

TOWN OF LOCKPORT
ZONING BOARD OF APPEALS
September 22, 2015

PRESENT: Kevin McCabe
Elaine Sobieraski
Tim Lederhaus, Chairman
Kevin Roth

ALSO PRESENT: Brian Belson, Senior Building Inspector
Jane Trombley, Secretary
Michael Norris, Town Attorney

ABSENT: Donald Jablonski
Will Collins, Alternate

The September 22, 2015 Zoning Board of Appeals meeting was called to order at 6:00 pm by Chairman Lederhaus, who then led the Pledge of Allegiance.

MOTION made by Member McCabe, seconded by Member Sobieraski to approve the August 25, 2015 minutes. 4 Ayes, 0 Nays, Carried.

CASE #1 7154 Chestnut Ridge Road – SBL#110-00-1-11 REL, LLC & Verizon Wireless – Requesting a use and area variance to construct a cell tower. Attorney Norris stated this is not a Public Hearing, the Planning Board is looking very carefully into this project.

MOTION made by Member Roth, seconded by Member Sobieraski that this Board has no objection to the Town of Lockport Planning Board being the lead agency for SEQRA for the Verizon Wireless project. 4 Ayes, 0 Nays, Carried.

CASE #2 1070 Day Road – SBL #110.00-1-40 – James M. Timkey – Returning – Requesting a use variance to construct a fast food restaurant with related improvements as defined in the Town Code in an Agricultural Residential (AR) District and two area variances. Attorney Norris stated everyone has a copy of the new SEQRA Part I in front of them and asked all Board members to read over part II as the applicant's attorney and the Parsons, the prospective restaurant owners, are here to answer any questions. Attorney Norris then read each question in Part II to the Board, all with a no or small impact answer, and asking for Board input on each question as they were read. Hearing no objections, all questions were answered with a no or small impact. Part III of SEQRA did not need to be answered as all of part II are no or small impact.

MOTION made by Member McCabe, seconded by Member Sobieraski to approve SEQRA Resolution Decision received as Exhibit "G" for this matter and attached hereto. 4 Ayes, 0 Nays, Carried.

Attorney Norris clarified that the vacant restaurant to the north of this parcel is zoned Agricultural Residential, due to the adoption of a new zoning map by the Town Board in the mid 2000's, despite the Town Board in 1983 zoning it commercial. The current vacant restaurant was grandfathered in.

MOTION made by Member Sobieraski, seconded by Member Roth to waive the reading of the Resolution and Decision for the Use Variance Request. Attorney Norris gave all Board members time to read through the decision and resolution thoroughly, in which they did. 4 Ayes, 0 Nays, Carried.

MOTION made by Member McCabe, seconded by Member Roth to grant the Use Variance Request received as Exhibit "H" for this matter and attached hereto. 4 Ayes, 0 Nays, Carried.

MOTION made by Member McCabe, seconded by Member Sobieraski to waive the reading of the Resolution and Decision for the Area Variance Request – Front Setback. Attorney Norris gave Board members time to thoroughly read the resolution, in which they did. 4 Ayes, 0 Nays, Carried.

MOTION made by Member Roth, seconded by Member Sobieraski to grant the Area Variance Request – Front Set Back, received as Exhibit "I" for this matter and attached hereto. 4 Ayes, 0 Nays, Carried.

MOTION made by Member Sobieraski, seconded by Member Roth to waive the reading of the Resolution and Decision for the Area Variance Request – Rear Set Back. Attorney Norris gave the Board member time to thoroughly read the resolution, in which they did. 4 Ayes, 0 Nays, Carried.

MOTION made by Member McCabe, seconded by Member Roth to grant the Area Variance Request – Rear Set Back received as Exhibit "J" for this matter and attached hereto. 4 Ayes, 0 Nays, Carried.

MOTION made by Member Roth, seconded by Member Sobieraski to accept tonight's decisions. 4 Ayes, 0 Nays, Carried.

The next Zoning Board of Appeals meeting will be October 27, 2015.

MOTION made by Member McCabe, seconded by Member Roth to adjourn. 4 Ayes, 0 Nays, Carried.

EXHIBIT "G"

**TOWN OF LOCKPORT
ZONING BOARD OF APPEALS
RESOLUTION – DECISION**

**RE: James Timkey
1070 Day Road, Lockport, NY 14094
SBL No. 110.00-1-40**

SEQRA

WHEREAS, a Short Environmental Assessment Form having been prepared and filed on behalf of the above referenced applicant, and this form having been reviewed and considered,

NOW, THEREFORE, THIS BOARD FINDS AS FOLLOWS:

The Town of Lockport Town Zoning Board of Appeals is the lead agency. The action is an Unlisted Action pursuant to the State Environmental Quality Review Act (SEQRA). This Board finds that this action will not result in any significant adverse environmental impacts and, accordingly, directs that the Chairman sign the Short Environmental Assessment form.

