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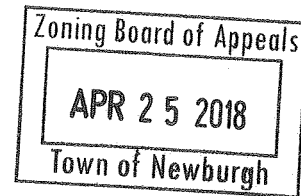
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April 25, 2018

Town of Newburgh Zoning Board of Appeal
308 Gardnertown Road
Newburgh, New York 12550

VIA HAND DELIVERY

RE: Appeal of WCC Tank Technologies
2102 Route 300, Town of Newburgh



Dear Chairman Scalzo and Honorable Board Members,

This firm represents Mr. James Manley, owner of 19 Forest Road, Wallkill, New York 12589. We submit this correspondence to the Board to respond to the applications of WCC Tank Technologies, Inc. (hereafter, "WCC") for an interpretation of a previous use variance granted to 2102 Route 300, Town of Newburgh (hereafter, "the premises") in 1982, or, in the alternative, a use variance for the premises.

I. Background.

On March 11, 1982 the Town of Newburgh Zoning Board of Appeals (hereafter, the "Board") approved a use variance (hereafter, the "1982 variance") that covered the subject premises so as to permit "the operation of a full tank lining business from premises located off Route 300 at Robles Lane, an AR Zone in the Town of Newburgh". See, Exhibit 1, pg. 1. According to the testimony of the Applicant given by him to the Board in support of his application for the 1982 variance, he described his "full tank lining business" to be one where "[w]e drive to a sight [sic] or location to where a tank is leaking, we repair the leaks and [then] put in fiber glass lining." See, Exhibit 2, pg.1.

On or about January 19, 2017, the Town of Newburgh Code Compliance Department (hereafter, "Code Compliance") submitted an application to this Board requesting an interpretation of the 1982 variance as to whether it permitted, *inter alia*,

the premises to be used for a “Hydro-excavation business”. *See*, Exhibit 3.¹ According to a website maintained by the Hydrovac, www.hydrovacinc.com, Hydro Excavation (“HE”) utilizes pressurized water and a vacuum system on board a large truck to remove dirt from a particular location.² A picture of one of the trucks used by the Defendant(s) to perform HE is attached hereto as Exhibit 4. The truck is a “Freightliner” on which the “Hydrovac device” is mounted.

This Board, after receiving oral and written public comments/submissions, issued a Decision on April 3, 2017, which, in pertinent part, found the 1982 variance did *not* permit:

- A. The premises to be used for and in support of a Hydro-excavation business; or,
- B. The premises to be used for and in support of the outdoor parking of a 2004-freightliner truck(s) on which a Hydrovac device is attached.

See, Exhibit 5 attached hereto, which is a copy of the Decision.

II. WCC’S request for an interpretation of the 1982 variance.

Now comes WCC in which it seeks from this Board an interpretation of the 1982 variance that holds that: (1) its use of the premises for the parking and storage of Hydrovac trucks is permitted under the 1982 variance as it is allegedly a permitted expansion of its existing business; and, (2) therefore, a building permit should issue for a new garage to house them. WCC requests fail for the following reasons.

First, WCC’s request should be summarily rejected because this Board last year held the 1982 variance did not permit the premises to be used for and in support of a Hydro-excavation business, or, the outdoor parking of a 2004-freightliner truck(s) on which a Hydrovac device is attached (i.e., a “Hydrovac truck”). *See*, Exhibit 5, pgs.7-8, ¶¶1(e) and 7. To put it squarely, if a Hydrovac truck is not currently permitted to parked on the premises, how does it become legally permissible to do so by parking it inside a structure on the premises? It is folly for WCC to take such a position.

Second, WCC’s claim that its use of/storage of Hydrovac trucks on the premises is a permitted expansion of its existing business of tank lining is false. To be sure,

¹ Note, for purposes of streamlining the relevant paperwork from the application submitted by Code Compliance, we have attached a copy of the “Additional Reasons” insert submitted by it in support of its previous application.

² On the website, Hydrovac lists the premises as its location and “Ira Conklin” as “Vice President.

WCC'S Hydrovac trucks perform "hydro excavation" services to customers regardless of whether a "tank" is involved in the excavation project they are used for. WCC's submission to the Board concedes this point when it describes what WCC'S Hydrovac trucks do:

Hydrovac is a specialized excavation business, which uses trucks with water powered excavation apparatus to remove soil (i.e., to "dig") in areas where it would be difficult or dangerous to excavate using traditional mechanical equipment (e.g., using a backhoe near water, sewer or gas lines).

See, pg. 3, Gaba correspondence, March 29, 2018.

Conspicuously absent from WCC's description here is any representation that a "tank" is involved with each excavation in which a Hydrovac truck is used.

