LEGAL ANALYSIS OF VILLAGE OF MAMARONECK VILLAGE CODE RELATING TO INTERPRETATION FOR CHOP'T MAMARONECK

SUBMITTED ON BEHALF OF CHOP'T CREATIVE SALAD COMPANY LLC

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INTERPRETATION FOR CHOP'T CREATIVE SALAD COMPANY LLC (D/B/A CHOPT MAMARONECK LLC)

POINT I

WHAT CHOP'T IS

CHOP'T is salad reimagined. CHOP'T is known in the restaurant industry as being the "Fast-Casual Salad Concept." It allows for patrons to choose from dozens of ingredients and individually customize each step of their entrée from the type of greens, to various vegetables and proteins, to the amount of salad dressing that is used. Simply put, a CHOP'T patron would never see a 'prepackaged container' or "prepackaged meal' upon entering the establishment. The business model has changed over time and is now more focused on making sure that its patrons can enjoy a fresh-made to order salad in a variety of ways, including pre-ordering with car service. The ability to allow customers to order seamlessly from wherever they are allows for the flexibility and convenience that almost every restaurant is striving to achieve. The demands of the restaurant industry as a whole are requiring restaurants to increase accessibility to their meals and arriving at an innovative and contactless means to do so.

A quick search on Open-Table or on Google for restaurants in Mamaroneck will immediately show how one can order food at every restaurant (dine-in, carry-out, delivery, contact-less). Indeed, upon a diligent search, we could not find any restaurant that allowed for dine-in that did not also allow for take-out or delivery. Whether it is reserving tables on-line through an app or ordering customized salads to pick up or for delivery, restauranteurs must meet the demands of its patrons. As such, CHOP'T's business operations are changing to still allow for patron fast casual seating inside the restaurant but also for easier access for delivery and pick up. Just as an example, a guardian or caretaker with two small children should be accommodated and could much more easily pick up two salads through a car service option as compared to parking, pushing a stroller across a parking lot, entering the restaurant, and then walking back through the parking lot with his or her hands full of salad while navigating a stroller.

A. INDUSTRY STANDARDS

The Institute for Traffic Engineers (ITE) provides several definitions of different types of restaurants.[1] According to the ITE, a "Fast Food Restaurant" is a type of type of restaurant that is characterized by a large drive-thru clientele, long hours of service (some are open late night or 24 hours a day) and a high turnover rate for eat-in customers. The defined industry term for a fast-food establishment is a "quick-service restaurant," or [hereinafter referred to as "QSR"]. It is most easily understood by thinking of such dining concepts as McDonald's, Wendys, KFC, and Burger

[1] A copy of the relevant definitions contained ITE Trip Generation Manual, 10th Edition are annexed hereto as **Exhibit A**.

King. Fast food/QSRs have price points of approximately $4.00 to $7.00 per meal, with pizza chains typically running just a bit more[2].

According to Franchise Direct, the Market Definition of a fast-food restaurant is known as a QSR and is described as a limited menu establishment which lends itself to production line techniques of producing food that is served and packaged for immediate consumption, on or off the premises. Fast food customers normally order at a counter and pay before eating.

As further explored in this Memo, CHOP'T does not fall within the definition of a "Fast Food Restaurant" [by industry standard or the Mamaroneck Village Code] as the primary goal is not how fast it can deliver the food. Rather, the focus of CHOP'T is to prepare customized made to order salads or wraps to its patrons. Furthermore, the price point of CHOP'T is $12.00.

B. CHOP'T IS A RESTAURANT THAT IS "**FAST CASUAL**"

Again referring to the ITE standard, a "Fast Casual" restaurant is defined as "a sit down restaurant with no wait staff or table service. Customers typically order off a menu board, pay for food before the food is prepared and seat themselves. The menu generally contains higher quality made to order food items with fewer frozen or processed ingredients than fast food restaurants."

The Village Code defines Restaurant as:

> A business engaged in the preparation and sale of food and beverages selected by patrons seated at a table or counter, served by a waiter or waitress and consumed on the premises. The term "restaurant" does not include a business whose principal operation is as a bar, cabaret, carry-out restaurant, delicatessen or fast-food restaurant. No drive-up car service shall be permitted. Car service shall be permitted by special use permit only.

Additionally, the Village Code defines "Car Service" as "Service from a restaurant provided to customers remaining in their vehicles and parked in a designated parking area of the restaurant parking lot."

Breaking down the Village's definition of "Restaurant", CHOP'T is a business engaged in preparing and selling food to patrons. The patrons select their food and watch their custom salad (or menu described salad) prepared at a counter. If the patron is staying to dine-in, the salad or bowl is prepared by CHOP'T employees provided with reusable dishes and flat ware. If the patron decides to take the meal to-go, the combined made to order ingredients are placed into a carry-out bowl. There is nothing that is prepared ahead of time and the entrée is created only after the patron submits the order. The only portion of the definition that is not met is the patron being served by wait staff.

There is no prohibition for a restaurant to have take-out service. Indeed, CHOP'T is a restaurant that provides for take-out or delivery service just as any other fine-dining restaurant in

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[2]Annexed hereto as **Exhibit B** are copies of the various industry standard regulations referenced in this Memo.

Mamaroneck. Finally, as set forth in more detail below, CHOP'T is not a business whose principal operation is as a bar, cabaret, carry-out restaurant, delicatessen or fast-food. The operations of CHOP'T squarely fit into the accepted industry standard definition of a "Fast Casual" restaurant.

As an integral and necessary part of its application, CHOP'T Mamaroneck is also seeking a special permit for Car Service (defined above)[3]. The Car Service component falls squarely within the Village's intent and purpose for allowing car service and serves as an essential component for CHOP'Ts operation and financial viability. CHOP'T Mamaroneck is proposing to use one of the existing drive thru lanes previously used by HSBC as the designated car service area with the parking lot. This allows for the car service to be located on-site and does not create any traffic congestion along Boston Post Road. Importantly, the pre-existing car service lane is unique in that it was previously designed so that it does not impair the circulation of vehicles and pedestrian on site and requires a patron to immediately exit the site onto Boston Post Road. Whereas Fast-Food Restaurants often have parking areas available after a patron picks up the meal at a drive thru window, CHOP"T Mamaroneck does not provide any parking areas for people to use and eat while in their car. The current site layout allows for the easy and constant flow of patrons who wish to park and dine in or to pick up their food and exit.

The applicant would also be willing to post signs to advise patrons that the Village prohibits idling for more than three (3) minutes. As previously communicated, those patrons opting for car service will have already ordered and paid for their meal [offsite] and will require less than thirty (30) seconds to pick up their food, thereby avoiding any lengthy duration onsite – this is efficient car service[4]. Moreover, those patrons who are opting to use car service will be given a designated pick-up time so that patrons are not waiting for their food to be prepared for any lengthy period of time. After the meal is ordered remotely and a pick-up time is provided, CHOP'T subsequently texts its patrons that the food is ready so that the patron does not arrive early. Additionally, as to further avoid any possible congestion, CHOP'T limits the number of pickup orders in a15-minutes time slot so there is a pre-determined cap to ensure sufficient time to prepare orders and have seamless pickup. Finally, car-service is an accessory use to a Restaurant. *See,* *Matter of Serota Smithtown LLC v. Town of Smithtown Board of Appeals*, 990 N.Y.S.2d 440, 43 Misc.3d 206(A) (2d Dept 2014) where a court did not disturb a finding that curb service was an accessory use to a counter-service restaurant.

i. CHOP'T'S BUSINESS MODEL – IT IS A "DESTINATION" RESTAURANT AND NOT A TYPICAL "CONVENIENCE" FOOD SERVICE.

CHOP'T, contrary to most fast-food chains, is a destination and is **not** a QSR that advertises quick stop eating for travelers. Moreover, CHOP'T does not have signage or other promotional material placed on major interstates or near exits to attract the wayward

[3] While the Applicant has a pending application for an interpretation and a special permit, the Applicant will be seeking to amend its existing application for a special permit for Car Service for February 4, 2021.

traveler for a quick bite or a midnight coffee and its business model is not focused on pre-cooked or pre-packaged meals.

POINT II

WHAT CHOP'T IS NOT

A. CHOP'T IS NOT FAST FOOD OR CARRY OUT

i. CHOP'T IS NOT PROPOSING A CARRY-OUT, DRIVE-IN, DRIVE-THRU OR CURBSIDE RESTAURANT

1. Under the Village Code, the Village has defined a few different types of eating establishments. However, CHOP'T does not fall under any of the other defined terms. Restaurant, Carry-Out, is defined as:

> **A business primarily engaged in the retail sale of food or beverages, which may include grocery items, for consumption off the premises, but which also includes the incidental sale of ready-to-consume food and beverages from a counter-type installation for consumption on the premises, provided that the area devoted to customer seating is clearly accessory to the main business and complies with the area requirements of the New York State Uniform Fire Prevention and Building Code.**

2. CHOP'T plans to utilize approximately 2,500 square feet of the Premises. Although patrons can order ahead, a significant portion of its patrons will eat on the premises, as the dining room is a primary part of the restaurant and not accessory in nature.

Restaurant, Fast-Food is defined as:

> **A business primarily engaged in the sale of food and beverages generally served in disposable or prepackaged containers or wrappers ready for consumption in a facility where most or all of the sales to the public are stand-up services. The term "fast-food restaurant" shall not include a carry-out restaurant or delicatessen. No drive-up or car service shall be permitted. Where a fast-food restaurant contains multiple counters, each serving one or more brands or types of fast food (for example, one counter for pizza and another for hamburgers), parking requirements shall be increased by 10% for each counter in excess of one.**

The fast-food industry does not consider CHOP'T a QSR as it does not meet any of the metrics. Specifically, the price point is too high, the preparation time is long, the advertising and promotion of the business is not how fast a meal can be in your hands, and the food is not frozen,

pre-packaged and ready to be fried.[5] Rather, CHOP'T receives their produce and meat deliveries on a regular basis assuring that all items and ingredients are fresh. The deliveries are "whole foods" and not frozen pallets of beef patties. The food is kitchen prepared every day (i.e., cleaned, chopped, diced and prepared daily. This process is often referred to as "kitchen prepped on site") and the individualized salad or other entrée is prepared in consultation with the patron in real-time or ordered in advance of picking up. There are no entrees in pre-packaged containers and the meals are not designed to be eaten with hands pr prepackaged for purchase and consumption.

Under both the industry standard definitions as well as the Village's definition of a Fast-Food Restaurant, it is clear that CHOP'T does not meet the requirements to be fast-food. When dining inside, patrons are served in reusable dishes and flat ware that is washed and reused in the same fashion as any other restaurant. Furthermore, the food is not typically eaten by hand and is not handed to customers in pre-packaged materials. Finally, there are not multiple counters from which one can order a prepared pizza slice, small fries or chicken nugget package.

Other terms used to describe fast-food establishment but that are not defined in the Village Code, include "Drive-in", "Drive-thru" and "Outside Counter" service. According to Wikipedia, a "drive-in" is a facility (such as a restaurant or movie theater) where one can drive in with a car for service. At a drive-in restaurant, for example, customers park their vehicles and are usually served by staff who walk or roller skate out to take orders and return with food, encouraging diners to remain parked while they eat. A drive-in is usually distinguished from a "drive-thru" in which drivers line up to make an order at a microphone set up at window height, and then drive to a window where they pay and receive their food. The drivers then take their meals elsewhere to eat.

In *Vitolo v. Chave*[6], 63 Misc.2d 971 (Sup. Court, Nassau County 1970), the Nassau Supreme Court found that a public eating house which provides a reasonable number of parking spaces in relation to its inside table accommodations cannot be classified as a "drive-in restaurant" within the town's zoning ordinance simply because trash cans were provided in parking areas and paper plates and a quick service menu were used.

Finally, "counter-service" is fast service where customers will order directly at the counter, and pick up their food once you call their names, with no gratuities expected.

As set forth herein, CHOP'T does not meet the requirements for a Drive-in, Drive-thru or Counter Service.

To further illustrate how CHOP'T may be distinguished from traditional definitions of 'fast food', approximately, 90 % of CHOP'T's patrons customize their orders. Although CHOP'T does have a pre-designed menu board from which patrons can choose a certain type of salad or sandwich, 9 out of 10 patrons choose to specialize their entrée. These individual salads range from

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[5] Some communities define Formula Fast Food Restaurants (FFFR's) and set forth several criteria that can help categorize a restaurant as an FFFR (e.g., food must be selected from limited or standardized menu).

[6] All cases refenced in this Memo are annexed hereto as **Exhibit C**.

a choice of dozens of fresh vegetables, proteins, and carbohydrates. Furthermore, the patron can customize how finely they want their salad cut, what kind and how much dressing one wants, and whether one would like a piece of bread. This type of individualized and custom ordering is not present at a fast-food restaurant where your choices are limited to a small or large fry or honey mustard or ketchup. As conveyed herein, a CHOP'T patron will never find a pre-packaged container or meal for purchase upon entering the establishment.

B. CHOP'T DOES NOT FURTHER ANY OF THE NEGATIVE EFFECTS ASSOCIATED WITH TRUE FAST FOOD EATING ESTABLISHMENTS

Most communities regulate fast-food restaurants, drive thru's and drive in's because of the littering, noise and traffic that is often associated with them. However, as CHOP'T Mamaroneck's application makes clear, the negative impacts associated with typical fast-food restaurants are not present here.

i. LITTERING

CHOP'T Mamaroneck will not produce the amount of litter that is typically associated with fast-food restaurants. First, for patrons eating on-site, CHOP'T serves its salads in reusable bowls and flatware. Therefore, if patrons are eating on-site, the amount of garbage that is created by an individual patron is non-existent but for a napkin. Second, a salad or bowl is not easily consumed in a car or as one is driving away from an establishment. CHOP'T Mamaroneck will not be serving typical finger-food or an easy to unwrap burger that takes but a few bites to finish. Third, CHOP'T Mamaroneck would be willing to place any desired number of trash bins that this Board would prefer. Unlike a CVS [or like drug store] or traditional drive thru's, a CHOP'T patron would not walk out with numerous bags of goods/merchandise and or easily to consume pre-packaged food items that can often be unwrapped and inappropriately disposed. In fact, the Court in Franchise Realty Interstate Corp. v. Burton RAB, et al., 72 Misc.2d 1061, associated the aforementioned use [drive-in] as commonly a source of "...a greater opportunity for litter and aggravating noise and activity...". The use proposed by CHOP'T would not result in the ill effects reflected in the court description by the very definition and description of its intended operation.

ii. NOISE

Noise associated with drive-thru's with speakers and people speaking loudly will not be present with CHOP'T Mamaroneck. The noise associated with this type of establishment with patrons coming and going during the normal business hours will be no different than that of a bank or other retail establishment. As illustrated by the scope of the traffic/parking study submitted with the Application [as prepared by Provident Design Engineer, dated November 8, 2020], the proposed exterior car service would be less intensive than the use previously enjoyed by HSBC and the transaction time would be faster.

