

TOWN OF PENDLETON
ZONING BOARD OF APPEALS
September 22, 2020

Members:

Wolfgang Buechler, Chairman
Lee Daigler
James Schlemmer
Nicholas Graves
Dennis Welka, Secretary

The ZBA open regular meeting was called to order by Mr. Wolfgang Buechler at 7:00 PM. ZBA members Mr. Buechler, Mr. Graves, and Mr. Welka were present at the meeting. Mr. Daigler attended remotely. Pendleton Town Prosecutor Theodore A. Joerg, Esq. was also present at the meeting. No changes were made to the ZBA agenda submitted by Wolfgang Buechler.

PUBLIC HEARINGS:

Ronald Cappello (Gasper Fulfaro, Agent)

5532 Killian Road

Pendleton, New York

(continued from public hearing of 23 July 2019)

APPLICATION FOR VARIANCE of the provisions of the Zoning ordinance of the Town of Pendleton to operate a stone crushing operation which is located 450 ft. from an occupied dwelling where no power-activated sorting machinery or equipment shall be located within 600 feet of any occupied dwelling per Town Code §247-43.B. Area variance sought is 150 ft. variance from required 600 ft. separation from any occupied residential dwelling. Property is 6.6 acres and zoned LI Light Industrial.

Mr. Fulfaro was in attendance and represented by counsel, Mr. Jeffrey Palumbo, Esq.

Pendleton Town Prosecutor John Sansone, Esq. and Pendleton Town Attorney, Claude A. Joerg, Esq. were also present at the meeting.

Before proceeding Mr. Buechler asked if Mr. Fulfaro had purchased the property since the time of the original variance application in July 2019, and Mr. Buechler asked if Mr. Fulfaro was assuming that application in his name. Mr. Fulfaro confirmed the purchase and Mr. Fulfaro and his attorney agreed to handling the current application as Mr. Fulfaro's own application.

Mr. Palumbo submitted information and documentation to the ZBA which included the following claims and/or assertions:

1. Mr. Fulfaro has leased and/or owned the subject property for approximately twenty (20) years for a gravel and stone stockpiling operation;

2. The concrete and/or stone crushing operation cited by the town takes place for a maximum of one (1) month at the end of the season – approximately late fall;
3. Approximately two (2) years ago, Mr. Fulfaro checked with the Town of Pendleton and was told that this use was allowed and that no further permits were required;
4. Town Code §247-43.B states “No gravel or sand operations shall be permitted unless such operations adhere to [certain setback regulations]”, therefore gravel and sand operations are permitted, so long as the gravel and sand operations have certain setbacks;
5. Because the Town placed §247-43.B within Article VI “General Regulations” of the Town Code, sand and gravel operations are a use not tied to any particular zoning district and should therefore be permitted in the Town’s Light Industrial district;
6. Applicant proposes placing the crushing equipment at approximately 450 ft. from the nearest occupied dwelling; and
7. Applicant proposed sound mitigation features.

The submittal includes a sound study from Aurora Acoustical Consultants, Inc. indicating noise levels at various property locations during operation of the stone and/or concrete crushing machinery.

The submittal includes argument toward each of the area variance standards required by New York State Law § 267-b(3)(b).

Messrs. Claude A. Joerg Esq. and John Sansone, Esq., representing the Town of Pendleton, offered rebuttal and argued:

1. That Mr. Fulfaro’s request for an area variance was improperly before the ZBA;
2. That Mr. Fulfaro’s acoustical testing and proposed sound mitigation features were irrelevant;
3. That Mr. Fulfaro’s use of this property as a stone and/or concrete crushing operation was not a use permitted by right; and
4. That the Town’s acceptance of an area variance request does not constitute an approval of the intended use.

Mr. Claude Joerg stated that any consideration of the setback variance is not appropriate, because Mr. Fulfaro’s intended stone and/or concrete crushing operation on the premises is not a use permitted by Town Code.

Mr. Palumbo claimed that the Town’s acceptance of the variance request and scheduling of hearing constituted agreement by the Town that the concrete and/or stone crushing operation was a permitted use.

Mr. Buechler addressed Mr. Palumbo’s claim and replied that the acceptance of variance applications and scheduling of hearings is merely an administrative function performed by the Town Clerk, and the acceptance of a variance application and scheduling of a hearing does not imply any additional determinations. All requests for variances are accepted for review and determination by the ZBA.

With regard to the issue of whether Mr. Fulfaro’s use of this property as a stone and/or concrete crushing operation was previously determined to be a use by right, Mr. Sansone produced

documentation showing that the applicant was notified by the Town Building Inspector, in a letter dated 26 September 2019 to Elizabeth Holmes, Esq., attorney for Mr. Fulfaro, that her client's concrete and stone crushing operation is **not** a permitted use by right and, as such, he "must obtain a variance from the Town of Pendleton Zoning Board of Appeals to resume operation." Mr. Sansone also presented a Stop Work Order dated 7 June 2019 with regard to Mr. Fulfaro's use of the subject property.

