

ZB# 07-26

Vito Rizzi

35-1-52

07-226 UHO Rizzi (INT/USE)
Rt. 32 (35-1-52)

ZONING BOARD OF APPEALS
TOWN OF NEW WINDSOR
555 UNION AVENUE
NEW WINDSOR, N.Y. 12553
Granted 7-23-07

07-26

In the Matter of the Application of

VITO RIZZI

**MEMORANDUM OF
DECISION DENYING
INTERPRETATION AND
USE VARIANCE REQUEST**

CASE #07-26

WHEREAS, Daniel Bloom, Esq., Anthony Coppola, AIA and Eldred P. Carhart, Certified Appraiser represented the , owner(s) of the site on the East Side of Windsor Highway, Rt. 32), New Windsor, New York, 12553, has made application before the Zoning Board of Appeals for a/an Request for interpretation and/or use variance to extend commercial use into R-4 Zone at 287 Windsor Highway in a C/R-4 Zone (35-1-52)

WHEREAS, a public hearing was held on July 23rd, 2007 and continued on August 27th, 2007 before the Zoning Board of Appeals at the Town Hall, New Windsor, New York; and

WHEREAS, the Applicant appeared on behalf of this Application; and

WHEREAS, there were five spectators appearing at the public hearing; and

WHEREAS, five people spoke in opposition to the Application; and

WHEREAS, a decision was made by the Zoning Board of Appeals on the date of the public hearing granting the application; and

WHEREAS, the Zoning Board of Appeals of the Town of New Windsor sets forth the following findings in this matter here memorialized in furtherance of its previously made decision in this matter:

1. The notice of public hearing was duly sent to residents and businesses as prescribed by law and published in The Official Town Newspaper, also as required by law.
2. The Evidence presented by the Applicant showed that:
 - (a) The property is located partially in a commercial zone fronting a busy commercial highway and partially in a residential zone.
 - (b) The applicant proposes building a "Strip" type mall on the property and locating the mall partially in a residential zone.

- (c) The applicant's Certified Appraiser testified as to the economic desirability of locating a strip-mall on the property.
- (d) The portion of the property in the commercial zone is bordered by other commercial properties.
- (e) The objectants claimed that development in the residential portion of the zone would adversely affect the residential character of the community immediately behind the property by destroying the existing buffer between it and the commercial properties.
- (f) The applicants propose putting a detention pond in the back of the property if the application is approved, which pond is objected to as impairing the character of the neighborhood by the accumulation of mosquitos and other pests.

WHEREAS, The Zoning Board of Appeals of the Town of New Windsor makes the following conclusions of law here memorialized in furtherance of its previously made decision in this matter:

1. The ZBA finds that the use proposed by the applicant is not an allowed use for a residential zone. The applicant proposes a commercial for that zone which is not an allowed use as specified by the Town of New Windsor Code.
2. The applicant did not submit sufficient information that would allow the Board to comply with the requirements of SEQRA .
3. The commercial development on the proposed residential portion of the property is not necessary in order for the applicant to realize a reasonable return on that property. Although, commercial development on the residential portion may be economically desirable, it is not clear that it is necessary in order to provide the applicant with a "reasonable return".
4. The application is self-created. The applicant proposes constructing a building and adjacent parking lot which building and adjacent parking lot are not now on the premises. The proposed development is contrary to the provisions of the New Windsor Town Code and it is the, therefore, self-created.
5. The application will change the character of the neighborhood. The property is bordered by residential properties in the rear of the property which residential properties currently enjoy a "buffer zone" between them and the commercial development on Rt. 32. The applicant's proposal would destroy this "buffer zone" and, consequently impose on the adjacent neighborhood such as the noise, light and other pollution attendant to commercial development.

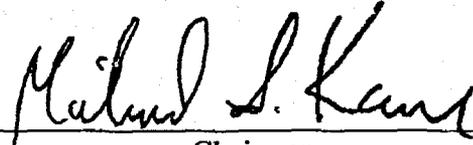
NOW, THEREFORE, BE IT

RESOLVED, that the Zoning Board of Appeals of the Town of New Windsor DENY a Request for interpretation and/or use variance to extend commercial use into R-4 Zone at 287 Windsor Highway in a C/R-4 Zone (35-1-52) as sought by the Applicant in accordance with plans filed with the Building Inspector and presented at the public hearing.

BE IT FURTHER

RESOLVED, that the Secretary of the Zoning Board of Appeals of the Town of New Windsor transmit a copy of this decision to the Town Clerk, Town Planning Board and/or Building Inspector and Applicant.

Dated: August 27, 2007

A handwritten signature in cursive script, reading "Michael S. Kears", is written over a horizontal line.

Chairman



Town of New Windsor

555 Union Avenue
New Windsor, New York 12553-6196
Telephone: (845) 563-4618
Fax: (845) 563-4695

Office of the Building Inspector

DATE : March 2, 2005

TO: Vito A. Rizzi
3 Ashley Way
Cornwall, NY 12518

SUBJECT: BUILDING PERMIT APPLICATIONS FOR:

PA2005-110 – Site Plan – 35-1-52
(project)

Dear Applicant:

We have reviewed your Application for Building Permit submitted to our office on 3/2/05. It has been determined that the project described in this application needs Town of New Windsor Planning Board approval.

We are enclosing a copy of the Referral Tracking Sheet showing the reference number to be used to make an appointment with the Planning Board. **Please contact Myra Mason, Monday-Friday, 8:30 to 4:30, at (845) 563-4615 to make an appointment with the Planning Board and please have the Tracking Sheet available when you call for an appointment.**

We will keep your Building Permit Application “pending” until Planning Board approval has been received. At that time, we will continue our review of your project.

PLEASE NOTE:

APPOINTMENTS FOR THE PLANNING BOARD WILL NOT BE MADE WITHOUT THE TRACKING SHEET NUMBER.

Very truly yours,

Michael Babcock
Building Inspector

MB: cm

Cc: Planning Board Office

IMPORTANT**YOU MUST CALL FOR ALL REQUIRED INSPECTIONS OF CONSTRUCTION**

Other inspections will be made in most cases but those listed below must be made or Certificate of Occupancy may be withheld. Do not mistake an unscheduled inspection for one of those listed below. Unless an inspection report is left on the job indicating approval of one of these inspections it has not been approved and it is improper to continue beyond that point in the work. Any disapproved work must be reinspected after correction.

1. When excavating is complete and footing forms are in place (before pouring.)
2. Foundation inspection. Check here for waterproofing and footing drains.
3. Inspect gravel base under concrete floors and under slab plumbing.
4. When framing, rough plumbing, rough electric and before being covered.
5. Insulation.
6. Final inspection for Certificate of Occupancy. Have on hand electrical inspection data and final certified plot plan. Building is to be completed at this time. Wall water test required and engineer's certification letter for septic system required.
7. Driveway inspection must meet approval of Town Highway Superintendent. A driveway pond may be required.
8. \$50.00 charge for any site that calls for the inspection fees.
9. Call 24 hours in advance, with permit number, to schedule inspection.
10. There will be no inspections unless yellow permit card is posted.
11. Sewer permits must be obtained along with building permits for new houses.
12. Septic permit must be submitted with engineer's drawing and percolation test.
13. Road opening permits must be obtained from Town Clerk's office.
14. All building permits will need a Certificate of Occupancy or a Certificate of Compliance and here is no fee for this.

PLANNING BOARD PERMIT NUMBER

RECEIVED

MAR 02 2005

BUILDING DEPARTMENT**FOR OFFICE USE ONLY:**Building Permit #: 2005-1180

AFFIDAVIT OF OWNERSHIP AND/OR CONTRACTOR'S COMP & LIABILITY INSURANCE CERTIFICATE IS REQUIRED BEFORE THE BUILDING PERMIT APPLICATION WILL BE ACCEPTED AND/OR ISSUED

PLEASE PRINT CLEARLY - FILL OUT ALL INFORMATION WHICH APPLIES TO YOU

Owner of Premises Vito A. RizziAddress 3 Ashley Way, Cornwall, NY Phone # 534-5102Mailing Address _____ Fax # 561-3027Name of Architect _____ 565-6680

Address _____ Phone _____

Name of Contractor _____

Address _____ Phone _____

State whether applicant is owner, lessee, agent, architect, engineer or builder _____ Owner _____

If applicant is a corporation, signature of duly authorized officer. _____
(Name and title of corporate officer)

1. On what street is property located? On the East side of Windsor Highway
(N, S, E or W)
and 700 feet from the intersection of Willow Lane

2. Zone or use district in which premises are situated C Is property a flood zone? Y N X

3. Tax Map Description: Section 35 Block 1 Lot 52

4. State existing use and occupancy of premises and intended use and occupancy of proposed construction.

a. Existing use and occupancy _____ b. Intended use and occupancy _____

5. Nature of work (check if applicable) New Bldg. Addition Alteration Repair Removal Demolition Other

6. Is this a corner lot? _____

Site plan

7. Dimensions of entire new construction. Front _____ Rear _____ Depth _____ Height _____ No. of stories _____

8. If dwelling, number of dwelling units: _____ Number of dwelling units on each floor _____

Number of bedrooms _____ Baths _____ Toilets _____ Heating Plant: Gas _____ Oil _____
Electric/Hot Air _____ Hot Water _____ If Garage, number of cars _____

9. If business, commercial or mixed occupancy, specify nature and extent of each type of use _____

10. Estimated cost _____

PAID

Fee \$ 50 -

CU# 1180

PLANNING BOARD

2 / 28 / 2008
date

APPLICATION FOR BUILDING PERMIT
TOWN OF NEW WINDSOR, ORANGE COUNTY, NEW YORK
Pursuant to New York State Building Code and Town Ordinances

Building Inspector: Michael L. Babcock
Asst. Inspectors Frank Lisi & Louis Krychear
New Windsor Town Hall
555 Union Avenue
New Windsor, New York 12553
(845) 563-4618
(845) 563-4695 FAX

Bldg Insp Examined _____
Fire Insp Examined _____
Approved _____
Disapproved _____
Permit No. _____

PLANNING BOARD TRACKING NUMBER

INSTRUCTIONS

- A. This application must be completely filled in by typewriter or in ink and submitted to the Building Inspector.
- B. Plot plan showing location of lot and buildings on premises, relationship to adjoining premises or public streets or areas, and giving a detailed description of layout of property must be drawn on the diagram, which is part of this application.
- C. This application must be accompanied by two complete sets of plans showing proposed construction and two complete sets of specifications. Plans and specifications shall describe the nature of the work to be performed, the materials and equipment to be used and installed and details of structural, mechanical and plumbing installations.
- D. The work covered by this application may not be commenced before the issuance of a Building Permit.
- E. Upon approval of this application, the Building Inspector will issue a Building Permit to the applicant together with approved set of plans and specifications. Such permit and approved plans and specifications shall be kept on the premises, available for inspection throughout the progress of the work.
- F. No building shall be occupied or used in whole or in part for any purpose whatever until a Certificate of Occupancy shall have been granted by the Building Inspector.

APPLICATION IS HEREBY MADE to the Building Inspector for the issuance of a Building Permit pursuant to the New York Building Construction Code Ordinances of the Town of New Windsor for the construction of buildings, additions, or alterations, or for removal or demolition or use of property as herein described. The applicant agrees to comply with all applicable laws, ordinances, regulations and certifies that he is the owner or agent of all that certain lot, piece or parcel of land and/or building described in this application and if not the owner, that he has been duly and properly authorized to make this application and to assume responsibility for the owner in connection with this application.

(Signature of Applicant)

Vito A. Rizzi

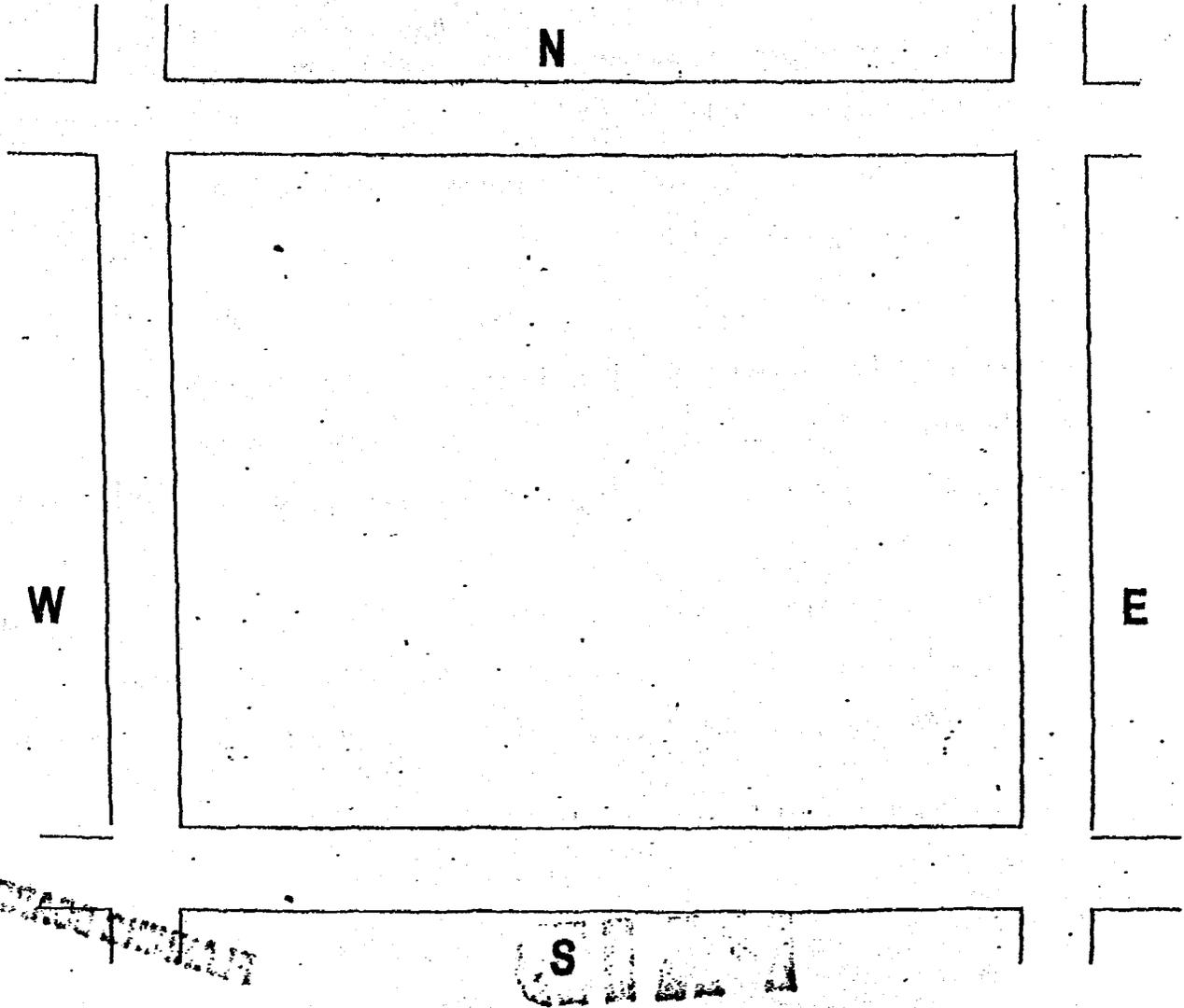
(Owner's Signature)

(Address of Applicant)

(Owner's Address)

PLOT P1

NOTE: Locate all buildings and indicate all set back dimensions. Applicant must indicate the building line or lines clearly and distinctly on the drawings.



CRACKED

S

On these plans will be made in most cases the lines which indicate the location of buildings and other structures on the site. The applicant should indicate the location of buildings and other structures on the site.

IMPORTANT
PLEASE ALLOW ONE TO TEN DAYS FOR DELIVERY
YOU MUST CALL FOR ALL REQUIRED INSPECTIONS OF CONSTRUCTION

TOWN OF NEW WINDSOR
ZONING BOARD OF APPEALS
RECEIPT OF ESCROW RECEIVED:

DATE RECEIVED: 12-19-07

FOR: 07-26 CLOSE OUT ESCROW

FROM:
VITO RIZZI
3 ASHLEY WAY
CORNWALL, NY 12518

CHECK FROM:
SAME

J. Henry
12-19-07

CHECK NUMBER: 1232

TELEPHONE: 565-1623

AMOUNT: 134.90

VITO A. RIZZI *565-1623*
MARYANNE RIZZI
3 ASHLEY WAY
CORNWALL, NY 12518

29-1/213
9453192114

1232

DATE 11/17/07

Town of New Windsor \$ 134 ⁹⁰/₁₀₀
PAY TO THE ORDER OF *One hundred thirty four* ⁹⁰/₁₀₀ DOLLARS 

Bank of America



MEMO ZBA File # 07-26 *Vito A. Rizzi*
⑆021300019⑆ 94531 92114⑆ 1232

PLEASE RETURN ONE SIGNED COPY TO MYRA FOR FILING

THANK YOU

To Close out escrow for Z.B.A. # 07-26

Thank You,
MD



Town of New Windsor

555 Union Avenue
New Windsor, New York 12553
Telephone: (845) 563-4615
Fax: (845) 563-4689

ZONING BOARD OF APPEALS

November 8, 2007

Vito A. Rizzi
3 Ashely Way
Cornwall, NY 12518

SUBJECT: ZBA FILE #07-26

Dear Mr. Rizzi:

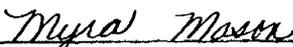
Please find attached a breakdown of fees charged against your escrow posted for your application to the Zoning Board of Appeals.

The amount of charges has exceeded the amount posted, therefore, a balance of \$134.90 is due to the Town. Please make check(s) payable to The Town of New Windsor in the above amount.

Upon receipt of your payment, I will finalize your application.

Thank you and if you have any questions, please feel free to contact me.

Very truly yours,



Myra Mason, Secretary to the
NEW WINDSOR ZONING BOARD OF APPEALS

MLM:mlm
cc: *Stow Eng.*



**TOWN OF NEW WINDSOR
ZONING BOARD OF APPEALS
RECORD OF CHARGES & PAYMENTS**



FILE #07-26

TYPE:INTERP. AND/OR VARIANCE TELEPHONE: 565-1623

APPLICANT:

Vito A. Rizzi
3 Ashely Way
Cornwall, NY 12518

RESIDENTIAL:	\$ 50.00	CHECK # _____
COMMERCIAL	\$ 150.00	CHECK # _____
INTERPRETATION	\$ 150.00	CHECK # <u>1359</u>

ESCROW: COMMERCIAL \$500.00 CHECK # 1358



<u>DISBURSEMENTS:</u>		<u>MINUTES</u>	<u>ATTORNEY</u>
		<u>\$7.00 / PAGE</u>	<u>FEE</u>
PRELIMINARY:	<u>4</u> PAGES	\$ <u>28.00</u>	\$ <u>35.00</u>
2 ND PRELIMINARY:	<u> </u> PAGES	\$ <u> </u>	\$ <u> </u>
PUBLIC HEARING:	<u>46</u> PAGES	\$ <u>322.00</u>	\$ <u>35.00</u>
PUBLIC HEARING:	<u>24</u> PAGES	\$ <u>168.00</u>	\$ <u>35.00</u>

LEGAL AD: Publish Date:07-13-07 \$ 11.90

TOTAL: \$ 529.90 \$ 105.00



ESCROW POSTED:	\$ 500.00
LESS: DISBURSEMENTS:	\$ <u>634.90</u>
 AMOUNT DUE:	 \$ <u>134.90</u>
 REFUND DUE:	 \$ <u> </u>

Cc:

L.R. _____

June 11, 2007

29

VITO_A._RIZZI_(07-26)

MR. KANE: Request for interpretation and/or use variance to extend commercial use into R-4 zone at 287 Windsor Highway.

Daniel Bloom, Esq. appeared before the board for this proposal.

MR. BLOOM: Good evening again ladies and gentlemen, I represent Anthony Rizzi and he'd like to remove the existing residence located on the subject property and replace it with a small retail shopping area just over 14,000 square feet. The problem arises from the fact that it's properly zoned for the shopping area from Windsor Highway in 200 feet into the property but beyond that you're in an R-4 zone and that would extend farther than the statute or ordinance permits even at that point. So, therefore, it will be necessary for him to get a use variance. I don't believe there are any other bulk variances required, the lot seems to be able to accommodate the proposed construction, however, the question of whether or not the board will be able to act favorably on it obviously will come down to whether or not the applicant can meet the necessary standards of the Town Law and in that regard I respectfully suggest to the board that we'll be presenting necessary financial data on that issue and expert testimony and an appraiser as well.

MR. KANE: You understand how difficult it is?

MR. BLOOM: Exactly.

MR. KRIEGER: Having been this way before.

MR. BLOOM: I might say the proposed construction is consistent with the general neighborhood and the proposed construction I would respectfully submit will definitely in my opinion improve the quality of the

neighborhood and raise the values of the properties around it. Really the problem arises from the technicality of having to pass through the existing permitted zone into the R-4 zone in the rear. You'll notice also that the plan proposes substantial amount of plantings and my client is prepared to even increase the amount of plantings that the planning board has requested in order to obviously limit the intrusiveness of the new construction on the residential areas to the rear of the property.

MR. KANE: What's next to this piece of property on 32 on either side?

MR. BLOOM: If you're facing the property to the left is the law offices, what used to be Alfred Cavalari, Flag Guys and I think there's also that new--

MR. KANE: Orange County Pools, Flag Guys.

MR. BLOOM: There's the contractor.

MR. BABCOCK: Steve Kuprich.

MR. BLOOM: To the right of that used to be the muffler place and across the street is the Giant Carpet building.

MR. KANE: So really does fit that area.

MR. BLOOM: I feel it does, yes.

MR. BABCOCK: Mr. Chairman, this did go to the planning board and through the workshops and the planning board, the planning board is saying that they like the building, the parking in front of the building cause the parking is what causes us the most problem with headlights and noise towards the commercial so if they pulled the building to the front, put the parking in the rear it's actually going to be worse for the

people, the residents back there for the noise for the headlights and so on and so forth. So the planning board has said that they, the parking is better off in the front of the retail.

MR. KANE: I agree.

MR. BLOOM: I don't know if you know the background. My client ran the deli, Anthony's Deli on the corner of 300 and 32 and moved to Newburgh and he'd like to come back actually locate in this building if this can work.

MR. KANE: So far it makes sense, the rest is going to be up to you and your team of specialists. I have no further questions at this time.

MR. LUNDSTROM: I have no further questions either.

MR. TORPEY: No.

MS. LOCEY: The applicant if this use variance is approved it would be for a deli is that what you're saying?

MR. BLOOM: No, it will be for more than a deli, he would put, he's contemplating putting his deli in a portion of it but the rest of it would be rented retail space.

MR. BABCOCK: It's a strip mall.

MR. KANE: You're going to have a couple retail spaces.

MR. TORPEY: Some space in there.

MR. BABCOCK: They're allowed there.

MR. LUNDSTROM: Mr. Chairman, I do welcome the comments from the building inspector cause my original feeling was would it make sense to put more of the building

closer to the road but with what interpretation and the comments from the building inspector this plan makes sense.

MR. KANE: I ran that pool store for eight years and parking is a nightmare along that area so parking out front makes a lot of sense, you have the neighbors right behind you and it's not fair to have the parking in the back of the building.

MR. LUNDSTROM: Having the building in the back protects the residents back there.

MS. LOCEY: He's looking for a use variance, is that correct?

MR. KANE: Yes.

MS. LOCEY: So he still has to go through whatever requirements he needs to.

MR. KANE: Whether we like it or not.

MR. BLOOM: Absolutely.

MR. KANE: And that's why you're going to make a proposal to set him up for a public hearing.

MS. LOCEY: I'd like to offer a motion on the application of Vito Rizzi for his request for interpretation and/or use variance to extend commercial use into an R-4 zone at 287 Windsor Highway in a CR-4 zone.

MR. LUNDSTROM: I'll second that motion.

ROLL CALL

MR. LUNDSTROM	AYE
MS. LOCEY	AYE

June 11, 2007

33

MR. TORPEY
MR. KANE

AYE
AYE

VITO_A._RIZZI_(07-26)

MR. KANE: Request for interpretation and/or use variance to extend commercial use into R-4 zone at 287 Windsor Highway.

Daniel Bloom, Esq. and Mr. Anthony Coppola appeared before the board for this proposal.

MR. COPPOLA: I want to make sure you have the revised copies.

MR. LUNDSTROM: For the record, may I ask the name of the people representing this case?

MR. COPPOLA: My name is Anthony Coppola, I'm the architect, I did not prepare this plan, this plan was prepared by Greg Shaw. My office prepared the building drawings.

MR. BLOOM: Daniel J. Bloom, I'm the attorney from Bloom & Bloom, P.C. representing the applicant, Mr. Vito Rizzi. For the record I believe this is a continuation of the prior public hearing, Mr. Chairman.

MR. KANE: That's correct. Tell us what you changed.

