

Town of Ballston
Zoning Board of Appeals

**TOWN OF BALLSTON
ZONING BOARD OF APPEALS**

Regular Monthly Meeting: March 4, 2015

ATTENDEES: Michael Lesniak, Chairman
Marilyn Bell, Vice Chair
Ellen Brown
Robin Kane
Stephen Merchant
Daniel Mertzluft
Peter Reilly, Attorney
Thomas Johnson, Building Inspector
Members of the General Public

Chairman Lesniak called March 4, 2015 meeting at 7:30 p.m. and led the Pledge of Allegiance.

Chairman Lesniak asked for asked for corrections to February 4, 2015 minutes.

Page 3, third paragraph from the bottom "If there is an existing lot" add (someone would)

MOTION: Ms. Kane made a motion to accept the February 4, 2015 minutes as amended. Mr. Merchant seconded the motion. All board members voted in favor - Ms. Brown and Chairman Lesniak recused themselves as they were not present at the February 4, 2015 meeting.

CARRIED.

NEW BUSINESS:

Appeal of David Stern and Smart Growth Ballston from a decision letter issued by the Building Inspector, Thomas Johnson, dated July 23, 2014 and November 17, 2014 ruling that the Rossi Commercial Business Planned Unit Development District (Local Law No. 3-2011) had not expired as substantial progress had commenced and continued without undue interruption after construction commenced pursuant to Section 7 of Local law No. 3-2011.

Mr. Reilly stated procedurally will open up with Mr. Baker representing the appellant and then the board will ask questions at that time. Written positions were received from the project developer and let the attorneys for the project developer respond. This is scheduled for a public hearing; it's a very limited issue – Mr. Johnson, Building Inspector had rendered an interpretation decision as to progress on the PUDD. Mr. Stern's and Smart Growths appeals are the only issue in front of the board of that decision – it's limited to a legal argument.

Town of Ballston
Zoning Board of Appeals

Ms. Mauro asked if council for Wal-Mart will also be able to present. Mr. Reilly said yes, after Mr. Baker is done with his presentation. Mr. Reilly said the board is going to listen to the arguments. The board received written materials from the appellants and the developer's attorneys - a decision will not be made evening and the board is going to take it under advisement and there will be a decision rendered either at the April or May meeting. Mr. Reilly stated the board has 62 days within which to render that decision.

Jeff Baker, Esq. with Young/ Sommer, LLC was present on behalf of the appellants. Mr. Baker stated as Mr. Reilly said "we are here to review the determinations of Mr. Johnson with regard to the compliance by the applicant with the Rossi PUDD requirements. In 2011 the Town Board approved the PUDD for the Rossi Mixed Use Development. Consistent with the provisions in the Town Law, the Town Board put a limit on the time in which the PUDD would be valid absent a commencement of construction and a continuation of construction – under the zoning code is a one year period in this PUDD, they granted them a two year window and within that two years window they had to demonstrate significant or substantial progress towards fulfilling the project and then demonstrate that the project was progressing without "undue" delay or interruption of the operation. Mr. Baker said "has the project proceeded in accordance with the PUDD because if it has not, then the approval is revoked and expires as a matter of law." Mr. Baker stated there is a provision for the applicant to ask for an extension for that time period particularly in regards to where construction has commenced, however there may be an "undue" circumstance in the delay of the completion of it. Mr. Baker said, "What we submit and respectively believe Mr. Johnson is wrong is that neither of those two events happened, neither was there substantial progress or implementation of the project within the 24 month period and even there was as he determined in September 2012. There is no basis to find that it progress without undue interruption because in fact it has not progressed at all and still has not obtained a single subsequent approval from the Town of Ballston necessary for the project to go forward." In September 2012, Mr. Rossi wrote to Mr. Johnson and asked for his determination as to whether substantial progress has been made and also asked for a determination as to whether it had been proceeding without undue interruption. At that time, Mr. Johnson said, "Yes I find substantial progress has been made, but no, I cannot give an opinion as to whether it is proceeding without undue interruption because that is a facts specific time frame, which will be take various factors into account when we make that determination, but cannot make that determination now." Mr. Baker said, "Until we made a request in June 2014 was the only determination that Mr. Johnson had ever made on that." Mr. Baker said the board has letter from the attorney from Wal-Mart and Mr. Rossi, II, Esq. stating that (A) "Our appeal is not timely because we did not bring it when the 2012 determination was made within 60 days of it or we did not bring it within 60 days of when we should had supposedly known about it when it was referenced in a late June town board meeting in 2014.