In reality, WCC is not seeking expansion of its tank-lining business, but, rather, is making a thinly veiled attempt to start a general excavation business from the premises using Hydrovac trucks—which does not limit its customers to those who need their tanks lined.³ Hence, WCC's reliance upon *Angel Plants, Inc. v. Schoenfeld*, 154 A.D.2d 459 (2nd Dept. 1989) and *Scarsdale Shopping Center Associates, LLC v. Board of Appeals on Zoning for City of New Rochelle*, 64 A.D.3d 604 (2nd Dept. 2009) is erroneous. Those cases teach that a premises which has received a use variance is no longer considered a pre-existing, non-conforming use, and, therefore, any expansion of their existing business, for zoning purposes, is treated on equal footing with conforming uses (subject to any limitations imposed by the original use variance). They certainly do not hold that a premises which has received a use variance is then permitted, willy-nilly, to create a new business. However, that is exactly what WCC, admittedly, intends to do—i.e., turn the premises which supported a tank lining business to now supporting a general excavation business and a truck leasing business.

III. WCC'S request for a use variance.

WCC seeks a use variance which would permit the premises: (a) to support "4 Hydrovac trucks for excavation work on projects other than tanks"; and, (b) to support WCC's leasing of its 4 Hydrovac trucks to another company. *See*, pg. 4, Gaba correspondence, March 29, 2018.

As this Board is aware, Town Law § 267-b (2)(b)-(c) provides:

³ We suspect that is why WCC alternatively seeks a use variance "to use its four Hydrovac trucks for excavation on projects *other* than tanks". *See*, pg. 4, Gaba correspondence, March 29, 2018. Emphasis added.

No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused 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, (1) 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.

Bearing in mind those criteria, WCC's application to the Board falls way short of the evidentiary requirements to obtain a use variance. We shall address each criteria, *in seriatim*.

- A. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence.

WCC provides no financial information to the Board that its existing tank-lining business cannot realize a reasonable monetary return. Rather, in conclusory fashion, WCC claims that its "tank lining repair business is no longer financially viable as a stand-alone business" and that "[n]atural growth in the tank repair industry calls for expansion into related areas, such as the specialized excavation work performed by Hydrovac trucks." *See*, pgs. 4-5, Gaba correspondence, March 29, 2018. However, WCC overlooks that prevailing law holds that a landowner may not seek a variance to compete more successfully in the market, or to operate an existing business more efficiently, or, even to gain "the most profitable return" from the business. *DeFeo v. Zoning Bd. of Appeals of Town of Bedford*, 28 N.Y.S.3d 111, 115 (2nd Dept. 2016).⁴ Therefore, WCC flunks the first test for applying for a use variance.

- B. 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.

⁴ Glaringly absent from WCC's application is any financial information, such as the original purchase price of the property, the expenses and carrying costs of the property, the present value of the property, the taxes, the amount of any mortgages or other encumbrances, the amount of income presently realized, if any, or an estimate as to what a reasonable return on the entire property or any portion should be, which is required information to be presented to this Board. *Id.*

We do not concede that WCC has established a cognizable hardship under prevailing law, and, therefore, the Board need not reach this factor.

C. That the requested use variance, if granted, will not alter the essential character of the neighborhood.

WCC concedes that the subject premises is located in the “Agricultural Residence” (“AR”) zoning district.⁵ WCC further concedes that “[p]ermitted uses in the in the AR District are rather limited, consisting mostly of residential uses and agricultural uses with some limited commercial uses such as veterinarian’s clinic, commercial kennels and membership clubs.”⁶ Therefore, because most commercial uses were unlawful in this area, this Board, back in 1982, issued a use variance for the premises limiting its commercial use to “tank lining” given the overall character of the area, to this day, is bucolic and residential.

Now, by WCC’s own admission in its application, it seeks the ability to use the premises, in addition to its tank lining business, to support a general excavation and a truck leasing business. The limited use of the premises granted by the Board under the 1982 variance for tank lining, which struck a balance between the applicant’s economic hardship at that time, and the overall residential character of neighborhood, would be upended by adding additional commercial vehicle traffic to and from the premises as part of WCC’s new business operations, along with their attendant noise, dust, and exhaust fumes. Unquestionably, these consequences of WCC’s new business operations would alter the character of the neighborhood and weigh against the issuance of a use variance on this ground.

D. That the alleged hardship has not been self-created.

Just one year ago, this Board issued a Decision which interpreted that the 1982 use variance did not permit the premises to be used for and in support of: (a) a Hydro-excavation business; or, (b) Hydrovac trucks. *See*, Exhibit 5, pgs.7-8, ¶¶1(e) and 7. There is no dispute that WCC acquired its Hydrovac trucks *before* the Board rendered its aforesaid Decision. Therefore, because WCC acquired these Hydrovac trucks without first seeking an interpretation from the Board that the 1982 use variance would have permitted the premises to support them, WCC’s alleged hardship in connection with these trucks has been self-created, and, concomitantly its request for a use variance for the premises to now support them should be denied.

