

Town of Allegany Planning Board Meeting Minutes

May 14 2012 at 7:00 PM Senior Center, Birch Run Rd.

Present:

Frank DeFiore, Chairman
Peter Hellier
Rick Kavanagh
Helen Larson
John Sayegh

APPROVED June 11, 2012

Also Present:

John Hare, Town Supervisor; David Koebelin, Ed Allen, Jim Hitchcock, David O'Dell, Town Board; Carol Horowitz, Town Planner; Jason Crisafulli, Kinley Corp.; Kevin Sheen, Jim Muscato, Esq., Everpower; Daniel Spitzer, Esq. Charles Malcolm, Esq., Nick Pircio; Lynette Semsel, Secretary; Townspeople

Mr. DeFiore opened the meeting with the Pledge to the Flag at 7:00 PM. He then asked if there were any corrections or changes to the minutes of April 9, 2012.

Mr. Kavanagh made a motion to approve the minutes as written of the March 12, 2012 meeting. 2nd by Mrs. Larson. Ayes all. Carried.

Bonaventure Square: Request for extension of Special Use Permit and Site Plan

Mrs. Horowitz stated this is a request for an extension of the Board's conditional approval of final plat which is to reaggregate the tax map parcels into one parcel. This would be the second and final extension. Her recommendation is for the board to approve the request as the applicant seems to be making progress toward satisfying the conditions. Mr. DeFiore asked Jason Crisafulli to update the board on their progress. Mr. Crisafulli stated Ross Wilson is working with NYS DEC at present to get the necessary permit. This involves working out some problems with the City of Olean treatment plant. They need the Health Department permit. They will have the aggregation done before the final deadline. Mr. Kavanagh asked: "With the aggregation of land, you are actually still talking about one owner on that?" Mr. Crisafulli: "Yes." Mr. Hellier asked: "Where does the power house stand?" Mr. Crisafulli: "That is nonexistent." Mr. Hellier: "Nonexistent now. It's gone completely?" Mr. Crisafulli: "Yes."

Mr. Kavanagh made a motion to approve the 90 day extension of the Conditional Approval of Final Plat to Ross Wilson Associates for Bonaventure Square subdivision. 2nd by Mr. Hellier. Ayes all.

Allegany Wind LLC: Request for extension of Special Use Permit and Site Plan

Mr. DeFiore stated the request is for a one year extension. He then asked the Everpower Representatives to explain why the project has been held up.

Jim Muscato, representing Everpower, stated: "We requested the Special Use Permit and Site Plan approval be extended. The permit and approval were originally granted July 11, 2011. The

permit stated the permit could be extended by request and the Allegany ordinance allows for the Planning Board to grant an extension on a request. Immediately following the issuance of the permit back in July, the opponents of the wind farm challenged the approvals in court suing both the Town and the company in Supreme Court. The decision affirming the grant of the approvals was granted in about November of 2011 and the opponents appealed. That appeal still remains pending in the Appellate Court. So because of these litigations and the appeal being pending, the company cannot proceed with the necessary financing to proceed with construction. In addition, the market conditions have changed substantially since last July when the permit approvals were originally granted. As a result, the company is seeking the extension from the Planning Board for one year.”

Mr. DeFiore: You said that you can't proceed? Is it you can't or that, just because of the market, you decided to kind of put it on hold for a while?

Mr. Muscato: That is two separate issues actually. Because the litigation is pending, the parent company is not able to get the financing that is necessary to proceed with construction based on the potential risk associated with the litigation and the appeal, if it is successful.

Mr. Sheen: I think that the bigger issue prior was the lawsuit throwing us off--the risk and litigation including that. Moving now, I think the risk is less with the lawsuit and more just market conditions, production tax credit, the price of natural gas, things like that.

Mr. DeFiore: I think the last time we discussed things with you, one of the issues that was outstanding was your contract for road use. Have those been looked at any further?

Mr. Sheen: Yes. We had been discussing those with the Town Board as well. I think you are referring to the Town of Carrollton.

Mr. DeFiore: At one point it was one route you were going to use and then in another statement it was a number of different routes. You have been discussing that further then with the Town Board and are still working on that?

