Shawn & Gina Barry
4 High Lonesome Terr.
Wallkill, NY 12589

April 20, 2018

Town of Newburgh Zoning Board of Appeals
Old Town Hall
309 Gardnertown Rd.
Newbugh, NY12550

Dear: Town of Newburgh Zoning Board,

My name is Shawn Barry, I am a lifelong resident of the Town of Newburgh. I am writing this response in rebuttal to WCC Tank Technology, Inc. filing an application for a Use Variance for 2102 Route 300, Wallkill, NY 12589, Tax Map# 3-1-21.61 & 3-1-21.31.

In February of 2017, I stood before the ZBA and presented evidence in opposition of the granting of a Use Variance for the aforesaid property. I once again raise the same objections.

In reviewing the documents provided by the applicant to the Town of Newburgh Zoning Board of Appeals (ZBA), dated 03/29/2018 my first observation is the application in and of it self is not completely filled out. Specifically, questions 4,5(a,b,c,d),6. (a,b,c,d,e). 7. These questions are noted "see attached"; however in researching the documents, I do not see anywhere where these questions are answered specifically.

In review of the letter from Drake Attorney at law dated March 29, 2018, Mr. Gaba is seeking "an interpretation and/or variance base on the Building Inspector's referral letter of February 1, 2018 and also appealing from the Order to Remedy issued by the Town's Code Enforcement Officer". On January 19, 2017 the Town of Newburgh Building Department filed an application to ZBA requesting interpretation to the March 11, 1982 ZBA decision for the aforesaid property. The matter of interpretation has been thoroughly reviewed and evidence for both sides was presented in February of 2017 and the ZBA rendering a decision on April 3, 2017, denying the Accessory Use for a hydro excavating business. Subsequently, the Hydro Excavating business remains at the site and continues to both operate business and store equipment, trucks and shipping containers, all of which are in direct violation of the Town of Newburgh Code. On 12/07/2017 the Town of Newburgh Building Department issued a "Order to Remedy" to 2102 Partners Inc. for expanding a business beyond the previously approved use

variance. Since such time 2102 Partners continues to operate and maintain a hydro excavating business and store equipment, trucks and shipping containers in violation of Town of Newburgh Town Code.

In Mr. Gaba's letter, he identifies the definition of "nonconforming use" TNC §185.3 "*A use or building, whether of a building or land or both, which does not conform to the requirements respecting permitted uses or coverage as set forth in this chapter for the district in which it is situated but which lawfully existed prior to the enactment of a zoning law or any revision or amendment thereto which would prohibit the use and which is maintained after the effective date thereof although it does not conform to the use or coverage regulations of the district in which it is located*".

In his letter, Mr .Gaba improperly identifies the original use for the aforementioned property as being granted. The original use variance was for a tank lining business for which all parties have determined, is no longer a functioning business at this location. Therefore, as a general rule, if the business conducted by the original use variance is no longer in operation, the use variance cannot be applied to any future business operation that falls outside of its original use.

Mr. Gaba provides a citation of Angel Plants, Inc. V. Schoenfeld, 154 A.D.2d 459, 460, 546 N.Y.S.2d 112 (2nd Dept. 1989). In this matter, the complainant was operating an approved business granted a use variance and was denied a building permit where the complainant sought to add a structure (expanded use) on the property. The court granted the petition and annulled the zoning boards denial. What is unique to this case is that the complainant (Angel Plants Inc.) already had a use variance permit and was expanding his previously approved business. In the instant matter, 2102 Partners and WCC Tank Technologies business of hydro excavating is not, nor was ever an approved business at the aforesaid property.

Mr. Gaba adds a second citation, Scarsdale Shopping Ctr. Assoc. v Bd. of Appeals on Zoning for New Rochelle, 64 AD3d 604 [2d Dept 2009]. In this matter, the original business was destroyed in a fire and the owners sought to rebuild. The zoning board denied the application due to not having a use variance. The matter was returned to the zoning board with the court indicating Scarsdale Shopping Ctr. Assoc. did not need a use variance since the original and new construction were both retail stores; however, the court noted that although a use variance was not necessary, an area variance may have been. In this case, as with the previously cited case, the original business obtained and operated under a use variance issued by the municipality. In the instant matter, 2102 Partners and WCC Tank Technologies business of hydro excavating is not, nor was ever an approved business at the aforesaid property.

