

TOWN OF EDEN
ZONING BOARD OF APPEALS
2795 EAST CHURCH ST, EDEN, NY 14057

PUBLIC HEARING DATE: July 18, 2016

BOARD MEMBERS PRESENT: Kristin Kent, Chair
Phil Muck
Curtis Neureuter
Drew Reidel
Mary Lou Pew, Town Board Liaison

APPLICANT PRESENT: Mr. & Mrs. William Vail

OTHERS PRESENT: Leonard Berkowitz, Esq., representing neighbors

**RE: Appeal No. 2016-3 (Vail)
8531 East Eden Road
Eden, NY**

Ms. Kent called the hearing to order at 7:05 p.m.

Mr. Neureuter made a motion to approve the minutes from the Vail adjournment, seconded by Mr.Reidel, all voted “Aye” - motion approved.

Ms. Kent made a motion to approve the minutes from the Beljan hearing for a pole barn, seconded by Mr. Muck, all voted “Aye” - motion approved.

Ms. Kent introduced the Board to those present, and read the following Legal Notice published in the “Sun”:

Vail : Request for a use variance to occupy a building for storage of contractor equipment and supplies at 8531 East Eden Road in violation of Town of Eden code section 225-11, and for special permission under code section 225-36B (1) to change the use of a nonconforming property to a different nonconforming use.

Ms. Kent reviewed the Affidavit of personal delivery of legal notice from the applicant and noted it is notarized and contains signatures of all but two of the neighbors, in substantial compliance with our Code requirements. She explained the order of hearing and appeal process. If the applicant does not like the decision of this board they can appeal to New York State Supreme Court; the decision of this board will be filed with the Town Clerk.

Ms. Kent then read the application from Mr. Vail, who said the property is zoned commercial and it can't be used for any other purpose. His business is growing and the storage space will allow him to expand his business. He was asked if his use would change the character of the

neighborhood and he said no, it won't change anything. He was also asked if this difficulty was self- created and his reply was no, the property came this way and his purchase of it is contingent upon getting permission to use it for his business storage. Mr. Vail then told the board he is a painting contractor; he basically wants to store ladders, scaffolding and possibly a van in the winter. He would also use a small office in the building.

Ms. Kent then read the requirements for a Use Variance:

- That the property cannot deliver a reasonable return;
- That the hardship is unique and does not apply to other properties in the neighborhood;
- That the changes requested will not alter the character of the neighborhood;
- That the hardship is not self-created.

She noted that special for permission to change to a different nonconforming use can be granted by this board only if the use is of a more restrictive nature than the prior use.

Ms. Kent commented on the recent history of the property going back to 2005. Mr. Persinger came before this board for permission to use the property for tractor repair and a lawnmower machine shop. There were a number of objections at that time (apparently he had already been using it already for these purposes). Mr. Vail would be a new user and has stated that he would comply with the Town's Codes.

This board sent a SEQR referral to Erie County Environment and Planning department, because the property is on a County road, and the board received a reply that the County has No Recommendation. Erie County asked this board to clarify the scope of the uses with the applicant, and suggested potential issues he should consider:

- Exterior storage of related heavy equipment, motorized or not
- Fuel storage, above or below ground
- Curb cuts for heavy vehicles
- Limits for outdoor storage
- Potential of flammable or explosive materials, with notice to the Fire Department.

Mr. Vail said he has reviewed the County's letter, and his use of the property will not involve any of the items covered by the list above.

Mr. Neureuter solicited specifics about the proposed use of the building, and Mr. Vail said he will store ladders scaffolding, drywall lifts, spackling compound and paint, and possibly his work van in the winter; the hours of operation will be at about 7:30 a.m. to gather materials and then 5:00 to 6:00 p.m. to return them; he will use the office, but only for paperwork; there will be no customers or sales from the building; there is one bathroom in the building; there will be no excessive noise - no generators or machinery; his wife may work in the office a couple of hours, two times a week. He would not favor dismantling the bathroom because that would require him to run home - that would make no sense. His attorney advised him that he need have to have the septic system tested per NYS law, and the Erie County Health Department will have to give him approval. There will not be a dumpster on property, he leaves garbage at job sites or takes it home, on average one bag a week. Electricity will be turned on, in Mr. Vail's name.

