

TOWN OF MAMAKATING
ZONING BOARD OF APPEALS

MINUTES

February 23, 2023

TOWN HALL

WURTSBORO, NEW YORK

ZONING BOARD MEMBERS :

MATTHEW MORREALE, Chairman

GEORGIA RAMPE, Board Member

KENT FINDLEY, Board Member

GENEVIEVE MULHARE, Board Member

DAVID LEWIS, Board Member

JON FOURNIER, Alternate Board Member

STEVEN MOGEL, ESQ., Attorney

KYRA PLATT, Building Department

KELSEY CALHOUN, Building Department

JERIC CORPORATION
Court Reporting Services
P.O. Box 385
Narrowsburg, New York 12764
(845) 252-3515

Reported By: Rosemary A. Meyer

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COUNTY OF SULLIVAN : TOWN OF MAMAKATING
ZONING BOARD OF APPEALS

----- X
Old Roosa Gap Realty LLC c/o Moshe Smilowitz
Interpretation and Appeal of Building Inspector Decision
To Deny Two Production Wells
Tax Map Section 46; Block 2; Lot 41.1
Village Adjacent Zone
----- X

Town Hall
Town of Mamakating
February 23, 2023
7:00 P.M.

ZONING BOARD MEMBERS :

- MATTHEW MORREALE, Chairman
- GEORGIA RAMPE, Board Member
- KENT FINDLEY, Board Member
- GENEVIEVE MULHARE, Board Member
- DAVID LEWIS, Board Member
- JON FOURNIER, Alternate Board Member
- STEVEN MOGEL, ESQ., Attorney
- KYRA PLATT, Building Department
- KELSEY CALHOUN, Building Department

Also Present: Steven Barshov, Esq.
On Behalf of Applicant (via Zoom)

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P.O. Box 385
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Reported By: Rosemary A. Meyer

1 - RE: OLD ROOSA GAP REALTY LLC -

2 CHAIRMAN MORREALE: Okay. Ladies and gentlemen, the
3 February ZBA meeting is called to order.

4 Would everyone please stand for the Pledge of
5 Allegiance.

6 (The Pledge of Allegiance was recited.)

7 CHAIRMAN MORREALE: Okay. We're going to do a quick
8 attendance.

9 Dave Lewis.

10 BOARD MEMBER LEWIS: Here.

11 CHAIRMAN MORREALE: Genevieve Mulhare.

12 BOARD MEMBER MULHARE: Here.

13 CHAIRMAN MORREALE: Kent Findley.

14 BOARD MEMBER FINDLEY: Here.

15 CHAIRMAN MORREALE: Georgia Rampe.

16 BOARD MEMBER RAMPE: Here.

17 CHAIRMAN MORREALE: Jon Fournier.

18 ALTERNATE BOARD MEMBER FOURNIER: Here.

19 CHAIRMAN MORREALE: All right. Are we coming through
20 loud and clear on Zoom, Kyra? Do you have a confirmation of
21 that?

22 MR. BARSHOV: Yes, I can hear you, Mr. Chairman.

23 CHAIRMAN MORREALE: Great.

24 All right. Looking to follow the agenda script.

25 All right, the acceptance of the January minutes. Did

1 - RE: OLD ROOSA GAP REALTY LLC -

2 everyone get a chance to look at those?

3 BOARD MEMBER RAMPE: Yes.

4 BOARD MEMBER MULHARE: Yes.

5 BOARD MEMBER FINDLEY: Yes.

6 CHAIRMAN MORREALE: Do I have a motion to accept them?

7 BOARD MEMBER RAMPE: I'll make a motion.

8 CHAIRMAN MORREALE: Second.

9 All in favor?

10 BOARD MEMBER RAMPE: Aye.

11 BOARD MEMBER FINDLEY: Aye.

12 BOARD MEMBER MULHARE: Aye.

13 BOARD MEMBER LEWIS: Aye.

14 CHAIRMAN MORREALE: Aye.

15 (The motion was approved and carried.)

16 (The stenographer inquired as to the meeting
17 date of the approved minutes.)

18 CHAIRMAN MORREALE: Thank you. For clarification, that
19 was January 25th's meeting.

20 BOARD MEMBER RAMPE: The 26th.

21 CHAIRMAN MORREALE: Was it the 26th or 25th? January
22 26th.

23 Okay. Who is first before us, or who is before us
24 tonight?

25 MS. PLATT: Old Roosa Gap Road Realty LLC, care of Moshe

1 - RE: OLD ROOSA GAP REALTY LLC -

2 Smilowitz with Steven Barshov. Interpretation and appeal of
3 Building Inspector's decision to deny drilling two wells on a
4 property with an existing single-family home, well and septic
5 system.

6 The property is located on 32 Old Roosa Gap Road, Tax
7 Map Section 46; Block 2; Lot 41.1. It is approximately 18.39
8 acres and lies in the Village Adjacent Zone.

