

TOWN OF PLATTEKILL
ZONING BOARD OF APPEALS
P.O. BOX 45
MODENA, N.Y. 12548

Minutes of September 9, 2021

THE MEETING FOR THE ZONING BOARD OF APPEALS OPENED WITH A SALUTE TO THE FLAG BY CHAIRMAN WILFRIDO CASTILLO AT 7:00 P.M.

ROLL CALL: Wilfrido Castillo Jr., Judi Loertscher, Pearl Morse, Larry Lindenauer, George Hickey, Joe Egan,

CONSULTANT: Richard Hoyt, ZBA Attorney

EXCUSED ABSENCE: Bruce Jantzi

MOTION:

Mr. Hickey made a motion to move the minutes to the end of the meeting, seconded by Ms. Morse. On the vote: Mr. Castillo-aye, Mr. Hickey-aye, Mr. Lindenauer-aye, Mrs. Morse-aye, Ms. Loertscher-aye, Joe Egan-aye

PUBLIC HEARING: Continued from August 12, 2021

New Notices Sent – Mr. Hoyt - Stated at the August 12, 2021 Public Hearing another Public Hearing was to be held on September 9, 2021 at 7:00 pm.

RODRIGUEZ, KENNETH

SBL# 101.2-1-4 & 7

151 FREETOWN ROAD

CEO DETERMINATION

Mr. Lindenauer opened the Public Hearing.

David Gordon: Stated that Mr. Hoyt brought up the attention that the Building Inspector was trying to cast that the February 3rd determination was not a use determination. This is not a recast he was constant that the March 18th was the use determination.

You appeal the determination that you were given and Mr. Rodriguez is appealing the determination that he was given from the Building Department.

Mr. Hoyt: Stated that he wanted to submit for the record:

- 1) The variance denial dated July 8, 2021
- 2) The Planning Board minutes: March 12, 2019 & June 28, 2020.

Final comments were requested of the audience.

MOTION:

Ms. Morse made a motion to close the public hearing, seconded by Mr. Hickey. On the vote: of 6 ayes and 0 nays the hearing was closed.

Mr. Hoyt summarized a proposed Resolution noting that ask board members received prior draft within the past several days and commented back to Mr. Hoyt on those drafts.

The Board than adapted the Resolution as attached to these minutes.

ZONING BOARD OF APPEALS
TOWN OF PLATTEKILL: COUNTY OF ULSTER

In the Matter of the Application of Kenneth Rodriguez
for an Appeal of a Code Official Determination dated
3/18/21

At a regular, duly noticed meeting of the Zoning Board of Appeals of the Town of Plattekill held at the Town Hall on the 9th day of September 2021 the following Resolution was moved by Member HICKEY, seconded by Member MORSE and upon a vote of 6 ayes and 0 nays (Chair CASTILLO and Members EGAN, LOERTSCHER, MORSE, HICKEY and LINDENAUER) (Member JANTZI absent) was declared duly adopted.

RESOLVED that the following findings of fact are determined:

1. This is an application for an appeal of the Town of Plattekill Code Official's Determination dated March 18, 2021 regarding a proposed drag strip for lands of Dirago/Bucci at 153 Freetown Road, Town of Plattekill.
 2. The application was filed by Kenneth Rodriguez, 151 Freetown Road, on May 17, 2021. It was supplemented with a five (5) page letter dated May 17, 2021 prepared by the applicant's attorneys, Gordon and Svenson of Poughkeepsie, NY.
 3. Mr. Rodriguez owns and resides at property adjacent to lands of Dirago and Bucci.
 4. Dirago/Bucci first approached the Town Planning Board on March 19, 2019 and again on July 28, 2020 to pursue a permit for a drag strip. The Planning Board minutes reflect that at both meetings the use was considered Outdoor Recreation and Amusement.
 5. By Determination dated February 3, 2021 (attached hereto as Exhibit "A"), the Code Official of the Town determined that this use is Outdoor Recreation and Amusement, is a special use in the BD-60 zone and requires a 150 ft. setback per Zoning Law Section 110-45-(B), the Zoning law section specifically regulating such special use. With this Determination, the matter was referred to the Zoning Board of Appeals as the applicant's plans did not meet the setback requirement for Outdoor Recreation and Amusement per Zoning Law 110-45(B).
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6. Dirago/Bucci immediately applied for the necessary area variance and the matter was the subject of four (4) separate public hearings before this board from March 25, 2021 through June 24, 2021.
 7. These public hearings resulted in more than 75 oral testimonies from interested parties, both in favor of and opposed to the project. Additionally, that record contains over 100 pages of written comments.
 8. At the March 25, 2021 public hearing on the variance, Mr. Rodriguez was present and heard the following exchange:
 - a. Speaker Mark Jaffee – “Asked when the determination for the use variance was made?”
 - b. Speaker Ms. Brooks (the Dirago/Bucci surveyor) – “Indicated that the determination to the Zoning Board of Appeals was dated February 3, 2021”
 - c. Speaker Mark Jaffee – “Indicated that he was shocked that drag racing would be under recreational use and asked if they would still have an opportunity to dispute the interpretation of the code? Mr. Jaffee asked if they still had time to appeal the use?”
 - d. Speaker Mr. Hoyt (attorney for the ZBA): “Indicated that state law gives people with standing the ability to appeal the code enforcement’s decision within 60 days.” (See page 3 of 3/25/21 ZBA minutes attached hereto as Exhibit “B”.)
 9. On March 18, 2021, the Plattekill Code Official issued another determination on the use question (attached hereto as Exhibit “C”). This March 18, 2021 was sent to Mr. Dirago but was not received by the ZBA attorney until May 14, 2021. The March 18, 2021 determination explained in greater detail the basis for the finding that the use is allowed in the BD-60 zone as Outdoor Recreation and Amusement.
 10. On July 8, 2021, the Dirago/Bucci setback variance application was denied by the ZBA by a vote of 7 ayes and 0 nays. Thus, the Town of Plattekill Planning Board has no jurisdiction to review and decide the Special Use/Site Plan application for the drag strip. At this time, the drag strip proposal, as presented, cannot be pursued.
 11. Pursuant to notice as required by law, the public hearing on this appeal by Kenneth Rodriguez convened on July 22, 2021 and was adjourned to August 12, 2021 and again to September 9, 2021 when it was closed.
 12. Various written submissions on the issues surrounding this appeal all have been reviewed by the ZBA and made part of this record as follows:
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- a. Letter dated 6/23/21 (3 pages) from Ken Stenger, Esq., Wappingers Falls, NY, attorney for Dirago/Bucci.
 - b. Letter dated 7/2/21 (4 pages with one exhibit) from Richard Cantor, Esq., Poughkeepsie, NY, attorney for undisclosed neighbors objecting to the drag strip and supporting the Rodriguez appeal.
 - c. Letter dated 7/13/21 (3 pages) from attorney Richard Cantor in support of the appeal.
 - d. Letter dated 7/14/21 (3 pages with 7 exhibits) from Ken Stenger, Esq., opposing the appeal.
 - e. Letter dated 7/21/21 (2 pages) from Richard Cantor in support of the appeal.
 - f. Letter dated 7/22/21 (5 pages) from Gordon and Svenson on behalf of the appellant, Kenneth Rodriguez, in support of his appeal.
 - g. Affidavit of Kenneth Rodriguez dated 7/22/21 (2 pages).
 - h. Letter dated 7/22/21 (2 pages) from Ken Stenger, Esq., in opposition to the appeal.
 - i. Letter dated 7/26/21 (2 pages) from Ken Stenger, Esq., in opposition to the appeal.
 - j. Letter dated 8/2/21 (2 pages) from Richard Cantor, Esq., in support of the appeal.
 - k. Letter dated 8/5/21 (6 pages with attachments) from Ken Stenger, Esq., in opposition to the appeal.
 - l. Letter dated 8/5/21 (5 pages) from Gordon and Svenson in support of the appeal.
 - m. Letter dated 8/6/21 (2 pages with exhibits) from Ken Stenger opposing the appeal.
 - n. Letter dated 8/6/21 (1 page) from Gordon and Svenson objecting to the 8/6/21 Stenger submittal.
 - o. Letter dated 4/15/21 from Shari Riley – submitted again on 8/12/21.
 - p. Letter from Ken Stenger, Esq., dated 8/26/21 (4 pages with attachments) opposing the appeal.
 - q. Letter dated 8/26/21 (3 pages) from Gordon and Svenson Esq. in support of the appeal.
 - r. Letter dated 8/27/21 (one page) from Richard Cantor, Esq., in support of the appeal.
 - s. Other miscellaneous oral and written comments received throughout this application for this appeal.
13. Additionally, the minutes of the Plattekill Planning Board dated 3/12/19 and 7/28/20 also are made part of this record as is the July 8, 2021 Resolution denying the variance.
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NOW THEREFORE, the following conclusions and determinations hereby are rendered:

1. A threshold question for the ZBA is whether or not this May 17, 2021 appeal is timely. Both the NYS Town Law and the Zoning Law of the Town of Plattekill require that any such appeal must be filed within sixty (60) days of the filing of the Code Official's Determination.
 - a. The Code Official rendered two (2) determinations: one on February 3, 2021 and the other on March 18, 2021.
 - b. Both Determinations reached the same conclusion – a drag strip is the use of Outdoor Recreation and Amusement, permitted as a Special Use in the BD-60 zone. In fact, this has been the generally accepted conclusion first expressed by the Town Planning Board at its meeting of March 12, 2019.
 - c. The question before the Board is whether the sixty (60) day Statutes of Limitations runs from the first Determination dated 2/3/21 or does it run anew from the second Determination dated 3/18/21? If the former, this appeal is not timely and must be dismissed.
 - d. An ancillary question is whether or not any interested party must receive actual notice of any Code Official's Determination in order for the sixty (60) day clock to commence?
2. Counsel for all interested parties have submitted their arguments and provided caselaw in support of their respective, but diametrically opposite, positions on these questions.
3. As to which Determination starts the 60 day clock, the Board finds that the February 3, 2021 decision controls. The first part of the first sentence of that Determination could not be more clear (See Exhibit "A"): "The proposed outdoor recreation and amusement is a special use in the BD-60 zone..." The March 18, 2021 Determination did not alter this finding.
4. The Board is mindful of the recent oral advice of the Code Official that he did not intend that his 2/3/21 Determination be read as a use determination. However, the Board notes that for the ensuing 5 months since 2/3/21 the ZBA held hearings on a setback variance request which only arose due to the 2/3/21 Determination; that one was required for this Outdoor Recreation and Amusement Use. The variance would not have been required if the use were not Outdoor Recreation and Amusement.

The Board finds that the 2/3/21 Determination is clear and subject to no other interpretation. It was not retracted nor modified by the later Determination of 3/18/21. As to the recent oral advice of the Code

Official, if a written Determination subsequently can be modified orally, no one ever will be able to rely on such written Determinations which, necessarily, form the basis for any appeal of a Code Official's written decisions. There has to be finality; property owners and municipal officials must be able to rely on such written and filed Determinations and not be left to wonder if such reliance might later be voided by subsequent statements or other acts of the Code Official.

5. As to the ancillary question of actual notice to a would-be appellant, Mr. Rodriguez claims that the 60 day statute of limitations did not begin to run against him until it could be shown that he had actual notice of the Determination. By way of Affidavit dated 7/22/21, Mr. Rodriguez swears that the first time he "...had access..." to the 2/3/21 Determination was on April 8, 2021. The Board finds that nowhere in either statute does the 60 day rule run from the date of actual notice in hand. Both statutes start the 60 day period from the filing of the Determination in Town Hall. Indeed, this type of analysis would extend the 60 days indefinitely for all citizens with standing in the Town, clearly not a result contemplated by the drafters of both Town Law 267-a-(5)b and Plattekill Zoning Law 110-74(F). Requiring actual notice to every property owner with standing for every Determination of the Code Official imposes on the Town a significant burden, a burden that would be difficult to meet and a burden not imposed by the statutes, for good reason. Both statutes are clear – the 60 days runs from the filing of the Determination and there is no mention of extending that window from the date that actual notice is in hand by any would-be appellant.