Additionally, in the matter of *Traveler Real Estate, Inc. v Cain*, 160 AD2d 1214 [3d Dept 1990]. The business owner operated a permitted nonconforming business under a use variance. When the owner attempted to open another nonconforming business on the second floor of the structure, the zoning board denied the use for the second nonconforming business. The matter was appealed and upheld by the court and affirmed the zoning boards decision stating "*The establishment of a second nonconforming use in the building constituted a prohibited extension and enlargement of the prior nonconforming use*". The relevancy of this case to the instant

matter is that regardless if the original nonconforming use was approved, any further nonconforming use on the property requires zoning approval.

Furthermore, in the matter of *Mazurkiewicz v Levine*, 159 AD2d 892 [3d Dept 1990] a property owner whished to expand his already approved small grocery business to include a sit-in delicatessen, the zoning board denied the expansion. The owner appealed and the court denied the petition, affirming the zoning boards decision to not grant approval due to the expansion was not a permitted use. The scope of the proposed business constituted a dramatic change and expansion of the commercial use that would detract from the residential character of the neighborhood. The importance of this case in the instant matter is that WCC Tank has expanded beyond the original approved use variance. It promised to install a buffer, which was never installed, and in fact, the wooded area surrounding the property has been diminished due to the deposit of slurry and the removal of vegetation and trees on the property.

Mr. Gaba in his letter (Pg #3) states the "ZBA's 1982 decision specifically noted (at paragraph "2" that the use of the property included "parking for a variety of motor vehicles", and the conditions imposed by the ZBA did not include any limitation on parking for vehicles used in WCC's business". The document Mr. Gaba is referring is a summation of William Conklin's original application which Mr. Gaba included in his appeal. However in the January 28, 1982 minutes of the Zoning Board of Appeals, Mr. Conklin provided direct and specific information as to what he was seeking approval for. On page #1, Mr. Conklin was asked by ZBA Board Chairman Richard Raskin, "How much equipment do you plan on having?" to which Mr. Conklin responded "There are two tractor trailers, straight tractor and pick ups. They are traveling factories. We drive to a sight or location to where a tank is leaking, we repair the leaks and put in a fiber glass lining…..". It is quite evident by Mr. Conklin's own statements that he was seeking approval for only the vehicles he outlined in his testimony. Also, there is no mention of any type of excavating equipment or specifically, hydro excavating business or equipment.

If we look at #7 on page #4 of the 1982 decision, we can see that the board noted the concerns of the property neighbors in its decision. *"a. That the granting of a use variance for this parcel will "open the door" for an onslaught of variance application and or will set a precedent. B. From a neighbor to the effect that such use will decrease property values and that she does not want to look at it"*. I feel that the 1982 board included this in the minutes for future ZBA use in the event additional variance applications were sought for this property. I feel their intent was to document the concerns of the neighbors and hopefully prevent an expansive commercial operation at this AR zoned property. Additionally, Mr. Gaba points out that the 1982 decision allows for expansion of the pole barn as noted by #3 on page #5 "may be increased if needed by the applicant. If we look at #1-#7 on page #5:

1. an in ground fuel storage tank of 6000 gal. capacity for diesel fuel,
2. an in ground fuel storage tank of 3000 gal. capacity for unleaded gasoline,
3. an in ground storage tank of 550 gal. capacity for acetone,
4. a 50 foot by 60 foot pole building,
5. a 25 foot by 25 foot stockade enclosure,
6. a chain link fence enclosure,
7. business use of the accessory building.

All of which pertain to a tank repair and relining business as indicated by William Conklin's January 28, 1982 testimony. *"Mr. Conklin seeks a use variance to permit the operation of a fuel tank lining business from premises located off route 300 at Robles Lane, an AR zone in the Town of Newburgh"*, *"Yes, I do relining of underground storage tanks.... New Jersey, new York and Delaware"*. Since such time, the tank lining business has become defunct and storage tanks have been removed.

