

Town of Halfmoon Zoning Board of Appeals
Meeting Minutes
December 5, 2011

Chairman Hansen opened the meeting of the Town of Halfmoon Zoning Board of Appeals at 7:00 p.m. on Monday, December 5, 2011 at the Halfmoon Town Hall with the following members present:

Members: Vice-Chairman Tedrow, Mrs. Jordan, Mr. Brennan
Alternates: Mr. Burdyl and Mrs. Smith-Law
Town Board Liaison: Paul Hotaling
Town Attorney: Mrs. Murphy, Mr. Chauvin
Town Planner: Mrs. Zepko
Secretary: Mrs. Mikol

Chairman Hansen commented that Mr. Burdyl, Alternate would be voting tonight in the absence of Mr. Rose.

Motion was made by Mrs. Jordan and seconded by Mr. Burdyl that the minutes from the November 7, 2011 meeting be approved. Motion carried.

Joseph Lynch, 81 Sheldon Drive

The public hearing opened at 7:10 p.m. Chairman Hansen explained that should the Board feel that the application is complete they would set a public hearing for the next meeting of Monday, January 3, 2012.

Chairman Hansen commented that the actual site plan with the application did not show the location of the deck and sunroom on the house.

Mr. Lynch was present and explained to the Board that he received a building permit from the Town for his deck back in July 2010. I have the approved building permit from the Town, the approved letter from Sheldon Hills Homeowners Association and the approved deck plans. The deck was built strong enough to handle a sunroom in the future and I have the certificate of occupancy from when the deck was completed. Mr. Lynch explained that he never thought there would be a problem to build a sunroom when the house was built. We decided to wait because of the cost factor. At no time, did anyone from the Building Department ever say to me that you could not build a sunroom on a deck.

Now we are ready for the sunroom and I applied for the permit and was denied by the Building Department because it did not meet the required 25' side yard setback. If you look at the plot plan given to you now you will see that we are looking at approximately 10' that we would be encroaching on the 25' setback line. I would like to have it approved.

Mr. Lynch explained that the property to the right of him is forever wild; there is a stream that runs through there. To the left is a neighbor and the way the house is situated that she can only see a corner of the sunroom. To the rear of my property are the lands of Pingelski and we won't bother anyone in that direction, it's old farmland. Photos were submitted to the Board of the rear of his property for the record. According to the photos you will not be able to see the sunroom from the road.

Chairman Hansen commented that tonight we are here to determine if you have enough information to proceed to a hearing. I think that the interpretation of the building and zoning ordinance is that open decks do not have to meet the setback requirements because they are open. When you put a structure on them like an enclosed porch then you start to encroach and that is the building encroachment. That is why we could have issued a deck permit that would encroach on the backyard. They can't issue a building permit for a structure other than a deck.

Mr. Lynch commented that it confuses him a little because the gentlemen who approved the deck, the gentlemen from Comfort Windows who is my contractor, who talked to him about it he said that the deck should have never been approved either. I am just a little confused. The inspector from Halfmoon Building Department said it was an illegal deck.

Chairman Hansen commented that other towns interpret it differently but our ordinance allows for a deck. Our inspector from this Town said it was an illegal deck?

Mr. Lynch commented, yes it was Mr. Milkiewicz. David Milkiewicz.

Chairman Hansen commented that this deck definitely needs a variance if you want to put a sunroom on it, which is what you are planning to do now. It would be helpful if you could submit a plan that shows the dimensions to the property line for the public hearing.

Mr. Lynch will drop off a copy to the Town.

Mrs. Zepko commented that she would like to clarify for the record that our rear yard setback definition states that "an open space extended across the entire width of the lot between the rear wall of the principal building and the rear line of the lot, and unoccupied except for accessory building and open porches." I wanted to make sure that was said for the record.

Motion made by Vice-Chairman Tedrow and seconded by Mrs. Jordan to set a public hearing for Tuesday, January 3, 2012 at 7:00 p.m.

Motion carried.

Stewarts, 454 Route 146

Chairman Hansen commented that the next item is to reconsider the Stewarts matter. We have had two meetings on so far.

Vice-Chairman Tedrow is recused from this item. Mrs. Smith-Law will be the alternate on this case.

Mr. Tom Lewis, Ms. Jennifer Howard and Mr. Pat Russo, Real Estate for Stewarts Shops were present.

Chairman Hansen asked Mr. Lewis to please update the Board on what happened since the last time you appeared before the Board.

Mr. Lewis commented that because we have Attorney's at the table tonight that were not here previously and didn't hear the evolution that we went through which shows the case that we are looking for the minimum variance possible. We have gone through a lot of changes. I will hand out the packet of changes to the Board. There are only two color copies because our color copier broke.

Mr. Lewis told Chairman Hansen that he would do it briefly.

Mr. Lewis commented that the first sheet was for the first application that includes a renovation of the shop, not a whole new building but we added behind the shop and a new gas island with a bank and drive-through. We went to the Planning Board and they felt that we were asking for more than what was reasonable. The Planning Board said they would need a lot of variances. The second sheet showed the elevation without the bank and drive-through and without purchasing the \$280,000 piece of property.

We ran it by the Planning Board Members and they wanted a newer building with the additional property. Third page shows the signing of the land contract and the new building and gas island are shown on the plan. The gas island and the building are not within the building envelope and again would need variances. Then we went to page four to Planning Board, which needs a very small variance for the gas canopy of less than 1% with the landscaping. At the last Board meeting there was a lot of discussion on the curb cut on Plant Road and some of the Board Members felt that they needed legal council. I did phone Mr. Watts at the Planning Board and as Mr. Brennan has said, the Planning Board has not thoroughly looked at that. The Planning Board looked at it at the first and second meeting, they seemed fine with it. There was some discussion but not a thorough discussion. I asked if we could go back to the Planning Board again before coming back to the Zoning Board and resolve the issue of the curb cut. Had we gone in with the design before we changed it we would have needed a 40' variance and 15' variance. With this latest drawing we are down to a 9' variance. Mr. Watts said let me think about it and I will get back to you. I am not sure if he spoke with the Attorneys or not but he said that you should go to the Zoning Board.

Mr. Lewis commented that we are here to make a case for an extremely small variance of less than 1% along with the balancing test, the benefit to the applicant vs. any detriment to the neighborhood. We believe, in fact, that this is a benefit to the neighborhood because it makes not a very good situation substantially better with the circulation and more parking. We certainly went through many different designs and brought it down to the minimum.

Mr. Burdyl asked Mr. Lewis about the diagram of the buildable area with the small variance being sought.

Mrs. Jordan commented that she would like to ask Council before getting more involved, the pervue of the Zoning Board is to consider only this variance and we are not to consider the curb cut at all, is that correct?

Mrs. Murphy commented, yes that is correct. The curb cut is unrelated to the variance issue. They are not asking for a variance to have the curb cut. That is a Planning Board issue. The Zoning Board's only issue is the variance which is the canopy of the gas pump.

Mrs. Jordan commented, thank you.

Chairman Hansen commented that he did get an e-mail, which was passed around to everybody to that effect.

Mrs. Smith-Law commented, just to clarify, the last time this property was before the Zoning Board of Appeals for a variance, the curb cut was denied by the Zoning Board.

Mrs. Murphy commented that was because the entire site plan had to do with where the access would be. It was seen as a brand new application asking for the access to the site off Plant Road and Route 146.

Chairman Hansen commented that just for the benefit of those who are here tonight does anyone else have any comments to make.

Mr. Leonard, 145 Plant Road commented that he lives directly behind Stewart's. I just want to make it clear as to what we can talk about. We were at the last meeting on November 7, 2011 about our concerns. I guess the only thing we can address now is the variance, is that correct?

Chairman Hansen commented, yes that is correct.

Mrs. Murphy, Town Attorney commented, the minutes will be forwarded to the Planning Board for their meeting on Monday, December 12, 2011. Everything you have voiced as a concern regarding ingress and egress will go to them. The Planning Board is aware of your concerns and will have that while they review their site plan. This Board's pervue is to address the variance request and not the matter of egress/ingress.

Mr. Leonard, 145 Plant Road asked if there was a chance going ahead at the Planning Board meeting to get up and voice our concerns?

Mrs. Murphy, Town Attorney, commented that the Planning Board would not have a public hearing normally just because it is for a site plan approval. It is not required by statue. The Board has all of your concerns voiced in writing and will be carried from one Board to another Board. So will there be a public informational meeting? I can't say that, it's the Board's pervue. Legally it's not required. However, the Board will be aware of what your concerns are.

Mr. Leonard, 145 Plant Road commented that are numerous plans with the larger retention area. Can we comment on that later?

Mrs. Murphy, Town Attorney commented that you could always put your comments in writing to the Planning Board so they are aware of your concerns. I just can't tell you that they will hold a public informational meeting because they are not required to do so.

Chairman Hansen commented that one other concern that the Leonard's have was the fencing. I believe Stewart's has agreed to put that in, is that correct?

Mr. Lewis commented yes, that is correct. At the first and second Planning Board meeting Mr. Leonard asked for a fence that is of the same kind that Mr. Tanski did at the Sunoco Site and we said, yes we would do that.

Mrs. Murphy, Town Attorney commented that will now be on the site plan.

Chairman asked if there were any more questions from the public or Board?

Motion made by Mrs. Smith-Law and seconded by Mrs. Jordan that the public hearing be closed at 7:33 p.m. Motion was carried.

RESOLUTION OF THE TOWN OF HALFMOON ZONING BOARD OF APPEALS FOR GRANTING OF AN AREA VARIANCE APPLICATION FOR STEWART'S LOCATED AT 454 State Route 146, TOWN OF HALFMOON.

WHEREAS, on Monday, October 3, 2011 an application was filed with the Zoning Board of Appeals of the Town of Halfmoon (the "Town") by Stewart's for approval of an area variance located at 454 State Route 146 in the Town of Halfmoon and

WHEREAS, the submitted site plan titled "Stewart's Plant Road, 454 Route 146" with a date of 6-23-10 and created by LH Rutland, Jr. P.E. and depicts a parcel SBL # 272.3-3-7.2 that is within the Town of Halfmoon's C-1 Commercial Zoning District, and

WHEREAS, the plan detailed above depicts a relocation of the existing Stewart's store together with an expansion to four gas pumps covered by a canopy, and

WHEREAS, the proposed canopy requires a variance as it extends approximately nine feet into the set back restrictions required in a C-1 Zone, representing a variance of less than one percent, and

WHEREAS, a Public Hearing was held at the Town of Halfmoon Town Hall on November 7, 2011, and December 5, 2011, where the applicant provided details supporting the application and neighbors expressed their opinions regarding the propriety of granting the area variance, and

WHEREAS, the Zoning Board of Appeals considered all of the evidence and testimony presented regarding this application together with the standards as set forth in Section 267 of the Town Laws of the State of New York,

NOW THEREFORE, BE IT RESOLVED by the Zoning Board of Appeals of the Town of Halfmoon at its meeting of Monday, December 5, 2011 during its regular session duly convened as follows:

- That the applicant has shown that the granting of the area variance will not produce an undesirable change in the neighborhood or be detrimental to nearby properties as the property is currently used for a Stewart's and the variance requested occurs more than ten feet off of the ground. The area variance will also permit a more orderly traffic flow through the existing parcel.
- That the testimony as put forth by the applicant demonstrated that the configuration as set forth on the site plan was the best design for the projected canopy with the least violation of the Town's Local Laws as they relate to zoning.
- That the variance requested represents less than one percent of the site plan and is therefore not a request for a substantial variance.
- The requested area variance shall not have a detrimental effect on the physical or environmental qualities of the neighborhood as the use will not change and the variance involves only a canopy extending into the required setback.
- The hardship is self-created in that the applicant is choosing to reconfigure the current site plan.
- The area variance is hereby granted.
- This resolution shall take effect immediately.

Motion was made by Mrs. Jordan and seconded by Mrs. Smith-Law. Motion was carried unanimously.

John Forino, 14 Upper Newtown Road

Chairman Hansen commented that this a public hearing of a new application made by Mr. Forino of Upper Newtown Road. The public hearing opened at 7:35 p.m. The applicant wants to use an existing building on their property as a fabrication and welding shop.

Mr. Rabideau was present from VanGuilder and Associates. Mr. Watkins, Attorney for Mr. Forino was also present. On October 26, 2011 Mr. Forino submitted to the Zoning Board an application for a use variance at 14 Upper Newtown Road and at the November 7, 2011 Zoning Board meeting this public hearing was scheduled. Basically, we are requesting a use variance for a 3.2-acre parcel that was subdivided this summer by the Planning Board. The lot has been established around the 4,000 sq. ft. warehouse. The reason we are going for the use variance is because we feel that the parcel that was created was a commercial use for about 100 years. The commercial aspect of the parcel just in the last few years has ceased the commercial use but the commercial building is still there. The material submitted at the last meeting also applies to the new application. The packet had mapping in it showing AR versus the area that is LI-C. It also shows the people that were in favor of the proposal by the shading shown on the map surrounding the parcel. The first meeting to this application we have added two more parcels. You can visually see the people who are in favor of this parcel and some of the people that are not in favor. The second page shows one of the criteria that we need to meet. We are not changing the character of the neighborhood.

Chairman Hansen asked Mr. Rabideau if he handed out maps tonight? Mr. Rabideau commented that they were handed out with the application at the last meeting of November 7, 2011. The plan's submitted to the Board showed the different parcels that Mr. Forino owns and how they were created. There is public water on Upper Newtown Road and sewer is anticipated next year. This is a very viable parcel for LI-C type use. Zoning history was shown on the next few photos based on Town history starting in 1971 when the site was being used and zoned as C-1, Commercial from the road 1000 ft. back. The zoning changed or modified in 1995 and was still LI-C 100 ft. back from the road. In 1997 the zoning was modified to A-R Agricultural Residential. That is the zoning history of the parcel. Photos were given to the members. One was an aerial taken north of Upper Newtown Road. The google maps were recently updated to October of this year. The other four photos' are of the actual building we are trying to get the variance for. It's the side of building which is right near the tracks. The next photo is from the front of the building looking across the tracks to a building on the opposite side of the railroad which when we were out in the field last time we could not see because of the leaves on the trees. The third photo is a clearer picture of that building. That building was part of the commercial operation back in the day when it was active. It is now abandoned but it was an active commercial building. The last photo is the front of the building when it was a commercial building.

Mr. Grey Watkins, Attorney for Mr. Forino stated, the criteria that we think has been established to justify the Board to grant a use variance is set forth in the application. In order to establish the unnecessary hardship that is required by the zoning ordinance in order for a use variance to be granted are four criteria's set forth. We addressed each of these criteria in the application. As corrected, as we said, this is a new application.

- o The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence. There is some evidence of that submitted to the Board. I know there was considerable evidence during the period of time the property was listed as AR use without any interest at all. That is competent financial evidence but just to repeat some of what Mr. Rabideau has said, and not just to read the application to you, the history of this parcel clearly shows that it was designed and intended and used for commercial and industrial purposes for in the neighborhood 100 years. It could have continued to be used as such despite the zoning change in 1997 except there was a discontinuation of use of this building. Although a use variance application is for a parcel of land, in this case it's really for this unique 4000 sq. ft. building that would be hard to use for anything other than a commercial industrial use. Mr. Forino intends to relocate his business there. The unnecessary hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood. Specifically we have tried to use the parcel and sell it to get a reasonable return within the existing zoning and it has not worked. He has a perfect use for it and Mr. Forino's home being adjacent on an adjacent separate parcel for him to go out his back door and go to work and operate his business out of the existing building would be ideal for him and it certainly would not be an unusual type use considering the use of the other buildings in the neighborhood both historical and present. As Mr. Rabideau indicated, everything to the north of this parcel is commercial and industrial zoned and much of it is being used. Certainly there is a very significant potential for that very large parcel immediately to the north to be developed accordingly despite the wetlands. That is what nation wide permits are for. With public water and sewer that parcel will be developed in a matter of time and you folks will be getting applications on the Planning Board for that. We feel that we have addressed the first criteria.

- That the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood in the sense that much of the surrounding neighborhood is commercial industrial zoned and will continue to be used as such. Its this parcel with the 4000 sq. ft. building on it only that is challenged by this zoning because there is no appropriate use for that building other than a commercial industrial use. In that sense, it is unique.
- That the requested use variance, if granted, will not alter the essential character of the neighborhood. Based on what has been explained and after a sight visit and that speaks for its self. Much if not all the surrounding property is commercial and light industrially zoned. Much of the parcel to the north being exactly in that way in that distant future. I can't see that it would alter the essential character of the neighborhood since the historical character of the neighborhood is commercial and industrial.
- The alleged hardship has not been self-created. Certainly it has not been self-created in the sense that when Mr. Forino purchased the property attempted to use it for the current zoning. This particular piece is somewhat unique because of the structure that is on it. No one has had any interest in purchasing any of the other parcels of agricultural residential property that are adjacent. Those parcels are subdivided into separate parcel. Presumably because of the close proximity of other commercial industrial property. It is not a self-created hardship, in a sense we are trying to turn back the clock so that we can simply use this one parcel not the rest of the parcels that he owns which is not asking for a variance for its original intended use and for the same use which is what the adjoining properties are being used for that is commercial and industrial.

In that sense, I think we have met the requirements for use variance by establishing those four criteria to show that the Forino's are experiencing an unnecessary hardship.

Chairman Hansen asked the Board if they had any questions or commented to make.

Mr. Burdyl asked Mr. Watkins when did his client, Mr. Forino buy the property? Did your applicant use a real estate agent?

Mr. Watkins commented in February 2007. Mr. Forino did not use a real estate agent to purchase the property.

Mr. Forino commented that he purchased the house parcel in 2005 on a separate parcel.

Mr. Burdyl asked at the time of your closing did your attorney advise you on the zoning regulations?

Mr. Forino commented that no his attorney did not advise him on the zoning regulations but he was aware of the current zoning when he purchased the property.

Mrs. Jordan asked Mr. Watkins, in not self-created. In your explanation of it not being self-created you sort of tied it in that they couldn't get a reasonable return on the investment. They are two separate criteria and two separate prongs of the test. I would like to hear another argument on how it's not self-created.

Mr. Watkins commented that it's not self-created in the sense that it was not an intentional or deliberate act on the part of the applicant. Not with the expectation of "oh, I'll buy it and get a variance on it for whatever I want." That is in my opinion, a self-created hardship. That is a deliberate self-created hardship. For any use variance, give me an example of something that isn't a self-created hardship and you can convince me. Mr. Forino did attempt, and make a very good faith effort, to use it for it's intended in zone use for a period of time. How long was this property on the market? It was on the market for 544 days. In that sense it is not a self-created hardship.

Mrs. Murphy, Town Attorney, commented that the applicant interprets the law in a way that I would not interpret the law and the Board needs to be aware. I will not comment unless you have additional questions for me.

Mr. Burdyl asked, Mrs. Murphy, Town Attorney, we found a document under Town Law Section 267 in our packet here tonight; did you prepare that for us?

Mrs. Murphy, Town Attorney commented that she did not prepare it for you for the purposes of this hearing but it is a document that I do rely on when I am reviewing variances.

Mr. Burdyl commented that in Section E, I did not see that section in the Zoning Code.

Mrs. Murphy, Town Attorney commented that section that has been established through case law and it kind of incorporates the other criteria that the Board utilizes it is almost a catchall. You have to have the four prongs and if you have the four the fifth one falls right into place. It is a rewording of the other four. It's established through case law.

Mr. Burdyl asked if that is the reason it's not in this booklet?

Mrs. Murphy, Town Attorney commented, yes that is correct. This is a combination, as you can see. It talks about case law and it refers to specific findings with regards to what doesn't constitute a self-created hardship. If you purchase the property and it's zoned a certain way case law is very clear that is by definition a self-created hardship.

Mrs. Jordan commented that she would like to go a little further on that in self-created hardships. I know when we go to an educational class every year for the Zoning Board of Appeals, it seems that the case law has taken it further in that a property owner is bound by zoning restrictions even if he or she doesn't have actual knowledge of them at the time of purchase. How would you answer to that?

Mr. Watkins, Attorney, commented that as he said before that if you apply those criteria specifically, no use variance could ever be granted, in my opinion. I think that my opinion is that the purpose of that is to prevent someone, and Mrs. Murphy is certainly entitled to disagree and you should take advice from her she is your Attorney, the purpose of that criteria is to prevent people from taking advantage of the restrictions on the orderly and predictable and legal development of real property within your municipality by purchasing something knowing that it's not appropriate for a use and disregarding that and intentionally trying to do something different with it. That is not what is going on here. Here from Assist-to-Sell Julie Fontaine, you folks were given from the last application June 23, 2011. There were no interest in the two acre parcels which he attempted to sell for residential purposes even at such a low price between \$50-\$70,000 and they were listed for 544 days without one offer. I don't disagree in what you are saying but if it was purchased with the intention of using this parcel for industrial or commercial purposes knowing that it was agricultural that would be self-created and that is not the case and that is the point I am trying to make.

Mr. Rabideau commented that when, the Forino's bought it in 2007 they had a viable business, Kodiak Steel in Stillwater. They did not buy the land to use this building for the business. In 2008 when the economy went down hill, commercial building construction, which Mr. Forino was in, basically dried up. Mr. Forino didn't buy the land in 2007 to set up his business it was almost within a year the economy collapsed. What could he do? The commercial building industry is gone basically he still has a talent for welding and small metal fabrication. If you look around these are his assets. Mr. Forino has a 4,000 sq. ft. building in the back, which would fit his need to down size his business. That is the reason why we are here tonight, to be able to utilize this building. It wasn't to me a self-created hardship. That was never the intent to buy this parcel. It just happened so everything went bad within the year; he looked at his options and said this is an option. I need to apply for a variance to use it. I believe that would help to clarify it not being a self-created hardship.

Mrs. Jordan commented that at the same time, and I am sorry with Mr. Forino, when we are considering a use variance we are considering that it is being created for the land, not for the person. Not for the hardship of the person, it's a hardship for the land.

Mr. Rabideau commented, yes, that is correct but Mr. Forino fell into it. It's not self-created in that sense.

Mr. Watkins, Attorney commented that was the point I was trying to make and I appreciate your help, Mr. Rabideau. The fact is that Mr. Forino took the smallest parcel he had with this building on it. A building that has no practical or commercial value if the current zoning not the past zoning is applied to its use whatsoever. Let's ask the Board for guidance, what is to be done in this situation other than to apply for a use variance? If you apply the criteria of self-created hardship as you're proposing, then we are creating a worthless piece of property for Mr. Forino.

Mrs. Murphy, Town Attorney, commented that she is advising the Board not to give ideas with regards to solving the applicant's problems. Your pervue is with regards to this variance and whether or not to grant it. The applicant was advised prior to creating this parcel, which was just created in the last 2-3 months, that creating the parcel was in no way a guarantee that he would be able to utilize it in the manner to which he is now proposing before this Board. Just so you are clear, because you were not a part of that process.

Mrs. Smith-Law commented that this parcel was for sale for Residential/Agricultural use and you have one statement from one realtors, I believe it is. Do you have any comparisons for similar types of lands represented by other realtor for how long they have been on the market? This economy is not great and parcels sit so is this an unreasonable amount of time for a parcel such as this to be on the market?

Mr. Watkins, Attorney, commented 544 days I am not a realtor or a licensed appraiser but I handle quite a bit of real estate closings.

Mrs. Smith-Law commented but in this economy it's less than 2 years. Is that unreasonable or unusual in this economy for a similar type of parcel?

Mr. Rabideau commented that he agrees with Mr. Watkins on the time frame. It is quite extensive but the average parcel in the area was selling from \$50-\$70,000 and they were within that range. That is a going price it's not over and above.

Mrs. Smith-Law commented with that price how long of a period of time? The assumption or gut feeling is on the part of the owner is that it is an unusually long amount of time for that parcel not to be sold. Is that a personal feeling or is it backed up by fact?

Mr. Rabideau commented 544 days. We have information from Mr. Forino's realtor not other ones. It would be based on the realtor and their experience in the area. The feedback they were also getting was the fact that it was very close to the railroad and was commercial on the other side of the railroad tracks. That was probably the big reason and the economy was part of it as well. Location, location, location, we are near the railroad tracks with intense commercial use.

Mrs. Murphy, Town Attorney, commented that for clarification purposes that parcel did not exist. This 3-acre parcel did not exist. This parcel has never been marketed.

Mr. Rabideau commented that we are not talking about that. We are talking about the two 2-acre parcels.

Mr. Watkins, Attorney, commented that we are just trying to clarify for Mrs. Smith-Law that this realtor's information that we have and just referred to is talking about two separate 2-acre parcels that were part of the larger Jennings parcel originally that were marked separately. Not this parcel. This parcel was never marketed. It's a 4000 sq. ft. warehouse on a residentially zoned parcel.

Vice-Chairman Tedrow commented that another one of the findings and criteria that we have to make is that the hardship is unique to the single parcel and not general throughout the neighborhood. As it's just been brought up the two parcels that were offered for sale, in fact, were just a little bit to the west of the parcel. So you presented evidence that the hardship is not unique to this parcel with the building on it that is a problem with the general area of the neighborhood. What I am saying is the fact that these parcels could not sell, the problem is not unique to this single parcel for which the use variance has been applied.

Mr. Watkins, Attorney, commented that he disagreed I don't see that it necessarily has anything to do with it. We are talking about the use of a parcel not the intended sale for its zoned appropriately.

Vice-Chairman Tedrow commented that it's his understanding that the attempt to sell is part of your case and that you couldn't get a reasonable return, which is yet another factor that has to be considered.

Mr. Rabideau commented that one of the issues here is the fact that has to be considered is the parcel that we are trying to get the use variance on abuts directly on the railroad tracks. Because of the close proximity of the railroad tracks it's almost impossible to do anything residential with that. We do have e-mail, which is in your packet from the railroad company stating that they would prefer to have this parcel as commercial. The railroads intent is to have a parcel like that create a buffer they do not like residential parcels against the tracks. They have constant problems for instance the people in Ballston Spa and the issue they are having up there. They would much rather have this as commercial use like it was before.

Mrs. Smith-Law commented that she has another question about this parcel. This parcel with this building on it was that recently subdivided? How long was that? What was the intent to subdivide that parcel?

Mrs. Murphy, Town Attorney commented the Planning Board subdivided it on September 12, 2011.

Mr. Rabideau commented it was done to create a parcel. The lot in question was not created for us being able to say we are going to get a use variance. It was created because it could be for a residential parcel.

Mrs. Smith-Law commented that you just said that it would be impossible to sell it for commercial use. So you did specifically subdivide this land with the intention that it would be for commercial use.

Mr. Watkins, Attorney commented, yes that is correct.

Mrs. Murphy, Town Attorney commented that Mr. Forino was told by the Planning Board that by subdividing this parcel it would not change its use. That they would be proceeding with that subdivision at their own risk knowing that they had to go before this Board to determine what is appropriate.

Mrs. Smith-Law commented that Mr. Forino subdivided it anyway with the hopes that they could use it for commercial use.

Mr. Rabideau commented that it was subdivided for commercial knowing that there was no guarantee and we knew that when we went in. However, it set up a parcel to present to the Board that we are only asking for a use variance on a 3-acre parcel not the entire 20+ acres.

Mrs. Smith-Law commented that I need you to tell me how this is not self created.

Mr. Watkins, Attorney commented that the self-creation would be involved from the inception not from what was done at the suggestion of whomever for the purposes of dealing with this particular parcel. What was subdivided was out of the 22-acre parcel and it was the smallest possible lot with this unique structure on it. Someone somewhere thought it was worth a try. We are not asking for use variance on the 22-acre parcel, that is why the subdivision took place. I was not involved in that but it makes sense to me that a variance could be granted for this piece but not for the remainder of the parcel. It's up to Mr. Forino what he does with the remainder of the parcel using it consistent with the present zoning.

Chairman Hansen commented that he thinks he maybe able to speak for some of the other Board members, I think one issue here in this particular parcel with the storage building on it is that you are using apples and comparing it to oranges. Your saying this because you couldn't sell 2 residential lots 1000 ft. away, you can't sell this building or use it for something else either. You never tried to market this building for any other purpose. That is what you have to show.

There are other permitted uses where we are so focused on residential and the use for residential that you ignored the fact that there are 11 other uses one or two of them may not be practical for this particular parcel. However, you haven't addressed them either. There are funeral homes, nursing homes, federal and state buildings, private or public recreation or playground area, golf course, marinas of course you're not close enough to the water but there are still places that can sell boats. Other uses are public utility, churches, cemetery, an in-home occupation, farm-related uses and a bed-breakfast homestead. You have not even begun to look into that list and other uses that this property can be used for. You subdivided out 2-lots away from this building, tried to sell them, they didn't sell and you're using that as an argument to get a variance for this building. It doesn't work, in my opinion.

Mr. Watkins, Attorney, commented that the theory is that we couldn't sell vacant land we probably couldn't sell 2 or 3 - acre parcel with a 4,000 sq. ft. building on it for Agricultural Residential uses on it.

Chairman Hansen commented you might say that, but you haven't proven it. That is the problem that you have is that you haven't proven it.

Mr. Watkins, Attorney, commented I don't say that with anything but respect for the Board but, as I said, if these criteria were applied strictly and literally in every case there is no use variance that could ever be granted.

Chairman Hansen commented that you might have hit on a universal truth here. There are cases that probably could pass the test. If you think about it, there could be cases where because of other development in an area you wind up with a parcel that is surrounded by supermarkets and a house and a commercial area near residential areas where the person trying to sell the house wants to sell it to CVS or somebody and they can't because that area was never rezoned properly. But somehow there is other commercial uses where existing non-conforming uses that have been added on to over the years that are there. So there are unique circumstances where that might apply but I guess what we are saying here is maybe you haven't proven that to us yet. That this is one of those cases. You have a mix in this area you do have commercial uses but you also have residential uses it's a mixed bag.

Mr. Watkins, Attorney commented that the history of the use of this parcel when combined with what is going on around it does make the situation of this parcel unique. If you don't feel it fits the criteria then obviously you are entitled to reach that conclusion. I don't see how it can't be considered unique and a hardship and it's not self-created in the sense that it isn't something that the applicant did in the whole disregard of the zoning rules and regulations. That is why we are standing before you today.

Chairman Hansen commented going back to what we have before us from our Attorney is a copy from New York State Town Law.

Mr. Chauvin, Town Attorney, commented that it's a combination of the statute and the case law that has been put together by Mrs. Murphy over time. We use it as a reference when evaluating a use variance.

Chairman Hansen commented that the first two paragraphs are directly taken from the Town Law. Then what you must prove is taken from case law from that point on. It would seem to me that you would have to show that this building on a separate parcel could not be used for other reasons that are permitted under the ordinance. Do you agree with that? That you would have to show this building now that it's on a separately created parcel. I think that is what's missing here. You haven't tried to market this building for any of the uses that are permitted under our ordinance.

Mr. Watkins, Attorney, commented without creating unnecessary hardship, yes.

Vice-Chairman Tedrow commented that we should not mislead the applicant. All of the criteria have to be met just not a majority. I think that the last one is the one that marks the application out of the box the self-created hardship and the finding in our guidance, which stems from case law. If the person buys the property with the zoning in place then to try to do something else that isn't permitted by the zoning through a use variance is a self-created hardship. As far as I can tell the only way you can consider a use variance is if the zoning changes for your property while you are holding it. For instance, if the ownership had been with the old zoning where apparently it was light-industrial or commercial and then it dropped back 10-15 years ago to residential the person that is holding that property at that time might have a case for use variance.

Mr. Watkins, Attorney commented that he does not disagree with that whatsoever except use variances are granted in conditions other than the one you just posed.

Vice-Chairman Tedrow commented that in this instance I don't see how that criteria can be met.

Mr. Watkins, Attorney commented that he appreciated what he is saying.

Chairman Hansen commented that other people that may want to say something about this application but I would ask that you not repeat everything that has already been said prior to this. Maybe I can't do that? Is that permissible?

Mrs. Murphy, Town Attorney commented that you could ask the residents to not be repetitive and you can always give them a time limit.

Chairman Hansen commented that if you do want to speak come up and use the microphone.

Mr. Watkins, Attorney commented that to save the Board time let us speak with our client for just a moment. On behalf of my client, Mr. Forino we would like to withdraw our application at this time.

Chairman Hansen commented to Mrs. Murphy and Mr. Chauvin, Town Attorneys if they withdraw this application will would they need to re-apply if they should come back? It would be a totally new application.

CGM Construction, 87 Button Road

Chairman Hansen explained that the applicant would like a use variance to construct a building for the purpose of storing construction equipment. The public hearing opened at 8:30 p.m.

Mr. Christopher A. Marchand was present of 91 Devitt Road. Mr. Marchand explained that he was present at the November 7, 2011 Zoning Board meeting where he submitted an application to construct a equipment garage for their business at 87 Button Road. At that time, a public hearing was scheduled for tonight's meeting and the nature of the variance that is required as I read in the public hearing notice is that Section 267 of the law that a primary structure must be in place before an accessory structure is permitted. If I understand it properly the primary structure would be a home. We are looking to construct a pole barn without a home on the property. That is the nature of tonight's variance. There were several of our neighbors that we spoke to when we purchased the property to let them know our attempt. The neighbors came to the Planning Board meeting to support us. The building is just for storage.

It would only be used during primary business hours. The neighbors know that it will not impact their lives. The neighbors were more concerned with the developments that have gone on the past with other commercial uses. RJ Valente gravel has a truck garage up the road, Mead Enterprises has a commercial construction garage within 100 yards of our proposed site, and there is a mining operation about ¼ mile up the road for several local sand and gravel companies. They seem to be generating a lot of truck traffic ours will not. Ours will be a few small trucks, rack trucks, pick-up trucks that we just need to store just in one consolidated space. We anticipate very little impact on the neighbors. We would not be changing the character of the neighborhood.

Mrs. Murphy, Town Attorney commented that everything the applicant has stated is accurate however, it is my understanding that the use variance is based on the fact that the property is zoned residential and he is proposing a commercial use not because it's an accessory building with no primary structure.

Mr. Marchand commented that it was his original understanding but when I read the flyer that came in the mail it said that so I was a little unsure of exactly what we were looking for.

Mrs. Zepko asked if there would be a residence there?

Mr. Marchand replied no.

Mrs. Murphy, Town Attorney commented that reading this I would say that his denial is in 2 parts because his building permit was denied due to an accessory structure without a primary structure but also the fact that it's a commercial use in a residential zone. You can modify your application if you would like.

Mr. Marchand commented that the variance would be for a use variance in order for us to construct this commercial style pole barn garage in this residential zoning district. We feel that while it is a residential zoned part of the Town it is very much in character with a lot of the uses on the same stretch of road. We met with all of the Zoning Members this past Saturday at the site. When you drive up the road you can see that there are 2 houses nearby the rest of the homes are surrounded by commercial uses. That is why we went out and sought this piece of land because we wanted to do something that would have as little impact as possible. We are very conscientious of our neighbors around us while people want to live in peace and quiet in their homes and don't want their way of living sacrificed by commercial use. We feel it is very private and secluded area that would impact very few people. There is not very much left in the Town to offer this kind of an area. The zoning doesn't really reflect what is around it. We feel it is a reasonable request for a use variance.

Chairman Hansen commented that based on what you heard previously. This is a previously subdivided and purchased piece of property. This all happened in the last few months.

Mr. Marchand commented that this piece was originally going before the Town for a PDD by the previous owner. The owner wanted to construct a black top and concrete recycling plant on this parcel. We approached the owner and said we are interested in this parcel and want to do something a lot less obtrusive would you be willing to subdivide a piece of land for us for an equipment garage. We thought it would benefit everyone including the previous owner who generates income from the property from us buying it, also benefits the neighbors because of a building we would use only a few times a week and is less of a burden than the concrete black top recycling plant.

Mr. Hansen commented that he doesn't have the Planning Board minutes regarding this application was this all discussed at their meeting?

Mrs. Murphy, Town Attorney commented that as far as what the use is, yes that was discussed at the Planning Board. The Planning Board gave the same warning that they gave the other applicant when they subdivided off the property that there is no guarantee that this Board would grant a variance and that is a standard that is very difficult etc. As far as the blacktopping that was not discussed as part of the Planning Board.

Mr. Marchand commented that the PDD might have been applied for a year ago.

Mrs. Murphy, Town Attorney commented that it was just not discussed.

Vice-Chairman Tedrow commented that we have the same fundamental issue on this as we did on the last one in terms of self-created hardship.

Mrs. Murphy, Town Attorney commented yes, that is why the applicant was originally going to do a PDD on the parcel before because they couldn't get around the difficulty with the use variance.

Vice-Chairman Tedrow commented Stewarts wanted an area variance not a use variance they already have the use. With a use variance you're changing or erasing something that the Town Board has created in the basic zoning and the land use pattern. So the test for the use variance is much tougher than for an area variance.

Chairman Hansen commented that Stewarts is in a commercial zone. It is a legally permitted use so the variance request they had was for the corner of the canopy over the gas pump islands will encroach slightly on the rear yard setback by 8'. It is a small piece of the canopy and it has nothing to do with the use of the property. They are already a permitted use, they are in a commercial zone it is a completely different set of tests. Whereas you are asking and what Forino is asking is to put a use on the property that is not permitted on the property at this time because of the way it is zoned. Your property is zoned residential and Forino's is agricultural residential which is similar. It is almost the same thing except the lot size in AR is a little bigger than a residential zone. But that is the difference and why there is different tests for use variance requests.

Mr. Marchand commented that is true that the previous owner, and I understand that we have to look at the four tests and the first three we passed with flying colors but when it comes to the hardship I feel like its almost not entirely self-created. We sought this out because it was in an area that was surrounded by other similar uses. Granted the technically of the zoning creates this hardship but I don't necessarily feel that it was self-created. It was sought out with the intent of doing the best for everybody in a spot that no neighbors object to. It is in an area spot that surrounded by more commercial uses that generate more traffic than we would. I don't feel that we have created a hardship because we sought out this parcel because we felt it was compatible with everything around it. I guess the definition of hardship is a grey area. I think we all come to a very different term of what the hardship is.

Vice-Chairman Tedrow commented that except the courts have defined it. That is why it puts us in a straight jacket that we can't give it our personal interpretation of what a hardship is or what a self-created hardship is. The courts have said if you buy the land with the wrong zoning and you want to come for a use variance you can't get it because by the court's definition it's a self-created hardship.

Mr. Marchand asked if he was correct in saying that there is never any use variances granted?

Vice Chairman Tedrow replied, no that is not true.

Mr. Marchand asked then how would I be able to ask how those were approved.

Vice Chairman Tedrow commented well in some cases I can think of the land was actually owned since the 1960's when zoning started. You had the same owner all those years and the use variance was requested for that. Frankly, we don't see many use variances. We just coincidently just had a few before us.

Mr. Chris Marchand Sr. commented that I understand part of the problem but I am 100% agreement but when is a use variance ever not self-created, never? It just seems totally ridiculous to me.

Chairman Hansen commented that Vice-Chairman Tedrow just pointed one out. For instance, for example, before we had any zoning in the Town people could do whatever they wanted with their property. You could have a fellow living in one house here and next door is a guy that started a repair shop for cars and another guy on the other side started the same thing and they stayed in a residential zone. Then, a few more things added on before zoning came in. A guy opened a convenient store down the road. Then he comes in 40 years later and wants to sell his property retire and go to Florida and Stewarts comes along and wants to buy his house and tear it down and build a Stewarts next to a garage on one side and a garage on the other side and something else down the road. The Town tells him well no you can't have it; you can't sell it for that because you're in a residential zone. So the guy says no one wants to buy my house because there is a garage on one side and a garage on the other side and this down the road bla bla bla. They are the kind of people this was meant to help. To get them out of the box they are in. They could never do anything with their property. But they have to show that they can't by putting their property up for sale. The guy could say well I have had my property for sale for 5 years and no one wants to buy it because no one wants to live next to two garages one on each side. There is a case that we would grant a use variance for.

Mr. Marchand Sr. commented that you think this a case in the exact reverse of that? This is and has been primarily a commercial area since and before zoning in Halfmoon. Gravel banks have been there forever; there was some farming in the area. We are putting up a barn that would keep it looking like a farm in nature. To me that is why the Board is here to do to assess each case individually. We have no complaints from the neighbors. We are not opening a can of worms I don't think it could be any simpler. You have to look at those scenerials because it's not just a square peg in a square hole.

This is primarily a commercial area. Just because the Jeskey's had that house down in the hollow, the only house that was there at the time when it was all commercial type uses surrounding them we are just the reverse of that scenerial. There is no opposition from anyone. So what is the down side of that? Don't you agree? You have to look at the situation. That is what the Board is here for.

Chairman Hansen commented we also have to look at law. We are not making a decision here yet. We are just discussing facts. But what we have to deal with is the way the law is written and the way it has been interpreted and to some degree because of this property just recently being sold kind of throws a fly in the ointment in your case. Because you weren't stuck with this piece of property you bought it. Do you follow me?

Mr. Marchand Sr. commented no question. Again, we bought it because of the commercial nature because they are filing for a PDD so we knew it was going to be commercial.

Chairman Hansen commented that there is no guarantee that the PDD was going to be issued, they never applied for it.

Mr. Marchand Sr. commented that they started the process.

Mrs. Murphy, Town Attorney commented that it has not gone before the either Town or Planning Board at this time. There is a 10-acre limit on PDD's unless the Town Board decides in its discretion to allow smaller parcels to go through the PDD process. Arguably that would be the only way you purchase property knowing that the zone would have to be re-zoned. The law has very strict standards with regards to the process, which we enforce through Town Law. Again, not saying that the applicant is unreasonable just that this Board has to abide by the Letter of the Law.

Chairman Hansen asked how large is this parcel?

Mr. Marchand Sr. commented that the parcel is 2.8 acres. As far as the Law goes am I better off keeping the property in my name and using it to store my own vehicles?

Chairman Hansen commented that the seller only retained less than an acre.

Mrs. Murphy, Town Attorney commented you would still need a variance.

Mr. Marchand Sr. commented will I am here for a variance if it were in my name do we get past this stumbling block you have with the law which is absolutely ridiculous in my eyes.

Chairman Hansen commented that I don't understand your question. You own the property, correct? Why would that change your request for a use variance?

Mr. Marchand Sr., commented yes he owns the property under CGM Construction. I would put it under Christopher Marchand I would store my own personal vehicles there.

Mr. Marchand Sr., commented that there is no way around this?

Mrs. Murphy, Town Attorney commented no not legally.

Mr. Burdyl commented that just for rhetorical purposes if the Board decides to ignore Section D of the self-created hardship would we then be open to law suit by the Attorney General or what would the consequences of that?

Mrs. Jordan commented that we would also be setting a precedent and it would be a very bad one.

Mr. Marchand Sr. commented that he was looking for direction.

Chairman Hansen commented that there is a limit to what we can do. We really can't advise applicants nor can our Attorney's advise applicant to what they should or shouldn't do when they become before us. In a way we are like 5 judges. You wouldn't go to a judge with a traffic ticket and say, Judge what should I do? We can't advise you and neither can our Town Attorney. The Attorney's can advise us but certainly not you.

Mr. Marchand Sr. commented that if I am understanding Mrs. Murphy, Town Attorney correctly when it's a simple area when there is no opposition the neighbors would be ones to raise this, I agree it would it would set a bad precedent. But you have to have some cases that you do what you think is the right move.

Mrs. Jordan commented that we would have Mr. Forino coming back to us too. Why don't we ignore the prong test for him?

Mr. Marchand Sr. commented that there is always going to be that case but there is opposition with Mr. Forino's variance request and that is the concern to his the neighbors.

Mrs. Jordan commented that is not how you apply the Law.

Chairman Hansen commented that it is not a popularity contest because in his case there was almost 50-50. You were not here during the hearings. Half the people sat on one side of the room and the other half sat on the other side of room some folks didn't want it and the other folks it doesn't matter. There may have been more in his favor than against it but aside from that no where does it say in the law that governs what we do that we have to take a vote from the people whether they are in favor of not. It's not one of the tests. It vaguely says something about altering the neighborhood or something like. You could say well nobody cares then it doesn't affect the neighborhood. Even that could be challenged.

Mr. Marchand asked how the other commercial uses were approved? For instance, Mr. Valente's commercial building up the road.

Mrs. Murphy, Town Attorney commented that those are life of mine and they are outside of the purview of any of the Board's in this Town. It is granted by the State.

Mr. Marchand asked what about Mead Enterprises up the road? Is a PDD our only option? We don't want to walk away from this but we are trying to keep our business in Town. Something like this chases people away. We could go to Waterford but we want to keep our business in Halfmoon.

Mrs. Murphy, Town Attorney commented that it's not personal. We can't advise you.

Mr. Marchand commented that he knows it's not personal but we are asking what to do as a business. We are not sure if a PDD would work for a parcel that size. I feel like if we ask the Board to vote I am getting the consensus that the vote won't go our way. Then we are left to do something somewhere else, I guess.

Chairman Hansen commented that as a PDD and the size of the parcel is an issue could they ask to be annexed to the existing PDD for Dalheim because you are adjacent neighbors to him.

Mrs. Murphy, Town Attorney commented that I think what the Chairman is asking me if the person that owns the PDD that has been in existence next door can expand his border of the PDD which would involve an extension of his PDD amendment but would satisfy the size requirement of the Town. Would that work? Is that your question, Chairman Hansen? If they can work out a deal and go before the Town Board they would have to approve it then it would go to the Planning Board for site plan approval.

Mr. Marchand Sr. commented yes, Mr. Dalheim acquired a 3-acre parcel and that is what we subdivided from for this 1.8-acre parcel that we now own. We would have gone that route if we had known what it would have taken. We asked all these questions.

Mrs. Murphy, Town Attorney commented that you were advised at the Planning Board several times that a use variance was not something that is granted lightly. It was made very clear.

Mrs. Jordan commented that maybe you should seek advise from your own legal council based on some of the things you have heard and proceed that way.

Chairman Hansen commented, Mrs. Murphy you are saying that the Town does have the discretion to the Town Planning Board and the Town Board to approve PDD of less than the 10 acres.

Mrs. Murphy, Town Attorney commented that it is something that the Town Board does take very seriously just because of the issue of spot zoning. The Town doesn't want to be accused of that however, there are circumstances that would allow for them to modify a tunnel effect on an acre piece. They are not saying that this is the appropriate circumstance I can't say that, I don't speak for the Town Board it would be something that they could take a look at. I am not aware what your contract says with respect to the purchase of the property.

Chairman Hansen commented that the property is already paid for and the deed is already filed at the County. This is not a contingency you already own it. The door is not slammed in their face if they came in for a PDD they might get it. Does the Board want to take a vote on this now? Or does the applicant wish to withdraw his application whichever you prefer.

Mr. Marchand commented that he already knows which way this is going just from the Board's response. What happens if we still take the vote does it change anything?

Mrs. Murphy, Town Attorney commented that if this Board decides to vote right now you will need to make a detailed analysis of the criteria of the resolution.

Chairman Hansen commented that we would now go over the criteria for the use variance resolution.

- "That for each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence."

Chairman Hansen asked if we were presented with any financial evidence regarding this property?

Mrs. Jordan commented that we have no evidence whatsoever.

- "That the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood."

Chairman Hansen asked if we head arguments to that effect? I think we did, does anyone agree with that?

Mrs. Smith-Law commented that it is not particularly unique. Quite a bit of the neighborhood as stated is commercial in nature. Especially with the mining, a lot of it is commercial use. There is a business next door that is commercial. But not particularly unique which is what you are looking for.

Mrs. Jordan commented that your argument is really saying that it is unique because it is zoned residential and they are asking for a commercial use on residential land and so they are in a unique situation and they are surrounded by commercial uses. It is a unique circumstance.

Mrs. Smith-Law commented that yes she would agree with that.

- "That the requested use variance, if granted, will not alter the essential character of the neighborhood; and"

Mrs. Jordan commented that it would not alter the neighborhood at all. I drove there this morning and I drove up and down the road and looked all around and there really is a bunch of commercial buildings and warehouses.

Chairman Hansen commented and the key test, please keep in mind that you have to pass all of these tests.

- "That the alleged hardship has not been self-created."

Chairman Hansen commented we just discussed this one.

Mr. Marchand commented that 99% of all use variances are not granted.

Mrs. Jordan commented that by the letter of the law this was self-created and that you bought it knowing that it wasn't zoned for the use that you are asking for and it was just recently purchased as well.

Vice-Chairman Tedrow commented that for area variances self-created hardship isn't a fatal flaw it is just something to aware of.

Chairman Hansen commented you have to pass all four with flying colors in order to get a use variance. The reason they did that is so that basically Zoning Board's didn't have a free hand to basically go around and say "oh sure you want to put up a garage in the middle of that subdivision or a supermarket next to that school." There have been so many court cases regarding use variances through the years. We now have a very restrictive set of criteria.

Mr. Marchand commented isn't that what the Board is here for? It's not like they give you a criteria to go buy it's not like the stage is going to come down on you because you made this decision when you know it's the proper decision. It is just like a guideline.

Mrs. Jordan commented, no it's the law.

Mrs. Murphy, Town Attorney commented that it's the law. The rules are the only circumstances under which a use variance is granted if these four prongs are met. It is very, very strict standard.

Chairman Hansen commented that he is not sure if the Board does it as a policy but we probably should handout the paperwork with the application. The applicant can read it carefully and then decide if they want to proceed.

