

**TOWN OF FENTON
ZONING BOARD OF APPEALS**

IN THE MATTER OF

Maureen Singer

Linda Baker

Adrienne Irons

Kurt Mohny

Aja Townley

Michael Weaver

St Francis of Assisi Parish

Represented by:

BRAYMER LAW PLLC

DECISION

Chenango Valley CSD

Represented by:

TOOHER & BARONE, LLP

THE O'HARE FAMILY

KEVIN AND DEBRA WILSON

RACHEL ZANDT

65, 69, 71, 93 WEST SERVICE ROAD

TOWN OF FENTON

BROOME COUNTY, NEW YORK

Members Present: Dale Gregory, Chairman

Timothy Brown, Cynthia Cook, Mikel Lidell, Michael Ward

FACTS

Hearings by the Town of Fenton Zoning Board of Appeals were held in the Port Crane Fire Station, 844 NYS Route 369 on Tuesday, January 23, 2018 and Tuesday February 6, 2018 to hear the appeals by Claudia Braymer, Maeve Tooher, The O'Hare Family, Kevin and Debra Wilson and Rachel Zandt from the October 12, 2017 determination by Matthew Banks, Town of Fenton Building Inspector, that the proposed project submitted by NG Advantage, LLC falls under the description of a Truck and Freight Terminal as a permitted use within §150-15.A(6) of the Limited Industrial Zoning District (hereinafter "Determination").

Notices of the Public Hearings were published in the Press & Sun Bulletin.

Pursuant to a ruling by Hon. Ferris D. Lebous; Supreme Court, Sixth Judicial District in the City of Binghamton on August 2, 2017, NG Advantage, LLC (hereinafter “NGA”) opted to submit a new application for a proposed compressing/fueling/truck transport facility at 65, 69, 71 and 93 West Service Road.

An informational package dated January 12, 2018 was submitted by Mary Elizabeth Slevin of STOCKLI SLEVIN, LLP (hereinafter Slevin) – Attorneys for NG Advantage, LLC – which detailed reasons why the determination of the Building Inspector should be affirmed.

The Appellants:

A preliminary package dated September 9, 2018 was submitted by Claudia Braymer of Braymer Law, PLLC (hereinafter Braymer) detailing the areas supporting the position that the proposed project was not a permitted use within the Limited Industrial District and a formal application for an interpretation of the code relative to the “Determination” was presented November 27, 2017 that either reiterated or expanded upon information contained in the Sept. 9 package. Braymer requested that the board consider that the proposed use was not that of a Truck and Freight Terminal.

An application for an Interpretation of the “Determination” dated November 29, 2017 was submitted by the Chenango Valley Central School District represented by Maeve Tooher of Tooher & Barone, LLP (hereinafter Tooher) along with an accompanying letter and detailed statement of position requesting that the “Determination” be reversed. Tooher questioned the validity of the documents used to support the “Determination” and expanded upon safety concerns as well as necessary evacuation plans that would be inconsistent with a standard Truck and Freight Terminal. Additional concerns relative to traffic and the transport of gas in the vicinity of schools were cited to ask that the ZBA reverse the “Determination”.

Applications for an appeal of the ”Determination” and accompanying letters supporting the reasoning of the applicants were submitted by the following additional parties:

The O’Hare Family – December 1, 2017

Kevin and Debra Wilson – December 8, 2017

Rachel Zandt – December 8, 2017

The public hearing was opened for statements by the appellants.

Claudia Braymer highlighted the position that a compressor station was not listed as a permitted use within the Limited Industrial (LI) district and introduced the issue of pertinent real property classification codes. She reiterated the position pertaining to proximity to schools, churches, residents, parks, and the aquifer and raised the aspect of adding an odorant to the gas as a secondary process. Maureen Singer (represented by Braymer) was allowed an opportunity to present a slide show depicting the position that NG Advantage had referred to the proposed project as a compressor station, a fueling

station, a virtual pipeline or the Fenton Operations Center but had only recently begun to suggest it was a trucking terminal. Singer stated that given her experience in the field that what was being proposed was not a trucking terminal.