Mr. Gaba states in his letter that he is seeking an interpretation by the ZBA as to whether the 1982 use variance extends to indoor storage of so-called "Hydrovac" trucks. I would argue that this matter was identified in both the 1982 use variance and the 2017 decision issued by the ZBA. Specifically, the 1982 decision granted a use variance for a "fuel tank lining business" at the premises located off Route 300 on Robles Lane. In the 2017 decision, it was determined that

> "1(e) ***Did the march 1982 use variance allow the premises to be used for and in support of a Hydro-excavation business?***
>
> *The board finds that the 1982 use variance did not authorize use of the premises for this specific purpose."*

> "8. ***Did the March 1982 use variance allow the premises to be used for and in support of the outdoor presence on the surface of the premises of storage containers, shipping containers and like mobil/portable enclosures designed for storing items and materials?***
>
> *The board finds that the 1982 use variance did not authorize use of the premises for this specific use."*

> "9. ***Did the March 1982 use variance allow the premises to be used for and in support of outdoor work activities conducted by the employees and agents of the business in furtherance of the use identified in "1" above?***
>
> *The board finds that the 1982 use variance did authorize use of the premises for the specific uses described in connection with items 1(a), 1(b), 1(c) and did not authorize use of the premises for the specific uses described in connection with items 1(d) and 1(e).*

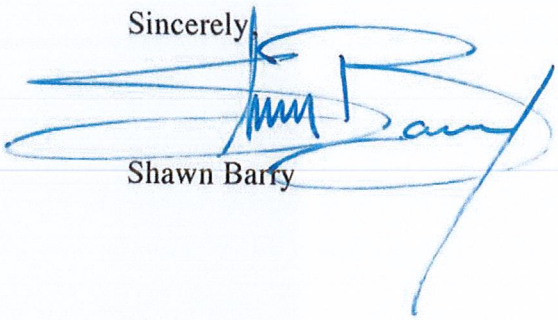
Both the 1982 decision and the 2017 decision are unequivocally clear in that the use variance does not authorize the premises to be used for anything other than a tank repair and lining business. Therefore, as already determined, the use of the premises for a Hydro-excavation business is not permitted and the petition for a use variance brought before this board should be denied.

Mr. Gaba lists in his "Request For Variance" that Hydrovac will be removing its trucks from the property and establishing a separate business address elsewhere. However, WCC proposes to use its four Hydrovac trucks for excavation work on projects other than tanks. Addtionally Mr. Gaba points out that "WCC may lease or lend its trucks to Hydrovac for offsite work". What is overtly apparent is Hydrovac is playing a shell game with its holdings and company names. Regardless of whoever owns the equipment (WCC or Hydrovac), the underlying issue remains the same. The use variance was granted to William Conklin in 1982

due in part to him having a tank repair and lining business and he resided in an adjacent property. The 1982 ZBA identified concerns they had for increased commercial traffic and only allowed the use variance for this specific business. This was recognized in the 2017 decision.

I would ask each member of the board to look at each of the specifics I have raised. When each segment of the applicant's letter and supporting documents are challenged, the only reasonable decision that can be derived, is this matter has been decided upon on two separate occasions. The 1982 use variance was specific to a tank repair business, the 2017 decision affirmed the 1982 decision and therefore, the applicant's request for variance should be denied.

Sincerely,



Shawn Barry

Angel Plants, Inc. v. Schoenfeld

Supreme Court of New York, Appellate Division, Second Department

October 10, 1989

No Number in Original

Reporter
154 A.D.2d 459 *; 546 N.Y.S.2d 112 **; 1989 N.Y. App. Div. LEXIS 12497 ***

In the Matter of Angel Plants, Inc., Respondent, v. Michael P. Schoenfeld et al., Constituting the Zoning Board of Appeals of the Town of Huntington, Appellants

Prior History: [***1] In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Huntington, dated July 2, 1987, which denied the petitioner's appeal from the denial of a building permit by the Department of Engineering, Building and Housing of the Town of Huntington, the appeal is from an order of the Supreme Court, Suffolk County (Brown, J.), entered March 18, 1988, which granted the petition, annulled the appellant's determination, and remitted the matter to it for reconsideration.

Case Summary

Procedural Posture
Respondent Zoning Board of Appeals of the Town of Huntington (zoning board) denied petitioner nursery owner's appeal from the denial of a building permit, under Huntington, N.Y., Town Code § 198-2. The nursery sought review. The Supreme Court, Suffolk County (New York), granted the petition, annulled the zoning board's determination, and remitted the matter for reconsideration. The zoning board appealed.

