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July 11, 2024

Darrin J. Scalzo Chairman
Town of Newburgh
Zoning Board of Appeals
21 Hudson Valley Professional Plaza
Newburgh, New York 12550
Via Electronic Mail

ZBA Variance Request - Prime and Tuvel
2 Lakeside Rd, Newburgh
86-1-39.3 IB Zone

Dear Chairman Scalzo and Members of the Board:

I represent CPD Energy, owner of the Mobil-on-the-run gasoline station located 372 feet west of the subject parcel where the Applicant proposes to site a supersized Quick Chek gasoline station in violation of the plain language of the Town Code.

For the following reasons, the Applicant's request should be denied.

First, the Town Code provides at section 185-28(G):

[I]n no instance shall a new motor vehicle service station or any other establishment dispensing gasoline be permitted to be established within 1,000 feet in any direction from a lot on which there is an existing motor vehicle service station or other establishment dispensing gasoline. This prohibition shall not apply to gasoline or diesel fuel service facilities located in a travel center approved by the Planning Board. (Emphasis added.)

In statutory construction:

"It is fundamental that, because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" *Matter of Lisa T. v King E.T.*, 30 NY3d 548, 552 [2017] see also *Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594, 607.

"We begin with the plain language of the statute, which is the clearest indicator of legislative intent"; *People v Pabon*, 28 NY3d 147, 152, [2016] ["(w)hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used"]; *Makinen v City of New York*, 30 NY3d 81, 85, [2017] "Inasmuch as (t)he text of a statute is the clearest indicator of such legislative intent, where the disputed language is unambiguous, we are bound to give effect to its plain

meaning. Moreover, (w)here(, as here,) the legislative language is clear, (we have) no occasion (to) examin(e) . . . extrinsic evidence to discover legislative intent" *Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 567, [2018]

Here, §185-28(G) states "in no instance shall" a gasoline station be sited within 1000 feet of another such station.

The statute's use of "shall" is an imperative command indicating that certain actions are mandatory, and not permissive. *Mennella v Lopez-Torres*, 91 NY2d 474, 478 (1998). And:

> Generally, "shall" signifies command, not suggestion. The word is imperative. It is not intended to allow discretion (*Matter of City of Rochester*, 10 N. Y. S. 436, 437). In a statute the word "shall" is ordinarily mandatory and excludes the idea of discretion...

Akers Motor Lines, Inc. v New York, 72 Misc 2d 751 (Civ Ct, Kings County 1972):

Moreover, were there any doubt as to the interpretation of "in no instance" the next sentence in the statute refers to the phrase as a "prohibition." "Prohibit" is defined as "to forbid by authority" in the Merriam-Webster dictionary. https://www.merriam-webster.com/dictionary/Prohibiting.

Thus, there is no discretion for the ZBA to exercise as the "unambiguous language of a statute is alone determinative." *Excellus Health Plan, Inc. v Serio*, 2 NY3d 166, 171 (2004). See also *Matter of Tartan Oil Corp. v Bohrer*, 249 AD2d 481, 482 (2d Dept 1998): "the legislation must be interpreted as it exists. Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute... where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used...

Indeed, prohibiting gasoline stations within a certain distance of other uses has long been common in New York as in *Gencarelli v Balint*, 11 Misc 2d 707 (Sup Ct, Westchester County 1958), where the Court upheld an ordinance forbiding gasoline stations within 100 feet of a school:

> A gasoline service station necessarily involves the storage and use of gasoline and oil which are highly inflammable. The use of property for the operation of a gasoline service station is a potentially dangerous use. The regulation of the location of such gasoline service stations is in the interest of public health, safety and welfare and constitutes a valid exercise of the police power by a legislative body. (See *Matter of Green Point Sav. Bank v. Board of Zoning Appeals*, 281 N. Y. 534; *Matter of Epstein v. Weisser*, 278 App. Div. 668.)...
>
> The ordinance was enacted for the public welfare and the protection of children and must be liberally construed to effect its intended purpose. (See *Matter of Bruchhausen v. Murdock*, supra.)" zoning ordinance requiring gas station to be at least 100 feet away from a school.

Second, when considering the Newburgh zoning code in its entirety the phrase "in no instance" and "prohibition" are unique.

Specifically, that phrase and "prohibition" are not used in any other section of the Code indicating the Town Board wished to make it clear beyond a shadow of a doubt that the ZBA was not authorized to allow the siting of gasoline stations within 1000 feet of each other – unlike all of the rest of the setback requirements in the Code for which the ZBA may grant variances.

And, even were the ZBA to exercise discretion, both the Town Code and Town Law 267-a clearly do not support issuing a variance.