9 And Mr. Barshov is on Zoom.

10 CHAIRMAN MORREALE: Mr. Barshov, could you please bring
11 us back up to speed with your application?

12 MR. BARSHOV: Sure. So we've been before the ZBA now on
13 multiple occasions. The public hearing on this application
14 has been closed.

15 I believe that in the course of the public hearings, the
16 way that the Board conducted it, that there were many
17 exchanges and I answered, or at least attempted to answer,
18 all of the questions that had been raised by the public, as
19 well as questions that were raised by the Board.

20 In our prior submissions and in my oral statements I had
21 made clear to the Board that this is an application for
22 approval of two -- well, I shouldn't say approval. It's an
23 application appealing the denial of two test wells for my
24 client's property so that they can ascertain what the
25 possibilities are for water in these particular wells, both

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2 in terms of quantity and quality.

3 I confirmed to the Board, and I also went back and
4 looked, and this is in our original appeal papers as well,
5 that there are no applications filed before any other
6 governmental agency to actually put these wells into
7 production and so the only issue that we believe is before
8 the Board is whether or not the town's Code Enforcement
9 Officer lawfully denied these permit applications for test
10 wells. The submission that we made in the very beginning, we
11 indicated that the basis for the denial, which was that
12 production wells are prohibited under the applicable zoning,
13 is something that the town is preempted by state law from
14 prohibiting. But regardless of that, there is no application
15 to actually put any wells into production. So because there
16 is no such application yet and we've indicated that the only
17 purpose for these wells at this time is to test, to do the
18 72-hour pump test of neighboring wells and to see A, what
19 their capacity would be; B, what their quality would be; and
20 of course, C, what impact, if any, there would be on
21 surrounding property owners' wells from the 72-hour pump
22 test, that there's no basis in the record to have those
23 applications denied. So we're here before you today asking
24 for you to overturn the denial and to authorize the wells to
25 be used for testing purpose to ascertain water quality and

1 - RE: OLD ROOSA GAP REALTY LLC -
2 quantity.

3 CHAIRMAN MORREALE: Thank you.

4 Kent, your brought a section of 195 to my attention.
5 Would you like to discuss that?

6 BOARD MEMBER FINDLEY: I would actually like to ask that
7 we go into Executive Session to seek --

8 MS. PLATT: Is your mic on?

9 BOARD MEMBER FINDLEY: I think it is. I'm trying to
10 talk into it. If I'm not, I apologize.

11 But I would like to go into Executive Session to seek
12 some legal advice, to direct questions to the counsel.

13 CHAIRMAN MORREALE: Steve, is that warranted, in your
14 opinion?

15 MR. MOGEL: It's warranted previously so I'd say it's
16 warranted now. I mean the Board would have to vote whether
17 they want to go into Executive Session. So Mr. Findley's
18 making the application that the Board go into Executive
19 Session so the Board can take a vote as to whether you want
20 to go into Executive Session.

21 CHAIRMAN MORREALE: Based on my reading of the Open Case
22 Law in New York, we would have to give a specific reason --

23 MR. MOGEL: Correct.

24 CHAIRMAN MORREALE: -- whether it be the threat of
25 litigation from the prior meeting that you would like to

1 - RE: OLD ROOSA GAP REALTY LLC -

2 discuss?

3 BOARD MEMBER FINDLEY: That's not the reason. I just
4 have very specific legal questions about the law.

5 MR. MOGEL: Well, as you know, there are specific
6 reasons that you can go into Executive Session. The last
7 time that we went into Executive Session, it was because of
8 the threat of litigation, potential litigation. And if you
9 do not have a discernible reason in order to go into
10 Executive Session, that's not something that, in my opinion,
11 would be legal. As I said before, the Board did go into
12 Executive Session previously, given that threat of litigation
13 and if that is the basis for your application now, then I
14 don't see any legal impediment to it.

15 CHAIRMAN MORREALE: Being that you don't want to discuss
16 the litigation but you would like to speak with Steve
17 regarding, we do have another 30 days.

18 BOARD MEMBER FINDLEY: I'm fine to keep going.

19 CHAIRMAN MORREALE: Delaying this any further is not, I
20 think, ideal, but if there's conversations that you need to
21 have to satisfy your vote ...

22 MR. MOGEL: I do take issue. I don't believe that I can
23 be consulted separately by individual members outside of the
24 meetings. If there's a valid reason for -- I don't
25 represent, and there's no attorney, client privilege and I

1 - RE: OLD ROOSA GAP REALTY LLC -
2 don't represent any individual member of the board. So if
3 there's a motion for a proper legal reason to go into
4 Executive Session, that's one thing, but I have no intention
5 of meeting surreptitiously with any member of the board to
6 provide legal advice. The community is entitled to know when
7 we're going into Executive Session, that we'll be talking
8 about what the subject of that would be and I don't feel that
9 it is appropriate for me to meet individually with members
10 outside of these meetings for the purpose of providing legal
11 advice regarding an application.

