

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
September 27, 2018**

MEMBERS PRESENT

Joseph Malcarne, Chairman

John Calogero
Charles Canham

Chris Juliano

Arthur Weiland

ALSO PRESENT

Arlene Campbell, Secretary

MEMBERS ABSENT

Norma Dolan

Macy Sherow III

Eliot Werner, Liaison Officer

Chairman Malcarne called the meeting to order at 7:32 pm. Chairman Malcarne asked if the application was properly advertised and neighboring property owners were notified. Ms. Campbell responded, "Yes".

VARIANCE APPLICATIONS:

Stewart's Shop Corp Variance - property located at 2300 Salt Point Turnpike **Tax Grid No. 6566-00-331547.**

The applicant requests a variance to Section 250-11(C)(5) of the Town of Clinton Zoning Law allowing hours of operation from 5:00 a.m. to 11:00 p.m. for the store and gas station.

Chuck Marshall appeared on behalf of Stewarts' Shop Corporation. He submitted the traffic study along Salt Point Turnpike. He stated that the land use code of a convenience store per IT manual is 853. Since opening the store in 1994, the store hours have been the same. He explained the data that he submitted to the board. The average data two-direction traffic (ADTT) goes from 2343 in 1994 to 4,217 in 2014.

Mr. Marshall stated that the store has been operating outside the permitted hours that is associated with the Special Use Permit granted in 1993. He explained his discussion with the Zoning Officer that he can seek an area variance. He also indicated the discussion at the Planning Board meeting whether the change in the store hours is an area or use variance. Mr. Marshall opined that the only person who can overturn the Zoning Administrator's decision is the ZBA. The reality is the store is already there.

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Mr. Marshall explained the negative declaration report that they received when the SEQRA review process was conducted. He underscored that there is no environmental impact.

He explained the increasing demand in the early hours store opening versus late opening. He feels that the consistent result of SEQRA negative declaration indicates that the change in the hours of operation is a request for an area variance.

Chairman Malcarne asked for questions and comments from the board.

Mr. Canham read the Planning Board recommendation dated August 7, 2018 which is neutral. No letter was received from any of the neighboring properties.

Mr. Marshall continued that one of the conditions of the special permit that was granted in 1993 was about the hours of operation, which limits the hours from 6 am to 10 pm. According to the Zoning Administrator, he can appeal the hours of operation by seeking an area variance. Mr. Marshall underscored that they are simply requesting an hour-early opening and an hour-late closing. He indicated the demand for the 5:00 am opening. The charging station is accessible 24 hours/day but noted that they are not proposing store hours of 24 hours of operation.

Mr. Marshall said that he is not an attorney but there is a gas station proximity rule. For instance, you cannot have a competing gas station within 500 or 1,000 feet in case there is an explosion. He cited an instance about a gas station case wherein the court ruled that any dimensional relief is an area variance. Mr. Marshall opined that a relief from the permitted operating hours of 6 am to 10 pm is an area variance.

Mr. Canham remarked that this case is different. The gas station ruling was about the setback, the store hours change falls under the schedule of uses under the zoning regulations. It is up to the ZBA how to decide on this matter but he feels that this is a use variance. This is not a convenience store and it is clear that the use is being changed per Sec. 250.11 C-5. Mr. Canham opined that there are two uses, one for the store hours and the other use as a convenience store.

Mr. Calogero expressed no disagreement with Mr. Canham but asked, "If this is a use variance, how is the applicant going to prove their case?" He feels that the applicant is asking for something not achievable.

Mr. Marshall responded that he is asking for relief from the zoning regulation. Mr. Calogero said that this is why the board needs to find a solution in achieving this answer. He sees a merit in the request. Community changes and people drive to Taconic to go to NYC. He feels that the board has to be flexible with the needs of the community.

Mr. Marshall explained why they don't think use variance is feasible. You have to prove financial stability of the business and Stewarts is a profitable business. He indicated the

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four use variances that they have in the past wherein two of them were granted due to the change in the neighborhood.

Mr. Calogero agreed. The financial hurdle is something, however, he feels that there will be a change in the needs of the community. He hopes to hear the public input. He was baffled why no one shows up from the public. There was a huge crowd and numerous people expressed concerns when the store was originally proposed.

