VILLAGE OF RED HOOK
ZONING BOARD OF APPEALS MEETING
April 4, 2013
7:00 PM

Chairman Beekman opened the meeting at 7:00pm.

Present: Chairman Beekman, Member Duntz, Member Cuthell and Member Husted.

Non Members Present: Village ZBA Attorney, Victoria Polidoro, Esq.

Motion made by Chairman Beekman to accept the minutes of the ZBA Meeting dated February 28, 2013. Motion seconded by Member Duntz. All in favor.

#1. LISA GRIFFIN 7361 SOUTH BROADWAY USE VARIANCE
Tax Grid # 6272-14-278485

Chairman Beekman advised that Lisa Griffin was seeking a use variance to allow for the sale of outdoor plants, by her friends, on Sundays in the parking lot when their deli business is closed.

Lisa Griffin was present, with the proposed sellers, and advised the Board that she was advised by CEO Harkins that a person inquired as to whether they had a proper permit to sell plants, which she did not know she needed to have. Her friends had been previously selling flowers in the parking lot and that has now stopped.

Chairman Beekman advised that the issue is that this property is located in an R10,000 zone.

Member Duntz asked if the store was closed on Sundays. Chairman Beekman said yes. Lisa Griffin advised that these gentlemen selling flowers were friends of hers and that she was doing this for them as a favor and not benefiting from this at all. Member Duntz asked if Lisa owned the deli. Lisa said yes. Member Cuthell said the lot is the corner lot on Amherst Road which is in the R10,000 zone and not part of the NMU or GB. Member Beekman said one of the problems is that in operating like this is that when it was in one of the other commercial zones you could get a special permit, but because it is not in a commercial zone there is not a special permit available for residential neighborhoods. Chairman Beekman advised that he contacted Albany for more information and that they will be getting back to him. Chairman Beekman advised that this is being listed as a use variance and that a use variance is very difficult to qualify for, but that they are looking at another option of an expansion of the previously granted variance. Lisa felt that this was a simple issue that has been going on since last summer and felt it is taking too long due to being misinformed due to mailings and not knowing which board this would be in front of. Chairman Beekman advised that her existing deli business is allowed in that zone and she already has a variance for that, but normally you cannot expand on a variance already, but there is some kind of precedence and that he is waiting on feedback from Albany as to whether they can do it or not.

Member Husted said this was not a big impact, but that the can of worms has been opened and we now have to go through the process. Lisa asked what would happen if they sold the plants inside. Chairman Beekman said that would probably not be an issue. Member Husted asked if under their current variance, if it mattered what they sell. Member Duntz asked what if they paid Lisa $1 each day that they took over the lot, than it's considered a home business. Chairman Beekman said these were not Lisa's flowers, but somebody else's too. Member Duntz asked what if they sold Lisa the flowers for $1.

Attorney Victoria Polidoro advised that the issue here is that this is an expansion of the use, based on what is allowed, and asked if the current approval stated anything with regard to the number of days it would be open. Chairman Beekman said he did not think so, but remembers notes on parking issue, which he feels does not impact this at all. Lisa said she could have been open 7 days but chose to close on Sundays. Member Duntz asked if wouldn't' her operating business would fall under the Ag & State – and if she is out in the parking lot she doesn't need a hazardous food license permit. Lisa said she is under Ag & Markets. Chairman Beekman read the definition of a deli in the Village of Red Hook Zoning Code. Member Cuthell said technically selling plants is not an included description in that. Chairman Beekman said If it were being sold inside the deli it would be considered part of the business. Member Cuthell said the issue is being sold in the parking lot. Member Duntz felt that she would need a hazardous food permit. Chairman Beekman said we are not looking at the permit, but the activity. Lisa said she will not be getting a hazardous food license and feels this has nothing to do with inside. Member Duntz said that if you are selling plants you would be required to have this permit for inside, and this might cover outside. Lisa said she is not selling the plants and her friends have all their permits from the State required to sell these plants. Member Cuthell said the parking lot is not considered retail. Lisa asked about selling them in the driveway at the apartments behind the store. Member Husted said this was still the same property and still in the R10,000 zone. Member Cuthell said this Board was given a memo from CEO Harkins that this would require a use variance. Lisa asked about the expansion of the variance. Member Husted, we don't know and that this was not in the Village code book. Chairman Beekman said we are waiting on a response from Albany. Chairman Beekman read the definition of a use variance. Chairman Beekman said will wait on a response from Albany before sending out certified letters. Chairman Beekman read the tests that were involved with a use variance. Lisa asked if this was really a use variance or an expansion of her current variance and asked who listed this as a use variance. Member Cuthell said CEO Harkins. Chairman Beekman said ZEO Harkins and the Village Attorney.