12 CHAIRMAN MORREALE: All right.

13 BOARD MEMBER RAMPE: Do you want to read the ...

14 CHAIRMAN MORREALE: Read the --

15 BOARD MEMBER RAMPE: Yes.

16 CHAIRMAN MORREALE: Sure. I mean unless, Kent, you have
17 anything to say, I'll read 195, the section.

18 BOARD MEMBER FINDLEY: No, nothing at this time.

19 CHAIRMAN MORREALE: Okay. So the language in Section
20 195.1(a), or actually 195(b) in the general section: The
21 well shall be constructed on the same lot or property as the
22 structure being served, outside the structure in an
23 accessible location which is not subject to flooding and at a
24 distance from potential sources of pollution on the owner's
25 lot or property, or on adjoining lots or properties which is

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2 not less than that stated in the 10 NYCRR Appendix 5(b),
3 rural water supply.

4 I'm aware of an interpretation of the first part of this
5 sentence: The well shall be constructed on the same lot or
6 property as the structure being served.

7 Being that the existing structure is not the believed
8 end user of these two wells being asked permission to be
9 drilled, that this would disqualify anyone from bringing a
10 permit and perhaps -- sorry, I'm losing my train of thought
11 here. The argument being made is that being that the
12 existing structure that is on the property is not the end
13 user, that then the denial should be upheld because it is
14 believed that, like I said, the structure that's there would
15 not be the one being served.

16 Am I accurately making the case, Kent, in a fumbled way?

17 BOARD MEMBER FINDLEY: Yes, that's what you wrote. Or
18 that's what ...

19 CHAIRMAN MORREALE: That's what it says.

20 My interpretation is that the key word in this section
21 is "served". That would be the use of these wells and not
22 their mere existence. And the use of these wells is not
23 something that the ZBA has the authority to discuss or even
24 determine, make a determination.

25 MR. MOGEL: It's not before the Board.

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2 CHAIRMAN MORREALE: It's not --

3 MR. MOGEL: It's not before the Board at this time.

4 BOARD MEMBER FINDLEY: Well, I mean --

5 MS. PLATT: Into the microphone.

6 BOARD MEMBER FINDLEY: In this -- how many pages is
7 this? On page 2 it even states: Even putting aside that the
8 water from the wells would ultimately be used to supply water
9 to property in an adjoining municipality, nothing in town
10 code authorizes the Building Inspector to deny well permits
11 because of how the water wells could or would be used in the
12 future. He's stating in this thing that that's the ultimate
13 use of the water.

14 CHAIRMAN MORREALE: Absolutely, agreed.

15 And he's also stating, which I agree with, that the
16 application for drilling wells is not the intent of the use.
17 It is not up for debate for the Building Inspector.

18 195 basically goes through the criteria of getting a
19 well permit. The Applicant has met all the criteria of the
20 well permit. It is our belief that the end use of it is
21 something that requires Planning Board approval. But that's
22 not before us and what's only before us is the permit that
23 was denied which is for two wells.

24 195 goes on to describe yield testing as a possible use,
25 a permitted use. That's exactly what they've applied for.

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2 That's exactly what they can do with the wells. Anything
3 beyond that, if they were to continue beyond that, they would
4 be in violation.

5 ALTERNATE BOARD MEMBER FOURNIER: So Matt, what you're
6 saying is if they go beyond using the well just as a test
7 well, so they're not using the well, so that means that the
8 well is going to be abandoned; is that correct?

9 CHAIRMAN MORREALE: I don't know. It would depend on
10 the yield.

11 ALTERNATE BOARD MEMBER FOURNIER: So if there is no
12 purpose of these wells, they're just using it as a test well
13 to the test water.

14 One of my first questions was can this well be removed
15 and the response was no, it can't be removed. Well, I did
16 some research and they can remove the wells and they can use
17 a certain grout and actually take the well out.

18 I also went further and the DEC, the State of New York
19 has thousands of wells that are not being of use right now
20 which are posing hazards to children and pets. They're also
21 pathways for contamination in our groundwater.

22 And I also want to note that it's pretty much been a
23 unanimous decision by everyone that walked in the room that
24 they did not want to have that, so it's been on everybody's
25 mind. So I just wanted to state that.

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2 Also, I contacted the DEC for some questions. They have
3 not gotten back with me yet so I'd like to wait for them to
4 get to me. It's the Residential Sanitation Section Bureau of
5 Water Supply Protection of New York State.

6 CHAIRMAN MORREALE: I think with the debate of the board
7 members and like you said, everybody that made public
8 comments, all of their concerns were of the use of the wells,
9 what were these wells going to be used for. And it's, even
10 though the Applicant, their counsel, Mr. Barshov, has made
11 very clear that they're not making any firm declarations of
12 what they're going use these wells for, I think reasonable
13 minds could deduce, based on the full extent of their
14 application, all the supporting documents, that it's probably
15 going to be used for production. But again, what is before
16 us and what do we have the authority to either uphold or
17 deny.