Overview
The court found that there was no rational basis for the zoning board to treat the nursery owner's appeal from the denial of a building permit as an application for a use variance, and affirmed the lower court's annulment of that determination. Previously the nursery owner obtained a use variance for the construction and operation of its wholesale nursery facility in a residentially zoned district., which the zoning board granted. Then nursery owner sought to extend its existing facility but was denied a building permit. The zoning board treated nursery owner's appeal from the denial of the building permit as an application for a use variance and denied the application, concluding that it was completely devoid of facts necessary for the zoning board to make the required findings to justify a use variance and that it would adversely affect residential property values in the area. However, the court found that the zoning board applied an incorrect standard in finding that it was necessary for nursery owner to apply for a further use variance in order to expand its business premises, which already had the benefit of a use variance.

Outcome
The ordered, which granted the nursery owner's petition for review, annulled the zoning board's denial of a building permit, and remitted the matter to it for reconsideration was affirmed.

Judges: Mangano, J.P., Bracken, Kunzeman and Harwood, JJ., concur.

Opinion

[*460] [113]** Ordered that on the court's own motion, the appellant's notice of appeal is treated as an application for leave to appeal, that application is referred to Justice Bracken, and leave to appeal is granted by Justice Bracken (CPLR 5701 [b] [1]); and is further,

Ordered that the order is affirmed, without costs or disbursements.

There was no rational basis for the Zoning Board of Appeals of the Town of Huntington to treat the petitioner's appeal from the denial of a building permit as an application for a use variance. In 1981, the petitioner obtained a use [***2] variance for the construction and operation of its wholesale nursery facility in a residentially zoned district. In granting the

use variance, the appellant had noted that the "proposed use is in keeping with the character of the community and will have no adverse impact on neighboring property values". In 1987, the petitioner sought to extend its existing facility but was denied a building permit. The appellant treated the petitioner's appeal from the denial of the building permit as an application for a use variance and denied the application, concluding that it was "completely devoid of facts necessary for a Zoning Board to make the required findings to justify a use variance [and that it would] adversely affect residential property values in the area".

It is well settled that a use variance is necessary to expand a business conducted as a prior nonconforming use *(see, Matter of Upper Delaware Ave. Assn. v Fritts, 124 AD2d 273*; *Matter of Crossroads Recreation v Broz, 4 NY2d 39*). However, under the Huntington Town Code which defines a nonconforming use as a use in existence at the time of the enactment of that code, the petitioner's use is not nonconforming *(see,* **[***3]** Huntington Town Code § 198-2). " It should be noted that a building constructed under a variance is not a nonconforming **[*461]** use within the meaning of ordinances limiting nonconforming buildings and uses. Hence, a building which does not conform to the use restrictions of the area in which it is located, but which was constructed pursuant to a variance, may be altered without regard to limitations on the alteration of nonconforming buildings' (1 Anderson, New York Zoning Law and Practice, 2d ed, § 6.37, p 233, n 2" *(Matter of James v Town of New Hartford, 49 AD2d 247, 250)*.

Under this authority, the appellant applied an incorrect standard in finding that it was necessary for the petitioner to apply for a further use variance in order to expand its business premises which already had the benefit of a use variance. Accordingly, the Supreme Court did not err in annulling that determination. We note that the petitioner requires no further use variance and the appellant's jurisdiction is limited to the area variances, if any, sought by the petitioner.

End of Document

Matter of Scarsdale Shopping Ctr. Assoc. v. Bd. of Appeals on Zoning for New Rochelle

Supreme Court of New York, Appellate Division, Second Department

July 7, 2009, Decided

2008-01423

Reporter
64 A.D.3d 604 *; 882 N.Y.S.2d 308 **; 2009 N.Y. App. Div. LEXIS 5631 ***; 2009 NY Slip Op 5783 ****

[****1] In the Matter of Scarsdale Shopping Center Associates, LLC, Respondent, v Board of Appeals on Zoning for the City of New Rochelle, Appellant. (Index No. 11312/07)

Case Summary

Procedural Posture
Petitioner applicant brought a CPLR art. 78 proceeding to review a decision of respondent zoning board which affirmed the denial of a building permit application. The Supreme Court, Westchester County (New York), granted the petition, annulled the determination, and remitted with direction that the proposed building was subject to planning board site plan review and approval without an additional variance. The zoning board appealed.