Mr. Rodriguez had notice of the 2/3/21 Determination and of the 60 day deadline to appeal by at least the 3/25/21 ZBA meeting and had eleven (11) days left (to 4/5/21) to file an appeal but did not do so. The record reflects that on March 25, 2021 Mr. Rodriguez was present and heard the exchange (See Exhibit "B"). It is unfortunate that there may have been confusion at Town Hall regarding his FOIL request and it is unclear why he may not have "...had access..." to the 2/3/21 Determination until April 8, 2021 but, for the reasons stated above, the 60 day clock runs from the filing of the Determination and not from the day a would-be appellant receives a copy of it.

The FOIL officer was not participating in the ZBA variance proceedings. Mr. Rodriguez was at the March 25, 2021 ZBA meeting, heard the exchange and was obligated to pursue the matter as it was made very clear that the Code Official had issued a written Determination dated 2/3/21. It is unfortunate that Mr. Rodriguez did not specifically ask for the 2/3/21 Determination in his FOIL request

nor did he amend that request immediately after the 3/25/21 ZBA meeting.

6. As the ZBA has no jurisdiction to entertain this appeal, it cannot reach the merits of the appeal but it urges the Town Board to revisit the issue of Outdoor Recreation and Amusement and to exercise its legislative prerogative to address any issues that, in its judgment, need to be resolved.
7. This matter does not involve any of the six (6) actions subject to referral to the Ulster County Planning Board per GML 239-m(3).
8. This matter is a Type II – Exempt Action per the SEQRA Regulations at 6 NYCRR 617.5(c)37.
9. Based upon this entire record, the ZBA concludes that this appeal of Kenneth Rodriguez dated 5/17/21 is not timely per the controlling statutes and must be and hereby is dismissed.
10. A copy of this Resolution shall be filed with the Town Clerk, the Code Official, the Town Board and a copy sent to Mr. Rodriguez.

Dated: September 9, 2021
Plattekill, NY

BY ORDER OF THE ZONING BOARD
OF APPEALS OF THE TOWN OF
PLATTEKILL


WILFREDO CASTILLO JR., Chairman

Town of Plattekill

Scott F. Mandoske
Code Enforcement Officer
P.O. Box 45
Modena, NY 12548

EXHIBIT "A"

Phone: (845) 883-7331
Fax: (845) 883-7207
Hours: M-F 9:00AM - 4PM

Feb. 3, 2021

NOTICE OF DETERMINATION

To: Anthony Dirago
149 Freetown Rd.
Walkkill, NY 12589

RE: ZBA -153 Freetown Rd
LOCATION: 153 Freetown Rd
S/B/L: 101.2-1-4 & 7
ZONE: BD-60

PLEASE TAKE NOTICE that upon review, the following determination(s) were made:

The proposed outdoor recreation and amusement is a special use in the BD 60 zone and requires 150' setback as required in Section 110-45-(B) in the town code. The required setback is not met as indicated on the attached map.

Your application will be forwarded to the ZBA.

If there are any questions, please do not hesitate to contact this office.

Sincerely,



Scott F. Mandoske
Code Enforcement Officer

EXHIBIT "B"

variance of 115 feet to permit construction 35 feet from the northerly boundary line. The applicant has engaged the services of a traffic engineer and a noise engineer, in addition to a civil engineer, who is designing the stormwater management plan to address the issues of noise and traffic should this project proceed to the Planning Board for their review. I would like to remind you that the public hearing this evening is for the area variance. Full site plan details have not yet been fully developed, and if and when they are, they will be addressed by the Planning Board. I welcome all comments here this evening. The Chairman already said that the public hearing will be kept open for at least another month. I will be taking notes of all of the questions, but for the interest of time, we are not going to have a dialogue with the audience. All the questions should be addressed to the Board and not to me. Thank you.