Although the ZBA is no doubt well-aware of the following sections, they are provided for reference.

The Town Code §185-54, governing the ZBA's "Powers and duties" at B(1) "Variances" provides (emphasis added):

> To authorize... such variances from the terms of this chapter as will not be contrary to the public interest where, **owing to exceptional and extraordinary circumstances**, there are unnecessary hardships or practical difficulties in the way of carrying out of the strict letter of this chapter... however, that no such variance shall be granted unless the Zoning Board of Appeals finds:
>
> (a) That there are **special circumstances** or conditions fully described in the findings of the Board applying to the land or building for which the variance is sought, which circumstances or conditions are unique to such land or building and do not apply generally to land or buildings in the neighborhood and have not resulted from any act of the appellant or applicant subsequent to the adoption of this chapter, whether in violation of the provisions hereof or not.
>
> (b) That for reasons fully set forth in the findings of the Board, the aforesaid circumstances or conditions are such that the strict application of the provisions of this chapter **would deprive the appellant or applicant of the reasonable use of such land** or building and **the granting of the variance is necessary for the reasonable use of the land** or building and that the variance which is granted by the Board is the minimum variance that will accomplish this purpose.
>
> (c) That the granting of the variance **will be in harmony with the general purposes and intent of this chapter** and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

And, Town Law 267-a requires the ZBA to consider:

> 1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

2. Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

3. Whether the requested area variance is substantial.

4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

5. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Here, the Applicant seeks to locate a gasoline station not just within 1000 feet of one gasoline station but within 1000 feet of TWO gasoline stations thus seeking a double variance.

And, rather than 1000 feet, the Pilot gasoline station is directly across the street, just **148 feet away** and the Mobil station is just **372 feet** west of the Applicant's lot. See Two Attached Maps from Orange County GIS with distances provided.

Notably, the Code does allow for gasoline stations to be co-located, but only where the Planning Board has made the determination that the stations would be within a "travel center."

The Planning Board has made no such determination and the ZBA is unauthorized to intrude upon the Planning Board's statutory authority.

Were the ZBA to apply the factors in Town Code §185-54 and Town Law 267-a, there is no shred of evidence supporting a variance.

As above, pursuant to §185-54, there are no "exceptional and extraordinary circumstances " and no "circumstances or conditions are unique to such land or building [that] do not apply generally to land or buildings in the neighborhood."

Moreover, the Applicant cannot demonstrate that not granting a variance "would deprive the appellant or applicant of the reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land" pursuant to §185-54.

Indeed, the Applicant's property is located in the Interchange Business District (IB) which allows dozens of profitable uses including mini-malls, individual retail stores, personal service stores, uses and health clubs and fitness facilities, shopping centers, theatres, offices for business, research and professional use and banks, restaurants and fast-food establishments, research laboratories and single family and 2-family residential development. See 185 Attachment 13 Town of Newburgh Table of Use and Bulk Requirements IB District -- Schedule 8.

Given that wide assortment of uses, as a matter of law, the Applicant cannot demonstrate that denying a gasoline station use would deprive the Applicant of a reasonable use of the land.

Applying the five Town Law 367-a factors achieves the same result.

The character of the neighborhood is defined by what is permitted in the zoning code. Again, as a matter of law, the siting of a gasoline station closer than 1000 feet to TWO other stations is permitted "in no instance." That specifically expressed "prohibition" is proof that the Applicant's proposal is contrary to the character of the neighborhood.

Regarding whether the benefit to the Applicant can be achieved by other measures, as above, the IB zone allows for a multitude of commercial and residential uses concerning the development of the property.

As to whether the requested variance is "substantial," as above, the Applicant seeks a double variance – rather than being less than 1000 feet to one gasoline station, the Applicant proposes to be less than 1000 feet to TWO gasoline stations – a 100% variance.

Additionally, the Applicant's lot distance to the Pilot gasoline station lot is 148 feet – an 85% variance, and the distance to the Mobil is 372 feet – a 63% variance.

The Applicant also seeks a 50% landscape buffer variance and 2 signs totaling 150 sq. ft. instead of one – a 100% variance.

These requested variances are unprecedented and abhorrent to the Code as they do not approach a reasonable and rational deviation. In fact, nowhere in the annals of New York case law is there a zoning case that approaches this magnitude of deviation. Instead, far less deviations have been deemed substantial in denying variances. For example, in *Pecoraro v Bd. of Appeals*, 2 NY3d 608, 614 (2004), the Court of Appeals held:

> The variance sought would have allowed a 33.3% deficiency in lot area and a 27.3% deficiency in frontage width. It was not an abuse of discretion to determine that the substantiality of such a variance weighed against granting it. Moreover, the Board properly determined that the need for the variance was self-created here. Petitioner was fully aware that the subject parcel did not conform to the zoning requirements...