MR. COPPOLA: Thank you. From the last public hearing last month there was a lot of comment about the rear of the building, the buffer area, the area between the building that we're proposing and the residences in the rear. So a couple changes after the meeting, I spoke to Greg Shaw, the engineer, and the following changes were made in response to that meeting. First of all, this plan indicates a clear 50 foot wooded buffer area so that's an area that's going to be basically always green and what he's done he's indicated a boundary kind of a U-shaped boundary that wraps around which is the existing wooded area to remain so that wooded area is included in the buffer. And it also includes along the

August 27, 2007

35

property line so it forms a U. He's relocated some additional evergreens in the center, they're showing seven plants now but that's subject to change but the idea basically is to leave the existing--

MR. KANE: Fifty foot straight line going straight across?

MR. COPPOLA: Right, and basically intersperse these into the existing so obviously when you're out there probably not going to be like this, if there's a space they would, you know, introduce the new plantings but leave everything that's there. So this is the idea the intent here is to supplement what's there, not to clear cut there and plant new but basically leave everything that's there and add these to what's there. So there was also landscaping about the retention pond basically in the first version of this, it has not been designed yet as I thought, it's just a designated area but Greg has basically taken a look at it, reduced the size of that area and then also basically indicated to me that the planning board would require a fence around that area so there was a lot of discussion about the fence, would there be a fence around the retention area, yes, there will be. The planning board he basically said they require that as a matter of record and as a matter of practice probably a black vinyl fence with mesh on it, something like that. So those were basically the changes on this plan. The front of the property remains the same, he did look at moving the building forward towards Windsor Highway but basically what happens in that scenario is that the parking that's there is the parking that's required to be there. I think it's one space per 150 square feet, so any attempt to move this building forward basically results in the parking being relocated to the rear of the building. And I think the intent of the planning board or the consensus of the zoning board last month was not to introduce parking in the rear of the building so we did not do that, we did not move, we did not move this

building forward, the front parking lot and the location of the building is the same as it was last month. So all the changes to the plan have happened in the rear and that's basically what you have.

MR. KANE: Okay, so let's get right to it. Let's open up the public hearing.

MS. CAVALLO: I'm Kara Cavallo, K-A-R-A, C-A-V-A-L-L-O, I'm at 14 Lannis Avenue so I'm adjacent to the property. I think last time I talked about, you know, I have two year old twins, we have our family there, we have our home, we feel this would be inappropriate. They basically put the commercial area right up to my back yard which I think is inappropriate. But I think what has really struck me since then is I really feel strongly that they haven't met the legal standard. I'm also I practice law here in New York, I do civil litigation, I have been an attorney here for five years and just looked into this even from a cursory review of the case law in this regard I really feel that they are not meeting the legal standard regardless of the trees, regardless of any of that and I'd like to talk about that a little bit. Just looking at 267 (b)(2)(b) the statute that would control here for the use variance it provides that no such use variance shall be granted by a board of appeals without a showing by the applicant that the applicable zoning regulations and restrictions have caused an unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located the applicant cannot realize a reasonable return. I'm just summarizing, demonstrated by competent financial evidence. Two, that the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district. Three, that the requested use variance if granted will not alter the essential character of the neighborhood and four

that the alleged hardship has not been self-created. I don't think they need any of the four, they need to meet all four. So just briefly to go through them one by one. They submitted evidence purported evidence that they do not make a reasonable return on the property, and I would submit that they need more than that, it's that they cannot within the, what's there as a commercial zone that they cannot make a reasonable rate of return. They have to have dollars and cents proof to this board that it's not possible, they cannot do it, I don't think they can make that showing given the fact that there are commercial neighbors that share the zoning like the Flag Guys, the pool company, I think that they could make a reasonable rate of return within the already zoned commercial lot. The applicant wants to put a deli there, this is a 14,000 square foot building that would house six tenants. And my understanding tends to be one of those tenants I think perhaps he can make a reasonable rate of return if only Anthony's Deli was right there and he can do it within the already zoned commercial. On the second point that the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood. I think the commercial neighbors there share the same zoning restrictions that residential buffer zone, my understanding goes along Lannis Avenue and that each of those commercial neighbors shares the same restrictions so therefore it's not.

MR. KANE: To a degree, it kind of narrows.

MS. CAVALLO: And that's written in the statute, it's construed by the case law, it's just not unique, they don't meet the standard as a matter of law. On the third point that the requested use variance if granted will alter the essential character of the neighborhood. That's what we talked about mostly last time, everyone in the neighborhood agrees it's absolutely going to change the character of the neighborhood. This is

about 1/3 of Lannis Avenue, I think is my understanding that's a big portion of Lannis Avenue, I don't know, I wish I had pictures, it's a beautiful residential street, it's, I think it's a dead-end street, it's quiet, there's trees. My family is protected from Route 32. We all are all the neighbors are I'm sure they'll speak to this point. This is a big chunk of Lannis Avenue that would change it, it would make what is a residential portion behind my own home and the neighbors' homes it would make that a commercial land. It's just, I don't think that you can really say with a straight face that it wouldn't change the character of the neighborhood. And I would be concerned about the slippery slope argument now it is different now, the neighborhood is commercial and now we have to deal with that and now we have retention ponds and fences and trees are not going to alleviate that. The hardship would be to the residents of Lannis Avenue if this were to pass, not the other way around. And then the fourth point is that the alleged hardship has not been self-created. As far as I can see in the case law which I know and I will quote hardship is self-created for zoning purposes where the applicants for a variance acquired the property subject to the restrictions from which he or she seeks relief so I think there again as a matter of law he knew when he bought it that it was zoned in this way.

MR. KANE: Just I'm not correcting anything they're going for an interpretation and/or use variance, so it's not just so you know not strictly for a use variance, just want to let you know so you can address that.

MS. CAVALLO: All right, so those are the points I'd like to make. I don't want to go through it too much. The other thing is my understanding of this is that 1/3 of this is commercial, 2/3 of this lot the residential, so he wants, the applicant wants to really, you know, sort of I see a lot of overreaching here, he wants to

change what's really predominantly a residential lot into a commercial lot and put this 14,000 square foot strip mall there where the neighbors, the commercial neighbors are all single house, much smaller units. So I won't go, you know, into great detail on that. I think that I just think that you need to look at the statute really that's your inquiry here, what do they need to prove legally, have they done it. I don't think so. I don't see how they have proved any of these four points. And then as far as 267 (b)(2)(c) the board of appeals in the granting of use variance shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant and at the same time preserve and protect the character of the neighborhood and health, safety and welfare of the community. If you do decide which I don't think you should and the neighbors don't think you should but if you did then it should be narrowly tailored to just what they need to address their hardship and which I don't see any hardship, I don't even want to really discuss that because I think that the inquiry stops with 267 (b)(2)(b) but you should be narrowly tailoring this and protecting the character of the neighborhood and my family and the families of the other residents here. I have a very informal sort of summary of arguments I have made here, if I might submit it to the board as part of the record. I'd like to thank you. That is all I have, thank you.

MR. KANE: Let the record show from Kara Cavallo we're entering into the record a briefing basically from Kara on her arguments against the interpretation and/or the granting of a use variance. Next?

MS. WASHINGTON: My name is Mary Washington, I live at 16 Lannis Avenue. I think this is a horrendous project to foist on us and I sort of got the feeling it's not in your back yards and from last time we met you could care less about our back yards and I don't think it's

right. Property values will certainly go down, the noise you're going to have not only daytime noise but cleaning crews coming in at night, you're going to have lights, you're going to have traffic and I see no need for a 97 space parking lot, the automats or the supermarkets have that but you don't see anything like that. This zoning for residential goes all the way from Vails Gate here and people have lived with it, they have businesses along the street and Mr. Rizzi had a going business and I'm sure if he comes back to the neighborhood he's going to have his old customers back plus new ones from the Patriot Ridge and that type of thing, he's not going to suffer any loss at all. I also have a letter from Diane Newlander, she's out of town today and couldn't come.

MR. KANE: Would you like to introduce that into the record?

MS. WASHINGTON: To the Chairman and Members of the ZBA: Regarding an application for a use variance submitted by Vito Rizzi on July 23, 2007, I would like to note that although the minutes from the August 13, 2007 ZBA meeting are available on the town web site, the minutes from the July 23 meeting which contain the record of the public hearing are not there. I don't know whether you're aware of that or not and she goes through the same thing that Kara just went through. In order to receive a use variance the applicant must prove unnecessary hardship, to prove this state law requires the application to show all of the following. That the property is incapable of earning a reasonable return for the initial investment, that the dollars and cents proof must be submitted, that the property is being affected by unique or highly uncommon circumstances, that the variance if granted will not alter the essential character of the neighborhood which it certainly would, that the hardship is not self-created, if one or more of the above factors is not proven state law requires that the Zoning Board

must deny the variance. I just wonder as an aside if you realize that domino effect if he gets this variance you're going to have every business from Vails Gate and they're all going to, they want to extend their business in the residential zone. Mr. Rizzi purchased the property consisting of 3 acres of land with a brick one family home for \$450,000, the property is within both residential and commercial zoning, he currently receives rent from the home, considering his initial investment and the value of the land alone this can hardly be considered a hardship, even if the property remained just as it is. Along the strip of land on Route 32 there are small commercial businesses all within the commercial zoning. If Mr. Rizzi who's owned and operated a successful delicatessen in New Windsor was to open such a business on this property it would be welcomed by all and certainly would not be operating under any hardship. The proposed project 14,000 square feet of mostly retail space and 97 parking spaces would drastically alter the essential character of any neighborhood, if there's any hardship to be addressed it is the hardship placed on us the neighbors by this project, we'll watch as the natural barrier is destroyed and the value of our property diminished. According to the table of use bulk regulations, the parking for commercial use is not permitted by right in the R-4 zone and requires a variance as well. It is the job of the ZBA to preserve, protect the character of the neighborhood and the health, safety and welfare of the community. I strongly am opposed to granting this use variance. Sincerely submitted, Diane Newlander.

MR. KANE: Can I have that for the record, please? Anybody else? Ma'am, did you want to say anything else?

MS. WASHINGTON: No, just I'm afraid of the domino effect if he does get it all the other businesses are going to want to encroach on the property. Right now

they've lived with it for years, I don't see why we can't continue.

MR. KANE: Thank you. Sir?

MR. STEIDLE: Bill Steidle. I appreciate the opportunity to speak tonight. My name is Bill Steidle, I live on Jackson Avenue in the Town of New Windsor. I wanted to begin by talking about process a little bit, I do speak before the planning board on occasion and in days passed I have provided testimony in a number of different forums. In each and every instance, I review the file, I review plans before speaking and I did so before the first public hearing. In this case, I attempted to review the plan that's up on the board a week ago today we filed a Freedom of Information Request, the plan was not in the file, it was not available. On Friday, last business day before today I called the Town Hall, I called for Myra and Myra was not in and requested that I come in and review the revised plan if in fact such a plan was available in the file. I was told that the plan was not available, there was no revised plan. Now I think that's unfair to the public, it's unfair to the residents, it's unfair to the board not to have the opportunity to review the plans before the meetings. And I'd just like to offer a remedy if I might, very simply, the board and the planning board should require that plans be submitted at least 10 days or 14 days prior to the hearing and that those plans be so date stamped to verify that submission. And that way the public and the board members have the opportunity to review the plans. I also have to say it was somewhat incredulous at the last meeting when the applicant submitted a financial data regarding hardship one of the criteria that has to be met, basic criteria, submitted it to the board and the board apparently had never seen that before and certainly the public did not and it was only by chance that the board didn't vote on the proposal on that occasion, I think that again is the case where

it's inappropriate, plans and reports have to be available prior to public hearings and prior to decisions so they can be reviewed. One other thing I think Diane brought it up a little bit there was some discussion at the last meeting that and I think it was very clear that the project could be worse that you could in fact develop a worse project on that site if it were, if the use variance were in fact granted. And it was also discussed that you could put parking in the rear of that site without a variance. I objected to that last time, I see no basis in law or regulations that in fact allows commercial parking lots in residential zones without a variance. And I think where this leads me is some of the residents of Lannis Avenue feel threatened by things that were said either by the applicant or by the board and we all have perceptions of what was said or what may have been said but I think it's unfortunate that people feel threatened in these instances. So I think we all should use due diligence to try, not try to make people uncomfortable and not to tell people that things could be worse. Now I want to tell you everything I have said thus far has no bearing on your decision, it has no bearing whatsoever as Kara indicated, your decision has to be based on the four criteria that were discussed, the criteria talks about making reasonable returns, talks about unique or highly uncommon circumstances, it talks about affects on the neighborhood and that's why I wanted to review the plan because that's my area of expertise. And the last is hardship. You know, I'll say to the board and I think Kara said it very well, if each of you consider those four criteria your decision will be very easy, you only have to find that the applicant does not meet one of those criteria to deny the use variance and I think unquestionably you will find that that is the case and the variance should be denied. Thank you.

MR. BABCOCK: Bill, just so you know about the plans the plans were here on time from the applicant, they

were cause Myra's out sick there's been a little confusion there, when my office called me and said that you and Diane had called and wanted a plan, I immediately came to Town Hall, pulled out the plan and said give me their number so I can call them and say it's available. And my office said that Diane was going to call back that afternoon because she was moving around and get the plans. So the day you called for it it was available for you, Bill.

MR. STEIDLE: I'm not pointing fingers. Anthony, I should mention I think the applicant has excellent consultants, Anthony is an excellent architect so I'm not pointing fingers, I just pointed out that mistakes happen but make sure the plans are available.

MR. BABCOCK: I apologize for that.

MR. KANE: Next? Sir?

MR. EVANS: Vincent Evans, 5 Lannis Avenue. I just want to repeat some of the things that have already been said, I believe they are my opinion and my wife's also who couldn't be here. I don't believe Mr. Rizzi has met the hardship condition that he claims to have, it wasn't brought up in any of the meeting last time we met but it just said that he received rent and that the rent wasn't sufficient enough to meet his expenses or to provide some additional income. It didn't go into any consideration how he was going to meet or generate that income, just that the fact that he had rent on the house, he wasn't developing it as a commercial business and he wasn't looking to do anything else with the property other than the rent from the tenant. The other thing is I object because I do believe it will set a precedent to other businesses on the highway if they see that they are able to get a variance for this piece then they would look to also get a variance sometime in the future. The third thing is I do believe it will create a hardship for the people who

border that property or the adjoining properties in the future and their livelihood could be affected by that. That's all I have to say.

MR. KANE: Okay. Anybody else? Ma'am?

MS. DEWITT: My name is Linda DeWitt, I live at 11 Lannis Avenue which is directly across from this project. We have lived there for 36 years and that buffer area has always been there and it's just not the first time that people have tried to extend their business in there to make a windfall, to make more money and we have fought it several times, I remember one was the transmission place but that just affected like I think one property. This affects four properties, about a third of the street. Now I'm looking directly into this project, all right, you have trees there but those trees are deciduous trees, they lose their leaves in the winter so we'll be looking right into it, we'll see all the lights, we'll see whatever goes going on there, the pond, whatever is going to be wide open to us and I'm very much opposed to this.

MR. KANE: Thank you. Sir?

MR. MC CARTHY: Phil McCarthy, 10 Lannis Avenue. Right now there's an existing stream through my back yard, from what I, my neighbor who's lived here 50 years he said it was a deer path now I guess road runoff goes through that path, there's no water easement through my back yard where this wading pool is, I don't know if that's going to drain through the existing little stream that I have back there but like I said, you can build a parking lot, I can fill in that stream any time I want and like I said, there's no existing water easement back there so that's all I have to say.

MR. KANE: Thank you.

August 27, 2007

46

MR. WESTFALL: Fred Westfall, 12 Lannis Avenue. Basically, I want to agree with Mrs. Washington, all the businesses on Route 32 have conformed to the zoning, nobody's ever gone further back, if they're granted the variance there's not going to be anything to stop anybody on 32 from doing the same thing. As it is now traffic on 32 is pretty bad during the day, you open up 32 to all the other businesses there you're not going to be able to move through the Town of New Windsor on Route 32. During the day, I don't try to get out, if I'm making a left I go out to 94 where I can make a right, you open up that stretch you're going to have to put a traffic light to control all the traffic. Again, I think it's going to encroach on all the properties, doesn't matter how many trees they put back there, you're still going to see the businesses. I'm opposed to it. Thank you.

MR. KANE: Thank you. Anybody else?

MS. MAXWELL: Fran Maxwell, 11 Hudson Drive. Can you tell me please how large is that pond supposed to be?

MR. COPPOLA: I can only tell you what's indicated on the drawings, let's see if I can get you a number here, well, it's probably indicated to be the width of the lot here is 250 feet so to me it looks like it's 150 feet by 75 to 100 feet in depth.

MS. MAXWELL: How deep?

MR. COPPOLA: Usually not more than 4 to 6 feet when they're full, I think, but it depends on percolation of the soil and the volume of the water that's generated. So basically kind of piggyback on the other man's question about the water runoff, again, there's a water course that runs through there, in theory that existing water course will remain the same, the same amount of water that flows there now will flow there after all these hard surfaces are built so the pre-development

runoff is the same as the post-development runoff, that's the purpose of the pond.

MS. MAXWELL: Now as we've seen in the past 20 years all those retention ponds that have been built from other developments are filling in and becoming marshes and totally filled in and not doing nothing but in the meantime they become mosquito ponds and I wonder if Lannis Avenue wants all the mosquitoes in their back yard, in their street and in Harth Drive and in Willow Lane and in Park Lane and all along Hudson. Developing a health hazard and having such a large pond for such a length of time that will then fill in its not very deep it will become shallow as it fills in with all the runoff and the soil you see that right across the street in those developments and what happened to their ponds, that's what I have to say and in other words I agree with all the other people that have said that and Bill of course Mrs. Washington they have all got valid points. Thank you.

MR. KANE: Thank you. Anybody else? Sir?

MR. BATAPAGLIA: Nick Batapaglia. I want to say something from a street other than Lannis, I agree with these people that there needs to be enforcement of the existing regulations about the size if you would and I'm just for enforcing what we already have as rules so let's abide by what we already have. Thank you.

MR. KANE: Thank you, sir. Anybody else? Okay, we'll close the public portion of the meeting, bring it back to the board. Further questions from the board?

MR. LUNDSTROM: Just a couple of observations, Mr. chairman, in looking through some of the printed material regarding zoning boards and actions they can take I'd like to read from a publication that was produced by the New York Planning Federation page 9-4, zoning variance, zoning variance permit exceptions,

permit exceptions to the rule and as such must be undertaken with caution and approved only with a strict letter where the strict letter of the law is met granting an unjustified variance establishing precedent and protection for equal protection challenges the community should be vigilant to afford it the substantial and thoughtful planning and zoning efforts that the community has worked hard to achieve. I bring that to the floor only because I know it's been said that we as a zoning board do not accept this established precedent and that's correct but the other thing is by us taking certain actions can always subject the town to challenges under equal protection of the law. One of the questions that I have and let me direct this to Mr. Coppola, just to be very honest I'm somewhat disappointed with the new plan, I know one of the questions I asked at the last meeting was what could be done to minimize some of the parking in front, one of the ideas thrown out was the option of doing a variance for parking, I know the zoning board has done that before, second question I would ask and I know it's come up in zoning board decisions before is to get a use variance the owner must substantiate the fact that he cannot make a reasonable return without that. Also what the law says is what is the minimum that he needs to make a reasonable return does he need a building that's 14,000 square feet or could it be smaller and by doing that could that building be moved closer to the road with less parking spaces.

MR. COPPOLA: Let me just address kind of the geometry of what's here, not the financial aspects of it. The building could be made smaller but that doesn't get you there, it's eliminating the parking spaces to move this building closer.

MR. LUNDSTROM: But if you make it smaller the number of parking spaces gets reduced because you said the parking spaces are based on the square footage.

MR. COPPOLA: It does but it doesn't, I looked at that like cutting off a portion of this leg here and moving the building forward, you still end up, it's the parking that, it's the parking that's still under that scenario wants to jump back to the rear even if you lop off whatever, a portion of this building, 1,000, 3,000, 5,000 square feet you're still going to move it forward but you're not going to have enough parking unless even with that smaller amount you put some of that parking towards the rear.

MR. LUNDSTROM: But what about a parking lot variance?

MR. COPPOLA: Well--

MR. LUNDSTROM: Have you considered that?

MR. COPPOLA: Well, I guess my understanding was that parking was not the board really didn't want us to go in the direction to introduce parking in the rear.

MR. LUNDSTROM: We're not talking about the parking in the rear, we're talking about if the building were moved closer to the street.

MR. COPPOLA: You're talking about less parking?

MR. LUNDSTROM: Less parking that's an option that's there and I don't see that option having been investigated in this latest proposal.

MR. TORPEY: Excuse me, too, you know, the neighbors are talking about these trees that only have leaves on them half of the year, why is all these fine trees along the size of the property when both sides are commercial anyway? They're going to see each other, why aren't they addressing putting the trees in the back that are green all year so they'll totally see nothing all year round? How come there was no border built around that instead of leaving the trees that are

going to come and go?

MS. LOCEY: These are additional.

MR. TORPEY: These all just one spot, you're just separating commercial properties from each other, they're going to be commercial no matter what.

MR. COPPOLA: Right, the screening needs to be in the rear, not on the sides, but the intention of what we're introducing new maybe those whatever they are seven or eight or 20 whatever it is you really don't know until you go out there and find the spot for those so we don't know where those will end up.

MR. TORPEY: Talking about a new tree line says new edge of wooded area that wooded area is going to lose its leaves.

MR. COPPOLA: I don't think the intention is not to remove and I think everything there is deciduous, the leaves drop.

MR. TORPEY: Exactly, but if you took all these trees, you see how many trees you've got on the sides of the properties?

MR. COPPOLA: On the side yards.

MR. TORPEY: You're just going up against the transmission shop and a beauty salon and a flag place, they're the ones who are getting the privacy.

MR. COPPOLA: Yeah, maybe that does need to be screened on the sides.

MR. TORPEY: If you took off the trees you'd build such a wall you wouldn't see that place all year round.

MR. COPPOLA: I agree.

MR. TORPEY: Not in a bad sense but--

MR. COPPOLA: Right, then we would certainly be amenable to that, I mean, increasing the number of screening that's on here.

MR. TORPEY: This is where you'd want your wall on the back edge.

MR. COPPOLA: Correct.

MR. TORPEY: That's where you've got your problem, you don't have a problem on the side properties.

MR. COPPOLA: Correct.

MR. LUNDSTROM: Again, I think that substantiates another comment I made about the previous one had one line of trees and I suggested if we can move that pond upwards which it looks like you've done so you can have three lines of trees but again I don't see that on the plan so again there's a level of disappointment on my part. I think what happened at the last meeting and I felt bad because some of the public was saying that the feeling they got of this board was we didn't care and I think that's incorrect because I think we do care, this is our town as well as everyone else's town and we want to do what we can to help and protect and preserve the character of this town. Part of our job and again it's not an easy job, it's a very difficult job is we're asked to make decisions based upon plans that are presented to us, there are certain recommendations made at the previous meeting, again, I think a lot of us heard what the public was saying and hearing what the public was saying is different from what they were saying and we have to understand what they are saying, part of it was consideration for the children and grandchildren, I understand that you're saying the planning board will insist that there's a fence. The

other thing is property values and the closeness and the character of the community. The other thing is what is the minimum. Again, I go back to this what is the minimal size of a building that would give your applicant again the minimal and reasonable return. I don't think it's 14,000 square feet, I think it could be substantially less and I think you could always come back to the zoning board and ask for a variance on the number of parking spaces which may mean that you don't have to come back to the zoning board at all if that building could be put totally in the commercial space.

MR. COPPOLA: I mean we did speak about that and Mike kind of said that he thought that the town had increased the parking for retail because they found that that, that it wasn't working. It's newer now and I don't know if it's five years old or whatever it is the one space per 150 square feet, it used to be one space per 200 square feet, so we didn't pursue that aspect of it. I mean, there's a lot of spaces here absolutely and I can't say that there's not but we didn't pursue it that way.

MR. LUNDSTROM: I think that may have been a tactical error.

MR. COPPOLA: Well, there was a lot of stuff discussed and we tried to, I'm still listening.

MR. LUNDSTROM: The other thing I'm looking at here the plan for the new retail building you've got the shape of an L to give you a certain amount of square feet, I'm disappointed cause I thought that you were going to consider redoing that in some way, possibly lopping off part of the L and making part of it wider so it could be moved up further so it's not a major change. Again, I don't see that here.

MR. COPPOLA: Yeah, I mean, it is something that I went through the next day in, you know, looking at this

thing lopping off 10 feet, 20 feet of this portion and moving it up but it's just the parking doesn't permit you to do that, that's what I'm saying, you do lose parking spaces but don't lose enough spaces to get the building forward.

MR. LUNDSTROM: But now are you saying that you're convinced that this board would not give you a variance on parking spaces?

MR. COPPOLA: Well, I'm just saying that no, I'm not saying anything like that, I'm just saying that the direction I thought the direction was that the town thought that that parking was warranted but that's not my personal opinion. My personal opinion is this is a large lot but I may be wrong about that, you know, whether it's going to be filled at Christmas time or when the building is filled.

