

TOWN OF GOSHEN
Zoning Board of Appeals
April 19, 2016

Members Present:

Frank Leva, Chairman
Trino Canton
Cynthia Hand
Bob Farfalla
Ed Garling

Also Present:

Kelly Naughton, Esq., Attorney
Richard Golden, Esq., Attorney
Sean Hoffman, Engineer
Neal Halloran, Building Inspector

The ZBA meeting was opened at 7:30 p.m. by Chairman Frank Leva.

CONTINUED PUBLIC HEARING

Orange County Gospel Church – 11-1-100.2: located on 7.12 +/- acres on Duck Cedar and Old Chester Roads in the RU District with AQ-6, Floodplain & Ponding Area, Stream Corridor and Water Supply Watershed and Scenic Road Corridor Overlay Districts. Requesting area variance and interpretation

Representing the applicant:

Anthony Trochiano, Steve Esposito
Jay Myrow, Esq.

Upon motion by Chairman Frank Leva, seconded by Trino Canton and passed unanimously, the public hearing was opened.

Appearing for the applicant was Jay Myrow, Esq. of Blustein, Shapiro, Rich & Barone.

PROJECT PRESENTATION

Mr. Myrow stated the applicant is looking for relief primarily and firstly for an interpretation of the code with respect to the bulk requirements that have applied to the application. For the public's benefit Mr. Myrow reviewed where the application stands currently. The applicant owns a 7.1-acre parcel of land on Old Chester Road. It is in the RU district. In the use tables for the RU district there are a number of permitted uses and specially permitted uses. One of the permitted uses is religious use of the property. The special use will be permitted by the Planning Board once the applicant meets all of the criteria.

The property was purchased in 2014 and it was zoned as it is currently at that time. There is a site plan application in front of the Planning Board and a special permit application pending before the Planning Board. The proposed improvement is a 14,400 square foot church including 2000 square feet of office and carriage house. The plans show a future expansion which may or may not happen which has been considered under SEQRA and will be considered by the Planning Board for a 12,800 square foot future expansion.

The Planning Board has had the application for some time. It has declared itself lead agency under SEQRA and as of the last meeting that the board has authorized the attorneys for the

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Planning Board to draft a negative declaration under SEQRA which will be considered at the next meeting. Kelly Naughton confirmed it has not been adopted, but it has been authorized to be drafted.

If the Zoning Board of Appeals has to consider an area variance, the applicant has to get through SEQRA before they can do that. In order to do an interpretation, that is a Type II action and does not require a SEQRA determination to render an interpretation of the zoning law. The Planning Board required the applicant to submit reports based on traffic, parking, drainage, and a storm water pollution plan.

At some point there was a request by the PB of the building inspector as to whether or not there are any bulk requirements in the zoning law that would apply to the project. Mr. Myrow feels there are none. He feels the tables for the RU zone show no bulk requirements that apply to a religious use.

The building inspector issued a memo dated July 15, 2015 stating that because the lot was created by a subdivision of the land under the small-scale subdivision regulations in the code, those regulations would come into play with respect to this particular use. Mr. Myrow stated he respectfully disagrees with that interpretation. He believes a small-scale development is specifically defined in the code as applying to residential lots. He believes in his case there are two mentions of the words religious use in the entire zoning law. One is in the definitions and one is in the use table. He feels there are no bulk requirements that are specifically applied to a religious use.

Mr. Myrow stated he is asking the ZBA to exercise its power in interpreting the code. He stated the ZBA is not bound by the interpretation of the building inspector, nor are they to give any deference to his opinion.

Mr. Myrow stated that the particular provision of the code that comes into play by applying small-scale development provisions to the application is restrictions for a residential use which must not have more than 10 percent of impervious material coverage.