Attorney Polidoro said the ZEO Officer Harkins made a determination that this was a use variance and if it were processed under that it would require the tests so the Chairman of the ZBA contacted Land Use Department in Albany to see if the tests would be required. Lisa asked why she wasn't told this from day one. Member Husted asked what she meant by day one. Lisa said because she has been going through this for months now. Member Husted said that ZEO Harkins has to make a judgment call when something is reported to him. Lisa asked attorney Polidoro if it was her advisement that this was a use variance. Attorney Polidoro said correct. Lisa asked if she has no recourse as to challenge this. Attorney Polidoro said you do,

with this Board. Chairman Beekman said hopefully he will have an answer in a couple of days and we will know where to go from here. Chairman Beekman did advise that if it comes back to be a use variance, it will be hard for them to meet those tests.

Member Husted asked if the meeting could be the next regularly scheduled ZBA date of April 25th. Member Husted asked if they could find another lot in the business district to sell the plants. Lisa said she could get them further south in the Town but that this situation makes her very angry. Member Husted again advised that the problem is that this is in a residential district and again suggested moving outside of the residential district. Member Cuthell said if we find out from Albany that we can expand on the current use variance then there will be no use variance required and Sam's determination will be wrong and she will be able to do this. Attorney Polidoro said we need to look at the approval resolution for the deli and see if there were any restrictions or locations and how it was worded. Member Cuthell asked when it was turned into a deli and when the variance first happeded. Attorney Polidoro said yes. Member Cuthell asked if it was non-conforming when zoning was overlaid on it. Lisa said yes. Member Cuthell said it didn't have a variance it was just an existing business when zoning was created. Chairman Beekman asked what year Lisa bought the deli. Lisa advised 2005 – possibly 2004. Lisa said the people before her had the same, but that the building was also vacant for one year. Attorney Polidoro suggested that a public hearing be set.

Lisa asked if Albany said we can expand on her current variance does she still have to have a public hearing. Chairman Beekman said he has never had an issue with an expansion of a previously granted variance situation, so he needs to hear back from Albany and what it entails, but that it is safe to say that a public hearing would need to be held.

Member Cuthell said the issue here is about the uses that are permitted within the description of the R10,000 zone and that plant sales are not explicitly listed under the special permit section.

The question was asked suppose flowers wanted to be sold on the church property - is that allowed. Member Cuthell said technically the Church is in the R10,000 too. Member Cuthell said this is about uses that are permitted in the R10,000 zone. Member Duntz said than Churches cannot have bake sales. Member Cuthell said that is a permitted use under the special permit section but the definition to do a plant sale is not explicitly listed in the special permit section. Attorney Polidoro said this might fall under site plan review if this is a permitted in the district. It was decided that notices will not be mailed until Chairman Beekman makes a decision as to how this Board wishes to proceed and if the applicant wishes to pursue this application.

Chairman Beekman made a motion to table this matter to April 25, 2013. Motion seconded by Member Cuthell. All in favor.

Chairman Beekman made a motion to hold a public hearing on April 25, 2013. Motion seconded by Member Cuthell. All in favor.

#2. DGR HOLDINGS, LLC (Rondack Construction) **Firehouse Lane Tax Grid #6272-10-388518** **Use/Area Variance**

Nick DiGugno of Rondack Construction was present and Lollie Humphrey from St. Paul's Lutheran Church and Kevin Wade, Esq., representing St. Paul's Church was present.

