

**VILLAGE OF ESSEX JUNCTION  
ZONING BOARD OF ADJUSTMENT  
MINUTES OF MEETING  
September 16, 2008**

**MEMBERS PRESENT:** Tom Weaver (Chairman); Ron Gauthier, Jim Moody, Mary Gauthier, Bruce Murdough.  
**ADMINISTRATION:** Robin Pierce, Development Director.

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**1. CALL TO ORDER and AUDIENCE FOR VISITORS**

Chairman Tom Weaver called the meeting to order at 7 p.m. There were no comments from the public.

**2. ADDITIONS/AMENDMENTS TO AGENDA**

None.

**3. MINUTES**

July 15, 2008

**MOTION by Mary Gauthier, SECOND by Ron Gauthier, to approve the 7/15/08 as written. VOTING: 5 ayes; motion carried**

**4. PUBLIC HEARING**

The function of the Zoning Board as a quasi-judicial board and the hearing procedure were explained. Individuals to give testimony before the Board were sworn in.

Conditional Use application for a nonconforming use and structure addition at 33 Park Street in the R-2 District by Scott Oeschger, D&C Transportation, owner

Chad Whitehead with Dufresne & Associates appeared on behalf of the application. Tom Weaver noted a letter of violation was sent to the property owner on April 25, 2008 regarding construction of the addition on the office/storage building at 33 Park Street. There is no record of an appeal filed by the property owner and the appeal timeframe has passed so the property remains in violation. The addition to the building is built. Chairman Weaver said he initially thought the violation should be discussed rather than an after-the-fact conditional use approval, but the Village Attorney advised leaving the violation and dealing with the application before the Zoning Board. The use at 33 Park Street is nonconforming and the Zoning Board needs to determine if there is an expansion of a nonconforming use per Section 801 of the Land Development Code. The application is before the Zoning Board under Section 803 whereby the applicant is asking to make the use a conforming use.

**STAFF REPORT**

Robin Pierce pointed out the existing addition to the building was built without a permit. An earthen dike and a wall are proposed around the fuel tanks to contain run off. The Village Engineer said as designed the structure does not meet Code requirements. Also, there are cars parked close to the setback and if the parking is moved to meet the setbacks it is unlikely there will be space enough for trucks to maneuver in the area. Per the Code

maximum lot coverage in the district is 40%. The existing lot coverage is 45%. There are trucks running their engines on the site in violation of the noise ordinance and the decibel level. Complaints have been made by the neighbors. The police now have noise monitors and can be contacted to take readings. There was a letter sent to the former owner in May, 1998 about idling trucks being in violation of the permit. The Code shows conditional uses designated in the Use Chart Section 620. The use on the applicant's property is not listed in the Use Chart. In summary the use is noncomplying with a noncomplying structure and the expansion is not permitted by the Code.

#### APPLICANT COMMENTS

Chad Whitehead stated the property owner acknowledges the existing structure was built without a permit. The addition was built to contain the biodiesel tank which must be maintained at room temperature. The second part of the application is for a containment structure around the fuel tanks (earthen structure and wall) which is required by the Environmental Protection Agency. The existing containment structure failed. There were trees growing in it and trees are not allowed in the structure. The EPA is now also requiring a concrete wall as a secondary containment structure around the tanks. The water that ponds within the wall will remain on the site (does not drain). The water is tested for the presence of fuel and if fuel is found then emergency procedures for a spill are executed. The tanks also have alarms on them to warn of a leak/spill. If the water tests are fine then the fluid goes through a water separator treatment process and eventually drains into the village sewer system. The containment wall was moved to meet zoning setbacks, stated Mr. Whitehead, adding the applicant is willing to do whatever is necessary for the village because the requirements of the EPA must be met or the business cannot continue to operate at the site.

Tom Weaver asked about lot coverage. Mr. Whitehead calculated the proposed impervious surface is 28,450 s.f. or 45% lot coverage. The coverage includes the building, parking lot, outbuildings, existing addition, and the entire containment structure. Building coverage is 5,575 s.f. or less than 10% lot coverage. Mr. Whitehead stated the use has been in existence since the site was created so there is not a change in use. The earthen berm (part of the containment structure) is an improvement over the failed berm. The building addition for the biodiesel tank was built in 2007. Ron Gauthier pointed out when the subdivision of the property was approved the lot coverage that existing at that time was not questioned. Tom Weaver summarized there is an existing nonconforming use and that nonconforming use has been expanded in floor space. Per Section 801.A a nonconforming use cannot be expanded or extended to occupy more floor area. A change of use has not occurred. Mr. Weaver felt the buildings are not noncomplying because they do not exceed the allowed lot coverage of 25% and they are not in the setback. Therefore Section 802 of the Code does not apply (because noncomplying buildings are not being discussed). The containment structures are not in the setbacks. In essence Section 801 and Section 803 must be applied in review of the application. Robin Pierce noted the setbacks for the R-2 District were designed for residential to residential. Ron Gauthier mentioned the houses at the back of the lot were not there 10 years ago. Tom Weaver observed the applicant or former owner created the situation when the lot was subdivided.