Significantly, the hours of operation do not include breakfast hours and would typically open around 10:30 a.m. and close around 8:00 p.m. There will be no midnight hour runs for coffee or a hamburger and the proposed hours are customary to any other fine dining eating establishment in the Village.

iii. TRAFFIC AND PARKING

As set forth in the Application, there is adequate off-street parking and the circulation pattern that already exists will provide for smooth and unhindered movement of cars on-site for patrons dining-in and for car service. Furthermore, for those patrons that will be pre-ordering for car service, they will be given a specific time to arrive to pick up their food thereby eliminating any queues or other on-site congestion. We must reiterate that the Provident Design Engineer report, reflected a transactional time of approximately thirty (30) seconds.

C. CHOP'T AS A FAST CASUAL RESTAURANT

The negative effects of fast-food restaurants, carry-out restaurants or outside counter restaurants are simply not present with CHOP'T Mamaroneck. There is adequate on-site parking, proven on-site traffic circulation with a previous drive-thru bank in operation, and no discernable increase in noise or litter. The image of CHOP'T is very different than that of a McDonalds, Wendys, Burger King or Pizza Hut. There is no typical building footprint, aesthetic (golden arches), red-roof line, or signage that is known to be synonymous with CHOP'T. CHOP'T Mamaroneck will simply be a destination type restaurant where a member of the Sound Shore Community can enjoy a healthy meal. Finally, if there are any specific concerns relating to its appearance, use of property, location of trash cans, or other site-specific issue, this Board can address such issues as part of the special permit process.

Finally, as of the date of this memo, there is no evidence in the record of negative impacts to surrounding properties (health, safety, comfort, order of the Village) of finding that CHOP'T Mamaroneck is a Restaurant. In fact, the record contains substantial evidence including professional analyses regarding the adequacy of the parking and the movement of traffic and other information showing the use falls within those uses encouraged and permitted within the C-1 Zoning District. As such, the record supports a determination that CHOP'T Mamaroneck meets the definition of Restaurant. *See, Matter of Twin County Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000 (2d Dept 1997) where Second Department found that the Town Board's denial was not supported by substantial evidence in the record. *See also, Old County Burgers, Inc. v. Town Board of the Town of Oyster Bay*, 127 A.D.2d 772 (2d Dept. 1987).

As made reference to by the Court in Dunkin' Donuts v. Wright, 63 A.D.23d 927, upon review and thorough consideration of this Application, this Board would be required to arrive at the conclusion that the property use would not prevent "the orderly and reasonable use of adjacent properties" and would further not adversely affect "the safety, health, welfare, comfort, convenience or order of the town", which would comport with the same requirements enjoyed by the Code of the Village of Mamaroneck.

POINT III

AMBIGUITY MUST FALL IN FAVOR OF THE PROPERTY OWNER

It is well settled that ambiguity in zoning ordinances, being in derogation of common-law, property rights must be resolved in favor of the property owner. *See,* *Mamaroneck Beach & Yacht Club v. Vil. Of Mamaroneck Zoning Board of Appeals*, 53 A.D.3d 494 (2d Dep't 2008). *See also,* *Vitolo v. Chave*, 63 Misc.2d 971 (Nassau County, Supreme Court 1970). Courts have often found that ambiguity in relation to eating establishments fall in favor of a broader definition for a property owner. In *Vitolo*, the Supreme Court found that the property owner was entitled to a building permit for a restaurant and that the establishment was *not* a drive-in restaurant. The Court noted that the ordinance in question did not define a "restaurant" or a "drive-in restaurant" and that since the ordinance did not provide a sufficient standard to guide the board, the ambiguity must be resolved in favor of the property owner.

Similarly, in *Matter of Burke v. O'Connor*, 50 Misc. 2d 669, the Court took into consideration the number of parking spaces compared to the number of restaurant seats (28 seats compared to 50 parking spaces) but found that the establishment was still a full-service restaurant because there was no indication that the proposed restaurant would provide service to patrons while they remained in their cars. In *Matter of Dengeles v. Young*, 1 Misc.2d 692, Nassau County (1955) the court was reviewing whether a diner was a "restaurant" and the court found that a diner fell within the common understanding and the standard definition of a restaurant. The court noted further that the zoning ordinance was silent as to how to distinguish a diner from a restaurant.

Another court found that a Dairy Queen was a restaurant and not a drive-in where even though all the services were to take place inside but it was contemplated that much of the food may be carried to the parked cars and eaten or eaten entirely off the premises. *See,* *State ex rel. Spiccia v. Abate*, 2 Ohio St.2d 129 (1965).

Here, the Board must consider the facts as presented – not fear or speculation that is premature. The facts, as provided by the Applicant, establish that the ratio of parking spaces to the number of seats, the business model and the requirement that one must pre-order their meal before they can quickly pick up their meal all weigh in favor of CHOP'T Mamaroneck being regulated as a Restaurant.

POINT IV

CHOP'T MAMARONECK WILL FURTHER THE GOALS OF THE C-1 ZONING DISTRICT AND IS CONSISTENT WITH OTHER PERMITTED ESTABLISHMENTS IN THE C-1 ZONE

This Board can also look to the overall intent of the C-1 District set forth in the Village land use plans. The Commercial District is intended to set forth a variety of business and retail uses. This particular location along Boston Post Road has numerous other commercial and retail businesses mixed in with various restaurants. The Village Zoning Code and its definitions are not

simple words on paper that stay stagnant over time. Indeed, uses of land that did not exist a decade ago and that are not specifically defined in zoning codes exist now without amendments to codes because municipalities have interpreted their existing regulations to permit same (e.g., solar panels, outdoor fireplaces, small cell antenna or distributed antenna systems). Similarly, other provisions of all municipal codes that have not been holistically updated are inapplicable (places for horse-drawn carriages).

A. THE VILLAGE ZONING DEFINITIONS HAVE NOT CHANGED TO ACCOMMODATE THIS USE

i. VILLAGE ADDED NUMEROUS DEFINITIONS DEFINING VARIOUS FORMS OF MICROBREWERY, MICROCIDERY AND OTHER SIMILAR USES BASED ON NEW VARIATIONS OF DRINKING ESTABLISHMENTS BUT HAS NOT FOR EATING ESTABLISHMENTS

One very recent example where the Village created several new defined terms and uses involve the numerous types of drinking establishments. The Village, because of the influx of microbreweries, wineries and other new forms of bars, added several definitions that differentiate the ways an establishment/business provides beverages to the public. The Village Code now contains definitions with very specific criteria to define what a Microbrewery is compared to a Microcidery, among other alcohol/spirit themed establishments. With CHOP'T Mamaroneck, the Village Code has simply not redefined the various types of restaurants that are now commonplace. As such, this Board must consider the existing definitions. Based on the above definitions, legal analysis and case-law, it is respectfully submitted that the only definition under which CHOP'T Mamaroneck fits is Restaurant.

CONCLUSION

The well-recognized industry definitions as well as the Village's definitions easily lead this Board to the conclusion that CHOP'T Mamaroneck is a Restaurant. Whether this Board approaches its analysis from a deductive (reducing the definitions to their major elements and applying the elements of CHOP'T) or inductive position (understanding the detailed operation of CHOP'T Mamaroneck and trying to fit it to an existing definition), both scenarios end with the same conclusion - CHOP'T Mamaroneck is a Restaurant for which a special permit is needed for both the restaurant and car service. Finally, any ambiguity must be interpreted in favor of CHOP'T Mamaroneck. As such, the record before this Board unequivocally leads to the conclusion that CHOP'T Mamaroneck is a restaurant for which a special permit is needed.[7]

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[7] This Board can impose conditions on CHOP'T Mamaroneck as part of its special permit to address any concerns it may regarding its operations. Based on the prior public hearing and the concerns raised, some possible conditions could be: 1) No menu board or intercom equipment shall be permitted outside the building; 2) No payments can be made at the Car Service spaces (all orders for Car Service must be pre-paid); 3) Permanently mark all Car Service spaces (all of which would be off-street) with signage and require all cars to be in "park"; 4) Post signs indicating that

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it is illegal to leave cars idling for more than 3 minutes; and 5) Sign all other parking spaces for dine-in patrons only.

EXHIBIT "A"

INSTITUTE OF TRANSPORTATION ENGINEERS
DEFINITIONS FOR RESTAURANT TYPES

INSTITUTE OF TRANSPORTATION ENGINEERS (ITE)

DEFINITIONS FOR RESTAURANT TYPES

SOURCE: ITE TRIP GENERATION MANUAL 10th EDITION

SUPPLEMENTAL SOURCE: ITE PARKING GENERATION MANUAL 5th EDITION

Land Use: 930
Fast Casual Restaurant

Description

A fast casual restaurant is a sit down restaurant with no wait staff or table service. Customers typically order off a menu board, pay for food before the food is prepared and seat themselves. The menu generally contains higher quality made to order food items with fewer frozen or processed ingredients than fast food restaurants. Quality restaurant (Land Use 931), high-turnover (sit-down) restaurant (Land Use 932), fast-food restaurant without drive-through window (Land Use 933), fast-food restaurant with drive-through window (Land Use 934), and fast-food restaurant with drive-through window and no indoor seating (Land Use 935) are related uses.

Additional Data

Time-of-day distribution data for this land use for a weekday and Saturday are presented in Appendix A. For the one general urban/suburban site with data, the overall highest vehicle volumes during the AM and PM on a weekday were counted between 11:30 a.m. and 12:30 p.m. and 12:00 and 1:00 p.m., respectively.

The sites were surveyed in the 2010s in Minnesota, South Carolina, Washington, and Wisconsin.

Source Numbers

861, 869, 939, 959, 962

From ITE Parking Generation, 5th Edition

Land Use: 930 Fast Casual Restaurant

Description

A fast casual restaurant is a sit-down restaurant with no (or very limited) wait staff or table service. Customers typically order off a menu board, pay for food before the food is prepared and seat themselves. The menu generally contains higher quality made to order food items with fewer frozen or processed ingredients than at a fast food restaurant. Most patrons eat their meal within the restaurant, but a significant proportion of the restaurant sales are carry-out orders. The restaurants typically serve lunch and dinner; some serve breakfast. A typical duration of stay for an eat-in customer is 40 minutes or less. Quality restaurant (Land Use 931), high-turnover (sit-down) restaurant (Land Use 932), fast-food restaurant without drive-through window (Land Use 933), and fast-food restaurant with drive-through window (Land Use 934) are related uses.

Time of Day Distribution for Parking Demand

The following table presents a time-of-day distribution of parking demand on a weekday (three study sites) and a Saturday (one study site) in a general urban/suburban setting.

	Percent of Peak Parking Demand	
Hour Beginning	Weekday	Saturday
12:00–4:00 a.m.	–	–
5:00 a.m.	–	–
6:00 a.m.	2	–
7:00 a.m.	2	–
8:00 a.m.	5	3
9:00 a.m.	14	7
10:00 a.m.	17	7
11:00 a.m.	18	27
12:00 p.m.	100	70
1:00 p.m.	75	80
2:00 p.m.	45	100
3:00 p.m.	31	57
4:00 p.m.	23	43
5:00 p.m.	49	60
6:00 p.m.	77	87
7:00 p.m.	69	53
8:00 p.m.	28	43
9:00 p.m.	20	33
10:00 p.m.	11	20
11:00 p.m.	–	–

Land Use: 931
Quality Restaurant

Description

This land use consists of high quality, full-service eating establishments with a typical duration of stay of at least one hour. Quality restaurants generally do not serve breakfast; some do not serve lunch; all serve dinner. This type of restaurant often requests and sometimes requires reservations and is generally not part of a chain. Patrons commonly wait to be seated, are served by a waiter/waitress, order from menus and pay for meals after they eat. While some of the study sites have lounge or bar facilities (serving alcoholic beverages), they are ancillary to the restaurant. Fast casual restaurant (Land Use 930) and high-turnover (sit-down) restaurant (Land Use 932) are related uses.

Additional Data

The outdoor seating area is not included in the overall gross floor area. Therefore, the number of seats may be a more reliable independent variable on which to establish trip generation rates for facilities having significant outdoor seating.

The sites were surveyed in the 1980s and the 1990s in Alberta (CAN), California, Colorado, Florida, Indiana, Kentucky, New Jersey, and Utah.

Source Numbers

126, 260, 291, 301, 338, 339, 368, 437, 440, 976

Land Use: 932
High-Turnover (Sit-Down) Restaurant

Description

This land use consists of sit-down, full-service eating establishments with typical duration of stay of approximately one hour. This type of restaurant is usually moderately priced and frequently belongs to a restaurant chain. Generally, these restaurants serve lunch and dinner; they may also be open for breakfast and are sometimes open 24 hours a day. These restaurants typically do not take reservations. Patrons commonly wait to be seated, are served by a waiter/waitress, order from menus and pay for their meal after they eat. Some facilities contained within this land use may also contain a bar area for serving food and alcoholic drinks. Fast casual restaurant (Land Use 930), quality restaurant (Land Use 931), fast-food restaurant without drive-through window (Land Use 933), fast-food restaurant with drive-through window (Land Use 934), and fast-food restaurant with drive-through window and no indoor seating (Land Use 935) are related uses.

Additional Data

Users should exercise caution when applying statistics during the AM peak periods, as the sites contained in the database for this land use may or may not be open for breakfast. In cases where it was confirmed that the sites were not open for breakfast, data for the AM peak hour of the adjacent street traffic were removed from the database.

The outdoor seating area is not included in the overall gross floor area. Therefore, the number of seats may be a more reliable independent variable on which to establish trip generation rates for facilities having significant outdoor seating.

Time-of-day distribution data for this land use for a weekday, Saturday, and Sunday are presented in Appendix A. For the 38 general urban/suburban sites with data, the overall highest vehicle volumes during the AM and PM on a weekday were counted between 11:45 a.m. and 12:45 p.m. and 12:00 and 1:00 p.m., respectively.

The sites were surveyed in the 1980s, the 1990s, the 2000s, and the 2010s in Alberta (CAN), California, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, and Wisconsin.

Source Numbers

126, 269, 275, 280, 300, 301, 305, 338, 340, 341, 358, 384, 424, 432, 437, 438, 444, 507, 555, 577, 589, 617, 618, 728, 868, 884, 885, 903, 927, 944, 961, 962, 977

Land Use: 933
Fast-Food Restaurant without Drive-Through Window

Description

This land use includes fast-food restaurants without drive-through windows. This type of restaurant is characterized by a large carry-out clientele, long hours of service (some are open for breakfast, all are open for lunch and dinner, some are open late at night or 24 hours a day) and high turnover rates for eat-in customers. These limited-service eating establishments do not provide table service. Patrons generally order at a cash register and pay before they eat. Fast casual restaurant (Land Use 930), high-turnover (sit-down) restaurant (Land Use 932), fast-food restaurant with drive-through window (Land Use 934), and fast-food restaurant with drive-through window and no indoor seating (Land Use 935) are related uses.

Additional Data

The outdoor seating area is not included in the overall gross floor area. Therefore, the number of seats may be a more reliable independent variable on which to establish trip generation rates for facilities having significant outdoor seating.

Time-of-day distribution data for this land use are presented in Appendix A. For the four general urban/suburban sites with data, the overall highest vehicle volumes during the AM and PM on a weekday were counted between 11:45 a.m. and 12:45 p.m. and 12:15 and 1:15 p.m., respectively.

The sites were surveyed in the 1980s and the 2010s in Alberta (CAN), California, Colorado, Connecticut, Maryland, Montana, and Texas.

