

PRIME TUVEL & MICELI

—•—•—•—•—•—•—
ATTORNEYS AT LAW

July 19, 2024

VIA EMAIL

Town of Newburgh Zoning Board of Appeals
21 Hudson Valley Professional Plaza
Newburgh, New York 12550
Attn.: Daniel J, Scalzo, Chairman

RE: 2 Lakeside Road, Newburgh (the “Property”) Quick Chek (the “Applicant”) Zoning Board of Appeals (the “Board”) Variance Application (the “Application”) Response to Objection Letter of James Bryan Bacon, Esq. on behalf of CPD Energy (“CPD”), dated July 11, 2024

Dear Chairman and Board Members;

We are possession of the objection letter from CPD to the Application. We would like to respond to CPD’s points, in defense of the Application, showing that the variance may be granted by the Board.

CPD’s first point relates to the language used in the Ordinance, Section 185-28(G) “*Supplemental Regulations Applicable to Certain Uses- Motor Vehicle Service Stations, Car Washes, and Rental Agencies*”. The full text of the section states:

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 for 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.

CPD’s assertion is that the words “in no instance shall” require that this prohibition be binding in all circumstances. The citation above, however, is clear in its reference to the ability of the **Planning Board** to approve of a gasoline station under these conditions, however it does not preclude a property owner from appealing to the Board for a variance from the zoning restrictions. Such a strict reading of this

supplemental regulation would serve to strip the power from the Board, precluding it from approving variances- which are this Board's sole jurisdiction and lawful role. As the Ordinance states in Section 185-54, the powers/role of the Board are:

The [ZBA] shall have all of the powers and duties prescribed by law and by this chapter...provided that none of the following shall be deemed to limit any power of the [ZBA] that is conferred by law.

Interpretation. To determine on appeal...the meaning of any portion of the text of this chapter **or of any condition or requirement specified** or made under the provisions of this chapter.

To authorize, upon appeal of a decision of the Building and Code Enforcement Officer and the **Chairman of the Planning Board**, such variances from the terms of this chapter as will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, there are unnecessary hardships or practical difficulties in the way of carrying out of the strict letter of this chapter, subject to terms and conditions to be fixed by the Zoning Board of Appeals...

The Ordinance is clear, the Board and only the Board has the power to interpret/override the existing zoning restrictions with the grant of a variance. There is nothing in the Ordinance which states, the Board may grant a variance from any provision, **except 185-28(G)**. While the Planning Board may be prohibited from granting approval for a gasoline station within 1,000 ft. of another- it does not mean this Board is unable to exercise that authority. CPD's reading would essentially remove the Board's authority to grant any variances in the Municipality.

This application is for an area variance, offering relief from the restriction within 185-28(G). As the board is aware, an area variance is one where it involved a "physical requirement" of the zoning regulations, *New York Zoning Law and Practice, 4th, Patricia Salkin*. The proximity restriction in 185-28(G) is one such physical requirement, and the Board has the ability to grant variances from any such requirement.

CPD cites to *Excellus Health Plan, Inc. v Serio*, 2 NY3d 166, 171 (2004) in support of its assertion, that a regulatory body may not interpret a statute beyond the clear meaning of the wording. We disagree with his reading and interpretation. Town Law 267-B is very clear regarding area variances, "The zoning board of appeals shall have the power, upon an appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law, to grant area variances as defined herein."

Again, to accept CPD's interpretation of *Excellus*, the Board would never be able to permit a variance from any provision or restriction in the Ordinance. The Ordinance does not enumerate the instances where the Board may grant a variance-it is in fact the opposite, granting the Board the power to grant variances or deviations from **any** zoning requirement, by reason of exceptional circumstances. In addition, we reiterate, the clear meaning of Section 185-28(G) refers only to the Planning Board, and makes no mention of this Board being unable to exercise its authority.

CPD further cites to *Akers Motor Lines, Inc. v New York*, 72 Misc 2d 751 (Civ Ct, Kings County 1972), to support its assertion that the use of the word "shall" means "*it is an imperative command indicating that certain actions are mandatory.*" However, in that same ruling the *Akers* Court also stated "*When found in a statute the word "shall" is not always imperative.*" It goes on to say that it [shall] may only be deemed mandatory absent ameliorating or qualifying language. The Newburgh Ordinance includes that ameliorating language, specifically in the exception for a travel center, this is secondary to the language of the powers granted to the Board to determine the meaning of any text of this Ordinance and to approve variances from any of the terms therein.

CPD's second point going to the legislative intent of the prohibition. He cites to *Gencarelli v Balint*, 11 Misc 2d 707 (Sup Ct, Westchester County 1958) wherein the Court upheld a restriction forbidding a gasoline station from opening up within 100 ft. of a soon to be developed nursery. The Court therein based their decision in part on the fact that gasoline stations are potentially dangerous uses, and it within the rights of local governments in the interest of public health and safety to limit their development.