Town of Ballston
Zoning Board of Appeals

Mr. Baker stated that a Freedom of Information (FOIL) request was submitted once this project was coming back to life and a site plan application as being prepared in May 2014 for all of the town's files regarding the PUDD adoption and actions since then. Mr. Baker stated that the Town Clerk did a good job of compiling the relevant documents and in the documents that she provided to us, was Mr. Rossi's September 4, 2012 letter asking for a determination – what was not in the file was Mr. Johnson's September 11, 2012 response. Mr. Baker said that we had no way of knowing up until that time when it had been done and the town attorney did not know that there had ever been a response to that and first learned about it at the June 24, 2014 meeting of the town board. Mr. Baker stated previous to that had written a letter and asked for a specific determination because they thought that one had never been made asking "is the PUDD still valid" because at that point certainly more than two years have passed and no construction had commenced and felt pretty clear that the PUDD had expired. Mr. Baker stated that a response was not received from Mr. Johnson until July 23, 2014 and filed their appeal within 60 days on September 23, 2014 of that decision. Mr. Baker said, "This is the first time we had an answer to our question where he made a determination and referred back to his earlier determination, but added other facts because he said he made that determination at the time on certain work that had been done – the completion of the storm water pollution prevention plan (SWPPP), but then he also referenced events that occurred in November 2012, after he supposedly made that determination. Mr. Baker stated that Mr. Reilly informed them that their appeal was untimely because he believes that it should have been brought within 60 days of the June 24, 2014 meeting. Mr. Baker stated that he pointed out to Mr. Reilly that even if Mr. Johnson were to rely on the September 2012 determination regarding whether substantial progress had been made, he had not ruled on the question of whether it continued without undue interruption and that we had a right to have an appeal on that and to have a determination made. Mr. Reilly agreed that there had not been a determination made, Mr. Johnson then issued a determination on that regard in December 2014 and now have the amended appeal that covers both points.

Mr. Baker stated clearly given when information was available when the Town Clerk even had it; we had a timely proceeding from the determination, the request that we made the specific questions and then the determinations made by Mr. Johnson.

Mr. Baker stated there is admittedly very little case law that provides guidance on a question of to what is substantial progress and what is an undue interruption – that is largely a determination that has to be made by the board's that are faced with it. Mr. Baker stated the reason for the time frame in the PUDD is to put a limit and not have an open ended process for which this PUDD is supposed to be out there. The letter that was submitted to Mr. Rossi "yesterday" says that the PUDD presented this as a shovel ready project. Mr. Baker stated that it was not a shovel ready project because it needed a minimum site plan review and probably a subdivision review and it needed a specific project and an idea of what was going to be put in there and the PUDD recognized that there is going to be subsequent reviews and there has to

Town of Ballston
Zoning Board of Appeals

be a project specific undertaking. The delays in going forward are not anybody's fault, but Mr. Rossi's - there was no litigation pending, no actions going to stop this. The first application to the Planning Board for an approval was in or around March 2013 for a preliminary subdivision plat to carve up some of the property for the bank areas and areas around it, not even associated with the main development of the commercial building.

Mr. Baker stated the Planning Board issued "there is some confusion on this" a decision in November 2013 and there is confusion as to whether they issued a preliminary plat approval or a final plat approval. Mr. Baker stated regardless from November 2013 until July 2014 Mr. Rossi made no further progress to either finalize that preliminary plat (if it was a preliminary plat) or meet the conditions of a final plat or if it was a conditional final plat. In or about May or June, there was a pre-meeting before the application was put in, of 2014, there is finally an application for the Wal-Mart. This is three years after the PUDD was approved, a full year after expired as a matter of law and suddenly and finally the application is finally being put forward to meet the requirements of the PUDD.

Mr. Baker stated that Mr. Johnson based his initial determination that substantial progress has been made based on the acceptance of a storm water pollution prevention plan (SWPPP), which is just a preliminary document and must be noted that the storm water pollution prevention plan does not even apply to the Wal-Mart because it does not deal with the impervious surfaces associated with the pad for 130,000 square foot building. It's associated with some of the roads and the sewer connections and disturbance and grading that was going to be done, but was not for the full project and going to have to be modified if their project ever goes forward. Mr. Johnson also indicated that construction had occurred and approximately 250ft. of sewer line had been constructed -- that was the full extent of the construction that occurred other than also some grading and filling of a wetland and the creation of a wetland mitigation area. Mr. Baker stated that no building permit had been pulled, no site plan had been given, and no work had been done. Mr. Baker said, "You are reviewing Mr. Johnson's decision here because he is the Code Enforcement Officer/Building Inspector charged with interpreting and applying the zoning code. Based on the record that was before him, he made the decisions that we are appealing, so we ask in our latest appeal we said "Please produce the record for your decision and while he gave us his list of what he thought were the steps that had been taken to demonstrate that there had not been an undue interruption in the project." The only document that constitutes his record and how he knows that there has not been an undue interruption is the storm water pollution prevention plan (SWPPP), all of the other steps that he lists in his December decision -- there is no documentation for that, he has not presented any documentation, presumably it's all verbal references representations made by Mr. Rossi and/or Wal-Mart. Mr. Baker stated that is not a basis to make a decision and that is not the way it works so all of this time passed and Mr. Rossi was sitting on his rights even though he got his PUDD and says, "it was a shovel ready project" and did not have a project, was not prepared to forward with a project and nor was he

Town of Ballston
Zoning Board of Appeals

prepared or did he bother or at any time to ask the town board for an extension of that two year period. In section 7 of the PUDD it specifically says that the applicant after commencing construction if they believe they need an extension on the undue interruption, they can ask the Town Board for an extension and after hearing and making a determination for cause, the Town Board could decide to grant that. It was never asked and so as a matter of law it has been revoked and not valid anymore and the only recourse Mr. Rossi has it to go back to the Town Board and get another PUDD approved. Mr. Baker stated that even now are very early in the process, the Planning Board is still in the middle of holding a public hearing on the site plan approval, they have reapplied for the subdivision approval and have recognized that their subdivision in November 2013 lapsed and reapplied for it August 2014.