Mr. Myrow feels that to apply a strictly residential requirement to a non-commercial development that is permitted in the zone can only be done so by implication. He discussed at length how he believes the code should be interpreted. He then went on to discuss religious land use in the institutionalized persons act which is typically called RELUIPA. RELUIPA is in the Federal law and the basic governing provision is that no government shall impose or implement a land-use regulation in a manner that imposes a substantial burden on religious exercise of a person including a religious assembly or institution unless a government demonstrates that it is in furtherance of a compelling government interest and it is the least means of furthering that compelling government interest. He explained at length how he feels RELUIPA applies to this application.

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BOARD COMMENTS AND QUESTIONS

Chairman Leva polled the board for questions and comments.

Trino Canton asked why different uses would have different impervious coverage requirements. It was clarified that impervious coverage is decided by zone, not by use.

Ed Garling commented that were a substantial number of uses outside of residential uses in the RU zone, therefore the 10 percent coverage would apply to all those uses, not just religious uses.

Cynthia Hand asked if small-scale development is noted on the map. Attorney Golden stated within the resolution it would indicate that is the basis upon which that land was subdivided. Attorney Naughton stated that when the land was originally subdivided the resolution of approval indicated that it was a small-scale subdivision and note on the plat is required if a subdivision of more lots than a certain number, then it's no longer a small-scale subdivision. It becomes an open-space subdivision. There was a note on the subdivision plat that said any lots when it was initially done, any lots greater than 4 would be no longer be considered a small-scale subdivision and would have to proceed as an open-space subdivision under the Town's code. This subdivision had three lots. Neal Halloran stated many of the other uses in the zone are commercial uses and within this zone commercial uses would be restricted to no more than 5000 square feet in the building. Commercial uses are even more restrictive.

Chairman Leva stated he had some questions regarding the calculation of the 10 percent. He stated the application is at 38.7 percent. He questioned if that was based on the expansion as well. Engineer Anthony Trochiano stated it was. Chairman Leva stated if that was taken out, what would be the percentage then? Mr. Trochiano stated it would have to be recalculated. He stated there is a flood plain on the property which has been excluded that bumps the number up. The applicant has included any possible impervious surface for whatever could be constructed.

Chairman Leva stated he is concerned about the sensitivity of the area because of the Otterkill. The Environmental Review Board is concerned as well. Town Engineer Sean Hoffman stated that the code has a definition for the calculation of impervious surface coverage. The calculation takes a total lot area, which is a total parcel area and deducts wetlands and water courses and floodplains from that total area. It then calculates the ratio of impervious surface coverage based on that. The applicant provided a plan with the additional development and he performed a confirming calculation and the applicant's arithmetic is correct at 38.7 percent.

Mr. Myrow stated the issue of the Otterkill came up very early in the site plan and SEQRA review and those issues were worked through at great length with the Planning Board and their engineer. A SWPPP was developed and he feels the applicant has done everything they can to answer all of those concerns. He hopes that is reflected in the negative declaration that is being drafted.

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COMMENTS FROM THE PUBLIC

Monty Corey 115 Old Chester Rd: Mr. Corey handed out photographs to the ZBA board members. He feels this application will be a tremendous impact on the neighborhood. He feels it is way too big for the property and it will create a scenic problem. He explained what each photo indicates. He is concerned about the traffic crossing over the Heritage Trail. Mr. Corey is also concerned with a water shortage for his and his neighbors' wells in light of the Heritage Estates Development also coming into the area consisting of 76 homes as well as the additional traffic to Old Chester Road

Alan Jorgensen 124 Old Chester Rd: Mr. Jorgensen stated the area has been rezoned from when he bought his home and 10 percent impervious coverage is now what is allowed. He thinks the church is too large for the parcel. He is concerned about water issues and flooding into his home. He is also concerned about his well drying. He believes the request for impervious coverage from the applicant is outrageous. He is very nervous about the erosion and runoff from the project. Mr. Jorgensen also provided the board with photographs. He thinks the church should be smaller.