Specialized Land Use Data

One study provided data for a yogurt shop without a drive-through (source 414). The trip generating characteristics of this site differed from the sites included in this land use; therefore, trip generation information for this site is presented here and was excluded from the data plots. The site had a gross floor area of 860 square feet. It generated 13 vehicle trips during the weekday PM peak hour of adjacent street traffic and 16 vehicle trips during the weekday PM peak hour of the generator.

Source Numbers

163, 247, 278, 319, 342, 414, 885, 977

Land Use: 934
Fast-Food Restaurant with Drive-Through Window

Description

This category includes fast-food restaurants with drive-through windows. This type of restaurant is characterized by a large drive-through clientele, long hours of service (some are open for breakfast, all are open for lunch and dinner, some are open late at night or 24 hours a day) and high turnover rates for eat-in customers. These limited-service eating establishments do not provide table service. Non-drive-through patrons generally order at a cash register and pay before they eat. Fast casual restaurant (Land Use 930), high-turnover (sit-down) restaurant (Land Use 932), fast-food restaurant without drive-through window (Land Use 933), and fast-food restaurant with drive-through window and no indoor seating (Land Use 935) are related uses.

Additional Data

Users should exercise caution when applying statistics during the AM peak periods, as the sites contained in the database for this land use may or may not be open for breakfast. In cases where it was confirmed that the sites were not open for breakfast, data for the AM peak hour of the adjacent street traffic were removed from the database.

The outdoor seating area is not included in the overall gross floor area. Therefore, the number of seats may be a more reliable independent variable on which to establish trip generation rates for facilities having significant outdoor seating.

Time-of-day distribution data for this land use for a weekday, Saturday, and Sunday are presented in Appendix A. For the 46 general urban/suburban sites with data, the overall highest vehicle volumes during the AM and PM on a weekday were counted between 11:45 a.m. and 12:45 p.m. and 12:00 and 1:00 p.m., respectively. For the one dense multi-use urban site with data, the same AM and PM peak hours were observed.

The sites were surveyed in the 1980s, the 1990s, the 2000s, and the 2010s in Alaska, Alberta (CAN), California, Colorado, Florida, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, and Wisconsin.

Source Numbers

163, 164, 168, 180, 181, 241, 245, 278, 294, 300, 301, 319, 338, 340, 342, 358, 389, 438, 502, 552, 577, 583, 584, 617, 640, 641, 704, 715, 728, 810, 866, 867, 869, 885, 886, 927, 935, 962, 977

Land Use: 935
Fast-Food Restaurant with Drive-Through Window and No Indoor Seating

Description

This category includes fast-food restaurants with drive-through service only. These facilities typically have very small building areas and may provide a limited amount of outside seating. These limited-service eating establishments usually do not provide table service. Fast casual restaurant (Land Use 930), high-turnover (sit-down) restaurant (Land Use 932), fast-food restaurant without drive-through window (Land Use 933), and fast-food restaurant with drive-through window (Land Use 934) are related uses.

Additional Data

Time-of-day distribution data for this land use are presented in Appendix A. For the five general urban/suburban sites with data, the overall highest vehicle volumes during the AM and PM on a weekday were counted between 11:45 a.m. and 12:45 p.m. and 12:00 and 1:00 p.m., respectively.

The sites were surveyed in the 1990s, the 2000s, and the 2010s in California, Indiana, Kentucky, New Jersey, New York, and Texas.

Source Numbers

404, 713, 720, 886

EXHIBIT "B"

FAST FOOD FRANCHISE INDUSTRY STUDY

Resolution Makers Flock to Chop't in 2011's First Week

INDUSTRY NEWS | JANUARY 12, 2011

Chop't, a fast-casual salad concept, experienced a 20 percent spike in lunch sales the first week of January. The company sees a similar sales boost after other holidays, including Thanksgiving and on Mondays, when weekend indulgence turns to waistline repentance.

Chop't is the perfect New Year's Resolution Diet destination, say Tony Shure and Colin McCabe, cofounders of Chop't Creative Salad Company.

"If there's one thing that kills people's New Year's Resolutions, it's monotony," Shure says. "Our variety and flexibility let people stick to their diets while keeping it fresh."

Chop't offers eight chef-designed Chop't Classic Salads with less than 500 calories and more than 50 ingredients for diners to craft their own salads or salad sandwiches. In addition to its daily menu, every 60 days, Chop't also unveils

three new Seasonal Specials, unique salad creations that feature artisanal, all-natural, local products and flavors from around the world.

The latest round of Seasonal Specials, to be released January 12, includes the aromatic and spiced Tandoori Cobb, packed with Tandoori all-natural Freebird chicken, mango, cucumber, red onion, and romaine lettuce. It contains only 270 calories.

With Chop't dedicated to offering hearty, meatless salads for vegetarian and vegan eaters, the latest round of Seasonal Specials also includes the Athens Cobb, which features lentils, feta cheese, tomato, kalamata olives, spinach, and mesclun lettuce. The Athens Cobb is rich in protein, iron, fiber, calcium, vitamins, and more, and is less than 450 calories when paired with the recommended Spa Balsamic Vinaigrette.

Diners can also choose from seven low-fat Spa Dressings—special Chop't recipes, ranging from the classic Spa Dijon to the bold Spa Tex-Mex Ranch—that offer full flavor for only 15–40 calories per serving. The menu offers 27 original recipe dressings, which are made daily in small batches and have absolutely no sugar or high fructose corn syrup.

To see more about the Chop't concept, click here.

News and information presented in this release has not been corroborated by *QSR*, Food News Media, or Journalistic, Inc.

READ MORE
CHOP'T
CONSUMER TRENDS
FAST CASUAL
MENU INNOVATIONS

Find a franchise

Fast Food Franchise Industry Study

January 13, 2010

US Fast Food Franchise Industry Report

This study outlines a brief review of the U.S. fast food restaurant franchise industry based on data collected from Franchise Disclosure Documents (FDDs) and from published industry sources. The FDDs covered **22 fast food franchises** in the U.S.

When **J. Walter Anderson** opened the first White Castle in Wichita, **Kansas in 1921**, it marked the beginning of the fast food industry in the US. They sold fries, sodas and burgers at 5c each. The modern day market leader, **McDonalds**, didn't open their doors for business until **1940** and with the help of Ray Kroc, McDonalds' first franchisee, they have since become the world's largest food service retail chain. The fast food industry has over **300,000 units in the US** alone and US fast food franchises are present in over 100 countries around the world. The global fast food industry generated total revenues of $154.7 billion in 2008.[1]

[1]*Datamonitor, Global – Fast Food (Published august 2009)*

Market Definition

A fast food restaurant, also known as a quick service restaurant (QSR), is described as a limited menu establishment which lends itself to production line techniques of producing food that is served packaged for immediate consumption, on or off the restaurant premises. Fast food customers normally order at a counter and pay before eating.

Industry

Market value

The fast food industry in the US consists of nearly **300,000 restaurants and franchised units** and is projected to post sales of $163.8 billion for 2009, a gain of 4.2% over 2008 which generated total sales of $157.2 billion.[2] A typical fast food restaurant or franchise generates sales of **$670,000 annually** according to the National Restaurant Association. The fast food industry has exhibited a continuous growth rate over the previous 3 years and the value of the fast food industry is forecast to continue to grow by approximately 4% each year.[3]

[2]*National Restaurant Association, 2009 Restaurant Industry Forecast: http://www.restaurant.org/research/forecast.cfm*

[3]*Datamonitor, United States - Fast Food (Published August 2009)*

Market Volume

The **US leads the global fast food market**, accounting for 52.4% of the market's overall value. According to a report released by Datamonitor the fast food market reached a volume of 36.6 billion sales transactions in 2008. The number of sales transactions has grown at a stable rate of 1.6% for 2007 and 2008 but is however predicted to slow marginally in the coming year due to a lack of consumer spending.

EXHIBIT "C"

CASE LAW

WESTLAW CLASSIC

New York Official Reports

View National Reporter System version

Matter of Vitolo v Chave

Supreme Court, Special Term, Nassau County September 04, 1970 63 Misc.2d 971 314 N.Y.S.2d 51 *(Approx. 4 pages)*

In the Matter of Elda Vitolo, Petitioner,

v.

W. Kenneth Chave et al., Constituting the Board of Zoning Appeals of the Town of Hempstead, et al., Respondents

Supreme Court, Special Term, Nassau County,
September 4, 1970

CITE TITLE AS: Matter of Vitolo v Chave

HEADNOTES

Municipal corporations
zoning
restaurant which is not operated for patrons who give orders from their automobiles is not "drive-in"--permit to construct "restaurant" building is ordered reinstated--civic association which owns no realty is not "aggrieved".

(1) The term "drive-in" restaurant ordinarily means one devoted exclusively or primarily to patrons who are accommodated or served in their automobiles. The restaurant in this case is a fully enclosed air-conditioned building with seats for 64 persons, and with all the food being purchased in the building, and with parking facilities for a reasonable number of cars (24 cars) in relation to its inside table accommodations, and with toilet facilities inside the building which cannot be entered from outside the building, and with no intercommunication equipment or other facility whereby persons outside the building can transmit orders to employees either inside or outside the building. Relatively unimportant are the facts that trash cans are provided in the parking areas and that paper plates are used and that a quick service menu is provided. It happens that this restaurant is operated by a lessee of a company which ordinarily franchises places where patrons eat both in the structure and in their cars and where the food is served in disposable food packagings for which many trash cans are provided; however, in this instance, the lease expressly provides "only for restaurant purposes, other than a ... drive-in restaurant". This is a "restaurant" and not a "drive-in restaurant" within the meaning of the town's zoning ordinance.

(2) The building has not yet been completed; hence the court will not yet direct the town authorities to issue a certificate of occupancy. If, when the building is completed, the premises are actually operated as a "drive-in" restaurant, the town may obtain an injunction against such operation in a building which has been constructed under a permit for a "restaurant".

(3) Accordingly, it was erroneous and arbitrary of the town's Board of Zoning Appeals to revoke the "restaurant" building permit. The permit is reinstated.

(4) A community civic association which itself owns no realty is not "any person aggrieved" (Town Law, § 267, subd. 2; cf. subd. 7).

APPEARANCES OF COUNSEL

Kaye & Scholly (*Arthur A. Kaye* and *John M. Farrell, Jr.*, of counsel), for petitioner. *Von Oiste & Carter* for Carman Community Association, Inc., respondent. *Howard E. Levitt, Town*

SELECTED TOPICS

Zoning and Planning

Construction, Operation and Effect
Residential or Commercial Zoning Ordinance
Judicial Review or Relief
Administrative Review of City Planning and Zoning Commission Conditional Approval of Site Development Plan
Permits, Certificates and Approvals
County Board of Appeals Use of Certainty Standard

Secondary Sources

THE UNIFORM LAND USE REVIEW PROCEDURE (ULURP) - WHEN AND HOW

20110309P NYCBAR 168

...law and rules to compel the issuance of such determination. (3) A decision of the tribunal sitting en banc shall be issued within six months from the date of the request to the tribunal for en banc rev...

APPENDIX IV GUIDANCE AND TECHNICAL ASSISTANCE MANUALS

ADA Compliance Guide Appendix IV

...Under the Americans with Disabilities Act of 1990 (the "ADA"), an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given ...

§ 37:11. Land use resources for the New York practitioner

3 N.Y. Zoning Law & Prac. § 37:11

...This site has compiled all counties in New York which have web sites, and also each of the municipalities within those counties which have web sites. If this web site stays current, users of this treat...

See More Secondary Sources

Briefs

Brief of Amici Curiae, National Association of Home Builders, American Society of Planning Officials, and American Institute of Planners

1975 WL 173676
THE CITY OF EASTLAKE, et al., Petitioners, v. FOREST CITY ENTERPRISES, INC., Respondent.
Supreme Court of the United States
Dec. 31, 1975

...This Amici Curiae brief is respectfully submitted by the National Association of Home Builders, American Society of Planning Officials, and American Institute of Planners, in support of respondent, For...

Statement of Jurisdiction

1962 WL 115201
Harold E. VICKERS, Appellant, v. TOWNSHIP COMMITTEE OF GLOUCESTER TOWNSHIP, et al., Appellees.
Supreme Court of the United States
Nov. 03, 1962

...Appellant, Harold E. Vickers, submits herewith his statement particularly enumerating the basis upon which this Court

Attorney (*Jeffrey L. Stadler* of counsel), for Board of Zoning Appeals, respondent.

OPINION OF THE COURT

Bernard S. Meyer, J.

In this article 78 CPLR proceeding petitioner seeks reversal of a decision of the respondent Board of Zoning Appeals which revoked a building permit for a restaurant **972* granted to petitioner. In an earlier prohibition proceeding, petitioner sought to prevent the board from hearing the appeal of respondent Carman Community Association, Inc., on the ground that its appeal was not timely. In denying the writ of prohibition, this court ruled that since timeliness of the appeal depended, under the rule of *Matter of Pansa v. Damiano* (14 N Y 2d 356) and *Matter of Highway Displays v. Zoning Bd. of Appeals* (32 A D 2d 668), upon when appellants reasonably became chargeable with notice and whether there was undue delay or laches, it could not be said that the board was without jurisdiction. The point that a civic association had no standing to appeal was not considered, though briefed, because not raised in the petition.

At basic issue in this proceeding is the question whether the use for which the permit was granted is a "restaurant", which is a permitted use in the Business District within which petitioner's property is located, or a "drive-in restaurant" which is permitted only as a special exception use after application to the board. The board ruled, after a hearing, that the appeal was timely, that the Association was aggrieved, and that the use was a drive-in restaurant, and revoked the permit. In this proceeding petitioner argues that it has expended or committed some $75,000 to the building and, therefore, has a vested right to complete it, that the use is a restaurant rather than a drive-in restaurant, that the Association is not aggrieved and the appeal not timely. A further point that one of the board members who voted for the decision now in question was not present at the hearing was not briefed or argued and is deemed abandoned. The Association pleads three defenses: (1) the decision on the application for a writ of prohibition is *res judicata* of its standing, (2) petitioner has not exhausted her administrative remedies since she has made no application for a special use permit, (3) petitioner misrepresented the nature of the operation to the Building Department. The decision of the board is reversed and building permit No. 6902841 is reinstated, but insofar as the petition requests that the court direct the issuance of a certificate of occupancy it is denied as premature, the building being as yet unfinished.

Concluding as it does that the decision of the board is erroneous as a matter of law on the questions of standing and of use, the court does not find it necessary to consider whether the Association's appeal was timely taken. The Association's defenses are overruled; the first, on the ground that absence of standing goes to the capacity of a party rather than the jurisdiction of the board over the parties or the subject matter and, **973* therefore, could not have been the basis for issuance of a writ of prohibition even if properly raised in the earlier proceeding; the second, because petitioner cannot be required to seek as a matter of grace that which she is entitled to as a matter of right and, therefore, is entitled to immediate review of the decision revoking her permit (see *Dowsey v. Village of Kensington*, 257 N. Y. 221, 231; *Matter of Adams Holding Corp. v. Van Rosendaal*, 15 Misc 2d 498; cf. *Matter of Calabrese v. Chave*, 33 A D 2d 689, 690); the third, for reasons hereafter stated.