EXHIBIT "H"

**TOWN OF LOCKPORT
ZONING BOARD OF APPEALS
RESOLUTION – DECISION**

**RE: James Timkey
1070 Day Road, Lockport, NY 14094
SBL No. 110.00-1-40**

USE VARIANCE REQUEST

An application made by James M. Timkey, owner of said above referenced parcel, having been submitted for a Use Variance of the provisions of the Zoning Code of the Town of Lockport to construct a fast food restaurant with related improvements by Mark and Lori Parsons as defined in the Town Code in an Agricultural Residential (AR) District and two Area Variances of the provisions of the Zoning Code of the Town of Lockport: a front set back of 40' for the restaurant as 75' is required and a rear set back of 40' for the pole barn and covered seating area as 50' is required, and a Public Hearing having been held, and after weighing all the Exhibits received as reflected in the Board minutes of July 28, 2015 and August 25, 2015, it is the determination of this Board that:

Regarding the request for a Use Variance of the provisions of the Zoning Code of the Town of Lockport to construct a fast food restaurant with related improvements as defined in the Town Code in an Agricultural Residential District: the requested variance is a use variance. The applicant wishes to have a fast food restaurant with related improvements as defined in the Town

Code on said parcel which is located in an Agricultural Residential (AR) District. The Zoning Code of the Town of Lockport does not allow restaurants in an Agricultural Residential (AR) District. Restaurants (Sit down) are permitted in the Local Business (B-1) District and Restaurants, including fast food, are permitted in the General Business (B-2) District.

During the public hearing sessions: 1) A Notice and Demand Petition requesting no change in zoning with twenty-two signatures was received by the Board at the July 28, 2015 meeting; 2) Forty-eight (48) letters with signatures in support of the variance from neighborhood residents and (24) letters in support of the variance from other Town residents was received by the Board from the applicant and prospective restaurant owners, Mark and Lori Parsons at the August 25, 2015 meeting; and 3) Public comments were received for and against the granting of the use variance. The basis of this decision, to allow a use not otherwise allowed in said district, rested on whether the applicant has demonstrated to the Board an unnecessary hardship based upon the established four-prong criteria as defined in New York State Town Law §267-b(2)(b). The comments and written evidence from the public to the Board are duly considered as they relate to the criteria established by New York State Town Law §267-b(2)(b).

Having heard the comments at the Public Hearing and reviewed the evidence submitted at the Public Hearing, this Board finds that the applicant has demonstrated an unnecessary hardship for the following reasons:

1) The applicant cannot realize a reasonable return – substantial as shown by competent financial evidence. Applicant submitted an Economic Viability Analysis to the Board (and received by the Board as an Exhibit) dated August 17, 2015 by Donald A. Griebner, a New York State Certified General Real Estate Appraiser, of Real Property Services, LLC from Williamsville, New York and Mr. Griebner testified at the Board's August 25, 2015 public

hearing. Mr. Griebner certified in his report and testified in front of the Board that his analysis looked at the highest and best use for said parcel, using four factors of legally allowable, physically possible, financially feasible and maximally productive; the value based upon comparison sales; and then the rate of return compared to the investment of the owner. The applicant, based upon the competent evidence presented by Mr. Griebner through his written submission and testimony in the record, has demonstrated to this Board that he cannot receive a reasonable rate of return on this property, for any use allowed in an Agricultural Residential (AR) District which would be physical possible on said parcel. Mr. Griebner testified that each allowed use is not financially feasible and that each allowed use would result in taking a loss based upon his investment and carrying costs. Further, the applicant's attorney has testified that only one bona fide offer (being from the Parsons for this proposed use) was received since purchasing the parcel in a County in rem foreclosure in 2009, although the premises was continuously offered for sale.