Mr. Muck asked whether the applicant will use a portable compressor and Mr. Vail replied not right now, who knows about the future

Ms. Kent asked if the applicant will make changes to the building and Mr. Vail's said his plan is to paint the building to make it more appealing.

Ms. Kent then asked if anyone in the audience would like to address the board. Mr. Berkowitz introduced himself as representing neighbors (Acanfora, Pepper and Swanson) who are opposed to the application. He made the following comments.

1. If this board is going to make a positive determination tonight, the first thing that needs to be done is compliance with the State Environmental Quality Review Act. He has not seen any environmental assessment form or any determination; there has been no determination as to a Positive or Negative Declaration. There has been nothing determined if there will be an environmental impact. It seems to him that there would be an environmental impact because we have been told that the septic system that had been installed was for the prior use, and is inappropriate for this use. We don't know whether that is true, but should be investigated before any determination is made. Ms. Kent told Mr. Berkowitz that he is more than welcome to review all the submittals for the appeal.
2. Mr. Acanfora and Mr. Pepper were not served with the Legal Notice. They were asked to sign a petition in favor (Mrs. Vail said that is absolutely incorrect) and of course they are opposed but they were never given the Legal Notice. If we do go to court over this they will sign affidavits that they were never served. It was made clear to the applicant at the last hearing about the requirements of hearing. He showed up at everyone's door with a petition in favor instead.

Ms. Kent repeated that Mr. Vail has substantially complied with the service of the Legal Notice requirement.

Mr. Berkowitz then addressed the test for approval, per the requirements, as follows.

1. There has to be financial evidence submitted to this board that shows that he can't get a reasonable return for a use that complies with the Agricultural zone. The property is not commercially zoned it's agriculturally zoned.

Ms. Kent asked Mr. Berkowitz if he was suggesting that Mr. Vail could farm that small parcel with a building on it. Mr. Berkowitz suggested that there are other permitted uses such as a single-family dwelling; he could have a home there. Just because there is a building there doesn't mean it's there forever.

2. The applicant also has not proven that his hardship is unique. There is hardship for every property on that road, they are all in the same position, they all can be used for something else. There is nothing specific about this piece of property that this gentleman has not shown that it is unique. It's not about the building it's about the land and how it has to have a unique aspect of it. We have no proof by this applicant that this is a unique problem, the applicant has to prove that.

3. The request for the Use Variance if granted will not alter the character of the neighborhood - we have a situation here where there was a prior use, now we have a different use and it seems to him it's a less restrictive use not more restrictive. It will change the character of the neighborhood with employees and talk of an office.
4. The use has not been self-created – the fact that he buys the structure and the structure exists doesn't make it not self-created, it is self-created. Because, he will buy the structure if he is granted the variance. So it has nothing to do with a hardship that is not self-created. Self-created relates to a hardship that relates to the land so that if the building was on a steep cliff and you couldn't build the structure in a certain area that would be a hardship subject to the land. Here there's nothing related to the land, if you took down the building you could put anything there and it would comply with the ordinance.

Ms. Kent asked if Mr. Berkowitz is suggesting that all non-conforming buildings must be demolished and his reply was no, he is suggesting that a non-conforming use could continue as a non-conforming use - this is a different use. The other non-conforming use has expired. His position is that permission for a different non-conforming use does not apply here, because we have a non-conforming use that's been extinguished for an extended period of time and now we have another use coming in. This proposed use is that it is a less restrictive nature. The applicant talked about employees coming and going, having an office - that's less restrictive not more restrictive.