On the remaining two points in issue the board's decision is contrary to decisional law binding upon it and, on the question of use, is not supported by substantial evidence and is contrary to the board's own earlier decision as well.

Standing to appeal is governed by subdivision 2 of section 267 of the Town Law which provides that appeal to the board from a determination made by an administrative official "may be taken by any person aggrieved". No case construing the words "person aggrieved" as used in that subdivision has been found, but neither the Association nor the board has suggested any reason, and none occurs to the court, why they should be construed any differently in that subdivision than they are in subdivision 7, which gives to "Any person ... aggrieved by any decision of the board of appeals" the right of review in an article 78 proceeding. That a civic association which does not own property (and the hearing minutes at page 2118 establish that Carman Community Association does not) is not a person aggrieved entitled to review under subdivision 7 is the flat holding of *Matter of Manor Woods Assn. v. Randol* (29 A D 2d 778); *Matter of Moore v. Burchell* (14 A D 2d 572, mot. for lv. to app. den. 10 N Y 2d 709); *Matter of Lido Beach Civic Assn. v. Board of Zoning Appeals* (13 A D 2d 1030); *Point Lookout Civic Assn. v. Town of Hempstead* (22 Misc 2d 757, affd. 12 A

has jurisdiction on appeal to review the judgment of the Supreme Court of New Jerse...

Brief for Petitioners

2004 WL 2619921
CITY OF RANCHO PALOS VERDES, et al., Petitioners, v. Mark J. ABRAMS, Respondent.
Supreme Court of the United States
Nov. 12, 2004

...West Headnotes 78 1073 k. Zoning, Building, and Planning; Land Use. 78 1479 k. Proceedings, Grounds, and Objections in General. The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 354...

See More Briefs

Trial Court Documents

Gansevoort Street LLC v. The City Planning Com'n of the City of New York

2006 WL 8403324
GANSEVOORT STREET LLC and Michael Wu, Petitioners, v. THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK and The City Council of the City of New York, Respondents.
Supreme Court, New York.
Feb. 06, 2006

...Mtn Seq. 001 WALTER B. TOLUB, J.: The instant application involves a question of the land use and zoning of properties situated on the south side of Gansevoort Street between Washington and Greenwich S...

In re Daffy's, Inc.

2012 WL 4472427
In re DAFFY'S, INC., Debtor.
United States Bankruptcy Court, S.D. New York.
Aug. 02, 2012

...Chapter 11 Upon the motion (the "Motion") dated August 1, 2012 of Daffy's, Inc., as debtor and debtor in possession (the "Debtor") in the above-captioned chapter 11 case, pursuant to sections 105(a), 3...

The Council of the City of New York v. The Dept. of City Planning of the City of New York

2019 WL 3501555
THE COUNCIL OF THE CITY OF NEW YORK, and Manhattan Borough President Gale A. Brewer, Petitioners, v. THE DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, New York City Planning Commission, New York City Department of Buildings, The City of New York, and Marisa Lago, Respondents, and Two Bridges Associates, LP, Lei Sub LLC, and Cherry Street Owner, LLC, Intervenor-Respondents.
Supreme Court, New York.
July 31, 2019

...The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 29, 30, 31, 76, 77, 78, 79, 82, 209, 210, 211, 212 were read on this motion for INJUNCTION. The following e-filed docum...

See More Trial Court Documents

D 2d 505, affd. 9 N Y 2d 961); *Matter of Mueller v. Anderson* (60 Misc 2d 568); *Matter of Miller v. Village of East Hills* (41 Misc 2d 525); *Matter of Property Owners Assn. v. Board of Appeals* (2 Misc 2d 309); see *Bayport Civic Assn. v. Koehler* (138 N. Y. S. 2d 524). Without mention of any of those authorities, the board predicated its holding "that the appeal herein was brought by a person aggrieved" on its finding that the Association "is a membership corporation, which was merely a vehicle, acting on behalf of its resident property owner members. The Board heard the testimony of both Mr. Stein and Mr. Mummery, who are members and officers of the corporation, as well as nearby property owners. It is clear that they are aggrieved persons .... The Board finds that the persons **974* here concerned are affected by the proposed land use and that the appeal has been brought by persons aggrieved. To rule otherwise would be to lay emphasis on form rather than substance."

The egregiousness of the error is evident when one reflects that (1) it must have occurred to the courts that decided the cases cited in the preceding paragraph that each of the civic associations involved was also "acting on behalf of its resident property owner members", yet each was held without standing, (2) Mr. Stein testified that he lived "five or six blocks" away and Mr. Mummery testified that he lived "As the crow flies ... about six blocks" and that the record contains no evidence of any special damage to either of their properties, or to the property of Mr. Newill, a member of the association who testified he lived within 300 feet (see *Marcus v. Village of Mamaroneck*, 283 N. Y. 325, 333; *Matter of Haber v. Board of Estimate*, 33 A D 2d 571; ***Matter of** Moore v. Burchell*, 14 A D 2d 572, *supra*). Moreover, in light of the subtle distinction, in relation to property values, between a restaurant as a permitted use and a drive-in restaurant as a special exception use, the court cannot presume, and the board should not have presumed, that there was such damage.

The foregoing is not to say that as a matter of policy the definition of persons aggrieved should not be broadened. That, however, is a matter for the Legislature rather than the board or this court, neither of which has the power to correct the Association's failure to have one or more of its members, who qualified as an aggrieved person and who had not already lost his right to appeal, join with it in taking the appeal.

If, however, it be assumed that the Association was a proper appellant, the board's decision must nonetheless be reversed. Article 7 (§ X-1.0 and § X-1.8) of the Building Zone Ordinance allows, in a Business District, a "Restaurant other than a diner, lunch wagon, drive-in restaurant, drive-in luncheonette, drive-in lunch counter or drive-in refereshment stand"; article 12, section Z-5.0 (c) (10) authorizes as a special use when approved by the Board of Appeals a "Store or shop for the sale of food, refreshments or other edibles or drinks, which provides or makes available any facility (including but not limited to parking or standing space on premises for vehicles) for, or permits the consumption of such food, refereshments or other edibles or drink on the premises outside the building or structure occupied by such store"; and section Z-5.0 (c) (14) authorizes as a special use a "drive-in restaurant". The ordinance contains no definition of a "restaurant", a "store or shop" or a "drive-in **975* restaurant". Unless the ordinary meaning of those words supplies criteria for distinguishing between them, it must follow that (1) the ordinance does not provide a sufficient standard to guide the board, and (2) since zoning ordinances, "being in derogation of common-law property rights, must be ***strictly*** construed" (*Thomson Inds. v. Incorporated Vil. of Port Washington North*, 27 N Y 2d 537, 539; emphasis in the original), any ambiguity must be resolved in favor of petitioner.

That the board's decision in this proceeding so construes the ordinance as to create rather than avoid ambiguity is evident from the dictionary definitions of the operative words. Webster's Third New International Dictionary defines a "restaurant" (p. 1936) as: "an establishment where refreshments or meals may be procured by the public: a public eating house", a "shop" (p. 2101) as: "a building or room stocked with merchandise for sale", a "store" (p. 2252) as: "a business establishment where goods are kept for retail sale" and: "a commercial establishment (as a bank, restaurant, or dry-cleaning shop)", and a "drive-in" (p. 692) as: "a place of business (as a motion-picture theater, bank or refreshment stand) laid out and equipped so as to allow its patrons to be served or accommodated while remaining in their automobiles." If one uses the ordinary meaning of the words (and overlooks the possible legislative significance of the use of the word "restaurant" in sections X-1.8 and Z-5.0 [c] [14] and the use of the words "store" and "shop" in section Z-5.0 [c] [10]), then section Z-5.0 (c) (10) mandates a special use permit for any public eating house that provides parking space, for by definition of the section parking is a facility for consumption of food on the premises outside the building. If so, then section X-1.8 must be limited in its

application to restaurants which do not provide parking space. That such cannot be the correct construction is, however, evident from article 14, section G-19.0 (a) (11), which mandates parking space for every restaurant. Moreover, if one applies the ordinary meaning of "drive-in", it is evident that a "drive-in restaurant" is a public eating house laid out and equipped so as to allow patrons to be served or accommodated in their cars, and that a public eating house which provides a reasonable number of parking spaces in relation to its inside table accommodations cannot be classified as a "drive- in restaurant", as the board has done here, simply because trash cans are provided in the parking areas, paper plates are used and a quick service menu is provided. To paraphrase the holding of the Court of Appeals in the *Thomson Inds.* case (27 N Y 2d 537, *supra*), a strict construction of the term "drive-in restaurant" ***976** requires that it be held to include only an operation devoted primarily or exclusively to service of patrons in their cars. The term is not reasonably applicable to an operation in which no such service is provided even though some patrons may in fact consume the food in their cars.

The construction thus arrived at is sustained by *Matter of Dengeles v. Young* (1 Misc 2d 692, revd. on other grounds 3 A D 2d 758); *Matter of Burke v. O'Connor* (53 Misc 2d 669); and *State ex rel. Spiccia v. Abate* (2 Ohio St. 2d 129, overruled on other grounds by *State ex rel. Sebarco Corp. v. Berea*, 7 Ohio St. 2d 85; see, also, Ann. 82 ALR 2d 989); and by the respondent board's own decision in *Matter of McCurdy* (Case No. 769, decided Jan. 16, 1970). *Matter of Dengeles* (*supra*) concerned whether a "diner" was to be considered a "restaurant" and thus a permitted use, or simply of the same general character as a restaurant and thus a special exception use, under an ordinance which did not define the term "restaurant". Mr. Justice Samuel Rabin's conclusion that it was a permitted use was indorsed by the Appellate Division, which noted, however, that amendment of the ordinance after the decision below necessitated reversal. In *Matter of Burke v. O'Connor* (*supra*), on facts less favorable to the property owner (only 28 seats but 50 parking spaces in that case, as against 64 seats and 24 parking spaces in this case) and under an ordinance distinguishing by definition between a "Full-service Restaurant" and a "Drive-in Restaurant", Mr. Justice Jasen (as he then was) held that since there was no indication that the proposed restaurant would provide service to patrons while they remained in their automobiles, the operation was a full- service restaurant and the property owner was entitled to a building permit. In the *Abate* case (*supra*, p. 130) the Supreme Court of Ohio held that a Dairy Queen "where all services to the purchasers are to take place inside the building, and where it is contemplated that much of the food will be eaten at tables provided for that purpose" was properly classified as a "restaurant" rather than a "drive-in restaurant" notwithstanding that "much of the food may be carried to the parked cars and there eaten or carried out and eaten entirely off the premises."

Moreover, considered on the facts rather than solely on the law, the board's finding that the "Drummer Boy" to be operated on petitioner's property is a "drive-in restaurant" is not sustained by substantial evidence. That finding is based on the facts that "Drummer Boy" is a fast food operation and part of a franchised business in which *at other units* patrons ate both in the structure and in the car and many trash cans were *977 provided in parking areas for the disposable food packaging. Those findings, however, ignore the lease between petitioner and the "Drummer Boy" parent company, which expressly provides that "The premises shall be used only for restaurant purposes, other than a ... drive-in restaurant" and that "Lessee represents that the maintenance and operation of a Drummer Boy Restaurant on said premises qualifies for such restaurant use and covenants that the premises will not be permitted to be used for any other purposes", and the uncontradicted testimony of petitioner's witness that in negotiating the lease he had made clear that lessee "would have to limit their operation solely to a sit-down restaurant, as clarified by the Zoning Ordinance of the Town of Hempstead." They ignore also the facts that the structure is a permanent, fully enclosed, air-conditioned building with a seating capacity of 64, with toilet facilities that can only be reached from the inside, with parking facilities for 24 cars, no intercom equipment or other facilities whereby orders can be transmitted from persons outside to employees either out or inside, and with all of the food being purchased in the structure. On facts less favorable to the property owner (only 36 seats; outside toilet facilities), the board in *Matter of McCurdy* (*supra*) held the operation to be a restaurant rather than a drive- in, and noted that it could not base its decision on speculation or fears and could rely only on facts. Quite obviously, since petitioner's permit was revoked before the completion of the building, the conclusion of the board that the proposed use "*is* a 'drive-in' restaurant" (emphasis supplied) is based on speculation and is premature. It is not without significance that should the

business, when actually put into operation, function as a "drive-in" rather than as a "restaurant", the town need not rely solely on petitioner to enforce the covenant in the lease, but has its own right, wholly independent of the lease, to enjoin the violation of the ordinance that would be involved in operating a "drive-in" in a building constructed under a permit for a "restaurant" (*Matter of Carpenter v. Grab*, 257 App. Div. 860, mot. for lv. to app. den. 281 N. Y. 885).

Grounds for dismissal of the Association's third defense of misrepresentation are evident from the foregoing. Though perhaps unnecessary, the court notes further that the board made no finding of misrepresentation, though the point was urged before them, and that the Association has come forward with no evidence to suggest that there was a misrepresentation, as indeed they would be hard put to do in the face of the lease covenant recited above. ***978**

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Franchise Realty Interstate Corp. v Rab

Supreme Court, Special Term, Nassau County January 29, 1973 72 Misc.2d 1061 340 N.Y.S.2d 446 *(Approx. 3 pages)*

Franchise Realty Interstate Corp., Petitioner,

v.

Burton Rab et al., Constituting the Zoning Board of Appeals of the Village of Port Washington North, Respondents

Supreme Court, Special Term, Nassau County,
January 29, 1973

CITE TITLE AS: Franchise Realty Interstate Corp. v Rab

HEADNOTES

Municipal corporations
zoning
fast food chain stores--denial of application by fast food chain for conditional use permit to operate restaurant was not arbitrary where zoning ordinance prohibits drive-in, eat- out restaurant--defense of insufficient parking spaces is dismissed--petition dismissed without prejudice.

(1) The denial by a Village Zoning Board of Appeals of an application by a fast food chain for a conditional use permit to operate a restaurant was not unreasonable or arbitrary where it found that the contemplated use was a drive-in, eat-out place, and such use was prohibited by the ordinance.

(2) The objection that insufficient parking spaces were available for the facility does not constitute a defense. On the whole, there appear to be sufficient spaces surrounding the site.

(3) The petition is dismissed without prejudice to petitioner's right to submit further modifications or to request a variance. ***1062***

APPEARANCES OF COUNSEL

Gordon, Kotler & Kushnick for petitioner. *Schiffmacher, Rochford & Cullen* for respondents.

OPINION OF THE COURT

Bertram Harnett, J.

The Village Zoning Board of Appeals of Port Washington North has denied the application of the well-known McDonald's food chain corporate real estate entity, Franchise Realty Interstate Corp. (hereinafter McDonald's) for a conditional use permit. The board found that the contemplated activity at McDonald's being a drive-in and eat-out place, fell within uses prohibited by local ordinances, and that, in any event, insufficient parking spaces were available for the facility. McDonald's does not attack the validity of these zoning rules in this article 78 proceeding, but instead challenges the board's determination under the applicable ordinances, as arbitrary and unreasonable.

