

THE REGULAR MEETING of the ZONING BOARD OF APPEALS of the Town of Cortlandt was conducted at the Town Hall, 1 Heady St., Cortlandt Manor, NY on *Wednesday, January 15th, 2020*. The meeting was called to order, and began with the Pledge of Allegiance.

David S. Douglas, Chairman presided and other members of the Board were in attendance as follows:

Wai Man Chin, Vice Chairman
Adrian C. Hunte
Eileen Henry
Thomas Walsh
Frank Franco
Cristin Jacoby

Also Present

Chris Kehoe, Deputy Director for Planning
Joshua Subin, Assistant Town attorney
Mr. Chris Beloff – Alternate Member

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Mr. David Douglas stated first let me introduce and say welcome to Mr. Christopher Beloff who is our newest alternate member of the Zoning Board. There was a new Town Ordinance passed that essentially is for both the Planning Board and the Zoning Board allows us to have an alternate member who will fill in on cases or meetings where somebody's missing. I think the way the law's crafted is basically, with that situation then I've got the option to ask the alternate member to sit in and join. I'm not – everybody's here tonight so Mr. Beloff will not be participating but just be sitting here and for the one case that we have recused members on, Mr. Beloff is not going to be joining on that because he literally came – his first work session on Monday night and so obviously has not had the benefit of hearing the various presentations by the attorneys and the experts, and members of the public, and reading the submissions on the Hudson Wellness matter. I think that the phrase he said is he would not be adequately informed enough to participate in that. He's not – he's just going to be observing from his spot over there today.

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ADOPTION OF MEETING MINUTES FOR DECEMBER 18, 2019

Mr. David Douglas stated somebody want to make a motion?

So moved, seconded with all in favor saying "aye".

Mr. David Douglas stated the December minutes are adopted.

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ADJOURNED PUBLIC HEARINGS:

- A. Case No. 2019 – 13 Application of Elizabeth Holloway of Station Glo of New England,** for the property of Ibrahim Jamil, for an area variance for additional signage at the existing Mobil Gas Station located at 2225 Crompond Road (Route 202).

Mr. David Douglas asked Mr. Kehoe, the applicant has asked that that be adjourned until next month?

Mr. Chris Kehoe responded yes.

Mr. David Douglas asked somebody want to make a motion to adjourn it?

So moved, seconded with all in favor saying "aye".

Mr. David Douglas stated case #2019-13 is adjourned until next month.

- B. Case No. 2019-14 Application of Elizabeth Holloway of Station Glo of New England, for the property of GTY NY Leasing, Inc.** for an area variance for additional signage at the existing Mobil Gas Station located at 2072 E. Main St. (Route 6).

Mr. David Douglas asked that applicant is also seeking an adjournment, correct?

Mr. Chris Kehoe responded correct.

Mr. David Douglas asked somebody want to make a motion?

So moved, seconded with all in favor saying "aye".

Mr. David Douglas stated case #2019-14 is adjourned to the February meeting. That February meeting is on February 19th.

**C. Case No. 2016-24 Application of Hudson Ridge Wellness Center, Inc. for an Area Variance from the requirement that a hospital in a residential district must have frontage on a State Road for property located at 2016 Quaker Ridge Road.
(Adjourned to the February 19, 2020 meeting)**

Mr. David Douglas stated that case is doing a coordinated review with the Planning Board and that's going to be adjourned until next month as well. Somebody want to make a motion?

So moved, seconded with all in favor saying "aye".

Mr. David Douglas stated case #2016-24 is adjourned to February.

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OLD BUSINESS:

A. Case No. 2019-10 Application of Hudson Ridge Wellness Center, Inc. for an interpretation related to the Code Enforcement Officer's determination(s) on the proposed wellness center for property located at 2016 Quaker Ridge Road.

Mr. David Douglas stated we had closed the public hearing a few meetings ago and then we'd indicated that we would consider the matter and then we would issue – not issue, but we would vote on a Decision & Order today. That's what we're going to do. There has been a Decision & Order that's been...

Mr. Chris Kehoe asked do you want Tom and Frank to...