We agree, safety may be a concern when it comes to the location of gasoline stations. However, *Gencarelli* was decided in 1958 and the Ordinance prohibition is also at least 30 years old. In the intervening decades, there have been major advancements in the safety of gasoline stations- which Quick Chek's operations manager has provided (attached hereto) and the Board will have the opportunity to review and take into account in evaluating the variance request. CPD, also dutifully points out that there is an exception included along with the prohibition in the Ordinance, namely that any gasoline or fueling station located within a travel center may be within 1,000 ft. of another gasoline service station. It would seem, based upon this exception, that safety due to gasoline storage is not a primary concern for the Town, or they would not allow travel centers, which are generally larger and with more pumps and storage tanks, to be within 1,000 ft. of each other.

In addition, as CPD points out- we should look to the language of the prohibition. The first sentence of 185-28(G) gives some indication in regards to the concerns at play, specifically, "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...**" These are the

concerns imputed the Planning Board in reviewing such an application. In that regard, we have submitted a traffic study prepared by Stonefield Engineering for the Board's review and they can make the determination that the proposed development can be built without any danger or interference to local traffic. The traffic study findings include:

1. There would be no perceptible impact to the level of service at the affected intersections with the new development
2. The Applicant will be making a number of improvements to the traffic along 17K, including; improvements to the signal at the corner of 17K and Lakeside Road, modify the Pilot driveway to provide a right-turn only lane, restripe Northbound 17K lanes to extend the left turn bay, upgrade the vehicle detection equipment on the existing signal, and reconstruct the corner of 17K and Lakeside Road

These findings/improvements should alleviate any concerns for traffic safety associated with the proposed development.

CPD also points out that the proposed development is within 1,000 ft. of two other gasoline stations. We contend CPD is incorrect in this assertion. The Pilot station located 150 ft. away from the proposed development falls within the "travel center" exception mentioned in the Ordinance. In essence, the requested variance is actually for development of a gasoline station located 372 ft. away from CPD's client. If the Pilot station were not to fall within this exception, it would mean the Board had granted the selfsame variance to one of those locations.

It should be noted, as determined by the court in *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 515 N.Y.S.2d 418, 422-23, 508 N.E.2d 130, 134-35 (1987), that "zoning laws do not exist to insure limited business competition" and the Board may not make their sole determination based upon any decrease in business for CPD.

CPD further seeks to usurp the authority of the Board by determining that "there are no exceptional or extraordinary circumstances" which would support the need for a variance, but that is not for him to determine.

As the Board no doubt is already aware, the analysis for granting an area variance relies on the 5-part test set under 267-B:

1. Will an undesirable change be produced to the detriment of nearby properties by granting the variances sought
2. Whether the benefit sought by the Applicant can be achieved by other means besides the variances
3. Whether the requested variances are substantial
4. Whether the requested variances will have an adverse impact on the physical or environmental conditions of the district
5. Whether the alleged difficulty was self-created

The Applicant is seeking a single area variance for the Property, relief from the 1,000 ft. proximity restriction imposed upon gasoline stations which are not “travel centers.” In looking at this application through the lens of the 5-part test, we believe we meet the burden on all elements.

Addressing these criteria, the Applicant is proposing to develop vacant land situated between two highways into a useful addition to the neighborhood. In addition, the Applicant will be making significant improvements to the traffic patterns and roadways, as detailed above. CPD claims the variance is substantial due to only being a separation of 372 ft. where 1,000 is required. We argue that the Property’s location along two major thoroughfares supports the assertion that the neighborhood can support an additional gasoline station without it being deemed “substantial.” As CPD points out, the Pilot travel center is only 150 feet away from its property, but both are able to co-exist, and as noted in the *Sun-Brite* case, economic impact to a neighbor alone is not enough to deny a variance. The grant of the variance will have no impact on the environmental or physical conditions of the district, as the Applicant is taking care to preserve the existing wetlands on the Property and will be tying into the existing sewer system to keep stormwater runoff to a minimum.

Lastly, CPD claims the actual hardship was “100% self-created” and offers a list of other permitted uses for the Property, this is incorrect. CPD offers that the Applicant may construct single-family homes, shopping center, or a theatre in the Zone, however these suggestions ignore the facts of the Property. The nature of this variance is related to the Property itself; its location at the intersection of 2 major thoroughfares makes it particularly unsuited for single family homes (and particularly well suited for a gas station), but also a significant percentage of the Property is comprised of protected wetlands and the required buffer area, meaning that approximately only 45% of the total area is actually developable. If the developer were able to make use of the full area of the Property, we could develop a gasoline station which met the required 1,000 ft. separation, but that is not the case, hence the hardship. Developing a theatre or any other use would require more and greater area variances than the proposed gas station.

There is no need to respond to CPD’s claims of 80% or 100% deviations as those numbers are incorrect, and the signage and buffer variances have been eliminated. The only remaining variance is for the development of a gasoline station 372 ft. from CPD’s business where 1,000 ft is required. It is up to the Board to determine if exceptional circumstances apply to the Property due to its unique location and orientation.

The Application is not for a special permit or change in use of the Property, it is for an area variance only. Ultimately, it is our contention that with the traffic impact study and traffic improvements prepared by Stonefield, the safety precautions taken by Quick Chek, and the submission related to the Property and its potential use, our application meets the burden for the grant of the proposed variance,

which is within the purview of the Board, and that the requested variance will not be injurious to the neighborhood or detrimental to the public welfare.