The proposed site for the McDonald's restaurant is the Soundview Shopping Center on Shore Road, a nine-acre spread presently improved with three separate buildings housing a professional office, movie theatre, 15 retail stores and two small restaurants, and a large

SELECTED TOPICS

Zoning and Planning

Validity of Zoning Regulations
Zoning Ordinance Regulating Adult Oriented Businesses
Construction, Operation and Effect
Residential or Commercial Zoning Ordinance
Commercially Zoned Part of Lot

Secondary Sources

APPENDIX IV GUIDANCE AND TECHNICAL ASSISTANCE MANUALS

ADA Compliance Guide Appendix IV

...Under the Americans with Disabilities Act of 1990 (the "ADA"), an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given ...

APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIONS TITLE 29 CODE OF FEDERAL REGULATIONS

Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II

...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...

APPENDIX IV: ADMINISTRATIVE LETTER RULINGS: DOL, WAGE AND HOUR DIVISION

FLSA Emp. Exemption Hdbk. Appendix IV

...(The following article appeared in the July 1995 update to the Employer's Guide to the Fair Labor Standards Act, published by Thompson Publishing Group. It is intended to provide basic information on c...

See More Secondary Sources

Briefs

Statement of Jurisdiction

1962 WL 115201
Harold E. VICKERS, Appellant, v. TOWNSHIP COMMITTEE OF GLOUCESTER TOWNSHIP, et al., Appellees.
Supreme Court of the United States
Nov. 03, 1962

...Appellant, Harold E. Vickers, submits herewith his statement particularly enumerating the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of New Jerse...

Final Second Brief of Appellee/Cross-Appellant

2001 WL 36084394
LAURENCE WOLF CAPITAL MANAGEMENT TRUST, Plaintiff/Applellant /Cross-Appellee, v. CITY OF FERNDALE, a Michigan municipal corporation, Defendant/Appellee/Cross-Appellant.
United States Court of Appeals, Sixth Circuit.
Sep. 11, 2001

...Appellee/Cross-Appellant City of Ferndale believes this Court would gain a better

parking field with 486 car spaces. The existing buildings are located in the northwest portion of the parking area; McDonald's plans to build its store on a 100 feet by 100 feet leased area in the southeast corner.

The entire shopping center is zoned as a business district. We approach the problem mindful of the general rule that zoning ordinances which restrict the use of private property in derogation of the common law, must be strictly construed, and any ambiguity or uncertainty of ordinance application must be resolved in favor of free property usage. (*Thompson Ind. v. Incorporated Vil. of Port Washington North*, 27 N Y 2d 537, 539; ***Matter of*** *440 East 102nd St. Corp. v. Murdock*, 285 N. Y. 298, 304.) However, it is nonetheless true that the duly enacted zoning ordinances of a locality determine the ways in which land may be used and the burdens of proof imposed upon those who wish to engage in prohibited uses.

The board's first objection is that the proposed McDonald's, with 104 inside seats, is a place of public assembly, but lacks the requisite number of 10 feet by 20 feet parking spaces for that type of facility. A "place of public assembly" is defined in the State Building Code for general building construction as a space where more than 99 persons congregate or gather for amusement, athletic, civic, dining, or similar purposes. Under article VII (code sections dealing with business districts), section 9 of the building zone ordinance of the Village of Port Washington North, a place of public assembly is required to have ***1063** one parking space for each employee and one space for every four persons to be legally accommodated. The McDonald's would have about 20 employees working at any given time.

However, the court does not find this objection insurmountable. It is doubtful that the State Building Code's definition of "place of public assembly" applies, since the code relates to construction matters, not land use restriction, and "zoning ordinances" are specifically excluded from its ambit. (Executive Law, § 372, subd. 4.) "Place of public assembly" is not defined in the village code, nor is the State Building Code definition adopted by reference. There are simply no guidelines to indicate that the contemplated McDonald's is a place of public assembly for zoning purposes. The parking spaces available fall well within the number required of "retail stores" generally. (Building Zone Ordinance of the Village of Port Washington North, art. VII, § 2.) Further, petitioner has offered to develop 27 additional parking spaces near the proposed site, and, while the board questions access to these spaces, it appears that there is an easement to them on the intervening parcel which would permit cars and people to cross over. Finally, McDonald's agreed, in any event, to lower its seating capacity to under 100 if the parking question were a major hurdle. On the whole, there appear to be sufficient spaces surrounding the site when viewed in conjunction with reasonable conditions imposed for their site and use. The board's third affirmative defense is therefore dismissed.

Yet, the board's two major objections contained in its first and second affirmative defenses go more to the heart of McDonald's business. The board has classified the proposed restaurant as a "drive-in" establishment which allows food and beverage consumption on the premises, but outside of the building. Under section 3 of article VII of the ordinance of the Village of Port Washington North, property may be conditionally used for a "restaurant" upon obtaining the approval of the Board of Appeals, provided it is not "the type(s) of restaurant(s) commonly known as: 'Drive-ins'".

Article VII (§ 2, subd. [5]) provides: "The foregoing permitted uses are intended to be limited to shops and stores for the sale at retail of consumer merchandise and service where the transaction with the consumer and the operation of the business is conducted entirely within a building.

The following types of uses are therefore prohibited:

(a) Drive-in establishments;

(b) Shops or stores which make available any facility for, or ***1064** which permit the consumption of food or beverage on the premises outside a building".

While there would be no outdoor tables at the proposed facility, by McDonald's own estimate, 10-15% of its patrons buy the quick order, portable, and packaged food and beverages at the counter, then carry them outside to their cars, and have their snack or meal in stationary automobiles parked nearby, all with the restaurant's permission. The board's estimate of 30%, garnered from observation of a similar McDonald's, located in a Northport

appreciation of the facts and issues involved in this matter by allowing oral argument. Accordingly, Appellee/Cross-App...

Brief for Appellee

1980 WL 339546
James F. SCHAD, 613 Corporation and Juliette Ann Di Luciano, Appellants, v. BOROUGH OF MOUNT EPHRAIM, Appellee.
Supreme Court of the United States
Oct 1980

...The appellee adopts the recitation of the opinions below as set forth on pages 1 and 2 of the appellants' brief. The appellee submits that this Court is without jurisdiction over this matter as set for...

See More Briefs

Trial Court Documents

In re Daffy's, Inc.

2012 WL 4472427
In re DAFFY'S, INC., Debtor.
United States Bankruptcy Court, S.D. New York.
Aug. 02, 2012

...Chapter 11 Upon the motion (the "Motion") dated August 1, 2012 of Daffy's, Inc., as debtor and debtor in possession (the "Debtor") in the above-captioned chapter 11 case, pursuant to sections 105(a), 3...

In re Radioshack Corp.

2015 WL 641868
In Re RADIOSHACK CORPORATION, et al., Debtors.
United States Bankruptcy Court, D. Delaware.
Feb. 09, 2015

...Upon the motion (the "Motion") of the Debtors for the entry of an interim order (the "Interim Order"), pursuant to Bankruptcy Code sections 105, 363, and 365 and Bankruptcy Rules 2002 and 6004; (a) aut...

In re Namco, LLC

2013 WL 2369865
In re: NAMCO, LLC, Debtor.
United States Bankruptcy Court, D. Delaware.
May 28, 2013

...FN1. The Debtor in this case, along with the last four digits of its federal tax identification number, is Namco, LLC (5145). Ref. Docket Nos. 88, 89, 91, 92 Chapter 11 Upon the motion (the "Motion") o...

See More Trial Court Documents

Plaza and recommended by petitioners to the board for comparison viewing, does not seem unreasonable, either particularly during the warmer months.

There is authority cited for finding that McDonald's is not a "drive-in" establishment. (See *Matter of Vitolo v. Chave*, 63 Misc 2d 971.) Yet, the ordinance here appears to permit only those businesses which are "conducted entirely within a building", thereafter enumerating some specific types of businesses not falling within the permitted classification and being then prohibited.

The court does not believe that the proverbial "car-hop" service is the primary or only determinant for classifying an eating establishment as a "drive-in". Any establishment which has a significant component of its business in eating in parked adjoining cars may be characterized as a "drive- in". This is particularly so where the manner of packaging and service is designedly conducive to such activity.

The lengthy discussion before the board regarding proper supervisory personnel to police the patrons parking around lends further credence to the notion, observable at restaurants which have a combined sit-down, take-out business, that a substantial number of customers do bring their food outside the restaurant to eat on the premises by or inside their cars. Eating food in cars is not the problem, but rather the increased outdoor activity which it entails. This would seem to be the vice for land use purposes of the commonly known "drive-in" since it is the rapid flow and the visible presence outdoors of people, with greater opportunity for litter and aggravating noise and activity, which underlies singling out such restaurants as prohibited uses, permitted only upon variance obtainment.

In any event, regardless of "drive-in" characterization, the proposed use was clearly a shop which was to "make available any facility for, or which permit(s) the consumption of food or beverage on the premises outside a building", and as such, is prohibited under the over-all governing zoning ordinance. In ***1065*** sum, then, article VII of the Building Zone Ordinance of the Village of Port Washington North excludes this use from being conditionally permitted and prohibits it entirely from uses permitted without limitation.

There is a crucial difference between a conditional use permit and a variance. The permit is more easily obtainable, being issued upon a general showing of compliance and reasonableness with respect to requirements. (*Matter of Freitag v. Marsh*, 280 App. Div. 934.) A variance which abrogates a use specifically prohibited by local law is obtainable only upon a showing of practical difficulty, unnecessary hardship or economic harm. (*Matter of Village of Bronxville v. Francis*, 1 A D 2d 236, affd. 1 N Y 2d 839; see ***Matter of*** *Otto v. Steinhilber*, 282 N.Y. 71, 75; *Matter of Fulling v. Palumbo*, 21 N Y 2d 30.)

Petitioner's application was made on the incorrect premise that a conditional use permit could be issued for its restaurant. The proof given fell short of the showing of a "practical difficulty" required to obtain the required variance of the prohibited use. Accordingly, the board's determination that petitioner's proposed operation fell within a prohibited use classification and that the greater burden required to overcome the prohibition had not been carried, was not unreasonable or arbitrary.

Accordingly, the petition is dismissed without prejudice to petitioner's rights to submit further modifications or to request a variance.

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Matter of Twin County Recycling Corp. v Yevoli

Court of Appeals of New York October 28, 1997 90 N.Y.2d 1000 688 N.E.2d 501 665 N.Y.S.2d 627 1997 N.Y. Slip Op. 08872 *(Approx. 2 pages)*

In the Matter of Twin County Recycling Corp., Respondent,

v.

Louis Yevoli et al., Comprising the Town Board of the Town of Oyster Bay, Appellants.

Court of Appeals of New York
170
Argued September 10, 1997;
Decided October 28, 1997

CITE TITLE AS: Matter of Twin County Recycling Corp. v Yevoli

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 20, 1996, which affirmed a judgment of the Supreme Court (John DiNoto, J.), entered in Nassau County, annulling a determination of the Town Board of the Town of Oyster Bay which denied petitioner's application for renewal of a special use permit to continue to operate an asphalt manufacturing plant and to store petroleum in quantities greater than tank car lots, and directing the Town Board to grant petitioner's application for renewal of its permit.

Matter of Twin County Recycling Corp. v Yevoli, 224 AD2d 628, affirmed.*1001*

HEADNOTES

Municipal Corporations
Zoning
Special Use Permit--Asphalt Recycling Plant

(1) A municipality's denial of a special use permit to continue to operate an asphalt recycling plant was not supported by substantial evidence where petitioner, in support of its application for renewal, introduced the prior special use permit, which was issued after a negative environmental impact finding, along with testimony by experts in the fields of manufacture and recycling of asphalt, traffic and land use values, a Supreme Court judgment dismissing a public nuisance claim against petitioner, and proof from the Environmental Protection Agency that the plant complies with all applicable governmental regulations, and where opposition to the application came mainly from residents of the bordering neighborhoods who objected to the operation of the plant, since the classification of a particular use as permitted in a zoning district is tantamount to a legislative finding that the use is in harmony with the general zoning plan and will not adversely affect the neighborhood, as opposed to a variance which would allow an otherwise prohibited use. While the municipality still retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence, and although scientific or expert testimony is surely not in every case required to support a zoning board determination, the board may not base its decision on generalized community objections. Given the present record, it is evident that the application was denied not because it failed to

SELECTED TOPICS

Zoning and Planning

Conditional Use Section of Zoning Resolution Determination
Actions or Decisions of County Board of Appeals
Judicial Review or Relief
Standard of Review of Denial of Conditional Use Permit

Secondary Sources

Attack upon validity of zoning statute or ordinance as affected by provisions for variations, permits, etc

136 A.L.R. 1378 (Originally published in 1942)

...The reported case for this annotation is People v. Calvar Corporation, 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376 (1941).

Zoning: creation by statute or ordinance of restricted residence districts from which business buildings or multiple residences are excluded

117 A.L.R. 1117 (Originally published in 1938)

...The reported case for this annotation is Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 (1938).

Constitutionality of city or town planning statutes or ordinances

12 A.L.R. 679 (Originally published in 1921)

...The reported case for this annotation is Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669 (1920). This annotation is supplemented by 28 ALR 314, 44 ALR 1377 and 53 ALR 1222.

See More Secondary Sources

Briefs

Brief of Appellees

1999 WL 33615427
Aubrey E. HENRY, Plaintiff-Appellant, v. THE JEFFERSON COUNTY PLANNING COMMISSION; Scott Coyle, Commission Member, in his individual capacity; H. Richard Flaherty, Commission Member, in his individual capacity; Paul Griger, Commission Member, in his individual capacity; Sam Donley, Commission Member, in his individual capacity; Jim Knode, Commission Member, in his individual capacity; Ernie Benner, Commission Member, in his individual capacity; Gilbert Page
United States Court of Appeals, Fourth Circuit.
1999

...The appellees do not contest jurisdiction. 1.The trial court correctly ruled that appellees are permitted discretion to deny the Mr. Henry's application for a conditional use permit where he proposed a...

Appellant's Brief

1999 WL 33615425
Aubrey E. HENRY, Plaintiff-Appellant, v. JEFFERSON COUNTY, Jefferson County Board of Zoning Appeals, Jefferson County Planning and Zoning Commission, Scott

meet the applicable criteria but because of generalized community pressure.

APPEARANCES OF COUNSEL

John Venditto, Town Attorney of Town of Oyster Bay (*Anthony J. Sabino* of counsel), for appellants.
Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, P. C., Uniondale (*Andrew J. Simons* and *Anthony S. Guardino* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Petitioner owns premises in an area zoned for industrial use by the Town of Oyster Bay from which petitioner has operated an asphalt recycling plant under a special use permit granted by the Town Board in 1982. The 10-year permit was issued after a negative environmental impact finding, and it provided for a five-year renewal after expiration. In support of its application for renewal, petitioner introduced the special use permit from 1982, along with testimony by experts in the fields of manufacture and recycling of asphalt, traffic and land use ***1002** values, and a Supreme Court judgment dismissing a public nuisance claim against petitioner. Petitioner also submitted proof from the Environmental Protection Agency that the plant complies with all applicable governmental regulations.

Opposition to the application came mainly from residents of the bordering neighborhoods who objected to the operation of the plant. Despite complaints by these residents, there has been no finding by the New York State Department of Environmental Conservation--the agency charged with oversight and enforcement responsibilities--that petitioner's facility is in violation of any governmental regulation.

