

**Town of Ontario
Zoning Board of Appeals
Minutes
November 5, 2008**

Present: Zoning Board Members – Chairman, Donald Anderson; Charles Neumann; William Bridson, Robin Schmidt; Jason Coleman; Donna Burolla, Secretary, William Riddell, Director of Economic Development and Parks and Recreation, and Richard Williams, Deputy Attorney for the Town

Chairman Anderson called the meeting to order at 7 p.m. and led the Pledge of Allegiance.

Public Hearing Closed

1905/1907 Ridge Road – Interpretation (postponed from last month)

Chairman Anderson announced the public hearing for the application of Vincent DeFranco requesting an interpretation on the revocation of a Certificate of Occupancy for an accessory structure has previously been held. The public hearing has now been closed and no further comments will be accepted. The property is owned by Mr. DeFranco and zoned Urban Residential (U.R.).

Mr. Williams distributed a resolution for the board's consideration. Mr. Neumann thanked Mr. Williams for the resolution and recommended a minor change to include a reference under Decision to a poker facility.

**INTERPRETATION RESOLUTION
ZONING BOARD OF APPEALS
TOWN OF ONTARIO
RE: DeFranco Accessory Structure
1905 Ridge Road, Ontario New York
Tax Parcel Number: 63117-09-221510**

WHEREAS, Vincent DeFranco has submitted an application for Interpretation, challenging a Cease and Desist Order issued by the Ontario Code Enforcement Office on July 3, 2008 and relating to the accessory structure located at the above address; and

WHEREAS, this matter is a Type II Action under Section 617.5(a)(31) and, therefore, is not subject to environmental review under SEQRA; and

NOW, THEREFORE, upon consideration by the Board of all written and oral submissions and testimony by the Applicant and the Code Enforcement Office and following a public hearing on this matter, held on September 3, 2008, and the Board having given this matter due deliberation and consideration; it is

RESOLVED, that the Zoning Board of Appeals hereby makes the following Findings and Decision:

FINDINGS

In June of 2007, Mr. DeFranco applied for a Building Permit to construct a 56' x 32' accessory structure on the lot at 1905 Ridge Rd. At that time, the only other structure on the property was a single-family residence. On the Building Permit application, Mr. DeFranco indicated that the structure would be used for "storage, workshop, gym (weights, etc), family & friends gatherings."

On July 6, 2007 the Code Enforcement Office issued the requested Building Permit and a Certificate of Occupancy was issued on January 9, 2008. The C of O contained specific conditions that "no business of any kind shall be operated from the structure" and that the "use of the building shall be for storage, workshop, personal gym per permit application."

On July 3, 2008, Code Enforcement Officer Edward D. Collins, Sr. sent a "Cease and Desist Order" to Mr. DeFranco, specifically indicating that the "operation of a poker facility" within the accessory structure was to cease.

Mr. DeFranco has brought an appeal from the Cease and Desist Order to this board, requesting that a determination be made that the current use of the accessory structure is allowed by code.

In that regard, Town Code contains, at §150-5, a definition of an allowed "accessory building or structure" as being a building or structure "the use of which is customarily associated with that of the principal building." Similarly, the Code defines an allowed "accessory use" as one which is "incidental and subordinate to the principal use."

Thus, the issue before this board is whether or not Mr. DeFranco's use of the accessory structure as a poker facility is, in fact, one which may be characterized as "customarily incidental" to the single-family residential use of the primary structure located on the same lot.

In determining the answer to the above question, this Board has taken into consideration all of the evidence submitted at the public hearing, including the testimony and written materials of Mr. DeFranco, the testimony and written materials of Code Enforcement Officer Collins and the testimony of members of the public.

