TOWN OF CORTLANDVILLE ZONING BOARD OF APPEALS
Public Hearings/Meeting Minutes - Tuesday, 31 May 2016 – 6:30 PM
Town Hall Court Room – 3577 Terrace Road – Cortland, NY

Board Members (*absent)
David Plew, Chairman
John Finn
Thomas Bilodeau
Lenore LeFevre
Joanne Aloi

Others Present
Bruce Weber, Planning/Zoning Officer
Joan E. Fitch, Board Secretary
John B. Folmer, Town Attorney

Applicants & Public Present
Donna McClory-Lyon for Angeline McClory, Applicant; Angeline McClory; Roger Wagner, Applicant; Pam Jenkins, Barb Leach, Andra Niggli, William & Larie Cifaratta, Michael Barylski, Victor Siegle, Cheri & Chuck Sheridan, Sharon Stevans (Ch. 2 Volunteer), Tyrone Heppard (*Cortland Standard* Reporter).

The Public Hearings were opened at 6:30 p.m. by Chairman David Plew, who read aloud the Legal Notice as published in the *Cortland Standard* on 19 May 2016, as follows:

NOTICE IS HEREBY GIVEN that a public hearing before the Zoning Board of Appeals of the Town of Cortlandville will be held Tuesday, May 31, 2016 at 6:30 p.m. at the Raymond G. Thorpe Municipal Building, 3577 Terrace Road, in the Town of Cortlandville, New York, to consider the following applications pursuant to the 1986 Zoning Law:

1. *In the matter of the request from Pam Jenkins for review of the determination by the Zoning Officer regarding property at 1834 Route 13, in the terms and conditions of Article XXI, Section 178-132 A.*

2. *In the matter of the application of Angeline McClory for property located at 1086 Starr Road, Tax Map No. 96.09-04-13.000, for a variance in the terms and conditions of Article VI, Section 178-25 A (1) to allow for a front yard less than allowed.*

3. *In the matter of the application of Roger Wagner for property located at 873 Route 13, Tax Map No. 95.16-02-72.000, for a variance in the terms and conditions of Article XVIII, Section 178-111 F, Table 1, to allow for signage above the height of the wall of the building and for building-mounted signs to be illuminated.*

The above applications are open to inspection at the office of Bruce A. Weber, Planning & Zoning Officer, Raymond G. Thorpe Municipal Building, 3577 Terrace Road, Cortland, New York, call (607) 756-7052 or (607) 423-7490. Persons wishing to appear at such hearing may do so in person, by Attorney, or other representative. Communications in writing in relation thereto may be filed with the Board or at such hearing.

David Plew, Chairperson
Zoning Board of Appeals

(Note: Proof of Publication has been placed on file for the record.)

PUBLIC HEARING #1

As Requested by Pam Jenkins - Review of Zoning Officer's Determination – 1834 NYS Route 13 – Leach Properties, LLC

Chairman David Plew asked Town Attorney John Folmer to provide those present with the background on this request.

Attorney Folmer addressed everyone: *"I think it's appropriate, Mr. Chairman, that I formally make a report to you concerning the Jenkins et al litigation against this Board, the Planning Board, and the Town Board. As I'm sure you are all aware by now, the Court has determined that your determination, the Planning Board's determination, and the Town Board's determination have been declared null and avoid ab initio, which means from the very beginning. Consequently, your variance has been vacated and there are no further steps with regard to that. Now, Judge Cerio in his Decision quite frankly reached the conclusion that did not surprise me. Mr. Weber and I talked about it in some length. It didn't surprise me at all. I was a little surprised at the length that he went into in regard to the SEQR process, but there's always a light at the end of the tunnel and I think that's probably a good thing. For the present, I would ask so that your record is perfectly clear, that the pending application is now over and gone. You have placed on the table a resolution that you adopted granting a rehearing of that matter. And I think that in order to make your record clear I would ask that you take that matter off the table and rescind the resolution that you entered into granting a rehearing. That way it will be perfectly clear that there's nothing left hanging fire on your record. So I make that request.*