Overview
A building official determined that a use variance was required to further expand the applicant's shopping center on the ground that a 1956 variance did not permit such construction. However, the appellate court ruled that a use for which a variance was granted was a conforming use and, as a result, no further use variance was required. To the extent that the zoning board found that a use variance was required, its determination was improper. Nevertheless, the use of the property remained subject to the terms of the use variance. The resolution granting the use variance was destroyed in a fire, but on the record, the only reasonable view of the 1956 variance was that it allowed retail use of the property, but did not limit that use to the 10 stores referred to on the building card. Thus, the zoning board improperly found that the 1956 variance was so limited. The extent of the 1956 variance was defined by regulations applicable to the retail zoning district in effect before the city council's action. Thus, while a use variance was not necessary, an area variance may have been, in addition to the site plan approval. The building official did not reach the area variance issue.

Outcome
The judgment was modified by remitting the matter to the zoning board for remittal, in turn, to the building official for further proceedings. As so modified, the judgment was affirmed.

Counsel: [***1] Bernis E. Shapiro, Corporation Counsel, New Rochelle, N.Y. (Kathleen E. Gil of counsel), for appellant.

Shamberg Marwell Davis & Hollis, P.C., Mount Kisco, N.Y. (Robert F. Davis and Diana Bunin of counsel), for respondent.

Judges: REINALDO E. RIVERA, J.P., ROBERT A. SPOLZINO, DANIEL D. ANGIOLILLO, RUTH C. BALKIN, JJ. RIVERA, J.P., SPOLZINO, ANGIOLILLO and BALKIN, JJ., concur.

Opinion

[*604] [309]** In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Appeals on Zoning for the City of New Rochelle dated May 22, 2007, which, after a hearing, affirmed **[*605]** the denial, by the Building Official of the City of New Rochelle, of the petitioner's application for a building permit, the appeal is from a judgment of the Supreme Court, Westchester County (Nicolai, J.), entered February 1, 2008, which granted the petition, annulled the determination, and remitted the matter to the Board of Appeals on Zoning for the City of Rochelle "with the direction that petitioner's proposed building is subject to Planning Board site plan review and approval

without the necessity of an additional use variance."

Ordered that the judgment is modified, on the law, by deleting the provision thereof remitting **[***2]** the matter to the Board of Appeals on Zoning for the City of Rochelle "with the direction that petitioner's proposed building is subject to Planning Board site plan review and approval without the necessity of an additional use variance" and substituting therefor a provision remitting the matter to the Board of Appeals on Zoning for the City of Rochelle for remittal, in turn, to the Building Official for the City of New Rochelle for further proceedings consistent herewith; as so modified, the judgment is affirmed, without costs or disbursements.

In this proceeding pursuant to CPLR article 78, the petitioner, Scarsdale Shopping Center Associates, LLC, challenges the determination of the Board of Appeals on Zoning of the City of New Rochelle (hereinafter the Board of Appeals) affirming the determination of the Building Official of the City of New Rochelle (hereinafter the Building Official) that the petitioner is required to obtain a use variance for the further expansion of its shopping center. The Supreme Court granted the petition, annulled the Board of Appeals' determination, and remitted the matter to the Board of Appeals "with the direction that petitioner's proposed building is **[***3]** subject to Planning Board site plan review and approval without the necessity of an additional use variance." We agree that no **[****2]** additional use variance is required. We do not agree, however, that the petitioner established that its application otherwise complied with the applicable zoning restrictions and may therefore proceed directly to the site plan review phase.

The petitioner owns an 8.29-acre shopping center in the City of New Rochelle, on its border with the Village of Scarsdale. The original building in the shopping center **[**310]** was constructed in 1956, after the Supreme Court determined that the property owner had a vested right to build under the zoning code provisions applicable to the NR-2 neighborhood retail zoning district in which the subject property was situated prior to 1956, despite the improper action of the New Rochelle City Council in **[*606]** prohibiting the granting of any approvals for the property and then rezoning it as part of a residential district (*see* Matter of Miller v Dassler, 155 NYS2d 975 [Sup Ct Westchester County 1956]). The property owner was permitted to complete the construction that had been commenced prior to the City Council's action and, later that year, **[***4]** the Board of Appeals granted a use variance to permit the construction of additional retail space. In the ensuing years, the petitioner was permitted to expand the shopping center on several occasions, to its current 28 stores, without any additional use variances.