Mr. David Douglas stated yes I'm sorry, Mr. Franco and Mr. Walsh have recused themselves from this matter so I'll give them a minute to leave the podium. It's not that I forgot about you guys. There's been a Decision & Order that's been proposed. What I'm going to do is I'm going to read, slash summarize it. It's a number of pages and I apologize if I drone on a little bit but I think it's important that you read it so that the members of the public and anybody who is watching on television or on line will have a sense of what exactly the proposed Decision & Order says and what its rationale is. I'm going to read parts of it and I'm going to summarize parts of it. This is an application by the Hudson Ridge Wellness Center for an interpretation related to certain determinations of the town's Code Enforcement Officer, Martin G. Rogers in memoranda dated March 21, 2019 and May 16, 2019 concerning the applicant's proposed wellness center for the property located at 2016 Quaker Ridge Road. D&O then has some background information and information about the issue presented and it notes that it's related to a previously filed application in which the applicant seeks an area variance from the requirement that a hospital in a town residential zoning district must have frontage on a state road. That application is concurrently pending before the Planning Board which has been designated the

lead agency for purposes of SEQRA related issues and as is appropriate, an application in which certain issues are before the Planning Board and certain issues are before this board. The two boards are coordinating their review of the matter. And we also note that for further efficiency and coordination, the D&O and the board have determined that those two applications should be consolidated. The D&O then goes on to note that in its application to this board in October of 2016, the applicant set forth its project description in relevant part as quote, “a specialty hospital serving patients with substance use disorder,” close quote. As part of proceedings before the Planning Board on February 5, 2019, the Planning Board sought a zoning opinion on two issues: first, whether the proposed wellness center is a, quote, “hospital” and two if it is a hospital, does it require a frontage on a, quote, “main road?” This request by the Planning Board in turn led to Mr. Rogers’s consideration of the matter in his capacity as the town’s Director of Code Enforcement. Upon his analysis of the situation, Mr. Rogers determined, in essence, that the proposed wellness center is not a hospital or a specialty hospital but rather a rehabilitation center and alcohol and drug center indicating custodial care, that the proposed wellness center therefore constitutes a use that is not permitted in the R80 zone in which it would be located and does not meet the required conditions for a special permit in such residential zone and that the proposed use may require a use variance. The applicant then filed this application contending that the Code Enforcement Officer’s determinations were incorrect. The board held hearings on various dates on the issue of whether the proposed use is a hospital and therefore potentially eligible for a special permit and variance, as the applicant contends, or is not a hospital and therefore not permitted in the proposed residential zone, absent the use variance as Mr. Rogers concluded, and as persons opposed to the applicant’s proposal contend. Then there’s some various footnotes that are in the proposed D&O which I won’t bother reading those. As has been the case throughout the entirety of the proceedings concerning the applicant’s applications, the board had the benefit of thorough skillful comprehensive written submissions and oral presentations by representatives of the applicant and persons opposed to the application which substantially aided the ZBA in its consideration of the issue presented. The board additionally had the benefit of Mr. Rogers’s own live presentation and the opportunity to hear his answers to certain questions posed by the board or suggested by the applicant’s counsel and counsel’s for a citizen’s group opposed to the application. Moreover, all members of the public who wished to be heard on the issue presented were heard or given an opportunity to be heard. The proposed D&O then discusses certain definitional and interpretative issues and continues: the fundamental issue boils down to whether Hudson Wellness’s proposed facility is a hospital or something else. This issue in turn requires answering the fundamental question of how a, quote, “hospital” is to be defined. In seeking to answer this question, this board must first look to the town’s zoning code. Unfortunately, there’s no definition of, quote, “hospital” in the zoning code. There is no such definition in section 307-4 which is the definitions section. There is no such definition in section 307-59 which is the section pertaining to hospitals or nursing home. There is no such definition in the code’s table of permitted uses. The zoning code does contain some guidance regarding how one should proceed in the absence of a defined term. Unfortunately, the provisions doing so themselves are not crystal clear and are subject to different interpretations. And then the proposed D&O quotes from section 307-4 and what it provides, and also quotes from section 307-14 which is titled: Content of Table of Permitted Uses. It then notes that the directives in those sections appear somewhat ambiguous. Does the language mean for purposes of defining, quote, “hospital” which is not