IV. WCC’s appeal from the Order to remedy.

⁵ *See*, pg. 1, Gaba correspondence, March 29, 2018.

⁶ *See*, pg. 1, Gaba correspondence, March 29, 2018.

In light of the fact WCC's arguments for an interpretation and/or a use variance fall flat for the foregoing reasons, WCC's appeal from the Notice to Remedy should be denied in all respects.

V. CONCLUSION

For the foregoing reasons, this Board should interpret the 1982 variance does *not* permit WCC to use the premises for the parking and storage of Hydrovac trucks as a permitted expansion of its existing business; and, therefore, a building permit should not issue for a new garage to house them. Moreover, WCC request for a use variance to support 4 Hydrovac trucks for excavation work on projects other than tanks, and, to support WCC's leasing of its 4 Hydrovac trucks to another company, should be denied in all respects. Therefore, WCC's appeal from the Notice to Remedy should be denied in all respects.

Very truly yours,



Kevin D. Bloom, Esq.

cc- Dickover, Donnelly, & Donovan, LLP
Attention: David A. Donovan, Esq.
28 Bruen Place
Goshen, New York 10924

cc- Client

TOWN OF HENNINGTON
ZONING BOARD OF APPEALS

In the Application of
WILLIAM C. CONKLIN,

DECISION AND
RESOLUTION.

The application of WILLIAM C. CONKLIN seeks a use variance to permit the operation of a full tank lining business from premises located off Route 300 at Hobbes Lane, an AA Zone in the Town of Hennington.

The applicant having submitted his application with short environmental assessment form annexed, paid the required fee, provided a true copy of the property description, submitted a plot plan and list of property owners within three hundred (300) feet, the matter was noticed for public hearing and notice thereof was mailed by the applicant to said owners and was sensed to be published by the Chairman of the Board and forwarded to the Orange County Planning Department for its review, and the hearing being conducted the Board thereupon entered into executive session and by motion duly made, seconded and passed adjourned consideration the application for the purpose of obtaining additional information, data and clarification, the application was then scheduled for the next regular meeting

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of the Board and the Chairman gave notice of the continuation of the hearing to the adjacent owners entitled to such notice and to such persons as had appeared at the initial hearing, and the adjourned hearing being conducted the Board thereupon entered into executive session and does find as follows:

1. That the procedural requirements of the Law of the State of New York, the Zoning Ordinance of the Town of Newburgh, and the regulations of this Board have been complied with in all respects.

2. The applicant is the owner of a 5.082 acre parcel and is the purchaser under contract for adjacent lands being an additional 3.4 acres. The parcel is presently improved by the applicant's residence and pool, a structure being approximately 150 foot by 25 foot and being utilized as garage, office and shed, two underground storage tanks, and parking for a variety of motor vehicles. At the time of this application the applicant is in violation of the Ordinance and this Board will not consider any self-imposed hardship that fact may impose.

3. The applicant seeks a use variance to permit the operation of applicant's fuel tank lining business from subject parcel, which also contains applicant's residence. Though the actual relining of fuel storage tanks is not done on the premises, all equipment and supplies required for such a service, are kept or stored upon the premises.

4. The applicant seeks specific permission for (1) an underground fuel storage tank of 6000 gal. capacity for diesel fuel, (2) an underground fuel storage tank of 1000 gal. capacity for unleaded gasoline, (3) an underground storage tank of 550 gal. capacity for bulk storage of acetone, (4) a 50 foot by 60 foot pole building, (5) a 25 foot by 25 foot stockade enclosure for the storage of empty barrels and (6) a chain link enclosure fence located along the entrance way of Route 300.

5. That up until November of 1981, applicant's business was conducted from the Ira D. Conklin property on Stewart Avenue in the Town of Newburgh. That property was insufficient for the operation of both businesses and applicant moved his operation to the present location, subject parcel. Any hardship that may be suffered by the applicant as a result of his present operation and changes will not be considered by this Board as the same is deemed to be self imposed and created.

6. The subject parcel, being the acreage in title to the applicant plus the additional parcels subject to contract of sale, was previously the subject of a subdivision for residential development. The testimony presented to the Board, however, indicates that the land is not suited for residential use by reason of the very low ground and underground springs and that, though on the market for many years, it has not been marketable for residential use, though the one owner stated that he has had four offers that would involve various commercial uses. This

Board is satisfied from the evidence presented that the subject parcel, as hereinbefore described, cannot be utilized for residential purposes.

7. That at both public hearings a number of area residents voiced objections to the granting of the relief sought by this application, those objections may be summarized as follows:

- a. that the granting of a use variance for this parcel will "open the door" for an onslaught of variance application and/or will set a precedent,
- b. from a neighbor to the effect that such use will decrease property values and that she does not want to look at it.