Mr. Calogero asked about the charging station whose business operation is 24 hours. He commented that maybe they could make a case out of that.

Mr. Marshall responded that the ZEO made a determination that the charging station was an accessory use.

Mr. Calogero expressed his concern about setting precedence. This is a hamlet. There are restrictions. The applicant is asking for store hours from 5 am to 11 pm. What about any future business or stores in the hamlet? This will set precedence.

The board had a lengthy discussion about the application on hand.

Chairman Malcarne opened questions and comments from the board. Mr. Canham commented that Stewarts Shop is an asset to the town. He feels that the application needs to be area variance for him to be able to vote on this. The use variance is not achievable.

Mr. Marshall cited the use variances cases that he had in the past. He noted that he obtained a use variance for a property that was contaminated and been on the market for years. The other use variance that was granted was about a distressed property. Mr. Marshall reiterated that the application on hand is an area variance. The Town Zoning Officer made a determination that this is an area variance.

Mr. Canham asked to see the letter of the determination made by the Zoning Officer that this application is an area variance. Mr. Marshall presented the letter from the ZA addressed to Mr. Wael Hassan of Stewarts Shop dated June 4, 2018.

Mr. Marshall commented that given the ZA's determination and court ruling about the dimensional relief, Mr. Marshall said that he doesn't know how else to convince the board.

Mr. Canham said that this board is a very reasonable board but he is stuck with the law. The regulation does not allow this change.

Mr. Marshall reiterated the Zoning Administrator's determination. This is an area variance. He argued that by changing physical elements, when you open the store at 5 am, the physical characteristics of the store will change. There will be an increase in the number of cars on the road, stopping for gas, grabbing coffee, etc.

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Mr. Canham asked the applicant if the store was still operating at 5 am. The applicant responded, “No.”

Mr. Canham asked how many cars pulled in at 5 am. Mr. Marshall responded that there were around 45 transactions in the early hours when the store first opened up. This increases significantly over the years.

Mr. Canham expressed his comment. Based on the previous ZBA determination and the town attorney’s opinion, he feels that this request is a use variance. He wants to see the argument that this is not a use variance. He feels that he is not alone in his opinion that this is a use variance.

Mr. Weiland said that the code specifically protects the hamlet. The point is keeping the hamlet quieter than the other location.

Mr. Juliano asked about the safety issue given the proximity of the Taconic State Parkway.

Mr. Marshall responded that the Planning Board recommendation indicated that the store is a potential benefit to the community. He’s not sure about the safety element since Stewarts does not advertise about their hours of operation. GPS or smart phones normally indicate what’s the nearest gas station.

Mr. Weiland stated that the parkway starts up at 4 or 5 am. It is pretty noisy up there. Mr. Marshall said that this is an excellent point for the store to open up early. Mr. Weiland said that this is a hamlet and they need to protect the hamlet. He commented that he will support an emergency opening when there is a power outage. It’s an emergency. He asked Mr. Marshall if the store had a backup generator. The applicant responded, “Yes”. Mr. Weiland stated that he will fully support the 24/7 opening during emergency situations or power outages. This will be a benefit to the community.

Mr. Werner stated that the Zoning Committee did not change the hours of operation in the hamlet though this can be revisited during the zoning revision. He asked Ms. Campbell about the ruling on the TESLA charging station’s operation. Ms. Campbell stated that with regards to the 24 hours operation of the TESLA, she noted that there was a determination from the ZEO that the use of TESLA is an accessory use to Stewarts Shop.

Mr. Marshall said that he can go back to the original approval of Stewarts where it was determined that the store is the accessory use of the gas station. Convenience store is not allowed in the hamlet.

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Mr. Canham expressed difficulty in understanding the above statement. This is still commercial activity and in violation of Sec. 250-11 C-5. He opined that there are ways to get relief from this.

Sec. 250-11 C-5 (Hamlet) states...Hours of operation for commercial uses are limited to between 6:00 a.m. and 10:00 p.m., except agriculture, medical facilities, hotels, motels or theaters.