MS. GANN: I have a question regarding the retention pond, the outlet over here as of right now the building that you have out there is 14,000 square feet and you mentioned you gave us the logistics of how big that outlet pool will be. If in fact this building were to shrink in size would that in fact shrink in size of the outlet pool as well? Would it need to be as big as it is right now if you can shrink down the building size?

MR. COPPOLA: If you shrink the building size and the parking area so the size of that retention pond is a function of all your paved and hard surfaces so the pavement and the roof so you can see that you have just a huge amount of parking here you probably have twice as much parking and area as a 14,000 square foot roof.

MS. GANN: So if you reduce the amount of parking then your retention pond would be smaller?

MR. COPPOLA: Theoretically yes, yes, it would.

MR. TORPEY: Just don't have a large paved area.

MR. COPPOLA: You're still going to have a large paved area if you lop off 3,000 square feet of the building that's 20 spaces.

MR. TORPEY: Still going to have--

MR. COPPOLA: So you have 70 spaces instead of 95 or something like that.

MR. LUNDSTROM: What would be the minimal square feet of retail space if the, that the applicant would need to make a reasonable return, minimum reasonable return, is that something that can be identified?

MR. BLOOM: It in my opinion can be, Mr. Lundstrom, but I wouldn't venture a guess at it without consulting with our expert who did the calculations and submitted, Mr. Carhart submitted the report based upon this configuration and this size. But I have listened to this board this evening and obviously you misunderstood completely the direction the board wanted us to go with it, it's not the board's fault, it's our fault and so for that purpose, I'd respectfully request that this board consider continuing the meeting and giving us an opportunity to come back with a revised plan which hopefully will incorporate what I interpreted to be very constructive suggestions both from the board as well as the public.

MR. KANE: You can, personally, I think it's going to take some time to figure out what might really work on that spot as has been pointed out the commercial portion of that particular lot is about 1/3 and 2/3 as residential, I just, I don't see continuing it at this point, I think a newer application is a better way to go down the line because I think it should be done in a timely fashion. We have extended this for the good people back there, people don't like to live with that

kind of stress, again, it can come up again and again and that's a different thing but I don't see continuing this right here because I think it's going to take some work to put a good plan together that would seem reasonable and fit that particular space and pass everything by it and most people are correct, I don't think and I'm talking about the interpretation part that we would do because I don't see us passing anything that would be a use variance on it at this point. But my feeling here is not to continue after this point, I think a newer application down the line well thought out might be a better way to go. So as far as that I think that we're going to vote tonight on the application as presented.

MR. BLOOM: Very well.

MR. LUNDSTROM: Mr. Chairman, is it safe to assume Roberts Rules of Parliamentary Procedure direct us that any motion must be in the affirmative?

MR. KANE: Absolutely.

MR. KRIEGER: That's correct.

MR. LUNDSTROM: Mr. Chairman, with that in mind, if it's time for a motion I will be happy to make a motion.

MR. KANE: Let me just clarify there are no more questions from the any of the board members? I want this decided tonight, they have the ability as any homeowner does to go back to the drawing board, make another plan and come back down the line, you know, if it doesn't get approved they have, I'm not saying it's being approved or denied but I think we're going to settle this portion of the issue tonight and if it doesn't get approved then they need to go back to the drawing board and I think that's going to take some substantial effort.

MR. BABCOCK: But it will have to be readvertised so if you're on the list you'll be notified.

MR. KANE: It would be a brand new application.

MR. KRIEGER: It will be a new application all the same procedures would apply.

MR. KANE: If as Mike said if whatever design they come up with for that property puts them back in front of this particular board. With that said and no further questions from the board, I'll accept a motion and yes with Robert Rules it does have to be in the affirmative.

MR. LUNDSTROM: With that in mind, I will make a motion that this board grant the variance for Mr. Vito Rizzi as presented on the agenda of the Zoning Board of Appeals August 27, 2007 request for an interpretation and/or use variance to extend commercial use into an R-4 zone at 287 Windsor Highway in a C/R-4 zone, section, block and lot 37-1-52.

MS. LOCEY: Correction, 35-1.

MR. LUNDSTROM: Thank you.

MS. GANN: I'll second the motion.

ROLL CALL

MS. GANN	NO
MR. LUNDSTROM	NO
MS. LOCEY	NO
MR. TORPEY	NO
MR. KANE	NO

MR. KANE: Motion's denied, we have our next meeting September 10 and that's it. Motion to adjourn?

August 27, 2007

57

MR. LUNDSTROM: So moved.

MS. GANN: Second it.

ROLL CALL

MS. GANN	AYE
MR. LUNDSTROM	AYE
MS. LOCEY	AYE
MR. TORPEY	AYE
MR. KANE	AYE

Respectfully Submitted By:

Frances Roth
Stenographer

July 23, 2007

PUBLIC HEARINGS

VITO A. RIZZI (07-26)

MR. KANE: Tonights first public hearing, request for interpretation and/or use variance to extend commercial use into R-4 Zone at 287 Windsor Highway in a C/R-4 Zone.

Daniel Bloom, Esq., Mr. Anthony Coppola and Mr. Eldred P. Carhart appeared before the board for this proposal.

MR. BLOOM: Good evening. Ladies and gentlemen, for the record my name is Dan Bloom and I represent Anthony Rizzi on this application.

MR. KANE: Mr. Bloom, let me just interrupt you for one second and ask if there is anybody in the audience for this particular hearing? Okay. We are going to give you a piece of paper just for your name and address. It's strictly for the stenographer so that she has the information for the record. We are not going to sell it to any web sites or anything like that.

MR. COPPOLA: Thank you. If it pleases the panel I would like to present the matter this evening in a certain order. I would like to have our architect, Mr. Anthony Coppola make a presentation first so there will be a general overview of the type of structure we wish to construct and then I will make a few comments to the board and then I would like to have my expert appraiser, Mr. Carhart, address the board at that time.

MR. KANE: Okay.

MR. ATTORNEYNAME: Thank you, Dan. My name, again, is Anthony Coppola. I prepared the

July 23, 2007

drawings for the building, but I am also going to explain the site plan first. The site plan was prepared by Greg Shaw. I will go over the site plan first and then the floor plan, then the exterior elevations. Starting with the site plan this is approximately a three acre parcel. It's about 250 feet wide along Windsor Highway and over 500 feet deep. What we are proposing to do is basically an L shaped, one story office retail building of approximately 14,500 square feet. And that is depicted right in the center of the parcel. The -- this footprint of the proposed building straddles the zoning line which 200 -it's set 200 feet back so that zoning line is C Zone in the front and R-4 Zone in the back. Basically the configuration and the reasoning behind this site plan is basically to incorporate all of the required parking in the front of the building, which would be how almost all retail buildings are set up so there are -- as the town would require, one space per every 150 square feet of proposed building so that 97 parking spaces in the front. The entrance is down on the northeastern side of the parcel right down here (indicating) and that is two-way traffic in through here and circulated around the front of the parking area and basically there is a loading area in the rear. So aside from the L shaped building there is existing landscaping and screen on each side and then in the rear of the parcel there is approximately a 200 ft. setback from the corner of the building to the lot line and within that 200 ft. setback that will be basically almost entirely green area. There is going to be a new water quality and storm water retention area there that will basically mitigate any of the water that is collected by the hard surfaces here. The new roof and the new pavement area that will collect in that retention area there is a small area here or I guess an area on the eastern side that is going to be undisturbed wooded and proposing some new white pines in the

July 23, 2007

rear to add to the screen, but I think one of the most important things here is from the rear property line which borders the residential lots over here it's 200 feet to the -- to the building. So that is the site plan in an outline. Showing you what we are doing architecturally. Again, we are calling this an office/retail building, but my feeling is it will probably be primarily a retail building, 14,500 square feet dividing it up into a proposed maximum of seven spaces, maybe fewer than that depending if they are combined. All of these spaces are accessed out of the front. Some will be able to park in the front and we basically developed a covered walkway area all of the way and so you would be able to go -- to basically walk from one corner of the building in and around the walkway down to the far corner without -- in case it's raining exposing yourself to the rain like tonight, so seven spaces. Now showing you what we are going doing as far as the fascade, so these two fascades, this is the fascade you would see from Windsor Highway. Basically, again, it's hard to read because it's L shaped. You have the long L here and the short leg here, so this portion of the fascade is much closer to you. It's coming forward then if I were looking at the building from the side. I would see the side of the building here and then again that leg coming out into the parking lot.

MR. KANE: Let me interrupt you for one second. When we open it up to the public portion of the meeting we will put that up so everybody can see exactly what they are talking about on the plans, okay, just so you know.

MR. COPPOLA: So basically the fascade is going to be -- as it's viewed from the front from Windsor Highway, going to be a mixture of brick all of the way down on the bottom here and we basically brought brick accents in terms of

July 23, 2007

soldier course and detailed in the gable, that is the gable closest to the highway. So there is basically a lot of brick, brick columns and then there is a wood column set on top of a brick pier that divides that. And like I said, a colonnade which extends all of the way around this L shape enclosing all of these retail units. I think that is about six feet deep. There will be a few areas for signage. A large area here again that breaks up kind of the long body of the roof. We brought that portion up a little bit so signage is here and can be right above the walkway here and that is all done in a stow or a stucco exterior finishing system. And the back we basically left very plain, kind of undone without a lot of detail and that has been done on purpose. I think, at least my feeling is, that we don't want to draw attention to the rear. This is going to face the residential area even though it's 200 feet deep so we are going to put a minimum amount of ornamentation on the rear, a minimum amount of lighting. And that will be used for occasional deliveries and service access in the rear of the lot, but again that is 200 feet away from the lot line. So that is basically what we are proposing to do. The elevations, the floor plan and site plan and I can answer any questions.

MR. KANE: Okay.

MR. BLOOM: Thank you. Mr. Chairperson, by way of background on the application, my client, Anthony Rizzi, first started business in the Town of New Windsor quite sometime ago. As you may know he ran Anthony's Deli up on the intersection of 32 and Union Avenue and he first bought this property about four years ago. It was the intention at the time to immediately set up and move his deli from where it was to this location because his lease was expiring. Unfortunately because of difficulties in the closing it was not

July 23, 2007

possible to get it done in time and his lease ran out so he had to relocate into Newburgh. His intention now, if this plan were to go forward, he would like to move back and into something of this type of complex. When he purchased the property it was a single family residence. It still is. It's a two story single family brick residence. It has been there many years and at the time he had a tenant on the property that was paying \$1,600 a month in rent and it's my understanding, our expert will indicate to the board, that that is the market rate, \$1,600 per month. It does not allow a reasonable return. I respectfully submit to my client under the circumstances given his investment and the maintenance and cost, etc., but those issues will be addressed in more detail by Mr. Carhart. Now, the question is is this an undo hardship to my client and I respectfully submit to the board that it is. He made a substantial investment. Even at the present time as he tries to rent it it's a very difficult piece of property to rent. It's only one of four residences within a quarter of a mile of Route 32. It's been basically commercial for many, many years. As we know across the street we have Parry's Automotive. We have the carpet store next store. We have the Flags Guys and so on and so forth. So if the board were to be disposed to grant the application and I submit to the board that it would not change the character of the neighborhood. Matter of fact, it would be more in keeping with the character of the neighborhood if the construction were permitted to go forward. More importantly, I believe that from a logically and a planning prospective, I believe it would be an enhancement to the quality of the neighborhood that a structure of this quality be constructed in that area at this time. I submit, if it were, this indeed would -- the values of all of the surrounding commercial values would be increased by this structure. I also know, and my

July 23, 2007

client and Anthony Coppola, went to great lengths to try to design a building not only as aesthetically pleasing and functional, but also takes into consideration, I believe, the general ambience of the residential community behind it. It's not flashy. It's conservative. It's in keeping with the style and the quality of hisotric surroundings of the entire neighborhood. And as Anthony Coppola says, it's 200 feet setback from the actual residences in the rear. I personally toured the area. I note that all of the commercial structures leading up to it and beyond it all border, of course, on the same residential neighborhood and looking at those buildings and looking at this rendering this evening I can't help but submit to the board that I believe if construction, if it were allowed to go forward, it would not only be pleasing to the eye but increase the value of not just the commercial, but I think would lend something even to the residential. It's a unique situation my client is faced with because, as I say, he has a two family -- he has a two story residential in a commercial zone. All of the other structures around it are commercial. When he purchased it he didn't create the residence itself, that had been there for many years. And so I respectfully submit that he did not of his own volition or certainly of his own actions create the situation with which he is presently confronted. Having said that, with the boards' permission, I would like to introduce Mr. Eldred Carhart, a certified New York State appraiser and he will address the issues of a lack of reasonable return, which we must establish, of course, from a legal prospective. With the boards' permission Mr. Carhart will address the board.

MR. KANE: Thank you.

MR. CARHART: I wonder if I can give you all a copy of this proposed testimony. If you wouldn't

July 23, 2007

mind I would like to summarize the content. I don't need to repeat or preach to you, but the page that deals with the lack of reasonable return is Page 2. This property was purchased from Scott Rollo in 2004 for \$450,000. And if we were to use a 5 percent appreciation rate, which is very reasonable, today it would be worth \$509,800, roughly. The house has a fair market rent of \$1,600 a month, which equates to \$19,200 all together annually. I have applied a 5 percent vacancy and bad debt allowance, which is \$960 and it throws off an effective gross income of \$18,240 with expenses of \$10,400, which includes \$7,275 in taxes and maintenance and repairs, legal and accounting, professional property management, miscellaneous and a reserve for short lived items, the garbage collection and lawn care and so forth is paid for by the tenant. That leaves a net operating income of \$7,840. Now, the cash-on-cash rate of return is -- can be computed by dividing the net operating income by the value of the property, which equates to 1.54 percent. This is -- the nominal cash-on-cash return is 5-10 percent. Now, cash-on-cash really is an overall yield rate for the overall value of the property, that is just an appraisal term. The building, of course, is going to be 14,500 square feet, single story building. It would have a rent roll in the neighborhood of \$12.00 to \$16.00 per square foot rental value. And I think that is basically the whole -- the whole equation here. If anybody would like to ask any questions I would be more than happy to try to answer them.

MR. KANE: Mike, quick question, the zoning line that runs continually right through the Flag Guys, Orange County Pools, so every business in there is half in, half in residential basically.

MR. BABCOCK: Yes. I would not say everyone.

July 23, 2007

MR. KANE: Close?

MR. BABCOCK: Yes.

MR. LUNDSTROM: One further question Mr. Chairman for the building inspector. Mike, the neighboring properties, is the structure itself in the C zone or the R-4 zone?

MR. BABCOCK: The one on either side, the structure on Prokosch (phonetic) you can see says existing dwelling, but that has been remodeled to a hair salon, that is in C zone. And the one that says existing dwelling there, I assume, that is Cavalieri's Flag Guys where they sell the flags.

MR. LUNDSTROM: Yup.

MR. BABCOCK: What they did is remodeled the existing houses and created businesses out of the existing houses.

MR. KANE: Orange County Pools is the next one down.

MR. COPPOLA: That one probably is.

MR. KANE: I know it is. I ran it for six years.

MS. LOCEY: Your calculations indicate that with the single family home his rate of return is 1.54 percent and the average is 5-10 percent?

MR. CARHART: Yes.

MS. LOCEY: Okay. And on this site plan there are existing homes?

MR. COPPOLA: There is one existing home.

MS. LOCEY: In the back of the property?

July 23, 2007

MR. COPPOLA: No, I will show you. Over here on this parcel.

MS. LOCEY: Yes. But the back of this parcel is deep, 500 ft. parcel.

MR. COPPOLA: Correct. There is just the one building on the lot.

MR. BABCOCK: And behind it --

MR. COPPOLA: Those are --

MR. BABCOCK: -- those are homes.

MR. COPPOLA: I believe those are all single family homes.

MS. LOCEY: How are they accessed?

MR. COPPOLA: What is the street? I forget.

MR. BLOOM: Lannis.

MS. LOCEY: Lannis, L A N N I S. Where is that?

MR. BABCOCK: It's off of Willow. You go down Willow and it's the first right on Willow.

MR. COPPOLA: Here is the location now. That gives you -- there is Lannis off Willow, which is off Windsor Highway and then you can see the lots there, so the rest of the lots from this -- his tax map extend all of the way to the houses.

MR. BABCOCK: Yes.

MR. KANE: Now, if they wanted to Mike, they can -- they are basically here because the building itself is going in towards the residential part of where the line hits. If they put the building in the commercial section and the parking in the

July 23, 2007

rear they would not be here at all.

MR. BABCOCK: That's correct. The Planning Board -
- the Planning Board -- the Planning Board told
them they wanted the parking in the front.

MR. KANE: I know. I just want to bring that up.
That it's possible for them to build there and put
all of the parking in the back technically.

MR. BABCOCK: That's correct.

MR. KANE: So there is an option there just so the
homeowners know that. I think I would rather
have the parking in the front than the rear and having
all of that noise, but that is my own personal
thing. I just wanted to point that out. It's an
option to still build on this and put parking in
the back. Okay. At this point I think what I am
going to do is open it up to the public. Let's
hear the public's questions. Please don't
repeat yourselves. Just stand up and give your
name, address and answer the questions. Name
and address?

MS. CAVALLO: Sorry. It's Kara Cavallo, C-
A-V-A-L-L-O. I am at 14 Lannis Avenue. I live in
the house that, I think, on the map I saw it, it's
Hughes. I have a question about what you just
said about the parking. They would not require a
variance to have the parking in the back?

MR. KANE: No.

MS. CAVALLO: So....

MR. KANE: It's their property. It's where the
building is. If the building is okay they can do
anything they want basically in the backyard.

MS. CAVALLO: My understanding about the purpose

July 23, 2007

of this hearing is to request a variance of the 200 ft. buffer zone where we --

MR. KANE: Basically what is happening is -- show her where the building hits, right where the zoning.

MR. COPPOLA: Here is our building, the L shape building. This is the 200 ft. zoning line so it cuts right through the building so a portion of the building is in the R-4 and a smaller portion of the building is in the C zone. Almost the entire parking lot is in the C zone.

MS. CAVALLO: And if you switched it then the parking lot would not be in the R-4 zone?

MR. KANE: They would not be here.

MR. KRIEGER: They would not be here.

MR. KANE: The parking would be in an R-4 zone and the building would be entirely in the commercial zone. If they proposed doing it that way then they would not need a variance.

MS. CAVALLO: So it's permissible to cut down the trees there and put in the parking lot?

MR. KANE: Sure.

MS. CAVALLO: Well, that being what it is I will say --

MR. KANE: If you notice in the back you can -- I think this is what everybody is concerned about, show them the wooded area and where the back of the building is and you are leaving those trees all back there. They are leaving a very good buffer for the neighbors in the back.

MS. CAVALLO: Right.

July 23, 2007

MR. COPPOLA: This 200 ft. portion here to the lot line, to the rear lot line of the houses would be basically mostly undisturbed. There would be a portion of this that would be a storm water retention area, like a pond, that collects this water. A portion of this that is wooded we are going to add new plantings so new white pines being proposed so those are coniferous trees that will be planted along the property line edge there and there will be a small paved area right behind the building.

MS. CAVALLO: All right. Well, I would object to the variance. I live right behind there at 14 Lannis Avenue and I do I disagree that it would not change the character of the neighborhood. I think it really drastically would. Lannis Avenue is a beautiful street in New Windsor. It's a -- it's a beautiful quiet street. We have this buffer behind our house that I think my understanding is a 200 ft. buffer that currently has trees and other vegetation and we bought our house with the understanding and relying upon that buffer zone that it would provide a sort of buffer between us and the commercial properties that are on Route 32. I understand that that is commercial and I think that is fine. They should be able to do whatever they want within that zone. I don't think they should be able to encroach into that buffer. It provides privacy for us. We don't hear Route 32. We don't see it, especially during the summertime. I have two year old twin boys and, you know, we have pets on the street and there is lots of small kids on the street. People who have been there since, you know, the houses were built in the 70's. It's completely inappropriate to cut down into that buffer and put a pond there. It would make my home -- it would make it an inappropriate place for me to live and I feel very strongly about that. It provides safety and security and privacy for us. People are not walking from

July 23, 2007

Route 32 into my backyard with that buffer there. I fear that they would be without it. So I think that the buffer there -- is there for a reason. The law put it there for a status quo should be provided as far as the hardship I heard a little bit about that. I disagree that it's a hardship for this gentlemen who owns this house. It sounds like he is still making a profit at 1 percent, whatever it is. Margarita's and Flags Guys are homes that are turned into -- I go to Margarita's to get my haircut. I have -Margarita, she is great. This to me seems very different from that.

MR. KANE: You do understand they can put the -- still put the pond in here. They are not here for that. They are here for the building and parking to the rear of the building without anybody same except for the Planning Board.

MS. CAVALLO: My understanding is that they are applying for a variance of that residential zone.

MR. KANE: No. Just to put the building into the portion of the residential zone. If they want to put the building in the commercial end of it they can put all of the parking in the rear. That is what happened with Orange County Pools.

MS. CAVALLO: My objection --

MR. KANE: There is no objection to that. They can do it.

MS. CAVALLO: I am here --

MR. KANE: I just want you to understand.

MS. CAVALLO: That -- well, I disagree with that. I don't want that building there. Is that what I am here to say. I think that that is not appropriate use and it would change, would change

July 23, 2007

the -- it would change the character of the neighborhood. I don't think that it would -- I think it would be more of a hardship to us as residents to have that building there. It's a 14,000 square foot building. What is there right now is a house. Now, I understand that they can still do it, but I am just, you know, I object on that basis. I disagree that there is a hardship demonstrated there. I think it's a far more hardship for the houses behind it.

MR. KANE: Next. Ma'am?

MS. NEWLANDER: Diane Newlander, 4 Lannis Avenue. I will put aside my objections to the site plan although I have a few. I would like to say I am strongly opposed to granting the use variance to Petitioner Vito Rizzi in an R-4 Zone at 287 Windsor Highway. When I purchased my house on Lannis Avenue I researched the property behind me to know who owned it and what it was zoned for and that information was a determining factor in the purchase of my home and other neighbors I talked to say the same thing. We bought it because we knew we were protected from commercial buildings coming right up to the backs of our property. We do see the limits would adversely effect the homes on Lannis Avenue. The wooded nature between the residences and Route 32 strip after screening, removal of the trees and that pond looks very big to me. When you say you are not going to have to remove many trees I find that hard to believe looking at the size of that pond. The removal of the trees would not only create an adverse visual impact, but reduce the noise buffering and would set a precedent that other commercial establishments along that strip would follow. Mr. Rizzi bought the property knowing full well what the zoning was and, you know, he has to deal with that now. And I don't (inaudible) can claim hardship. He has a whole commercial area that he can do something with.

July 23, 2007

The purpose of the Zoning Board of Appeals is to protect the quality of life of the residents. Since New Windsor has entered into a contract for professional planning services for preparation of a new master plan and since one of your members sits on the committee I recommend respecting that process or any other use variance until the new master plan is completed.

MR. KANE: Thank you. Next. Sir?

MR. STEIDLE: Thank you very much. My name is Bill Steidle, 575 Jackson Avenue. I have -- just so the record is clear I sit on the Master Plan Committee with Eric. I speak tonight however as a private resident and the opinions I express are my opinions only. Now, in preparation for the meeting tonight I did review the site plan that was submitted to the Planning Board. I reviewed the tax map to see how the property was situated in relation to residential properties. I reviewed the zoning map and I also reviewed the zoning ordinance on both tables. You know, in that regard, I will mention that, you know, I am surprised that what you say as far as the -- a need for variance or lack of need for variance for parking lots in the R-4 Zone in the bulk tables I saw that nothing Al load permitted by right commercial parking lots. I cannot believe that you can have a Walmart situated in the commercial zone with all of the parking in a residential zone I mean and not require variance.

MR. KANE: All they have to do, speaking from experience, I ran Orange County Pools, is put the gravel in the back and force the cars through the back. That is what Orange County Pools has done.