Chad Whitehead addressed the conditional use criteria in Section 502.C of the Land Development Code, noting the development was in existence prior to 1970 and was accepted by the village. A change of the existing use is not proposed so there will not be an impact on the neighborhood. The containment wall is to protect the surrounding area. The berm has been moved away from the property line to allow room for landscaping. A landscape plan has been submitted. The property owner will plant whatever the village wants to screen view of the area. Regarding public health, safety, and welfare, the existing containment structure failed so a new one will be constructed. The building addition protects the biodiesel tank from the weather. The fuel will be used by school buses and other biodiesel vehicles. Existing setbacks are met. Parking lot and loading dock requirements are met. The increased storage for biodiesel fuel is a swap for the existing diesel fuel so there will not be a significant change in traffic patterns or demand on services in the community. The on-site biodiesel fuel promotes the use of renewable energy resources and the containment structure protects the environment.

Mary Gauthier asked about the trucks coming to the site. Mr. Whitehead explained the site is a bulk fuel storage facility with fuel delivered in bulk by large trucks. There are also delivery trucks coming to the site for heating fuel. Jim Moody asked what will happen to the existing tanks as more biodiesel fuel is stored on-site. Mr. Whitehead said the other tanks will remain in operation. Presently on the site there is heating, diesel, off-road diesel, and biodiesel fuels. Robin Pierce asked about trucks idling in order to maintain the temperature of the biodiesel product. Chad Whitehead explained the drivers keep the trucks running when making a delivery. Handling biodiesel fuel does not require the delivery truck to remain idling. The Zoning Board was in agreement it would have been helpful to have a representative from the company present to answer questions about the operation. Mr. Whitehead did a good job in presenting the technical site information.

Following further discussion the consensus of the Zoning Board is the application is for conditional use approval of a nonconforming use and structure addition. The Planning Commission will deal with the remainder of the proposal including noise issues.

#### PUBLIC COMMENT

Russell Bibens, 5 Nicholas Court, stated there are other companies parking vehicles on the site. There are two dump trucks parked there 24 hours a day seven days a week. In addition, fuel trucks from other companies come to the site. Kerosene is stored at the site along with the other types of fuel mentioned by Mr. Whitehead. Regarding the biodiesel fuel, there are very large trucks (18-wheel tanker trucks) delivering fuel to the site throughout the night (midnight through the early morning hours). The trucks must remain running in order to pump out the fuel. The heating oil trucks do not have to run in order to pump out fuel. The small tank trucks load up and make deliveries. The big tanker trucks (3,500 gallons) come to the site for delivery. The big tankers are the real problem. The neighbors have tried to resolve the noise problem with the property owner, but the owner said the issue of trucks arriving throughout the middle of the night is out of his control. The noise of the trucks wakes up the neighbors. The addition to the building for

the biodiesel tank was built last winter without a permit, continued Mr. Bibens, mentioning the extensive process he went through with the village just to add a deck to his house.

Tom Weaver asked if the biodiesel tank could be housed in the existing garage. Mr. Whitehead stated the company's delivery trucks are supposed to be parked in the garage in the future. The garage is part of the containment and water separation treatment system.

Rick Hamilton, 1 Nicholas Court, noted the trucks at the site impact the residents on Nicholas Court and on Iroquois Avenue as well. The heavy tankers arrive throughout the night (midnight and later) and are there (running) for 45 minutes to an hour. Sometimes there is more than one truck at the site at the same time. There is lots of noise which disrupts sleep and quality of life. The neighboring residents have tried to work with the owner, but not much progress has been made.

Mary Sorrentino, 3 Nicholas Court, stated the building addition for the biodiesel tank is the cause of trucks idling at night because the trucks must run to keep the fuel heated while pumping. The truckers do not come to the site during normal waking hours, but rather come in the middle of the night and are there for 45 minutes or longer.