8. That each application for a variance of any kind is individual and is heard upon its own merits. There is no precedent set by the granting or denial of any variance application. Applications for variance have traditionally been based upon the needs of an individual owner, not the past record of considerations of the Zoning Board of Appeals.

That if this Board properly discharges its obligations, the subject parcel should have no effect upon values of surrounding properties and should not represent an annoyance for its neighbors.

THERE BEING NO FURTHER FINDINGS REQUIRED of this Board, the Building Inspector is hereby authorized to issue a permit to

WILLIAM C. CONKLIN, as follows:

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

Subject however, to the following terms and conditions:

1. the fuel storage tanks shall be located as shown on the accompanying site plan,
2. the acetone storage tank shall be located no nearer than 50 feet from any property line and no nearer than 10 feet from any structure and such location shall be subject to the approval of the Fire Inspector of the Town of Newburgh,
3. the pole building shall be located as shown on the accompanying site plan, the size of which may be increased if needed by the applicant,
4. the stockade enclosure shall not be located at any point less than 150 feet set back from any property line and at no time shall the storage of empty drums exceed twenty (20) such drums,
5. the chain link fence shall be located and constructed in accord with the provisions of the Zoning Ordinance,
6. that along the northerly line of subject parcel, beginning at a point adjacent to the accessory building and continuing to a point 200 feet along the westerly line, applicant shall provide a green belt buffer covering a depth of twenty-five feet from each said line planted with a screen of ever-green having a uniform height of not less than

five foot above ground level at the time of planting and set in a double staggered row spaced eight foot apart on each row, said screening to be properly and effectively maintained.

DAIRD: Newburgh, New York
March 17, 1982.

William N. Gase
Act. Chmn.

VOTING APPLICATION OF WILLIAM C. CONKLIN

RICHARD RASKIN	VOTE	AYE
RALPH L. HOLT	VOTE	AYE
DOUGLAS CARLE	VOTE	AYE
JOHN P. DELESSIO	VOTE	AYE
JAMES A. SARVIS	VOTE	AYE

DATED: March // , 1981,
Newburgh, New York



W. C. Conklin

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PRESENT: Richard Raskin, Acting Chairman
Charles W. Beck, Jr., Attorney
Doris A. Beck, Secretary
James A. Sarvis
Douglas Carle
John P. DeLussio
Paul Blanchard

Application of: William C. Conklin

Mr. William C. Conklin seeks a use variance to permit the operation of a full tank lining business from premises located off Route 100 at Robles Lane, an AR Zone in the Town of Newburgh. All mailings were in order.

Mr. Raskin: Do these 6000 gal. tanks currently exist in the ground now.

Mr. Conklin: Yes... I put them in the ground and then found out I couldn't use them. I do relining of underground storage tanks... New Jersey, New York and Delaware.

Mr. Raskin: What would be stored in these tanks.

Mr. Conklin: Fuel.

Mr. Raskin: How much equipment do you plan on having.

Mr. Conklin: There are two tractor trailers, straight tractor and pick ups. They are travelling factories. We drive to a sight or location to where a tank is leaking, we repair the leaks and put in a fiber glass lining.....

Mr. Raskin: The material that lines the tanks, do you plan on keeping that on the sight.

Mr. Conklin: Yes.

Mr. Raskin: What does that consist of.

Mr. Conklin: It's a polyester material.

Mr. Raskin: It is in a granual form or is it in a liquid form.

Mr. Conklin: It's like a pudding.

Mr. Raskin: Where would you store that.

Mr. Conklin: On the property.

Mr. Raskin: Where.

Mr. Conklin: Outside.

Mr. Raskin: How many would you have at one given time.

Mr. Conklin: Ten, fifty gallon drums.

Mr. Raskin: Is this flammable or toxic.

Mr. Conklin: No it's non-toxic, but you can't eat it.

It's non-toxic if you breath it.

Mr. Raskin: What is the chemical use.

Mr. Conklin: It's a polyester TL3-80. These drums are already prepared, there is no mixing.

Mr. Raskin: Your lot is an acre and a half.

Mr. Conklin: Yes.

Mr. Conklin explained to the board the overall acreage that he owns, and additional land he is in the process of becoming titled too. His means of ingress and egress was demonstrated to the Board according to the map submitted and presented to the Board.

Mr. Raskin: How many people do you employ.

Mr. Conklin: I have nine right now. Office help and drivers.

Mr. Raskin: When would the trucks go out.....approximately the same time every day?

Mr. Con-

Mr. Conklin: Usually...right now both of the trucks are out on sight and they don't return until the job is completed. They come back to the site fill up....lead up and go to another location. They are a travelling factory. They do not run in and out at night. Office area was pointed out to the Board. The tanks are in full view of the office so there is no supervision needed for the tanks. The chemicals are stored outside until I, Mr. Conklin, can get enough money to erect a storage area. These chemicals are not explosive... they are flammable. Under high temperatures in the summer these drums do not have to be stored in a cooling system. These drums are hauled in by a common carrier. There are no restrictions to how they are handled. Fuel will be stored in the tanks....6000 gal. diesel fuel and 3000 unleaded.