Mr. Baker stated by raising those points were not looking to delay the project or keeping them to set up a situation where they could not meet the requirements of the PUDD, by that time, the PUDD "in our opinion" had already expired as a matter of law. We were pointing out what the Planning Board was doing was illegal in terms of not following the requirements for the subdivision approval process and cited the specific sections of the law stating that said, "in one of or the other what they have done was illegal" and laid out various grounds of what they have done and whether they have agreed or not they decided that the better course was to withdraw the application and consider it in conjunction with the site plan approval and combined SEQRA determination because you cannot segment a project. Mr. Baker said they are still not moving along and the Planning Board has held the public hearing open and requesting more information from the applicant and has not made a determination of significance under SEQRA yet and the time is still going – these are all delays that are under the applicant's control. Mr. Baker stated that their position of representing residents of the town and citizens is to hold the applicant to the requirements of the zoning approval in 2011 – it even had a one year longer window that is normally provided for under the Ballston Zoning Code. Mr. Baker said, "They did not ask for an extension, didn't really start work and you really cannot say by putting together a storm water pollution prevention plan (SWPPP) and creating 250 ft. of a sewer line is substantial or a significant investment on a PUDD that envisions over 230,000 square feet of office space, mixed use or commercial office space. Mr. Baker stated that this is a relatively simple question as to whether you (the board) think that was a reasonable to find a significant substantial progress or that there has not been an undue halt in that progress once it began and given the time frames from which it waited until applications were submitted, and still have not been acted on and any of the other steps going forward there is no really other option. Mr. Baker thanked the board for their time and would be happy to answer any questions.

Chairman Lesniak stated that Mr. Baker requested the information from the town based on the Rossi letter dated, September 4, 2011 or 2012. Mr. Baker stated that is not quite right. Chairman Lesniak asked when you submitted to ask for all this information. Mr. Baker replied May 2014, when Smart Growth Ballston was just being formed and we were hired and at that

Town of Ballston
Zoning Board of Appeals

point all we knew is that the planning board was looking at a site plan application. Mr. Baker stated that he did a Freedom of Information Request (FOIL) for all of the town's records and that's when he found out about Mr. Rossi's letter from 2012 (after that). Chairman Lesniak said, "You still submitted two years after the fact" "the September 4, 2012 letter that Mr. Rossi referred to." Mr. Baker said, "We had no way of knowing that such a letter existed." Chairman Lesniak said, "You knew that one existed" Mr. Baker said, "He did not know about Mr. Rossi's September 2011 letter until late June when he received the FOIL documents from the Town Clerk. In June 2014 in a response to the FOIL request is when we saw Mr. Rossi's letter and at that point, there was no letter in the file from Mr. Johnson (no response). Chairman Lesniak stated that it was well after the fact whether it was in there or not. Mr. Baker stated there is question about that, but there is no way that anyone can know about that because nothing was happening on the project site. Chairman Lesniak stated in Section 7, keep referring to the fact about the PUDD approval – that first sentence of Section 7 says, "Construction on the town road shall begin within 24 months of final approvals and issuance of all required permits and may occur in phases of sketch plan approved by the planning board." Chairman Lesniak stated that he finds it hard to believe that they had all the permits. Mr. Baker said, "You would then have to read the second sentence which also says – if no significant or substantial progress has been demonstrated within 24 months of PUDD approval and also note in Mr. Johnson's 2012 letter, he reiterated that 24 months applies to PUDD approval. Mr. Baker said, "He admits that thing is not written clearly, but the point is, they were supposed to have shown something within that and even if you want to give credence to Mr. Johnson's determination that putting a shovel in the ground constituted essentially substantial progress, there is no explanation for why even after that it was about six to nine months before an application for a subdivision approval was submitted and more than 18 months after that before an application before a site plan application had been submitted.

Leslie Mauro, Esq. with Harter Secrest & Emery, LLP for the Wal-Mart stores in this matter. Ms. Mauro stated that Town Law §267-a(5)(b) sets forth a sixty day limitation period during which somebody can challenge a Building Inspector's determination. In this case, petitioners ran out of time. Ms. Mauro stated while it may be true, that Mr. Baker did not know of Building Inspector Johnson's September 11, 2012 determination until July 24. Mr. Mauro stated that he never inquired after receiving Mr. Rossi's "October 4 or September 4 letter" asking for the determination and never even followed up with Mr. Rossi, council to council, Mr. Johnson or with Peter Reilly, Esq. instead they waited and wrote a letter to Mr. Reilly out of time in September 2014 challenging the request - challenging that determination as to whether significant and substantial progress had been made. In response to that September 2014 request, attorney Reilly came back and said, "You are out of time" and you knew of the determination back in June 2014 and attorney Rossi and I were present at the meeting and we both explained to Mr. Baker that there had been a response from Building Inspector Johnson and discussed what the contents of the response were. None the less, he (Mr. Baker) waited, Smart Growth waited until September and for that reason Mr. Reilly informed them that they