Ms. Kent asked Mr. Berkowitz if he or his clients reviewed the 2005 Minutes discussing the Persinger use and he replied yes we did. She asked if he was aware he ran a generator all day long? – yes. Aware that he was storing things improperly? – yes. Aware that Mr. Persinger had customers day and night? – yes.

Mr. Muck advised Mr. Berkowitz that the property could not be used for a single-family dwelling, even if this was vacant property. The Agricultural district only allows for 4-acre lots, it would not comply. That would be setting a precedent for a lot that is too undersized for the zone it is in. Mr. Berkowitz replied that rather than have a business, a house would be more restrictive and a house is certainly permitted in the Agricultural Zone.

Ms. Kent asked Mr. Vail how long the property was on the market before he made an offer and he was not positive. She asked Mr. Vail if his agent told him of other competition for the property, and if his agent told him to hurry up and sign a contract – he replied no. Mr. Berkowitz repeated that the applicant has no proof of financial hardship.

Ms. Kent then asked if Mr. Berkowitz' clients would like to address the board.

Mr. Acanfora said that the first time Mr. Persinger ran a generator we came over here many times to Scott Henry to make complaints. Mr. Henry was supposed to take care of it and nothing was ever done.

Mr. Acanfora added if we would have known what we know now we could of hired a lawyer representing us for the last hearing for this property against Mr. Persinger, and he would have never gotten his variance. It's not a commercially zoned property it's residential agriculture.

Ms. Kent noted the records of the Town show the building was built in 1957 and has been used continuously, with some interruptions, for businesses for nearly 60 years. Mr. Vail says he is going to make a more neighborly use of it, by not running a generator day and night, by not having customers at various times during the day, and not using the septic system without getting his septic permit. She believes that is the more restrictive use of the property.

Mr. Acanfora told the board there are two septic systems on the property; the Persingers never removed the first one. The one that they installed is only for K & M business, from what the State told him. So when K & M went out of business in 2012 that system is null and void, it should have been removed. This new business should remove the old one and install a new system, one that will support new employees

Mr. Neureuter commented that it is really up to the Health Department. There needs to be an inspection to determine if there is a working system or not. Mr. Berkowitz added that the septic system is also a SEQR issue. SEQR requires this board to consider the environmental impacts and that should be researched before any decision.

Mrs. Vail said that they will not do any work at the property; her husband does all his work at the customer's location. She will only work there after her job - after 3:00 p.m. and she also has four kids so if she works there, she will be home cooking dinner at 5:00 p.m.

Mr. Acanfora commented that this is all the same argument we've heard before. We heard that Mr. Persinger was an outstanding citizen and look at the problems we had. I got a restraining order against him on numerous occasions. I called the police about the cameras. Mr. Muck and the Zoning Board members did nothing for us. I do not want to get into another confrontational situation with paints and flammables. There is no fire suppression system in that building; there is a cottage septic system, which I was told, is only for one person maximum. This is not going to carry on eight years like with the other owners. In 2005 Mr. Muck and the other board members went into executive session and approved the use because the person had a lawyer. That's why we have an attorney today, because of the underhanded back door meeting.

Ms. Kent noted that going into executive session is this board's right by law.

Mr. Acanfora said he has no comments for Mr. Vail, he just doesn't want a rehash of past events. When we call for a violation we want it addressed, which it never was before. Ms. Kent said that if Mr. Vail does something and you complain to our new Code Enforcement Officer she would hope that you would get a better result.

Mary Lou Pew wanted clarification of the location of the property. A discussion of past problems at the property followed. Mr. Acanfora said he placed the framework with strips of fabric on his property to block the cameras that are pointed at his house, taking live photos of his granddaughter and wife in his home. The cameras are still there. Mrs. Vail asked to address the board and she said that when they went around getting signatures they were told that this neighborhood feud has been going on for about fifteen years. She told the neighbors that she doesn't care about the feud. Why should this stand in the way of our livelihood? She doesn't know any of these people, yes we heard about the cameras, the flags, we heard about it going back and forth and the threats. Mr. Acanfora's house was the first one we

went to with the Legal Notice and wow, I was shell shocked he was not very nice to us. I didn't know anything about the feud then.