Mr. Sheen: We have. Still working on that. I think we have a good solution for both components and the aggregates and materials we use, and we will be hammering out those details with the Town Board.

Mr. DeFiore: Any other questions, suggestions, at this point? Anybody here?

Mr. Sayegh: I have actually two-pronged question, if you don't mind. The first one is you cited that the first reason you couldn't start is because of the appeal or the litigation?

Mr. Sheen: The litigation.

Mr. Sayegh: The litigation taking place and the second reason was the market conditions. Are you speculating on what's going to happen on the market conditions?

Mr. Sheen: Well, specifically what had happened was when we first applied, and when we were pushing hard, at that time there was a recovery fund, an ARA16-03 Recovery Fund that we wanted to get qualified for but you needed to do certain things to be qualified by the end of last year and you had to have your facility into operation. We were unable to do so, because of the threat of lawsuit. We felt it was too risky to continue so we decided to push that back a bit. Now, the biggest risk is the expiration of the production tax credit and we think that it will be extended, but it probably won't be extended until after the election.

Mr. Muscato: So the year's time will allow for certainly in terms of the production tax credit, and then for them to prepare the necessary construction, the lead times for contracts and to order products.

Mr. Sheen: That's the other problem. Once you start the ordering process, to order turbines and get them delivered, that can be six to nine months' lead time at minimum.

Mr. DeFiore: Are there questions by the Board members up here directly?

Mr. Kavanagh: I guess this one would be for Dan. If we grant an extension today, being that we still have sixty-two days to work on this, does the extension for the year start when we grant it or is it tacked onto the end of the original agreement?

Mr. Spitzer: It usually goes from the date that is granted so they actually have until July to get it. Whatever date you actually grant them on would be when the time frame would start as long as you give a specific time frame.

Mr. DeFiore then asked Mr. Spitzer if he would let the board know what the steps are that they have before them. Mr. Spitzer said he was willing to do so and would also like to ask a few questions to clarify some things.

Mr. Spitzer: Mr. Muscato, you started off by saying that you were immediately sued but we weren't sued until three months later. Why didn't your client take steps to get a building permit and start construction. The statute of limitations expired, as you know because you moved to dismiss on the basis of statute of limitations, for two and a half months before there was a lawsuit. So could you fill in why? The reason I ask this is, the Planning Board members who were here will remember, there was a considerable emphasis by your client that it was essential that the project be approved because of the 16-03 timing and yet nothing happened after the approval. So there is a bit of a gap between, quote/unquote, to use your term, immediately being sued. It would be helpful if you can fill that in why you didn't do anything.

Mr. Sheen: I'm happy to explain why we maybe didn't appear to be doing something as doing things behind the scenes are two entirely different things. From our company's point of view, a real time trigger for us is always the statute of limitations. From our mindset, we're a risk-averse company so, until statute of limitations runs, we don't necessarily see a permit being granted. That is just the way we work. We are a risk-averse company. So that is part of the reason for the delay. It is kind of getting our ducks in a row behind the scenes and waiting to see if the statute of limitations pass. The statute of limitations, based on your comments, did pass and then soon afterwards the lawsuit happened. So, you know, just because you didn't see us necessarily moving forward doesn't mean that we weren't. We were meeting the supplier, and, I can tell you and maybe even people in town saw it, we had interviews with contractors during that time frame, we had people in town to take a look at the site, so things were definitely going on. It wasn't necessarily in front of the public.

Mr. Spitzer: Have you had any further discussions with the Town of Carrollton this year on the roads?

Mr. Sheen: We have not.

Mr. Spitzer: You came to the Board with the proposal to use Chipmonk Road. The Board said go talk to the highway superintendent and Dave Britton of CRA. We wanted a little greater investigation and detail about what was done. To my knowledge, nothing ever happened. Did you ever meet with those?

Mr. Sheen: No and that is because we don't plan on using Chipmonk Road and we do plan on formally withdrawing that as a route for the transportation.

Mr. Spitzer: I think this Board would be happy to put that on the record and transmit that to the Town Board that it has been formally withdrawn?

Mr. Sheen: Okay.