Town of Ballston
Zoning Board of Appeals

were out of time per the Town Law. Mr. Mauro stated that it is interesting because Mr. Baker misreads Building Inspector Johnson's determination with regard to undue interruption – Mr. Johnson does not say that he is unable to define undue interruption generally overall it's for a later date – he is saying that it is a fact specific determination, but based upon that facts in front of him and the questions that have been asked by attorney Rossi in September 2012, he could find very clearly and he states it in his determination that items such as contract negotiations, due diligence that an applicant will undertake in order to determine whether they are going to move forward with the project and the application process for SEQRA, Site Plan and Subdivision do not constitute undue interruption. Ms. Mauro stated at the time of the September 11, 2012 determination Building Inspector Johnson as very clearly able to say that going through the Site Plan, Subdivision, SEQRA process and contract negotiations will not constitute undue interruption of significant and substantial progress. Ms. Mauro stated that attorney Baker put forth to you today that Mr. Johnson's earlier determination of significant and substantial progress based upon the work that attorney Baker perceives that was done, is somehow deficient. Mr. Mauro said, "That questions has been asked and answered and any appeal of that determination is out of time and was clearly stated by attorney Reilly." Ms. Mauro stated what is in front of the board right now is the question of undue interruption and that too is out of time, because in June 24, 2014, the petitioners were made well aware of what would constitute undue interruption and were made well aware of the existence of Mr. Johnson's determination and did not challenge it and for the reason that the substantial and significant progress argument was "bounce" so should the undue interruption argument be similarly dismissed and untimely pursuant to Town Law. Ms. Mauro stated she is going to let attorney Rossi talk about what was done with regard to the Site Plan application process and the work that has been done since 2012, but will tell you that from Wal-Mart's perspective and as the attorney who has been involved in this project throughout the entire process, there has been an enormous amount of work that has been done and has not been interrupted and have been consistently working on this project since 2012 with the contract negotiations, with the developer through putting together our traffic study. Ms. Mauro stated that "We came to the town with a full traffic study, updated the earlier traffic studies that had been done, looked through town files, went through everything from geological surveys of the site to environmental investigations, put together building elevations and put together an awful lot of information as demonstrated by the twenty pounds worth of paper that were submitted in conjunction with the site plan application – that work was substantial and significant and had been taking place through the entire time in an uninterrupted fashion. Ms. Mauro stated even if this board should find that the petitioner's questions with regard to undue interruption merits consideration – we have been doing the very same activities that Building Inspector Johnson talked about constituting or not reaching the level of undue interruption – that being prosecuting our approvals and getting it all together. "We have been delayed by petitioner's actions alone" and have been peppered time and time again with additional questions with regard to traffic, questions with regard to alternatives, questions with regard to economic impacts, which are completely irrelevant for SEQRA purposes. "We have endeavored attorney

Town of Ballston
Zoning Board of Appeals

Rossi, myself and the Town of Ballston to answer those questions, wanting to be a good neighbor, wanting to make sure that the petitioners are as comfortable with that project as the applicants are and to have to come back to us and say "that we have not gotten any approvals yet and have been doing that work that we are supposed to be doing and patient and working to provide information to the petitioners and for that reason, even if you do consider the undue interruption argument, would put it to this board that we have not been unduly interrupted and have been working on this project consistently and constantly and if anyone should know it, it should be Smart Growth because they have been there step by step by step. Ms. Mauro stated "One would even look at their Facebook page to find out what's going on." Ms. Mauro stated with regard to the information that they learned in June 2014, in advance of that meeting, we learned of a big press release – there was going to be a big bombshell dealt at that meeting – couldn't say what it was going to be, but it was going to be a game changer for the Wal-Mart project. Ms. Mauro stated it was the existence of attorney Rossi's September 4th letter – they knew well in advance of that June meeting that this letter was out there and if it was such a big deal, why didn't you ask the town to make sure before you go out and make that sort of a statement – they never double checked and to that that Mr. Rossi put in a request for an interpretation and received nothing back "don't you think you might want to follow up with something that is going to be such a game changer and a bombshell", but they never did and still waited until September to even challenge that determination. Ms. Mauro thanked the board very much for their willingness to listen and excited to continue with this project and not suffer any further interruptions. Thank you.