MR. STEIDLE: Wait. I don't want to argue --

MR. KANE: Not arguing with you it's just --

July 23, 2007

MR. STEIDLE: The bulk table for the R-4 residential zone does not list by right commercial parking lots. Now, you know that commercial parking lots can be ten spaces, it can be 1,000 spaces in the case of a Walmart and I would beg to -- beg your indulgence and ask you to confer with your experts. Be that as it may, let me say that I am familiar with the site. I am familiar with Lannis Avenue. I have been to some of the residences on Lannis Avenue. I have been in the rear yards behind those houses and it's my belief that the project, as it is proposed, as Anthony outlined will certainly have major impacts on those residences. I mean, it's not -- as Diane indicated there certainly is tremendous amounts of clearing behind the building. You cannot build that pond without clearing the trees and it is presently wooded. And I think that will have substantial impacts, visual impact, noise impact and it will distract from the character of Lannis Avenue. Now, as far as hardship, the person who bought the property in 2004, the zoning in that area has not changed. It is exactly the same zoning, exactly the same boundary as it was in 2004, so to say there is now a hardship I find it difficult to accept. And I will mention one other thing, as far as the bulk tables contained in the zoning ordinance under the 6-9 shopping which this is in, there are many, many uses permitted in the 6-9 shopping, including things such as a delicatessen or whatever the owner wants to build and you can build that facility in -- within the commercial or 6-9 shopping portion of the property without infringing in the residential area. Now that is my belief. Now, you know from my prospective the residents of Lannis Avenue, you know, depends on the zoning to protect their investments, to protect their quality of life and to allow the total use of that entire property for commercial related uses is unfair to those residents. I think buffers -- Anthony, I have a

July 23, 2007

good deal of respect for the architect. I know he is a good architect, but that plan, as it's currently drawn, does absolutely nothing to protect the residents on Lannis Avenue, you know. They may put in two, four, six, eight, ten white pines, that is all they have done and they have taken out, you know, basically graded and removed all of the trees and put in ten white pine, that is not -- that is not going to protect the residents of Lannis Avenue one iota. I mean, you cannot prepare a plan that demonstrates a greater impact to the residents in my opinion. So in conclusion I would say, you know, as far as hardship, the person who bought the property in 2004, you know, the zoning has not changed. The, you know, \$450,000 is not a great deal of money for a three acre property partially within the 6-9 shopping district and I am sure that a return can be made with a site plan that respects the residential nature of the property to the rear. I think it's unfair. Secondly, I think it's unfair to burden the planning board with trying to develop a plan to later protect the residents. Putting ten white pines, you know, is not going to protect them and the planning board given that site plan is not going to be able to develop a plan that allows proper buffering for the residents of Lannis Avenue. I think buffers and I think Eric and I think the Master Plan Committee is going to try to deal with it. Buffers are essential between why the disparaging uses such as the 6-9 shopping and residential. You need buffers. You need screening. You need a separation to avoid the types of conflicts that we see all over New Windsor because of the lack of buffers and the lack of planning. So in conclusion I ask that you deny the variance, send the person back to prepare a plan that is consistent with the zoning and we go forth. Thank you.

MR. KANE: Thank you. Next.

July 23, 2007

MR. WESTFALL: My name is Fred Westfall. I live at 27 Lannis Avenue, which is on that map as Mark Hughes. I now own that residence. I have a question about this pond. If they change this building the other way and they put the parking lot in the back is this pond still going to be there.

MR. KANE: I have no idea.

MR. COPPOLA: I can answer that. I mean, the grades fall to the rear of the property so that is where water is going to go so I would probably say, yes, that is where the water needs --

MR. WESTFALL: The question about this pond is DEC and about having stagnant water in the rear of a residential area. As we all know, mosquitos are attracted to stagnant water and West Nile Virus is a big concern in this area. Who is going to monitor this pond to see if there is any kind of insect growth?

MR. KANE: All of that is, as far as I know, is planning board issues. That would be a discussion with the planning board, nothing that we would do here.

MR. WESTFALL: All right. Also, I have a question in reference to the parking if he changes it to the back. I was a police officer in New Windsor for 16 years before I retired and bought a house on Lannis. The reason I bought on Lannis was I was working on Lannis and Mark Street for years and because it is a quiet residential neighborhood with a large buffer zone behind the house. If it had been a commercial area there I probably would not have been interested. I think the parking lot, even though you say it's not under your control, the gentlemen over here, I have to agree with him, you say you ran Orange Pools for six years --

July 23, 2007

MR. KANE: Yes.

MR. WESTFALL: In my 16 years of working I don't ever remember a car being parked behind there. Your parking lot is out in front. The Flags Guys is on the side.

MR. KANE: Memorial Day weekend, have you ever been there when they parked on the streets? Not to argue, but that is where they put their cars. They have the combined driveway, which is now a veterinarian building next door. They steer them to the rear because there was no parking. Basically that is what they would do. It would be gravel. Again, its neither here nor there but....

MR. WESTFALL: Those are my concerns with this and I would like to see it turned down also.

MR. KANE: Thank you. Anybody else? Sir?

MR. MCCARTHY: Phil McCarthey, 10 Lannis. I'm also concerned about the swamp, not a pond. It's a swamp. There is no water easement through my backyard, nothing and when it overflows where is that going, my backyard. There is small children on the block. You are putting -- it's a danger zone you are putting in my backyard. The grandkids I plan on, you know. It's going to be a fatality.

MR. KANE: Thank you. Anybody else?

MR. WILLIAMS: I am Kirk Williams, 394 Riley Road. As a recent and unsuccessful applicant before this board I know Section 267, Town Law, State of New York, has certain requirements that need to be met. For the publics edification, can you illustrate what they are and show how the applicant has met these requirements?

MR. KANE: Can you tell what the requirments are

July 23, 2007

We have not said he met anything yet.

MR. WILLIAMS: Can you state that for the record then?

MR. KRIEGER: Section 267, Town Law, State of New York, okay, the applicant must prove four factors for each and every case. One, the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence. Two, that the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood. Three, that the requested use variance, if granted, will not alter the essential character of the neighborhood and four that the alleged hardship has not been self created.

MS. WASHINGTON: I think you just answered your questions.

MR. KANE: Ma'am, what was your name?

MS. WASHINGTON: Mary Washington.

MR. LUNDSTROM: And your only comment was?

MS. WASHINGTON: 16 Lannis Avenue.

MR. LUNDSTROM: For the record, would you state what your comment was?

MS. WASHINGTON: I think he just read, you know, those last few statements, that is what our concern is. I'd much prefer to see deer traveling up and down the back lot than have cars there. Thank you.

MR. KANE: Thank you. Anybody else? Sir?

July 23, 2007

MR. EVANS: Vincent Evans, 5 Lannis Avenue. I just wonder, my concerns are the fact that there is wetlands back there. I don't know if that is within your pervue or not. It's been wet back there for many years. There is other environmental concerns. There is a family of hawks that live in the back of the property and God knows what other kind of reptiles and other things I don't care to know about it. I am sure that will be changed if you go and do something like that. And by looking at that drawing the pond looks bigger than the building and then that brings me to the building itself, you say 14,000 square feet, which you don't tell me what the dimensions are.

MR. COPPOLA: I can certainly tell him what the dimensions are if you want.

MR. KANE: Please.

MR. COPPOLA: All of the dimensions are on the site plan so along the rear it's 158 feet. The leg here across the front is -- you have 108 feet and 163 feet here.

MR. EVANS: My next question is about the run off either from the pond or -- from the pond or from the parking lot itself. For many years there has been building all along Route 32. They have done some drainage along the highway, but everything else has been left in tact except for the streambed that runs down through some of those properties and through the middle of mine. There is very little infrastructure change and yet we just keep building and building and water keeps running down through there and when there are huge rains in some places it overflows the storm drains on Willow Avenue and cannot handle it. They just pile through the top of the manholes and someone comes out and puts up cones and barriers until the rain stops, so I am wondering

July 23, 2007

about that part of it too. Like I said, I don't know if that comes under your jurisdiction or not but --

MR. EVANS: The other thing too is about the property variance you are claiming Mr. Rizzi has a hardship or would have a hardship --

MR. KANE: No offense, but the board is not claiming anything. The applicant is.

MR. EVANS: No, his representatives. I believe that when he purchased the property he purchased it with the idea that he would put his own deli there and the building or some kind of alteration to the building would serve for his needs. Since then he has moved on and now he would like to build this huge thing and return himself a big profit, which is his right, but I think it goes against the variance part of it. And like I said, I think he full knew what he was buying when he bought it. I don't believe he is a man of lacking any intelligence. That is all I have to say.

MR. KANE: Thank you. Anybody else? Sir?

MR. PROKOSH: Yes. Al Prokosh. I own the -- my wife and own the building next to this property. I just want to say I am not against this project. My concern is I feel the concerns of the residents behind there. My concern is if they come back to the board again and move that building up to the front and put the parking in the back the way the building is shaped is kind of going to close me in between the transmission shop and the new building. I mean --

MR. KANE: Again, we are only here -- if they decided to do something just in the commercial area they would be in front of the, you know, to the building department for a permit and then to

July 23, 2007

the planning board unless they needed some kind of variance they would not come back to this board. We are only here because the building itself is extending into the R-4 zone.

MR. PROKOSH: Okay.

MR. KANE: So the building doesn't cross that zone they don't come back to this board. It's all an issue of the planning board.

MR. PROKOSH: As far as where that retention pond is I want to put on the record we have been there since 2000 and that was basically a field right back to the property line, a little bit now there is not a residence for a homeowner so it's starting to grow up a little bit in the back, but before Anthony bought it that was basically a field all of the way to the property line. It was open.

MR. MCCARTHY: No, it's not.

MR. KANE: Thank you. Anybody else?

MR. WILLIAMS: Kirk Williams again. From what I have heard tonight I don't think they met those four major points so I would urge the board to consider that.

MR. KANE: You have stated that. Thank you.

MR. KANE: Anyone else? Okay then we will close the public portion. Did you want to address --

MR. BLOOM: If I may, I would like to just make a couple of comments, if I may.

MR. KANE: Okay. We will officially close the public portion of the board.

MR. BLOOM: Just a couple of comments based upon

July 23, 2007

the comments of the residents of Lannis Avenue. Certainly their concerns are understandable, but they are not -- I respectfully submit unique in the sense that almost every application that comes before this board where you have a commercial construction next to a residential zone it's usually those concerns that are expressed and in this setting I would like to submit first of all that my client kept the building the way it was and continued to rent it as a residence. I mean, nothing can prevent him from clear cutting the entire lot, making it entirely barren, that was not his intention. He is not here to hurt anybody. If he -- the board acknowledged that if he wanted to build the building up in the front and put the parking in the rear he could. I don't think that is in the best interest to the people on Lannis Avenue.

Mr. Prokosh made a remark, I am glad he did, I am a local. In fact, I used to have an office when I first started practicing in Al Cavalieri's office and that was a field down there. It was never trees down there. It was a field. In fact, some brush going up in the meantime, but their concerns are legitimate. I respectfully submit to the board if this application is granted, it goes back to the planning board and, yes, there is only eight or ten pine trees shown on the drawing now. My client would have no objection to stipulating or having this board put a limit indicating the amount of pine trees or the vegetation, all coniferous, Evergreens, year round. One lady testified especially in the summertime she has privacy with coniferous. It will be year round. They are concerned about the construction, of course, of the pond and legitimate concerns about mosquito population and what have you, that is all under the control of the planning board. There are, as we all know, chemical ways of dealing with that. I am not sure the planning board will make that a stipulation of any planning board approval. I

July 23, 2007

respectfully submit to the board we have demonstrated the hardship. We have demonstrated that what we want to do is in the best interest of the general community, not at all inconsistent with the commercial construction and it -- and I don't believe will invade or intrude. I believe it will enhance the privacy of the people on Lannis Avenue. Thank you.

MR. KANE: Any further questions from the board?

MR. LUNDSTROM: A few questions, Mr. Chairman, addressed to the building inspector. Mike, in part of the public hearing some of the public indicated that there were wetlands back there. Is that documented wetlands or Federal, State or --

MR. BABCOCK: Well, according to this map there is no wetlands. It may be an area that when we talk about wetlands, lands that are wet. We are not necessarily wetlands.

MR. LUNDSTROM: I am talking about Federally or state protected wetlands.

MR. BABCOCK: No. According to the plans and engineer, that kind, no Federal wetlands on this property.

MR. LUNDSTROM: Also in the public hearing it was stated by the public there is a streambed running through that property. Is that documented anyplace?

MR. BABCOCK: Well, there is a 30 inch crossing on Route 32, that is what they are talking about. It's a drainage easement or I don't even know if it's an easement. It doesn't show. It appears that the state that owns Route 32 put a culvert pipe there and discharged it onto this piece of property. They are going to pick that up, their

July 23, 2007

plan is to pick that up with their water and go into this detention pond and then release it.

MR. LUNDSTROM: Would that be considered a natural or manmade streambed then or would it be considered a streambed at all?

MR. BABCOCK: You know, it's a drainage. I don't know whether it's a stream. I am sure -- I am sure when it does not rain there is nothing there.

MR. LUNDSTROM: Okay.

MS. LOCEY: May I ask about the proposed retention pond. Will this always be filled with water or is it drawn unless we have periods of severe rain?

MR. COPPOLA: I am not an expert in this, but I believe the way these are set up now that they are not meant to be dry. There is always some water in the bottom of it. The other thing I can say about this is these are always calculated so that the preconstruction runoff, what exists right now is all green, let's say you do have runoff even though it's green like today, the water still makes it down. The preconstruction has to equal the post construction so that rate of flow right now when it's green before anything is developed is going to be exactly the same rate after all of these improvements are made so the water will go in the same place at the same rate it is right now.

MS. GANN: In relation to that I would like to also ask what would the footage be when it is at a maximum, if it's maximum filled? I don't know if I am asking it right. What the depth is?

MR. BABCOCK: It all has to be calculated.

July 23, 2007

MR. COPPOLA: I cannot answer that. I very rarely see them filled. They are designed for a 25 year storm. I think that is what the town would require, a once -- a once in 25 year rain event, that is how these things are sized so you might not see it filled for a decade.

MR. BABCOCK: Mr. Chairman, one thing about the pond, this is not something that the applicant wants to do. It is something that the applicant has to do. It's state law he does this. He has no choice. He has to put this pond in.

MR. KANE: Right.

MR. LUNDSTROM: One further thing on the question Kimberly asked. Are we saying the maximum depth of that drainage pond would be two feet, ten feet?

MR. COPPOLA: Two to four feet, somewhere in that range. We're not looking at something that is -- the fact that he has created something wide that means it's very shallow and this thing is probably going to get smaller. He probably oversized it right now. He hasn't done any storm water --

MS. LOCEY: Analysis.

MR. COPPOLA: Right. So that can very well get smaller and then he will figure out the depth. I don't think these things are like pools.

MS. LOCEY: Can you tell me also how many feet passed the commercial zone into the residential zone is the building proposed to go? That one side of the building is 163?

MR. BABCOCK: It's about 100 feet.

MS. LOCEY: Okay. From the end of the proposed

July 23, 2007

building to the back of the lot line how much feet is left?

MR. BABCOCK: End of the building to the lot line 200, basically 200 feet.

MS. LOCEY: So 200 feet from the back side of the proposed building.

MR. COPPOLA: Correct. To the lot line. To the rear lot line.

MS. LOCEY: Okay.

MR. KRIEGER: So from the change of zoning, 300 feet, 100 feet, which would be taken up by the proposal and 200 feet remain as buffer.

MR. COPPOLA: Yes, that leg is almost exactly 500 feet so that is exactly 200. 100 ft. of the building and another 200 ft. of the rear, rear lot.

MR. LUNDSTROM: One other question of the building inspector. Mike, if they were to relocate the building, move it up forward so the entire structure were within the commercial zone they could then put a parking lot in the back, how large could that parking lot be?

MR. BABCOCK: I don't know that answer.

MR. LUNDSTROM: Can they go within a certain number of feet with the property line or back or do they still have to put the retention pond?

MR. BABCOCK: The pond has to go in no matter what.

MR. KANE: Probably state law. He has to have that retention pond.

July 23, 2007

MR. BABCOCK: That parking lot and the parking lot has to comply with the zoning regulations. He needs one space for every 150 feet of retail space so that determines the number of parking spaces and based on that no matter where the parking spaces are on this property that pond still has to be built.

MS. LOCEY: So the retention pond will remain relatively in the same place it's shown now no matter where the building and the parking lot are?

MR. BABCOCK: That's correct. It makes --

MR. KANE: It's dictated by the flow of the water.

MR. BABCOCK: That's correct.

MS. LOCEY: What is the possibility of -- is it a viable idea to recommend that there be some variance in the number of parking spaces so that the building can come up to the road a little bit more.
Is that --

MR. COPPOLA: We would be open to that. I mean, I will throw that out there. I personally believe 150, that is a huge number of parking spaces.

MS. LOCEY: Yes.

MR. BABCOCK: Well, I can tell you that we have retail spaces throughout town. I have been to just about every one and the reason the zoning was updated to the 150 was because there was not enough.

MR. COPPOLA: Right. Okay.

MR. BABCOCK: New Windsor Mall, there is not enough places to park, but that can happen.

July 23, 2007

MS. LOCEY: I am throwing it out. I thought that may be a semi compromise.

MR. COPPOLA: Is office still calculated one per 200?

MR. BABCOCK: I don't know.

MS. LOCEY: These are hard questions.

MR. BABCOCK: Everything has changed so much.

MR. COPPOLA: Okay.

MR. LUNDSTROM: I think Kathleen Locey brings up a valid point. Right now, just to summarize, I think the dilemma we are in, that we are faced with is an application saying they want to put 100 feet -- encroach upon the residential area that is 300 ft. long, they want to bring the commercial back 100 feet leaving the remaining 200 feet still wooded and no matter what happens you have to put that retention pond in.

MR. COPPOLA: Yes.

MR. LUNDSTROM: That is one. The other application is -- is forcing the applicant to put the commercial structure in the commercial zone and put the parking lot in the back. I am wondering if there may be grounds for some type of compromise that Kathleen mentioned. Is 100 feet -- go back 50, put the primary parking in the front and maybe auxiliary parking in the back. I don't know if that is an option or not and if it were I don't know how to proceed.

MR. BABCOCK: One of the problems with putting any parking in the back you have to have access to the back of the stores.

MS. LOCEY: I don't think -- then you bring up the

July 23, 2007

issue of lighting. And what is going to be intrusive --

MR. KANE: Lighting.

MS. LOCEY: -- the lighting or the back of the building. The cars driving in and out with their lights and their noise and their fumes or just the back of the building. So in my view, if we are looking for some sort of variance with respect to parking it should be for a lesser number of places, not to change the configuration as to where --

MR. BABCOCK: But --

MS. LOCEY: If I may continue for one moment. Basically two concerns, one is safety because of the fears of that retention pond and small children who either live or it's anticipated some day soon or in the future will live in that area. And number two, is the concern of the residential area losing its character of being disturbed with noise, with traffic, with lights and concerns that they want to be reassured of what would be a sufficient buffer. And I think if we could address those issues everybody would be at least satisfied, maybe not 100 percent, but at least be with the application. If it were I, I wouldn't want the parking lot behind the building, but I would want a large enough buffer so that I don't see the everyday comings and goings of a business commercial property. On the other side, the front portion of this property is perfect. So what can we do here? What is the best solution?

MR. COPPOLA: Just another idea to throw out as far as the parking, one that would make sense for this, if you were to put parking in the rear is basically parking designated for employees.

July 23, 2007

MS. LOCEY: Staff.

MR. COPPOLA: Right. If you did that with the parking spaces you could take maybe ten or fifteen spaces and put them behind. You are probably only going to move the building up, my guess, would be 20 feet, but then you have parking and headlights to deal with in the back. There is a 20 feet -- is 20 feet really going to make a huge difference.

MS. LOCEY: To tell you the truth I would rather see more trees.

MR. COPPOLA: I would agree with you. It's not worth it. Screen the headlights and that activity, that noise, which they don't have now. We did think that through a little bit.

MR. LUNDSTROM: Mr. Chairman, one further question for counsel. Of the four points that are needed to grant a use variance one of them is it is a self created hardship and the other one substantially change the character of the neighborhood or community.

MR. KRIEGER: Yes.

MR. LUNDSTROM: Just an open discussion for Mr. Bloom and the architect. Do you folks feel that will has been properly addressed before this board, that --

MR. BLOOM: Mr. Lundstrom, I respectfully suggest that it has been, but obviously I defer to your counsel. He is the ultimate arbitrator on that issue. I submit from my prospective that my client bought the property and he bought it with an existing residence on it. It's not a situation where he bought vacant land, constructed the residence several years ago and now wants to turn it into commercial. That would

July 23, 2007

be a classic case of unclean hands as we say in the law, that is not what occurred. On the other hand, I will take it upon myself to preempt your counsel's decision on that issue because obviously he is there for that purpose.

MR. KRIEGER: The -- ultimately the determination that the zoning board has to make as to whether they except Mr. Bloom's argument or not, that is in essence what it is, it's an argument. His argument that he has met the statutory requirement has been, I think, set forth sufficiently. So the board can decide whether that is sufficient or not sufficient. Whether that argument prevails or does not.

MR. LUNDSTROM: One last question of the building inspector. Mike, is there anything that can be done with this property where that swail does not have to be done if they did not do any construction on the property? If they left the building as it was will that drainage pond have to be done also?

MR. BABCOCK: Well, I don't think that they were ever going to leave it as a house. If they change it to a commercial establishment like Mr. Prokosh did, whatever, depending on how much disturbance they do they may or may not have to.

MR. LUNDSTROM: Okay.

MR. BABCOCK: This pond, I don't know, do you know when -- that is fairly new where every commercial establishment has a pond.

MR. COPPOLA: Zero net run off, that is the concept. I cannot empty anymore water than the green rate right now. In other words, water is flowing there tonight. It flows down hill. After we develop this site it's going to be the same net run off that is --

July 23, 2007

MS. LOCEY: Not more, not less.

MR. COPPOLA: That is the whole concept in a nutshell. What we have to do is retain that water and then slowly meter it out. First it's collected and then it's run off.

MR. KANE: And depending on what commercial building and parking lot will determine --

MR. BABCOCK: Right now today there is no parking lot. There are a couple of spots for, I don't know, whatever, for a car. So anything they do there they will have to put parking in for a commercial establishment so, yes, this -- he will have to have it, but it's going to be probably a lot smaller than that.

MR. KANE: Yes.

MR. BABCOCK: This pond looks awfully big for this project where they have circled that area. I can't imagine the pond can be that size. We have major, major developments that don't have ponds that big. But again, I don't know how much water is there.

MR. BLOOM: May I comment?

MR. KANE: Please.

MR. BLOOM: As the board realizes, the board has the capacity to either grant or deny. And if grant, to place conditions which the board deems reasonable under the circumstances to take into consideration the concerns of everyone here this evening. What strikes me as being one of the prime considerations, and rightfully so of the neighbors on Lannis Avenue, is a loss of privacy and buffer. And as I am looking at the plan I see eight to ten coniferous trees. I don't think it would be unreasonable for this board, if it

July 23, 2007

were to act favorably on the application, to place a condition of coniferous trees of whatever this board deems appropriate at whatever height. It seems to be any number of coniferous trees existing on that plan is a boom to the people on Lannis Avenue because this was always -- was a meadow and what is there now is really overgrowth and is deciduous. It does not provide a buffer in the wintertime. It seems to me that if we had -- even if we had a condition that a landscape plan be presented, subject to the approval of planning board, but a minimum number of coniferous trees in the rear of this building, a substantial number to give a buffer that would perhaps exceed what is there now and take into consideration that any homeowner or future homeowner even keeps it as a residence could clear cut. At least this way the neighbors on Lannis Avenue have in the record a right to -- a right to enforce their privacy through the planting of these -- planting and maintenance of these trees indefinitely.

MR. LUNDSTROM: Mr. Chairman one thought, if I may, to the architect. Mr. Coppola, right now the plan shows an oval shape to the storm water retention pond. What would be if that became oblong giving you more room to plant two, three rows of coniferous trees?

MR. COPPOLA: That is definitely doable. I mean, I think Mike is right. I think this is probably oversized on this plan until he does the calculation, but you would definitely have room. I mean, we could -- I would say we could probably -- he could probably do at least 30 feet there green. I am sure you can do that. 30 feet before the water or the storm water area and then do like a staggered planting in that 30 feet so....

MS. LOCEY: Even if you were to sketch it this way

July 23, 2007

maybe.

MR. COPPOLA: He has to work with the contour so I am not entirely sure there is a drainage course. You can see it on the plan.

MR. LUNDSTROM: Yup.

MR. COPPOLA: So he kind of has to conform to that.

MR. BABCOCK: That is some 30 feet off the property line right now.

MR. LUNDSTROM: Yes.

MR. COPPOLA: It's 30 feet right now. I am sure he can adjust that a little bit.

MR. BABCOCK: It's also 150 feet across.

MR. LUNDSTROM: Yes.

MR. BABCOCK: I think he is just showing the area of where that is going to take place.

MR. LUNDSTROM: I think the presentation of that is what is also concerning the general public.

MR. BABCOCK: That's correct.

MR. LUNDSTROM: It looks humongous. I don't know if we can sit down and put a stipulation in saying, you know, you have to have so much of a buffer area if the calculation says that does not give you enough room for that storm water retention.

MR. COPPOLA: I mean, then we would back here if I were to say 50 feet. I think he could do it within 50 feet. I cannot tell you for sure.

July 23, 2007

MR. LUNDSTROM: Again, keeping in mind the desires of the general public, would it be safe to say not only do planting along the back, but the sides?

MR. COPPOLA: Sure

MR. KANE: Is it possible to move the building 50 feet towards the road?

MR. COPPOLA: Well, it is if we put some parking in the rear. I can definitely move it 20 feet, but then I am going to -- I am going to --

MR. KANE: Could you do it where the parking would be in the rear where it would be employee?