See also, *Matter of Palmer v Town of New Windsor Zoning Bd. of Appeals*, 226 AD3d 688 (2d Dept 2024) "the ZBA rationally concluded that the area variances sought here, which departed up to 80% from the statutorily prescribed dimensional minimums in certain respects, were substantial...." and *Matter of Kami Holding Corp. v Zoning Bd. of Appeals of the Vil. of Westbury*, 223 AD3d 811 (2d Dept 2024) "[i]t is undisputed that the several area variances sought were substantial in nature" concerning 20% lot area variance and 50% lot width variance.

Whether the project would have an adverse impact on the area is a question to be resolved pursuant to SEQRA. My client appreciates the ZBA requesting a traffic study and although clever engineering could no doubt reduce the project's environmental impacts, there is

no altering the fact that granting a double variance is completely at odds with the zoning code's clear "prohibition" against granting such a request.

Finally, the Applicant's claimed hardship is 100% self-created.

In reality, there is no hardship since the IB district affords a generous and almost unlimited scope of potential uses for the Applicant's property.

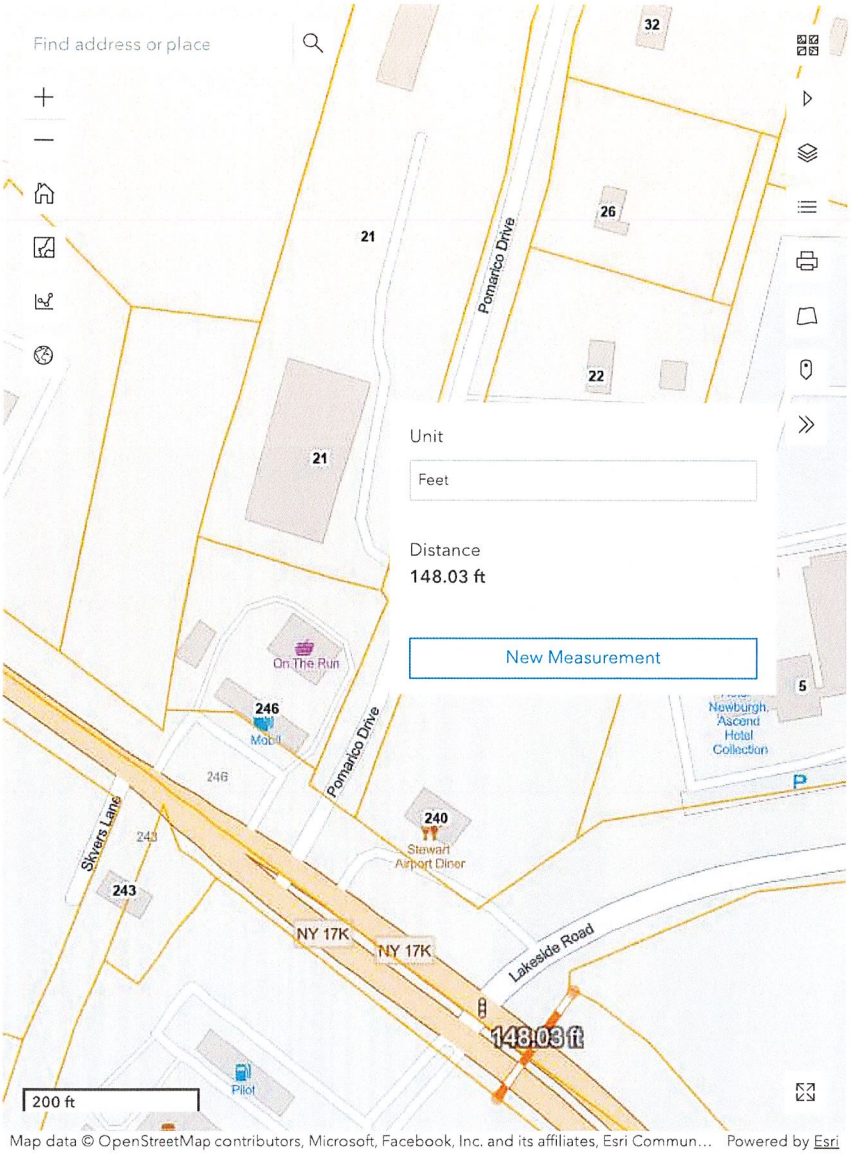
It just so happens that the property owner allowed a development speculator to advance an application that presents the maximum deviation possible from the Code. It is difficult to conceive of a use that is more contrary to the Code's precise and unambiguous **prohibition** in §185-28(G).