Mr. Spitzer: So for everybody here, explain the alternative route that you then propose to the Town Board.

Mr. Sheen: We believe we can bring our larger components up through Pennsylvania and use that small section of Nichols Run Road before it hits Chipmonk. It is still anticipated to use the route from Carrollton up for aggregates and things like that.

Mr. Spitzer: So you have to work out some kind of deal and have permission from Carrollton. I know there is a discussion on the issue of whether you actually need to have permission.

Mr. Sheen: It is our goal to get a road use agreement with the Town of Carrollton to use their roads. If that does not happen, we will obviously look at other alternative routes.

Mr. Spitzer: This may be more of a question for Mr. Muscato. Is using two roads instead of one a change in the application? Your letter requesting an extension suggested there is no change. Would the use of two roads instead of one be a change in the application?

Mr. Muscato: As I understand it, the review of all the roads that we are talking about today have all been looked at throughout the application which we originally submitted on the project. They were also part of the review under SEQRA; therefore, there isn't a change in terms of what we reviewed and what was part of the application.

Mr. Spitzer: My memory is that we were looking at one route at a time and I don't remember us ever talking about more than one route at a time. That really is the question that we may want to look at. I am not sure that that is correct in SEQRA. Kevin, you raised this issue in September with the Town Board and the Town Board had that same issue. You may want to look at that issue. Your letter to this Board for extension says there have been no changes in the project. You are correct that the routes that you are talking about were in there [SEQRA review], but the multiplicity of routes would be a concern to the Town. I think you need to tell this Board before they can make a decision that, yes, this proposal that is now before the Board is not a change in circumstances.

Mr. Muscato: To return to the change of circumstances, my understanding the provisions in road use for that spur would not necessitate an additional approval from the Planning Board and, for purposes of the change in circumstances, provisionally the test involves whether or not there is a change in circumstances in the factual surroundings of the project such that the extension may have different impacts on what was originally looked at.

Mr. Spitzer: That is why I think we should clarify it. I am not necessarily saying that the permit has been changed. The permit didn't specify the routes, only the Town Board's approval did. But again it is a very different question before this Board if there has been a change in the project that they approved. I think you should give this Board a reason why going from one route to a multiplicity of routes is not a change.

Mr. DeFiore: I have to agree with Dan as my recollection is that we were talking mainly about the Nine Mile.

Mr. Spitzer: Before this Board makes a decision you need to revisit that point. This Board looked at six different routes. Carrollton was a route where everything was going to go through Carrollton, Pennsylvania was a route where everything was going to go through Pennsylvania. What is potentially talked about now is a split in the traffic. I am not sure that was actually reviewed in SEQRA and I want the applicant to say why it isn't a change in the project.

Mr. Kavanagh: The road use agreement itself is still controlled through the Town Board. We had nothing to do with it, correct?

Mr. Spitzer: That is correct. The question that this leads to is, assuming that they are using two roads and therefore tying up two roads in the community, in your opinion is that a change in the project? It depends on the permit that you issued. That is the question that is potentially out there that you are in effect addressing.

Mr. Muscato: This is not a question of a change in the project but an extension request. Your question is whether or not there has been a change in the circumstances surrounding the project that the original approval granted somehow now has different impacts. We should look at the original approval.

Mr. Kavanagh: What does it do to the escrow accounts?

Mr. Spitzer: The escrow account typically says that the payment, which is in escrow, is not due until the litigation is over. The escrow account is not affected by the extension. The host agreement has a payment due in October.

Mr. Hellier: On the road subject, would you be willing to put that in a memo to us and explain where you are headed.

Mr. Muscato: Yes.

Mr. Spitzer: Can you confirm, at this point, that the Nordex N100, which the noise model, visual model and the shadow flicker model were based on, is still your current preferred model for this project?

Mr. Sheen: The Nordex N100 is still our preferred model.

Mr. Kavanagh: The preferred one but are they still available?

Mr. Sheen: I have heard nothing from Nordex to indicate any differently. They are concentrating a bit more on their N117 model but they have not said they cannot produce and allow us to use N100s.