Maeve Tooher reviewed the aspect of the compressor station activity not listed within the permitted uses and the concerns of the CVCSD relating to safety, proximity to facilities and parks; potential evacuation considerations, traffic, environmental concerns and application of broader uses separately permitted within the LI zoning district.

Timothy O'Hare referenced his family's letter submitted with their application and reiterated their position that this should not be considered a truck and freight terminal and voiced concerns regarding overall safety.

Kevin and Debra Wilson reviewed the historical health related factors in the area and asked that the human element and sense of community be thoughtfully pondered. They urged the ZBA to reflect on the safety of the many and diminish the economic aspects of the proposed activity. They too felt that the NG Advantage project was not a sound fit for the location.

Rachel Zandt indicated that all of her concerns had been addressed at length by others and she had nothing additional to offer. She was pleased to see the level of community support and thanked individuals for their time and attention.

After a brief break, representatives of NG Advantage were provided an opportunity to explain the proposed project.

The Applicants:

Michael Cefalo, VP Engineering and Construction for NGA, presented an overview of the proposed facility and focused on the differentiation between Compression and Processing versus the scope of compressing gas for transport and the virtual pipeline concept.

Mary Beth Slevin reminded the board that the limited aspect of the hearing was to examine the "Determination" and rule whether or not Mr. Banks had reached a proper conclusion. She acknowledged the emotional aspects of the appellants' positions and noted that although other permitted uses had been introduced into the discussion, the cited use as a Truck and Freight Terminal was appropriate and rationally supported. Slevin reiterated the aspect that there was no change of state or product within the scope of the proposed operation and that the addition of an odorant was added to allow transport. She additionally referenced the position rendered by Nan C. Stolzenburg, Planner (Community Planning and Environmental Assoc.) that favored the "Determination".

Braymer and Tooher were provided an opportunity to briefly comment on the Slevin remarks prior to opening up the floor for public comment.

Public Comment:

The following individuals addressed the board (non-residents as noted):

Steve Anderson, Joyce Gioia, William Huston (Town of Union), Kurt Mohny, Victor Furman (Chenango Forks; owns Fenton property), Carol Mion, Mary Jo Bowie, Stephen Kutney (resides in Newark Valley; owns Fenton property), John Kopalek, Leanne Avery (Chenango Bridge), Jeriann McLean (Port Dickenson), Valdi Weiderpass (Town of Union), Val Ford, Meta Parks, Carol Johnson

Positions were largely critical of either the siting and nature of the operation, the definition as a trucking terminal, traffic and safety concerns, environmental concerns and regulatory classifications. Proponents suggested the facility would be safe because of regulation; similar facilities had been constructed in urban areas and transportation and industry are both compatible and essential. Details are reflected in the stenographer's transcript.

After all individuals who were so inclined had been offered an opportunity to address the board, the public comment period was closed.

Deliberations within the ZBA:

Dale Gregory offered a preamble involving the process and role of the ZBA and the limited scope of the matter being considered. The nature of the interpretive appeal was discussed as well as the broader role undertaken by the Planning Board within the Special Approval Procedure and Site Plan Review process described within §150-47 of the Town Code.

Timothy Brown reviewed his research regarding the historical perspective of zoning as applied to this segment of the town. The evolution of both zoning and codification, as reflected in minutes of various meetings, demonstrated that uses were largely as observed and expanded and that this particular area had seen continued use as a trucking and heavy equipment application. He stated that it was not until 1976 that Planning Boards were granted the authority to conduct site plan reviews and that Zoning Boards of Appeal were relegated to a position as an appellate body. He also noted the progression of concerns that lead to the State Environmental Quality Review Act which dictates the process put in place to control pertinent aspects of development.