Frank Rossi, II, Esq. representing Frank Rossi Sr. and Rosemary Rossi who are the owners of the property in question (Rossi PUDD). Mr. Rossi stated that he sent in a letter and was not sure if the board had a chance to review and forwarded the hard copies this morning that may come across as short and mean spirited at times and the reason honestly (1) "Do believe in the term frivolous as being well applied here unfortunately, this is as frivolous as they come for an attorney when you see something like this despite how Mr. Baker played it and his comments here and in his brief that he handed at the eleventh hour here tonight and himself." (2) "When I started on this project a couple of years ago, I did not know Mr. Johnson and have heard of his work as Building Inspector and Code Enforcement Officer and interacted with him obviously on the letter that we have all been talking about from September 4, 2012, a letter at the time did not realize would have an impact two and a half years to the degree that it has." Mr. Rossi stated that in his interactions with Mr. Johnson, have learned an immense amount just from how he handles his job for over twenty years and he is basically "The Ballston Code Book" a walking version of it. Mr. Rossi takes it personally on his behalf to a certain degree; he is too modest to even say it, that unfortunately this appeal is nothing more than a shot at him as much it is a shot against the Rossi family and what they have done so far and do take that to heart – it's improper and he (Mr. Johnson) should not be used in this way by Mr. Baker and the petitioners and just sorry that it has come to this at this point in time. Mr. Rossi stated with that said has to sit and defend against a petition that really makes absolutely no sense. Mr.

Town of Ballston
Zoning Board of Appeals

Rossi stated that Mr. Reilly comically pointed out about the Supreme Court today talking about the healthcare Subsidies Act and one quote came out of it from Ruth Bader Ginsburg about standing and issue that elaborates on in his letter brief, but Mr. Baker from a quick shuffle from his papers, did not even answer about Smart Growth Ballston and whether or not they are an extension of a 2004 group and what their financial backing is in terms of a possible alter ego scenario that would affect their standing. Mr. Rossi stated that Ruth Bader Ginsburg stated today that "The court (meaning the Supreme Court) had a duty to look at standing, even if a lower court had not done so, in other words, any court - any "Body" sitting as a court any given day, has a duty to get into standing and would ask the board to consider those points made there about the information that probably should be presented about the petitioners under the circumstances.

Mr. Rossi stated we heard tonight that Section 7 "is a very tough to understand section" and Mr. Chairman you point out very well the first sentence is pretty clear - "that construction on a town road and associated infrastructure shall begin within 24 months of final approvals and issuance of all required permits that may occur in phases." Mr. Rossi pointed out the second sentence by Mr. Baker where he continues to say substantial construction or using accidentally perhaps or whatever, but it is substantial progress, which case law has defined in this appellate division and basically stated "physical work is not the only thing that constitutes significant or substantial in this case substantial progress." Being an active participant in the legal issue is substantial progress and leasing issues - that's substantial progress. Mr. Rossi stated that happen to be what Mr. Johnson himself said September 11, 2012 he listed - due diligence, leasing and the question of dealing with administrative illegal issues and being an active participant in them.

Mr. Rossi went back to the approval of the PUDD in June 2011; permits were obtained for wetland mitigation for underground work - the SWPPP was fulfilled and cannot start the project because the PUDD puts forth several obstacles or progress ridden elements to get done first. Mr. Rossi referred to Section 10 of the PUDD in which wetlands have to be mitigated. Since we were only given a sketch plan approved in the PUDD itself, subdivisions was still necessary to build the road. Subdivision for the road cannot be accomplished until you knew where to lay it; if wetlands could not be mitigated in a certain zone we would have to change the metes and bounds of the road. Section 10 states "Wetland mitigation will be a contingency on any site plan or subdivision and we actually did it before the subdivision to make sure we had it correct so that we would not have to go back a second time and waste the town's time and energy. Section 5 Sanitary Water Service - "We made sure the underground utilities were installed correctly - you cannot put a road down then go back and put those utilities in - it's impossible to do or unnecessary to put an expense into putting down a road and then have to dig it back up again because you have to put something underneath it. Mr. Rossi stated the reason Section 7 reads the way it does because the town board wanted to make sure that absent those required permits at least Rossi needs to be progressing towards that point

Town of Ballston
Zoning Board of Appeals

(substantial progress) while Mr. Baker wants to point out that you should have renewed it, in September 2012, asked the very question, and now he begs the questions apparently "As Mr. Johnson, Code Enforcement Officer" and somebody who was at every meeting presumably related to the PUDD itself, isn't necessary to do anything else – it's September 2012, we have two years according to the PUDD to make substantial progress in terms of the construction process and if not, what needs to be done. If he (Mr. Johnson) said there was something needed to be done well outside our ability to do it by June 2013, which would have been the two year mark, we would have done it.

Mr. Rossi stated after that letter almost immediately following it Phase (1) due diligence began by Wal-Mart and because we realize that Wal-Mart may be the first man in per se, that changed the ability to even phase in town road because it forced the enhanced mitigation package – any grocery user would have forced us to make larger highway changes and make sure the town road would accommodate the usage going in at that point in time. The PUDD embraced the fact that different users will create different scenarios, but whoever is first in, is going to have to figure out which one is going to trigger what. Mr. Rossi stated that Section 8 (B) expresses a strong desire for a connector road to Dominic Drive to connect the project to the solo part of Route 67 that is not adjoining Route 50 up toward Curtis Lumber and that area. The agreement as stated in the letter was December 2012 through March 2013 and in March 2013 we came to the Planning Board asking for subdivision approval because "now we knew the metes and bounds of the potential town road and wanted to secure the property not on our land that is going to be affected by it and let's get it done. It's a major subdivision and went through extreme engineering and that's why it took from March 2013 to November 2013 just to secure conditional preliminary subdivision approval. Mr. Rossi stated from November 2013 from March 2014, EDP worked to resolve the final issues that C. T. Male had. Once they were resolved, we sent the map into NYSDOH and NYSDEC, which took four months to get the seals. Mr. Rossi stated you can see nothing in terms of timing shows an interruption since September 2012. In April Wal-Mart submitted their conceptual site plan, May 1 2014, a meeting was held conceptual approval was given and in May a submission for site plan was made.