18 My evolution on this entire application, the first
19 meeting that we had a cursory view of their application, the
20 denial, the statements made at the first meeting, I left that
21 night thinking I know exactly where I stand. I felt that
22 they want production wells, production wells need to be
23 approved by the Planning Board and that's not us, therefore
24 the denial is to uphold. So at that point I completely
25 agreed with Mary, the Building Inspector. But we have

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2 luxuries that Mary doesn't. We had months to think about
3 this and quite a bit of latitude to understand and do
4 research and interpreting some of the code we're not very
5 familiar with because it doesn't come up very often. And
6 it's in the section or in 195. It's spells out exactly what
7 a citizen of Mamakating needs to do to get a well. It even
8 talks about second wells on properties. They have met that
9 criteria. And the problems that we have personally, and the
10 public have, with these wells is what they want to do or what
11 we think they want to do with those wells. It's simply not
12 the purview of the Zoning Board of Appeals, at least at this
13 stage, the way it is before us.

14 The permit is requesting two wells and what I have a
15 hard time doing is thinking do I rely on a very esoteric bias
16 view of certain words and parts of sentences of the code to
17 deny this one applicant wells where if anybody else met those
18 requirements they would be able to put a second well and test
19 the yield of them? I just can't do that. Now, that's
20 personally, that's me. But in our mind, or at least in my
21 mind, I had to divorce the intent, the use, with simply what
22 they applied to do. Well, and I think when you do that, it
23 makes it very, very easy. Well, easy in one way and
24 extremely hard in another. The concerns that the public
25 have, the justified concerns, are for another board, not us,

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2 and that's how I feel on the matter. I don't know if that
3 was helpful or not, but...

4 BOARD MEMBER FINDLEY: I would say that it was very
5 eloquently spoken and I don't disagree with you, but I think
6 they should get that board before --

7 I would say I don't disagree with where you are, but
8 they should be at that board prior to the ZBA.

9 CHAIRMAN MORREALE: Well, it's sort of a chicken or an
10 egg situation.

11 BOARD MEMBER FINDLEY: Yes.

12 CHAIRMAN MORREALE: But 195, I'm just going to pull it
13 up here. There's a section for yield, drilling wells for
14 yield testing. What they do with that well after the yield
15 test, that's when they would go to the Planning Board. You
16 can't go to the Planning Board, or at least it wouldn't be
17 very smart to go the Planning Board for approval, a special
18 use permit on a well, if you don't even know it produces the
19 water that it would need to produce or if it would have a
20 negative impasse on the wells surrounding it and therefore,
21 the project would be ...

22 So I think it's prudent and due diligence and
23 chronological order that you would apply for a well, which
24 they have every right to do, test the yield, which they have
25 every right to do, and then go to the Planning Board based on

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2 whatever those yield results, if they're positive or not.

3 MR. MOGEL: The Applicant also has an absolute right,
4 when receiving a denial from a code enforcement officer, to
5 appeal that to this board. Without a doubt, that's within
6 the code and that's precisely what the Applicant did.

7 CHAIRMAN MORREALE: 195, Section G. Sorry.

8 MR. MOGEL: No problem.

9 CHAIRMAN MORREALE: Yield test: Before being put into
10 use, the well shall be tested for yield and drawdown for at
11 least four hours duration. And it goes on to explain what
12 the yield test and the drawdown testing is. This is done
13 prior to Planning Board approval.

14 BOARD MEMBER FINDLEY: The code also references rural
15 water supply.

16 MS. PLATT: Kent, if you could just yell.

17 BOARD MEMBER FINDLEY: The code also references rural
18 water supply everywhere. Does not refer to water being drawn
19 down for a public use.

20 CHAIRMAN MORREALE: Where you're going with that, I
21 completely agree. A public use or a commercial use, it's not
22 something that the ZBA makes determinations on.

23 BOARD MEMBER FINDLEY: Yes. But the intent is always
24 supposed to be forthright and forward in public setting
25 before the Planning Board or the Zoning Board.

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2 MR. MOGEL: The Applicant hasn't hid the ball. The
3 Applicant has been very upfront about what it desires to do.
4 But nonetheless, without testing, it's still hypothetical. I
5 mean unless these wells produce, I'm reasonably confident all
6 things being equal, that the Applicant, if these wells do
7 produce adequate water, will seek to turn them into
8 production well, but it's still hypothetical. And it's
9 certainly hypothetical because they don't know if the wells
10 are going to produce. So if the wells don't produce, then
11 there will be no application in the future for production
12 wells. And if the wells do produce and God forbid, somebody
13 passes away or suffers financial problems on the Applicant's
14 side, then maybe they will not be converted decided to be
15 converted into production wells. It's hypothetical. And
16 again, they haven't hid what the desire is. It's not that
17 they're lying to us about what they desire to do. They've
18 made that quite clear, what they desire to do. But it
19 doesn't change the fact that at this point it's still
20 hypothetical because the wells have not been tested.

21 BOARD MEMBER MULHARE: Well, Steve, I have a question.

22 MR. MOGEL: Uh-huh.

23 BOARD MEMBER MULHARE: If the wells are, they provide
24 the quantity and the quality of the water they need, what's
25 in place to stop them from putting the wells into use?