In December 2006 the Building Official denied the petitioner's application for a building permit for the construction of a 14,243-square-foot addition to the shopping center on the ground that the 1956 variance did not permit such construction. The petitioner sought review of the denial before the Board of Appeals. After a public hearing, the Board of Appeals affirmed the denial, finding that the 1956 use variance was limited to the construction of one 10-store building and, thus, that another use variance was required for the proposed expansion.

Initially, the Supreme Court correctly determined that this matter was ripe for judicial review and that the petitioner exhausted its available administrative remedies by appealing to the Board of Appeals (*see* Matter of Ward v Bennett, 79 NY2d 394, 592 NE2d 787, 583 NYS2d 179 [1992]; *cf.* Matter of Brunjes v Nocella, 40 AD3d 1088, 837 NYS2d 226 [2007]; Waterways Dev. Corp. v. Lavalle, 28 AD3d 539, 813 NYS2d 485 [2006]).

With respect to the merits of the petition, **[***5]** a use for which a use variance has been granted is a conforming use and, as a result, no further use variance is required for its expansion, unlike a use that is permitted to continue only by virtue of its prior lawful, nonconforming status (*see* Matter of Angel Plants v Schoenfeld, 154 AD2d 459, 461, 546 NYS2d 112 [1989]). Thus, to the extent that the Board of Appeals determined that a use variance was required, its determination was irrational and contrary to law, and was properly annulled by the Supreme Court (*see* Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y., 30 AD3d 515, 817 NYS2d 361 [2006]).

The fact that the property may be used for commercial purposes, however, does not leave the development of the property unrestrained. The use of the property remains subject to the terms of the use variance (*see* Matter of Borer v Vineberg, 213 AD2d 828, 829, 623 NYS2d 378 [1995]) and, where the Board of Appeals has previously determined that the development is limited only to a certain extent by the terms of the variance, the Board of Appeals is not free to later disregard that determination (*see* Matter of Kogel v Zoning Bd. of Appeals of Town of Huntington, 58 AD3d 630, 632, 871 NYS2d 638 [2009]).

[*607] Here, the resolution granting the use variance

was destroyed [***6] in a fire and, as a result, the terms of the variance must be gleaned from the available extrinsic evidence (*see Matter of Borer v Vineberg, 213 AD2d at 829*). That evidence is equivocal. The original card maintained by the Bureau of Buildings of the City of Rochelle with respect to the property reflects that the Board of [**311] Appeals "granted permission to erect an addition . . . as per plans submitted." This language can be read as reflecting the Board of Appeals' determination to limit the variance to the construction that was then proposed. To do so, however, would be inconsistent with the more compelling evidence derived from the conduct of the responsible municipal officials more proximate in time to the granting of the variance. That conduct included a course of approvals for additions to the shopping center over many years, none of which required a use variance, and many of which were explicitly referred to as being pursuant to the 1956 use variance. On this record, therefore, the only reasonable view of the 1956 use variance is that it permitted the retail use of the property, but did not limit that use to the 10 stores referred to on the building card. The Board of Appeals acted [***7] arbitrarily, [****3] therefore, in concluding that the variance granted in the 1956 use variance was so limited.

That the variance is not so limited, however, does not mean that there can be no constraints on the commercial development of the property. It is undisputed in the record that the 1956 application sought approval for the use of the property in accordance with the regulations applicable to the NR-2 neighborhood retail zoning district that had been in effect prior to the City Council's action. It would not be unreasonable, therefore, to conclude that the extent of the 1956 variance is defined by those regulations. Thus, while a use variance is not necessary, an area variance may be required, in addition to the site plan approval to which the Supreme Court referred, if the proposed expansion of the shopping center exceeds the applicable dimensional constraints (*see Matter of Concerned Citizens of Westbury v Board of Appeals of Inc. Vil. of Westbury, 173 AD2d 615, 616, 570 NYS2d 314 [1991]*; *Matter of Angel Plants v Schoenfeld, 154 AD2d at 461*). " '[T]he power to interpret the zoning ordinance is vested in the building inspector and the Zoning Board of Appeals' " (*Figgie Intl. v Town of Huntington, 203 AD2d 416, 417-418, 610 NYS2d 563 [1994]*, [***8] quoting *Moriarty v Planning Bd. of Vil. of Sloatsburg, 119 AD2d 188, 197, 506 NYS2d 184 [1986]*). Since the Building Official concluded that a use variance was required, and the Board of Appeals sustained that determination, the Building Official did not reach the issue of whether an area variance may be required. Since the record does not conclusively demonstrate that no such [*608] area variance is required, the matter must be remitted to the Board of Appeals, for remittal, in turn, to the Building Official for consideration of that issue and a determination thereafter. Rivera, J.P., Spolzino, Angiolillo and Balkin, JJ., concur.