MS. LOCEY: But it still needs that lighting.

MR. COPPOLA: Yes.

MR. KANE: Yes. To me the lighting --

MS. LOCEY: For 20 feet that would be invasive I without a doubt.

MR. COPPOLA: It's not like I am doubling a setback. It's only ten percent of that, you know. I would like to say give it a calculated guess, a 50 ft. green area back there, 50 foot strip here before that retention pond. I think that is doable. He would have to calculate it out, some preliminary calculations to ensure that.

MR. BABCOCK: Mr. Chairman, you can get a lot of trees in 30 feet.

MR. COPPOLA: That is true too.

MR. LUNDSTROM: Mr. Chairman, I am in a quander here of what to do and what can we do, what

July 23, 2007

should we do. I am almost wondering, if it makes sense, to adjourn this public hearing and to have the architect go back and re-draw that, taking into account the opinions of the public. Now, when he comes back, may I ask counsel, do we need to republish this with the new plans?

MR. KRIEGER: Probably not.

MR. KANE: No, because we are not dealing with the numbers.

MR. KRIEGER: You don't publish the plans. The only publication are the notes, numbers

MR. KANE: And the public portion of the hearing is closed. There is no need to redo it into the newspaper. Although I will break it a little bit and ask the people here from Lannis Avenue if we put this on hold to take a look at it. My fear is somebody will put a commercial building on here and those lights are going to be in your backyard and more of a nightmare and with the car lights and with the parking lights and that kind of stuff back there and somebody can do it and no you cannot answer. The public portion has been closed. We already mentioned that, but I will ask, do you - - would you rather just see us vote on it as it is right now or come up with a reasonable plan with the property owner? Just so you know, a simple yes or no that you would like us to take a look at it or to vote on it right now. No opinions.

MR. LUNDSTROM: If I may?

MR. KANE: Yes or no? Not a ton of comments. I will take a yes or no.

MS. CAVALLO: I think it's a standalone project and should be voted on its merits.

July 23, 2007

MR. KANE: Sir?

MR. STEIDLE: As a revised plan I think the public should have an opportunity to review the revised plan.

MR. KANE: If we do put this on hold I will re-open the public portion of the meeting so we can take comments. We are not that hard core, you know. It's -- I want to try to find a reasonable thing. You are not going to be 100 percent happy with it, but I would rather find a compromise that is agreeable. Like Kathy said not everyone is going to be happy, but if we can come up with a reasonable plan and talk about it.

MR. STEIDLE: (Inaudible.)

MR. KANE: Again, that is planning board, not us. We have nothing to do with that.

MR. STEIDLE: You cannot make a decision without that type of information.

MS. LOCEY: Go to planning board.

MR. STEIDLE: How can you determine whether buffers are acceptable limits of clearing vegetation that is there, streams, wetlands, if you don't have that information to make the decision?

MR. KANE: The way it's set up that is a planning board thing. We decide if they can view it, planning board decides how they do it. I did not make that.

MR. STEIDLE: I am not trying to give you a hard time.

MR. KANE: Sir, I asked the gentleman behind you and put him off twice for making comments. I

July 23, 2007

would ask you to respect that. I ask -- and just a yes or no. And again, that was a good question, whether I would open it up to the public and I definitely would.

MR. WESTFALL: The idea of having him go back, look at some other options and come back, I just heard another gentlemen state even the possibility of a wall going back there. I know -- I believe it's behind the Coach Diner we have -- they have a semblance of a wall behind their residences or their establishment to protect Continental Drive residents so, yes, if they can look at some other ideals.

MR. KANE: Thank you. Sir?

MR. McCARTHY: Can a fence do?

MR. KANE: Wall, same thing. Same thing. Fence, wall, some kind of a barrier more than where the kids can walk through a tree.

MR. WESTFALL: I would agree it's a good idea to look at it or some other way to protect the neighborhood.

MR. KANE: Just trying to be reasonable.

MR. WESTFALL: And, you know, taking into account I think you said there would be deliveries and that kind of thing, just taking into account protecting the public.

MR. KANE: Any other comments on that? I will take it that the public is in agreement on the possibility of us to table this. We will re-open it to the public but --

MR. KRIEGER: Let me just say for the information of the members of the board, when you vote on this, to vote on a decision you are entitled by

July 23, 2007

law to attach what is -- what the law refers to as reasonable conditions. You are not entitled to substitute your judgment for that of the planning board. So you cannot get into -- for instance, you cannot get into the specifics of how many trees are going to be planted and the buffer zone and what kind of trees, how tall they are going to be and what the lighting fixtures are going to be. That is all matters that are, by law, the business of the planning board. You are entitled however to attach a condition like there will be a buffer zone as in the details of which will be approved by the planning board of not less than X number of feet between the property line and the development. So in other words, you are entitled in your conditions to paint a broad brush, but you are not entitled to paint a detailed picture.

MR. BABCOCK: Mr. Chairman, the applicant has said that they are willing to do a buffer of more trees.

MR. KANE: Right.

MR. KRIEGER: These minutes from this meeting go to the planning board.

MR. KANE: Right.

MR. KRIEGER: Just as if they went to the planning board first. If they were coming here again they -- it's a continuum. If they are approved here they go in front of the planning board and that is where all of the details of what -- what lighting fixtures are to be used and what kinds of vegetation would be used for buffering and all of those details. That is the business of a planning board.

MR. BLOOM: Mr. Chairman.

July 23, 2007

MR. KANE: Sure.

MR. BLOOM: Having heard the comments of the board and your counsel the thought crosses my mind that obviously my client has to be concerned with crossing the barrier in this -- before this board with respect to whether my client should be addressing certain issues with respect to the planning board, so the thought crosses my mind that perhaps the board might consider a 50 ft. buffer this evening as a condition of any approval if the board votes in favor of an approval. And if my client cannot comply with that after addressing the issues he has to address to the planning board we must come back here again for another public hearing.

MS. LOCEY: I would like to, in your calculation, see a buffer zone somewhat greater than what is existing now. That building is going to have added noise, traffic and I wouldn't even know how to say much greater, but certainly equal or greater. I would rather see something greater and I think your idea of coniferous is probably something we should look at since it's year round.

MR. BLOOM: Right.

MS. LOCEY: And the neighbors really need to be concerned during the winter months of losing that buffer so that is what I am thinking of in a broad --

MR. BLOOM: Broad sense. With a minimum buffer if we do not need -- if we have to come back and include in there a fence. I mean....

MS. LOCEY: Yes, I would.

MR. COPPOLA: Absolutely.

July 23, 2007

MS. LOCEY: If there is 200 feet in the back of the proposed building and the property line, 50 of which is going to be coniferous trees that to me sounds reasonable.

MR. BLOOM: That to me sounds reasonable and I respectfully submit that that is a --

MS. LOCEY: That is 25 percent.

MR. BLOOM: -- reasonable request of my client along with a -- along with a fence.

MS. LOCEY: With a fence.

MR. LUNDSTROM: Two points, Mr. Chairman. I think the opinion of counsel is certainly valid and I think we need to continue to appreciate this in a broad rush. However, if Mr. Coppola comes back with detail plans showing a certain number of feet with trees there we can then approve that without getting into the detail. Second part I want to mention, excuse me if I am overstepping, one of the problems -- I agree with Bill Steidle, one of the frustrations we face constantly is this separation of what the planning board does and what we can do. We cannot step over that bounds. This is not the first time we have run into awkward situations because of that.

MR. KANE: We are just not allowed to. Very simple.

MR. BABCOCK: If the applicant is agreeing, Anthony, to do this 50 ft. buffer zone the planning board is probably going to ask for it anyway, so if the applicant is going to agree to it I don't think the board has to stipulate it.

MS. LOCEY: Right.

MR. BABCOCK: He has gone on record he will do it

July 23, 2007

with a fence 50 feet wide and if the planning board wants 60 feet wide they are going to tell him that.

MR. LUNDSTROM: I think part of the reason we are doing this adjournment is to have the architect come back with the plans that the public can see and give them a more better feel of comfort from that.

MS. LOCEY: With a little bit more detail as far as the real numbers for this pond because it's really only going to be a third or half that size. I think that would appease the residents.

MR. KRIEGER: I would like to say as part of the plan a feet dimensions on the plan from the back property line to the borders of the pond so that we know.

MR. COPPOLA: Yes, that will be the buffer.

MR. KRIEGER: How big the buffer zone will be.

MS. LOCEY: Sounds good to me.

MR. KANE: Call for a motion to continue. Diane, is it a comment on delaying?

MS. NEWLANDER: It's a comment on delaying. I agree with her. I think it's a standalone project that should be voted on. The question here -- I realize you want to give nice details, but the question here is are you extending commercial use into an R-4 zone. That is the bottom line.

MR. KANE: Exactly what they are asking for and we're trying to get enough information to make a decision. Everything is not black and white. They can come in and put a commercial building on there and some kind of parking in the back with all of those lights facing the houses in the back

July 23, 2007

and there is not a thing --

MS. NEWLANDER: That thing sounds like a scare tactic.

MR. KANE: It's not a -- this is not a political forum.

MS. NEWLANDER: I live there. I am not doing this as a political forum. I live there.

MR. KANE: I know. That is why we are asking. I even opened it back up to ask the people in the neighborhood if they want to take a look at another decision or decide on it now. We don't have any hidden agenda. Personally, I could care less, okay, but I do care enough and I care enough about the buildings that they can put -- I have seen it happen in this town where they have put a building up legally and totally ruined what was going on with the neighborhood. I don't want to see that, so why not take the time to discuss it. That is all we are trying to do is give everybody an opportunity to come out with a lot of gray area and discuss the whole thing. That is my opinion. Again, I am -- comments from others in the public was they were for that. I have two that were not for that. So that is -that is what we are trying to do is just find a compromise. Okay. Again, if this is not something you want we can vote right now if you want to reconsider that. That is not a scare tactic. I have no idea how anybody else is going to vote so it cannot possibly be a scare tactic. I think we should take the time and discuss it so all sides can take a look at what the problem is and come up with a reasonable solution. Okay.

MS. LOCEY: Motion to continue this public hearing on the application of the Zoning Board of Appeals dated July 23rd, 2007.

MR. KANE: As the chairman I will second that motion.

ROLL CALL

July 23, 2007

MS. GANN	AYE
MR. LUNDSTROM	AYE
MS. LOCEY	AYE
MR. KANE	AYE

MR. KANE: Would you be ready by the 13th?

MR. COPPOLA: I am going to say or the second meeting in August. Second meeting in August, that way we can present the drawings before the meeting.

MR. KANE: That would be August 27th. No notice on this. The meeting will be August 27th.

MR. COPPOLA: Thank you.

MR. BLOOM: Thank you.

**OFFICE OF THE PLANNING BOARD
TOWN OF NEW WINDSOR
ORANGE COUNTY, NY**

NOTICE OF DISAPPROVAL OF PLANNING BOARD APPLICATION

PLANNING BOARD FILE NUMBER: 05-06

DATE: 5-18-05

APPLICANT:

Vito A. Rizzi
3 Ashley Way
Cornwall, NY 12518

2 ZBA 7-23-07

PLEASE TAKE NOTICE THAT YOUR APPLICATION:

DATED: 3-1-05

FOR: SITE PLAN

LOCATED AT: East Side Windsor Highway (Route 32)

ZONE: C

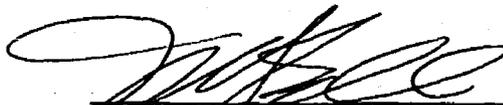
TABLE TO AUG-27-07

DESCRIPTION OF EXISTING SITE: SEC: 35 BLOCK: 1 LOT: 52

IS DISAPPROVED ON THE FOLLOWING GROUNDS:

Extension of Commercial Use into R-4 Zone beyond that permitted by Section 300-5 of Town Code (30' max permitted). Please also note that 300-5 refers to 50% in "less restricted district" and for this application only 36% +/- is in the C zone.

TOWN OF NEW WINDSOR CODE: 300-5



Mark J. Edsall, P.E., P.P.
Engineer for the Planning Board

March 23, 2005

3

ZBA REFERRAL:

VITO RIZZI SITE PLAN (05-06)

Mr. Gregory Shaw of Shaw Engineering appeared before the board for this proposal.

MR. PETRO: ZBA referral, Vito Rizzi, site plan on Windsor Highway represented by Mr. Shaw. Proposed construction of a 14,510 square foot building for office retail use. Application requires a variance from the ZBA, variance for what, Greg?

MR. SHAW: We're going to need a use variance because this parcel is similar to other parcels along Windsor Highway where it's approximately 600 feet deep, the first 200 feet is in the commercial zone, the balance of the property is in the R-4 zone. Mr. Rizzi would like to use the entire parcel for commercial use and with that he would like to construct a portion of the retail building and the loading area and in the residential zone so with that we need a rejection to allow us to go to the ZBA to get that variance.

MR. PETRO: You should probably put a line showing the 30 feet encroachment line so it looks like you even need less.

MR. SHAW: Good point.

MR. PETRO: Obviously we'll get to other things on the site plan if we're successful and come back so he has the screening, everything in the rear, I think there's a drainage easement back there too. Mark?

MR. EDSALL: I believe so, I believe it goes along the residential properties through there.

MR. PETRO: All the way up passed Napoli's.

March 23, 2005

4

MR. EDSALL: Yes.

MR. PETRO: And we're going to address that.

MR. SHAW: Is it on Mr. Rizzi's property?

MR. EDSALL: I believe it's on the residential properties but you can contact our office because that project was put in as part of a Community Development grant so we can show you the plans.

MR. SHAW: Okay.

MR. PETRO: Up by Napoli's and some of the other places, even John's piece that building that he just did there it's on the commercial property.

MR. EDSALL: Yeah and then I think--

MR. BABCOCK: It makes a turn and goes back out Continental Drive.

MR. SHAW: Sure, not a problem, there's many engineering issues that have to be dealt with once we get the variance but we have our work cut out with respect to the use variance.

MR. PETRO: It's not a very easy thing. You don't give out too many use variances in the zoning board, do you? He was there for a long time. But this is a little different case because it's the bulk of the, a lot of the property is in the C zone.

MR. SHAW: Well, the crazy part is and we can get into a discussion but if I can't use the balance of the property for commercial, what can I use it for, residential? I put a house back there with the commercial retail center in the front?

MR. PETRO: Well, you could put a house in the front

and have the back yard but I don't want to be negative on it either, I mean, that road is backing commercial, it is commercial, that's why the town made it 200 feet, 200 feet all the way frankly on these deep lots which are on both sides, even the Arby's lot the 400 feet deep, I think it was a mistake to just make 'em 200 feet there, they should have been a little deeper.

MR. SHAW: I agree.

MR. PETRO: Why would you have all 400 foot deep lots and first, make the first 200 feet commercial?

MR. BABCOCK: He actually could move the building, not a good layout, he could move the building forward by putting the parking in the rear.

MR. PETRO: I think the parking is better off in front, retail you want it in the front and number two, keep the headlights away from the people in the back. I think this better suits the property.

MR. SHAW: We can create a substantial buffer, we probably have about 160 feet of non-paved area that will be a combination of the pond and wood area so we can do a very good job screening that.

MR. PETRO: We're going to send you to the zoning board, I would assume we'll say a positive recommendation unless somebody disagrees with me, you have the understanding that we're not giving any nod to the site plan itself, other than the idea of the site plan, you'll have to engineer the site.

MR. SHAW: Absolutely.

MR. EDSALL: One of the things that a lot of times we suggest is that when you have an adjoining residential is that you get the applicant to agree to provide a higher level of finish for the rear of the building at

March 23, 2005

6

least so it doesn't look like a block building unfinished so it's more consistent with the views from the residential.

MR. PETRO: Give that some thought too, if you're going to use Decor block, use it on the entire building.

MR. SCHLESINGER: Where is this?

MR. PETRO: It's across from Lander Paving down in that area where the Flag Guys are.

MR. SCHLESINGER: Dog kennel.

MR. SHAW: Just south of the Flag Guys, just a little bit north of the Carpet Mill.

MR. KARNAVEZOS: Didn't his daughter put a hair salon right next door, isn't that the same property?

MR. PETRO: That's on the other side of the Flag Guys.

MR. RIZZI: I'm between the Flag Guys and The Hair Zone.

MR. SHAW: That's Anthony Rizzi, the owner of the property.

MR. PETRO: Okay, motion for final approval?

MR. SCHLESINGER: Make a motion for final approval for the Vito Rizzi site plan.

MR. MINUTA: Second it.

MR. PETRO: Motion's been made and seconded that the New Windsor Planning Board grant final approval to the Vito Rizzi site plan on Windsor Highway. Any further discussion from the board members? If not, roll call.

March 23, 2005

7

ROLL CALL

MR. SCHLESINGER	NO
MR. MASON	NO
MR. KARNAVEZOS	NO
MR. MINUTA	NO
MR. PETRO	NO

MR. PETRO: At this time, you have been referred to the New Windsor Zoning Board to seek the necessary variances that are required. If you're successful in receiving those and wish to reappear before this board we'll take a look at it.

MR. SHAW: Thank you.

Diane Newlander
4 Lannis Avenue
New Windsor, NY 12553

Zoning Board of Appeals
New Windsor Town Hall
555 Union Avenue
New Windsor, NY 12553

To the Chairman and Members of the Zoning Board of Appeals:

Regarding an application for a use variance submitted by Vito Rizzi on July 23, 2007.

I would like to note that although the minutes from the August 13, 2007 ZBA meeting are available on the Town website, the minutes from the July 23 meeting which contain the record of the public hearing, are not there.

In order to receive a use variance, the applicant must prove "unnecessary hardship". To prove this, State law requires the applicant to show *all* of the following:

1. that the property is incapable of earning a reasonable return on initial investment if used for any of the allowed uses in the district (actual "dollars and cents" proof must be submitted);
2. that the property is being affected by unique, or at least highly uncommon circumstances;
3. that the variance, if granted, will not alter the essential character of the neighborhood; and
4. that the hardship is not self-created.

If *any one or more* of the above factors is not proven, State law requires that the ZBA must deny the variance.

In 2004, Mr. Rizzi purchased this property, consisting of three acres of land and a brick one-family home for \$450,000. The property is within both commercial and residential zoning. He currently receives rent from the home. Considering his initial investment and the value of the land alone, this can hardly be considered a hardship even if the property remained just as it is.

Along this strip of land on Rt. 32, there are small commercial businesses all within the commercial zoning. If Mr. Rizzi, who has owned and operated a successful delicatessen in New Windsor, were to open such a business on this property, it would be welcomed by all and he certainly would not be operating under any hardship.

The proposed project, 14,000 square feet of mostly retail space and 97 parking spaces, would drastically alter the essential character of my neighborhood.

If there is any hardship to be addressed, it is the hardship placed on us, the neighbors by this project. We would watch as a natural barrier is destroyed and the value of our properties diminished.

According to the Table of Use/Bulk Regulations, parking for a commercial use, is not permitted by right in the R-4 zone and would require a variance as well.

It is the job of the Zoning Board of Appeals to preserve and protect the character of the neighborhood and the health, safety and welfare of the community, not be an advocate for an applicant.

I am strongly opposed to granting this use variance.

Respectfully submitted,

A handwritten signature in cursive script that reads "Diane Newlander". The signature is written in dark ink and is positioned below the typed name.

Diane Newlander

TOWN OF NEW WINDSOR
ZONING BOARD OF APPEALS
RECEIPT OF ESCROW RECEIVED:

DATE RECEIVED: 06-08-07

FOR: ESCROW 07-26

FROM:

Vito A. Rizzi
3 Ashely Way
Cornwall, NY 12518

CHECK FROM:

ANTHONY'S DELI & CATERING
600 BROADWAY STE 7
NEWBURGH, NY 12550

CHECK NUMBER: 1358

TELEPHONE: 565-1623

AMOUNT: 500.00

RECEIVED AT COMPTROLLER'S OFFICE BY:

J. George 6-11-07
NAME DATE

PLEASE RETURN ONE SIGNED COPY TO MYRA FOR FILING

THANK YOU

MEMORANDUM
NY CLS Town Law § 267-b

The applicant, Vito A. Rizzi, seeks a use variance pursuant to New York Consolidated Laws Section 267-b(2). The applicant seeks to build a 14,510 square foot structure onto his lot, which lies partially in a residential zone. The new building would house a six-unit office-retail building, and would accommodate parking for 97 vehicles. The applicant seeks a variance that would alter the entire residential portion of the lot to permit commercial use.

Pursuant to Town Law Section 267-b(2), the applicant must demonstrate that the applicable zoning regulations and restrictions have caused "unnecessary hardship" to the applicant. Unnecessary hardship requires proof of the following elements for each and every permitted use under the zoning regulations for the particular district where the property is located: "(1) [that] the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created." *Ferruggia v. Zoning Bd. of Appeals*, 233 A.D.2d 505, 506 (N.Y. App. Div. 1996)(quoting Town Law §267-b(2)(b)). The applicant cannot make this showing.

1. The Applicant Has Failed To Demonstrate That He Cannot Realize A Reasonable Return For Each And Every Permitted Use Under The Current Zoning Regulations.

The applicant has not demonstrated that he cannot realize a reasonable return on the property. To demonstrate that he cannot make a reasonable return, the applicant must demonstrate not only that he is not currently making a reasonable return, but indeed that he cannot do so for each and every permitted use of his property. The applicant has not made this showing.

For example, the applicant has stated to the Zoning Board of Appeals (“ZBA”) that “[h]e would still, if the ZBA approves his application, make the New Windsor location the new home of his business.” (See Proposed Testimony Before The New Windsor ZBA, dated July 23, 2007, submitted by Eldred P. Carhart). The applicant is the owner of Anthony’s Deli. The applicant has not proven to the ZBA that he cannot put Anthony’s Deli, or a business of similar size within the commercial portion of the lot, nor that some other appropriately sized business would be incapable of making a reasonable return. Instead, the applicant seeks to place a 14,510 square foot building with six tenants on the lot. The applicant has made no showing that such an inordinately large commercial building is necessary to enable him to make a reasonable return on the property.

Indeed, the proposed building is far larger than the neighboring businesses which are similarly zoned, including, *inter alia*, Margherita’s Hair Zone, The Flag Guys, and Orange County Pools. These businesses are making a reasonable return given the similar zoning constraints. Thus, the applicant should likewise be capable of making a reasonable return within the current commercial zone.

“A use variance runs with the land and thus the hardship must relate to the land, and a variance may not be granted merely to ease the personal difficulties of the current landowner.” *Conte v. Town of Norfolk Zoning Bd. of Appeals*, 261 A.D.2d 734, 736 (N.Y. App. Div. 1999)(approving ZBA’s denial of use variance for farming even where family had farmed for 15 years on property because applicant did not demonstrate that land could not achieve a reasonable return under some other use as zoned). Here, the applicant should not be permitted the use variance because he has not demonstrated that he cannot, like his commercial neighbors, realize a reasonable return on his property as it is currently zoned.

2. The Applicant Has Failed To Demonstrate That The Alleged Hardship Relating To The Property In Question Is Unique.

The applicant is required to demonstrate that his alleged hardship relating to the property is unique, and does not apply to a substantial portion of the district or neighborhood. NY CLS Town Law §267-b(2)(b). The applicant has made no showing that the neighboring businesses are not similarly zoned. Thus, he has not demonstrated a unique hardship relating to the property.

3. The Requested Use Variance Will Alter The Essential Character Of The Neighborhood.

The proposed use variance will absolutely alter the essential character of the neighborhood. The property sits on Route 32. The portion of the property that sits on Route 32 is commercial. Directly behind the portion of the property that lies in a residential zone, however, are single family dwellings that sit on Lannis Avenue.

Lannis Avenue is a quiet, beautiful tree-lined street. It is protected from the commercial activity of Route 32 by the residential buffer zone which the applicant now

seeks to alter to a commercial zone. Lannis Avenue is part of a residential neighborhood where there are small children, families, and elderly people who were the original owners of their homes. The use variance would place a commercial zone directly behind the backyard of the residents. Indeed, it is the residents of Lannis Avenue who would face an unnecessary hardship if the use variance is granted, not the applicant.

The residents of Lannis Avenue purchased their homes in reliance on the residential buffer zone, and they are gravely concerned about the application for a zoning variance to deprive them of the residential buffer zone that protects their street and their neighborhood. The residents are concerned about the health, safety, and welfare of their children, the impact on the physical environment of the neighborhood, and their property values if the use variance is granted. If the variance is granted, it may pave the way for all of the businesses along Route 32 that sit in a dual commercial and residential zone to seek a variance. Granting the application will surely change the neighborhood and allow other businesses to seek similar treatment to expand backward, right up to their residential neighbors. If the application is granted, it will likely be the catalyst for businesses along Route 32 to either expand, or sell their lots to businesses who would expand, obliterating the protections that the law has put in place for the residents of Lannis Avenue since the homes were built on that street. The ZBA should deny the variance application to protect the neighborhood from this unlawful encroachment into the residential zone.