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2 MR. MOGEL: They need to --

3 BOARD MEMBER MULHARE: To have a well permit.

4 MR. MOGEL: In order to turn them into production wells
5 they would need to get site plan approval, at least. I mean
6 I believe that there are several other requirements that they
7 have to address and I believe, I would not be surprised if
8 the application came back before this board for a further
9 interpretation. There are a number of issues and there are
10 questions that have been raised about the propriety of having
11 production wells in this zone, whether that's a permissible
12 use. And I think these are all very good questions.

13 The Applicant has raised the notion that state law, as
14 the Applicant did, the Applicant's attorney just raised it a
15 few moments ago, that state law somehow preempts our local
16 code. But obviously, that's a question for another day. The
17 fact is that if the fear is that the well will be dug and
18 then immediately put into production, the protections that
19 you have for that are the same protections that any
20 individual who uses property for any reason that is not
21 consistent with local law, they would be those same
22 protections, which would mean that the Building Inspector
23 could come in, that legal action could be taken, et cetera,
24 et cetera, et cetera.

25 BOARD MEMBER MULHARE: Thank you.

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2 MR. MOGEL: Sure.

3 BOARD MEMBER RAMPE: The other thing that I often think
4 about is, he has stated that many times, if the water is of
5 the quantity, if the wells are the quantity and the quality
6 that they're looking for. What is the quantity?

7 MR. MOGEL: You could ask the Applicant that, I suppose.

8 BOARD MEMBER RAMPE: Mr. Barshov, what is the quantity
9 that's desired?

10 MR. BARSHOV: There is no set quantity or any other
11 numbers that have been set. The purpose of drilling the
12 wells is to see what their capacity would be and what the
13 quality would be. So there is no number that anybody is
14 looking for other than what the actual production capacity of
15 the well would be, what its capacity would be when you do a
16 72-hour pump test. So there is no number that anybody has in
17 mind, is looking for. It's simply an open-ended test to see
18 what will the wells yield, what will the quality be, and of
19 course, what would the impact be, if any, on surrounding
20 property owners.

21 BOARD MEMBER RAMPE: Thank you.

22 CHAIRMAN MORREALE: Georgia, there's some language in
23 195 that kind of goes down. It might answer part of your
24 question.

25 BOARD MEMBER RAMPE: Good.

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2 CHAIRMAN MORREALE: The test pump shall have a capacity
3 at least equal to the pumping rate at which it is expected
4 the well will be pumped during its usage. The test pump
5 shall be installed to operate continuously until the water
6 level has stabilized. At this point, the yield and drawdown
7 will be determined.

8 Periodic water level observations shall be made during
9 the drawdown and subsequent recovery periods. A minimum
10 sustained well yield of five gallons per minute shall be
11 obtained.

12 BOARD MEMBER RAMPE: That's not much.

13 BOARD MEMBER FINDLEY: See, again --

14 MR. MOGEL: I would imagine that setting that sustained
15 yield of five gallons a minute, I suspect that that is not a
16 rate that would equal a production well.

17 CHAIRMAN MORREALE: No.

18 MR. MOGEL: I don't think that would be adequate.
19 That's just setting forth that bare minimum for a well for
20 any usage at all.

21 CHAIRMAN MORREALE: I agree. I think the first sentence
22 is more in line. The test pump shall have a capacity at
23 least equal to the pumping rate at which it is expected the
24 well will be pumped during its usage.

25 MR. BARSHOV: Right. And I think if I might add in, at

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2 least in my experience, this is all done by reasoning
3 backwards. In other words, the well capacity is determined
4 based upon doing the 72-hour pump test and one finds out what
5 the maximum yield would be, basically determining when the
6 water level is dropping in the well by pumping at a certain
7 number of gallons per minute. And then if one is doing that,
8 you start scaling back until you see what number of gallons
9 per minute would be pumped and there is not any lowering of
10 the water level in the well, and then you know what your
11 capacity is. Now, what those numbers are, who knows. We
12 have no expectation one way or the another or a certain
13 minimum as to what it has to be or what. We just want to
14 find out what it is.

15 CHAIRMAN MORREALE: The yield test will dictate what
16 capacity these wells have.

17 BOARD MEMBER RAMPE: My other concern is that we've had
18 an awful lot of public comment on water capacity in the area.
19 I know we had an unusually dry summer. We probably will have
20 another dry summer. We have no snowpack. And if you have a
21 dry summer and you don't have a well in production, what will
22 the future be in that case? They're already having water
23 trouble.

24 CHAIRMAN MORREALE: The concern of the public and what
25 you're talking about is adding two more wells to an already

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2 taxed water table.

3 BOARD MEMBER RAMPE: Yes, of course.

4 CHAIRMAN MORREALE: Yes, completely valid concern.

5 BOARD MEMBER RAMPE: Yes.

6 CHAIRMAN MORREALE: But, again, we're going into the
7 use. And you even said production. We're talking about a
8 yield test, something that if they meet the criteria for the
9 permit, they get it, they do the yield test. Now, the next
10 step would be production and then that's when those concerns
11 would be addressed.