Thus, for the above reasons, my client respectfully requests that the ZBA confirm that "in no instance shall" a gasoline station be permitted to be located closer than 1000 feet to the existing gasoline stations and deny the Applicant's request.

Respectfully,

James Bacon

Cc: David Donovan, Esq. ZBA Counsel
Jason Tuvel, Esq. Counsel for the Applicant



Orange County GIS

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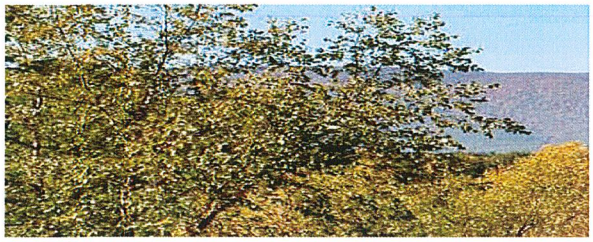

Welcome

Orange County N.Y. GIS
Steven M. Neuhaus, County Executive

Orange County Geographic Information Systems (OCGIS) dev
York. OCGIS was created to address the long-term GIS needs
digital mapping systems in New York State. Please contact u

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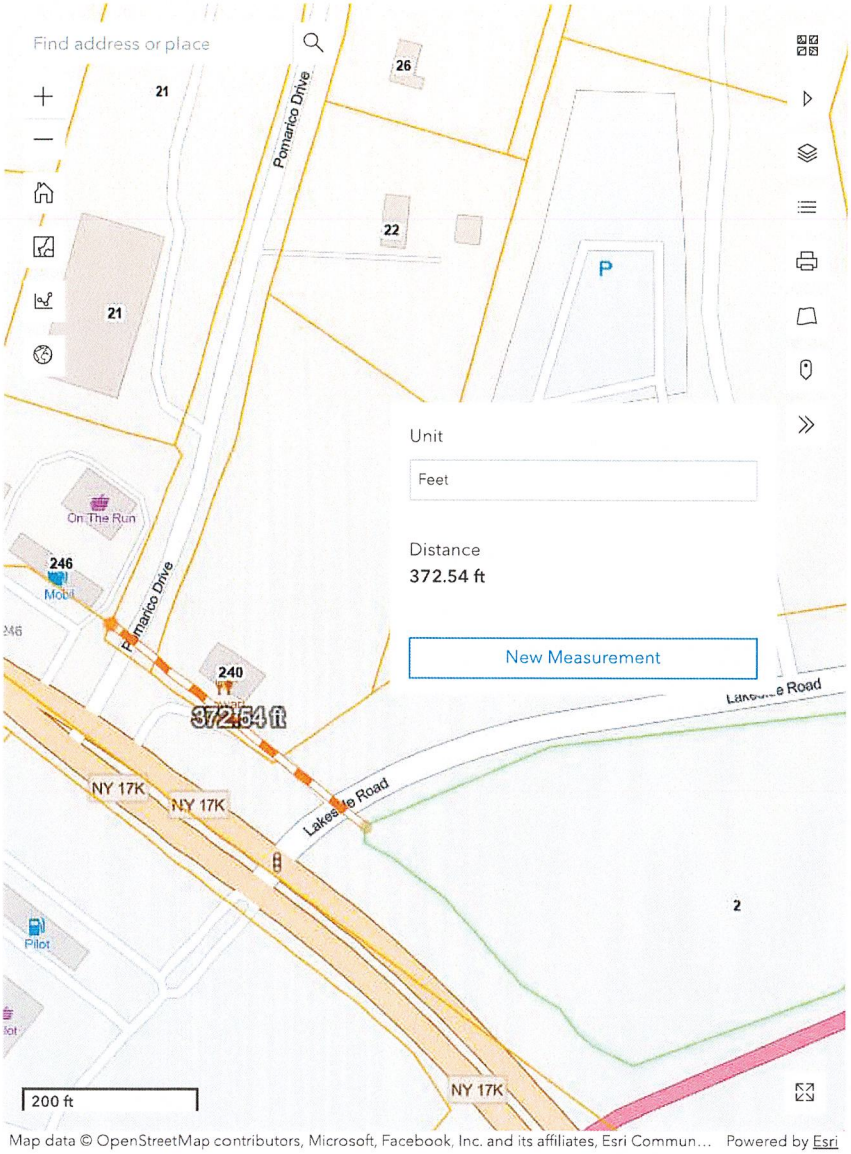
Additional Resources

- Orange County Website
- Orange County Tourism
- Orange County Parks and Rec
- Orange County Services



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Parcel Boundaries (1 records)

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