2) The hardship is unique to the parcel compared to other properties located in an Agricultural Residential (AR) District. The size of the parcel is 1.09 acres. The parcel size is too small to sustain permitted uses in an AR district such as schools, day care centers, hospitals, health care facilities or nursing homes, a public park, cemetery or agricultural operations. The parcel is situated next to a vacant restaurant to the north, a residential house with a row of pine trees bordering the properties to the south, a large Town park with a main access driveway and adjacent paved parking area directly across the street to the west and a large wooded parcel with substantial wetlands located to the east. This 1.09 acre parcel is severely restricted due to its physical location as described above, which does not make it feasibly possible for a parcel expansion which could sustain large permitted uses in a AR district such as schools, day care

centers, hospitals, health care facilities or nursing homes, a public park, cemetery or agricultural use. The remaining allowable uses in an AR district include a single family dwelling, a church structure and an in home day care center for six children or less, and these are not feasible on this parcel due to: the negative locational factors with a vacant restaurant in disrepair to the north and the driveway entrance of the active Day Road town park directly across the street to the west; the substantial physical infrastructure costs associated with said parcel for building a house or church compared to other lots in Town located in an AR District; and further evidenced based upon the information that no bona fide offers have been received for a single family house or church in over six years since the applicant obtained ownership.

3. The requested variance will not alter the essential character of the neighborhood.

There has been a restaurant right next door to the north of this parcel since the 1980's and though not currently operating, the restaurant remained operational under various owners for most of the period of time since the 1980's until 2014. There is large Town Park to the west of the parcel with hundreds of children and adults there consistently with a regular volume of traffic coming and going. A large parking lot takes up all frontage, except in a small portion in southeast part of the park. The parcel is also located on an active main roadway and an additional family operated restaurant will have minimal impact on the volume of traffic in this area.

4. The hardship is not self-created as the physical and surrounding conditions were more limiting than the applicant anticipated when purchasing the property through the County in rem foreclosure auction. There is no market for a single family residence as established by continuous marketing for six years with no bona fide purchase offers. The parcel is an established separated parcel with limited size. The permitted uses of a single family home, church or in home day care center in the Agricultural Residential (AR) District for this parcel are

cost prohibitive due to high capital infrastructure costs for these types of uses at this location, including the pushing of water across the road from the other side and adding a grinder pump with sewer lateral or septic system as the alternative. Further, substantial wetlands in the parcel to the east have been discovered and said land is not for sale which prevent any parcel expansion hopes by the applicant for other permitted uses located in an A/R Zone. Also, the surrounding conditions of the area has changed since 2009 when the applicant purchased said parcel from the County in-rem auction including the evolution and expansion of Day Road Park to the west of the parcel across the street with increased traffic and activity and the restaurant to the north of the parcel being vacated and deteriorating, which has caused the placement of possible physically uses of a single family residential home, church or in home day care for this parcel to be severely impacted due to the highly negative effects for such uses.

It is further determined that the request variance is the minimum variance and this Board finds it necessary and adequate to address the unnecessary hardship proved by the applicant, and, with conditions established by this decision, will preserve the health, safety and welfare of the community. Further, this Board has examined every special use which may be permitted upon obtaining a special use permit in the discretion of the Town of Lockport Planning Board in an Agricultural-Residential (AR) District and finds that any special use will face the same physical or financial feasible difficulties as any allowed use in the AR District and would not have different or less affect on the area of the requested variance. Also, there has been no application for a Special Use Permit for said parcel received in the past six years.

BASED UPON THE FOREGOING FINDINGS, THIS BOARD GRANTS AN USE VARIANCE FOR THIS PARCEL TO CONSTRUCT A FAST FOOD RESTAURANT WITH RELATED IMPROVEMENTS APPLIED FOR IN THE TOWN CODE IN AN

AGRICULTURAL RESIDENTIAL DISTRICT, AND THE VARIANCE GRANTED, HOWEVER, IS CONDITIONED, PURSUANT TO NEW YORK STATE TOWN LAW §267-b (4) FOR THE PURPOSE OF MINIMIZING ANY ADVERSE IMPACT ON THE NEIGHBORHOOD AS FOLLOWS:

1. The Applicant must plant at the time of development, and maintain an earthen berm which can be mowed, and upon which will be planted closely spaced shrubbery on the south property line. Said berm and shrubbery shall provide continuous screen of not less than eight (8) feet from road grade level, which shall be neatly maintained by the property owner to minimize any adverse impact the variance may have on the adjacent residential property.

2. No generator or air conditioning units or other noise making devices shall be installed south of the south facade, as extended, of the restaurant building, to minimize any adverse impact the variance may have on the adjacent residential property.