12 BOARD MEMBER FINDLEY: But even for our code, the yield
13 test that they have to do is vastly different.

14 MS. PLATT: A little louder.

15 BOARD MEMBER FINDLEY: The yield test that's required in
16 the code is vastly different than what he's proposing or what
17 even may be necessary to see the right yield for the clearly
18 intended use and that's why it is my belief that even the
19 well tests, because of the intended use, should be in front
20 of a board that has professionals to decide what those yield
21 tests should look like, what they should do, how much they
22 should be, how long. I don't even know what the right, how
23 much of what we're talking about. This board is clearly not
24 well professionals, nor should it be well professionals.

25 CHAIRMAN MORREALE: I agree with you there. But I think

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2 we can, with common sense --

3 BOARD MEMBER FINDLEY: It talks about a four hour well
4 test. It's talking 72 hours.

5 BOARD MEMBER RAMPE: Right.

6 BOARD MEMBER FINDLEY: It's the intended use, which is
7 clear. There's no ...

8 CHAIRMAN MORREALE: I agree with you. I think you'd
9 have to be unreasonable to assume it's something else.

10 BOARD MEMBER FINDLEY: Somewhere else is my opinion.

11 CHAIRMAN MORREALE: I'm sorry?

12 BOARD MEMBER FINDLEY: Then it should be before another
13 board even to determine what tests should be done for the
14 test wells. We don't even talk about test wells,
15 necessarily. It is implied that there are test wells, but
16 there's no differentiation in our code between test wells and
17 production wells that I noticed.

18 CHAIRMAN MORREALE: Well, no. I think test wells is
19 something that's been created during our meetings. But yield
20 test is in our code.

21 BOARD MEMBER FINDLEY: Yes.

22 CHAIRMAN MORREALE: And I think that's what they're
23 describing with different language.

24 BOARD MEMBER FINDLEY: Well, there's been a lot --

25 BOARD MEMBER RAMPE: With bigger language.

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2 BOARD MEMBER FINDLEY: There's been a lot --

3 CHAIRMAN MORREALE: Well, and a lot more of it.

4 MR. MOGEL: I'm just going to say again. The law is
5 clear that this applicant has a right to appeal this decision
6 to this board. This board wouldn't be doing its duty to punt
7 the decision to the Planning Board for further study or
8 evaluation. The fact is there was a decision that was made
9 by the Planning Board, the Applicant appealed that decision
10 and now it's before this board.

11 BOARD MEMBER RAMPE: Building Department.

12 MR. MOGEL: What did I say?

13 BOARD MEMBER RAMPE: Planning Board.

14 MR. MOGEL: I'm sorry.

15 The Building Inspector and it's before this board
16 properly. So this board needs to make a determination, one
17 way or the other, whether it's going to uphold the decision
18 of the Building Inspector or overturn the decision of the
19 Building Inspector.

20 And again, this whole idea of future use, no matter how
21 you slice it, is hypothetical. Things change. And we also
22 don't know what the production, what yield these wells will
23 have. And it's really, again, it's not for this board to
24 make that determination. Yes, they want production wells.
25 They have made it abundantly clear they want production

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2 wells. This would be -- take it back. That's the desire,
3 the ultimate desire for these test wells. But the fact is,
4 we simply can't look into the future and say, Oh, this is
5 definitely going to happen, because we don't know what the
6 yield is and we're not the Applicant. We don't know. So at
7 that point, the Board is just getting so far beyond it's
8 purview. This is a legal question. It's an ethical, moral;
9 it's not a judgment issue. This is a legal question. The
10 Board needs to determine if, based on the code, if the
11 Building Inspector's decision was legally correct or not.

12 CHAIRMAN MORREALE: I agree. And I think one of the
13 reasons we're going off on these limbs is because of the
14 public's outcry, really. And I think it's all affected us
15 and it makes us really want to think very, very deeply on
16 this applicant and this interpretation. But it really does
17 just boil down to a Mamakating citizen, if they meet the
18 criteria to drill a well. They can test, they can do a yield
19 test of that well. And, well, I can't think of any reason
20 other than a hypothetical why we would deny this particular
21 citizen that right and that's my feeling on that. It's
22 really just that simple.

23 BOARD MEMBER LEWIS: Has the existing well been tested?
24 Here, you have a well there. You already know that there's
25 maps that DEC provides that shows the watershed under the

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2 ground. You couldn't test the well that's currently there
3 and reference the DEC maps for the water supply in the
4 aquifers that are there? It just seems silly to drill two
5 more wells for a single-family house when the neighbors have
6 all told you that there's not a lot of water there. Test the
7 well that you have. I mean I'm sure you could find out all
8 the depths of all the neighboring wells and go from there.
9 It seems like there's other ways around this without punching
10 holes in the ground, saying that you're going to do this and
11 not going to do that. It just seems like it's very complex
12 and there's a simple solution where everybody kind of gets
13 what they want. Is it possible to test the existing well?