Mr. Beck: Mr. Conklin, is there an office on this site where your entire business is conducted.

Mr. Conklin: Yes.

Mr. Beck: The people that you use in the conduct of your business, is not done specifically on the site, they go to another location.

Mr. Conklin: Yes. They load the trucks and go to the particular area in need of our service.

Mr. Beck: How long has your business been conducted from this site.

Mr. Conklin: I moved into my office on the 11th of November, 1981. I was on Stewart Avenue prior to that with Ira D. Conklin & Sons.

Mr. Harkin: Do you store any other chemicals on the site other than what you mentioned.

Mr. Conklin: Yes acetone. They are stored in drums in a covered area. That is explosive and flammable...it is in the same category as gasoline. It is highly explosive.

Mr. Jack: Are there any other agencies, such as fire inspector, etc., you must satisfy as to storage of these drums other than the Town of Newburgh Building Inspector.

Mr. Conklin: No, not to my knowledge. I use common sense in the storing of these drums and my years of experience.

Further questions were asked of Mr. Conklin regarding other locations in the Town of Newburgh for his business.


There were STRONG OBJECTIONS from the audience. Objections were heard from Joan Perry, Mary Lou Bateman and Peter Chase.

Mr. Joseph Radd, a workman, spoke in favor of this operation and the safety of the operation.

Hearing closed.

I CERTIFY that the foregoing is a full and complete transcript of the hearing conducted.

March 2th, 1982.


Doris A. Seck, Secretary

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Code Compliance Request for Interpretation
of the Meaning of the Conditions and Requirements of
ZBA's March 11, 1982 Decision and Resolution made
pursuant to Zoning Code Section, now denominated as, 185-54

Insert for Item No. "7"

The Code Compliance Department (the "Department") seeks an interpretation of the Board's March 11, 1982 Decision and Resolution (the "Decision"), which, in turn, granted a use variance pursuant to Town Code section 185-54(B) ("Powers and duties. Variances") regarding the subject parcel, 3-1-21.61 & 3-1-21.31, located at 300 Robles Lane in the Town (the "Premises"). According to the Decision, Applicant William C. Conklin sought "a use variance to permit the operation of a fuel tank lining business" from the Premises. Decision, at page 1. The Decision granted such a variance and directed the Building Inspector to issue Mr. Conklin a permit for several in ground fuel storage tanks, a pole building, both stockade and chain-link fence enclosures and the "business use of the accessory building". See Decision at unnumbered and handwritten page 5.

The findings and the conditions set forth in the Decision do not define or describe the nature of Mr. Conklin's fuel tank lining business. Neither do such findings and conditions establish any parameters for the permitted uses of the accessory building related to the fuel tank lining business. The Decision does not list or describe the uses and/or activities which may be conducted on the Premises. As such, it is not possible for the Department to assess whether the uses and/or activities, which several Town residents assert are occurring on the Premises, fall within the Board's intended scope of the use variance granted in the Decision and are permitted.

In light of the above, the Department seeks an interpretation regarding whether the following on-site uses and/or activities would fall within, and be permitted under, the use variance granted in the Decision:

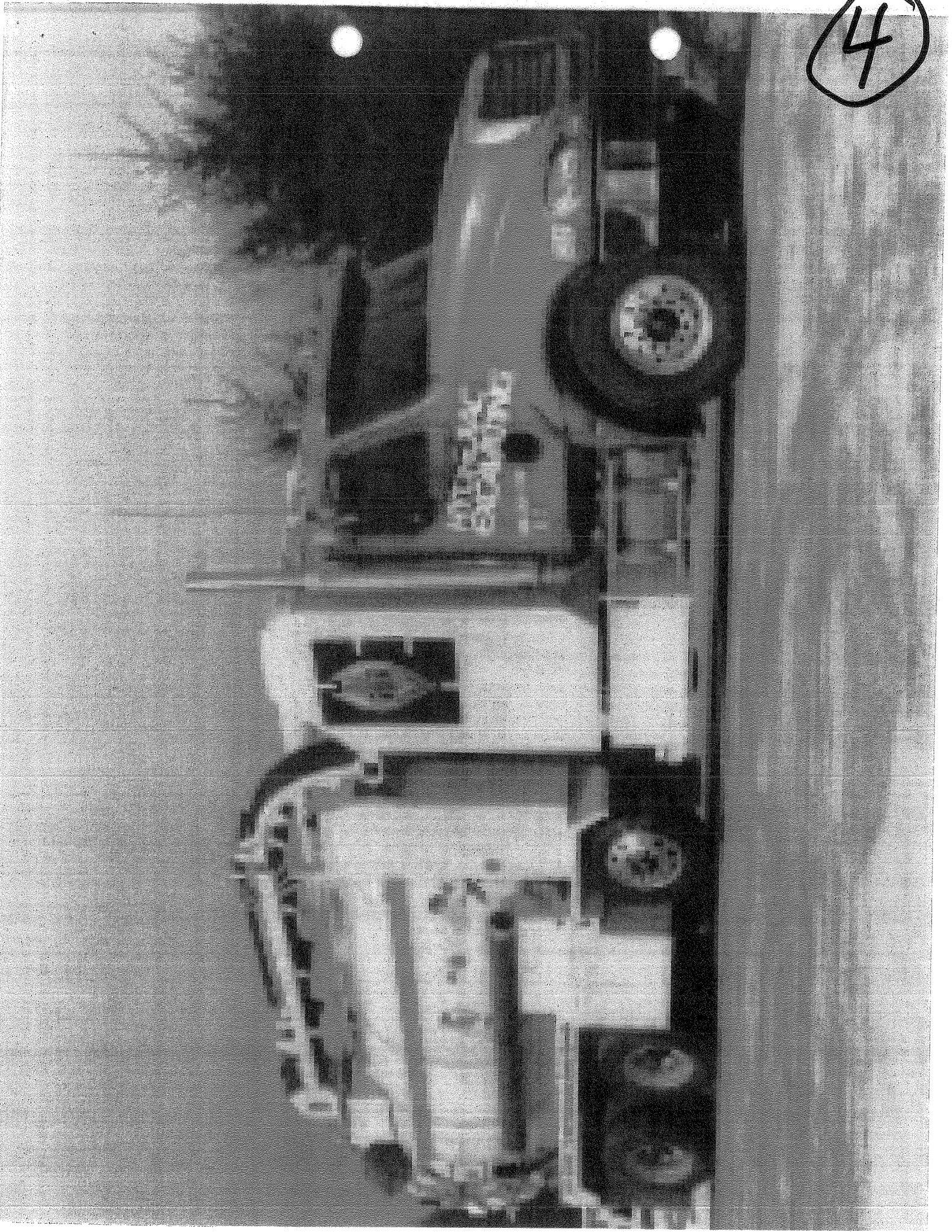
1. The use of the Premises for and in support of the following off-site services:
 - a. Underground and aboveground fuel storage tank reconditioning, including lining;
 - b. Underground and aboveground fuel storage tank testing;
 - c. Underground and aboveground fuel storage tank excavation;
 - d. Underground and aboveground storage tank compliance; and
 - e. Hydro-excavation business.
2. Outdoor storage of heavy equipment, including ploughs, land-grading equipment, etc.;
3. Depositing on the surface of the Premises a slurry consisting of soil and related materials that have been liquefied using highly-pressurized water injected into the ground and

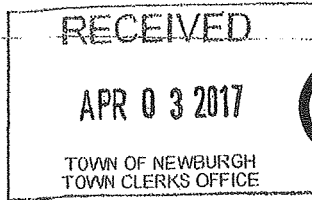
simultaneously extracted by a powerful combined vacuum and storage device (known as a "Hydrovac", which was constructed by Presvac Systems of Burlington, Ontario);

4. Operation of the Hydrovac device on the Premises for the depositing of the soil slurry onto the surface of the Premises, with resultant mechanical and operational noise;
5. Outdoor parking of pickup truck(s) operated by a business;
6. Outdoor parking of semi-truck(s) and trailer(s) operated by a business;
7. Outdoor parking of a 2004 Freightliner truck(s) on which is mounted a Hydrovac device;
8. Outdoor presence on the surface of the Premises of storage containers, shipping containers and like mobile/portable enclosures designed for storing items and materials; and
9. Outdoor work activities conducted by the employees and agents of the businesses in furtherance of the uses identified in "1" above.

The Department notes that this request for an interpretation is not intended to encompass any alleged violations of New York State law or of the Town Code which may currently exist on the Premises. Rather, the purpose of this request is limited to obtaining an interpretation of the Decision regarding whether the above enumerated uses and/or activities would fall within, and be permitted under, the use variance granted in the Decision. The Department has received complaints from residents alleging that said uses and/or activities are occurring on-site. However, the Department has made no determination whether said uses and/or activities are actually taking place nor has the Department commenced any proceeding to make such a determination. The Department requires the requested interpretation in order to decide whether the alleged uses and/or activities are permitted and, if not, whether an enforcement action is appropriate, necessary or required.