Mr. Spitzer: Would you agree, should they come in with N100 with a different blade configuration, that would at least require this board to look at the potential changes in the noise, sound and visual impacts.

Mr. Muscato: Yes, looking at how specific the approvals were with regard to a turbine model, the potential impact may be different based on the characteristics.

Mr. Spitzer: We want to make sure everyone understands that you are not proposing any changes at this point.

Mr. Sheen: Not at this point.

Mr. Spitzer: Just for the record, there is no part of your project, in terms of any physical aspects that you propose at this point, of any other change.

Mr. Sheen: Nothing that I can think of. We still plan on doing 29 turbine locations with the Nordex N100.

Mr. Spitzer: I wanted it on the record that the question was asked and that you answered it. Also, just to clarify the record the chairman suggested, the concern is that the PTC [Production Tax Credit] expires at the end of the year and that there isn't enough time, particularly with litigations, to build the project and still be sure you can have the PTC.

Mr. Sheen: Correct.

Mr. Spitzer: Second is the market issue in terms of market prices. Could you explain that?

Mr. Sheen: Well, obviously I think that market conditions are always something that you have to be concerned with. We were less concerned in some aspects of the market conditions. In a non PTC world, I am not certain what NYSERDA might do in the future.

Mr. Spitzer: Basically to make a wind farm profitable, there are three things that you try to get. One is the Federal production tax credit, the second is the State Renewable Energy Credit and the third is whatever the market is going to pay you which New York, which doesn't have a power purchase agreement, is usually whatever the merchant price is unless you are able to get an agreement with a co-op or something. What is the status of your renewable energy contract?

Mr. Sheen: We do not have a valid contract. We would need to inform NYSERDA to probably rebid the project.

Mr. Spitzer: One of the other concerns raised by members of the public is the uncertainty will result in harm to the property values of the people who live in the area. Can you be a little more

definite, assuming the litigation ends in October or November, and the PTC is approved after the election, what would your plan be?

Mr. Sheen: Spring 2013 construction.

Mr. Spitzer: And if the PTC wasn't renewed?

Mr. Sheen: I don't think we will see the project built if there is no PTC. I don't believe there will be any renewable energy project, specifically wind project, built.

Mr. Spitzer: With the time that has gone by, why isn't the fact that we now have properties that are potentially harmed, why hasn't that been a change in your project?

Mr. Muscato: Property values were looked at as part of the original project approval by the Planning Board under SEQRA. It shouldn't be a factor. The impact, associated with property values, was looked at and was decided on by the Planning Board. For purposes of an extension request, it is not the Planning Board's duty to go back to determine whether or not it made the right decision with regard to impact.

Mr. Spitzer: Assume the board wants to go back, why can't they?

Mr. Muscato: The extension request does not trigger a look back at those impacts again.

Mr. Spitzer: Mr. Chairman, what before the board is a request for extension. This decision is governed by your local law only. The prior (Bonaventure Square) decision was governed by New York State subdivision law and the "90 day, 90 day provisions" is a limit required by State law. The Town Board has chosen not to override those limits. Special Use Permit and Site Plan is a totally different context. Of the Sections 274a & b of the New York Town Law which governs Site Plan and Special Use Permit, there are no time frames on extensions and there are none in your law. What is before the board is an extension request. Technically, as with any request, even if you don't have a public hearing, you have 62 days generally to make a decision. You certainly should feel no need to decide tonight. My recommendation to you is based on the discussion and the fact that some of members of the public have put in some letters. There is no public hearing requirement. My legal advice to you is to defer but my recommendation to you is to table this until your next regular meeting to give yourselves a chance to consider it.

Mr. DeFiore asked if anyone else had any questions. There were none.

Mr. DeFiore made a motion to table the action before the Board for approval of extension of the Site Plan and Special Use Permit until the regular June 11, 2012 meeting in order to give the Board a chance to go into executive session and discuss any further questions and procedures with our counsel. 2nd by Mr. Sayegh. Ayes all. Carried.

Mr. DeFiore then informed those attending that the Board will go into executive session and, though there are other things on the agenda, the Board will not be discussing the extension any further. The Board then went into executive session.

