks it was let go because they finished the work and stayed within their property. He was worried about it impacting a different property and that is why he got involved. The other area of concern is the Hoffman development which will be a planned unit development of residential properties. He does not want a precedent set that this becomes a snowball effect of residences turning into commercial properties, as was mentioned in the letter.

Mr. Kortz agreed with Mr. Ritter regarding the need for financial documentation. He also agreed with Mr. Lemire that we are speaking about the property. He is also concerned about a snowball effect. The biggest problem he has is that the hardship was self-created since the property was residential when the applicant bought it.

Mr. Lemire stated that even if the applicant provided financial documentation the hardship is self-created. He feels this variance should be denied based the requirements of a use variance and that all requirements must be satisfied.

Mr. Telesh stated that even if the applicant provided evidence of financial hardship, the hardship was self-created.

Mr. Ritter made a motion to close the public hearing. Mrs. Gleason seconded. The public hearing was kept open.

Mr. Ritter asked if before we close the public hearing, do we want the applicant to provide financial documentation or is the board reasonably content with the self-created hardship. Does the board want to consider the option of giving an additional 400 square feet.

Mr. Kortz agrees with that, but first it was 25%, now it's a little more, then the business expands and he will come back for some more.

Mr. Telesh stated another option of the applicant going before the town board and addressing the zoning of the parcel.

There was discussion about whether to close the public hearing. Mr. Herbolt was asked if he wants to come back and provide documentation. He asked if he needed a second meeting to do this.

There was discussion between Mr. Ritter and Mr. Lemire on whether this is a self-created condition since the conditions of the neighborhood have changed dramatically since the applicant bought the property. Mr. Lemire stated that he feels it is self-created and that it does not matter when he bought it if it was residential when he bought it.

Mr. Joel asked Mr. Holt if he would still consider amending the application for just another 400 square feet. Mr. Holt said he discussed this with Mr. Herbolt. Mr. Peller stated that this is a substantial enough change from the application that he would need to reapply and withdraw this application. Another option would be to come back with financial evidence and let the board decide this application. The other option would be to let the board decide tonight.

Mr. Herbolt stated that he thinks the tone of the board speaks to the fact that this is pretty much a done deal and so he wants to pull this application.

At this time the board discussed the fact that after the public hearing was open, the applicant decided to withdraw the application and therefore no decision was made.

**5. An application from M. Kathleen Smith, requesting a variance from side setback requirements for an accessory structure in a CR Zone. Side setback required = 10' per section 208-12. Variance requested = 10'. Applicant wishes to place shed directly on property line. The property is located at 17 Garnsey Road, Rexford, New York. (Permit #80714)**

The secretary read the legal notice as it appeared in the Daily Gazette on October 2, 2008.

Applicant Kathy Smith presented this application and brought some photos showing the existing shed. She is looking to set it as far back to the side of the property as possible. She stated she has verbal permission and two emails from the abutting property owner stating that they have no problem with her building as close to the line as possible. She is looking to have better use of her backyard. The portion of the property that it would be abutting is a non-buildable portion of the adjacent lot. It is wooded and is at least ½ acre to the house that her neighbor is building. She described the property.

Mr. Dudick made a motion to close the public hearing. Mrs. Gleason seconded. Approval unanimous.

Mr. Telesh stated he feels this is pretty straightforward and sees no huge issues with granting this variance.

Mr. Dudick asked why it has to be on the property line. She stated that she is trying to get better use of her backyard. If she goes farther back it would still stick out. Her backyard is long but narrow. Further back is a marsh and a natural spring. She stated that the owner next to her is building a greenhouse.

Mr. Dudick stated that runoff from the roof of the shed would go onto the neighbor's property. Mr. Dudick asked Mr. Myers if this would be a concern and he said no. That portion of the neighbor's property is basically marsh.

Mr. Lemire asked Ms. Smith how she would feel about putting it 5 feet from the property line. Ms. Smith stated that this is really what it would be because of the type of shed. There is a two-foot overhang, which is what would be on the property line. Mr. Myers stated that this would be

two feet off the property line. Mr. Dudick asked for clarification and Mr. Myers stated that there would be no overhang onto the neighbor's property if it is placed correctly. He has no issues with this application especially if it will be moved 2 feet off the property line.

Mr. Dudick mentioned that having a structure on the property line would make it difficult to have a shed. He would have no problem approving an amended application.

Mr. Ritter made a motion to approve the application as amended, for an 8-foot variance, with removal of the existing shed. Mr. Telesh seconded. Ayes: Gleason, Ritter, Dudick, Lemire, Kortz, Telesh, Ferro. Noes: None.

Mr. Dudick made a motion to approve the minutes of September 2, 2008. Mr. Ritter seconded. Ayes: Gleason, Ritter, Dudick, Kortz, Telesh. Ms. Ferro and Mr. Lemire abstained.

Mr. Dudick made a motion to adjourn the meeting at 9:35 p.m. Mr. Ritter seconded. Approval unanimous.

Respectfully Submitted,

Jessica McCarthy  
Secretary

cc: Town Clerk, Town Board, Zoning Board Members, Joel Peller, Counsel, Steve Myers,  
Department of Building and Development, Planning Board, ECC, Assessor, Highway