Geri Corey 115 Old Chester Rd: Ms. Corey provided the board with documents and photographs. Two photos are of the Otterkill after one day of light to moderate rain. She stated that it depicts flooding. She stated the Otterkill is threatened on the DEC list. Ms. Corey's concerns are with the SEQRA process, traffic increases, both with pedestrians and bicycles. She feels the impervious coverage asked for is too large. She believes the applicant bought a property inappropriate to their needs. She stated Sundays are days off for the working people of the neighborhood and that is the day that the church will be most active with people and traffic and noise. Ms. Corey stated the magnitude of the project is too great. She has concerns with the scenic view the church will create and it will disrupt the rural character of her neighborhood. She also read several documents to the board members that she provided to them. She also provided a photograph showing her view from her home of the proposed site as it now is and described how it will change once the church is constructed.

For clarification, Engineer Sean Hoffman stated that when the EAF forms are submitted part of the SEQRA data forms are automatically filled in. The impaired water body question is filled out by the DEC. It is correct; there is no impaired water body. The threatened classification is less. Impaired is the worst. There are six classifications and threatened is third. There is no water quality problem currently, but there could be, based on surrounding areas. So the SEQRA form is accurate.

Glynnis Jorgensen 124 Old Chester Rd: Ms. Jorgensen asked if this application had gone before the Environmental Review Board. Neal Halloran stated yes, and they had rendered an opinion. Ms. Jorgensen handed out to the board a copy of the church's activities and calendar. She stated it looked to be a very active and growing church. Her concerns include traffic, activities seven days a week and lighting issues in the evening hours.

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Chairman Leva took this time to remind the audience that this public hearing was specifically and only to address the issue of impervious surface coverage only.

Sean McAllen 138 Old Chester Rd: Mr. McAllen stated he lives in the house directly on the other side of the Otterkill stream. His biggest concern is the visual impact of the size of the building. Also he believes the runoff from the parking lot down the hill impacts him. His property is below theirs and all the runoff has to go somewhere. He feels the variance requested is too large.

Michael Callaghan, Deacon, OCFC 169 Highland Avenue, Middletown: He stated that before the church purchased the lot they had numerous conversations with the building inspector regarding being able to put a church of this size on the lot. Neal Halloran stated he told the church the lot was zoned properly for religious uses. Mr. Callaghan stated he told the building inspector the size of the proposed building and parking lot and questioned how all that has now changed and it's unrealistic to put a facility of that magnitude on the lot. Neal Halloran stated he did not recall anything this large being proposed in the initial conversations. He feels that the church has been cooperative with all the boards. He also mentioned they plan to landscape the property and make it attractive to the neighborhood.

Fran Harris, The Chronicle Newspaper: She stated she was ignorant of the SEQRA process and asked who initiates the SEQRA process, what it is, and why are some of the pieces of the process automatically answered. Attorney Rick Golden stated this is public hearing for the ZBA to make a determination as to the application. SEQRA is implicated by the Planning Board. He stated he will make himself available to the reporter to answer questions generally about the process, but would like to move the public hearing portion along.

Mr. Myrow stated having heard the comments from the public, the applicant is not in agreement with many of them. He stated he presented to the Planning Board a full visual study, submitted factors mitigating issues that were raised, and they addressed lighting issues. He reiterated he clearly does not agree that religious uses can have no more than a 10 percent impervious surface coverage. He stated that specifically applies to residential uses only.

At this time Mr. Myrow read partial case law into the record regarding RELUIPA. He stated if the board was going to look to impose any regulation against the establishment of a church and the building of a church, they must find a compelling state interest supports that regulation. They cannot infer it from what they may see in the code. It has to have been specifically applied by the specific language in the code and he feels they will not find it in this particular case. He feels there are no regulations that are there.

Alan Jorgensen spoke again regarding permeable versus impermeable surfaces. He is concerned about the impact to the wells, the water table and feels threatened by Mr. Myrow's citing of RELUIPA. He reiterated he thinks it's an outrageous variance being asked for.

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Geri Corey spoke again stating there is no aquifer under the land. It is all shelf water.

FURTHER COMMENTS BY THE BOARD

Cynthia Hand asked the size of the congregation currently. It was answered anywhere from 200 to 250 people.