As was made clear at the hearing, Mr. DeFranco primarily uses the accessory structure as a facility for the playing of poker through a membership organization which the applicant refers to as "OntarioNYpoker.com" on the website he has established. The applicant obtains membership requests through his website (and presumably also by word of mouth) following which proposed members are "interviewed" by Mr. DeFranco in order to ensure that they meet the criteria of his "strict behavior codes". There are currently approximately 120 "members" who receive a "newsletter" and are eligible to participate in regularly scheduled poker games.

The facility, itself, will hold, according to Mr. DeFranco, approximately 65 people and he has established approximately 30 vehicle parking spaces on the lot. Mr. DeFranco's website indicates varying types of poker games held on Sundays, Mondays, Fridays and Saturdays. Mr. DeFranco testified that average attendance is between 10 and 20 individuals, except for Saturday tournaments, which draw 30 to 40 people.

Mr. DeFranco charges a \$50.00 "entry fee". Meals are served in the facility at several tables set up for such purpose and participants are allowed to bring alcoholic

beverages on their own. Kitchen facilities are located in the facility, although such facilities were not part of the building permit application.

Mr. DeFranco previously ran a poker facility at the Ontario Fireman's Exempt Hall, which he indicated needed to be relocated as a result of concerns raised regarding his payment of rent to a tax exempt organization.

Mr. DeFranco indicated that he does not "take a cut" of the money put up by the participants and that other than the \$50.00 "entry fee" he "makes his money by being a very good poker player."

The Board heard the testimony of several neighbors, who indicated an opinion that Mr. DeFranco is operating a "selective social club" and that the parking lot has been full on occasions, with overflow parking taking place at Ontario Center.

DECISION

Based on the above, this Board concludes that Mr. DeFranco's use of the accessory structure as a poker facility/social club is not one which is "customarily incidental" to the residential use of the primary structure and, therefore, was properly the subject of the Cease and Desist Order of the Code Enforcement Office.

Although the casual playing of poker within one's residence or within an accessory structure located on the same parcel would certainly be categorized as "customary", the activities of Mr. DeFranco are well beyond such casual use. Mr. DeFranco solicits strangers over the Internet and has established a facility which could accommodate dozens of poker players many times each week. He has established a structured and formal poker playing arrangement complete with a significant parking lot and eating facilities.

The Board finds that this is vastly different from having a few friends over to play a game of cards, converse and enjoy each other's company. Poker playing as a hobby or pastime may certainly be expected in a residential context, however Mr. DeFranco's use of the accessory structure is neither limited to "family and friends" nor is it in any way secondary or incidental the residential parcel on which it is located. To the contrary, Mr. DeFranco has established a second primary use on the property, both in form and in scope.

Accordingly, this Board finds in favor of the Code Enforcement Officer and upholds his determination that the use of the accessory structure is in violation of Town Code and that Mr. DeFranco must cease and desist such use.

The within Resolution was moved by Zoning Board Member Robin Schmidt, seconded by Zoning Board Member William Bridson, and voted upon by members of the Zoning Board as follows.

Jason Coleman voted	Abstain
Robin Schmidt voted	Aye
Charles Neumann voted	Aye
William Bridson voted	Aye
Donald Anderson voted	Aye

Adopted by the ZBA on November 5, 2008. Vote: 4-0- (1 Abstention)

Public Hearings

**309 Lake Road – Special Permit and Area Variance – Wind Energy Collector
(postponed from last month)**

Mr. Steven Glover requested a special permit to construct a residential 120 ft. high wind energy collector and an area variance to allow a structure exceeding the 36 ft. maximum height requirement. The property is owned by the applicant and zoned R-1. Mr. Michael Parks, from Northeast Emergency Power Systems, representing Mr. Glover, was also present.

Chairman Anderson gave Mr. Parks a copy of a memo from MRB Group, town engineers, dated Nov. 5, 2008, that identified several concerns regarding the structural design report that was submitted with the application. Mr. Parks said he has just received this memo and has not had time to read it or address any of the topics. However he did state that the application has changed to a monopole design, but the location on the lot has not changed.

