

TOWN OF MILAN ZONING BOARD OF APPEALS MEETING MINUTES - FINAL
WEDNESDAY, FEBRUARY 7, 2011

MEMBERS PRESENT:

Jack Grumet, Chairman
Rocky Mancini
Guy Russell
John Schneider
Phillip Zemke

MEMBERS ABSENT:

None

ALSO PRESENT:

Chairman Grumet opened the meeting at 7:05 p.m.

Applications:

1. **Diana Bergherr Area Variance** - Adrienna Odierna, attorney from Hanig and Schutzman for Ms. Bergherr, was present on behalf of Ms. Bergherr regarding her area variance application to reduce the required acreage from 10 acres to 4.83 acres to allow her to keep four horses on her property located at 371 North Road, tax grid number 6572-00-773337. Chairman Grumet said some of the Board members did a site visit a few weeks ago which allowed them to view the overall layout of the property. Chairman Grumet said the existing barn is not sufficient as it only has three stalls and Ms. Bergherr will need four. She is proposing to enlarge the existing structure resulting in four stalls and a different configuration. Mr. Zemke asked what the configuration of the barn is on the site plan. He said the site plan needs to be amended to show the existing structure after it is revised. Chairman Grumet said he asked Ms. Bergherr for a drawing of the proposed barn with the addition as well as elevations. When the applicant supplied the elevations, they sent generic plans. Chairman Grumet said, specifically, he wants to see what the old structure will look like with the new structure attached to it as far as the elevation and that needs to be added to the site plan. Chairman Grumet would also like to have it confirmed that the siding will be the same as it is now to make sure the addition blends in to the existing building. Chairman Grumet said there have been concerns voiced by neighbors about the removal of the trees which took down the natural screening and he got a clear picture of that on the site visit. Chairman Grumet said his recommendation will be to have as a condition to the variance, if granted, that the applicant plant a natural buffer of trees starting at the northwest corner of the property and traveling up the northern boundary until the spot where the property drops off. The tree line should be planted in between the old barbed wire fence (which he assumes to be the property line) and the proposed fence. There should be at least a 40 to 45 foot buffer in between the barbed wire fence and the proposed fence to allow for the trees. Chairman Grumet provided suggestions from the Farm and Home Center on the type of tree that would do best in this environment, not deer friendly, and to provide the best screen. However, if the applicant has other suggestions as to the type of tree, she should submit for the Board to consider. Chairman Grumet said this screening would be a condition of approval to mitigate the impact to the neighborhood and the trees that were cut down. Chairman Grumet agreed that the Board could schedule the public hearing for the

February 23rd meeting but the applicant needs to provide the requested information on the layout of the new barn as soon as possible. The elevations can just be sketched in; it is not necessary to have an architectural drawing and the applicant needs to understand that the screening will be a condition of variance approval.

Chairman Grumet motioned that the ZBA set the date for the public hearing for the Bergherr Area Variance application to be held at the February 23, 2011 ZBA meeting. Mr. Zemke seconded. All aye. Motion carried 5-0.