4. Any Alleged Hardship Was Self-Created.

The applicant cannot, as a matter of law, demonstrate that he is suffering from a hardship that was not self-created. Indeed, “[h]ardship is self-created, for zoning

purposes, where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief.” *Ferruggia*, 233 A.D.2d at 507 (finding the ZBA granting of a use variance arbitrary and capricious where the possibility that the hardship was not self-created was not negated by the applicant); *Carrier v. Town of Palmyra Zoning Bd. of Appeals*, 2006 NY Slip Op 4596, 2 (N.Y. App. Div. 2006)(upholding denial of use variance where it was undisputed that petitioner purchased the property fully knowing that the area was zoned residential, and thus petitioner's hardship was self-created). Here, the applicant bought the parcel knowing that it was subject to a dual commercial and residential zone. Thus, the applicant's alleged hardship, if any, was self-created as a matter of law, and the applicant cannot demonstrate otherwise. The applicant's request for a use variance should therefore be denied.

2006 NY Slip Op 4596, *; 30 A.D.3d 1036, **;
816 N.Y.S.2d 647, ***; 2006 N.Y. App. Div. LEXIS 7599

[* 1] MATTER OF KEVIN CARRIER, PETITIONER-APPELLANT, v TOWN OF PALMYRA ZONING BOARD OF APPEALS AND TOWN OF PALMYRA, RESPONDENTS-RESPONDENTS.

675 CA 06-00367

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

2006 NY Slip Op 4596; 30 A.D.3d 1036; 816 N.Y.S.2d 647; 2006 N.Y. App. Div. LEXIS 7599

June 9, 2006, Decided

June 9, 2006, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Reargument denied by, Appeal denied by Matter of Carrier v. Town of Palmyra Zoning Bd. of Appeals, 32 A.D.3d 1246, 821 N.Y.S.2d 141, 2006 N.Y. App. Div. LEXIS 11156 (N.Y. App. Div. 4th Dep't, 2006)
Appeal denied by Carrier v. Town of Palmyra Zoning Bd. of Appeals, 8 N.Y.3d 807, 865 N.E.2d 1255, 2007 N.Y. LEXIS 530, 834 N.Y.S.2d 88 (N.Y., Mar. 27, 2007)

PRIOR HISTORY: Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (Stephen R. Sirkin, A.J.), entered April 28, 2005 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner property owner appealed a judgment from the Supreme Court, Wayne County (New York), which dismissed his petition brought under N.Y. C.P.L.R. art. 78 for annulment of a decision by respondent, a town zoning board of appeals (ZBA), that denied the owner's application for a certificate of nonconformity or a use variance for his operation of a junkyard on his premises.

OVERVIEW: The property owner operated a junkyard without the requisite license to do so. He filed a variety of administrative and judicial actions seeking to have a certificate of approval as to the nonconformity or a use variance issued, all of which were unsuccessful. Upon the ZBA's denial of the owner's latest application for a certificate of nonconformity and use variance, he brought an action under art. 78 for an annulment of the ZBA's decision and a determination that the use of his premises was permissible based on approved nonconformity or a use variance. The trial court dismissed the petition. On appeal, the court found that the ZBA reasonably interpreted the applicable ordinance which prohibited the junkyard on the premises. There was no proof that the nonconforming use existed prior to the effective date. Further, as the owner was aware that the property was residential when he purchased it, his hardship was self-created and did not justify a use variance. A violation of the Open Meeting Law, N.Y. Pub. Off. Law §§ 103 and 105, was not reviewed for purposes of a sanction where the owner failed to show good cause for the court's exercise of discretion on that issue.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: junkyard, ordinance, nonconforming use, use variance, preexisting, zoning, inter alia, public records, dumping grounds, self-created, hardship, zoned

LEXISNEXIS(R) HEADNOTES

Real Property Law > Zoning & Land Use > Ordinances

HN1 Under a zoning ordinance which authorizes interpretation of its requirements by a town zoning board of appeals, specific application of a term of the ordinance to a particular property is governed by the board's interpretation, unless unreasonable or irrational.

COUNSEL: HISCOCK & BARCLAY, LLP, ROCHESTER (JAMES S. GROSSMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

JUDGES: PRESENT: PIGOTT, JR., P.J., KEHOE, GORSKI, GREEN, AND PINE, JJ.

OPINION

[1036] [***648] MEMORANDUM AND ORDER**

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Petitioner is the owner of a parcel of land in respondent Town of Palmyra (Town) where he has operated a **[**1037]** junkyard without the requisite license to do so. It appears from the record before us that, in the year 2000, petitioner applied for a "Certificate of Approval" to operate an automobile junkyard on the premises and that the Town's Code Enforcement Officer denied the application. Upon petitioner's appeal to respondent Town Zoning Board of Appeals (ZBA), the ZBA affirmed the Code Enforcement Officer's decision. The record contains a judgment dismissing without prejudice petitioner's CPLR article 78 petition challenging the ZBA's determination on the ground that the record was "inadequate for review" and remitting the matter to the ZBA "for findings as to whether the Petition[er] abandoned the alleged [preexisting nonconforming] use" In 2003 petitioner commenced an action seeking, inter alia, judgment ordering the ZBA to issue him the "necessary permits and approvals" to operate a junkyard on his premises. He alleged in his verified complaint that, although a hearing was held upon the court's remittal, he had yet to receive a decision or findings of fact from the ZBA on his application. Petitioner thereafter moved for the relief sought in the complaint, and Supreme Court issued an order vacating its prior judgment and directing that petitioner "shall not be time-barred from pursuing administrative remedies that were available to him in November 2001 regarding the above matter, including his right to seek a determination on the issue of [preexisting nonconforming] use of the property."

By application dated May 13, 2004, petitioner applied for a "Certificate of **[*2]** Nonconformity/Use Variance Application" and, following a public hearing before the ZBA, the ZBA denied his application. Petitioner then commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, judgment annulling the ZBA's determination and determining

that his use of the premises as a junkyard is a valid preexisting nonconforming use or, alternatively, that he is entitled to a use variance. The court properly dismissed the petition.

[649]** We reject at the outset petitioner's contention that the Town's 1953 "Ordinance re: Hauling and Disposal of Garbage and Rubbish" is not relevant in determining whether the use of the premises may be considered a valid preexisting nonconforming use. " *HN1* Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is . . . governed by the board's interpretation, unless unreasonable or irrational' " (*Matter of Hampton Hill Villas Condominium Bd. of Mgrs. v Town of Amherst Zoning Bd. of Appeals*, 13 A.D.3d 1079, 1080, 787 N.Y.S.2d 557, quoting *Matter of Frishman v Schmidt*, **[**1038]** 61 N.Y.2d 823, 825, 462 N.E.2d 134, 473 N.Y.S.2d 957). Here, the ZBA reasonably interpreted the ordinance as zoning certain areas of the Town as official public dumping grounds and prohibiting the operation of private dumping grounds in the Town. Moreover, the record establishes that, contrary to the contention of petitioner, he was on notice of the applicability of the ordinance to his current application inasmuch as the Town's Zoning Enforcement Officer and Building Inspector referred to the ordinance in his 1995 affidavit submitted in support of the Town's request at that time for a preliminary injunction and temporary restraining order in connection with the use by petitioner of his premises as a junkyard.

We conclude that the ZBA's determination that petitioner's use of the premises as a junkyard "did not continuously and lawfully exist prior to [the effective date of the 1953 ordinance]" is not "illegal, arbitrary or an abuse of discretion' " (*Matter of Stumpo v Town of Wheatfield*, 8 A.D.3d 1101, 1101, 778 N.Y.S.2d 359; see generally *Matter of Sasso v Osgood*, 86 N.Y.2d 374, 385, 657 N.E.2d 254, 633 N.Y.S.2d 259). As noted by the ZBA, petitioner failed to submit "any proof of public records indicating that the property had been used as a junkyard from 1952 to July 15, 1966" but, rather, he presented public records establishing only that the Town had issued a junkyard permit for the premises from July 15, 1966 to April 1, 1989.

We further conclude that the ZBA properly determined, inter alia, that petitioner's hardship was self-created and thus that petitioner was not entitled to a use variance (see generally Town Law § 267-b [2] [b]; *Matter of Welsh v Town of Amherst Zoning Bd. of Appeals*, 270 A.D.2d 844, 844-845, 706 N.Y.S.2d 281). Here, it is undisputed that petitioner purchased the property fully knowing that the area was zoned residential, and thus petitioner's hardship was self-created (see *Matter of Stamm v Board of Zoning Appeals of Town of Greece*, 283 A.D.2d 995, 723 N.Y.S.2d 737). In view of our determination, we do not consider other factors relevant to determining whether petitioner was entitled to a use variance, e.g., whether the property can provide a reasonable return as it is currently zoned (see *id.*).

We agree with petitioner that the ZBA violated the Open Meetings Law when it discussed this matter at an executive session (see Public Officers Law §§ 103, 105). Petitioner has failed, however, to show good cause why we should exercise our discretion to void the ZBA's determination as a sanction for that violation, and we decline to do so (see *Matter of Griswald v Village of Penn Yan*, 244 A.D.2d 950, 665 N.Y.S.2d 177).

Entered: June 9, 2006

Service: Get by LEXSEE®

Citation: 816 NYS2D 647

View: Full

Date/Time: Sunday, August 26, 2007 - 10:48 PM EDT

* Signal Legend:

● - Warning: Negative treatment is indicated

233 A.D.2d 505, *; 649 N.Y.S.2d 946, **;
1996 N.Y. App. Div. LEXIS 12678, ***

In the Matter of Donald Ferruggia et al., Appellants, v. Zoning Board of Appeals of Town of Warwick et al., Respondents.

95-10565

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

233 A.D.2d 505; 649 N.Y.S.2d 946; 1996 N.Y. App. Div. LEXIS 12678

October 25, 1996, Submitted
November 25, 1996, Decided

PRIOR HISTORY: [***1] In a proceeding pursuant to CPLR article 78 to review a determination of the respondent Zoning Board of Appeals of the Town of Warwick, dated May 29, 1993, which, after a hearing, granted the application of the respondent Edwin Wiley for a use variance for a certain parcel of real property, the petitioners appeal from a judgment of the Supreme Court, Orange County Smith, J., dated September 22, 1995, which denied the petition and dismissed the proceeding.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners sought review of a decision of the Supreme Court, Orange County (New York) that denied petitioners' request to annul the resolution of respondent Zoning Board of Appeals of the Town of Warwick that granted respondent vendee's application for a use variance in order to construct a two-story business or professional office building on a vacant, residentially zoned parcel.

OVERVIEW: The zoning board granted the vendee a use variance, and petitioners claimed that the evidence failed to support a finding of unnecessary hardship. The zoning board issued another resolution that was adverse to petitioners. After the lower court dismissed the proceeding to annul the resolution in its entirety, the court reversed. The court found that the record failed to demonstrate that the claimed "hardship" was not self-created because the evidence presented at the hearing before the zoning board did not specifically set forth the permitted uses of the property at the time the current owner acquired title. The record was devoid of any evidence from which the reasonable return on the property could be determined.

OUTCOME: The court reversed, holding that the zoning board's grant of the use variance was arbitrary and capricious. The possibility that the hardship was self-created was not negated.

CORE TERMS: unnecessary hardship, reasonable return, hardship, use variance, self-created, zoning, remitted, final judgment, permitted uses, neighborhood

LEXISNEXIS(R) HEADNOTES

Real Property Law > Zoning & Land Use > Special Permits & Variances

HNI "Unnecessary hardship" requires proof of the following elements: (1) that the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged

hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created. Warwick, N.Y. Town Law § 267-b(2)(b). With regard to the first element, it is clear that before a claim that a property is yielding less than a reasonable return may properly be interposed, the reasonable return for that property must first be known or at least be ascertainable. Moreover, the courts have consistently required proof, in dollars and cents form, of all matters bearing upon the return available under existing zoning. Such evidence must show that no permissible use will yield a reasonable return.

Environmental Law > Zoning & Land Use > Conditional Use Permits & Variances

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 ↓ Hardship is self-created, for zoning purposes, where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief.

COUNSEL: Sichel & Hicks, P.C., Suffern, N.Y. (John R. Lindstrom of counsel), for appellants.

Robert W. Fink, Goshen, N.Y., for respondent Zoning Board of Appeals of Town of Warwick.

JUDGES: Sullivan, J. P., Copertino, Santucci and Florio, JJ., concur.

OPINION

[*505] [947]** Ordered that the judgment is reversed, on the law, without costs or disbursements, the petition is granted, the determination granting Edwin Wiley a use variance is annulled, and the application is denied.

The respondent Edwin Wiley, the contract vendee of a vacant, residentially-zoned parcel of real property which is the subject of this proceeding, applied for a use variance in order to construct a two-story business or professional office building **[**2]** thereon. Following a hearing, the respondent Zoning Board of Appeals of the Town of Warwick (hereinafter the ZBA) granted the application in a resolution dated May 29, 1993. The petitioners commenced the instant proceeding to annul the resolution, contending, *inter alia*, that the evidence failed to **[*506]** support a finding of unnecessary hardship. In a subsequent order, the Supreme Court rejected the unnecessary hardship argument, but remitted the matter to the ZBA for a determination as to a distinct issue which is not before us on this appeal. Thereafter, the ZBA rendered an additional resolution, dated February 27, 1995, which was limited to that issue and was adverse to the petitioners. In a final judgment dated September 22, 1995, the Supreme Court dismissed the proceeding in its entirety. We reverse.

The petitioners were not obligated to commence a second CPLR article 78 proceeding in order to challenge the ZBA's additional resolution since, as the ZBA currently concedes, the Supreme Court retained jurisdiction over the proceeding when it remitted the matter to the ZBA (see, *Matter of Seeler v Planning Bd.*, 53 AD2d 632). Moreover, contrary to the contention **[**3]** of the ZBA, the **[**948]** petitioners are presently entitled to appellate review of the unnecessary hardship issue, which was previously rejected by the Supreme Court and which necessarily was brought up for review only in the final judgment. Indeed, the unnecessary hardship issue was neither remitted to nor considered by the ZBA in connection with its additional resolution. Accordingly, even if the motion of the petitioners challenging the additional resolution was untimely (see, Town Law § 267-c [1]), such

untimeliness would not preclude review of the unnecessary hardship issue.

Turning to the merits of that issue, it is well settled that ^{HN1} "unnecessary hardship" requires proof of the following elements: "(1) [that] the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created" **[**4]** (Town Law § 267-b [2] [b]; see, *Matter of Village Bd. v Jarrold*, 53 NY2d 254; *Matter of Otto v Steinhilber*, 282 NY 71; *Matter of Elwood Props. v Bohrer*, 216 AD2d 562). With regard to the first element, it is clear that "before a claim that a property is yielding less than a reasonable return may properly be interposed, the reasonable return for that property must first be known or at least be ascertainable" (*Matter of Crossroads Recreation v Broz*, 4 NY2d 39, 45). Moreover, the courts have consistently required "proof, in dollars and cents form, of all matters bearing upon the return available under existing zoning" **[*507]** (*Matter of Village Bd. v Jarrold*, supra, at 257; see, *Matter of DeBeer v Zoning Bd. of Appeals*, 226 AD2d 721; *Matter of Delmarco v Zoning Bd. of Appeals*, 204 AD2d 447). Such evidence "must show that no permissible use will yield a reasonable return" (*Matter of Village Bd. v Jarrold*, supra, at 258; see, *Matter of Miltope Corp. v Zoning Bd. of Appeals*, 184 AD2d 565).

In the instant case, the record is devoid of any evidence from which the reasonable return on the property could be determined. While there was **[**5]** some testimony regarding the inability of the owner to sell the property as residential premises, there was no evidence regarding whether other permitted uses within the applicable zoning district would fail to yield a reasonable return (see, *Matter of Forrest v Evershed*, 7 NY2d 256; *Matter of Miltope Corp. v Zoning Bd. of Appeals*, supra).

Similarly, the record fails to demonstrate that the claimed "hardship" was not self-created. ^{HN2} "Hardship is self-created, for zoning purposes, where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief" (*Matter of Eung Lim-Kim v Zoning Bd. of Appeals*, 185 AD2d 346, 347; see, *Matter of First Natl. Bank v City of Albany Bd. of Zoning Appeals*, 216 AD2d 680; *Matter of Tharp v Zoning Bd. of Appeals*, 138 AD2d 906). The evidence presented at the hearing before the ZBA did not specifically set forth the permitted uses of the property at the time the current owner acquired title. Accordingly, the possibility that the hardship was self-created was not negated. Under these circumstances, the determination of the ZBA granting the use variance was arbitrary and capricious.

[6]** Sullivan, J. P., Copertino, Santucci and Florio, JJ., concur.

Service: Get by LEXSEE®

Citation: 649 NYS2D 946

View: Full

Date/Time: Sunday, August 26, 2007 - 9:35 PM EDT

* Signal Legend:

- - Warning: Negative treatment is indicated
- Ⓞ - Questioned: Validity questioned by citing refs
- ⚠ - Caution: Possible negative treatment
- ◆ - Positive treatment is indicated
- Ⓐ - Citing Refs. With Analysis Available
- Ⓜ - Citation information available

* Click on any Shepard's signal to Shepardize® that case.

261 A.D.2d 734, *; 689 N.Y.S.2d 735, **;
1999 N.Y. App. Div. LEXIS 5370, ***

In the Matter of Jason P. Conte et al., Appellants, v. Town of Norfolk Zoning Board of Appeals et al., Respondents.

82980

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

261 A.D.2d 734; 689 N.Y.S.2d 735; 1999 N.Y. App. Div. LEXIS 5370

May 13, 1999, Decided

May 13, 1999, Entered

PRIOR HISTORY: [***1] Appeal from a judgment of the Supreme Court (Demarest, J.), entered October 14, 1997 in St. Lawrence County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Town of Norfolk Zoning Board of Appeals denying petitioners' request for a zoning variance.

DISPOSITION: The judgment is affirmed, without costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners appealed a decision from the Supreme Court in St. Lawrence County (New York) dismissing their application to review a determination of respondent Zoning Board of Appeals that denied their request for a zoning variance.

OVERVIEW: Petitioners sought to annul a Zoning Board of Appeals determination denying their request for a zoning variance to house animals on their land for personal consumption. Petitioners claimed that the family had done so for the preceding fifteen years, prior to conveying their land to their nephew. The lower court's decision to dismiss the petition was appealed. The court found that petitioners failed to prove necessary hardship to qualify for a use variance by failing to submit "dollars and cents" proof that denial of the variance would preclude their realizing a reasonable return on the property, such as evidence of the property's purchase price, present value, real property taxes, and liens or asking price if offered for sale. Since the use variance would run with the land, petitioners were required to prove a hardship related to the land, not just to ease personal difficulties.

OUTCOME: The court affirmed the decision of the Zoning Board of Appeals that denied their request for a zoning variance to house animals on their land for personal consumption as the court found insufficient evidence to establish petitioners' need for a variance.

CORE TERMS: animals, variance, farm, use variance, zoning laws, reasonable return, barn, demonstrating, consumption, hardship, zoned, unnecessary hardship, building permits, zoning, zoning boards, zoning classification, permitted use, adjacent land, failed to demonstrate, abuse of discretion, rational basis, substantial evidence, continuously, neighborhood, issuance, invalid, housed

LEXISNEXIS(R) HEADNOTES

Environmental Law > Zoning & Land Use > Conditional Use Permits & Variances

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN1 ↓ Zoning boards are reposed with broad discretion to consider variance applications, and judicial review of their determinations is limited to determining whether the record reveals illegality, arbitrariness or an abuse of discretion; indeed, the determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record.

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 ↓ The long-standing test that applicants must satisfy in order to qualify for a use variance premised upon unnecessary hardship requires a showing (1) that the property cannot yield a reasonable return if used for permitted purposes as currently zoned, (2) that the hardship results from unique characteristics of the property, and (3) that the proposed use will not alter the character of the neighborhood.

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN3 ↓ A use variance runs with the land and thus the hardship must relate to the land, and a variance may not be granted merely to ease the personal difficulties of the current landowner.

Real Property Law > Adjoining Landowners > General Overview

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN4 ↓ The fact that adjacent land is being used to house farm animals does not relieve an applicants' burden of proving a lack of reasonable return if used as zoned.

COUNSEL: Steven G. Ballan, Potsdam, for appellants.

Pease & Gustafson (Eric J. Gustafson of counsel), Massena, for respondents.

JUDGES: Cardona, P. J., Mikoll, Yesawich Jr. and Graffeo, JJ., concur.

OPINION BY: Spain

OPINION

[*734] [736]** Spain, J.

Petitioners, Jason P. Conte and his uncle, Donald L. Fuller, applied to respondent Town of Norfolk Zoning Board of Appeals **[*735]** (hereinafter the ZBA) in 1997 for a use variance to authorize Fuller to continue to keep a limited number of farm animals for consumption on property owned by Conte on Joy Road in the Town of Norfolk, St. Lawrence County which, since 1973, has been zoned as a "Residential **[**737]** Hamlet". It is undisputed that keeping farm animals is not a permitted use in this zoning classification. Petitioners offered evidence **[***2]** at the ZBA's April and May 1997 hearings demonstrating that Fuller, along with his parents (Richard Fuller, now deceased, and Katherine Fuller [hereinafter collectively referred to as the Fullers]), has resided and continuously kept animals on the property for the family's own consumption since 1982 when the Fullers purchased the property. The animals were housed on the property in a barn constructed with a permit in 1984 and

renovated in 1989. The Fullers conveyed title to the land to Conte in 1994. Although petitioners and others contended that farm animals had been kept on the property for many years prior to the Fullers' purchase, no affidavits or other proof was submitted specifying any names or dates of such prior use and, indeed, the petition merely alleges that the practice existed "for many years prior to [1982]". One of the adjacent land owners, Donald Chapin, appeared in opposition to the variance request.

The ZBA unanimously voted to deny the requested use variance, finding the property could be used for other purposes and the applicants had not demonstrated hardship. Petitioners commenced this CPLR article 78 proceeding seeking to annul *****3** the ZBA's determination and for a judgment directing that it grant the requested variance. Supreme Court dismissed the petition finding that petitioners had failed to demonstrate that no permitted use would yield a reasonable return. Petitioners now appeal.

We affirm. We begin with the proposition that ^{HN1} zoning boards are reposed with broad discretion to consider variance applications, and judicial review of their determinations is limited to determining whether the record reveals illegality, arbitrariness or an abuse of discretion; indeed, "the determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record" (*Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309, 314; see, *Matter of La Dirot Assocs. v Smith*, 169 AD2d 896, 897). ^{HN2} The long-standing test that applicants must satisfy in order to qualify for a use variance premised upon unnecessary hardship *****4** requires a showing (1) that the property cannot yield a reasonable return if used for permitted purposes as currently zoned, (2) that the ***736** hardship results from unique characteristics of the property, and (3) that the proposed use will not alter the character of the neighborhood (*Matter of Dwyer v Polsinello*, 160 AD2d 1056, 1058; see, *Matter of Belgarde v Kocher*, 215 AD2d 1002; see also, Town Law § 267-b [2] [b]). In view of petitioners' complete failure to submit "dollars and cents" proof, as required, of the return available under existing zoning, i.e., that denial of the variance would preclude their realizing a reasonable return on the property, such as evidence of the property's purchase price, present value, real property taxes, mortgages and liens or other expenses, if any, or asking price if offered for sale, Supreme Court correctly concluded that they failed to demonstrate unnecessary hardship so as to enable the ZBA to exercise its discretion to grant a use variance (see, *Matter of Belgarde v Kocher*, *supra*; see also, *Matter of Village Bd. v Jarrold*, 53 NY2d 254, 257-259; *****5** *Matter of Otto v Steinhilber*, 282 NY 71, 76; 2 Anderson, New York Zoning Law and Practice § 23.13 [3d ed]).

The conclusory statements contained in the variance application, and submitted at the public hearings, to the effect that the property cannot yield a reasonable return without--or would achieve a higher return with--the variance because petitioners need to raise animals to provide food for their families, and that Conte, by agreement, may not transfer or rent *****738** the property without first offering it to Fuller, are simply insufficient (see, *Matter of Drake v Zoning Bd. of Appeals*, 183 AD2d 1031; see also, *Matter of Village Bd. v Jarrold*, *supra*, at 259; *Matter of Governale v Board of Appeals*, 121 AD2d 539, 540). Indeed, ^{HN3} a use variance runs with the land and thus the hardship must relate to the land, and a variance may not be granted merely to ease the personal difficulties of the current landowner (see, *Matter of Fuhst v Foley*, 45 NY2d 441; *Matter of Governale v Board of Appeals*, *supra*, at 540). *****6**

^{HN4} The fact that adjacent land is being used to house farm animals did not relieve the applicants' burden of proving a lack of reasonable return if used as zoned (see, 2 Anderson, New York Zoning Law and Practice §§ 23.17, 23.18 [3d ed]). Further, there was no evidence before the ZBA demonstrating, and the petition does not even allege, that farm animals were lawfully housed on this property in 1973 when the Zoning Law of respondent Town of Norfolk became effective and continuously thereafter so as to establish a preexisting nonconforming

use (see, *City of New York v Bilynn Realty Corp.*, 118 AD2d 511, 513-514; see also, Anderson, *New York Zoning Law and Practice* § 6.02 [3d ed]).