Ms. Pew commented that she remembers hearing of the feud through the years. It is unfortunate it went down like it did, when the Zoning Board made the decision they based it on a number of criteria that permit that was given to them was a Special Use Permit that is renewable every year. Mr. Pepper said that it was supposed to be a Special Use Permit and the board went into special session and granted the variance.

Ms. Pew asked Ms. Kent if this Special Use Permit would be reviewed every year. Ms. Kent clarified that this is a request for a Use Variance to use the property for a purpose not permitted in the zone. The use that proceeded Mr. Vail's request was non-conforming, it was a tractor and lawnmower repair shop. Mr. Persinger had permission for that non-conforming use. Mr. Vail is asking for a change from non-conforming use, to a different one. This is not a Special Use Permit request. Mr. Vail inquired at the Planning Board and was advised to come before this board.

Mr. Neureuter stated that this board is charged with asking the questions regarding the Use Variance, and as Mr. Berkowitz pointed out it's unable to provide a reasonable return, prove its not self-created hardship and won't change the essential character of the neighborhood. That is the guideline this board needs to work with, and also if this is a more extensive use than what it was used previously. He believes that Mr. Berkowitz is correct in that we do need to consider SEQR, and whether there may be some environmental concerns based on previous uses.

Mr. Acanfora said that he had contacted Mr. Henry about Mr. Persinger dumping oil on the property for years. There is a written complaint about this and he also took 500 pictures, so there may very well be contaminated soils on that property. Mr. Berkowitz added that Mr. Neureuter is correct what we have is a situation where we have a property that may have an environmental impact, that's what the SEQR regulations say. The appropriate thing for this board to do is before it makes a decision is make a Positive Declaration the use may have a significant environmental impact. Then Mr. Vail and the seller would have to retain the engineers to do a study of that premises and investigate the very things my clients are talking about and then this board, once it gets an environmental report from the appropriate engineers, require Mr. Vail to pay for the study.

Mr. Neureuter said that on the other hand this could be a Negative Declaration and we would not have to do any of that. Ms. Kent stated that this board is required to answer a series of questions concerning the appeal. She then read the questions from the Short Environment Assessment form, Part II (this is on file with the secretary). We see no major environmental impacts for this appeal. SEQR requires this board to take action only if we believe there is major impact. Mr. Vail has the option to move forward knowing there may be two septic systems, one of which may be restricted to the prior use, and one possibly used years ago. Whether there is anything to the claim that the prior owner was dumping on the property, Mr. Vail needs to consider this. Ms. Kent then asked Mr. Vail if his contract requires an environmental assessment - he replied no.

Mr. Neureuter asked Mr. Vail if he was financing the property and his answer was no. Mr. Berkowitz noted that as Mr. Neureuter knows if there were a bank, they would be looking at all of these things because they consider SEQR issues before they lend.

Mr. Neureuter asked Mr. Berkowitz which question on the SEQR form he felt would significantly impact the environment. He said it is the question about private septic systems and we have evidence there was dumping on the property, that there is oil on this property by evidence of his client's suggestion. Ms. Kent noted that "evidence" doesn't mean unsupported statements by Mr. Berkowitz' clients.

Mr. Pepper said that he felt that they were being punished from the previous building inspector because nothing was done about the complaints that were made to him. Ms. Pew asked Ms. Herzog (the Code Enforcement Officer's secretary as well as secretary to this board) whether she is aware of any complaints about the property through the Code Enforcement Officer's office? She replied no.

Mr. Acanfora repeated that they were never given the opportunity to appeal the Zoning Boards approval of the use variance in 2005. If they were given that opportunity in 2005 they would have appealed and would not be sitting here tonight. So that is why we are exercising our rights tonight. Ms. Kent asked if any of the neighbors ever attempted to buy this property. Mr. Acanfora replied that he didn't know, it's a dead piece of property, no one would ever want it except himself or Mr. Swanson. Mr. Neureuter said that he thought that this adds to the uniqueness of the circumstances. Ms. Kent added that the property has supported a commercial building for nearly 60 years, and, yes, you are correct it is "dead" to farming.