With this so noted, the board paused to consider the appeal a Type II Action under SEQRA. Motion made by Mike Ward; seconded by Cindy Cook. Unanimously affirmed by roll call vote.

Tim Brown continued to discuss the nature of language used within zoning and the aspect of ambiguity and interpretation.

Mike Ward suggested that given the additional information presented and the nature of health-related suggested reading that he would propose an opportunity to digest some of that material. Cindy Cook concurred and Mike Lidell felt he would like to understand more about the referenced 49 CFR section that was discussed.

Dale Gregory noted that Matt Banks had been heavily criticized regarding substantiating the "Determination" and that one such document was a text, *The Geography of Transport Systems* authored, in large part, by Professor Jean-Paul Rodrigue, PhD. of Hofstra University. Gregory stated that in the course of his research to either affirm or reverse the "Determination" he not only purchased a copy of the online text but contacted Dr. Rodrigue and received permission to cite from the work. He also expanded upon the historical local nature of transport systems (canals, railroads, intersecting interstate highways) and how the cited chapter "The Function of Transport Terminals" pertained to the decision rendered by the Building Inspector. He felt this demonstrated a clear academic position that supported the decision in rational terms.

The continuing discussion pointed toward the need to hold the hearing over pending the members' desire to read and consider additional information. Tooher requested that various cited documents be made available and/or included in the record. Additionally, she requested an opportunity to discuss the content of these items as a procedural matter.

Mike Ward made the motion to hold the hearing over until February 6, 2018 (a date pre-determined as acceptable in the event additional time might be required); seconded by Mike Lidell and unanimously approved by roll call vote.

The Continuation:

The Public Hearing was continued on February 6, 2018 in the Port Crane Fire Station at 7:00 PM as advertised in the Press & Sun-Bulletin

Tooher, Braymer and Slevin each submitted documents supporting or clarifying stated positions. Tooher provided a report from J. Theodore Fink, AICP of Greenplan, Inc. that expressed his opinion that the proposed project should not be considered a permitted use within the LI district. Slevin submitted a letter that expanded upon various terms or comments referenced within the initial (January 23, 2018) portion of the hearing and discussed the impact of some of the regulatory passages mentioned which she felt substantiated the position that the "Determination" should be affirmed.

The board members each took an opportunity to comment at length on the issues that they felt impacted their decision-making process and which elements of submitted information or concerns expressed by residents figured significantly in their impending vote on the matter.

DECISION

Pursuant to Town Code §150-45, The Town of Fenton Zoning Board of Appeals hereby reverses the decision of the Building Inspector as rendered October 12, 2017 that the proposed NGA project is a permitted use within §150-15.A(6) of the Limited Industrial Zoning District

The motion: To affirm the decision of the Building Inspector that the project as proposed by NG Advantage be considered a permitted use as a truck and freight terminal within town code §150-15.A(6) of the Limited Industrial Zoning District:

Members in Favor: Timothy Brown
Dale Gregory
Members Opposed: Cynthia Cook
Mikel Lidell
Michael Ward

Attorney Braymer asked that the inverse motion be voted upon from the perspective of the Appellants.

The motion: To affirm the position of the five Appellants that the decision of the Building Inspector be reversed and the proposed project not be a permitted use within §150-15.A(6) of the Limited Industrial Zoning District.

Members in Favor: Cynthia Cook
Mikel Lidell
Michael Ward
Members opposed: Timothy Brown
Dale Gregory

Members who voted to reverse the “Determination” felt that the proposed use included activity that went beyond that of a truck and freight terminal, the aspect of compression of the gas and addition of odorant constituted a change of state that was beyond the LI permitted intent or the permitted uses should have been viewed as a larger set of restrictions.

Members opposed gave deference to the decision rendered by the Building Inspector and found that there was sufficient cause to consider the “Determination “ to have been rationally supported. While limiting focus to the process and considering the broader scope of transportation, other concerning aspects of the project as proposed should have been satisfactorily resolved through the Site Plan Review.

Dated: February 13, 2018