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Section 3, Block 1, Lots 21.61 & 21.31

TOWN OF NEWBURGH: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

-----X

In the Matter of the Application of

TOWN OF NEWBURGH CODE COMPLIANCE
DEPARTMENT

DECISION

For relief as follows:

- *An interpretation of the extent of the uses that were permitted pursuant to a Decision and Resolution granting a use variance issued by the Town of Newburgh Zoning Board of Appeals dated March 11, 1982.*

-----X

Background

This matter involves the interpretation of the parameters of a 1982 Decision and Resolution issued the Town of Newburgh Zoning Board of Appeals ("ZBA").

Specifically, the Town of Newburgh Code Compliance Department ("Code Compliance") has made application to the Town of Newburgh Zoning Board of Appeals ("ZBA" and/or the "Board") pursuant to Town Code Section 185-54(A)(1) seeking an interpretation "regarding whether the following [enumerated] onsite uses and/or activities which fall within, and [are] permitted under, the use variance granted in the decision¹" dated March 11, 1982. A copy of that Decision and Resolution is appended to this decision.

¹ See Application of Town of Newburgh Code Compliance, dated January 19, 2017.

The Decision and Resolution issued by the ZBA in March of 1982 granted a use variance to permit the operation of a "fuel tank lining business" at premises located off Route 300 on Robles Lane. The said property is identified on the Town Tax Map as Section 3, Block 1, Lot 21.61. It is located in the AR Zoning District.

It appears that business activities have been ongoing on the premises for the 35 +/- years since the issuance of the use variance by the ZBA. Based upon information provided to the Board during the public hearing process, it further appears that, over the course of the past several years, neighbors residing in the vicinity of the property have made complaints to Code Compliance that the activities currently being conducted on the premises are different from and therefore not permitted by the use variance issued by the ZBA in March of 1982.

Code Compliance now seeks guidance from the ZBA as to the scope of the use variance granted in 1982.

The Application Before the Board

In an application dated January 19, 2017, Code Compliance, pursuant to Section 185-54(A)(1) of the Code of the Town of Newburgh, has requested an interpretation regarding whether certain uses and/or activities fall within, and are permitted under, the terms of the use variance. Code Compliance states in their application that they have made no determination as to whether or not the uses for which they now seek guidance are actually occurring on the premises. Rather, the interpretation is requested "in order to decide whether the alleged uses and/or activities are permitted and, if not, whether enforcement action is appropriate, necessary or required."

The specific uses for which Code Compliance seeks guidance on the issue of whether or not they were encompassed by the 1982 use variance are as

follows:

1. The use of the Premises for and in support of the following off-site services:
 - a. Underground and aboveground fuel storage tank reconditioning, including lining;
 - b. Underground and aboveground fuel storage tank testing;
 - c. Underground and aboveground fuel storage tank excavation;
 - d. Underground and aboveground storage tank compliance; and
 - e. Hydro-excavation business.
2. Outdoor storage of heavy equipment, including ploughs, land-grading equipment etc.;
3. Depositing on the surface of the Premises a slurry consisting of soil and related materials that have been liquefied using highly-pressurized water injected into the ground and simultaneously extracted by a powerful combined vacuum and storage device (known as a "Hydrovac,;" which was constructed by Presvac Systems of Burlington, Ontario);
4. Operating of the Hydrovac device on the Premises for the depositing of the soil slurry onto the surface of the Premises with resultant mechanical and operational noise;
5. Outdoor parking of pickup truck(s) operated by a business;
6. Outdoor parking of semi-truck(s) and trailer(s) operated by a business;
7. Outdoor parking of a 2004 Freightliner truck(s) on which is mounted a Hyrovac device;
8. Outdoor presence on the surface of the Premises of storage

- containers, shipping containers and the like mobile/portable enclosures designed for storing items and materials; and
9. Outdoor work activities conducted by the employees and agents of the business in furtherance of the uses identified in "1" above.

Materials Considered By the Board

1. Application of Code Compliance dated January 19, 2017 to which the Decision and Resolution issued in March of 1982 was attached ;
2. Submission of Kevin D. Bloom, Esq. counsel for Susan D. Carroll, Lawrence S. Van De Mark and Claudia Van De Mark;
3. Affidavit of Susan D. Carroll duly sworn February 14, 2017;
4. Affidavit of Joan L. Perry duly sworn February 7, 2017;
5. Various photographs of the premises in question which are on file in the ZBA office;
6. Multiple items of correspondence from the public all of which are on file in the office of the ZBA and all of which assert that the use presently made of the premises is different from the use approved by the ZBA in March of 1982;
7. Extensive public comment received during the public hearing;

In rendering the determination herein, the ZBA was not able to review and/or consider the original application seeking the use variance that was ultimately granted in March of 1982 or review and/or consider any materials, such as a site plan, that may have been submitted with the application and would have

assisted *this* Board in determining the exact information considered in 1982 in rendering the use variance as that information could not be located by Code Compliance.² While it would have been helpful to have this information, the Board is constrained to proceed based upon on the information and materials that have been submitted and that are described above.