Mr. Bridson said he has reviewed requirements on the internet from various sites in the northeast for windmills and there should be no homes or structures within a certain radius of the windmill. He asked the total height of the structure. Mr. Parks said the pole will be 120 ft. high with 15 ft. blades, (total diameter of 30 ft.). The total height will be 135 ft. Mr. Bridson noted that on one side of the lot is a private driveway and on the other side is a home. He sees this as a safety hazard. He noted that he feels the windmills are a great thing, but standards indicate that the radius of 1 ½ times the height of the windmill (150 ft.) needs to be free of structures/or objects for safety reasons.

Mr. Parks said NYSERDA (New York State Energy Research Development Authority) regulations do not care if the fall zone encompasses a barn or a drive; their only concern is with dwellings. He noted that there is a large communication's tower located next to town hall which could fall on a public building. He said the monopole has 15 ft. blades which rotate faster and have less chance to accumulate ice.

Mr. Neumann stated that the tower next door at the fire department is stationary versus a windmill which has movement.

Chairman Anderson noted that the maximum height requirement is 36 ft. and Mr. Glover is requesting a structure that is 4 times that in height. He stated previously one other height variance was granted for a windmill, but that was granting 16 ft. relief for a windmill not to exceed 52 ft. in height (reference 540 Boston Rd.) and the fall zone was contained on the applicant's property.

Chairman Anderson asked if the monopole location could be moved more to the south on the property. Mr. Glover said there is a pond on the lot that does not show on the map. Mr. Glover said he may consider an option to reduce the height of the structure.

Chairman Anderson stated the appropriate action seems to postpone the application to allow time for the applicant to address MRB's memo. He read correspondence from the Wayne County Planning Board dated Aug. 28, 2008 recommending denial on the basis that the "wind energy conversion system would not be compatible with the neighborhood or adjacent property given that the "fall zone" is not fully contained on the applicant's property." He advised the applicant the Wayne County denial means that he must receive a super majority vote from the town zoning board for the area variance and special permit to be granted.

Mr. Neumann asked Mr. Williams since the application has changed, if it needed another review by the Wayne County Planning Board. Mr. Williams advised that if there is a significant change in the application, as a reduction in height, it would need to be re-submitted to the County.

Mr. Neumann moved to postpone the application, with the public hearing remaining open to the Jan. 7, 2009 zoning board meeting allowing the applicant time to apply for a December 10, 2008 meeting at the Wayne County Planning Board. Mrs. Schmidt seconded.

Robin Schmidt voted	Aye
Charles Neumann	Aye
Jason Coleman voted	Aye
William Bridson voted	Aye
Donald Anderson voted	Aye

Vote: 5-0. Motion carried.

2460 Ridge Road – Area Variance

Mr. Patsy Catalano requested an area variance to construct a 32 ft. x 48 ft. pole barn less than 40 ft. from the rear property line. The property is owned by the applicant and zoned Suburban Residential.

Mr. Catalano explained his proposal to the board stating the pole barn will be used to store his motor home and a couple of race cars that have sentimental value. The barn will be located 15 ft. from his rear property line due to the location of leach fields. If the barn were located within the 40 ft. setback required by zoning, it would be encroaching into the leach fields servicing his home.

Mr. Neumann asked for verification of the size. Mr. Catalano said it would be 32 ft. x 48 ft. and 16 ft. in height with two 14 ft. overhead doors. It will be a metal building. Mr.

Neumann also asked if he has spoken to the neighbor to the south, since the acreage may be used for a residential development in the future. Mr. Catalano said the neighbor is his Aunt and he has talked to her about the variance application. He said she has signed the letter stating she does not object to the application and her future plans include selling to a developer, but she does not want to do that at this time.

Mr. Bridson confirmed with Mr. Catalano that there would be no outside storage. Mr. Catalano agreed.

Chairman Anderson opened the application for public comments and there were none.