Mr. Muck said that he feels there is a need for SEQR to be done, but who is going to be paying for it, the owner or Mr. Vail. Secondly, if this board was to grant the variance after SEQR there are certain restrictions that can be put on that variance as to what you do on that property. That would be very easy to follow up on if there is a complaint.

Ms. Pew stated that her understanding is that the Board has already gone ahead and received the requested recommendation on SEQR from Erie County. Ms. Kent said that this board reviews the SEQR questions as we go through the hearing, and then makes a determination. The County also receives this and if they do not respond within 30 days then it is assumed they do not have a problem with the project. The County letter indicates it does not have a problem with the use of the property by Mr. Vail, and provided possible issues to keep in mind. Due diligence has been used on this application.

Mr. Acanfora said that he thinks within his 500 pictures of violations on that property he has a picture of Mr. Persinger dumping on the back corner of that property. Ms. Kent advised him that the DEC is the agency to respond to illegal dumping complaints. He said he can't remember whether he ever contacted DEC about oil dumping.

Mr. Berkowitz reminded the board that if there is no determination as to a Negative or Positive Declaration the courts may determine there should have been a Positive Declaration it seems to me that this is the easier way to proceed, rather than to have the court send it back and say look you should have done a Positive Declaration because there are these issues.

There is no proof there was dumping but that's the problem that is what SEQR does, you are compelled to analyze as early as possible and to do those analyses.

Mr. Neureuter said that he can appreciate Mr. Berkowitz' interpretation of SEQR but as far as he's concerned we have fulfilled our obligation in addressing that, based on what the State has given us. He said he is a little perplexed with demonstrating financial hardship, but does believe there is enough evidence that the property has been on the market a very long time. He then asked Mr. Berkowitz who had to show financial hardship and the answer was- whoever owns the property, not the potential owner. Mr. Neureuter then replied based on that, he would tend to agree with the financial hardship because of unsuccessful marketing of the property for a long time would give the evidence.

Ms. Kent then stated that Mr. Berkowitz' client captured it when he said it is a "dead" property, there is so little that can be done with it. She believes that Mr. Vail should not be disadvantaged by allegations about the previous owners. Mr. Berkowitz said that we are not making those allegations to try and convince this board that they shouldn't have it. We are going through the sections of the statute that make a Use Variance much more difficult than an Area Variance. It must be unique and in his judgment it is not unique.

Ms. Kent then asked about the requirement that the character of the neighborhood not change for the worse, and Mr. Vail stated it won't. Mr. Berkowitz noted because it is a non-conforming use, let's get it conforming. Rip the building down and build a house and get this conforming. The fact that the non-conforming use has lapsed it gives this board the power to change it to a conforming use. Ms. Kent noted that our Code expressly says that it can be changed to another non-conforming use if the board is of the opinion that it is of the same or more restrictive nature; to take the extreme view that the building must be torn down is not for this board to decide. Mr. Berkowitz then said that this board should make the decision to make it agricultural in the agricultural zone.

Mr. Neureuter said that he feels this board should be taking the recommendations from the County of Erie, and putting some restrictions on our approvals if we decide to act favorably. Ms. Kent said that she feels the board also should take into consideration the septic system review by the Health Department. Mr. Vail appears to understand that if we grant him permission he is to pay attention to all the laws that apply to his use of the property. Mr. Vail said that he plans on complying with all of the recommendations for the property. He also said that he would like to address the neighbors; he said he's a good neighbor - all I'm saying is that I'm the guy that helps everybody, I'm a contractor, I'm a skilled tradesman. I plan on complying with all that is before me.