[*737] Petitioners also argue that they relied on the issuance of building permits in constructing and subsequently renovating their barn on this property which houses the farm animals. Neither the permits nor any evidence pertaining to the barn was included in the record demonstrating that the barn was exclusively built, and could only be used, to house farm animals or that the [***7] permits were invalid, and Supreme Court concluded that destruction of the barn was not necessary. While expenditures made in good-faith reliance on an invalid building permit may be considered by the ZBA on a variance request as proof of unnecessary hardship (see, *Matter of La Dirot Assocs. v Smith, supra*, at 898), petitioners submitted no such proof. In any event, issuance of the building permits could not and did not confer authority to use the property in a manner prohibited by the Town's zoning laws (see, *Matter of Rejman v Welch*, 112 AD2d 795, appeal dismissed 66 NY2d 916).

Petitioners' claim of discriminatory enforcement of the zoning ordinance was not raised in the petition or before Supreme Court and is not properly before this Court (see, *General Elec. Tech. Servs. Co. v Clinton*, 173 AD2d 86, 89, lv denied 79 NY2d 759). Were we to address this selective enforcement claim, we would conclude that petitioners failed to sustain their heavy burden of demonstrating that the law was not applied to others similarly situated, e.g., similarly zoned, or that the denial of the variance was the result [***8] of intentional or impermissible discrimination (see, *Matter of Di Maggio v Brown*, 19 NY2d 283, 290-291; see also, *Matter of Vito v Jorling*, 197 AD2d 822, 825).

Moreover, the issue of petitioners' entitlement to the variance to raise farm animals for consumption on this property was not precluded by principles of res judicata or collateral estoppel, as petitioners contend, because none of the prior proceedings directly addressed a claim of undue hardship or a use variance request (see, *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664; *Ryan v New York Tel. Co.*, 62 NY2d 494, 499-501; *Comi v Breslin & Breslin*, 257 AD2d 754, 757). While it appears that there was previously some confusion [***739] as to the proper zoning classification of this property, that did not, by itself, provide any basis upon which to grant the variance request.

Finally, we discern no error in Supreme Court's dismissal of this proceeding, after oral argument, without holding an evidentiary hearing pursuant to CPLR 7804 (h), as the matter was summarily determinable from the papers submitted [***9] and no additional fact finding was necessary (see, *Matter of Ames v [738] Johnston*, 169 AD2d 84, 85-86; see also, CPLR 409 [b]). Based upon the foregoing principles governing use variances, we conclude that the denial of the use variance to house these limited number of farm animals for consumption, while certainly unfortunate for petitioners and their families who have apparently done so for over 15 years in a neighborhood where this practice is not uncommon, nonetheless had a rational basis and was supported by substantial evidence in the record and, thus, we are unable to conclude that the denial was arbitrary or the result of the ZBA's abuse of discretion (see, *Conley v Town of Brookhaven Zoning Bd. of Appeals, supra*, at 314; *Matter of Belgarde v Kocher, supra*, at 1002). We have examined petitioners' remaining contentions and conclude they are without merit and do not warrant annulling the ZBA's determination.

Cardona, P. J., Mikoll, Yesawich Jr. and Graffeo, JJ., concur.

Ordered that the judgment is affirmed, without costs.

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Citation: 689 NYS2d 735
View: Full



RESULTS OF Z.B.A. MEETING OF: Vito Rizzo July 23, 2007

PROJECT: Vito Rizzo ZBA # 07-26
P.B.# _____

USE VARIANCE: _____ NEED: EAF _____ PROXY _____

LEAD AGENCY: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

PUBLIC HEARING: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

NEGATIVE DEC: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

APPROVED: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

ALL VARIANCES - PRELIMINARY APPEARANCE:
SCHEDULE PUBLIC HEARING: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____

CARRIED: Y _____ N _____

Continue

PUBLIC HEARING: _____ STATEMENT OF MAILING READ INTO MINUTES _____
VARIANCE APPROVED: M) Lo S) Lu VOTE: A _____ N _____

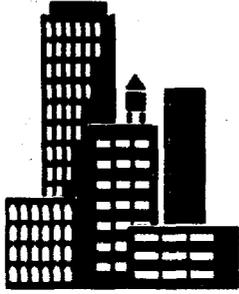
GANN A
LUNDSTROM A
LOCEY A
~~LOCEY~~ _____
KANE A

August 27th

CARRIED: Y _____ N _____



<i>Kara Cavalls</i>	<i>14 Lannis Ave.</i>	<i>- Opposed</i>
<i>Diane Nowlander</i>	<i>- 4 Lannis Ave.</i>	<i>- Opposed</i>
<i>Bill Steidl</i>	<i>- Jackson Ave.</i>	<i>- Opposed</i>
<i>Fred Westfall</i>	<i>- 12 Lannis</i>	<i>- Questioned paid - Opposed</i>
<i>Phil McArthy</i>	<i>10 Lannis</i>	<i>- " " Opposed</i>
<i>Kim Williams</i>	<i>- R Jay Rd</i>	<i>- Requirements for Use Variance</i>
<i>Mary Washington</i>	<i>- 16 Lannis Ave.</i>	<i>- Opposed</i>
<i>Vincent Evans</i>	<i>- 5 Lannis Ave.</i>	<i>- Opposed</i>
<i>Al Prochorch</i>	<i>- Hair Zone</i>	<i>- Not Opposed</i>
<i>Tabled -</i>		



ELDRED P. CARHART

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Fax: (845) 561-7004

email: ecarhart@hvc.rr.com

PROPOSED TESTIMONY BEFORE THE NEW WINDSOR ZBA

Property: Windsor Highway (NY Route 32), New Windsor, NY

Present Zoning: C and R4

Property Owner: Vito A. Rizzi

Tax Map ID: Section 35, Block 1, Lot 52 (3/01 +/- Acres)

Present Use of the Subject: The property is currently improved with a two-story, single-family dwelling of approximately 2,050 square feet.

Objective: To be granted a "use" variance so that the existing structure can be razed and a new, six-unit office-retail building, together with a paved parking area for 97 vehicles can be constructed on the site.

The granting of the variance **will not alter the essential character of the neighborhood** - the following commercial uses are all located within a quarter mile of the subject property: Hudson Valley Veterinary Hospital, Orange County Pools, a vacant commercial building, The Flag Guys, The Hair Zone, Great Expectations, The Magical Cupboard, Euroteck Imports, Empire Auto Glass, Barry's Auto, John's Professional Acupuncture, Hong's Karate, The Carpet Mill Outlet, three residences, a dental office, U-Haul, and another commercial building.

The property is **unique** to the area by virtue of it being used for residential purposes while the balance of the neighborhood is being used for commercial purposes.

To deny the variance **will deny a reasonable return** on the investment in the property.

The property was purchased from Scott G. Rollo on October 14, 2004 for the sum of \$450,000. Assuming an appreciation rate of a nominal 5% annually, the property would have a value of approximately \$509,800 today.

In order to demonstrate the financial unfeasibility of the property, I have conducted a pro-forma analysis of its present use, to wit:

Gross Income (GI) at market rates:

Rental of house (actual or fair market rent, \$1,600/month).....	\$19,200
Vacancy and bad debt (VBD) allowance (5%).....	(960)
Effective Gross Income (EGI).....	\$18,240

Anticipated Expenses:

Realty Taxes.....	\$7,275
Property Insurance.....	800
Maintenance & Repairs (3.5% of EGI).....	640
Legal & Accounting.....	250
Professional Property Management (5% of EGI).....	910
Miscellaneous.....	250
Reserve for Replacement of Short-lived Items (1.5% of EGI).....	275
Garbage collection, Lawn care, snow plowing	Tenants Pay

	\$10,400..... (10,400)

Net Operating Income..... **\$ 7,840**

The cash-on-cash rate of return on the property can be computed by dividing the net operating income by the value of the property, which calculates to 1.54% (a nominal cash-on-cash rate on capital invested is 5-10%).

The property does not reflect a reasonable return on the investment.

At the time of purchase, Mr. Rizzi expected to relocate his deli to this location. But with his lease expiring at the intersection of Union Avenue and Route 32, he was forced to immediately relocate to a temporary location in the City of Newburgh. He would still, if the ZBA approves his application, make the New Windsor location the new home of his business.

The proposed new building is a 14,510 square foot, single-story, frame-masonry-glass structure that will include six commercial tenants (office and retail uses), and a rent roll in the range of \$12.00 to \$16.00 per square foot. This structure would be pleasant to view and an asset to the neighborhood and community in general.

The hardship is not self-created - these properties have existed as a commercial neighborhood for many years.

The granting of the variance will not negatively affect the value of the surrounding properties - a new commercial building constructed on the subject site could only increase the value of the neighboring properties.

Eldred P. Carhart

July 23, 2007

ELDRED P. CARHART

Date

NY State Certified General Appraiser

No. 46-000009964

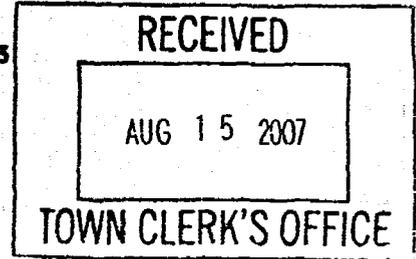


1763

TOWN OF NEW WINDSOR

cc: M. Mason

TOWN CLERK'S OFFICE
555 UNION AVENUE
NEW WINDSOR, NEW YORK 12553
Telephone: (845) 563-4611
Fax: (845) 563-4670



REQUEST FOR PUBLIC RECORDS

Date: 8/15/07

Name: Ricene Newlander

Address: 4 Lannis Ave.
New Windsor, NY

Phone: (845) 565-9287

Representing: self

Please specify:

- Property location (street address or section, block and lot number)
- Department you are requesting records from
- Describe information requested as fully as possible

Riggs file from 3 BA meetings
Notes file

Documents may not be taken from office

We the undersigned residents of New Windsor strongly oppose granting a use variance to Vito Rizzi that would extend commercial use into R-4 Zone at 287 Windsor Highway.

NAME	ADDRESS
Diane Newlander	4 Lannis Avenue
Wm E Rizzi	575 JACKSON AVENUE
Kara Cavallo	14 Lannis Avenue
Kirk J. Williams	394 RILEY ROAD NEW WINDSOR NY
Nancy Evans	5 Lannis Avenue
Lincoln Evans	5 Lannis Ave New Windsor, NY 12553
Phil McGinty	10 Lannis Ave N.W. NY 12553
John Craig	22 LANNIS AVE
Wm. Washington	16 Lannis Ave.
Mary Washington	16 Lannis Ave
FRED WESTFALL	12 LANNIS AVE



CC:

BUILDING DEPT.
TOWN CLERK

TOWN OF NEW WINDSOR

ZONING BOARD OF APPEALS

Regular Session

Date: JULY 23, 2007

AGENDA

7:30 p.m. – Roll Call

Motion to accept minutes of JUNE 25TH, 2007 meetings as written.

PRELIMINARY MEETINGS:

1. **ALBERT & MARY BERLINGIERI (07-35)** Request for 25 ft. Side Yard Setback and; 27 ft. Total Side Yard Setback for existing deck at 432 Bull Road in an R-1 Zone (52-1-13.5)
2. **MICHAEL PISACRETA (07-36)** Request for variance of:

EXISTING SHED: 5 ft. Side Yard Setback (300-11-A-1-B)
1 ft. 6 in. Rear Yard Setback (300-11-A-1-B)

EXISTING DECK: 30 ft. Rear Yard Setback (G-6)

All at 44 Keats Drive in an R-4 Zone (75-1-21)

3. **MATTHEW ZALOGA (for Mazza)⁰⁷⁻³⁷** Request for variance to permit 8 ft. fence for proposed tennis court at 1016 Forest Glen in an R-3 Zone (89-6-10)
4. **PETER MC LOUGHLIN (07-38)** Request for Interpretation and/or Use variance for Existing Single Family Dwelling with ~~proposed~~ addition and three kitchens at 502 Union Avenue in an R-4 Zone (7-1-29)

PUBLIC HEARINGS:

5. **VITO A. RIZZI (07-26)** Request for interpretation and/or use variance to extend commercial use into R-4 Zone at 287 Windsor Highway in a C/R-4 Zone (35-1-52)

CONTINUATION OF PUBLIC HEARING - TABLED FROM JUNE 25TH, 2007 MEETING:

6. **THOMAS RETCHO & TERRANCE RETCHO (07-07)** Request for :

2 ft. Building Height for Proposed 8 ft. fence.

Interpretation and/or Use Variance for the storage, parking and use of trailers (57-1-113.1)

Interpretation and/or Use Variance for the storage, parking and use of trailers (57-1-113.2)

All at 42 & 40 Lakeside Drive in an R-4 Zone.



Bloom & Bloom, P.C.
ATTORNEYS AND COUNSELORS AT LAW

DANIEL J. BLOOM
PETER E. BLOOM
KEVIN D. BLOOM *
*ALSO ADMITTED IN FLORIDA

530 BLOOMING GROVE TURNPIKE
P.O. BOX 4323
NEW WINDSOR, NEW YORK 12553
TELEPHONE (845) 561-6920
FAX: (845) 561-0978
E-MAIL: BLOOMBLOOM@hvc.rr.com

August 15, 2007

Town of New Windsor
Attn: Ms. Myra Mason-ZBA Clerk
555 Union Avenue
New Windsor, New York 12553

Via Hand Delivery

RECEIVED

AUG 16 2007

BUILDING DEPARTMENT

**RE: APPLICATION FOR USE VARIANCE & INTERPRETATION –
VITO A. RIZZI
Premises: 287 Windsor Highway, New Windsor, NY 12553
Section 35, Block 1, Lot 52
Our File No.: G-744**

Dear Myra:

Presented herewith by hand please find four copies of a “revised Concept Site Plan” in the above matter prepared by Shaw Engineering, on August 9, 2007. The enclosures are presented pursuant to the request of the Board for consideration at the “continued public hearing” in this matter scheduled to take place on Monday, August 27, 2007.

Thank you.

Sincerely yours,

Daniel J. Bloom

DANIEL J. BLOOM
DJB/sm (enc.)

cc: Mr. Vito A. Rizzi
3 Ashley Way
Cornwall, NY 12518
cc: Anthony J. Coppola, R.A.
3 Washington Center
Newburgh, NY 12550
cc: Shaw Engineering
Attn: Gregory Shaw, PE
744 Broadway
Newburgh, NY 12550

ZBA #07-26

Town of New Windsor
555 Union Avenue
New Windsor, NY 12553
(845) 563-4611

RECEIPT
#438-2007

06/12/2007

Anthony's Deli & Catering

Received \$ 150.00 for Zoning Board Fees, on 06/12/2007. Thank you for stopping by the Town Clerk's office.

As always, it is our pleasure to serve you.

Deborah Green
Town Clerk

PUBLIC HEARING NOTICE
ZONING BOARD OF APPEALS
TOWN OF NEW WINDSOR

PLEASE TAKE NOTICE that the Zoning Board of Appeals of the TOWN OF NEW WINDSOR, New York, will hold a Public Hearing on the following Proposition:

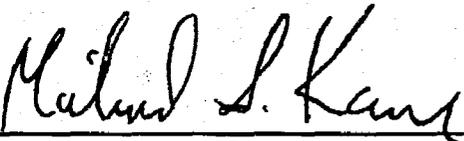
Appeal No. (07-26)

Request of VITO A. RIZZI

for a VARIANCE of the Zoning Local Law to Permit:

Request for interpretation and/or use variance to extend commercial use into R-4 Zone at 287 Windsor Highway in a C/R-4 Zone (35-1-52)

PUBLIC HEARING will take place on JULY 23, 2007 at the New Windsor Town Hall, 555 Union Avenue, New Windsor, New York beginning at 7:30 P.M.



Michael Kane, Chairman



Town of New Windsor

555 Union Avenue
New Windsor, New York 12553
Telephone: (845) 563-4631
Fax: (845) 563-3101

Assessors Office

June 13, 2007

Vito A. Rizzi
3 Ashley Way
Cornwall, NY 12518

Re: 35-1-52 ZBA#: 07-26 (35)

Dear Mr. Rizzi:

According to our records, the attached list of property owners are within five hundred (500) feet of the above referenced property.

The charge for this service is \$55.00 minus your deposit of \$25.00.

Please remit the balance of \$30.00 to the Town Clerk's Office.

Sincerely,

J. Todd Wiley, IAO
Sole Assessor

JTW/rah
Attachments

CC: Myra Mason, Zoning Board



45-1-1.1
GENEVIEVE MASLOSKI
24 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-56
ANIELLO &
MARIA GUERRIERO
306 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-7
DIANE NEWLANDER
4 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-45
GEORGE ROSS
PO BOX 3394
FORT LEE, NJ 07024

42-1-1.1
HUDSON VALLEY FEDERAL CREDIT
UNION
159 BARNEGAT RD.
POGHKEEPSIE, NY 12601

42-1-8
PETER FORMAL
6 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-46,47,53.22
RONALD LANDER &
PHYLIS SILVER
278 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-1.21
VENERA MARTINISI
273 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-9
PHILIP MCCARTHY &
LORI SCHIFFMAR
10 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-48
IN KEE HONG &
HUI SONG
PO BOX 914
WOODRIDGE, NY 12789

42-1-1.22
RICHARD HARRIS
275 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-10
FRED WESTFALL
12 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-50
STEPHEN & FAITH KUPRYCH
279 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-1.23
JAIME & MARY MENEGAZZO
14 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-11
ANTHONY & KARA CAVALLO
14 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-51
ALFRED &
PAULINE CAVALARI
283 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-2
BERTHA KARPOFF
8 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-12
WILLIAM &
MARY WASHINGTON
16 LANNIS AVE.
NEW WINDSOR, NY 12553

35-1-54.12
SEYMOUR & TERRI BORDEN
C/O CARPET MILLS OUTLET
294 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-3
CHRISTOPHER &
LAURIE ORR
10 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-13
H Z REALTY INC.
293 WINDSOR HWY.
NEW WINDSOR, NY 12553

35-1-54.21
110 CORPORATE DR., LLC
110 CORPORATE DR.
NEW WINDSOR, NY 12553

42-1-4
HERMAN & SALLY INGRIM
12 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-14
KLJ CORP.
C/O L. BAKKER
PO BOX 2
CORNWALL, NY 12518

35-1-55
AMERCO REAL ESTATE CO.
C/O U-HAUL INT., INC.
PO BOX 29046
PHOENIX, AZ 85038

42-1-5
ANNE HODASH
18 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-15
MODEL MAKERS
MUSEUM, LLC
297 WINDSOR HWY.
NEW WINDSOR, NY 12553

35-1-112
COX HOLDINGS, LLC
7 APTA WAY UNIT #101
MONROE, NY 10950

42-1-6
WILLIAM &
HELEN BLENDERMAN
20 WILLOW LN.
NEW WINDSOR, NY 12553

42-1-16
DENMARK REALTY, LLC
299 WINDSOR HWY.
NEW WINDSOR, NY 12553

Easy Peel Labels
Use Avery® TEMPLATE 5160®



Fee

42-1-17
NOREEN & PETER MARINO
18 LANNIS AVE.
NEW WINDSOR, NY 12553

42-1-18
RUTH BAKKER
20 LANNIS AVE.
NEW WINDSOR, NY 12553

42-1-19
LINDA CANALE &
FRANCIS MCKEON
301 WINDSOR HWY.
NEW WINDSOR, NY 12553

42-1-20
ROBERT PAVIGNANO
62 WOODWARD TERR.
CENTRAL VALLEY, NY 10917

42-1-21
JOHN & MARY CRAIG
22 LANNIS AVE.
NEW WINDSOR, NY 12553

RESULTS OF Z.B.A. MEETING OF: June 11, 2007

PROJECT: Vito Rizzo ZBA # 07-26

P.B.# _____

USE VARIANCE: NEED: EAF _____ PROXY _____

LEAD AGENCY: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

PUBLIC HEARING: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

NEGATIVE DEC: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

APPROVED: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____ CARRIED: Y _____ N _____

ALL VARIANCES - PRELIMINARY APPEARANCE:

SCHEDULE PUBLIC HEARING: M) LO S) LU VOTE: A 4 N 0

~~GANN~~ _____
LUNDSTROM A _____
LOCEY A _____
TORPEY A _____
KANE A _____

CARRIED: Y ✓ N _____

PUBLIC HEARING: STATEMENT OF MAILING READ INTO MINUTES _____

VARIANCE APPROVED: M) _____ S) _____ VOTE: A _____ N _____

GANN _____
LUNDSTROM _____
LOCEY _____
TORPEY _____
KANE _____

CARRIED: Y _____ N _____

Empty table with 10 rows and 1 column.



**TOWN OF NEW WINDSOR
ZONING BOARD OF APPEALS**



APPLICATION FOR VARIANCE

_____ Date Application Type: Use Variance Area Variance
Sign Variance Interpretation

I. **Owner Information:** Phone Number: (845) 565-1623
Vito A. Rizzi Fax Number: (845) 565-6680
(Name)
3 Ashley Way, Cornwall, NY 12518
(Address)

II. **Applicant:**
same as "I" above Phone Number: ()
(Name) Fax Number: ()

(Address)

III. **Forwarding Address, if any, for return of escrow:** Phone Number: ()
Same as "I" above Fax Number: ()
(Name)

(Address)

IV. ~~Contractor/Engineer/Architect/Surveyor/~~ Phone Number (845) 561-3559
Anthony J. Coppola, R.A. Fax Number: (845) 561-2051
(Name)
3 Washington Center, Newburgh, NY 12550
(Address)

V. **Property Information:**
R-4 and
Zone: C (Commercial) Property Address in Question: East side of Windsor Highway (Route 32)
Lot Size: 3.01± acres Tax Map Number: Section 35 Block 1 Lot 52
a. What other zones lie within 500 feet? _____
b. Is pending sale or lease subject to ZBA approval of this Application? NO
c. When was property purchased by present owner? October 19, 2004
d. Has property been subdivided previously? unknown If so, When: unknown
e. Has an Order to Remedy Violation been issued against the property by the
Building/Zoning/Fire Inspector? NO
f. Is there any outside storage at the property now or is any proposed? NO

****PLEASE NOTE:*****

THIS APPLICATION, IF NOT FINALIZED, EXPIRES ONE YEAR FROM THE DATE OF SUBMITTAL.

COMPLETE THIS PAGE

**TOWN OF NEW WINDSOR
ZONING BOARD OF APPEALS**

APPLICATION FOR VARIANCE - continued

VI. USE VARIANCE:

Use Variance requested from New Windsor Zoning Local Law, for the extension of commercial use into R-4 Zone beyond that permitted by Section 300-5 of Town Code.

Section _____, Table of _____ Regs., Col. _____.

Describe proposal:

Applicant seeks a Use Variance to raise the existing 2-story family dwelling of approximately 2,050 sq. feet and construct in its place a new 6-unit office-retail building (14,510 sq. feet) together with paved parking area for 97 vehicles on site. The subject parcel is approximately 600 ft. deep extending from NYS Rte. 32 in an easterly direction. The first 200 ft. is located in a commercial zone and the remaining portion of the property is in a R-4 Zone. Applicant would like to use the entire parcel for the aforesaid commercial use. A portion of a retail building and the loading area would extend into the residential zone.

VII. The legal standard for a "Use Variance" is unnecessary hardship. Describe why you feel unnecessary hardship will result unless the Use Variance is granted. Also state any efforts you have made to alleviate the hardship other than this application.

There is presently located on the premises a one family residence which the applicant has rented in the past. The income generated from said rental is insufficient to permit applicant to secure a reasonable return on his investment in the property, after payment of taxes, insurance and maintenance.

PLEASE NOTE:

THIS APPLICATION, IF NOT FINALIZED, EXPIRES ONE YEAR FROM THE DATE OF SUBMITTAL.

COMPLETE THIS PAGE

**OWN OF NEW WINDSOR
ZONING BOARD OF APPEALS**

APPLICATION FOR VARIANCE - continued

X. SIGN VARIANCE:

- (a) Variance requested from New Windsor Zoning Local Law, Section _____, Supplementary Sign Regulations

	<u>Requirements</u>	<u>Proposed or Available</u>	<u>Variance Request</u>
Sign #1			
Sign #2			
Sign #3			
Sign #4			

- (b) Describe in detail the sign(s) for which you seek a variance, and set forth your reasons for requiring extra or oversized signs.

- (c) What is total area in square feet of all signs on premises including signs on windows, face of building and freestanding signs _____?

