

JUL 31 2012
TOWN OF NEWBURGH
TOWN CLERK'S OFFICE

Section 60, Block 3, Lot 40.2

TOWN OF NEWBURGH: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

-----X

In the Matter of the Application of

GAS DEVELOPMENT LEASE, LLC

DECISION

For area variances as follows:

- *Grant of a variance allowing a gas station to be located within 1,000 feet of an existing gas station;*
- *Grant of a variance allowing the total signage on the premises to be 520 square feet where 144 square feet is the maximum square footage allowed under the Code.*

-----X

Introduction

Gas Development Lease, LLC seek area variances¹ as follows: (1) a variance allowing a gas station to be located within 1,000 feet of another existing gas station; and (2) an area variance allowing the total square footage of the proposed signage to be 520 square feet where the maximum square footage allowed under the Code is 144 square feet.

The property is located at 1413 Route 300 in the IB Zoning District and is

¹ This matter comes before the zoning board upon a referral from the planning board. In their referral, the planning board indicated that *three* variances *may* be required. The applicant determined that the third variance – a prohibition against the construction of a gasoline dispensing or storage facility within 200 feet of a place of public assembly (Town Code section 185-28(F)) – was not required and thus seeks only the two variances addressed herein.

identified on the Town of Newburgh tax maps as Section 60, Block 3, Lot 40.2.

A public hearing was held on May 24, 2012, notice of which was published in The Mid-Hudson Times and The Sentinel and mailed to adjoining property owners as required by Code. The public hearing was continued until June 28, 2012 at which time it was closed.

Law

Section 185-28(G) of the Code of Ordinances of the Town of Newburgh [Zoning], provides as follows:

Before the planning board shall approve the plans for a car wash or motor vehicle service station, the board shall consider the potential interference with or danger to traffic on all abutting streets. The cumulative effect of all curb cuts or any such new use shall also be considered, and in no instance shall a new motor vehicle service station or any other establishment dispensing gasoline be permitted to be established within 1,000 feet in any direction from a lot on which there is an existing motor vehicle service station or other establishment dispensing gasoline. This prohibition shall not apply to gasoline or diesel fuel service facilities located in a travel center approved by the planning board.

Section 185(14)(B)(1)(c) limits the total square footage for all signs on a particular property to no more than one half of the street frontage of that property. In this case the above stated formula limits the total square footage for all signage to 144 square feet.

Background

After receiving all the materials presented by the applicant and upon hearing the testimony of Larry Wolinsky, Esq., Timothy Onderko, P.E. and John

Cappello, Esq. at the public hearings held before the Zoning Board of Appeals on May 24, 2012 and June 28, 2012, the Board makes the following findings of fact:

1. The applicant is the owner of a 3.03+/- acre lot (tax parcel 60-3-40.2) located at 1413 Route 300.
2. The lot is currently vacant. The applicant now proposes to erect three buildings on the lot which will include a gasoline station, a tire service center and a credit union.
3. The applicant's proposal is set forth in an application that includes a conceptual site plan prepared by Langan Engineering and Environmental Services dated February 1, 2012 and a signage plan prepared by Langan Engineering and Environmental Services dated April 4, 2012.
4. Additionally, the applicant's have submitted a Traffic Assessment prepared by Langan Engineering and Environmental Services which concludes that "it is our opinion that the site driveway will operate at an acceptable LOS [Level of Service]" and that the proposed project "could occur with no significant impact to the Union Avenue corridor."
5. This application provided the Board with the opportunity to review the definition of "Sign Area" as set forth in section 185-3 of the Town Code. Because the signage proposed by the applicant was located on a backdrop or awning that was identified with a color or theme that is associated with the proposed user of the building in question, the Code Compliance Department offered the opinion at the public hearing that the entire backdrop/awning would fall within the definition of

“Sign Area.” Code compliance therefore indicated at the hearing that the total area of the backdrop or awning should be included in the signage calculation². The Board notes, however, that the Code provides two separate, distinct and mutually exclusive ways to calculate sign area. Under the first analysis provided, when a sign is on a plate, is framed or is outlined, the entire area of such frame, plate or outline is included. Under the second analysis, when a sign consists of only letters, designs or figures, only the area of the letters, designs or figures is included in the calculation pursuant to the methodology provided in this portion of the Code. Upon due consideration of this matter, the Board finds that signage placed upon an awning or a backdrop, which signage is not enclosed on a plate, frame or outline, and regardless of the color or theme of the awning or backdrop, should be calculated based upon the methodology set forth in paragraph (2) of the definition of “sign area” as contained in the Code. This calculation – limited to the letters, designs and figures pursuant to the methodology provided in the Code – is therefore utilized by the Board herein to evaluate the variance requested relative to signage.