On this record, we agree with the lower courts that respondents' denial of the special use permit is not supported by substantial evidence. The classification of a particular use as permitted in a zoning district is "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Thomaston,* 30 NY2d 238, 243) as opposed to a variance which would allow an otherwise prohibited use. While the Town Board still retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence (*Matter of Market Sq. Props. v Town of Guilderland Zoning Bd. of Appeals,* 66 NY2d 893, 895; *Matter of Pleasant Val. Home Constr. v Van Wagner,* 41 NY2d 1028, 1029).

Although scientific or expert testimony is surely not in every case required to support a zoning board determination, the board may not base its decision on generalized community objections (*Matter of Pleasant Val. Home Constr. v Van Wagner, supra*). Given the present record established by petitioner, it is evident that the application was denied not because it failed to meet the applicable criteria but because of generalized community pressure. The determination was, therefore, properly annulled.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine, Ciparick and Wesley concur.
Order affirmed, with costs, in a memorandum. ***1003**

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Coyle, H. Richard Flaherty, Paul Griger, Sam Donley, Jim Knode, Ernie Benner, Gilbert Page Wright, and Lyle Campbell Tabb, Commission Members, in their individual and official capacities, and Paul J. Raco, Director of Planning and Zoning, in his individual and official capacity, Defendants-Appellees.
United States Court of Appeals, Fourth Circuit.
Oct. 20, 1999

...The district court had subject-matter jurisdiction over this case under 28 U.S.C. §§1331 and 1342, as the case involved federal questions, the plaintiff's claims having been brought pursuant to 42 U.S....

Reply Brief

2002 WL 32134254
Aubrey E. HENRY, Petitioner, v. JEFFERSON COUNTY PLANNING COMMISSION, et al., Respondents.
Supreme Court of the United States
Dec. 30, 2002

...The Respondents admit there is a conflict amongst the circuits over the property interest issue raised here, arguing against the standard followed in the Third Circuit, the Seventh Circuit, and more re...

See More Briefs

Trial Court Documents

In re Sugarleaf Timber, LLC

2013 WL 6927342
In re: SUGARLEAF TIMBER, LLC, Debtor.
United States Bankruptcy Court, M.D. Florida.
Nov. 22, 2013

...THIS CASE came before the Court for a final evidentiary hearing to consider confirmation of the Debtor's Chapter 11 Plan, as amended. (Doc. 211). Farm Credit of North Florida, ACA (Farm Credit) filed a...

In re South Canaan Cellular Investments, Inc.

2011 WL 4193251
In re SOUTH CANAAN CELLULAR INVESTMENTS, INC. & South Canaan Cellular Equity, LLC, Debtors.
United States Bankruptcy Court, E.D. Pennsylvania.
Sep. 08, 2011

...The above-captioned chapter 11 debtors seek confirmation under 11 U.S.C. § 1129(b) of their jointly filed second amended chapter 11 plan dated September 28, 2009. Confirmation is opposed by secured cre...

In re Orleans Homebuilders, Inc.

2011 WL 2750754
In re: ORLEANS HOMEBUILDERS, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
May 03, 2011

...FN1. The Debtors in these Chapter 11 cases, along with the last four digits of each of the Debtors' tax identification numbers, are: Orleans Homebuilders, Inc. (4323), Brookshire Estates, L.P. (8725), ...

See More Trial Court Documents

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Matter of Franklin Sq. Donut Sys., LLC v Wright

Supreme Court, Appellate Division, Second Department, New York June 16, 2009 63 A.D.3d 927 881 N.Y.S.2d 163 2009 N.Y. Slip Op. 05127 *(Approx. 3 pages)*

****1** In the Matter of Franklin Square Donut System, LLC, Doing Business as Dunkin' Donuts, Appellant

v

Gerald G. Wright, et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
June 16, 2009

CITE TITLE AS: Matter of Franklin Sq. Donut Sys., LLC v Wright

HEADNOTE

Municipal Corporations
Zoning
Special Use Permit

Determinations of Board of Appeals which denied petitioner's applications for special exception permits to maintain drive-thru windows at its franchise were rational and supported by evidence—Board properly considered standards articulated in applicable ordinance and determined that proposed use prevented orderly and reasonable use of adjacent properties and that its location adversely affected safety, health, welfare, comfort, convenience or order of town; residents of neighboring development testified that vehicles waiting to enter drive-thru ***928** backed up onto street, causing traffic congestion which prohibited free flow of traffic out of neighborhood and blocked in one resident's driveway many mornings; these complaints amounted to more than generalized community opposition to specific type of use; they constituted eyewitness testimony of actual conditions at premises.

Forchelli, Curto, Crowe, Deegan, Schwartz, Mineo & Cohn, LLP, Mineola, N.Y. (William F. Bonesso, Domenica Leone, and William Cohn of counsel), for appellant.
Joseph J. Ra, Town Attorney, Hempstead, N.Y. (Charles S. Kovit of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review six determinations of the Board of Appeals of the Town of Hempstead, all dated May 2, 2007, which denied the petitioner's applications for, inter alia, special exemptions to maintain drive-thru windows, the petitioner appeals from a judgment of the Supreme Court, Nassau County (Feinman, J.), entered November 16, 2007, which confirmed the determinations, denied the petition, and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioner operates a Dunkin' Donuts franchise on the northeast corner of Franklin Avenue and Ferngate Drive in Franklin Square in the Town of Hempstead. Franklin Avenue is a main thoroughfare, while Ferngate Drive provides ingress from Franklin Avenue to a residential neighborhood. The property is located in a business district. In 1986 the Town of Hempstead Board of Appeals (hereinafter the Board) granted the petitioner a special exception permit to operate a drive-thru window. The special exception permit was granted temporarily for five years and imposed certain conditions, including the condition that the

SELECTED TOPICS

Zoning and Planning

Variances or Exceptions
Board of Adjustment of Special Exception
Use of Gasoline Service Stations
Board of Appeals Issuance Special Use

(Approx. 3 pages)

Secondary Sources

Zoning regulations as to gasoline filling stations

75 A.L.R.2d 168 (Originally published in 1961)

...In its original and primary sense, "zoning" is simply the division of a municipality into districts, and the prescription and application of different regulations in each district. Strictly speaking, h...

§ 30:25. Findings—Range of discretion

2 N.Y. Zoning Law & Prac. § 30:25

...Following the denial of a special use permit by the Board of Standards and Appeals to allow the petitioner to enlarge a single-family residence in Brooklyn, petitioner appealed. When petitioner's contr...

Public regulation or authorization of gas-filling stations

96 A.L.R. 1337 (Originally published in 1935)

...The reported case for this annotation is State Bank & Trust Co. v. Village of Wilmette, 358 Ill. 311, 193 N.E. 131, 96 A.L.R. 1327 (1934).

See More Secondary Sources

Briefs

Jurisdictional Statement

1963 WL 105748
FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation, Appellants, v. THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, Appellee.
Supreme Court of the United States
Apr. 01, 1963

...Appellants appeal from the judgment of the Supreme Court of Florida entered on the 5th day of November, 1962, denying the petition of the Appellants for a Writ of Certiorari to review the judgment of t...

Brief in Opposition for Respondent Area Plan Commission of Evansville and Vanderburgh County

1999 WL 33639999
Kevin J. WILSON, Petitioner, v. AREA PLAN COMMISSION OF EVANSVILLE and Vanderburgh County and City of Evansville, Respondents.
Supreme Court of the United States
Oct. 22, 1999

...FN1. While Wilson also seeks to challenge the Special Use Ordinance's facial validity under the Establishment Clause, he failed to properly raise and present this issue in the state court. The Indiana ...

drive-thru shall be maintained so as not to permit vehicle back-up onto Franklin Avenue or Ferngate Drive. The special exception permit was renewed each five years, the last renewal occurring in 2001.

In 2004 the petitioner applied to the Board for a renewal of its special exception permit, and special exception permits to legalize a second drive-thru window and two related menu boards which had been installed on the premises. The petitioner then withdrew these applications and applied to the Town Building Department to maintain the drive-thru windows as of right. The Town Building Department denied the applications, citing Town of Hempstead Building Zone Ordinance § 272 (C) (14), which requires special exception permits for diners, lunchwagons, drive-in restaurants, drive-in luncheonettes, drive-in lunch counters, or drive-in refreshment stands. The petitioner then submitted new applications to the Board, seeking special exception permits for the drive-thrus and menu boards, and appealing the Building Department's denials. After a hearing, the Board denied the appeals and the applications for special **2 exception permits. The petitioner then commenced this proceeding to review the determinations, and the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals, and we affirm. ***929***

The Board's determination that special exception permits are required to operate a drive-thru on the premises was rational and supported by evidence in the record (*see* Town of Hempstead Building Zone Ordinance § 272 [C] [14]). The Board's denial of the special exception permits was likewise rational and supported by evidence in the record (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002]; *Matter of Wegmans Enters. v Lansing*, 72 NY2d 1000 [1988]). Accordingly, the Supreme Court properly confirmed the determinations.

Unlike a variance, which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception involves a use permitted by the zoning ordinance, but under stated conditions (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195 [2002]; *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243 [1972]). Accordingly, an applicant's burden of proof is much lighter than the burden on one seeking a variance. However, entitlement to a special exception permit is not a matter of right. Compliance with local ordinance standards must be shown before a special exception permit may be granted (*see Matter of Wegmans Enters. v Lansing*, 72 NY2d 1000 [1988]; *Matter of Roginski v Rose*, 97 AD2d 417 [1983], ***affd on op below*** 63 NY2d 735 [1984]; *Matter of Tandem Holding Corp. v Board of Zoning Appeals of Town of Hempstead*, 43 NY2d 801 [1977]; *Matter of L & M Realty v Village of Millbrook Planning Bd.*, 207 AD2d 346 [1994]).

The Board properly considered the standards articulated in the ordinance and determined, inter alia, that the proposed use prevented "the orderly and reasonable use of adjacent properties" and that its location adversely affected "the safety, health, welfare, comfort, convenience or order of the town" (Town of Hempstead Building Zone Ordinance § 267 [D] [2] [a]; [3]). Residents of the neighboring development testified that, despite improvements made by the petitioner, vehicles waiting to enter the drive-thru backed up onto Ferngate Drive, causing extreme traffic congestion which prohibited the free flow of traffic out of the neighborhood and blocked in one resident's driveway many mornings. These complaints amounted to more than generalized community opposition to a specific type of use; they constituted eyewitness testimony of actual conditions at the premises (*see Matter of Pleasant Val. Home Constr. v Van Wagner*, 41 NY2d 1028, 1029 [1977]; *Matter of Roginski v Rose*, 97 AD2d 417 [1983], ***affd on op below*** 63 NY2d 735 [1984]; ***cf. *930 Matter of Robert Lee Realty Co. v Village of Spring Val.***, 61 NY2d 892 [1984]). The testimony of the petitioner's witnesses did not compel a different result, given the evidence presented at the hearing which supported the Board's determination (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d at 196; *Matter of Wegmans Enters. v Lansing*, 72 NY2d 1000 [1988]).

Finally, given the particular location of the drive-thru, the denials were not arbitrary and capricious for a failure to adhere to prior Board precedent (*see Matter of Lucas v Board of Appeals of Vil. of Mamaroneck*, 57 AD3d 784, 785 [2008]). Fisher, J.P., Dickerson, Eng and Hall, JJ., concur.

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Reply Brief for Plaintiff-Appellant

2001 WL 34355796
Harlen ASSOCIATES, Plaintiff - Appellant, v. THE INCORPORATED VILLAGE OF MINEOLA and BOARD OF TRUSTEES FOR THE INCORPORATED VILLAGE OF MINEOLA, Defendants - Appellees.
United States Court of Appeals, Second Circuit.
June 01, 2001

...A governmental decision based merely on negative attitudes of neighbors of a project is a violation of equal protection under the United States Constitution. City of Cleburne v. Cleburne Living Center,...

See More Briefs

Trial Court Documents

Colin Realty Co. LLC v. Town of North Hempstead

2012 WL 757010
COLIN REALTY CO. LLC, Petitioner, v. TOWN OF NORTH HEMPSTEAD, Town of North Hempstead Board of Zoning and Appeals and David L. Mammina, Donal McCarthy, Paul Aloe, Leslie Francis, Ana Kaplan, as Members thereof, and Manhasset Pizza LLC, and Fradler Realty Corporation, Respondents.
Supreme Court, New York.
Feb. 14, 2012

...[This opinion is uncorrected and not selected for official publication.] TRIAL/IAS, PART 41 INDEX NO.: 009407-11 XXX MOTION SUBMISSION DATE: 9-16-11 MOTION SEQUENCE NO. 1 The following papers read on t...

B.L.R. Associates, Inc. v. The Bd. of Trustees of the Inc. Village of Williston Park

2007 WL 2815523
In the Matter of the Proceeding By B.L.R. ASSOCIATES, INC., Petitioner, THE BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF WILLISTON PARK, Respondent.
Supreme Court, New York.
Sep. 07, 2007

...[This opinion is uncorrected and not selected for official publication.] TRIAL/IAS PART 7 NASSAU COUNTY ORIGINAL RETURN DATE: 03/05/07 SUBMISSION DATE: 07/13/07 MOTION SEQUENCE #1 The following papers ...

In re New York Mart Group, Inc. v. Srinivasan

2013 WL 6059237
In the Matter of the Application of NEW YORK MART GROUP, INC., Petitioner, v. Meenakshi SRINIVASAN, Chairperson, Christopher Collins, Vice-Chairman, Dara Ottley-Brown, Commissioner, Susan M. Hinkson, R.A., Commissioner, Eileen Montanez, P.E., Commissioner, constituting the Board of Standards and Appeals of the City of New York, the Department of Buildings of the City of New York, Don Rick Associates, and Barbizon Owners, Inc., Respondents.
Supreme Court, New York.
Oct. 27, 2013

...[This opinion is uncorrected and not selected for official publication.] OTSC Date: 06/25/13 Seq. No.: 1 BY: STRAUSS, J. In this Article 78 proceeding, petitioner New York Mart Group Inc. (Mart) seeks ...

See More Trial Court Documents

End of Document

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WESTLAW CLASSIC

New York Official Reports

Distinguished by County of St. Lawrence v. Shah, | N.Y.A.D. 3 Dept., | November 26, 2014

Matter of Mamaroneck Beach & Yacht Club, Inc. v Zoning Bd. of Appeals of Vil. of Mamaroneck

Supreme Court, Appellate Division, Second Department, New York July 01, 2008 53 A.D.3d 494 862 N.Y.S.2d 81 2008 N.Y. Slip Op. 06157 (Approx. 3 pages)

View National Reporter System version

53 A.D.3d 494, 862 N.Y.S.2d 81, 2008 N.Y. Slip Op. 06157

**1 In the Matter of Mamaroneck Beach & Yacht Club, Inc., et al., Respondents

v

Zoning Board of Appeals of Village of Mamaroneck et al., Appellants, et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
July 1, 2008

CITE TITLE AS: Matter of Mamaroneck Beach & Yacht Club, Inc. v Zoning Bd. of Appeals of Vil. of Mamaroneck

Municipal Corporations
Zoning

Petitioners' proposed construction of seasonal residences at beach and yacht club was permitted accessory use under zoning code; although zoning code defined accessory use as one "customarily incidental and subordinate to" principal use of subject site as clubhouse, it did not follow that accessory use could not be larger in square footage than other structures on site; primary use of property as membership yacht club was not confined to building; other permitted uses included outdoor recreational facilities such as docks, swimming pools, beaches, and tennis courts, as well as buildings providing club facilities; zoning board of appeals, in engrafting area requirements upon provisions defining permissive accessory use, based upon square footage of other building structures on property, was irrational and unreasonable.