2. **Ed Eiffert/James Murphy Use Variance** – Ed Eiffert and Karen Hagstrom, attorney for the applicant, were present on behalf of Mr. Eiffert's and Mr. Murphy's request for an interpretation and use variance application to construct a 30' x 120' (or preferably a 60' x 160') metal/wood storage shed to house building material and equipment on a vacant 109.52 acre lot located on Route 199 in the A5A zoning district. Chairman Grumet said an escrow account has been established and we were able to correspond with John Greco, Town Attorney, to get a better idea of the legal obstacles. Mr. Greco sent the ZBA a memo on January 20, 2011 which is attorney-client privilege. The applicant stated he wants to move forward with both applications, the interpretation and the use variance. Chairman Grumet said we will review the interpretation to determine whether the Stop Work Order was properly issued by the building inspector. The first step in this process will be a review of the interpretation and the next step the use variance. Chairman Grumet said after he read the correspondence from Mr. Greco, he was struck by the high bar that is put in place to get a use variance. A use variance has four aspects to be addressed and all four must be satisfied. The first is that there is no other reasonable return on this property. The owner has to show that he can't use that property for anything else and that must be established by competent financial evidence. Solid proof must be demonstrated that he can't do anything else with the property, there can't be a house on it, no other use. That proof will need to be obtained through experts and legal documentation that the only possible use for that property is that garage and nothing else and it needs to be detailed and exacting proof. The Board will also need to see the documentation on all expenses that the owner of the property incurred with the work that has been done thus far, the clearing, the hydraulic hammering, etc. The second aspect is that the alleged hardship is unique to the property. This will again require proof that there can be no other building on this property, that the owner can't get any other reasonable return from that property in the A5A zoning district. The third aspect is that a use variance will not alter the essential character of the neighborhood. The owner of the property will have to prove that the building of the garage and the associated truck traffic will not have a detrimental impact on the neighborhood and there will be a public hearing and public input will be considered. Will a garage of that size with the potential truck traffic impact the neighborhood? The fourth aspect is whether the alleged hardship has been self-created. If a building permit has been issued in error, our zoning code says it can be rescinded. If a building permit was issued in error, we have to determine whether, through due diligence, the person issued the building permit would have known it was

issued in error. For example, would the average person know that he couldn't build that commercial structure in the A5A zoning district? Chairman Grumet said this board will remain impartial and can't make any decisions until all the facts are in. Chairman Grumet also said he just wants to make sure the applicant is fully aware that a use variance is an extremely high hurdle and he fully understands what he is embarking on. The ZBA is an impartial board but a use variance is a tough road and it will be expensive and will take a lot of time. Ms. Hagstrom said we have thought hard and had discussions about this. She said she has spoken with other attorneys who have been doing land use matters for years. We had an informal meeting with the Town initially and concluded this was the best course of action. One proposal was to do a lot line adjustment and make this building an as of right accessory structure but the structure they have proposed would have to be dramatically altered for that to work. Ms. Hagstrom said she has spoken to Mr. Greco who conveyed to her that the accessory structure would have to be about the size of a three car garage. So, at this time, we have no choice but to pursue the use variance. Mr. Eiffert has spent about \$88,000 of money he can't recoup. This is the only path that will let him accomplish the goal of cleaning up both properties. She said she can talk to Mr. Greco again. He did acknowledge the case law she cited in the application so, yes, there are those four criteria to be answered but there is also case law and support for money already spent. Ms. Hagstrom said she understands that these four factors are the four factors to be considered under the law but this situation is so unique in that the applicant was granted a building permit and spent a considerable sum of money. Mr. Eiffert said this property is not good for agriculture. We looked through the zoning book to try to find an allowed use to call it but came up empty. Chairman Grumet asked if a house could be built on the property. Ms. Hagstrom said the property is essentially rock. Chairman Grumet said if you can build a garage, you can build a house. Mr. Eiffert said with a house you have different requirements such as a septic system and well, items not required for a garage. Chairman Grumet acknowledged that but said there is not a lot of leeway in the law for a use variance. Ms. Hagstrom said those four items are the law straight out of the book but in this circumstance, someone spent money which was justifiable due to the issuance of the building permit and there is case law which states those expenditures should be considered in determining whether the property owner has suffered unnecessary hardship which would warrant a use variance. Chairman Grumet agreed but added that case law goes both ways. Ms. Hagstrom said, again, we are left with no choice. Chairman Grumet said he would like to look for a compromise. He wants to hear all the facts; however, the laws seem to be overwhelming. If there is any other possibility, which may be not getting what you want but some of what you want, maybe that can be considered. Ms. Hagstrom said that would be scaling the building down so much it would not be usable for this proposal so all the money spent on the building and the hammering is gone. It's not that we aren't receptive to a compromise, we did set up the initial meeting with the Town and have dealt with this on an upfront level. We do want to have these properties cleaned up and we think a structure of this size fits in under the agricultural zone. She said the structure is permitted, not the use. This use is not anything that is going to bother anyone, it won't be