14 CHAIRMAN MORREALE: Dave, unfortunately, it's not in our
15 town code to be a good neighbor. We do have specific --
16 maybe that hypothetical situation, what you're describing,
17 could be true, but they have every right do what they're
18 doing. And if we're going to deny them this right for being
19 a bad neighbor, I don't think would be, and potentially being
20 a bad, I don't want to really cast, but we're looking for
21 special circumstances to uphold the denial when it's a
22 criteria permit. They meet the criteria, they can do it.
23 Can they test existing wells? Probably. But do they have
24 every right to drill two more wells and test them? It's
25 right in Section 195 that they do.

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2 ALTERNATE BOARD MEMBER FOURNIER: Is 195(b) residential
3 or commercial?

4 CHAIRMAN MORREALE: 95(b).

5 MS. PLATT: Which part? There's one, two, three, four,
6 five and six, I think. Oh, one through eight.

7 ALTERNATE BOARD MEMBER FOURNIER: Well, I believe we're
8 taking a residential situation and creating a commercial
9 situation with three wells for one home.

10 CHAIRMAN MORREALE: Drilling a test well, a yield.
11 Drilling a well to do a yield test I don't think is either
12 commercial or residential. I don't think we can get into
13 labeling the usage until there is a usage.

14 ALTERNATE BOARD MEMBER FOURNIER: I'm just concerned
15 with multiple holes in the ground and the infiltration of
16 biohazards and chemical hazards that can go in the aquifers
17 of the surrounding neighbors.

18 CHAIRMAN MORREALE: I think that's a valid concern. But
19 again, it's a hypothetical situation.

20 MR. MOGEL: Also, that would be the purview of the
21 Building Department. If there was some hazard that was posed
22 by these additional drillings, then that's something that
23 could be addressed. I mean again, if somebody is causing a
24 dangerous circumstance to exist on their property through
25 their actions, then the Building Department has the authority

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2 to take action, as do private individuals. I mean that's
3 without getting into that.

4 CHAIRMAN MORREALE: You know ...

5 MR. MOGEL: I just wonder how the Board is going to
6 decide to proceed. I don't know if, at some point -- do you
7 want to continue to ...

8 CHAIRMAN MORREALE: I mean I've written down a draft of
9 what we could vote on. And I'm not assuming we're going to
10 vote tonight, but this the interpretation of a Building
11 Inspector's decision to deny the drilling of two wells. Yes
12 would be in favor of the Building Inspector's decision and no
13 would be to overturn the denial.

14 But to your point, Jon, it's a very, very -- if we're
15 going to validate the concerns of the neighbors I think we
16 should take into consideration how those concerns would best
17 be addressed now. A decision that is indefensible, would
18 that be in their favor or not. Again, that's not what we're
19 here to discuss and what we're here to vote on, but it's
20 something that I thought about. Are we taking the concerns
21 and would it be, if you're the point of view that this should
22 not occur and we deny it because of our feelings on the
23 matter and are valid concerns for the neighbors but it's
24 overturned, I mean have we benefited them in any way and
25 could we have even weakened their position because the chance

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2 could be -- what's the phrase that's been used so many times?

3 Arbitrary and ...

4 MR. MOGEL: Arbitrary and capricious.

5 CHAIRMAN MORREALE: Anyway, I don't want to --

6 MR. MOGEL: I just want to, in my role as counsel, there
7 is ample case law that says that if a board makes a decision
8 based on the generalized opposition of the public, that that
9 is, by definition, arbitrary, capricious and not based on
10 substantial evidence and it's subject to being overturned.
11 If the Board is going to make a determination it needs to
12 make its determination based on the law and the law only.
13 Whatever future apprehensions you might have, whatever the
14 opposition of the community, of your neighbors or family
15 members, even, should be discounted no matter how difficult
16 that may be. It has to be discounted by the members of the
17 Board. The members of the Board need to make that
18 determination based on the law and the law only.

19 BOARD MEMBER RAMPE: If that is the way we are supposed
20 to proceed, why even bother with a public comment?

21 MR. MOGEL: The public has a right to be heard. I mean
22 they also have a legal right to be heard.

23 BOARD MEMBER RAMPE: Okay.

24 MR. MOGEL: My reading of the statute is that this board
25 is not allowed to make any of its decisions, whatsoever,

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2 without public comment and I think that that's actually an
3 excellent thing. I'm glad that the public gets to tell us,
4 if not only for the simple reason that the public often has
5 ideas that nobody else on this board, myself included, has
6 thought of.

7 BOARD MEMBER RAMPE: Right.

8 MR. MOGEL: And sometimes those are directly relevant to
9 the issue at hand. So absolutely, the Board should be heard.
10 And again, this is a question, it is an appeal that calls for
11 an interpretation, in essence, so the Board should hear these
12 comments. It just so happens that in this particular
13 circumstance, the overwhelming majority of the comments from
14 the public pertain to the potential future use of these test
15 wells and that is something that we have addressed in detail
16 here.