Mrs. Schmidt asked if a driveway would be installed. Mr. Catalano said there would be no driveway, since the ground is very hard in that area and the vehicles would be in and out only a few times a year. Mrs. Schmidt asked if the barn would be serviced with electricity. Mr. Catalano replied he would have it wired for electricity and use a generator.

Mr. Coleman asked if he would be driving the motor home over the leach lines. Mr. Catalano replied, "No."

Chairman Anderson asked if there was any possibility the structure could be reduced in size. Mr. Catalano replied, "No."

Motion

Mr. Neumann moved to grant the area variance of 25 ft. relief to 2460 Ridge Rd. to construct a 32 ft. x 48 ft., 16 ft. high pole barn, 15 ft. from the rear property line with the condition construction be completed in one year. The variance was granted on the following basis:

The benefit can not be achieved by other means feasible to the applicant;
There will be no undesirable change in the neighborhood character or to nearby properties;
The request is not substantial;
The variance request will not have any adverse physical or environmental effects;
The variance is self created, but acceptable to the zoning board.

Mr. Anderson seconded.

Robin Schmidt voted	Aye
Charles Neumann	Aye
Jason Coleman voted	Aye
William Bridson voted	Aye
Donald Anderson voted	Aye

Vote: 5-0. Motion carried.

6172 Lillypond Way – Area Variance

Mr. Craig Akins requested an area variance to the rear setback requirement to allow construction of a 10 ft. x 7 ft. pergola, 7 ft. from the rear property line. The property is owned by the applicant and zoned P.U.D. (Planned Unit Development).

Mr. Akins described the pergola stating it is 10 ft. x 7 ft. high. One side has roses growing on it and the other side has grapes. A patio has been constructed underneath it with a swing. The structure is not permanent and can be moved. He was advised by Todd Luke, the Code Enforcement Officer that a permit is required.

Mr. Akins continued his explanation stating his property does extend to the pond waterline and the pond is owned by Gerber Homes. There are no neighbors behind his home and the pergola does not block anyone's view.

Mr. Coleman asked about the footers. Mr. Akins said they are sitting into the ground with rods running inside.

Mr. Williams said he has discussed the application with the Code Enforcement Officer and the structure does qualify for a building permit. There was discussion if other improvements such as swing sets and doghouses need a permit. Mr. Williams said at this time, those items qualify as structures and should have permits.

Mrs. Schmidt asked why the pergola could not be moved. Mr. Akins said it has already been constructed and would be costly to move with the patio already constructed. He noted that a 40 ft. setback would place it in very close proximity to the rear of his home. Mrs. Schmidt asked how long it has been up. Mr. Akins said three months.

Motion

Mr. Bridson moved to grant the area variance of 33 ft. relief to 6172 Lillypond Way to construct a 10 ft x 7 ft. pergola 7 ft. from the rear property line on the following basis:

The variance will not create an undesirable change in the neighborhood character or to nearby properties;

The benefit could be achieved by other means, but the structure is acceptable as it exists;

The variance is not substantial;

The variance will not have an adverse physical or environment effects;

The alleged difficulty is not self-created.

Mr. Coleman seconded.

Robin Schmidt voted	Aye
Charles Neumann	Aye
Jason Coleman voted	Aye
William Bridson voted	Aye
Donald Anderson voted	Aye

Vote: 5-0. Motion carried.

Minutes


Mr. Anderson moved to approve the minutes dated October 1, 2008 with the following change: 1st page, 1st paragraph, 3rd line, delete: William Riddell, Director Economic Development and Recreation & Parks; Edward Collins, Building Inspector and Code Enforcement Officer, Todd Luke, Building Inspector and Code Enforcement Officer.

Mr. Neumann seconded.

Robin Schmidt voted	Aye
Charles Neumann	Aye
Jason Coleman voted	Abstained
William Bridson voted	Aye
Donald Anderson voted	Aye

Vote: 4-0- 1 Abstention

The meeting was adjourned at 7:50 p.m.



Donna Burolla, Secretary
Zoning Board of Appeals