Mr. Rossi stated he would like to clear up the record for something Mr. Baker had said, "I have never withdrawn our preliminary subdivision approval from November 2013 – we have submitted a new one yes, but have never withdrawn." Mr. Rossi said "We have done it in terms of the resubmission to avoid what seems to be the unavoidable (litigation that could involve the town) from Smart Growth Ballston." "Now take the shovel that he has been using and hit me over the head with it because in the Ballston Journal agreed was the correct call in the first place in September 2014 is a little hypocritical at this point and takes issue with it."

Mr. Rossi stated that we have been in constant engagement with this project and have not been able to take on legal clients (has his own practice as a lawyer) and have become project manager in 2012 on this because his parents cannot handle the day-to-day. Mr. Rossi stated

Town of Ballston
Zoning Board of Appeals

the hundreds of thousands of dollars that his family has spent on this should speak for itself that we have done – an immense amount and much was spent after Mr. Johnson gave his very wise opinion back in September 2012. There is no question here that we have substantially performed what we needed to do and progressed the way we need to do and would ask the board to find the same way. Thank you.

Chairman Lesniak asked if there were questions from the board.

Mr. Russell stated he listened to the discussion and read through the provided documents including Section 7 which states “The construction of town road and associated infrastructure shall begin within 24 months, the final approvals and issuance of all required permits, which may be done in phases.” Mr. Russell stated after reviewing Mr. Johnson’s documented factors (a total of 14) specific actions beginning in the spring of 2012 through non jurisdictional wetlands were cleared in the filled and up to June 2014 testing of existing water main. Mr. Russell stated from the report Mr. Johnson has “nicely delineated” actions on a progressive basis, but some of the work that had to be done would require engineering, surveying, construction and interfacing with other agencies. Mr. Rossi replied absolutely. Mr. Rossi stated the wetlands obviously had to have state and federal approval and permitting to occur for the mitigation. Mr. Russell said, “You went through NYSDEC – Mr. Rossi replied yes, and ACOE. Mr. Russell asked if SHPPO evaluation was included. Mr. Rossi stated the he believes so and had the archeological investigation. Mr. Russell asked about (Phase II) environmental assessment. Mr. Rossi stated in 2013. Wal-Mart did their (Phase I) in November/December 2012 and went into 2013, went back to contract negotiations because they were satisfied that things should move forward based on (Phase I), but they did get an allowance for (Phase II) as you would expect any company small or large would ask for that. Mr. Russell said there were no findings of significant impact. Mr. Rossi replied no, not in (Phase I). Ms. Mauro stated that we found in (Phase II) that fill had been imported that was not going to be structurally sufficient for the building and that have levels that we wanted to excavate from the building footprint and move to another area of the property. We went through that analysis and determination with our engineers and also got concurrence from NYSDEC that it would be acceptable. Mr. Rossi stated that occurred in late 2013 into early 2014 until we saw that NYSDEC approval we did not suggest any work towards site plan and we also wanted to wait until the subdivision map got filed with NYSDOH and NYSDEC – that why it met with that April 2014 timeframe and constantly doing work and evaluation of the land along side of Wal-Mart with respect to (Phase II). Mr. Russell stated that it would imply that surveying needed to be performed on a number of occasions for each of the steps and progresses including the wetlands before and after. Mr. Rossi replied yes, and reports given to the agencies. Ms. Mauro stated for the reports that were done by Mr. Rossi, Wal-Mart also did its own reports and had its own engineers further analyze Mr. Rossi had his engineers looking at the wetlands, mitigation and what to do and then our engineers went through and did a forensic review to make sure what we felt it satisfied the requirements of the state and federal agencies and we were satisfied with

Town of Ballston
Zoning Board of Appeals

anything that could possibly impact our operations and reflect on our presence and property. Ms. Mauro stated that reviews are not just done by one engineer firm, but by a number of engineering firms to make sure that it has been fully evaluated and present together the best information possible to the town's engineer for their review. Mr. Russell stated since the Ballston code "would describe as silent" except for in one instance, where it identifies the Planning Board it says "Within 24 months of final approvals and issuance of all required permits." Mr. Russell stated those are not permits from the town that you were working on in many of these 14 "milestones." Mr. Russell stated you include NYSDEC, SHPPO and ACOE. Mr. Rossi stated that he would have to check his own files to make sure he has not missed any. Mr. Russell said that is not information to expect Mr. Johnson to have immediately on file, but has been able to track and identify the steps that have been completed including all the engineering, surveying and contracting to go with it.