Public Hearing

A public hearing was held on February 23, 2017 notice of which was published in *The Mid-Hudson Times* and *The Sentinel* and mailed to adjoining property owners as required by Code. Extensive public comment was received and considered by the Board. The minutes of the Board meeting are on file in the ZBA office.

SEQRA

Requests for interpretations are designated as Type II actions under SEQRA. {see 6 NYCRR 617.5(31)} As such, this application is not subject to review under SEQRA.

GML 239 Referral

Requests for interpretations are not required to be referred to the Orange County Planning Department for review and report.

Decision

Prior to addressing each item for which Code Compliance seeks guidance, the Board wishes to repeat and emphasize that it is constrained to render

² See transcript of February 23, 2017 ZBA meeting at pages 2-3.

this Decision based upon the information that has been submitted for consideration which information does *not* encompass the entirety of the information that would have been considered by the ZBA prior to the issuance of the use variance in March of 1982. Subject to this important caveat, and based upon the information given to the Board, and further based upon all of the testimony given at the public hearing and upon consideration of all of the written materials submitted referenced hereinabove, and after due consideration and deliberation, the Board hereby finds and answers the inquiries of Code Compliance as follows:

1(a) Did the March 1982 use variance allow the premises to be used for and in support of underground and aboveground fuel storage tank re-conditioning, including lining?

The Board finds that the 1982 use variance did authorize use of the premises for this specific use.

1(b) Did the March 1982 use variance allow the premises to be used for and in support of fuel storage tank testing?

The Board finds that the 1982 use variance did authorize use of the premises for this specific use.

1(c) Did the March 1982 use variance allow the premises to be used for and in support of underground and aboveground fuel storage tank excavation?

The Board finds that the 1982 use variance did authorize use of the premises for this specific use.

1(d) Did the March 1982 use variance allow the premises to be used for and in support of underground and aboveground fuel storage tank compliance?

The Board finds that it has insufficient evidence to make a determination if the 1982 use variance authorized the use of the premises for this specific use.

1(e) Did the March 1982 use variance allow the premises to be used for and in support of a Hydro-excavation business?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

2. Did the March 1982 use variance allow the premises to be used for and in support of the outdoor storage of heavy equipment, including ploughs, land-grading equipment etc.?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

3. Did the March 1982 use variance allow the premises to be used for and in support of the depositing on the surface of the premises a slurry consisting of soil and related materials that have been liquefied using highly-pressurized water injected into the ground and simultaneously extracted by a powerful combined vacuum and storage device (known as a "Hydrovac," which was constructed by Presvac Systems of Burlington, Ontario)?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

4. Did the March 1982 use variance allow the premises to be used for and in support of the operation of the Hydrovac device on the premises for the depositing of the soil slurry onto the surface of the premises, with resultant mechanical and operation noise?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

5. Did the March 1982 use variance allow the premises to be used for and in support of the outdoor parking of pickup truck(s) operated by a business?

The Board finds that the 1982 use variance did authorize use of the premises for this specific use.

6. Did the March 1982 use variance allow the premises to be used for and in support of the outdoor parking of semi-truck(s) and trailer(s) operating by a business?

The Board finds that it has insufficient evidence to make a determination if the 1982 use variance authorized the use of the premises for this specific use.

7. Did the March 1982 use variance allow the premises to be used for and in support of the outdoor parking of a 2004-freightliner truck(s) on which is mounted a Hyrdovac device?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

8. Did the March 1982 use variance allow the premises to be used for and in support of the outdoor presence on the surface of the premises of storage containers, shipping containers and like mobile/portable enclosures designed for storing items and materials?

The Board finds that the 1982 use variance did not authorize use of the premises for this specific use.

9. Did the March 1982 use variance allow the premises to be used for and in support of outdoor work activities conducted by the employees and agents of the business in furtherance of the uses identified in "1" above?

The Board finds that the 1982 use variance did authorize use of the premises for the specific uses described in connection with items 1(a), 1(b), 1(c) and did not authorize use of the premises for this specific uses described in connection with items 1(d) and 1(e).

The foregoing constitutes the decision of the Board. As reflected in the meeting minutes, each item set forth above was voted on independently and the results of each vote was unanimous among the five (5) Board members who.

were present at the meeting on March 23, 2017 when the vote was held.

Dated: 4/3/17

John McKelvey
John McKelvey, Vice-Chair
Town of Newburgh ZBA

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

AYES: Member Darrell Bell
 Member John McKelvey
 Member John Masten
 Member Richard Levin
 Member Darrin Scalzo

NAYS: None

ABSENT: Chair James Manley
 Member Michael Maher

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 February 28, 2013.



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

APR - 3 2017



ANDREW J. ZARUTSKIE, CLERK

TOWN OF NEWBURGH