The ZBA members reviewed the ZBA minutes of the 23 July 2019 hearing which stated that the ZBA members had voted to table the hearing "to obtain a letter from town officials if this operation was a use by right". The ZBA members also noted that no application for a use variance had been submitted by Mr. Fulfaro in the intervening year, in spite of the continual extensions, by mutual agreement, to provide Mr. Fulfaro with adequate time to address the issues concerning use of the property.

Mr. Buechler expressed concern that were the ZBA to proceed with assessing the merits of the area variance application, the action might be misinterpreted as implicit agreement that the stone and/or concrete crushing operation was a permitted use.

A motion was made by Mr. Dennis Welka and seconded by Mr. Nick Graves to reject the area variance request as not applicable since the stone and/or concrete crushing operation is not a permitted use, per letter dated 26 September 2019 from Town Building Inspector Ron Diedrich. Mr. Wolfgang Buechler, Mr. Lee Daigler, Mr. Nick Graves, Mr. James Schlemmer, and Mr. Dennis Welka voted in favor of the motion to reject the area variance request as not applicable since Mr. Fulfaro's stone and/or concrete crushing operation is not a permitted use. No member voted against the motion to reject the application.

The public hearing was closed at 7:35 p.m.

**Hayes, Jill and Farley, Scott
7264 Creekbend Dr**

APPLICATION FOR VARIANCE of the provisions of the Zoning ordinance of the Town of Pendleton to construct a 1400 SF accessory structure at a front yard setback of 102 ft. where maximum accessory structure area allowed is 600 SF and minimum front yard setback required is 150 ft. per Town Codes §247-34.E(1) and §247-34.F(3)(a), respectively. Area variances requested are 800 SF accessory structure size variance and 48 ft. front yard setback variance. Property is 147 ft. x 250 ft. and zoned R2 Medium-Density Residential.

Mr. Jurkiw, a neighbor, stated that he had no problem with the project.

The public hearing was closed at 8:25 p.m.

**Sunbeam Laboratories, LLC
6150 Donner Rd.
Pendleton, NY 14094**

Owner is requesting an appeal from a Notice of Violation dated 22 July 2020 and a Stop Work Order dated 5 August 2020. Parcel is 8.3 acres and zoned LI Light Industrial.

The ZBA received a request from Mindy Zoghlin of Zoghlin Group PLLC, representative for Sunbeam Laboratories LLC, and Town Attorneys to adjourn the hearing to the October 27, 2020 meeting date.

A motion was made by Mr. Welka and seconded by Mr. Schlemmer to postpone the public hearing until the October 27, 2020 meeting based on the mutual request of the attorneys. All voted in favor.

REGULAR ZBA MEETING:

Review Minutes from Prior Meeting:

A motion was made by Dennis Welka to accept the minutes of the August 25, 2020 meeting, and was seconded by Lee Daigler. All voted in favor.

Specific Board Deliberation Actions:

Hayes, Jill and Farley, Scott - 7264 Creekbend Dr. Owners wish to construct a 1400 SF accessory structure at a front yard setback of 102 ft. where maximum accessory structure area allowed is 600 SF and minimum front yard setback required is 150 ft. per Town Codes §247-34.E(1) and §247-34.F(3)(a), respectively. Area variances requested are 800 SF accessory structure size variance and 48 ft. front yard setback variance. Property is 147 ft. x 250 ft. and zoned R2 Medium-Density Residential.

A motion was made by Mr. Schlemmer to table the proposed variance request and direct the applicant to return to the Building Dept. for further evaluation. The motion was seconded by Mr. Welka. All voted in favor of the motion.

Dispenza, Charles – 6721 Aiken Rd. Owner wishes to construct a 300 sq. ft. (approx.) egg storage building at 45 ft. front yard setback where minimum allowed per Town Code §247-34.F(2)(a) is 150 ft. Area variance requested is 105 ft. of accessory structure front yard setback variance. Property is 15 acres and zoned R1 Low-Density Residential.

A motion was made by Mr. Schlemmer to table the decision until the October 27, 2020 meeting pending action by the Niagara County Legislature. Mr. Graves seconded the motion. All voted in favor.

New Inquiries to ZBA: *None*

Correspondence:

Email regarding Sunbeam Labs

Niagara County Legislature minutes regarding Charles Dispenza

Attachments:

Town of Pendleton Public Hearing Request for Jill Hayes & Scott Farley
Town of Pendleton Notice of Public Hearing for Jill Hayes & Scott Farley
Town of Pendleton Denial of Building Application for Jill Hayes & Scott Farley
Public Hearing Mailing List for Jill Hayes & Scott Farley
Project renderings for Jill Hayes & Scott Farley
Site Survey of Property for Jill Hayes & Scott Farley

Documentation provided by Jeffrey Palumbo, Esq. for Gaspar Fulfaro
Letter from Building Inspector regarding Killian Rd. Property
Stop Work Order for Killian Rd. Property

Email regarding Sunbeam Labs

Niagara County Legislature minutes regarding Charles Dispenza

Sign In Sheet for 9/22/20

Special Topics: *None*

Miscellaneous ZBA Topics:

1. The next scheduled meeting will be on Tuesday, October 27, 2020, at 7:00PM.

A motion was made by Mr. Graves to adjourn the meeting at 9:17 PM, and seconded by Mr. Schlemmer. All voted in favor.

Submitted for:

Dennis Welka
Secretary