defined in the zoning code, then one should look first to the building code then second, if the building code does not have a definition to the dictionary then third to the SIC and the SIC is the Standard Industrial Classification Manual, which is referenced in those provisions which I didn't read the actual text of them; or does it mean as, quote, "hospital" is a term mentioned in the table of permitted uses, one should look solely to the SIC, may one additionally look towards other sources for further guidance or is that precluded? Moreover, a search does not reveal a specific source titled: Webster's Unabridged Dictionary which is also quoted in the provisions of the zoning code. Which dictionary then should be considered most authoritative? Furthermore, the SIC itself is largely replaced by an updated classification called the North American Industry of Classification System known as the NAICS in 1997. The proposed D&O then notes, in a footnote, that this board has previously recommended that the zoning code be amended so as to reference the NAICS rather than the SIC and that we further recommend that sections 307-04 and 307-14 be amended so as to eliminate ambiguity such as those that the proposed D&O notes. Not surprisingly, the applicant and persons opposed to the proposed wellness center have disagreed concerning the proper reading of the zoning code. The applicant asserts that one must look solely to the SIC in answering the question of whether its proposed project constitutes a, quote, "hospital." The opposition disagrees contending that one instead should utilize what it describes as a, quote, "waterfall approach." Though the matter is not free from all doubt, the board concurs with the applicant that, as quote, "hospital" is a non-residential use listed in the table of permitted uses but otherwise undefined in the zoning code. It's meaning for purposes of the code must be drawn exclusively from analysis and application of the SIC. The proposed Decision & Order then discusses the SIC and notes that under the SIC the question boils down to which of two classifications is more appropriately applied: SIC code 80-69 pertaining to, quote, "specialty hospitals" or SIC code 83-61 pertaining to residential care. Then the proposed D&O quotes from both of those sections and I'll just note that for SIC code 80-69 regarding specialty hospitals, according to the SIC examples given include, quote, "alcoholism rehabilitation hospitals" end quote, drug rehabilitation hospitals. And I'll just note that for SIC code 83-61 which pertains to residential care, examples given include, quote, "alcoholism rehabilitation centers, residential with healthcare incidental," close quote and, quote, "drug rehabilitation centers residential with healthcare incidental," close quote. Thus, under the SIC, the issue ultimately turns on whether the facts show that, quote, "healthcare" to be given will or will not be, quote, "incidental." Then the proposed Decision & Order has a conclusion section, which reads: upon consideration of the evidence presented to the board concerning the issue of whether the applicant's proposed wellness center is a, quote, "hospital" and the board's understanding of the statutory and case law pertinent to consideration of the issue, a majority of the members of the board considering this matter concludes that the proposed project is a, quote, "hospital." Facts that support this conclusion include the following: 1) The services that the applicant's facility will be providing are akin to those provided to persons admitted to hospitals. For instance, once a person with an acute substance abuse issue has been stabilized and detoxified at a hospital emergency room, she can be transferred to a unit located at that same hospital for further medical treatment and care. Here, that person would simply be admitted to a separate facility, the applicant's facility for similar such treatment and care. 2) According to the applicant, the patient's at the applicant's facility will require a 24-hour healthcare supervision and treatment. 3) The applicant's facility will be serviced by the same kind of professionals,

including: doctors, nurses and social workers who treat persons with substance abuse problems who have been admitted to hospitals. According to the applicant, the facility will have at least two doctors on site along with at least fifteen nurses, two psychologists, and twenty-three social workers, counselors and technicians. Clinical staffing coverage will encompass internal medicine, addictionology, psychiatry, and psychology. 4) The medical treatment to be provided at the applicant's facility will be central to the care provided to patients not merely, quote, "incidental." The core of the services to be provided will consist of medical treatment, diagnostic services and other services provided by facilities that fall within the understood definition of a hospital. 5) The applicant has represented that the medical treatment and services to be provided will include diagnostic assessment, regular drug testing, mental health and physical examinations, medication assisted treatment, 28 to 45 days of inpatient treatment, individual group and family counseling, case management, psychotropic medication treatment as necessary, and other medical and health assistance. 6) Such treatments and services will be provided to a specified category of patients namely, persons with substance use disorder and thus the applicant's facility can be considered a, quote, "specialty hospital." Thus if this Decision & Order is adopted, the determinations and conclusions contained in Mr. Rogers's memoranda dated March 21, 2019 and May 16, 2019 would be set aside to the extent that they're inconsistent with the Decision & Order and the Decision & Order notes that the issue raised by the application namely with the interpretation of whether the applicant's proposed project falls within the definition of a hospital is a type II action under SEQRA as it consists of the interpretation of an existing code or rule. Do any members of the board have any comments they wish to make about the proposed Decision & Order?

Mr. Wai Man Chin stated I'd like to make a motion that we adopt...