XI. INTERPRETATION:

- (a) Interpretation requested of New Windsor Zoning Local Law, Section 300-5

- (b) Describe in detail the proposal before the Board:

The zoning for the C-zone (Design Shopping) allows a maximum Floor Area Ratio of .50 and a maximum Development Coverage of 85%. The Floor Area Ratio and Development Coverage for the entire site (3.01 acres) are within the limitations and are 0.11 and 54% respectively. When computed for the land solely in the C-zone (1.14 acres), the Floor Area Ratio and Development Coverage are also satisfactory and 0.05 and 76%, respectively. Out of an abundance

(continued)

PLEASE NOTE:

THIS APPLICATION, IF NOT FINALIZED, EXPIRES ONE YEAR FROM THE DATE OF SUBMITTAL.

XI. INTERPRETATION: (continued)

of caution, however, this Board's interpretation confirming applicant's position in the aforesaid regard is respectfully sought on this Application.

XII. ADDITIONAL COMMENTS:

- (a) Describe any conditions or safeguards you offer to ensure that the quality of the zone and neighboring zones is maintained or upgraded and that the intent and spirit of the New Windsor Zoning Local Law is fostered. (Trees, landscaped, curbs, lighting, paving, fencing, screening, sign limitations, utilities, drainage.)
Trees, landscaping and fencing will be utilized to screen subject premises from any residences located in the residential zone.

XIII. ATTACHMENTS REQUIRED:

- Copy of contract of sale, lease or franchise agreement. Copy of deed and title policy.
- * * Copy of site plan or survey (if available) showing the size and location of the lot, buildings, facilities, utilities, access drives, parking areas, trees, landscaping, fencing, screening, signs, curbs, paving and streets within 200 ft. of the lot in question.
- Copies of signs with dimensions and location.
- Three checks: (each payable to the TOWN OF NEW WINDSOR)
- One in the amount of \$ 300.00 or 500.00 (escrow)
- One in the amount of \$ 50.00 or 150.00 (application fee)
- One in the amount of \$ 25.00 (Public Hearing List Deposit)
- Photographs of existing premises (5 or 6) from several angles. (IF SUBMITTING DIGITAL PHOTOS PRINTED FROM COMPUTER - PLEASE SUBMIT FOUR (4) SETS OF THE PHOTOS.)

** Note: Need four single sheet copies of the site plan.*

XIV. AFFIDAVIT.
STATE OF NEW YORK)
) SS.:
COUNTY OF ORANGE)

The undersigned applicant, being duly sworn, deposes and states that the information, statements and representations contained in this application are true and accurate to the best of his/her knowledge or to the best of his/her information and belief. The applicant further understands and agrees that the Zoning Board of Appeals may take action to rescind any variance granted if the conditions or situation presented herein are materially changed.

Sworn to before me this:

9th day of May 20 07.

Ellen Testa
Signature and Stamp of Notary

ELLEN TESTA
NOTARY PUBLIC-STATE OF NY
RESIDING IN ORANGE COUNTY
#01TE5009112
COMMISSION EXPIRES 03/08/2011

Vito A. Ruzi
Owner's Signature (Notarized)
Vito A. Ruzi

[Signature]
Owner's Name (Please Print)

[Signature]
Applicant's Signature (If not Owner)

PLEASE NOTE:
THIS APPLICATION, IF NOT FINALIZED, EXPIRES ONE YEAR FROM THE DATE OF SUBMITTAL.

APPLICANT/OWNER PROXY STATEMENT
(for professional representation)

for submittal to the:
TOWN OF NEW WINDSOR ZONING BOARD OF APPEALS

Vito A. Rizzi, deposes and says that he resides
(OWNER)
at 3 Ashley Way, Cornwall in the County of Orange
(OWNER'S ADDRESS)

and State of New York and that he is the owner of property tax map
(Sec. Block Lot)
designation number (Sec. 35 Block 1 Lot 52) which is the premises described in
the foregoing application and that he authorizes:

Daniel J. Bloom, Esq., Bloom & Bloom, P.C., 530 Blooming Grove Tpke., P.O. Box 4323,
(Applicant Name & Address, if different from owner) New Windsor, NY 12553

Anthony J. Coppola, R.A. Architect
(Name & Address of Professional Representative of Owner and/or Applicant)

to make the foregoing application as described therein.

Date: May 9, 2007

Sworn to before me this:
9th day of May 2007

** Vito A. Rizzi
Owner's Signature (MUST BE NOTARIZED)
Vito A. Rizzi

[Signature]
Applicant's Signature (If different than owner)
Daniel J. Bloom, Esq. - Bloom & Bloom, P.C.

[Signature]
Representative's Signature
Daniel J. Bloom, Esq. - Bloom & Bloom, P.C.

Ellen Testa
Signature and Stamp of Notary
ELLEN TESTA
NOTARY PUBLIC-STATE OF NY
RESIDING IN ORANGE COUNTY
#01TE5009112
COMMISSION EXPIRES 03/08/2011

THIS FORM IS TO BE COMPLETED ONLY IF SOMEONE OTHER THAN THE PROPERTY OWNER WILL BE APPEARING AS REPRESENTATION OF THE OWNER AT THE ZBA MEETINGS.

**** PLEASE NOTE:
ONLY OWNER'S SIGNATURE MUST BE NOTARIZED.**

COMPLETE THIS PAGE

PROJECT I.D. NUMBER

617.21

SEQR

Appendix C

State Environmental Quality Review
SHORT ENVIRONMENTAL ASSESSMENT FORM
 For UNLISTED ACTIONS Only

PART I--PROJECT INFORMATION (To be completed by Applicant or Project sponsor)

1. APPLICANT /SPONSOR Vito A. Rizzi	2. PROJECT NAME "New Office/Retail Building for Vito A. Rizzi"
3. PROJECT LOCATION: Municipality New Windsor County Orange Concept Site Plan	
4. PRECISE LOCATION (Street address and road intersections, prominent landmarks, etc., or provide map) 287 Windsor Highway, New Windsor, NY 12553 Approximately 1,000 ft. South of the intersection of Willow Avenue and NYS Rte. 32 on the easterly side of Rte. 32	
5. IS PROPOSED ACTION: <input type="checkbox"/> New <input type="checkbox"/> Expansion <input checked="" type="checkbox"/> Modification/alteration	
6. DESCRIBE PROJECT BRIEFLY: Applicant seeks to raise the existing 2-story single family dwelling and replace it with a 14, 510 sq. ft. building for office/retail use.	
7. AMOUNT OF LAND AFFECTED: Initially <u>3.01±</u> acres Ultimately <u>3.01±</u> acres	
8. WILL PROPOSED ACTION COMPLY WITH EXISTING ZONING OR OTHER EXISTING LAND USE RESTRICTIONS? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If No, describe briefly Subject parcel is approximately 600 ft. deep. The first 200 ft. is located in a commercial zone and the remaining portion of the property is in an R-4 zone.	
9. WHAT IS PRESENT LAND USE IN VICINITY OF PROJECT? <input type="checkbox"/> Residential <input type="checkbox"/> Industrial <input checked="" type="checkbox"/> Commercial <input type="checkbox"/> Agriculture <input type="checkbox"/> Park/Forest/Open space <input checked="" type="checkbox"/> Other Describe: That portion of the premises that abuts N.Y.S. Route 32 and the rear portion of the premises abuts a residential zone.	
10. DOES ACTION INVOLVE A PERMIT APPROVAL, OR FUNDING, NOW OR ULTIMATELY FROM ANY OTHER GOVERNMENTAL AGENCY (FEDERAL, STATE OR LOCAL)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, list agency(s) and permit/approvals	
11. DOES ANY ASPECT OF THE ACTION HAVE A CURRENTLY VALID PERMIT OR APPROVAL? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, list agency name and permit/approval	
12. AS A RESULT OF PROPOSED ACTION WILL EXISTING PERMIT/APPROVAL REQUIRE MODIFICATION? <input type="checkbox"/> Yes <input type="checkbox"/> No N/A	
I CERTIFY THAT THE INFORMATION PROVIDED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE	
Applicant/sponsor name: <u>Vito A. Rizzi</u>	Date: <u>5/9/07</u>
Signature: <u>Vito A. Rizzi</u>	

If the action is in the Coastal Area, and you are a state agency, complete the Coastal Assessment Form before proceeding with this assessment

OVER

1

PART II—ENVIRONMENTAL ASSESSMENT (To be completed by Agency)

A. DOES ACTION EXCEED ANY TYPE I THRESHOLD IN 6 NYCRR, PART 617.12? If yes, coordinate the review process and use the FULL EAF.
 Yes No

B. WILL ACTION RECEIVE COORDINATED REVIEW AS PROVIDED FOR UNLISTED ACTIONS IN 6 NYCRR, PART 617.8? If No, a negative declaration may be superseded by another involved agency.
 Yes No

C. COULD ACTION RESULT IN ANY ADVERSE EFFECTS ASSOCIATED WITH THE FOLLOWING: (Answers may be handwritten, if legible)

C1. Existing air quality, surface or groundwater quality or quantity, noise levels, existing traffic patterns, solid waste production or disposal, potential for erosion, drainage or flooding problems? Explain briefly:

C2. Aesthetic, agricultural, archaeological, historic, or other natural or cultural resources; or community or neighborhood character? Explain briefly:

C3. Vegetation or fauna, fish, shellfish or wildlife species, significant habitats, or threatened or endangered species? Explain briefly:

C4. A community's existing plans or goals as officially adopted, or a change in use or intensity of use of land or other natural resources? Explain briefly:

C5. Growth, subsequent development, or related activities likely to be induced by the proposed action? Explain briefly:

C6. Long term, short term, cumulative, or other effects not identified in C1-C5? Explain briefly:

C7. Other impacts (including changes in use of either quantity or type of energy)? Explain briefly:

D. IS THERE, OR IS THERE LIKELY TO BE, CONTROVERSY RELATED TO POTENTIAL ADVERSE ENVIRONMENTAL IMPACTS?
 Yes No If Yes, explain briefly

PART III—DETERMINATION OF SIGNIFICANCE (To be completed by Agency)

INSTRUCTIONS: For each adverse effect identified above, determine whether it is substantial, large, important or otherwise significant. Each effect should be assessed in connection with its (a) setting (i.e. urban or rural); (b) probability of occurring; (c) duration; (d) irreversibility; (e) geographic scope; and (f) magnitude. If necessary, add attachments or reference supporting materials. Ensure that explanations contain sufficient detail to show that all relevant adverse impacts have been identified and adequately addressed.

Check this box if you have identified one or more potentially large or significant adverse impacts which MAY occur. Then proceed directly to the FULL EAF and/or prepare a positive declaration.

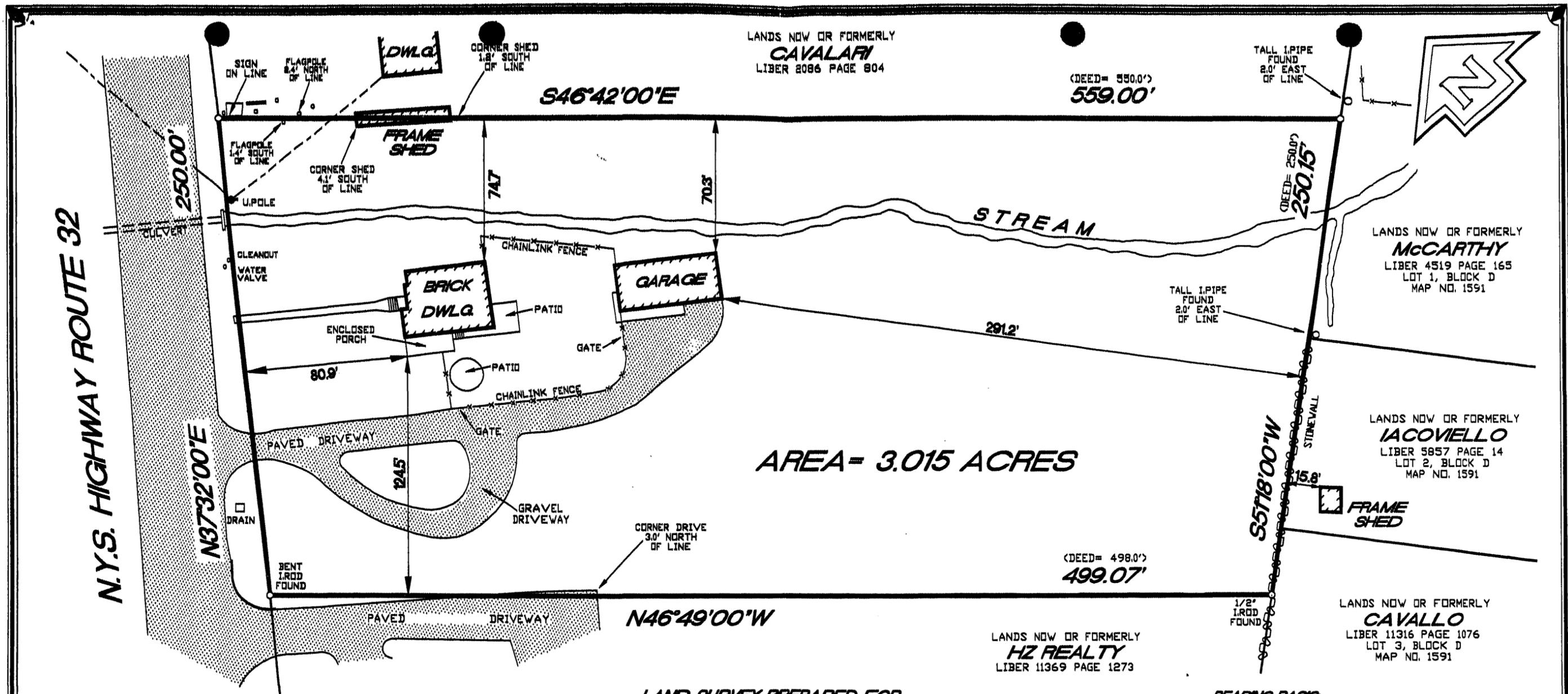
Check this box if you have determined, based on the information and analysis above and any supporting documentation, that the proposed action WILL NOT result in any significant adverse environmental impacts AND provide on attachments as necessary, the reasons supporting this determination:

_____ Name of Lead Agency

_____ Print or Type Name of Responsible Officer in Lead Agency _____ Title of Responsible Officer

_____ Signature of Responsible Officer in Lead Agency _____ Signature of Preparer (If different from responsible officer)

_____ Date



AREA = 3.015 ACRES

LAND SURVEY PREPARED FOR
RIZZI

LOCATED IN THE TOWN OF NEW WINDSOR
ORANGE COUNTY NEW YORK
SCALE: 1" = 50'
JULY 20, 2004



REVISIONS:

SURVEYOR:

Anthony A. Sorace
ANTHONY A. SORACE, P.L.S. LIC. No. 50187

SURVEY IS VOID WITHOUT MY
RAISED IMPRESSION SEAL

CERTIFICATION:

I, ANTHONY A. SORACE, P.L.S., DO HEREBY CERTIFY IN MY PROFESSIONAL OPINION, ONLY TO PARTIES LISTED BELOW THAT THIS SURVEY IS THE RESULT OF AN ACTUAL FIELD SURVEY COMPLETED ON JULY 17, 2004 AND COMPLIES WITH EXISTING CODE OF PRACTICE FOR LAND SURVEYS ADOPTED BY THE NEW YORK STATE ASSOCIATION OF LAND SURVEYORS. THIS CERTIFICATION DOESN'T RUN WITH TITLE TO THE LAND AND IS NOT TRANSFERABLE TO ADDITIONAL LENDING INSTITUTIONS OR SUBSEQUENT OWNERS;

- VTO ANTHONY RIZZI
- LAWYERS TITLE INSURANCE CORPORATION
- G. SCOTT ROLLO and LBA ROLLO

SURVEY No. 0449

BEARING BASIS:

NORTH ORIENTATION IS BASED ON DATUM ESTABLISHED FROM FILED MAP OR DEED OF RECORD.

DEED OF RECORD:

BEING LIBER 6156 PAGE 62, FILED WITH OFFICE OF THE ORANGE COUNTY CLERK.

TAX LOT DESIGNATION:

SECTION 35, BLOCK 1, LOT 52, AS SHOWN ON THE TOWN OF NEW WINDSOR TAX MAPS.

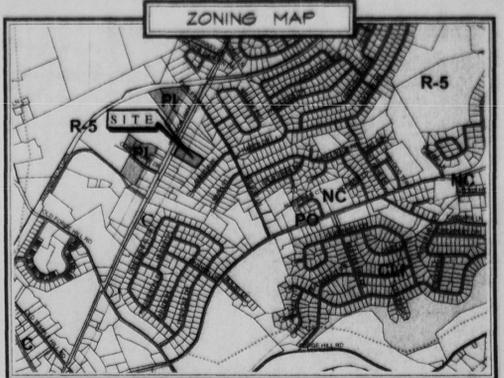
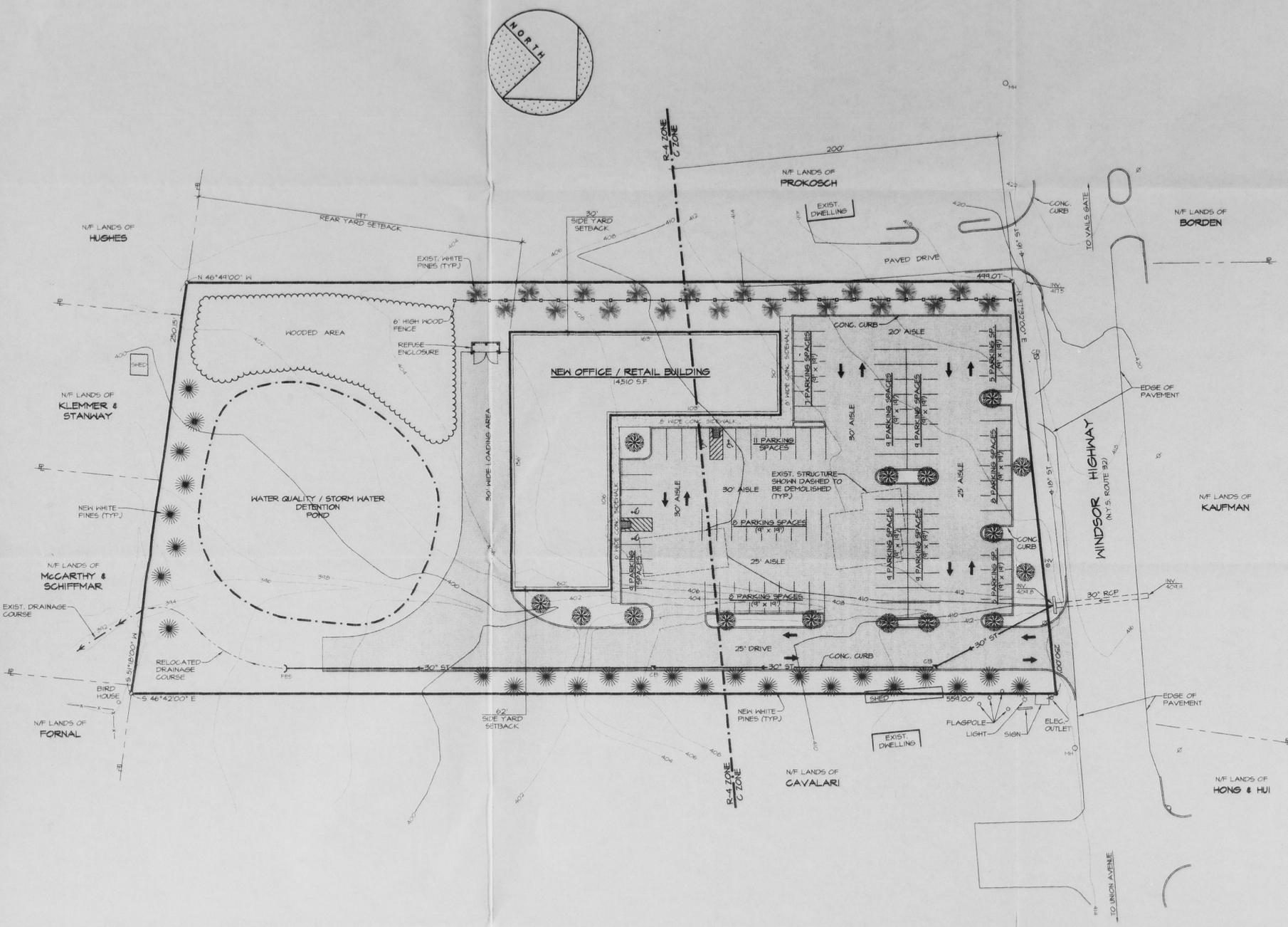
GENERAL MAP NOTES:

1. THIS SURVEY IS SUBJECT TO ANY RECORDED AND/OR UN-RECORDED COVENANTS, RESTRICTIONS, EASEMENTS, RIGHT-OF-WAYS, AND AGREEMENTS, IF ANY.
2. UNLESS ILLUSTRATED AND NOTED BY A POINT OF REFERENCE, UNDERGROUND IMPROVEMENTS OR ENCROACHMENTS, IF ANY, ARE NOT SHOWN HEREON.

THE ALTERATION OF THIS SURVEY MAP BY ANYONE OTHER THAN THE ORIGINAL PREPARER IS MISLEADING, CONFUSING AND NOT IN THE GENERAL WELFARE AND BENEFIT OF THE PUBLIC. IT IS A VIOLATION OF SECTION 7809, SUB-DIVISION 2, OF THE NEW YORK STATE EDUCATION LAW.

(845) 498-3367

ANTHONY A. SORACE, P.L.S.
PROFESSIONAL LAND SURVEYOR
ROCK TAVERN, NEW YORK - 12575
© 2004 BY ANTHONY A. SORACE, P.L.S.



LEGEND

EXISTING	NEW
10' CONTOUR	CATCH BASIN
BOUNDARY	FLARED END SECTION
ADJ. PROPERTY LINE	30" ST. STORM DRAIN
CATCH BASIN	MACADAM PAVEMENT
SANITARY MANHOLE	
UTILITY POLE	
WATER VALVE	
HYDRANT	
24" ST. STORM SEWER	

ZONING SCHEDULE

ZONE: C-1 DESIGN SHOPPING
USES: A-3 OFFICE / RETAIL

BULK REGULATIONS: C ZONE	REQUIRED	PROVIDED
MIN. LOT AREA	40,000 S.F.	13,318 S.F.
MIN. LOT WIDTH	200 FT.	244 FT.
MIN. FRONT YARD DEPTH	60 FT.	143 FT.
MIN. SIDE YARD - ONE	30 FT.	30 FT.
MIN. SIDE YARD - BOTH	10 FT.	92 FT.
MIN. REAR YARD DEPTH	30 FT.	117 FT.
MIN. STREET FRONTAGE	N/A	N/A
BUILDING HEIGHT (12' / FT. OF DISTANCE TO NEAREST LOT LINE - 30 FT.)	30 FT.	-
MAX. FLOOR AREA RATIO	0.50	0.11
DEVELOPMENT COVERAGE	85%	54%

OFF-STREET PARKING	REQUIRED	PROVIDED
OFFICE / RETAIL (1 SPACE PER 150 S.F.) (14,510 S.F. / 1 SPACE PER 150 S.F.)	97 SPACES	97 SPACES

- ### NOTES
- ZONING DISTRICT: C-1 DESIGN SHOPPING
 - RECORD OWNER & APPLICANT: VITO A. RIZZI, 3 ASHLEY WAY, CORNHILL, NEW YORK 12518
 - TOTAL PARCEL AREA: 3.014 ACRES
 - TAX MAP DESIGNATION: SECTION 39, BLOCK 1, LOT 52
 - BOUNDARY: PLANIMETRIC, TOPOGRAPHIC AND UTILITY SURVEY INFORMATION OBTAINED BY ANTHONY SORACE, LAND SURVEYOR.
 - THE LOCATIONS OF EXISTING UTILITIES ARE TO BE CONSIDERED AS APPROX. PRIOR TO EXCAVATION THE CONTRACTOR SHALL VERIFY THEIR LOCATIONS.
 - UNDERGROUND FACILITIES PROTECTIVE ORGANIZATION (U.F.P.O.), SECTION 118B OF THE PUBLIC SERVICE LAW, ARTICLE 36 OF THE GENERAL BUSINESS LAW AND INDUSTRIAL CODE RULE 133 REQUIRES (1) WORKING DAYS NOTICE BEFORE EXCAVATION, DRILLING OR BLASTING, UNDERGROUND UTILITIES CALL CENTER TEL. NO. 1-800-462-7462. CONTRACTOR SHALL PROTECT AND PRESERVE UTILITY MARKINGS.

TOWN OF NEW WINDSOR PLANNING BOARD
STAMP OF APPROVAL

Shaw Engineering
Consulting Engineers
744 Broadway
Newburgh, N.Y. 12550

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ISSUE	REVISION	DATE

Drawn By: J.R.J.
Checked By: G.J.S.
Scale: 1"=30'
Date: 3-1-2005

Project: NEW OFFICE / RETAIL BUILDING FOR VITO A. RIZZI
2871 WINDSOR HIGHWAY, TOWN OF NEW WINDSOR, N.Y.

Project No. 0413

05-06