End of Document

Traveler Real Estate, Inc. v. Cain

Supreme Court of New York, Appellate Division, Third Department

April 26, 1990

No. 60010

Reporter
160 A.D.2d 1214 *; 555 N.Y.S.2d 217 **; 1990 N.Y. App. Div. LEXIS 4693 ***

In the Matter of Traveler Real Estate, Inc., et al., Appellants, v. Joseph Cain et al., Constituting the Zoning Board of Appeals of the Village of Kinderhook, et al., Respondents

Prior History: [***1] Appeal from a judgment of the Supreme Court (Connor, J.), entered May 10, 1989 in Columbia County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Zoning Board of Appeals of the Village of Kinderhook.

Disposition: Judgment affirmed, without costs.

Case Summary

Procedural Posture
Petitioners, business owner and landowner, challenged a judgment from the Supreme Court in Columbia County (New York), which dismissed petitioners' application, in a proceeding pursuant to N.Y. C.P.L.R. art. 78, to review a determination of respondent zoning board of appeals (board). The board found that the business owner's business was not permitted in the absence of a use variance.

Overview
The business owner operated a beauty parlor on the first floor of a two-story structure owned by the landowner, as a permitted nonconforming use. The business owner applied for and was granted a building permit authorizing renovation of the second story of the premises for a body toning business. The business owner was issued a certificate of occupancy. Thereafter, a resident appealed the issuance of the certificate of occupancy to the board. After a hearing the board upheld the appeal on the ground that the body toning business was not permitted in the absence of a use variance. Petitioners appealed. On appeal, the court affirmed the board's determination. The court noted that under the board's interpretation of the zoning ordinance, the establishment of a second nonconforming use in the building constituted a prohibited extension and enlargement of the prior nonconforming use. The court held that the board's interpretation would not be disturbed unless unreasonable or irrational and there was adequate support in the record for the board's determination that the body toning business was a separate enterprise and not merely an accessory use to the beauty parlor.

Outcome
The court affirmed the judgment of the board determining that the business owner's body toning business was not permitted in the absence of a use variance, without costs.

Judges: Kane, J. P., Casey, Weiss, Mercure and Harvey, JJ., concur.

Opinion

[*1214] [218]** Mercure, J. Appeal from a judgment of the Supreme Court (Connor, J.), entered May 10, 1989 in Columbia County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Zoning Board of Appeals of the Village of Kinderhook.

Since 1979, petitioner Patricia McIntyre has operated a beauty parlor on the first floor of a two-story structure owned by petitioner Traveler Real Estate, Inc. as a permitted nonconforming use in an R-2 zone of the Village of Kinderhook, Columbia County. In 1987, McIntyre applied for and was granted a building permit authorizing renovation of the second story of the premises. The renovations were completed and McIntyre installed body-toning equipment, consisting of two sets [***2] of seven toning tables, and was issued a certificate of occupancy by the village building inspector.

Thereafter, a village resident, Marjorie Greene, appealed the issuance of the certificate of occupancy to respondent Zoning Board of Appeals and, after a hearing, the appeal was upheld upon the ground that McIntyre's body-toning business was not permitted in the absence of a use variance. Petitioners then commenced this CPLR article 78 proceeding, seeking to annul the [*1215] determination of the Zoning Board. Supreme Court dismissed the petition and petitioners appeal.