Mr. David Douglas asked before we make a motion I want to know if anybody has any comments?

Ms. Cristin Jacoby stated I just want to note that I am planning on abstaining from voting. I was not here for any of the public hearings. I don't feel I had adequate time to review the substantial submissions that have come in and thus I'm going to abstain tonight.

Mr. David Douglas asked anybody else have any comments? Before we vote, I want to note something so that it's on the record. Though you all had the opportunity to listen to me drone on for a bit about this proposed Decision & Order, I personally am not fully convinced by the Decision & Order and it is my intention to vote no on that Decision & Order. The Decision & Order contains the reasoning and rationale for its conclusion that the applicant's facility is a hospital so I just want to make sure that, on the record, some of the reasons why my conclusion is the opposite and I feel that it is ultimately not a hospital as the term is defined in the zoning code. So please bear with me a little bit more here. I do concur with much of what the proposed Decision & Order states and many of its contents. I do fully agree that, given the language of the code, the board in seeking it to ascertain to apply the meanings of the undefined term hospital must be guided by the analysis and application of the SIC. I also concur in the proposed Decision & Order's recognition that the language of the relevant sections of the code is not an ideal model

of clarity and I fully agree that it would be good if those sections were to be amended so ambiguities can be eliminated in the future and also that the code be updated so as to utilize the NAICS classifications rather than the SIC. As to why I disagree with the conclusion the proposed D&O that the Hudson Wellness's proposed facility is a hospital, to my mind the proposed facility, while it will unquestionably provide an extremely valuable service, that's not a question at all in my mind but I do not feel that it falls within the classification of a, quote, "hospital" as that term is properly understood under the SIC for several reasons. I believe that given the facts presented, the proposed facility falls more readily under SIC code 83-61 which covers residential care including, quote, "drug rehabilitation centers residential with healthcare incidental." I believe that given the facts presented, the medical treatment to be provided is, quote, "incidental," or to use a synonym for that word secondary to the primary type of care provided specifically the post detoxification in residential upkeep in care of the recovering patients with such care to be provided primarily by nurses and social workers. In this regard, the fact that at least two doctors will be on site doesn't necessarily make the facility a hospital. Medical care of course is provided in many non-hospital settings such as doctor's offices or medical clinics. The other professionals who will be on site, for instances: nurses, psychologists, social workers, counselors, technicians likewise are commonly based in non-hospital settings. Services such as diagnostic assessment, drug testing, and mental health and physical examinations, counseling, case management, and provision of medication similarly can and are usually are provided in non-hospital settings. To my mind, the applicant's proposed facility seems more akin not to a hospital but to other sorts of non-hospital healthcare facilities such as a hospice facility that includes palliative care or a residence with people with dementia. I believe that the evidence concerning the post-tox MAT, that stands for Medication-Assisted Treatment, that the facility will be providing, in my view, further supports the conclusion that the facility is not a, quote, "hospital." In this context, MAT appears to me to be a post-detoxification step down from the actual medical intervention in contrast to the actual detoxification, MAT does not need to be provided in hospital or by doctors but can be provided by non MDs in a non-hospital, quote, "qualified practice setting." Therefore, I believe that my conclusion – therefore, my conclusion does differ from that of my colleagues and as noted, I will not be voting in favor of the proposed Decision & Order. Someone want to make a motion on whether or not to adopt the Decision & Order?

Mr. Wai Man Chin stated on case 2019-10 I make a motion to adopt the D&O as read.

Seconded with all in favor saying "aye", all opposed "opposed".

Mr. Chris Kehoe stated I will poll the board. Mr. Chin; aye, Mr. Douglas; no, Ms. Hunte; aye, Ms. Jacoby; abstain, Ms. Henry; aye. I would prefer that the attorney to explain the next steps. It's 3 to 1 vote.

Mr. Joshua Subin stated we have 3 to 1: Three approving vote does not constitute a quorum of the entire board of appeals. The determination and conclusions of the Code Enforcement division therefore remain in effect.

Mr. David Douglas stated thank you. I think that concludes this case and I think that also concludes all of the items on the agenda tonight. Does someone want to make a motion?

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ADJOURNMENT

Ms. Eileen Henry stated motion to adjourn.

Seconded with all in favor saying "aye".

Mr. David Douglas stated the meeting is adjourned. Thank you all.

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NEXT REGULAR MEETING WEDNESDAY, FEBRUARY 19, 2020