Mr. DeFiore made a motion to go into executive session and adjourn this part of the regular Planning Board meeting. 2nd by Mr. Hellier. Ayes all. Carried

Mr. DeFiore made a motion to reopen the regular meeting of the Planning Board for the Town of Allegany for the May 14, 2012 meeting. 2nd by Mr. Kavanagh. Ayes all. Carried

Wellhead Protection Plan

Mrs. Horowitz went over the minor revisions to the Wellhead Protection Plan. If the Planning Board is comfortable with the plan as it is, Mrs. Horowitz will send it to the Village to be distributed to their

Planning Board members. The Board went over the plan and made minor changes to clear up some of the language.

Mr. DeFiore informed the Board that the Village of Allegany has completed their part of the work on the Wellhead Protection Overlay District, and said Mrs. Horowitz had been invited to get together with them to make sure the definitions were the same for both the Town and the Village. It is primary that the regulations and definitions be identical to avoid future problems especially for properties whose boundaries may cross over from Town to Village.

Mr. Hellier raised the question of what will happen if the project ends up extremely restrictive. Mrs. Horowitz said it may not go anywhere then as it still needs to be approved by the Town Board with a recommendation from the Planning Board. If the Planning Board is comfortable with it, they will then recommend the final Ordinance to the Town Board.

Due to the time, the Zoning ordinance update was tabled and Mr. DeFiore asked for an update on the Porcello/Casadent LLC project.

Porcello/Casadent LLC Dentist Office, Buffalo Rd.

Mrs. Horowitz stated there have been a range of issues associated with the building. Kyle Duggan, who sold the land to Nick Porcello, initially was the applicant on this project. Once his drawings were presented, the Planning Board asked for more information and a second set of drawings were presented. One of the criteria specified was to show the setbacks on the site plan. The first set of drawings had a notation showing an additional right-of-way acquired by the Cattaraugus County Public Works for sight distance easement along the Buffalo Road, as it is a high volume, high speed, high accident section of the road. When the second set of drawings was provided, that additional right-of-way area was erased from the plan along with the notation. Based on the second set, all the setbacks were fine and this set of plans was ultimately approved by the Board. The reality is that the parking lot is five feet off that additional right-of-way so Mr. Porcello needs a variance. He has applied for it and the ZBA will be reviewing that. Mr. Sayegh asked, "He applied for the variance after the fact?" Mrs. Horowitz answered, "yes, after the fact."

Mrs. Horowitz realized this when she received an email from Mr. Porcello regarding the sign he wishes to put up. After checking the original file to compare what was approved with what he was showing, she realized that what he had presented to the Board for approval was disingenuous at best. The sign he wants to put up will be in the right-of-way so she referred him to the County. He is now talking to the County about the sign; however, even if he gets approval from them, he still needs to get a variance from the provision in the ordinance that states the Code Enforcement Officer cannot issue a permit for a sign in the right-of-way.

Mr. DeFiore asked Mrs. Horowitz to bring the board up to date on Tanglewood. Ms. Horowitz stated that this subdivision has received all of the town Planning Board approvals and the plat was filed with Cattaraugus County. Once a plat is filed, the subdivision is then created so, in theory, he can build any time he wants. However, there is an on-going issue with the Village regarding the location of the tie-in to the Village's sewer line. The Board believed that this had been resolved at the time the Final Plat approval was issued. That approval identifies a sewer line tie-in location off St. John's/St. Joe's. The Village is now saying that this location is not acceptable and that a new sewer line should be installed on Seventh St. Another issue is that DEC, which also has to approve sewer line extensions, has determined that his DEC approval has expired. Therefore, Mr. Tiller now needs to reapply to DEC for another approval. If Mr. Tiller revises the sewer line location, to use Seventh

Street, he will need an amendment to his subdivision approval, new engineering, DEC approval and probably Village approval.

Mr. Hellier made a motion to adjourn. 2nd by Mr. Kavanagh. Ayes all. Carried.

The meeting was adjourned at 9:20 PM

Respectfully submitted,

A handwritten signature in blue ink that reads "Lynette K. Semsel". The signature is written in a cursive style with a large initial 'L'.

Lynette Semsel
Secretary