Silverberg Zalantis, LLP, White Plains, N.Y. (Katherine Zalantis and Steven M. Silverberg of counsel), for appellants Zoning Board of Appeals of Village of Mamaroneck, Mauro Gabriele, George Mgrditchian, Clark Neuringer, Peter Jackson, and Gregory Sullivan.
Steward E. Sterk, New York, N.Y., for appellant Leonard Aubrey, individually and as president of Shore Acres Property Owners Association.
Keane & Beane, P.C., White Plains, N.Y. (Joel H. Sachs and Eric L. Gordon of counsel), for petitioners-respondents.

In a proceeding, inter alia, pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Village of Mamaroneck dated November 2, 2006, which, after a hearing, annulled a determination of the Director of Building of the Village of Mamaroneck dated January 14, 2004 that the petitioners' proposed use of the subject premises was a permitted accessory use under the Zoning Code of the Village of Mamaroneck, the Zoning Board of Appeals of the Village of Mamaroneck and Mauro Gabriele, George Mgrditchian, Clark Neuringer, Peter Jackson, and Gregory Sullivan, individually and as members of the Zoning Board of Appeals of the Village of Mamaroneck, appeal, as limited by their brief, and Leonard Aubrey, individually and as the president of Shore Acres Property Owners Association, separately appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Westchester County (Lippman, J.), dated January 24, 2007, as granted the petition and annulled the determination.

SELECTED TOPICS

Zoning and Planning

Construction, Operation and Effect
Accessory Use Provisions of the Comprehensive Zoning Code
Language of the Zoning Ordinance
Issuance of Permit Irrespective of Amendatory Zoning Ordinance

Secondary Sources

§ 38:02. Interpretation of zoning ordinances; the zoning board of appeals

3 N.Y. Zoning Law & Prac. § 38:02

...The First Department dismissed a facial constitutional challenge to the New York City Zoning Resolution which alleged that the Zoning Resolution provided no objective criteria by which the define the t...

Zoning: Proof of Vested Right to Complete Development Project

35 Am. Jur. Proof of Facts 3d 385 (Originally published in 1996)

...The "vested rights doctrine" is one of the most contentious issues in zoning law today. The matter typically arises when a landowner or developer commences a particular land use activity in accordance ...

§ 337. Accessory uses

12A N.Y. Jur. 2d Buildings § 337

...Although an accessory use may be permitted in connection with a lawful nonconforming use, a landowner who enjoys a nonconforming use may not establish a use accessory thereto without showing that the a...

See More Secondary Sources

Briefs

Brief for Insurance Workers International Union, AFL-CIO

1967 WL 129590
NATIONAL LABOR RELATIONS BOARD, Petition, v. UNITED INSURANCE COMPANY OF AMERICA, et al. Insurance Workers International Union, AFL-CIO, Petitioner, v. National Labor Relations Board, et al.
Supreme Court of the United States
Nov. 24, 1967

...The opinion of the Court of Appeals is reported at 371 F. 2d 316 and is reprinted in the Joint Appendix herein ("A." hereinafter) at 1231. The Decision and Order of the National Labor Relations Board i...

Petition for Writ of Certiorari

2010 WL 4625035
TOWNSHIP OF LIBERTY, OHIO, et al., Petitioners, v. WEDGEWOOD LIMITED PARTNERSHIP I, Respondent.
Supreme Court of the United States
Nov. 10, 2010

...Petitioners: The Petitioners are Township of Liberty, Ohio, located in Delaware County, Ohio, the Board of Trustees of Liberty Township, the individual Board members in their capacity as Trustees, and ...

Ordered that the judgment is affirmed insofar as appealed from, without costs or disbursements.**2

The petitioners own and operate a beach and yacht club on premises located in the marine recreation zoning district (hereinafter the MR District) of the Village of Mamaroneck. In Janu *495 ary 2004 the petitioners submitted a site plan application to the Planning Board of the Village of Mamaroneck (hereinafter the Planning Board) which proposed, inter alia, the construction of 31 seasonal residences. Under the version of the zoning provisions of the Code of the Village of Mamaroneck (hereinafter the Zoning Code) that was in effect in January 2004, the sole permitted principal use in the MR District was the operation of a membership club; seasonal residences for club members and guests were permitted accessory uses in conjunction with this permitted principal use. In a memorandum to the Planning Board dated January 14, 2004 the Village Director of Building advised the Planning Board that the petitioners' proposed construction was a permitted use under the Zoning Code.

On March 12, 2004 Shore Acres Property Owners Association (hereinafter SAPOA), an association of neighboring landowners, appealed from that determination to the Village Zoning Board of Appeals (hereinafter the ZBA), seeking review of the "interpretation" by the Director of Building, and a contrary "interpretation" of the relevant provisions of the Zoning Code. On March 25, 2004 the petitioners appeared before the Planning Board for a public hearing on their application for site plan approval. They were informed that, pending the appeal to the ZBA, the Planning Board would not consider site plan approval for the site.

On April 14, 2004 the petitioners commenced a proceeding pursuant to CPLR article 78 to compel the Planning Board to consider the site plan application. In a judgment entered April 21, 2004, the Supreme Court granted the petition and directed the Planning Board to review the site plan and render a decision pursuant to the Zoning Code "as presently written without further delay." In that judgment, which was affirmed by this Court (*see Matter of Mamaroneck Beach & Yacht Club, Inc. v Fraioli,* 24 AD3d 669 [2005]), the Supreme Court stated that SAPOA "submitted an application to the Village's Zoning Board of Appeals" seeking review of the determination of the Director of Building that the proposal complied with the Zoning Code, but that, contrary to the Planning Board's contention, such an administrative appeal did not stay the Planning Board's proceedings pursuant to Village Law § 7-712-a (6) because that appeal was prosecuted by neighboring landowners, and not by the landowner of the subject site.

On April 26, 2004, however, the Village Board of Trustees enacted a moratorium, which barred consideration by any Village board or agency of "all permits and approvals within" the MR District, and barred the ZBA from providing interpretations *496 of the Zoning Code relating to the MR District. Nearly two years later, in a post-judgment order dated April 20, 2006, the Supreme Court directed the Planning Board to commence site plan review within 30 days, or be held in contempt, ruling that the judgment dated April 20, 2004, "trumped" the moratorium. SAPOA consequently requested that the ZBA finally hear and determine its administrative appeal on the ground that the Supreme Court had found that the moratorium on processing such appeals had been superseded by the order dated April 20, 2006.

On May 8, 2006 the Village suspended the moratorium and enacted new provisions of the Zoning Code which limited to 12 the number of seasonal residences any membership club may construct in an MR District (*see* Zoning Code § 342-35 [B] [5]). The public hearing on SAPOA's administrative appeal to the ZBA commenced on June 1, 2006, only weeks after the amendment to the Zoning Code was enacted. SAPOA claimed that the calendaring of the appeal was delayed not through any fault of its own, but solely because the moratorium was in effect. In fact, the **3 moratorium had precluded consideration of the appeal, since it barred the ZBA from granting an "interpretation" for any property in the MR District.

At the hearing, the Chairperson of the ZBA noted that the delay in hearing the administrative appeal caused SAPOA and the Village to "expend a significant amount of legal fees." Beth Hofstetter, who was president of SAPOA at the time the administrative appeal to the ZBA was filed, disputed that SAPOA was at fault. She stated that "it [the appeal] was brought into the Building Department at the time and then that was it," and she asserted that she was notified that the stack of papers submitted in connection with the administrative appeal was still in the offices of Building Department "a month ago," i.e., one month prior to the hearing. The Chairperson responded that the appeal to the ZBA should have been brought to the

Brief of Appellants

1995 WL 17844381
In the Matter of the Application of John R. LINDSTROM, Doreen A. Lindstrom, Joan Burger and Denis DeSousa, Petitioners-Appellants, v. THE ZONING BOARD OF APPEALS OF THE TOWN OF WARWICK, Orange County, New York and Yung Sam Ski Ltd., Respondents-Respondents.
Supreme Court, Appellate Division, Second Department, New York
Aug. 16, 1995

...1.The Orange County Index Number is 4146/92. 2.The full names of all original parties are as shown in the title of the case above. There has been no change of parties. 3.This Article 78 proceeding was ...

See More Briefs

Trial Court Documents

Kar-McVeigh, LLC v. The Zoning Bd. of Appeals of the Town of Riverhead

2010 WL 5475230
KAR-MCVEIGH, LLC, Petitioner, v. THE ZONING BOARD OF APPEALS OF THE TOWN OF RIVERHEAD, and the Town of Riverhead, New York, Respondents.
Supreme Court, New York.
Dec. 20, 2010

...[This opinion is uncorrected and not selected for official publication.] MOTION DATE (#001) 11-20-09 MOTION DATE (#004) 10-27-10 ADJ. DATE (#001) 10/27110 Upon the following papers numbered 1 to 47 rea...

In re Avramis v. Sarachan

2011 WL 13168837
In the Matter of Maria AVRAMIS, Petitioner-Plaintiff, v. Robert SARACHAN, et al., Respondents-Defendants; In the Matter of Maria Avramis, Petitioner-Plaintiff, v. Board of Zoning Appeals of the City of Ithaca, et al., Respondents-Defendants.
Supreme Court, New York.
Sep. 06, 2011

...Mulvey, Robert C., J. The parties stipulated to an order signed by the Court on July 21, 2011 consolidating the two actions/proceedings and resolving various issues in the first-captioned matter (Index...

Saglibene v. Baum

1996 WL 34546828
In the Matter of the Application of Harry SAGLIBENE, Petitioner(s), v. Jack BAUM, Philip Egan, Charles Collins, Jr., Dale Novack and Gregory Kleva, Constituting the Board of Zoning Appeals of the Town of Mount Pleasant, Respondent(s).
Supreme Court, New York.
Aug. 23, 1996

...In this CPLR Article 78 proceeding to review a determination of the respondent Zoning Board of Appeals of the Town of Mount Pleasant (hereinafter referred to as the "Zoning Board") the petitioner seeks...

See More Trial Court Documents

"forefront as soon as possible" to avoid needless litigation.

On November 2, 2006 the ZBA determined that the proposed use was not an accessory use, which is defined in Zoning Code § 342-3 (B) as a use "customarily incidental and subordinate to the principal use of the land or building located on the same lot with such principal use." This determination was based upon evidence that the residences would occupy more than 50% of the total building square footage on the subject site. The ZBA further noted that similar accessory uses at other clubs did not have individual kitchens, while the proposed residences did, ***497** thus casting further doubt on whether the proposed use was accessory or principal.

The petitioners then commenced the instant proceeding pursuant to CPLR article 78 to review the ZBA's determination dated November 2, 2006. The Supreme Court, in the judgment appealed from, inter alia, annulled the determination on the ground that SAPOA's administrative appeal to the ZBA was untimely heard. On the merits, the Supreme Court held that although the Zoning Code defined an accessory use as one "customarily incidental and subordinate to" the principal use of the subject site as a clubhouse, it did not follow that the accessory use could not be larger in square footage than other structures on the site. We affirm the judgment insofar as appealed from.

Village Law § 7-712-a (5) (b) states that an appeal from a determination of an administrative official shall be taken, within 60 days after the filing of the determination, "by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought." The Supreme Court found that SAPOA "arguably satisfied the 60 day time limit." This determination is consistent with the prior determination in *Matter of Mamaroneck Beach & Yacht Club, Inc. v Fraioli* (24 AD3d 669 [2005]), which noted that SAPOA timely filed an administrative appeal to the ZBA, a filing that formed the basis for the Planning Board's 2004 determination to defer consideration of the petitioners' application for site plan approval. It appears that the appeal was timely filed; however, it was not timely considered.

The moratorium explicitly barred the ZBA from granting "an interpretation for any property in the Marine Recreation (MR) District." Nevertheless, the facts in the record establish that the Village willfully and unduly delayed the proceedings, and only enacted revised zoning provisions after it was informed that further delay could result in a contempt citation. There is evidence that both the moratorium and the ensuing zoning amendments were prompted by the petitioners' site plan application and were intended to prevent the petitioners from constructing the proposed seasonal housing. Under the circumstances, the "special facts exception" applies (*see Matter of Pokoik v Silsdorf*, 40 NY2d 769, 772-773 [1976]; *Caruso v Town of Oyster Bay*, 250 AD2d 639 [1998]; ***4 Figgie Intl. v Town of Huntington*, 203 AD2d 416 [1994]), and the ZBA was required to apply the original zoning code, contrary to the general rule that the current law must be applied (*see Matter of Jul-Bet Enters., LLC v Town Bd. of Town of Riverhead*, 48 AD3d 567 [2008]; *Matter of D'Agostino Bros. Enters., Inc. v Vecchio*, 13 AD3d 369 [2004]). ***498**

Although the ZBA applied the original code, it nevertheless ruled against the petitioners on the ground that the proposed accessory use exceeded 50% of the total building square footage at the site, which the ZBA found was contrary to the definition of an accessory use as one "customarily incidental and subordinate to the principal use of the land or building" (Zoning Code § 342-3 [B]). In so doing, however, the ZBA acknowledged that the Zoning Code did "not seem to place a limitation as to the magnitude of square footage associated with an 'accessory use.' " Indeed, the Zoning Code specifically provided, without reference to floor area, that "seasonal residences for club members and guests" were permitted as accessory uses in the MR District, where the subject property is located (Zoning Code former § 342-35 [B] [6]).

"It is well settled that zoning codes, being in derogation of the common law, must be strictly construed against the enacting municipality and in favor of the property owner" in accordance with their ordinary meaning (*Matter of Baker v Town of Islip Zoning Bd. of Appeals*, 20 AD3d 522, 523 [2005]; *see FGL & L Prop. Corp. v City of Rye*, 66 NY2d 111, 115 [1985]). Ambiguities, if any, are to be resolved in favor of the property owner (*see Incorporated Vil. of Saltaire v Feustel*, 40 AD3d 586 [2007]). A zoning board has the discretion to interpret an ambiguous provision in cases where "it would be difficult or impractical" to promulgate a "definitive" ordinance (*Matter of Arceri v Town of Islip Zoning*

Bd. of Appeals, 16 AD3d 411, 412 [2005]). However, in the instant case, the Zoning Code was thereafter amended to limit the number of permitted seasonal residences to 12, demonstrating that the promulgation of a "definitive ordinance" was neither difficult or impractical.

The primary use of the petitioner's property is as a membership yacht club, which is not confined to a building. Other permitted uses include outdoor recreational uses such as docks, swimming pools, beaches, and tennis courts, as well as buildings providing club facilities (Zoning Code former § 342-35 [B] [2], [3]). The ZBA, in engrafting area requirements upon provisions defining a permissive accessory use, based upon the square footage of other building structures on the property, was irrational and unreasonable (*see Matter of Baker v Town of Islip Zoning Bd. of Appeals*, 20 AD3d 522, 523 [2005]).