The board had a lengthy discussion about the matter. Mr. Canham asked if the state allows gas pumps to open 24/7. He commented, "Probably not allowed." Mr. Marshall responded that it is in fact allowed.

Mr. Juliano asked what's the average number of cars they're getting during the first hours of opening. Mr. Marshall responded that they were averaging 40 to 45 cars/transactions from 5 am to 6 am. It can be gas or store stuff.

Mr. Juliano commented that there was a demand for it for people who commute in the early hours.

Mr. Juliano commented that you won't see the store if you're going north. Mr. Canham said that you won't see it either if you're heading south. Mr. Weiland remarked that the store is only visible when you're on Salt Point Turnpike.

Mr. Juliano said that he and his guys normally stop at Stewarts to get coffee if they have a call late at night. He expressed his hope to see the neighboring properties to hear their comments. He was looking at the benefit to the town at this point. The only concern he has is about the impact to the neighboring properties such as lighting, especially the one across the street from Stewarts. He commented that more and more people are commuting early hours nowadays. He expressed concerns about the impact in the future. He said, "We don't have too many stores in the town."

Mr. Weiland expressed the impact to the traffic for early opening hours. Mr. Juliano noted that more and more people are getting up early now and commuting.

Mr. Marshall remarked that in the course of 20 years in business, the data shows that average daily traffic is slightly less than double.

Mr. Canham indicated the comments from the town attorney stating that this is a use variance. He found this argument compelling. He's looking for a way to work this out. The town never had any case about a use variance. With area variances, the board has flexibility to allow pros and cons. Use variances are almost impossible to get.

Mr. Marshall said that he will not come before the board if this is a use variance. He noted that he worked in the state assembly. He commented that if this is a use variance, that will be overturned.

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Mr. Canham disagreed with the applicant. The code is clear about the hours of operations. It's a change of use.

Mr. Marshall remarked that the increase in hours is about dimension and not a "use". This is an area variance.

Mr. Juliano said that the use is already granted for the property. The use of the property is for the gas and the grocery. He feels that there is a benefit to the town. He said that there was already a use variance.

Mr. Canham disagreed. There was no use variance. The use of the gas and grocery is allowed in the hamlet. There was a special permit granted in 1993.

Mr. Canham said that the argument here is about the benefit to the neighborhood. He understands that the applicant is making an argument about the benefit to the neighborhood but there is also an impact to the neighbors and the traffic.

Chairman Malcarne asked the applicant why they wanted to increase the store hours. Mr. Marshall responded that it's the demand. They provide a unique function to an area that really doesn't have any. He sees the demand in the community. He noted that the 5 am store opening is more important to them than the late hours.

Chairman Malcarne agreed. As a business owner, you tried to maximize income and be profitable to the community. Personally, he feels that the early opening is profitable to everybody. He's been traveling a lot early and late hours and he sees the need of the store. The challenge that he sees is about the setback regarding the regulations whether the change in hours is a use or area variance.

Chairman Malcarne stated that the intent of the code seems to be more tied up to a use variance but he's happy to hear any argument or to grant this is an area variance. He said that the board wants to help out but it seems that this is more of a use variance. He asked, "Is there a way to concede this?"

Mr. Canham said that he is open minded about this application but one of the arguments from the town attorney states that increasing the hours will make the store a convenience store and that will change the use. Mr. Canham said that convenience stores are not allowed in the hamlet.

Mr. Marshall disagreed. He said that he can bring their attorney to argue about the town attorney's opinion. It is up to the board to make a ruling. The board can approve or deny the application and they can challenge it. The board can also approve the area variance. He reiterated that change in hours is "time". It is dimensional and not a change in use.

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Mr. Calogero indicated the previous determination from the Zoning Officer that this was an area variance.

Mr. Juliano expressed his concern about setting precedence. Mr. Canham stated that he wasn't worried about precedence since the board grants cases that are unique.

Mr. Juliano asked the applicant about his experience from other towns. Mr. Marshall responded that he was wondering why our town has a legislation about hours of operation. Mr. Juliano disagreed with the applicant. He said that he knew other towns that have hours of hours of operation as part of their legislation.

Mr. Marshall reiterated their lawyer's opinion that the increase in hours of operation is dimensional and an area variance. Mr. Canham disagreed.