"What happens now? Well, there are two routes: one for the Town, two possibly for the applicant. First, the applicant or the Town could appeal Judge Cerio's Decision. I can tell you right now that the Town is not going to appeal that Decision and, should Mr. Leach chose to appeal that Decision, we will not as a Town participate in that appeal because I believe that Judge Cerio's Decision, while there are things in it that I question, I think that his Decision is sound and needs to be followed. Mr. Leach, on the other hand, I think has two options: one, as I've said, he could file an appeal if he choses to do so, or he could reapply for his variance again. Now, I know there is disagreement as to whether or not he could reapply, but I would submit to you that he has the right to apply. Whether or not that application would ever be granted is another question because I think Judge Cerio's Decision has raised some significant issues that cause some concern primarily with regard to the establishment of a hardship. And you need to recall, if that conversation is ever had, that the hardship has to be measured at the time that your application and your consideration was originally made. What's happened subsequent to that is not relevant to a determination of the hardship that existed when the application was made. Secondly, there is a question of whether or not the hardship, if it exists, is or is not self-created. And I think there is significant issues now that may not have existed at the time of the original decision. Judge Cerio, based on the record he had, made the comment in his Decision that it was self-created. He made that comment. But that's based on the record that he had at the time. A de novo, or a new application, as to be considered by you, needs to start by examining the merits under 267 B of the Town Law.

"What are we going to do in the future? We've had, over the course of several years, a great many SEQRA reviews. We've had two that were challenged. One had to do with the Rerob gas station over on McLean Road; the other had to do with Walmart. In both of those instances, the process that we utilized was approved by the Court. The SEQRA regulations and their interpretations evolve like everything else does. Consequently, our procedures and our processes have to evolve in order to take into account where we are as of now. If you read Judge Cerio's Decision, I think there are two methods suggested by that Decision. One is that each Board do its own separate SEQR process. I don't think that the SEQR regulations require that there be three SEQR reviews on a single project; however, the other alternative is to create a process whereby the three boards act as, that one of the three boards be named as Lead Agency for SEQR purposes, that in that consideration the criteria to be examined by each individual Board would be taken into account by the Lead Agency as it does its SEQR review. Once that SEQR review is completed, it becomes the document on which all three boards can rely. Mr. Weber and I talked briefly today about a suggested change in process, and we will be presenting that to you as soon as we can, and I would

suggest we will have it for you by your next meeting. I can tell you right now that one of the things you're going to need to do is if you're doing the SEQR declaration, one way or the other you're going to have to do more discussion and more articulation of the reasons and the basis for which or upon which you have made the determinations that you made.

"So there you have it. That's past, that's present, and that's my ideas for the future. Thank you for letting me report."

Chairman Plew then recognized Pam Jenkins who thanked Board members for their time and attention and stated she would start by reading what her lawyer wrote about self-created hardship (no copy provided to Board Secretary): *"Self-created hardship defeats use variance as matter of law. That Mr. Leach's hardship is self-created is now the law of the case in this preceding unless it is reversed upon appeal. Therefore, Mr. Leach cannot reapply to the ZBA until and unless he gets the NYS Court of Appeals to reverse Judge Cerio's ruling of 2016."* Ms. Jenkins then stated then read from her prepared statement, as follows:

We trust that he would lose that appeal and that he will never qualify for a use variance.

For those reasons I want to be sure that Mr Weber has issued a stop work order to Mr Leach if he has not already done so. As recently as of around May 21, Mr Leach was continuing excavation and building on the site.

I believe that Mr Weber violated Cortlandville Town Law sections 86-3 (4) and (6), section 86-12 and section 86-15 for the reasons I will explain.

Mr Weber failed to enforce the conditions placed upon Mr Leach by the Cortland County Planning Board's October 21, 2015 Resolution #15-30 . These conditions were also adopted by the Cortlandville Boards.

Mr Weber also failed to properly investigate my April complaint about the new raised road (platform) off Rt 13 which Mr Leach was building., Mr Weber failed to issue a stop work order when he learned that Mr Leach had not filed a Notice of Intent to Disturb greater than 1 acre, and Mr Weber further violated Cortlandville Town law when Mr Weber learned that Mr Leach had not applied for or received a SPDES permit because Mr Weber took **no** enforcement action against Mr Leach. . Mr Weber failed to issue a stop work order when he learned that Mr Leach had, in fact, disturbed greater than 1 acre without a SPDES permit (see Bruce's April 23 , 2016 email to me).

Mr Weber's explanations for why he allowed the raised road (raised platform) to be built do not hold water. It appears that Mr Weber merely provided cover for Mr Leach while he built the raised road off State Rt 13.

Mr Leach could obviously have used his existing commercial driveways to dump fill in the area directly behind his transfer station.