Mr. Baker stated that Mr. Rossi like to engage in ad hominem attacks on me and said that he is not making an attack on Mr. Johnson, not criticizing Mr. Johnson. Mr. Baker stated that Mr. Johnson was doing his job and was just challenging his decision and certainly not a personal attack on him, but it is a point to make that Mr. Russell made is that when Mr. Johnson is making that determination, as to whether substantial progress has been made, or whether there is undue interruption on being done. Mr. Baker stated that he would expect him to inquire with the applicant in that regard in saying "what have you done, what is the work on it" and presumably he did, but there is no documentation submitted anywhere in the town's records or files – we have the SWPPP and it was signed – there is no documentation of the other work that has been done ""We are taking the word of Mr. Rossi" and we don't know the timeframe of when Wal-Mart came in, how they were progressing on it, if they were showing proper due diligence or if that really even qualifies as an undue interruption in the work. Mr. Baker stated that it is important to recognize that we are in the legal process on this and is the review of the Code Enforcement Officer's determination on the record as it existing when he was making that determination and that is why we asked for the record to be produced. "We do not have other than self-serving statements and letters from the lawyers for the applicant and Wal-Mart any documentation to support their statements about the work that has been done. Mr. Baker referenced Exhibit (5) – the September 11, 2012 letter from Mr. Johnson back to Mr. Rossi and number 3 – in response to his question "What would constitute undue interruption he says, "While the town cannot at this time render an opinion as to what would constitute and undue interruption as a definition would be fact based, the town agrees that the typical periods of time the site construction does not take place due to contract negotiations, site inspections and project specific site approvals would not constitute undue interruptions." Mr. Baker said, "He did not make a determination at that time, as to whether it had happened or not and did not make that determination whether it happened or not until December 2014 in response to our request of the appeal. The determination was based on the list of factors presented without any documentary evidence of that how those things occurred. Mr. Baker said this is clearly a timely challenge and never answered it – just engaged in a hypothetical and

Town of Ballston
Zoning Board of Appeals

specifically said, "I am not issuing an opinion on this, I can't tell you what it is or that it won't be in the future" and cannot be that Mr. Rossi or Wal-Mart relied and said "we know that anything we do as long as we claim we have a paper trail is going to be sufficient." Mr. Baker said they have to demonstrate that and still have not demonstrated and would admit that it no a definition of a per se reasonable excuse for an undue interruption and they want a clarification of it they should of either asked for another interpretation from Mr. Rossi or to cover themselves gone back to the town board and say "We just want to make sure you understand that we are working on this and want to make an extension of that time frame" – they did not do either. Mr. Baker stated that we made the appeal when we knew and understood when the application was submitted and regards to what Smart Growth Ballston said in June 2014, again, Mr. Rossi is misstating what we had done – we were raising the position in the letter that we submitted to the town board on that night that based on the documents that we reviewed in the town's files, there had not been substantial progress and it had been voided because there was no answer. Mr. Baker stated that it is not his obligation when he sees the town's files that there is no response to call the applicant and say "did you get a response" "No, I looked at the town and the Town Attorney had not seen that letter either." Mr. Baker stated that when he was taking to the town attorney said, "He did not know how they have satisfied the PUDD and he says "I don't see how they have done either – he did not know how they did either. The letter from Mr. Johnson in September 2011 does not show "cc's" to anybody in the town and no copies – who would have known that letter, existed. Mr. Baker stated it was not produced and given to the Town Clerk when she was soliciting all the documents from their FOIL request. Mr. Baker stated "We acted and knew we had a determination from Mr. Johnson in July 2014, filed the appeal, he then answered the second part of our question in December and filed a timely appeal. Thank you for your consideration.

Ms. Mauro stated first of all there is no legal requirement that we turn over our attorney's notes, our drafts of contract documents or even our contract with Mr. Rossi. There is no requirement that we provide the town with the information for Phase I or Phase II site assessment that was done – there is no legal requirement that information be provided to the town. In terms of the town or anyone else having to go on the representations of Mr. Rossi and myself, when this goes to litigation, which we are confident it will, we will provide affidavits. This is not the forum for an affidavit and made it very plain in the letter to the board that I (Ms. Mauro) was present, I made those statements, I was the one that spoke and said "here is what was determined in that September 11, 2012 letter". Ms. Mauro stated she has an oath as an attorney as does Mr. Rossi to speak truthfully and said she takes it seriously. Ms. Mauro stated that when she represents that we have been actively engaged since 2012 with the Rossi's and getting this project together is telling you is actively engaged and telling the truth – will submit it in an affidavit when the time comes, but that time is not now and have provided the you (the board) with her statement and thinks it should be sufficient. Thank you.

Town of Ballston
Zoning Board of Appeals

Chairman Lesniak stated that he has been looking at the summaries that Mr. Rossi and Ms. Mauro have made and a lot of letters and memos referenced, which would show that there was progress being done on a timeline and would think those letter and memos would substantiate the claims that were made. Ms. Mauro said in fact, our applications to the town substantiate all the work that has been done because it contains the studies, analysis that are brought before the town is right there – that is the evidence of the work that has been there.