Chairman Beekman advised that no responses for lead agency were received so it is defaulted that the Village of Red Hook ZBA is lead agency.

Chairman Beekman advised the members present of a meeting held with the Village ZBA Attorney, Victoria Polidoro, and himself and Member Cuthell, and that two resolutions have been drafted, and asked if any other member had any comment. Attorney Polidoro advised that each Resolution was different and that the Board could add to them each as they chose. Attorney Polidoro advised that should the Board chose to approve it they must go through the SEQR process, and reminded the Board that the County recommended disapproval so 4 votes are required.

Member Cuthell advised that this Board can either approve or deny this variance and that this Board has pros and cons for both. Member Duntz said that he feels that nothing is ever going to happen to it and does not foresee any business going in there other than something that would be relevant to being across from the firehouse or having a graveyard in the back yard. Member Duntz did not see any problems as far as environmental because of everything being built on a concrete slab, and fire house being right there. Chairman Beekman said that zone itself has a number of options that are there and they have not come forward with anything. Member Duntz said in his opinion he does not foresee anything in the future. Chairman Beekman said it is open land and anything could go there. Chairman Beekman said this Board has to go by if it is at all feasible. Member Cuthell said that because this is a use variance it must by NYS Statute meet all 4 of the tests, being that there is no other reasonable return if we don't grant them this, that the hardship relates to the property because it is unique and that if the variance is granted that it won't alter the essential character of the neighborhood, and that the alleged hardship has not been self-created, and unfortunately he does not feel that the Church has shown every reasonable attempt to sell this property due to it being listed during a difficult time at a high price, and this applicant being the only one who stepped up with a reasonable offer and it is not currently listed on the MLS.

Member Cuthell said the fact that the property is not entirely unique because there are other lots on that street near the fire house and next to the cemetery, and every Village having a firehouse and cemetery in it and those not being hardship properties. Member Cuthell said due to the times and nothing selling he is not surprised that anyone has stepped forward but this is not a zoning variance issue. Member Cuthell said he does not feel this would violate the essential character, but as the NMU is defined, there was an intent to make something other in the future and that is the way it is written. Member Cuthell said he understands that the Church is in a tough spot, but that is not the zoning board's criteria that the seller is in hardship. Member

Husted said but you can argue that the applicant can be the person seeking the hardship. Member Cuthell said yes, that is an angle, but to seek to buy a property that they know had use restrictions can be interpreted as self-created, at which time will not meet that test either. Member Cuthell said hands are tied by Statute that it has to meet this or else it will works its way into the appeals court system, and this Board would be shot down because it does not meet these tests, which he feels is unfortunate. Member Husted said he was inclined to agree with some of Member Cuthell's perspective, but also felt inclined to say that he would probably go through with granting this, but also feels that if it were granted it would be pretty likely that it would not survive an appeal and felt it probably would get challenged. Member Husted said he felt the Church did a decent job at demonstrating hardship in terms of not getting a reasonable return for any other uses, but the evidence was a little weak and the property price of when it was listed, and listed before, was probably more than the market would have warranted and feels it was wishful thinking in asking for $225,000.00 during a recession.