3. Site plan approval of the Town of Lockport Planning Board and the Town Engineer.

EXHIBIT "I"

**TOWN OF LOCKPORT
ZONING BOARD OF APPEALS
RESOLUTION – DECISION**

AREA VARIANCE REQUEST – FRONT SET BACK

**RE: James Timkey
1070 Day Road, Lockport, NY 14094
SBL No. 110.00-1-40**

An application made by James M. Timkey, owner of said above referenced parcel, having been submitted for a Use Variance of the provisions of the Zoning Code of the Town of Lockport to construct a fast food restaurant with related improvements by Mark and Lori Parsons as defined in the Town Code in an Agricultural Residential (AR) District and two Area Variances of the provisions of the Zoning Code of the Town of Lockport: a front set back of 40' for the restaurant as 75' is required and a rear set back of 40' for the pole barn and covered seating area as 50' is required, and a Public Hearing having been held, and after weighing all the Exhibits received as reflected in the Board minutes of July 28, 2015 and August 25, 2015, it is the determination of this Board that:

Regarding the applicant's request for an Area Variance of the provisions of the Zoning Code of the Town of Lockport for the front set back of 40' for a restaurant, as 75' is required. The requested variance is an Area Variance.

The comments and written evidence from the public to the Board are duly considered as they relate to the criteria established by New York State Town Law §267-b(3)(b). Having received and considered the comments and written evidence received at the public hearing on this matter, and having taken into consideration the benefits to the applicant if the Variance is granted as weighed against the detriment to the health, safety and welfare of the neighborhood by such grant, this Board makes the following findings:

1. There will not be an undesirable change in the character of the neighborhood or a detriment to nearby properties. The vacant restaurant to the north of this parcel does not have a 75' front set back and is also closer to the road than the required set back. Regarding the neighboring parcel to the south with a single family residential home, the proposed restaurant owner has stated in a letter dated August 25, 2015 and received by this Board, that the "row of evergreen trees will not be removed and will continue to provide a buffer" and the aforementioned Concept Plan submitted by the applicant from Apex as part of the application shows an Earthen Berm with Closely Spaced Shrubbery between this parcel and the neighboring parcel to the south. Further, the parking will be located on the north side of restaurant, at least 80 feet or more, from the south property line. The remaining nearby properties will not be affected by the variance. With appropriate conditions, as set forth in this decision, there will not be a detriment to nearby properties.

2. The benefit cannot be achieved by other means feasible to the applicant. Due to the necessity to provide maximum safety protection to the restaurant's patrons, proper parking spot

requirements and required drainage with a detention basin, the proposed concept layout from Timothy W. Arlington, P.E. of Apex Consulting Survey & Engineering Services (“Apex”), P.C. dated June 29, 2015, a licensed engineer, with a 40’ foot front set back for the restaurant is necessary to accomplish the balance of all these factors on this 1.09 acre parcel with 250’ x 219’ dimensions.

3. The request is not substantial, because of the nature of the area; with a large park and parking lot across the road and an adjacent restaurant.

4. The request will not have an adverse effect or impact on the physical or environmental conditions of the area. The SEQRA findings are incorporated herein as findings. The proposed use fits the physical conditions of the neighborhood. A large tract adjacent containing wetlands will not be affected, and the conditions of the variance protect the sole residence in the neighborhood.

5. The request is not self-created. This is a pre-existing lot. Due to the size of the lot being only 250’ x 219’ and the parking spots and drainage requirements of state and local codes, the request efficiently lays out the project with adequate safety flow within the space limitations.

THEREFORE, BASED UPON THE FOREGOING FINDINGS, THIS BOARD GRANTS AN AREA VARIANCE APPLIED FOR OF THE PROVISIONS OF THE ZONING CODE OF THE TOWN OF LOCKPORT FOR A FRONT SET BACK OF 40’ FOR THE RESTAURANT AND THE VARIANCE GRANTED, HOWEVER, IS CONDITIONED, PURSUANT TO NEW YORK STATE TOWN LAW §267-b(4) FOR THE PURPOSE OF MINIMIZING ANY ADVERSE IMPACT ON THE NEIGHBORHOOD AS FOLLOWS:

1. The Applicant must plant at the time of development, and maintain an earthen berm which can be mowed, and upon which will be planted closely spaced shrubbery on the south property line. Said berm and shrubbery shall provide continuous screen of not less than eight (8) feet from road grade level, which shall be neatly maintained by the property owner to minimize any adverse impact the variance may have on the adjacent residential property.

2. No generator or air conditioning units or other noise making devices shall be installed south of the south facade, as extended, of the restaurant building, to minimize any adverse impact the variance may have on the adjacent residential property.