The judgment should be affirmed. Respondents acknowledge that under the provisions of the village zoning ordinance (Code of Village of Kinderhook ch 97) relating to nonconforming uses, McIntyre was permitted to expand her existing beauty parlor business into the second floor of the premises. * Furthermore, she was permitted to substitute the body-toning business, another nonconforming use "which is of the same or more restricted in nature" (Code of Village of Kinderhook § 97-29), for the beauty parlor business. However, under the Zoning Board's interpretation of the zoning ordinance, the establishment of [***3] a second nonconforming use in the building constitutes a prohibited extension and enlargement of the prior nonconforming use. "It is axiomatic that a zoning board of appeals has the power to interpret the provisions of the local zoning ordinance or code" (*Matter of Rembar v Board of Appeals, 148 AD2d 619, 620)* and its interpretation will not be disturbed unless unreasonable or irrational *(see, Matter of Frampton v Zoning Bd. of Appeals, 114 AD2d 670)*. In our view, the Zoning Board's interpretation is by no means irrational, particularly in view of the clear "public policy to restrict nonconforming uses in order ultimately to eliminate them" (*Matter of Aboud v Wallace, 94 AD2d 874, 875*; *see, Matter of Cave v [**219] Zoning Bd. of Appeals, 49 AD2d 228, 233-234, lv denied 38 NY2d 710*). Finally, there is more than adequate support in the record for the Zoning Board's determination that the body-toning business constitutes a separate enterprise and is not a mere accessory to the beauty parlor business *(see,* 1 Anderson, New York Zoning Law and Practice § 6.28, at 252 [3d ed]).

[***4] Judgment affirmed, without costs.

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*Section 97-27 of the Code of the Village of Kinderhook provides that "[a] nonconforming use shall not be extended, enlarged or structurally altered, but the extension of a lawful use to any portion of a nonconforming building which existed prior to * * * adoption of [the ordinance] shall not be deemed the extension of such nonconforming use".

Mazurkiewicz v. Levine

Supreme Court of New York, Appellate Division, Third Department

March 29, 1990

No. 59370

Reporter

159 A.D.2d 892 *; 553 N.Y.S.2d 227 **; 1990 N.Y. App. Div. LEXIS 3646 ***

In the Matter of Henry C. Mazurkiewicz, Doing Business as New Winthrop Deli, Appellant, v. Erwin Levine et al., Constituting the Zoning Board of Appeals of the City of Saratoga Springs, et al., Respondents, and Brian D. Lee et al., Intervenors-Respondents

Prior History: [***1] Appeals (1) from a judgment of the Supreme Court (Brown, J.), entered January 10, 1989 in Saratoga County, which dismissed petitioner's applications, in two proceedings pursuant to CPLR article 78, to, inter alia, review determinations of respondent Zoning Board of Appeals of the City of Saratoga Springs denying petitioner's requests for use and area variances, (2) from an order of said court, entered April 3, 1989 in Saratoga County, which denied petitioner's motion for reargument, and (3) from an order of said court, entered April 14, 1989 in Saratoga County, which granted intervenors' motion to intervene.

Disposition: Judgment entered January 10, 1989 affirmed, order entered April 14, 1989 affirmed, and appeal from order entered April 3, 1989 dismissed, with one bill of costs.

Case Summary

Procedural Posture

The Supreme Court in Saratoga County (New York) dismissed petitioner property owner's applications to review the determinations of respondent board denying the property owner's requests for zoning use and area variances. The trial court denied the property owner's motion to reargue, granted intervenor adjoining neighbors' motion to intervene, and the property owner appealed.

Overview

The property owner had a nonconforming use of a small grocery in a two-family residence located in an area zoned for two-family residences. The property owner applied to the board to continue as a mixed residential and commercial use as a delicatessen with on-premises eating area, outside walk-in cooler, an eight-foot-high fence to surround the cooler, a wall sign, and a freestanding sign. The board denied the application on the basis that the restaurant was not a permitted use in the area and that the fencing and signs violated the city code. A real estate brokerage company stated that the best use of the premises was a grocery and deli since the building was too small to qualify for a two-family residence. The trial court held that the scope of the proposed business constituted a dramatic change and expansion of the commercial use that would detract from the residential character of the neighborhood. The court affirmed and held that the denial of the property owner's applications was rational and not an abuse of discretion. The court found that the proposed use would increase traffic congestion and parking requirements in an area zoned for residences.

Outcome

The court dismissed the property owner's appeal of the order that denied its motion to reargue, affirmed the orders that dismissed the property's owner's applications to review the board's denial of the property owner's requests for zoning use and area variances, and affirmed the order granting the adjoining neighbors' motion to intervene.

Judges: Kane, J. P., Casey, Mikoll, Yesawich, Jr., and Levine, JJ., concur.

Opinion

[*892] [227]** Levine, J. Appeals (1) from a judgment of the Supreme Court (Brown, J.), entered January 10, 1989 in Saratoga County, which dismissed petitioner's applications, in two proceedings pursuant to CPLR article 78, to, *inter alia*, review determinations of respondent Zoning Board of Appeals of the City

[redacted]