Eric Fenton, 125 Iroquois Ave., said he purchased his house about three years ago and was concerned then about the tanks being safe. Mr. Fenton said he works from home as a computer programmer for a California company and has witnessed Robinson Fuel trucks being the top speeder on Iroquois Ave. Also, the truckers honk their horn to get service. Mr. Fenton commented it seems "kind of shady" of the company to be incorporating EPA standards with an addition that benefits the company. Mr. Fenton asked how the biodiesel fuel will be heated if the power goes out, noting a generator can be very noisy. Mr. Fenton cited the emergency generator by the Fire Station which is very loud when in operation, and asked if the decision on the application can be delayed to allow the Board to hear the noise of the generator. Tom Weaver pointed out it is not known if the applicant has a generator on the site. Russell Bibens interjected the owner not being present shows disinterest in the community and the impact on the village. Chad Whitehead stated the owner could not attend due to work commitments, but plans to attend the Planning Commission meeting on 9/18/08. The owner has pledged to do what is necessary.

Mary Gauthier asked the residents if they feel the truck traffic has increased or the idling of trucks has increased because of the building addition. Russell Bibens said he cannot say one way or the other, but it seems the addition of the biodiesel fuel facility plus the other tanks on the property means more trucks to the site.

There were no further comments.

**MOTION by Ron Gauthier, SECOND by Mary Gauthier, to close the public portion of the conditional use application for a nonconforming use and structure addition at 33 Park Street. VOTING: 5 ayes; motion carried.**

**DELIBERATION/DECISION**

Conditional Use, Nonconforming Use and Structure Addition, 33 Park Street, D&C Transportation, Scott Oeschger

The Zoning Board discussed the conditional use approval for the building addition, noting the existing building is being expanded with the addition. A different fuel is being added to the fuels already bulk stored on the site, but diesel fuel will not totally be replaced by biodiesel fuel. The biodiesel tank could be located in the existing garage without approval from the Zoning Board. The Zoning Board further discussed the issue of “expanding the use”, and agreed the use is the same, but there is an increase in square footage. The Code indicates an expansion of floor area is not allowed with a nonconforming use so the applicant is in violation (enforcement issue) unless the nonconforming use receives conditional use approval which will deem the use conforming. The Zoning Board reviewed the permitted and conditional use criteria in Section 502.C. The use is not included in the R-2 zone. The building addition will not adversely impact the character of the area, but will likely result in more trucks due to the biodiesel tank. The use was in existence prior to the adjoining properties being developed. The building addition will not impact public health, safety or welfare.

**FINDINGS OF FACT:**

1. The lot size at 33 Park Street is approximately 62,557 s.f.
2. The project site is located in the Residential-2 District where the minimum lot size is 7,500 s.f.
3. Section 620 of the Land Development Code does not list commercial uses as permitted or conditional in the Residential-2 District.
4. The proposed site is adjacent to the Village Center District to the north and adjacent to the east side of Park Street which is in the Mixed Commercial District
5. The site at 33 Park Street abuts residential properties.
6. The property borders the railroad right-of-way to the east.
7. The applicant has erected a 13.1' x 31.6' addition to the existing garage building without a village zoning permit.
8. The addition is used to house a biodiesel tank and related storage.
9. There was public input expressing concern about noise from trucks time of operation; increase in truck traffic; speed of trucks on residential streets; parking on the site; the safety of fuel tanks; and the fact that the property is left open 24/7 as the gates are never closed.

## CONCLUSIONS:

1. Based on the Findings, the Zoning Board finds that the building addition is an expansion of a nonconforming use because the floor area is expanded as defined in Section 801.A – Expansion of Nonconforming Uses.
2. The applicant applied for conditional use approval under Section 803 and the Zoning Board reviewed the application under Section 803 using the conditional use criteria in Section 502.C
3. The Zoning Board finds the proposals does not comply with conditional use criterion “A” (proposed use is consistent with the Village Plan) of Section 502.C.

**MOTION by Bruce Murdough, SECOND by Mary Gauthier, based on the Findings and Conclusions to deny the request for conditional use approval for a nonconforming use and structure addition at 33 Park Street by Scott Oeschger with D&C Transportation. VOTING: 5 ayes; motion carried.**

Variance application for relief from the rear setback for a 12’x 24’ in-ground pool at 10 Adams Court in the R-2 District by Tom and Sharon Downs, owners  
Tom Weaver announced the application was withdrawn by the applicant on 8/29/08.

Variance application for relief from the side setback for a concrete retaining wall on the property line and relief from the side setback for a deck at 173 Pearl Street in the HA District by Tanner Palmer, agent for Sky’s the Limit Properties, Inc., owner  
Tanner Palmer and Alan Palmer appeared on behalf of the application.

## STAFF REPORT

Robin Pierce noted the property is a corner parcel with two front yards and two side yards. The applicant is proposing to build a four-unit three story building and a retaining wall on the property line within the setback. The turnaround area for cars is also within the setback as will be the open decks. The parking toward the existing building is within the setback and the aisle to access the new building is along the edge of the property line.