17 MS. GIRALDI: There's no public comment; right?

18 BOARD MEMBER FINDLEY: No.

19 CHAIRMAN MORREALE: It's been closed.

20 MS. GIRALDI: It's closed. the Board won't take
21 anything in writing; no.

22 BOARD MEMBER FINDLEY: It's closed.

23 MS. GIRALDI: Okay.

24 BOARD MEMBER FINDLEY: I mean ...

25 MS. GIRALDI: No, not a problem.

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2 BOARD MEMBER FINDLEY: So are we ready to vote?

3 CHAIRMAN MORREALE: That's a good question. I am ready
4 to vote.

5 BOARD MEMBER FINDLEY: Shall we have a vote to vote?

6 CHAIRMAN MORREALE: Sure. I'll second that motion.

7 Georgia, how do you feel about voting tonight?

8 BOARD MEMBER RAMPE: All right.

9 CHAIRMAN MORREALE: Dave.

10 BOARD MEMBER LEWIS: I'm good.

11 CHAIRMAN MORREALE: All right. Well, let's proceed.

12 Okay.

13 BOARD MEMBER RAMPE: You have to do the criteria?

14 CHAIRMAN MORREALE: There's no criteria for an
15 interpretation.

16 BOARD MEMBER RAMPE: Oh, okay.

17 CHAIRMAN MORREALE: So I'm going to read the language of
18 what we're going to be voting on again.

19 Regarding the interpretation of the Building Inspector's
20 decision to deny the drilling of two wells, yes would be in
21 favor of the Building Inspector's decision and no is to
22 overturn the denial.

23 MR. MOGEL: Two testing wells.

24 BOARD MEMBER RAMPE: Two.

25 MR. MOGEL: Specifically for testing.

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2 CHAIRMAN MORREALE: Yes, for two wells.

3 BOARD MEMBER FINDLEY: Wait. I'm sorry. Can you repeat
4 that?

5 CHAIRMAN MORREALE: I'm going to read the whole thing
6 again.

7 Okay. Regarding the interpretation of Building
8 Inspector's decision to deny the drilling of two wells --

9 BOARD MEMBER RAMPE: Test wells.

10 CHAIRMAN MORREALE: -- for yield testing --

11 BOARD MEMBER RAMPE: Okay.

12 CHAIRMAN MORREALE: -- yes is in favor of the Building
13 Inspector's decision --

14 MR. MOGEL: To hold

15 CHAIRMAN MORREALE: -- and no would be to overturn the
16 denial. So yes, in favor of denial. I probably should have
17 reversed those. But yes would be in favor of upholding the
18 denial; no would be overturning it.

19 BOARD MEMBER FINDLEY: Yes, upholding the decision.

20 CHAIRMAN MORREALE: Yes.

21 BOARD MEMBER FINDLEY: No is to overturn.

22 CHAIRMAN MORREALE: Okay. Correct. Is everyone clear
23 on that?

24 BOARD MEMBER LEWIS: Yes.

25 CHAIRMAN MORREALE: Okay. Dave, how do you vote?

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2 BOARD MEMBER LEWIS: I vote yes, to uphold her decision.

3 CHAIRMAN MORREALE: Genevieve, how do you vote?

4 BOARD MEMBER MULHARE: No, overrule.

5 CHAIRMAN MORREALE: Kent, how do you vote?

6 BOARD MEMBER FINDLEY: Yes.

7 CHAIRMAN MORREALE: Georgia, how do you vote?

8 BOARD MEMBER RAMPE: Yes.

9 CHAIRMAN MORREALE: I'm going to vote no.

10 The Building Inspector's decision is upheld.

11 And I thank the Applicant, Mr. Barshov, for your
12 participation in the process.

13 MR. BARSHOV: Thank you very much.

14 CHAIRMAN MORREALE: Unless there's any other business,
15 I'll put a motion to close.

16 BOARD MEMBER FINDLEY: I'll --

17 BOARD MEMBER MULHARE: I'm sorry.

18 CHAIRMAN MORREALE: Go ahead.

19 BOARD MEMBER MULHARE: I'm sorry, Kent.

20 I just wanted to make one comment. I heard every
21 comment at the public hearing.

22 MS. PLATT: A little more into the microphone.

23 BOARD MEMBER MULHARE: I heard every person who spoke
24 and I feel the same as Matt, where we have to interpret the
25 law and we cannot deny somebody the right to drill wells on

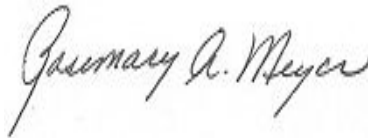
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REPORTER'S CERTIFICATION

I, ROSEMARY A. MEYER, a Shorthand Reporter and Notary Public in and for the State of New York, do hereby certify:

That the foregoing transcript is an accurate record of the proceedings in the matter of Old Roosa Gap Realty LLC, to the best of my knowledge and belief, having been stenographically recorded by me and transcribed under my supervision.

I further certify that I am in no way related to any of the parties to this action and that I have no personal interest whatsoever in the outcome thereof.



ROSEMARY A. MEYER

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