Mr. Castillo opened the public hearing to the audience members. Mr. Castillo indicated that whoever would like to speak has three minutes.

Cindy Delgado-Indicated several of her concerns were traffic, entering and exiting the track with the landfill traffic close by and the fact that the track would remain open until 10:00 at night.

Mark Jaffee-Asked when the determination for the use variance was made.

Ms. Brooks-indicated that the determination to the Zoning Board of Appeals was dated February 3, 2021.

Mark Jaffee-Indicated that he was shocked that drag racing would be under recreational use, and asked if they would still have an opportunity to dispute the interpretation of the code. Mr. Jaffee asked if they still had time to appeal the use.

Mr. Hoyt-Indicated that State law gives people with standing the ability to appeal the Code Enforcements decision within 60 days.

Kenny Bruno-Indicated he owned property just East of the track. He indicated that he had no problem with the track, all he wanted to do was to be able to access his property (r.o.w.).

Mr. Castillo-Indicated that was something for the Planning Board.

Town of Plattekill

Scott F. Mandoske
Code Enforcement Officer
P.O. Box 45
Modena, NY 12548

Phone: (845) 883-7331
Fax: (845) 883-7207
Hours: M-F 9:00AM - 4PM

EXHIBIT "C"

March 18, 2021

NOTICE OF DETERMINATION

To: Anthony Dirago
149 Freetown Rd.
Walkill, NY 12589

RE: Site Plan
LOCATION: 153 Freetown Rd
S/B/L: 101.2-1-4 & 7
ZONE: BD- 60

PLEASE TAKE NOTICE that upon review, the following determination(s) were made:

The proposed project appears to meet the Definition of "Outdoor Recreation and Amusement" as defined in Section 110-6:

OUTDOOR RECREATION AND AMUSEMENT

Any and all outdoor amusement and recreation uses, parks and playgrounds and associated facilities and structures, when all or a substantial portion of such activity is outside a building or structure and is intended and shall include uses employing modification of the natural terrain such as the construction of slopes, slides, runs, paths, courses or other improvements to assist in the activity, as well as uses which leave the land in a passive or undisturbed state, excluding commercial operation of off-road and motor vehicle uses in all residential zoning districts, including HR-1, RS-1, RR-1.5, AG-1.5 and M-3.

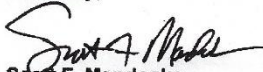
Outdoor recreation and amusement is a special use in the BD 60 zone, and is regulated by Section 110-45.

As per the July 28, 2020, planning board minutes, technical review comments by Pat Hines, planning board engineer, Item #3; the Building inspector makes "determinations" not interpretations. If an "interpretation" is required it would need to be reviewed by the Zoning Board of Appeals.

Your application will be forwarded to the Planning Board for further review.

If there are any questions, please do not hesitate to contact this office.

Sincerely,


Scott F. Mandoske
Code Enforcement Officer

MOTION:

Mr. Hickey made a motion to accept as stated for the resolution seconded by Mr. Egan. On the vote: Mr. Castillo-aye, Mr. Hickey-aye, Mr. Lindenauer-aye, Ms. Morse-aye, Ms. Loertscher-aye, Mr. Egan-aye

MOTION:

Ms. Morris made a motion to approve August 12, 2021 minutes with corrections seconded by Mr. Hickey. On the vote: Mr. Castillo-aye, Mr. Hickey-aye, Mr. Lindenauer-aye, Ms. Morse-aye, Ms. Loertscher-aye, Mr. Egan-aye

MOTION:

Mr. Hickey made a motion to close the meeting seconded by Ms. Morse. On the vote: Mr. Castillo-aye, Mr. Hickey-aye, Mr. Lindenauer-aye, Ms. Morse-aye, Mr. Egan-aye, Ms. Loertscher-aye

ADJOURNED:

Meeting closed at 7:29 pm