Mr Weber allowed Mr Leach to build a road that was not on the original site plan and which was not given any approvals or permits by any board in this county. At some point this spring, Mr Leach gave Bruce a map of the raised road he built off Rt 13...but the map which Mr Leach may have drawn, inaccurately shows the location of the area the Army Corps of Engineers told him he could fill.

Mr Leach failed to file a Notice of Intent to disturb greater than 1 acre, and he failed to apply for or receive a SPDES permit at least as of May 17, 2016 (per the May 17,2016 DEC FOIL request response). This was months after he began excavation and grading.

(The annotations shown in the first page of Ms. Jenkins' statement, were inserted by the Board Secretary because Ms. Jenkins included the words " and platform" and "and raised platform" in her reading.) Page 2 of her comments are as follows:

Also, on March 4, 2016the Army Corps of Engineers directed Mr Leach not to disturb or fill or grade any part of the property except for a small area directly behind the transfer station which he could access via the adjoining commercial driveways (see aerial), until a Federal Wetland Delineation had been completed and until the ACE issued a Jurisdictional Determination...at least as recently as of 4/26 2016....that had not been done...but Mr Leach continued excavating and filling in the property. Email from Aaron Smith, ACE

Instead, of complying with the conditions placed upon him by Cortlandville...Mr Leach built the raised road off Rt 13 along with raised platforms . He did this without having gotten the permission from any board in this county . No SEQR work was done, no drainage studies were done, no traffic studies were done, no archeological studies were done, no clearance was obtained from the NYS Office of Parks and Historic Preservation.

The area Mr Leach excavated, logged, filled and graded is in an area that is termed archeologically sensitive per New York State because historically the Tioghnioga was an important trade and travel route for the Onondaga Nation, with at least seasonal fishing villages along its shores.

My lawyer used to work for the DEC in the Division of Water in the Syracuse office.

When my lawyer brought upm the issue of the archeologically sensitive area, per the NYS DEC map, and that the DEC had to get clearance through the NYS Office of Parks and Historic Preservation before they accepted Mr Leach's Notice of Intent to Disturb Greater than one acre, and before they issue a SPDES permit, Tim DiGuilio of the DEC referred the investigation to the Acting Regional Director of Region 7, on May 20, 2016. The chief legal counsel for the Onondaga Nation is following up on this as well.

*Mr Leach has been fined by the DEC...(incorrect she said) I am waiting for my FOIL request response to show how much Mr Leach has been fined and the record of violations of NYS Law.

For all of the above reasons, I am requesting that you instruct Mr Weber to issue a stop work order .....and then under section 86-15 D direct Mr Weber to issue an injunction and then obtain an order for removal of the raised road off Rt 13 and the raised platform areas.

In the event that Mr Leach chooses to try to appeal to the NYS Court of Appeals to try to convince them to reverse Supreme Court Judge Cerio's ruling of May 23,2016, I request that when Mr Leach loses that appeal, you then direct Mr Weber to issue the injunction and then to obtain on order for removal of the raised road and filled/ raised areas which Mr Leach built off State Rt 13.

Any less action by this board would further the appearance of impropriety and conflict of interest under NYS Town Law because it would appear that Mr Leach has received preferential treatment.

Thank you,

*Ms. Jenkins indicated that she found out today that Mr. Leach has not yet been fined, but the DEC has issued a Notice of Violation and a Cease and Desist Directive, dated May 19th, 2016.

Ms. Jenkins reported that the NYSDEC "*is in the middle of their investigation; they have not decided yet what the violations and fines will be.*"

Ms. Jenkins continued: *"I learned also that Mr. Leach labeled the photos of the raised platforms that he built south of the new road that he built, he labeled them as his 'Roll-Off Container Parking, Storage Area,' but very importantly, as part of the DEC's investigation into my complaint, the DEC requested, formally written requested, Mr. Leach to give them the measurements of the land that he disturbed. Today I informed the DEC that Mr. Leach provided them with false information about the amount of the land that he's disturbed, excavated and filled. He provided the DEC with measurements for only some of the land he disturbed, while he failed to include the raised filled areas and the entire length of the road that he built and all of the other disturbed areas. I asked the DEC to come down to Cortlandville and to take measurements for themselves because of Mr. Leach's serious omission.*

"So then, going back to—for all of the above reasons I am requesting you to instruct Mr. Weber to issue a Stop Work Order, even though the DEC already did because I complained to them. And then, under Section 86-15D, please direct Mr. Weber to issue an Injunction and then to obtain an Order for removal of the raised road off of Route 13 and the raised platform areas that Mr. Leach built with no one's permission. In the event that Mr. Leach choses to try to appeal to the NYS Court of Appeals to try to convince them to reverse Judge Cerio's ruling of May 23rd, I request that when Mr. Leach loses that appeal, because he will not qualify for a use variance and he will not get that ruling overturned I am very confident, that you then direct Mr. Weber to issue the Injunction and then to obtain the Order for removal of the raised and filled areas. Of course, then the areas should be replanted and of course the Onondaga Nation will—well I can't speak for them—but the Office of Parks & Historic Preservation is going to be part of this investigation too. Any less action by this Board would further the appearance of impropriety and conflict of interest under NYS Town Law because it would appear that Mr. Leach has received preferential treatment. Thank you."

Chairman Plew asked if there were any other questions/comments from the audience; there were none.

With everyone heard who wished to be heard,
Chairman Plew closed the Public Hearing at 6:50 p.m.

PUBLIC HEARING #2

Angeline McClory, Applicant/Donald & Angeline McClory, Reputed Owners – 1086 Starr Road – TM #96.09-04-13.000 – Area Variance for Front Yard Less Than Allowed

Chairman Plew recognized the applicant who was seeking an area variance to construct a deck on the front of her home. The proposed deck is five feet over the required setback. Member Finn commented that he had visited the site and felt the request was reasonable.

Chairman Plew asked if there were any other questions/comments from the audience; there were none.

With everyone heard who wished to be heard,
Chairman Plew closed the Public Hearing at 6:53 p.m.

DISCUSSION/DECISION

Chairman Plew reiterated the appellant was asking for a variance of five feet and that her husband is in a wheelchair.

After a brief discussion, **a motion was made by Member Lenore LeFevre to grant the area variance for a front yard less than allowed, as requested. The motion was seconded by Member Joanne Aloi, with the vote recorded as follows:**

Ayes:	**Chairman Plew**	**Nays:**	**None**
	Member Finn		
	Member Bilodeau		
	Member LeFevre		
	Member Aloi		

Motion passed.

This becomes Action #17 of 2016.

PUBLIC HEARING #3

Roger Wagner, Applicant/Christopher Calabro, Reputed Owner – 873 NYS Route 13 – TM #95.16-02-72.000 – Area Variance for Building-Mounted Illuminated Sign

Chairman Plew recognized the applicant who was seeking an area variance to illuminate a building-mounted sign on the proposed Moe's Southwest Grill building (formerly Ponderosa). A variance is needed to allow for signage above the height of the wall, in addition to illumination. Mr. Wagner presented a new façade which was different from the one submitted to the Planning Board earlier this month; the Planning Board had asked the owner if Moe's could come up with a design "less garish."

There will be one sign facing the front, just below what the actual peak of the roof line is, 21 feet. The sign dimension is now 54 square feet; PZO Weber advised that this size would be in compliance, but the sign still extends above the wall of the building.

Chairman Plew asked what the hours of operation would be for the restaurant, and Mr. Wagner responded from 11 a.m. to anywhere between 10 and 11 at night. Time for the illumination of the sign was discussed.

Chairman Plew asked if there were any other questions/comments from the audience; there were none.

With everyone heard who wished to be heard,
Chairman Plew closed the Public Hearing at 6:57 p.m.

DISCUSSION/DECISION

After a brief discussion, **a motion was made by Member Tom Bilodeau to grant the area variance, as requested, with the illuminated sign to be turned off one hour after closing. The motion was seconded by Member LeFevre, with the vote recorded as follows:**

Ayes:	**Chairman Plew**	**Nays:**	**None**
	Member Finn		
	Member Bilodeau		
	Member LeFevre		
	Member Aloi		

Motion passed.

This becomes Action #18 of 2016.