Mr. Juliano asked to put on the record that he is in favor of the request knowing that ZEO Fennell and other two previous ZEOs made a determination that change is an area variance. He stated that he was more concerned about the impact to the neighborhood such as lighting. He added that on the point of the business owner, changes happen and sometimes they too need to adapt to the change.

Mr. Weiland felt that the rationale of convenience stores in the hamlet is due to lighting. Food store is not defined in the code.

Convenience Store as defined in Sec. 250-105 states....A retail store primarily used to sell food, beverages, and/or household supplies, which has hours of operation outside of those prescribed in § 250-11 and constructed after the effective date of this chapter.

Mr. Canham felt that he was stuck with the code. Mr. Caloero felt that there was wiggle room to amend the special permit.

Mr. Juliano said that the purpose of the variance is to give a relief of the code otherwise it won't be here. They have to look at the benefits. Is there a benefit? Obviously, this will benefit the business. His concern is the probability of seeing this issue coming back again i.e. hours of operation becoming earlier and earlier.

Mr. Juliano felt that this would benefit the town. There were no communications from the public. It seems that the benefits outweigh the benefit to the road. This is the only store in the town.

Mr. Canham felt that this is more of a change of use unless this is dimensional change. Mr. Marshall reiterated that this change is dimensional due to the change of hours.

The board had a 5-minute break and resumed at 9:02 pm.

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The board had a very lengthy discussion about the matter.

Mr. Weiland asked, “Is extending the hours a change of use?” Mr. Marshall said that the Zoning Administrator made a determination that this is an area variance. His job is to go with the code and be more restrictive. He cited the case law about the proximity rule that was upheld by the court. Mr. Canham agreed but felt troubled about the definition of the convenience store per the code.

The board reviewed the definition of Convenience Store per Sec. 205-105 of the zoning regulations.

Mr. Marshall understands the concern about setting precedence. He said people will still be going to request for a variance if they want additional store hours. He noted that Stewarts Shop has been operating the same hours for 24 years. The neighborhood and physical environment have changed and they are requesting additional hours to accommodate the environmental change.

Chairman Malcarne expressed his thoughts. If changing the hours make the store a convenience store, (viewing it as an old logic), Is that what they’re jumping to? He asked Mr. Canham, “Does the board have to go there or the board can look at what’s there now? Stewarts Shop has been there for 24 years, they need additional hours. It’s number, it’s time. The board is addressing this as an area variance.

Mr. Canham responded to the chairman that he can probably rationalize that view.

Mr. Marshall jumped in and said that they could rationalize it since the Stewarts never submitted for an addition or modify the interior layout of the building to accommodate the change in the hours. There’s no physical change in the use of the property. They requested for an addition to add a second bathroom to increase the demand for people who were stopping.

Mr. Canham asked about SEQRA. In 2005, the PB argued that this would require Type I SEQRA which obviously is not yet done. Mr. Marshall responded that under Sec. 617.5-C7 of 6 NYCRR, commercial construction under 4,000 square feet and since the project is already built out and they are not seeking for a physical change, then it is a Type II action, No SEQRA determination needed.

Mr. Weiland said that lighting is supposed to be a significant change. Mr. Marshall said that the lighting wouldn’t change the threshold of the SEQRA for the action. The 4,000 building is already built.

Ms. Campbell noted that area variance is a type II action and SEQRA is not needed.

The board had a lengthy discussion on how to address the request.

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Mr. Canham shared the verbiage that he crafted. He noted that they are creating a variance that essentially provides a relief from a normal definition of a gas station and food business. They haven't changed the definitions for everybody. In this case, a gas station with accessory food.

The board is just creating a variance that would allow them to operate outside the normal hours. They are not creating a convenience store but are just creating a variance in the definition of a gas station with accessory food.

Mr. Marshall suggested adding, "To this specific Stewarts application". Mr. Canham agreed, this pertains to a specific location. Variance doesn't create a general class. Changes are specific to an application.

Mr. Marshall added that the hardship is also unique as in the case of Stewarts Shop.

Mr. Juliano said that this is specific to a gas station.