## APPLICANT COMMENTS

Tanner Palmer addressed the variance criteria in Section 1703.C of the Land Development Code, noting the lot is narrow and the setbacks take up much of the land. There are two front yards each with 20’ setbacks. There is a large ravine at the back of the parcel which is unusable. The proposed retaining wall will allow leveling and use of more of the yard. Parking spaces, not the physical building, will impose on the property lines. The structure was designed to fit within the property without having to remove the existing house which looks nice and is useful as is. The unique shape of the property and the size of the ravine are existing hardships. The proposal is below the allowed 65% lot coverage in the zone. Some of the driveway to Pearl Street will be returned to green space and the retaining wall will allow more of the property to be usable. The property is in the Highway Arterial (HA) District. The adjacent neighbor is NuView Construction. There are other duplexes in the area. The proposal tries to stay within as many of the variances as possible (i.e. presenting the minimum variance). There is no renewable energy portion to the proposal.

Ron Gauthier mentioned building a two unit building would eliminate the need for some of the variances. Mr. Palmer noted a two unit building would not make the property successful. With a two unit building the parking requirements for the HA District could not be met and variances would still be needed. It is likely the retaining wall would also be needed. Alan Palmer pointed out the lot is 55' wide and 200' deep. With the setbacks there is very little usable space. The building envelope is only 25' wide. Variances will be needed. The minimum variance is being requested and the proposal will create an affordable living area in the village. Mr. Gauthier asked if the stream is considered wetlands. Tanner Palmer stated research of the records did not indicate this. Mary Gauthier clarified the stream is on the list of impaired waterways.

Robin Pierce asked about an area for snow storage. Alan Palmer pointed out the grass area by Pearl Street can be used for snow storage.

Jim Moody mentioned the intersection of Warner Ave. and Pearl Street is difficult. Tanner Palmer said they have considered removing the bushes to improve visibility at the corner.

Tom Weaver stated the lot is nonconforming due to lack of required frontage. The ordinance requires 60' of frontage and the lot has 55' of frontage. Alan Palmer pointed out there is 200' of frontage on Warner Ave.

#### PUBLIC COMMENT

There were no comments from the public on the application.

**MOTION by Ron Gauthier, SECOND by Mary Gauthier, to close the public portion of the variance application for 173 Pearl Street. VOTING: 5 ayes; motion carried.**

#### DELIBERATION/DECISION

Variance, Retaining Wall, Parking, Decks, Turnaround, 173 Pearl Street, Palmer

There was discussion of the retaining wall. Tom Weaver felt a variance is not needed for the stone wall at ground level because the wall is not the same as a fence. Ron Gauthier pointed out the wall is 18' high on the stream side. Robin Pierce noted a significant amount of fill will be necessary to fill in the space by the wall. It was stressed the footings and wall must be located on the applicant's property.

#### FINDINGS OF FACT:

1. The property is in the HA District with a lot size of approximately 11,000 s.f.
2. The minimum lot size in the HA District is 10,000 s.f.
3. The property has frontage on two streets: 200' along Warner Ave. and 55' along Pearl Street.
4. The applicant proposed to build a three story quad-plex on the parcel which will be accessed from Warner Ave., and to retain the existing duplex that is currently accessed from Pearl Street. The current proposal removes the Pearl

Street access and all vehicle traffic will access the site from Warner Ave. which will receive a new entrance once the existing Warner Ave. access is extinguished.

5. There are three variances required:
  - Porches and decks extending four feet into the side setback on the proposed four unit building.
  - Turnaround area extending eight feet into the side setback.
  - Parking area extending into the 20' front setback and on the west side being up to the property line.
6. There was no public input for or against the application.

**CONCLUSIONS:**

1. The Zoning Board reviewed the variance criteria in Section 1703.C and felt there are uses that can occur on the lot in conformance, therefore, the hardship is created by the proposal; Variance criteria #3 and #5 of Section 1703.C are not satisfied.
2. Findings #1-#5 do not support the variance criteria of Section 1703.C(1-6).

**MOTION by Ron Gauthier, SECOND by Jim Moody, based on the above Findings and Conclusions to deny the variance application for 173 Pearl Street by Tanner Palmer. VOTING: 5 ayes; motion carried.**

**MOTION by Jim Moody, SECOND by Bruce Murdough, to rescind the decision to deny the variance request by Tanner Palmer for 173 Pearl Street in favor of a decision to table the application until the next Zoning Board meeting pending further information. VOTING: 5 ayes; motion carried.**

**5. OTHER BUSINESS**

None.

**6. ADJOURNMENT**

**MOTION by Jim Moody, SECOND by Mary Gauthier, to adjourn the meeting. VOTING: 5 ayes; motion carried.**

The meeting was adjourned at 9:30 p.m.

*RScty: M.E. Riordan*