DISCUSSIONS/DECISIONS

Request by Pam Jenkins - Review of Zoning Officer's Determination – 1834 NYS Route 13 – Leach Properties, LLC

PZO Bruce Weber advised the Board that they needed to go back to this matter. But first, he stated the following:

> *"I do have a couple of things I would like to say. Ms. Jenkins has brought up a lot of issues that are not related to the request that was made which was my determination; she asked me to revoke the permit that I had issued. The only permit that I have issued is a Development Permit for fill. It was in compliance with the Town's regulations. The driveway/roadway that was constructed is only for that fill and has nothing to do with any 9-acre expansion. The sections of the Town Code, Section 86, is the Fire Prevention and Building Code Administration and Enforcement which is not my jurisdiction. My jurisdiction was only the issuance of the Development Permit. The area that Mr. Leach filled for the roadway is not in the floodplain and, as such, did not require a Development Permit. If I understood correctly, Joanne, at the last meeting did you indicate that there used to be a roadway there?"*

Member Joanne Aloi responded: *"Well, a driveway. The curbing has been, was cut down for a driveway and there was a footprint of a driveway in the past."*

PZO Weber continued: *"So this area that Mr. Leach developed in regard to the jurisdiction of the Town, the only jurisdiction we have is the Development Permit. I had indicated to Mr. Leach that it appeared he had disturbed more than one acre. I do not have any definitive knowledge that that is more than one acre. That's why the DEC has been contacted, that's why the DEC is involved. I have no ability to enforce DEC or Army Corps of Engineers, or NYSDOT regulations. I have no authority to enforce any of those regulations. And Ms. Jenkins has been in touch with the DEC, the DEC is evidently reviewing the situation, and that is part of the process; Mr. Leach needs to be in compliance with each regulatory agency, and my only regulatory approval here was the Development Permit for fill in the area that was approved by the Army Corps of Engineers, and that's all that I have approved."*

Town Attorney Folmer then stated to the Board: *"I think you had a request by Ms. Jenkins for you to take affirmative action with regard to directly Mr. Weber to take certain steps, the Injunction, the Cease Order, and so on. And, Ms. Jenkins is entitled to know whether or not this Board is going to honor that request or not. And you've heard Mr. Weber's indication that, in his opinion, the only regulatory authority he has he exercised by exercising, by granting the one permit that he was required or asked to grant, and that when he became aware of the fact that there had been more than the appropriate amount of dirt moved, he advised Mr. Leach that the DEC needed to be involved and a SPDES Permit would be necessary. I think the question that you have to answer is: Do you believe that Mr. Weber is correct with regard to him limited involvement, at which point you are not going to direct him to do the things that Ms. Jenkins has asked you to do, or—if you don't agree with Mr. Weber's determination, then you need to decide whether or not you are going to direct Mr. Weber to take the actions Ms. Jenkins has asked."*

After a brief discussion, **a motion was made by Member LeFevre that the Town of Cortlandville Zoning Board of Appeals denies Pam Jenkins' request to ask PZO Weber to issue a Stop Work Order, Injunction, and obtain an Order for removal of the raised road/platform areas because PZO Weber acted appropriately. The motion was seconded by Member Bilodeau, with the vote recorded as follows:**

Ayes:	**Chairman Plew**	**Nays:**	**None**
	Member Finn		
	Member Bilodeau		
	Member LeFevre		
	Member Aloi		

Motion passed.

This becomes Action #19 of 2016.

Town Attorney Folmer then advised the Board that they needed to indicate in their Minutes that they have not included the Cease and Desist Order in that determination, and the reason that was not done is because the NYSDEC has already issued same. Member LeFevre then reiterated that this Board is, in fact, not making a decision regarding the Cease and Desist Order because that has already been dealt with by the DEC. The Board agreed this was their understanding.

Leach Properties, LLC, Applicant/Suit-Kote Corp., Reputed Owner – Lorings Crossing Road – TM #s 77.00-04-11.111 & 11.112

Town Attorney Folmer reminded the Board that, as stated in his opening statement, they needed to make their record clear by rescinding the motion that was made granting a rehearing.

With no further discussion, **a motion was made by Member John Finn that because of the County of Cortland Supreme Court Decision & Order of 23 May 2016 (Index No. 2015-720), the Town of Cortlandville Zoning Board of Appeals rescinds Action #15 of 26 April 2016 in which it agreed to rehear the application to expand a junk yard. The motion was seconded by Member LeFevre, with the vote recorded as follows:**

Ayes:	**Chairman Plew**	**Nays:**	**None**
	Member Finn		
	Member Bilodeau		
	Member LeFevre		
	Member Aloi		

Motion passed.

This becomes Action #20 of 2016.

ADJOURNMENT

At 7:15 p.m., on a motion by Member Aloi, seconded by Member Bilodeau, with everyone present voting in the affirmative, the meeting was adjourned.

Joan E. Fitch, Board Secretary

Emailed to KS/KP, Bd. Members, JBF, BW, DD, DC on 6/9/16.