Mr. Canham asked the applicant to convince him to address his concern about future cases. He asked, "Could any other uses like logging, etc. come and ask to extend the duration of their activity?"

Mr. Marshall responded that his specific variance request is driven by past trips association. Other uses may come in for a request but the physical nature of their business is driven by external change.

Mr. Canham said that anyone else who comes before the board and asks for relief from 6 am to 10 am regulations would have to make their case.

The board agreed to open the public hearing.

Chairman Malcarne motioned to open the public hearing, seconded by Mr. Juliano, all Aye, Motion carried, 5-0.

Mr. Calogero asked the board if they were ready to move forward or they should leave the public hearing open. The board never received any input or correspondence from the public. He doesn't know the board's responsibility to the rest of the town. He's not sure if more people would support this or oppose this.

Ms. Campbell noted that the legal ad was posted on the newspaper and website. The neighboring properties were notified via certified mails.

The board had a lengthy discussion about Mr. Calogero's concern. Mr. Weiland asked if Ms. Campbell received any correspondence. Ms. Campbell responded, "nil". She added that she will normally receive a reaction if anybody has a concern about an application.

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Mr. Juliano feels that it seems that the neighbors are okay with the change.

Mr. Canham asked if the legal ad was circulated to the state given the proximity of the store to Taconic State Parkway. Ms. Campbell responded, "Yes."

The board agreed to close the public hearing.

Chairman Malcarne motioned to close the public hearing, seconded by Mr. Juliano, all Aye, Motion carried, 5-0.

After more two and half hours of exhausting deliberation, the board agreed to pass a resolution.

Mr. Charles Canham moved that the Town of Clinton Zoning Board of Appeals grant the request for an area variance by Stewart's Shops Corporation from Section 250-11(C)(5) of the Town of Clinton Zoning Law to allow hours of operation from 5:00 am to 11:00 pm for the grocery store and accessory gas station located as 2300 Salt Point Turnpike, **Tax Grid No. 6555-00-331457**, in the Hamlet Zoning District.

FACTORS:

1. There has been extensive discussion over many years whether extending the hours of operation of a permitted use requires a use variance or an area variance. Our determination is that extending the hours of operation by two hours by the applicant does not represent a change in use but rather a change in a dimension of the existing permitted use, and therefore requires an area variance.
2. The change in operating hours will not produce an undesirable change in the neighborhood. The location of the store is on the edge of the hamlet and shielded from neighbors by landscaping.
3. The extended hours of operation will not have an adverse effect on physical and environmental conditions in the neighborhood because the business flows from existing traffic.
4. After extended discussion, the board concluded that the benefits to the community outweighed any potential negative impacts.
5. The requested area variance extends business from 16 hours to 18 hours, an increase of 12.5%, which is substantial but does not preclude granting the variance.

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6. The site is in the Ridgeline, Scenic and Historic Protection Overlay District, and is in a Critical Environmental Area. But the property already has a Site Plan that addresses concerns within the district and the CEA. The variance does not require new construction or development within the Overlay District, and therefore does not represent a Type I action under SEQRA.
7. An area variance is otherwise a Type II action under SEQRA and requires no further action.
8. The alleged difficulty is self-created, but that does not preclude granting the variance.

Conditions:

1. That all fees have been paid.

Seconded by Mr. Juliano.

Discussion. Mr. Calogero expressed his wish that after a very lengthy discussion about the matter, the community will benefit from the extended hours especially during the time of emergency.

Mr. Weiland reiterated that there is currently a code for hours of operation from 6 am to 11 pm.

All Aye, except for Mr. Weiland who Nay Motion carried, 4-1.

APPROVAL OF MINUTES:

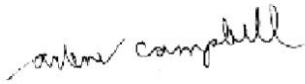
Mr. Weiland motioned to approve the minutes of May 24, 2018 as amended, seconded by Mr. Canham, all Aye, Motion carried, 5-0.

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ADJOURNMENT:

Chairman Malcarne motioned to adjourn the meeting at 10:00 pm, seconded by Mr. Canham , All Aye Motion carried, 5-0.

Respectfully Submitted By:



Arlene A. Campbell
Zoning Board of Appeals Secretary

Cc: Carol Mackin, Town Clerk