Mr. Rossi stated that he would like to echo the affidavit comments that Ms. Mauro has made and technically on both sides in terms on both legal and the project management ends of it, but whenever I (Mr. Rossi) sign a letter like this, am doing it as an attorney at the end of the day and this is my license at stake as much as anybody's and would not be telling mistruths when asked in a certain case and would take issue with the idea that it is not a lawyers due diligence requirement to go the extra step to ensure they are avoiding a frivolous situation so on June 24, 2014 Mr. Baker was told by Mr. Mauro and myself that a letter existed and was a response to my September 2012 letter – "his clock started at this point in time." Mr. Rossi stated 60 days after June 24, 2014 is not September 24, 2014, it's something earlier than that. Mr. Rossi said the file stamp on the first appeal was September 24, 2014 – his time had run out. Mr. Rossi reiterated that when you have a determination/interpretation in your favor you can't go back and get a re-clarification because no one will give it to you. Mr. Rossi said it's pretty clear what Mr. Johnson meant in number three of his September 11, 2012 letter so it tells me that due diligence, leasing issues, contract negotiation issues and the administrative processes would have to go through with site plan and subdivision to not constitute undue interruption of substantial progress. If there is an unbroken chain of those three events going on from September 2012 through now, then he does not need to ask him again or anybody else for that matter for an extension or reinterpretation – nothing changed in terms of what substantial progress is undue interruption would not be. "If we were in those three zones, we were fine, we were and we are" and would ask you to find the same. Thank you.

Chairman Lensiak opened the public hearing at 8:40 p.m. (Dealing with the continuation of progress)

Ben Baskin lives in the Town of Ballston and a Member of Smart Growth Ballston and thank you for having this meeting and the opportunity for Jeff Baker to present those arguments. Mr. Baskin said on June 24, 2014 at a Town Board meeting is when we first learned that the letter existed and the town apologized for providing us with everything but that letter – that was the one thing that was missing of everything that was foiled. Mr. Baskin said even though at that point the town acknowledged that the letter exists and apologized for not including it, we did not get that letter for another month. Mr. Baskin stated that we cannot respond to a letter that we not yet have and need that letter to respond to letter to know what's in it – so just knowing there is a letter in existence without having it in hand to read – that is not the time is should start – it should start when you receive that letter (that was in July) at least a month

Town of Ballston
Zoning Board of Appeals

later. Chairman Lesniak asked if there was documentation when you received the letter. Mr. Basking said he believes he does and was in an email. Mr. Baskin asked Mr. Baker if there was documentation of that letter. Mr. Baskin said "we will have to check, but think we do." Mr. Baskin will follow up on that and was in the 60 days of our receipt of the letter. Mr. Baskin said "Ten years ago, when the first Wal-Mart thing happened and were also told by the Rossi's that they had spent a million dollars on their property preparing it and that is in the minutes of a meeting. Mr. Baskin said documentation is important to document what has happened since the PUDD in 2011 and just to know for sure. Thank you.

Ms. Mauro directed the board attention to the case law in her letter "Schultz v. Town of Red Hook Zoning Board of Appeals, 293 AD2d 621, 740 NYS2d 235 (2d Dep't 2002) whereby the court stated "The petitioners have been closely involved with the project's underlying proceedings, the fact that petitioners were not provided with a copy of the interpretation will not toll the 60-day limitation period. Ms. Mauro stated Mr. Baskin is not an attorney, but she (Ms. Mauro) is and there is case law and does not go with what he says. Chairman Lesniak thanked Ms. Mauro for her comment.

Allan Cox stated that he seem to him that this letter is kind of irrelevant because basically it's like "Calling Wal-Mart's credit card department and saying am I in good standing and just wanted to find this out and they say "yes you are" and I say "Thank you very much have a nice day" – it seems to me that is what this letter is.

Chairman Lesniak closed the public hearing at 8:45 p.m.

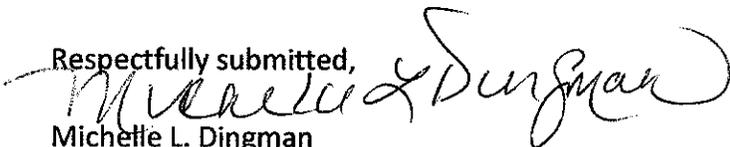
Mr. Reilly said the board is not going to make a decision this evening and have a 62-day time frame within which to decide that decision will be made or a public hearing at the April or May meeting. Mr. Reilly would invite both sides any further written comment and also proposed findings to be submitted would be welcomed.

Ms. Bell asked, does this mean all construction or any other progress on the development at this point has to be on hold until our decision. Mr. Reilly said no.

MOTION: Ms. Bell moved to adjourn. Ms. Kane seconded the motion and all present voted in favor. **CARRIED.**

Meeting adjourned at 8:47 p. m.

Respectfully submitted,


Michelle L. Dingman
Zoning Board Secretary