noisy with people in and out all the time. The goal we want to achieve is to clean up this property and the property next door. Chairman Grumet said we don't disagree with you and you have made many valid points; the problem is the strictness of the use variance requirements. Ms. Hagstrom said we are receptive to suggestions and compromises and have weighed the lot line adjustment proposal. Chairman Grumet said he did discuss with Mr. Greco the possibility of a lot line adjustment after which the Town may then allow the applicant to build a garage a size in keeping with other large garages in the Town which may suit at least some of his purposes. Ms. Hagstrom said Mr. Greco told her that Mr. Cole, the building inspector, said an appropriate size for such an accessory structure would be between 600 to 1,000 square feet which would be similar to a three car garage. Mr. Zemke said the building started out at 3,600 sq. feet and now the applicant would like to almost double the size; what is the need for that size building? Mr. Eiffert said we do foam insulation. The product is stored in barrels and we produce the foam on site. In order for us to do this, we have moving trucks (vans). The problem is in the winter time, all the trucks are parked down at the bottom of my driveway because they need to be plugged in and kept warm because the liquid can't freeze. He said he has six trucks, 24 foot box trucks, which are 40 feet from head to toe. The thought was to have a 15 foot bay in between the steel columns and a 12 foot door to back the truck in and to allow for room to walk around. A 60 foot length gives you room in the front and back. He was also planning on putting a loading dock in the back which is shown on the design so you could just jump in a truck and go. Once he can store the trucks, there won't be any trucks parked at the end of the road. They will be parked in this beautiful looking barn which is in character with the A5A agricultural district. Mr. Zemke asked what the use would be changed to as this is not a use allowed in the A5A district. Ms. Hagstrom said this size building is permitted in an ag zone if it is used for agriculture. In practicality, is this use really going to be anything different? He would be able to construct a barn with no issue. It is not the building, it is the use. Mr. Zemke said the plan does not show pavement and truck circulation. A building that large implies a lot of truck traffic. He said he would like to see more information as to how the site will be used, how many trucks will be stored there, how will they gain access, and where will they be driving. This appears to be like a light industrial use. Chairman Grumet said he agreed with much of what Mr. Eiffert is saying but the mechanism we have in place in this town for granting this is a very difficult mechanism and that is what we need to focus on. There are stringent requirements that will need to be met. The property abuts Route 199 but it is accessed through Mr. Eiffert's adjoining property. Mr. Zemke asked if this proposed use variance is intended to apply to the entire property. Mr. Eiffert said it doesn't have to. This property is all hills and rocks with a massive shale bank. Ms. Hagstrom said he would be willing to limit the variance to only pertain to this area; the Board could grant a use variance but impose that condition on it. Chairman Grumet said the applicant still has to prove that the rest of the property can't be used for anything else. Again, he said Ms. Hagstrom and Mr. Eiffert are making good points but that is not the issue; the issue is, it has to be proven you cannot do anything else with this property. Ms. Hagstrom said she will talk to Mr. Greco but she thinks that the analysis is different