Mr. Pepper asked how they go about acquiring all the records about the complaints they gave to Mr. Henry, and was told he can use a F.O.I.A. request to the Town clerk to obtain any records that exist. He then asked why Mr. Henry was relieved as Building Inspector. Ms. Pew indicated that personnel records are not public. He asked whether there ever was a SEQR review when the Persingers applied for their Use Variance, and Ms. Kent said she doesn't know. Mr. Neureuter that this board just determined that we do not need an environmental assessment beyond the SEQR form we just reviewed.

Mr. Pepper said that they are now paying for the sins from the past Building Inspector because things were not acted on. Ms. Pew said that she totally understood and she definitely

understands hardship, she has gone through hardship with Mr. Henry herself. The point is that we are here today to listen to this applicant and the comments of visitors and how it will impact their application. Mr. Pepper said the neighborhood is in such disarray because Mr. Henry did not do his job and nothing was ever done.

Mr. Muck said that he still thinks that this board needs a SEQR on that property.

Mr. Acanfora then asked if this should go to the Planning Board and Ms. Kent replied that the Planning board does not have jurisdiction over these issues. Why did it go the ZBA, then the Planning Board last time? They did not, replied Mr. Neureuter. Mr. Acanfora expanded on the issues raised in 2005, including parking spaces, dustless parking lot coverage, signage and gated storage. He believes the issues went to the Planning Board and said he conferred with Dr. O’Gorman about this property.

Ms. Kent noted that a project that is this small does not go before the Planning Board because it’s not a major subdivision, it’s not a proposed new road, it’s not the new senior apartment complex. All we can do today is grant or deny the Use Variance and the non-conforming use change; neighbors concerned about the possible violations at the property should contact the Code Enforcement Officer or the DEC.

Ms. Kent then asked Mr. Acanfora about the wooden framework with strips of fabric facing the property, and asked if they still serve a purpose. Mr. Aconfora said as long as cameras are affixed to that building his fabric will stay put. Mrs. Kent then asked Mr. Vail if he planned on removing the cameras from the building and his reply was “yes, on day one.” Ms. Pew asked Mr. Acanfora if would remove his strips of fabric and his reply was that remains to be seen. Mrs. Kent said she was surprised at how tired those strips of fabric look, and Mr. Acanfora said that it is artwork.

Mr. Neureuter moved that the board accept the application presented to the board, having heard the comments of the applicant and the public at the public hearing, and having reviewed the documents presented this evening, that we grant the Use Variance as requested.

Mr. Muck had a question – what about SEQR? If there is pollution on that property from oil then that has to be addressed and I think that Mr. Vail or the current owner needs to look at that situation and someone has to take responsibility for it. Mr. Muck asked Mr. Vail if he was in the position to pay for the remediation, if there is any, to have it removed. Mr. Vail replied that he would have to take into consideration the scope of the remediation and the cost of it. It’s a \$60,000 building, so if it’s half the cost of the building then probably not; he would look at all aspects of it and probably negotiate with the current owner and get it remediated. He doesn’t know if it is a yes or no answer just yet. Mr. Berkowitz noted that is the very reason why this analysis should be done before you make a decision.

Ms. Kent then seconded the motion for the Use Variance as proposed, Mr. Neureuter, Ms. Kent and Mr. Reidel voted “Aye” and Mr. Muck voted “No” - the motion was approved.

Ms. Kent then moved that the board approve the special permission for the changed non-conforming use, based on the testimony heard tonight that Mr. Vail’s proposed use

will be less intrusive to neighbors and the neighborhood than Mr. Persinger's use, but subject to the following conditions:

- 1. Consider the County's suggestions regarding materials and trucks and so forth, and take action as necessary.**
- 2. Obtain Health Department approval for a working septic system on the property for the intended use.**

Mr. Neureuter seconded the motion, Ms. Kent, Mr. Neureuter and Mr. Reidel voted "Aye" and Mr. Muck "No" – the motion was approved.

The hearing was adjourned at 8:25 p.m.

Respectfully submitted,
Diane Herzog
Secretary
July 25, 2016

The above minutes were reviewed and approved on _____, 2016 by:
