

**RUSH PLANNING BOARD
SPECIAL MEETING
MINUTES OF SEPTEMBER 8, 2015**

A special meeting of the Rush Planning Board was held on September 8, 2015 at the Rush Town Hall, 5977 East Henrietta Road and was called to order at 7:00 PM.

PRESENT: John Felsen, Chairman
John Morelli, Vice Chairman
Scott Strock, Member
Don Sweet, Member
Shivaun Featherman, Deputy Town Clerk

EXCUSED: Rick Wurzer, Member

OTHERS PRESENT: Gerry Kusse, Code Enforcement Officer (CEO)
John Mancuso, Esq., Town Attorney

Chairman Felsen welcomed all to the Special Meeting of the Planning Board to discuss the potential revocation of the Site Plan approval of Application 2009-02P for the remaining undeveloped parcel in the Nowak Subdivision on the grounds that Mr. James Dys has failed to comply with the conditions of approval, including the failure to extend the Irrevocable Letter of Credit as required by Condition #4.

Town Attorney John Mancuso explained that this situation has been going on for the past year and a half. Originally the Town Board received numerous complaints from the residents of the Nowak Subdivision that the road is not paved and is not being maintained. Mr. Dys has not followed through with building the road to the design criteria that the Planning Board imposed in the conditions of its approval in 2009.

Attorney Mancuso stated that he and the Town Board had begun the process of trying to illicit a response from Mr. Dys to complete the road dedication. The response received from Mr. Dys was that he was being precluded from doing that because of the then current provisions of the Town Code that required 90% build out of the subdivision before road dedication would be required. Attorney Mancuso and the Town Board had encouraged Mr. Dys to go before the Zoning Board for a variance from the 90% requirement, but he declined to do so. The Town Board then took affirmative action and amended the Town Code to remove the 90% requirement and then allow Mr. Dys to make an application to the Town Board to have the road dedicated and the design completed.

Attorney Mancuso stated that he has advised Mr. Dys of all this through a series of correspondence from his office to Mr. Dys, but Mr. Dys has declined to follow up with the Town Board or the Highway Superintendent in terms of carrying forward and building the road. Attorney Mancuso has sent numerous notices on behalf of the Town Board advising him to complete the road before winter so the subdivision would have the

benefit of road maintenance by the Town of Rush, but there has been no response from Mr. Dys to date.

Attorney Mancuso informed the Board that last Thursday, the Town Board adopted a resolution to authorize litigation against Mr. Dys and Mr. Salvaggio to take any necessary steps to remedy the violation of conditions and get the road dedicated.

Attorney Mancuso explained that the Town Board is the Board that would act on behalf of the Town to go to court to exercise any rights that the Town may have to protect itself by virtue of the violations. The Planning Board has the discretion to review the approval that it had granted for Subdivision and Site plan approval and decide whether there are any conditions that have been violated and if so, what the recourse for the violation should be.

Attorney Mancuso stated that he prepared a notice of this Special Meeting last week to Mr. Dys that was sent to his last known address and sent an email to the last known email that he was utilizing, and also contacted Mr. Salvaggio and a company known as DS Builders of WNY Inc., which was an entity that had been a joint venture between the two of them. The notices were sent Friday by certified mail and email, and Attorney Mancuso has confirmation of delivery and for pick up and has the certified mail receipts.

Attorney Mancuso stated he also sent Mr. Dys an email this morning with the Special Meeting Notice attached, and confirmed again that the meeting was tonight at 7:00 pm but has not received any report back from him. Mr. Dys has been notified as to the best extent practicable that can be ascertained at this point, but obviously he is not here, so the Planning Board can deliberate and decide what it wishes to do by virtue of the issue before it.

Chairman Felsen stated that Board Member Strock has a question regarding the original approval condition #5 which states the applicant constructing the road to the binder course in order to obtain any Certificate of Occupancy (C of O) for any constructed dwellings. The binder course is not in place, so how did the existing residences obtain C of O's?

CEO Kusse replied they were issued C of O's because their dwellings were completed, they passed the C of O, and he had talked with Supervisor Richard Anderson at the time and they knew that this was going to be a long, drawn out affair and they did not want to withhold C of O's because of a potential litigation with DS Builders. CEO Kusse stated there were "probably some warm fuzzies" associated with that. CEO Kusse recalled at the time, DS Builders was doing business all over the place and CEO Kusse didn't know it would come to an end like it did, but two homes had already been built.

Chairman Felsen asked in the future, should this be a requirement?

Attorney Mancuso replied the conditions that are imposed in this particular approval vs. others in the future, it's incumbent upon the Planning Board to work with the Town Engineer and the CEO. In this particular circumstance, it's clear that was violated. In the future, proper procedure would be for the applicant to come back before the

Planning Board and get relief from that provision if there are particular issues before C of O's are issued.

Vice Chairman Morelli requested to adjourn to Executive Session for a legal interpretive issue. Board Member Sweet made a Motion to adjourn to Executive Session at 7:12 PM. Vice Chairman Morelli seconded the Motion and the Board polled:

Roll: Scott Strock aye
Don Sweet aye
John Morelli aye
John Felsen aye carried.

Vice Chairman Morelli made a Motion to return to regular session at 7:25 PM. Board Member Sweet seconded the Motion and the Board polled:

Roll: Scott Strock aye
Don Sweet aye
John Morelli aye
John Felsen aye carried.

Attorney Mancuso stated the proposed resolution tonight is in regards to revoking the Site Plan approval for the remaining undeveloped lot owned by the applicant. The proposed resolution is effective only in the event that Mr. Dys fails to produce a Letter of Credit to the Town within a week. If the Board wishes, it can add to the resolution that the Letter of Credit be received to the Town of Rush on or before September 15, 2015 by 8:00 pm. Attorney Mancuso stated he will send the resolution to Mr. Dys tomorrow if the Planning Board adopts it tonight.

Vice Chairman Morelli stated he would like to have wording in the resolution that makes it clear that the Letter of Credit funds be immediately available to the Town of Rush.

Attorney Mancuso advised that the contents of the Letter of Credit are in the discretion of the Planning Board and the Town Engineer. The Planning Board approved the Subdivision and the Site Plan so it can dictate the level of protection that it wants to afford in the Letter of Credit.

There was discussion regarding the undeveloped lot that is currently for sale. Vice Chairman Morelli stated that he is concerned that if a Letter of Credit is received from Mr. Dys, and the Planning Board does not revoke the Site Plan, Mr. Dys could still sell the lot. Attorney Mancuso stated he won't be able to develop it and advised CEO Kusse not to issue a building permit for that lot. Attorney Mancuso advised that the Planning Board can request that CEO Kusse post that property of the notice that the Site Plan was revoked. Attorney Mancuso advised that after the posting of the property, they can look at avenues of filing liens and/or notices of pendency against the title to try to block a subsequent transfer. They can also advise realtors of the situation.

DECISIONS:

Chairman Felsen made a Motion **WHEREAS**, on January 20, 2009, the Town of Rush Planning Board approved **Application 2009 – 02P** by Charles Salvaggio, James M. Dys and DS Builders of WNY, Inc. for Subdivision and Site Plan approval to subdivide a 29.6 acre parcel of section 4 of the Nowak Subdivision into 7 lots; a single family dwelling is planned for 4 of the 7 lots; and the property is located at 8300 West Henrietta Road and is in an R-30 zoning district; and

WHEREAS, Subdivision and Site Plan approval of the Nowak Subdivision was conditioned upon the following:

1. The applicant adding to the plans the details from the Town of Rush Design Criteria for the #2 medium road section and meeting all other requirements specified for the #2 medium road section.
2. The applicant submitting a schedule/time line for construction of the road for review by Todd Ewell, Town Engineer.
3. The applicant providing an estimate of the road project construction costs (based on the Town of Rush Design Criteria) to be reviewed and approved by Todd Ewell, Town Engineer.
4. The applicant preparing and submitting a letter of credit (based on the specifications listed in the Town of Rush Design Criteria) to Todd Ewell, Town Engineer for his review and approval.
5. The applicant constructing the road to the binder course in order to obtain any certificate of occupancy for any constructed dwellings.
6. The applicant showing and labeling the existing hedge row on the north side of the proposed road out to West Henrietta Road.
7. The applicant meeting all the requirements from Todd Ewell, Town Engineer and all requirements from the Monroe County Department of Planning and Development; and

WHEREAS, to date, the completion of construction and dedication of the road for the Nowack Subdivision known as Madelyn's Way has not yet been completed; and

WHEREAS, this Board was previously notified that the applicant has failed to extend Irrevocable Letter of Credit No. 808, dated February 27, 2014, in the amount of \$42,500 as required by condition #4 of Subdivision and Site Plan approval of the Nowak Subdivision; and

WHEREAS, a special meeting was held by this Board on September 8, 2015 to discuss the potential revocation of the Site Plan approval for the remaining undeveloped parcel in the Nowak Subdivision on the grounds that the applicant has failed to comply with the

conditions of approval, including but not limited to, the failure to extend the Irrevocable Letter of Credit as required by Condition #4; and

WHEREAS, all persons at the meeting desiring to speak on the matter were heard, correspondence on the matter, if any, were read, and these statements were considered by this Board;

NOW THEREFORE, upon consideration by this Board of this matter, and this Board having given the matter due consideration, it is

RESOLVED that Site Plan approval for the remaining undeveloped parcel in the Nowak Subdivision is hereby revoked on the grounds that the applicant has failed to comply with the conditions of Subdivision and Site Plan approval, including: (1) the failure to extend the Irrevocable Letter of Credit as required by Condition #4; and (2) the failure to construct Madelyn's Way in accordance with the schedule/time line for construction as provided to this Board that expired in 2009; and be it further

RESOLVED that the revocation of Site Plan approval as set forth in this Resolution shall become effective only in the event the applicant fails to provide to the Town of Rush on or before 8:00 PM on September 15, 2015 an Irrevocable Letter of Credit in the amount of \$42,500 as required by condition #4 of Subdivision and Site Plan approval of the Nowak Subdivision and provided that the funds in the Irrevocable Letter of Credit are immediately available to the Town of Rush.

The adoption of the foregoing Resolution was moved by Chairman Felsen, seconded by Vice Chairman Morelli, and duly put to vote, which resulted as follows:

Roll: Scott Strock aye
Don Sweet aye
John Morelli aye
John Felsen aye carried.

The Resolution was thereupon duly adopted.

With no further business, it was agreed by common consent that the meeting be adjourned at 8:15 PM.

Respectfully submitted,

Shivaun Featherman
Deputy Town Clerk