because he spent money already that he cannot recoup and that can't be put towards another permitted use such as a barn, and he can't use the purchased building for another purpose. The traditional analysis has to be tailored to this case. The statute says you have to look at facts and case law. The applicant spent money which cannot be recouped or used for any other permitted use. He would have to spend more money on top of what has already been spent to do anything else with this property. Chairman Grumet said that would have to be proven. Mr. Greco does address those issues and he came up with case law contradictory to the case law referred to in the application. He said he is not disagreeing, but it will be a tough job. Ms. Hagstrom said, again, she thinks the analysis is a bit different for this case. The applicant is not coming in without having gotten a building permit. You can't ignore the building permit. He is not coming in fresh. That is not the type of use variance he is requesting. This situation is unique and is a hardship since he spent the money and can't use the shed and hammered rock for anything else. Chairman Grumet said Mr. Greco did say that a building permit issued in error does not gain for the landowner vested rights. Ms. Hagstrom agreed and said if he could get the vested right, then he could move on the project. Chairman Grumet said the Board will also be considering public input. Ms. Hagstrom said that is what Mr. Greco thought would be the biggest hurdle. We would be open to site visits and to speak with neighbors and to educate them as to the plan. We are trying to clean up the property. Mr. Eiffert said as far as truck traffic, nothing will change. The six trucks are already there. The neighbors have not complained about truck traffic. They have complained about water coming down the hill and we fixed that problem. We've worked with the Highway Dept. on some of the water coming down onto the road and spent a lot of money on drainage, etc. to fix those problems. As far as truck traffic, Mr. Eiffert said he believes once we explain what we are trying to do, the neighbors will be for it. As far as the other hurdles, it is what it is. Mr. Zemke asked why there are 10 bays. Mr. Eiffert explained the site plan. No one will see the trucks here or going into the building. There are plenty of trees for screening. We go and get our own material so one of the six box trucks is used to pick the material up. There are 10 doors you can't see. There is a big rock cliff right behind the building. Due to the topography, this is the only area where we could put this building. One of the bays will be for repair for a truck that may need maintenance or his regular pickup truck that may need repair. Mr. Eiffert said he has one shot at doing this so wants to do it right so that it works and he will never outgrow it. Mr. Zemke asked what the fuel is for and Mr. Eiffert said it is for boilers since the building has to be heated. He will have a waste fuel heating system. All the trucks are diesel. He will need a generator to power up the machines so will go through a lot of oil. The tanks will probably be about 550 gallons. Mr. Eiffert said you won't see the garage or anything up there from North Road. Mr. Zemke asked if they think they can surmount these four hurdles. Ms. Hagstrom said we will provide arguments. Chairman Grumet said he will work up an in depth list of requirements as far as documentation which we will provide to you. Ms. Hagstrom said again, we don't want to go down this road but we have no other choice. Chairman Grumet said we recently had a similar situation where a building permit was issued in error and we were able to work out a compromise; the property

owner didn't get quite the size of a structure that she wanted, but she got something and got it quickly. Mr. Eiffert said then suggest something but the building has to be 60 feet deep. Chairman Grumet said he can look through building permits issued for the last 10 years to get a building size and see where that takes us but it won't be what you are requesting. Mr. Eiffert said we have six trucks so we are limited in what we can do. Chairman Grumet pointed out again that these are all good points but the law confines us in allowing a use variance. The requirements to satisfy those four criteria are very difficult. Mr. Zemke said if you will proceed with this use variance, he would like to hear an argument as to if this use was allowed in the Town, what zone would it be allowed in and why? How does this project fit into the overall zoning and planning concepts for the Town? Would the plan conform to the Master Plan?

Chairman Grumet said at this point, he will research garage sizes that are common place in town and at the same time, start working on a list with respective questions and required documentation. Once that is completed, we will move forward. Once we have all the information, we will schedule the public hearing. There was no action taken at this meeting.

Administrative Items:

- Approval of Minutes: Mr. Russell motioned to approve the minutes of November, 2010 as presented. Mr. Mancini seconded. All aye. Motion carried 5-0.

Mr. Russell motioned to adjourn the meeting at 8:35 p.m. Mr. Mancini seconded. All aye. Motion carried 5-0.

The next ZBA meeting is scheduled to be held on February 23, 2011 at 7:00 p.m. at the Town Hall.

Respectfully submitted,

Karen Buechele, Clerk
Planning and Zoning

cc: Catherine Gill, Town Clerk
Town Board