6. No members of the public spoke either in favor or against this application.

² Because this application was referred to the Zoning Board by the Planning Board, Code Compliance did not prepare any calculations regarding the total signage variance required. During the course of the hearing, however, Code Compliance did express views regarding the signage calculation which view ultimately led to the Zoning Board analyzing the “Sign Area” definition as applied to this application.

7. The applicant has been referred to the Zoning Board of Appeal by the Town of Newburgh Planning Board pursuant to correspondence from their counsel dated April 3, 2012.

After hearing the testimony at the public hearing and considering the materials received by the Board and after viewing the subject site, the Board decides as follows:

SEQRA

This matter constitutes an unlisted action under the State Environmental Quality Review Act. The Board has issued a negative declaration thereby determining that the application will have no adverse impact upon the environment.

GML 239 Referral

This application has been referred to the Orange County Planning Department for review and report. The Planning Department has reported that this matter is one for local determination, there being no significant inter-municipal or countywide considerations found to exist.

Findings

In reviewing the facts presented for the requested variances, the Board considered the five standards for determining whether the applicants have sustained their burden of proof as required by Town Law Section 267-b (3). Each factor has been considered relevant to the decision of the board of appeals, but no single one is viewed as precluding the granting of the variance.

(1) Undesirable Change—Detriment to Nearby Properties

The premises in question are located in the IB Zoning District. The use proposed by the applicant is a use that is permitted in the IB Zoning District. Thus, the use, in and of itself, as a permitted use, will not cause any undesirable change to the character of the existing neighborhood nor result in any detriment to any nearby properties.

The issue for the Board to confront when analyzing this factor as it relates to the variance requested regarding the 1000 foot separation between gasoline stations, however, is whether or not the traffic generated by this permitted use will cause an undesirable change in the character of this existing neighborhood or result in any undue detriment to properties within that neighborhood.³ The applicant has submitted a detailed Traffic Assessment prepared by Langan Engineering & Environmental Services. This traffic assessment concludes that that the proposed project “could occur with no significant impact to the Union Avenue corridor.”

Accordingly, based on an objective analysis of the engineering data provided, the Zoning Board of Appeals determines that the additional traffic generated by this application will not cause any undesirable change in this existing neighborhood nor result in any detriment to any nearby properties in this neighborhood.

The applicant's representatives further testified at the hearing that the proposed signage would be in harmony with this existing and well-established commercial neighborhood. The applicant also testified that the proposed sign-

³ A reading of the Code provision in question – 185-28(G) – reveals that the underpinnings of the prohibition against gasoline dispensing establishments being within 1,000 feet of each other is to minimize adverse traffic impacts. Specifically, the Code provision provides that the planning board shall “consider the potential interference with or danger to traffic on all abutting streets. The cumulative effect of all curb cuts for any such new use shall also be considered.”

age would not in any way result in any undesirable change to the neighborhood nor cause any detriment to any nearby properties. The applicant further testified that the signage proposed is appropriate as to scale and is in harmony with other buildings and signs in this commercial neighborhood.

No contrary evidence or testimony was submitted to the Board at the public hearing.

Absent any testimony or evidence indicating such, the Board cannot conclude that any undesirable change in the character of the neighborhood or detriment to the surrounding properties in that neighborhood will result from the buildings and signage proposed to be constructed by the applicant.

Accordingly, based upon the evidence and testimony submitted to the Board, the Board finds that issuance of the requested variances will not result in any serious, undesirable, detriment to the surrounding neighborhood.

(2) Need for Variance

Because the prohibition imposed by Section 185-28(G) is absolute, it is not feasible for the applicant to obtain the relief sought herein relative to the distance between gasoline stations without the issuance of a variance from this Board.

The applicant testified that signage of the quantity and of the size proposed was integral to the identification of their businesses. Given the size of the property in question and further given the fact that it has limited road frontage, it is clear that the difficulty confronted by the applicant cannot be overcome by any method, feasible for the applicant to pursue, except by issuance of the area variance.