Mrs. Murphy, Town Attorney commented that she doesn't want the applicant to be given legal advice. The applicant should have common language without having case law about some of the things the Zoning Board Members look at. It's a break down that I wrote up for the members not for the applicant. Again, I don't want to give them legal advice.

Chairman Hansen commented that people have the impression that you can apply for a use variance, it almost implies like with most things you apply for in the government that you will probably going to get it if you jump through enough hoops. The use variance is probably the most difficult thing you are going to get from any government because there are so many criteria that we have to look at. It's not like a motor vehicle license where if you have good vision you can drive a car.

Mrs. Murphy, Town Attorney, will put together something for the applicants that would explain the process better to the applicant.

Mr. Marchand commented that maybe he is drawing at straws here. The hardship is not self-created and the Board has said that we purchased the property knowing that we needed this variance.

Vice-Chairman Tedrow commented knowing what the zoning is.

Mr. Marchand commented that we knew what the zoning was but didn't know we would need a variance. We had applied for a building permit for this garage. When we applied for that permit we were told by the Building Department that we would accept your application and no one made us aware that we would need a variance. We thought everything would proceed as is. We just filed for a building permit for this pole barn/garage type structure. We then closed on the property and did all the paperwork. Then we got a phone call from the Building Department that you need to go before the Planning Board to present it and then we were referred to the Zoning Board of Appeals. Time had passed and we continued to work legally toward purchasing the property. I think it helps my argument that the hardship wasn't self-created. We didn't think this was going to be a walk in the park for this variance. We thought we only needed a building permit.

Mrs. Jordan commented did you purchase the property after you starting jumping through hoops.

Mr. Marchand commented that we purchased it as soon as we applied for the building permit we started to purchase the property. It was a handshake and a deposit on the land. It's sold. It was not filed at the County Clerk at that point. For all intensive purposes the land was purchased. The purchase took place between Mr. Dalheim and us. I consider it purchased. It was not filed at that point with the County Clerk.

Mr. Burdyl commented that you applied for the building permit before the property closed?

Mr. Marchand commented we had a contract on the sale of the property. The legal survey was not done as of yet. The deed still had to be filed with the County. As far as we knew we only needed a building permit.

Mrs. Smith-Law commented that you stated earlier that the people you bought the parcel from informed you that they were going to do a PDD to be able to do what they wanted.

Mr. Marchand commented that he misunderstood. I didn't think it was residential. I thought it was the nature of the industrial type zone. Concrete recycling business up there with trucks coming in to deliver, stone and concrete it's a very intense industrial type use. You needed special permits from DEC to handle blacktop with asphalt and petroleum products in it. It's a recycling site with a very intense use than and all we want is a small pole barn. The uses going on there is much more intense of a use than our pole barn would be.

Mrs. Smith-Law asked if these are the people that you purchased the property from?

Mr. Marchand replied, yes. I don't know where the project stood with the Town. Our use was not in the same realm as the intense use going on at that site. I don't feel that our hardship was self-created. It was after the fact that we found out that this was something we would have to contend with.

Chairman Hansen commented that I am not trying to give you legal advise because it doesn't fall into that category but the PDD process is not that onerous in my estimation. If you go through it, it might cost you less than you hiring an attorney to fight us. You hire an engineer to come up with a plan and sell it to the Town Board and Planning Board. If the Town Board feels that your plan is more desirable for that area down there than an asphalt plant; which I am sure they will, they will probably be inclined to approve it. What I am saying is that you can't go to the bank with it, but I think if you present it reasonably and show them what you want to do.

They may even waive the 10-acre requirement it's a decent use low intensity and it's compatible with the neighborhood being a little mixed. There are some nice homes on Button Road too. We don't have that latitude. Our hands are tied by black and white. The Town Board can use their discretion and they can base it on your plan to them for what you want to do. They have the power they wrote the Town Zoning Ordinance with Town Engineers and Lawyers, they adopted it. They adopted it with provisions in there for PDD's that allows them the discretion to change it without going through the whole zoning process again. We don't have that power.

Mrs. Murphy, Town Attorney, commented that would be the easiest way to get your proposal approved, it is not legal advice. I represent the Board and this Town and I cannot give you any legal advice. I don't know what direction they would proceed in.

Chairman Hansen commented let's move forward. Did we answer the last question about the self-created hardship?

Vice-Chairman Tedrow commented that we have to go with the legal interpretation since they purchased the land with the present zoning in place it is by case law a self-created hardship.

Chairman Hansen commented now that we have discussed the four criteria is there a motion to approve or deny this application?

Motion was made by Mrs. Jordan that we deny the application and seconded by Vice-Chairman Tedrow. Motion was carried.

RESOLUTION OF THE TOWN OF HALFMOON ZONING BOARD OF APPEALS FOR DENIAL OF A USE VARIANCE APPLICATION FOR CGM CONSTRUCTION, INC. LOCATED AT 87 BUTTON ROAD, TOWN OF HALFMOON

WHEREAS, on September 20, 2011 an application was filed with the Zoning Board of Appeals of the Town of Halfmoon (the "Town") by CGM Construction, Inc. for approval of a use variance located at 87 Button Road in the Town of Halfmoon, and

WHEREAS, the submitted building plan titled "Equipment Garage, Button Road" with a date of October 14, 2011 and created by Greg Bold, P.E. and depicts a 7,500 sq. ft. commercial garage on a 1.815-acre parcel SBL# 279.-2-25 that is within the Town of Halfmoon in the Residential, R-1 zoning district, and

WHEREAS, the Zoning Board of Appeals at their November 7, 2011 meeting set a public hearing for December 5, 2011, and

WHEREAS, a public hearing was held at the Town of Halfmoon Town Hall on Monday, December 5, 2011, where the applicant provided details supporting the application and neighbors expressed their opinions regarding the property and the proposed use variance, and

WHEREAS, the Zoning Board of Appeals considered all of the evidence and testimony presented regarding this application together with the standards as set forth in Section 267 of the Town Laws of the State of New York, and

WHEREAS, a resolution was made that the CGM Construction, Inc. use variance request is denied by Motion made by Mrs. Jordan and seconded by Vice-Chairman Tedrow, motion was carried unanimously, and

NOW THEREFORE, BE IT RESOLVED by the Zoning Board of Appeals of the Town of Halfmoon at its meeting of Monday, December 5, 2011 during its regular session duly convened as follows:

The CGM Construction, Inc. use variance request is hereby denied on the basis that the proposed use is not a permitted use in the Towns' Residential zoning district as described in Article V Section 165-10 in the Town's Local laws, and

The Board found that the applicant was unable to meet all the tests for a Use Variance. Under section 165-70, Section B, part 1. Letter b, Number 4 "That the alleged hardship has been self-created." The applicant subdivided and purchased the 1.8-acre, R-1, Residential property with the knowledge of the permissible uses, a commercial garage not being a permissible use in the R-1 zone.

The resolution shall take effect immediately.

Motion was made by Mrs. Smith-Law to adjourn the meeting and seconded by Mr. Burdyl Motion was carried.

Meeting adjourned at 9:10 p.m.
Respectively submitted by Denise Mikol,
Zoning Board of Appeals Secretary.