Trino Canton questioned the Town Attorney the difference between a bulk requirement and an area variance. Rick Golden stated there are two issues before the ZBA. There is the interpretation of what are the bulk requirements that ought to apply to this application. If the board answers that question that the 10 percent for impervious applies, that that is the proper interpretation that would be sustaining what that building inspector has recently determined, then the board moves to the second request. That if that is the case, the applicant would like the board to go through the normal area variance of varying the Town's 10 percent to allow something greater up to and including the 38.7 percent.

Chairman Leva asked the applicant's engineer if on their plans there are any rain gardens or dry wells to recharge the underground water? Mr. Trochiano stated that when they go through the process of their storm water design, the DEC heavily encourages this. Mr. Trochiano stated the property is poor at percolation. They will provide filtration practices. They proposed a bio retention facility toward the rear of the property. It will filter and clean the storm water and discharges the water through a drain. It will be in the SWPPP.

Chairman Leva stated in the minutes from the Environmental Review Board there was a comment that the retention pond should be a part of the impervious surface calculation. He asked if that was correct. Mr. Trochiano stated perhaps they made that suggestion because they are considering that a water surface is impervious.

Trino Canton stated the code defines impervious surfaces and excludes wetlands, water courses and flood plains. So you take the total lot area and deduct those other areas. In the definition for water course it also includes ponds. The applicant is correct that the two larger areas are filters and will not store any water. So they should not be included as impervious. The pond would normally be, but in this instance the pond is in the flood plain and it's already been accounted for.

Ed Garling asked if the interpretation that the board is being asked to render of the zoning law, is that an interpretation relative to religious use or just any other use in the RU zone. Rick Golden stated it is going to be an interpretation of the code relative to a specific fact situation. The fact situation includes this particular project with this particular use which is a religious use. You cannot divorce the two.

Ed Garling commented that nothing that was discussed tonight had to do with the comprehensive plan and how it was to be interpreted. He stated he has been working with the

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Town of Goshen in one way or another for many years and knows pretty well the intent of the various zoning laws and comprehensive plans that have been prepared over the years. One of the concerns in the late 80's and early 90's was the lack of water in particular areas of Goshen. As a result of that zoning densities were lowered. The intent of the districts was to have a lot of open space. Overall impervious coverage was intended to be relatively low. Open space was supposed to be created in most of the areas of the Town with the exception of areas that had central water and sewer, industrial development and in and around the village. That is his understanding of the zoning since 1968 to the present time.

Mr. Myrow stated he hasn't seen copies of any of the submissions which he requested copies of. If the board is going to close the public hearing, he would like the opportunity to submit additional written materials for a period of time to supplement the record.

Upon motion by Chairman Leva and seconded by Bob Farfalla, it was unanimously resolved to close the public hearing.

COMMENTS OF THE ATTORNEY

Attorney Rick Golden stated the board has heard a lot of legal pronouncements by Mr. Myrow. Mr. Golden stated that he agreed with Mr. Myrow in that the board's determination on an appeal of an interpretation from the building inspector, is issued entirely anew. The board is to stand in the shoes of the building inspector as if they were hearing the first question for the very first time.

Mr. Golden also stated that he agrees that religious uses are considered to be a favorable use. They are given a preference, more so than other institutions and certainly more so than private individuals. Under New York Common Law it has long since been recognized in New York that religious uses are favored uses especially in residential uses. The board must consider religious uses different than other uses, but there are standards that you must consider with respect to that.

Mr. Golden disagrees with Mr. Myrow as to his legal pronouncements, some in minor ways and some in very substantial ways. Mr. Myrow spoke about RELUIPA and other law and quoted from some cases. Mr. Golden stated he will be advising the board in an attorney/client conference as to what is the proper role in interpreting the constitution, RELUIPA, common law in New York and the code and how the board has to balance those and interpret that. The board will then deliberate from that once it has the advice from the board attorneys.

Upon motion by Chairman Leva, seconded by Trino Canton, it was unanimously resolved to close the meeting at 9:30 p.m.

Respectfully submitted,
Tanya McPhee, ZBA Secretary