Accordingly, the Board finds that the benefit sought to be achieved by the applicant cannot be achieved by any other method other than the issuance of the requested variance.

(3) Substantial Nature of Variances Requested

The variances requested are substantial. However, under the circumstances present here, and because the focus of the inquiry by the Zoning Board of Appeals is upon the character of the neighborhood in question, we believe, that the substantial nature of the variance requested does not prohibit the Board from granting the application.

(4) Adverse Physical & Environmental Effects

No testimony was given, nor was any evidence produced that would indicate that issuance of the requested variances would result in any adverse physical and/or environmental effects. The applicant testified that no such effects would occur.

(5) Self-Created Difficulty

The need for these variances is clearly self-created in the sense that the applicants are charged with the knowledge of the requirements of the Town of Newburgh Zoning Ordinance.

However, given the fact that the Board has determined that issuance of the requested variances will not result in any adverse impact upon the surrounding neighborhood and further given that the Board has determined that the variances requested is the minimum variances that may be issued to allow the applicant the relief sought, the Board determines that the self-created nature of the

hardship confronting the applicant is not a bar to issuance of the relief requested herein.

Decision

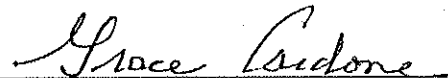
In employing the balancing tests set forth in Town Law Section 267-b (3), the Board hereby determines that the applicant has satisfied the requisites of Section 267-b and grants the variances as requested upon the following conditions:

1. The variances hereby granted are granted for the purpose of authorizing construction of what is shown on the plans or described within the application materials only. No construction other than as shown or described (architectural refinements aside) is authorized by this decision.
2. This approval is not issued in a vacuum but is rather one of two independent yet interconnected discretionary approvals (the other being within the jurisdiction of the Town of Newburgh Planning Board). As such, this grant of variance is conditioned upon approval of the application now pending before the planning board. This approval of the ZBA is intended to do no more than vary the specified strict limitation provisions of the Code identified; it is not intended to authorize construction of a particular building nor approve the footprint, size, volume or style thereof. The planning board remains possessed of all of its power and authority to review, limit, request modifications to, and to ultimately approve (absolutely or conditionally) any application in reference to this project as may come before it. Should the planning board require changes in the

size, location or configuration from what is shown on the plans before the ZBA that require greater or different variances, the applicant must return to the ZBA for further review and approval.

3. Section 185-55 [Procedure; construal of provisions; conflict with state law] of the Code of Ordinances of the Town of Newburgh provides, in subdivision "D," that this grant of variance shall become null and void at the expiration of six months from issuance, unless extended by this board for one additional six-month period. As noted above, this application is not decided in a vacuum but is rather tied to a specific application for approval pending before the Town of Newburgh Planning Board and this approval is conditioned upon the applicant diligently pursuing his application before that board. Provided that the applicant shall report to this board monthly on the progress of the application pending before the planning board, and provided that such reports demonstrate a diligent pursual of that application, the time period within which the planning board application is processed shall not be included within the initial six-month limitation of Section 185-55 D.

Dated: June 28, 2012



*Grace Cardone, Chair
Town of Newburgh ZBA*

By roll call a motion to adopt the decision was voted as follows:

AYES: Chair Grace Cardone
 Member Brenda Drake
 Member Ronald Hughes
 Member Michael Maher
 Member John McKelvey

NAYS: None

ABSENT: Member James Manley

STATE OF NEW YORK)
)ss:
COUNTY OF ORANGE)

I, BETTY GENNARELLI, Secretary to the Zoning Board of Appeals of the
Town of Newburgh, do hereby certify that the foregoing is a true and exact copy
of a Decision rendered by the Zoning Board at a meeting of said Board held on

June 28, 2012



BETTY GENNARELLI, SECRETARY

TOWN OF NEWBURGH ZONING BOARD OF APPEALS

I, ANDREW J. ZARUTSKIE, Clerk of the Town of Newburgh, do hereby certify
that the foregoing Decision was filed in the Office of the Town Clerk on

JUL 30 2012



ANDREW J. ZARUTSKIE, CLERK

TOWN OF NEWBURGH

O:\Irm\Town and Village Files\Newburgh ZBA\Gas Development Lease, LLC.doc