Kevin Wade, Esq., attorney for St. Paul's Church, advised that it was not multiple listed because it was stuck in contract and you cannot multiple list a property that you are in contract on so in the issue of hardship we are stuck in a contractual obligation. Member Cuthell questioned that when a house is in contract you have to remove the "house for sale" sign and not entertain other offers. Kevin Wade said correct and you should not show it when in contract. Member Duntz asked how long they were in contract. Kevin Wade advised since the summer of 2009. Attorney Polidoro said what was submitted to this Board was December, 2008. Chairman Beekman said he understands part of the hardship for 4 years due to the water situation, and there is a whole list of things that could go there, and although he likes the idea, meeting the tests would be the problem. Kevin Wade advised that the zoning change occurred after the purchase. Member Husted said that did not matter it was still R10,000 and you would need a use variance either way. Member Cuthell said it got better. Attorney Polidoro said for the record the zoning changed in 2005 and it became less restrictive. Kevin Wade said his point is that it was already there – the church has been there for 200 years. Member Cuthell said he agrees, but peeling off this lot can be easily be defined as a self-created there, but to peel off a lot they are trying to sell they created the hardship. Member Husted said there are many houses that border around the cemetery. Kevin Wade asked how many have been built since the firehouse was built. Chairman Beekman said a couple of them are – the one behind it - diagonally across - is fairly new. Kevin Wade said he will point out the Commons right behind it and does not think one unit has been sold there. Chairman Beekman said he did not think it was because it was next to a cemetery. Kevin Wade said he felt it was clearly a factor according to what the Statute
is asking to review. Member Husted said it was more likely because they are asking too much for them. Member Cuthell said the cemetery does not make it unique. Kevin Wade said no, but it gets to the point of use. Member Cuthell said he did not realize that while in contract it could not be shown and he will check that out. Kevin Wade said you cannot be contractually obligated to a party and go out to a third party. Member Cuthell said he wanted this to work, but the use variance is very strictly laid out in NYS Law and conditions have to be met and he has seen that all 4 have been met. Chairman Beekman said that all 4 tests have to be met and that is difficult to do. Chairman Beekman said that even with self-created it was open land that was acquired and trying to re-sell, so it was restricted use at that time and the option to break it off and try to sell it is a self-created hardship. Chairman Beekman said he reviewed other case law, and in his opinion this would definitely lose on an appeal. Chairman Beekman said he likes the idea of

a business going there and the building was beautiful but feel since the beginning it was not a matter of them liking the idea but that is still had to pass muster. Lorraine Humprey asked who would appeal. Chairman Beekman said anyone could appeal, but have to go by what the law says. Kevin Wade felt that an appeal should not be a factor under our Statues and in making this determination. Chairman Beekman said it was because they could not meet the tests that needed to be met. Kevin Wade said he feels it is #2 of the tests that is bothering everyone, so he feels this committee should not have this thought of a potential appeal as a decisioning factor. Chairman Beekman said it is not the appeal, which is a good possibility, but based on the law and the facts. Member Husted said we are thinking about the applicant as well, and if this Board approved and let it linger out there, he will spend more money to wait to see if there is an appeal and especially if the evidence is weak for this Board granting a variance in the first place. Lorraine Humphrey said it sounds like they are afraid of an appeal from the Village Board. Member Husted said he fears for the applicant. Member Husted said we are trying to be reasonable and we are thinking out loud. Member Cuthell said all 4 tests are subject to interpretation and 2 resolutions were drafted – one being pro- and one being con – because the argument can be made and he would like to see this happen, but his personal interpretation is that I have more reservations than can be ignored. Chairman Beekman said this is not based on that someone may question it - it is because tests were not met. Kevin Wade said that is all he is asking, but he keeps hearing appeal. Member Husted said this is coloring our thinking. Keving Wade said and that is what he is worried about. Member Husted said if it is coloring our thinking than it is doing the right thing because we are to consider our actions and that we are following the letter of the law and that it will stand up to the letter of the law. Kevin Wade said the risk of appeals falls on the applicant and not on the board. Member Husted said the Board should take a vote.

The question was asked with regard to other uses if the Board would want a group of apartments built there, close to the well field, and possible septic issues. Member Cuthell said that would be up to the DOH, Engineers, Planning Board and not our decision. Member Husted said what we decide on is the permitted uses.

Chairman Beekman read aloud the “BE IT FURTHER RESOLVED” section of the Resolution Denying Use Variance. A copy of the Resolution is on file with the Clerk of the Village of Red Hook.

A vote was taken on the Resolution to Deny the Use Variance. Vote as follows:
Chairman Beekman - YES
Member Duntz - NO
Member Cuthell - YES
Member Husted – YES

Member Duntz made a motion to close the April 4, 2013 ZBA meeting. Motion seconded by Member Cuthell. All in favor.

Submitted by,

Lara Hart, ZBA Secretary