3. Site plan approval of the Town of Lockport Planning Board and the Town Engineer.

EXHIBIT "J"

**TOWN OF LOCKPORT
ZONING BOARD OF APPEALS
RESOLUTION – DECISION**

AREA VARIANCE REQUEST – REAR SET BACK

**RE: James Timkey
1070 Day Road, Lockport, NY 14094
SBL No. 110.00-1-40**

An application made by James M. Timkey, owner of said above referenced parcel, having been submitted for a Use Variance of the provisions of the Zoning Code of the Town of Lockport to construct a fast food restaurant with related improvements by Mark and Lori Parsons as defined in the Town Code in an Agricultural Residential (AR) District and two Area Variances of the provisions of the Zoning Code of the Town of Lockport: a front set back of 40' for the restaurant as 75' is required and a rear set back of 40' for the pole barn and covered seating area as 50' is required, and a Public Hearing having been held, and after weighing all the Exhibits received as reflected in the Board minutes of July 28, 2015 and August 25, 2015, it is the determination of this Board that:

Regarding the applicant's request for an Area Variance of the provisions of the Zoning Code of the Town of Lockport for a rear set back of 40' for the pole barn and covered seating area as 50' is required. The requested variance is an Area Variance.

The comments and written evidence from the public to the Board are duly considered as they relate to the criteria established by New York State Town Law §267-b(3)(b). Having received and considered the comments and written evidence received at the public hearing on this matter, and having taken into consideration the benefits to the applicant if the Variance is granted as weighed against the detriment to the health, safety and welfare of the neighborhood by such grant, this Board makes the following findings:

1. There will not be an undesirable change in the character of the neighborhood or a detriment to nearby properties. The land to the east of said parcel is wooded and vacant. Regarding the neighboring parcel to the south with a single family residential home, the proposed restaurant owner has stated in a letter dated August 25, 2015 and received by this Board, that the "row of evergreen trees will not be removed and will continue to provide a buffer" and the aforementioned Concept Plan submitted by the applicant from Apex as part of the application shows an Earthen Berm with Closely Spaced Shrubbery between this parcel and the neighboring parcel to the south. Further, the parking will be located on the north side of pole barn and covered seating area, at least 80 feet or more, from the south property line. The remaining nearby properties will not be affected by the variance. With appropriate conditions, as set forth in this decision, there will not be a detriment to nearby properties.

2. The benefit cannot be achieved by other means feasible to the applicant. Due to the necessity to provide maximum safety protection to the restaurant's patrons, proper parking spot requirements and required drainage with a detention basin, the proposed concept layout from

Timothy W. Arlington, P.E. of Apex Consulting Survey & Engineering Services (“Apex”), P.C. dated June 29, 2015, a licensed engineer, with a 40’ foot rear set back for the pole barn and covered seating area is necessary to accomplish the balance of all these factors on this 1.09 with 250’ x 219’ dimensions.

3. The request is not substantial, as the parcel to the east is wooded and vacant.

4. The request will not have an adverse effect or impact on the physical or environmental conditions of the area. The SEQRA findings are incorporated herein as findings. The proposed use fits the physical conditions of the neighborhood. A large tract adjacent containing wetlands will not be affected, and the conditions of the variance protect the sole residence in the neighborhood.

5. The request is not self-created. This is a pre-existing lot. Due to the size of the lot being only 250’ x 219’ and the parking spots and drainage requirements of state and local codes, the request efficiently lays out the project with adequate safety flow within the space limitations.

THEREFORE, BASED UPON THE FOREGOING FINDINGS, THIS BOARD GRANTS AN AREA VARIANCE APPLIED FOR OF THE PROVISIONS OF THE ZONING CODE OF THE TOWN OF LOCKPORT FOR A REAR SET BACK OF 40’ FOR THE POLE BARN AND COVERED SEATED AREA, HOWEVER, IS CONDITIONED, PURSUANT TO NEW YORK STATE TOWN LAW §267-b(4) FOR THE PURPOSE OF MINIMIZING ANY ADVERSE IMPACT ON THE NEIGHBORHOOD AS FOLLOWS:

1. The Applicant must plant at the time of development, and maintain an earthen berm which can be mowed, and upon which will be planted closely spaced shrubbery on the south property line. Said berm and shrubbery shall provide continuous screen of not less than eight (8)

feet from road grade level, which shall be neatly maintained by the property owner to minimize any adverse impact the variance may have on the adjacent residential property.

2. No generator or air conditioning units or other noise making devices shall be installed south of the south facade, as extended, of the restaurant building, to minimize any adverse impact the variance may have on the adjacent residential property.

3. Site plan approval of the Town of Lockport Planning Board and the Town Engineer.