In view of the foregoing, the Supreme Court properly annulled the ZBA's determination dated November 2, 2006. Lifson, J.P., Florio, Angiolillo and Chambers, JJ., concur.

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53 Misc.2d 669
Supreme Court, Erie County, New York,
Special Term.

Application of Lester J. BURKE, Petitioner, v. James R. O'CONNOR, Village Engineer and Building Inspector, et al., Respondents.

May 11, 1967.

Synopsis

Article 78 proceeding to compel issuance of building permit to operate restaurant and to review determination of zoning board of appeals affirming denial of permit and in alternative to review determination of board refusing to grant variance. The Supreme Court, Matthew J. Jasen, J., held that fully enclosed building with seating capacity for 28 persons with self-service order counter and parking facilities for 50 cars was a 'full-service restaurant' and not a 'drive-in restaurant' within zoning ordinance and therefore the proposed restaurant was a permitted use in zoning district permitting restaurants conducted in completely enclosed building, especially where applicant for building permit agreed to abide by requirement that no food be consumed in vehicles on premises.

Determination of zoning board of appeals annulled and village building inspector directed to approve building permit.

See also Sup., 278 N.Y.S.2d 40.

West Headnotes (2)

[1] **Zoning and Planning** ⇐ Strict or liberal construction in general

Zoning ordinances are in derogation of common law and must be strictly construed.

1 Cases that cite this headnote

[2] **Zoning and Planning** ⇐ Restaurants and food services

Fully enclosed building with seating capacity for 28 persons, with self-service order counter and with parking facilities for 50 cars, was a "full-service restaurant" and not a "drive-in restaurant" within zoning ordinance and therefore the proposed restaurant was a permitted use in zoning district permitting restaurants conducted in completely enclosed buildings, especially where applicant for building permit agreed to abide by requirement that no food be consumed in vehicles on premises.

3 Cases that cite this headnote

Attorneys and Law Firms

****634** ***669** Moot, Sprague, Marcy, Landy & Fernbach, Buffalo (Norman E. Joslin, Buffalo, of counsel), for petitioner.

George Blair, Buffalo, for respondents.

MEMORANDUM

MATTHEW J. JASEN, Justice.

This Article 78 proceeding is brought (1) to compel the issuance of a building permit to operate a restaurant; (2) to review the determination of the East Aurora Zoning Board of Appeals in affirming the denial of a building permit by the Building Inspector of said village; and (3) in the alternative, to review the determination of the aforesaid Board in refusing to grant a variance to the petitioner.

The facts upon which this proceeding is based are as follows:

It appears that for many years there was maintained upon the property which is the subject of this proceeding, an inn and restaurant. Several years ago, the structure was destroyed by fire. Subsequently the petitioner purchased the property and now desires to build thereon a new restaurant. On March 16, 1966, the petitioner submitted his first application for a building permit to the Building Inspector of the village. On April 18, 1966, the Village Board directed the Building Inspector to disapprove the application upon the ground that the proposed structure was not a use permitted in 'C-Business District', ***670** and upon the further ground that there was insufficient off-street parking provided for this type

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of restaurant. Subsequently on April 22, 1966, the Village Board passed a resolution declaring a building moratorium to be retroactive to April 18, 1966, and extending until June 27, 1966, for the announced purpose of giving the Village Board an opportunity to review its zoning ordinance.

On June 27, 1966, petitioner met with village officials, at which time the proposed restaurant was discussed in detail. On July 15, 1966, a new application for a building permit, together with modified plans, which were made as a result of the June 27th meeting, were filed with the Building Inspector. A special meeting to consider the new application was held on July 25, 1966, and after a hearing the Board voted three in **635 favor, and three opposed to the issuance of a building permit. The tie vote of the Village Board had the effect of no action being taken by the Board upon the application and, accordingly, the Building Inspector disapproved the same. Thereafter, petitioner appealed to the Village Zoning Board of Appeals.

On December 9, 1966, the Village Zoning Board of Appeals denied the relief sought by the petitioner and sustained the Building Inspector's disapproval of the application upon the ground that 'the proposed use of the subject structure as described at the hearing more nearly satisfies the definition of a 'drive-in restaurant' than the definition of a 'full-service restaurant, as defined in the current Zoning Ordinance, and therefore, is not a permitted use in such 'C-Business District Zone'.'

The request for a variance was denied upon the ground that 'the applicant has not shown, by evidence and information presented, such practical difficulties or unnecessary hardships which would justify the granting of the variance applied for.'

The issue presented is whether the zoning ordinance restricts the building of the proposed restaurant in the area in question.

Let us first examine the pertinent provisions of the applicable zoning ordinance of the Village of East Aurora.

At the time the application was filed, the following sections were in effect:

'Section 5.03—C-Business District
A. Permitted uses. * * *
3. Retail and wholesale sales, personal services and restaurant, provided that any such use is conducted within a completely enclosed building * * *'

'Section 6.00—Required Spaces.
After the effective date of this amended ordinance, off-street parking spaces shall be provided as hereinafter specified at the time a building or structure is erected * * *'
*671 'B. 3—Eating or Drinking Places.

Two spaces for each five seats or standing spaces. Drive-in type establishment shall provide three spaces for each twenty square feet of gross floor space.'

Subsequent to the filing of the application and the hearing before the Village Board, the zoning ordinance was amended effective September 6, 1966, to add the following definitions to Article XII.
'24—B—Restaurants.

(a) Full-service Restaurant—An eating establishment where the products sold are consumed entirely within a completely enclosed building, where the taking out of food and drink from said building **636 is purely incidental, and where the consumption of food in vehicles on the premises where the building is located is prohibited.

(b) Drive-in Restaurant—An eating establishment where customers normally arrive by motor vehicles, are provided quick service, food and drink, and may retire outside to consume their purchases.'

It seems clear from the above sections that the zoning district within which the subject property is located purports to permit only 'Full-service Restaurants'.

Therefore, the question presented is whether the proposed building is a 'Full-service Restaurant' or a 'Drive-in Restaurant'.

A reading of the definitions of 'Full-service Restaurant' and 'Drive-in Restaurant' seem to differ essentially only as to the place where the food purchased is to be consumed. Both definitions permit 'take-out' service, but 'Full-service Restaurants' prohibit the consumption of food in vehicles on the premises where the building is located.

The plans for the proposed structure provide for the construction of a modern brick and glass building, fully enclosed, seating capacity 28 persons, with self-service order counter and parking facilities for 50 cars. There is no

indication that the proposed restaurant would provide service to patrons while such patrons remained in their automobiles. On the contrary, it conclusively appears that patrons in the proposed restaurant would be required to enter the restaurant and make their purchases there.

[1] It is well settled law that since zoning ordinances are in derogation of common law, they must be strictly construed. (440 East 102nd St. Corp. v. Murdock, 285 N.Y. 298, 34 N.E.2d 329; Incorporated Village of Brookville v. Paulgene Realty Corp., 24 Misc.2d 790, 200 N.Y.S.2d 126, affd. 14 A.D.2d 575, 218 N.Y.S.2d 264, affd. 11 N.Y.2d 672, 225 N.Y.S.2d 750, 180 N.E.2d 905.)

*672 [2] Consequently, bearing in mind the strict interpretation with which zoning ordinances must be examined, this court is of the opinion that the proposed structure should be classified as a 'Full-service Restaurant', and therefore a permitted use in the 'C-Business District' as set forth in Section 5.03 of the Zoning Ordinance.

An examination of all the documents, plans, specifications and papers submitted clearly indicates that the proposed structure is in complete compliance with the definitional provisions of the ordinance, in that the proposed restaurant contemplates the consumption of food within a 'completely enclosed building' and that the 'taking out of food and drink from said building is purely incidental.'

In addition, the characterization of the proposed structure by the Zoning Board of Appeals as a 'Drive-in Restaurant' is not supported by the record. The proposed structure is not a 'Drive-in Restaurant' within the meaning of the zoning ordinance, nor as that term is understood in **637 ordinary use. In Webster's Seventh New Collegiate Dictionary, 1965, 'Drive-in' is defined as 'a place of business so laid out that patrons can be accommodated while remaining in their automobiles'.

With respect to the defined provision that the consumption of food in vehicles on the premises be prohibited, the petitioner has agreed to abide by this requirement.

Accordingly, the determination of the Zoning Board of Appeals is annulled and the Village Building Inspector is directed to approve petitioner's building permit.

All Citations

53 Misc.2d 669, 279 N.Y.S.2d 633

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WESTLAW CLASSIC

New York Official Reports

Order Reversed by Application of Dengeles, N.Y.A.D. 2 Dept., March 11, 1957

Matter of Dengeles v Young
Supreme Court, Special Term, Nassau County November 21, 1955 1 Misc.2d 692 148 N.Y.S.2d 92 *(Approx. 2 pages)*
View National Reporter System version

1 Misc.2d 692, 148 N.Y.S.2d 92

In the Matter of Chris Dengeles et al., Petitioners,

v.

John C. Young, as Manager and Chief Building Inspector of the Building Department, Town of Hempstead, Respondent

Supreme Court, Special Term, Nassau County
November 21, 1955

CITE TITLE AS: Matter of Dengeles v Young

HEADNOTES

Municipal corporations
zoning
all-night diner is restaurant within meaning of zoning ordinance authorizing "restaurant"; it does not come within further section requiring application to town board for "special exception" for "use of the same general character"; town building department is directed to issue building permit upon compliance with building regulations.

(1) An all-night diner is a restaurant within common and dictionary definitions and within the meaning of a town zoning ordinance authorizing a "restaurant" in a business district. The diner does not come within a further section of the ordinance requiring that an application be made to the town board for a "special exception" permitting a "use of the same general character as any of the uses ... specifically permitted". The ordinance does not set up any standards for the guidance of such discretionary authorizations by the town board; and insofar as it curtails the uses of property it should not be extended by implication. A number of other diner permits have been issued by the town's building department without any application to the town board. Apparently the intention of the ordinance was to include a diner as a "restaurant". In this proceeding under article 78 of the Civil Practice Act, the chief inspector of the town's building department is directed to issue such permit forthwith, upon petitioners' compliance with the applicable regulations of the building department.

SUMMARY

Proceeding under article 78 of the Civil Practice Act.

APPEARANCES OF COUNSEL

Harry Rosenberg for petitioners.
John A. Morhous, Town Attorney, for Town of Hempstead.

OPINION OF THE COURT

Samuel Rabin, J.

This is a proceeding to require the chief inspector of the building department of the Town of Hempstead to issue a building permit for a structure characterized as a diner in petitioners' application for said permit.

SELECTED TOPICS

Zoning and Planning

Construction, Operation and Effect
Residential or Commercial Zoning Ordinance
Derogation of Common-Law Rights

Secondary Sources

APPENDIX IV GUIDANCE AND TECHNICAL ASSISTANCE MANUALS

ADA Compliance Guide Appendix IV

...Under the Americans with Disabilities Act of 1990 (the "ADA"), an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given ...

APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIONS TITLE 29 CODE OF FEDERAL REGULATIONS

Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II

...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...

APPENDIX IV: ADMINISTRATIVE LETTER RULINGS: DOL, WAGE AND HOUR DIVISION

FLSA Emp. Exemption Hdbk. Appendix IV

...(The following article appeared in the July 1995 update to the Employer's Guide to the Fair Labor Standards Act, published by Thompson Publishing Group. It is intended to provide basic information on c...

See More Secondary Sources

Briefs

Statement of Jurisdiction

1962 WL 115201
Harold E. VICKERS, Appellant, v. TOWNSHIP COMMITTEE OF GLOUCESTER TOWNSHIP, et al., Appellees.
Supreme Court of the United States
Nov. 03, 1962

...Appellant, Harold E. Vickers, submits herewith his statement particularly enumerating the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of New Jerse...

Final Second Brief of Appellee/Cross-Appellant

2001 WL 36084394
LAURENCE WOLF CAPITAL MANAGEMENT TRUST, Plaintiff/Appllellant /Cross-Appellee, v. CITY OF FERNDALE, a Michigan municipal corporation, Defendant/Appellee/Cross-Appellant.
United States Court of Appeals, Sixth Circuit.
Sep. 11, 2001

...Appellee/Cross-Appellant City of Ferndale believes this Court would gain a better appreciation of the facts and issues involved in this matter by allowing oral argument. Accordingly, Appellee/Cross-App...

The application was denied, the reason given being that it was "not a permitted use, application to town board required."

The Building Zone Ordinance of the Town of Hempstead under which the application was made is article 7, Business District, the pertinent sections of which follow:

"Sec. X-1.0. In a Business District the following regulations shall apply: *693

"A building may be erected, altered or used, and a lot or premises may be used for any of the following purposes and for no other: ...

"Sec. X-1.8. Restaurant. ...

"Sec. X-1.14. When permitted as a special exception by the Town Board: ...

"(f) Any use of the same general character as any of the uses hereinbefore specifically permitted".

Petitioners contend that a diner is a restaurant within the meaning of section X-1.8 of the ordinance. Respondent contends that a diner is not in fact a restaurant but only of the same general character as a restaurant and hence approval must be sought of the town board under subdivision (f) of section X-1.14.

If a diner falls within the definition of "restaurant" then there is no discretion in respondent; petitioners are entitled to a permit and respondent has no alternative except to issue it.

The ordinance does not define the term restaurant. We must look elsewhere for guidance.

Funk & Wagnalls New Standard Dictionary gives the following definitions:

"Restaurant -- A place where refreshments or meals are provided to order, especially one not connected with a hotel."

"Diner -- railroad -- A car for serving meals en route."

Ballentine's Law Dictionary with Pronunciations gives the following definition: "While the word [restaurant] has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where eatables are furnished to be consumed on the premises. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat."

Since no provision of the ordinance restricts petitioners' common-law right to the use of the property as a diner, resort should not be had to a strained construction in order to attain that result. The ordinance should be strictly construed. (*Village of Stamford v. Fisher*, 140 N. Y. 187; *Welch v. City of Niagara Falls*, 210 App. Div. 170.)

"Zoning laws which curtail and limit uses of real property must be given a strict construction, since they are in derogation of common-law rights and the provisions thereof may not be extended by implication." (*City of Albany v. Anthony*, 262 App. Div. 401, 404.)

If the term "restaurant" is virtually all-inclusive then petitioners are entitled to a permit. If "restaurant" is not all-inclusive and if the use is something which must be determined *694 by the inspector in the exercise of discretion, then the town board has failed to prescribe any standard or rule for the guidance of the inspector.

It is a principle of zoning law that where there is a delegation to an administrative body of legislative power, standards or rules must be prescribed for the guidance of the administrative body and for the public.

While this is not controlling, the failure to set up standards or rules for the guidance of the inspector is certainly some indication that it was the intent that the term restaurant embrace all eating establishments.

There is a further indication that it was the intent that the term restaurant embraces all eating establishments. There appears to have been no uniform policy requiring application to the town board for permits for the erection of diners. Certain it is that some such permits were issued without town board hearings.

Brief for Appellee

1980 WL 339546
James F. SCHAD, 613 Corporation and Juliette Ann Di Luciano, Appellants, v. BOROUGH OF MOUNT EPHRAIM, Appellee.
Supreme Court of the United States
Oct 1980

...The appellee adopts the recitation of the opinions below as set forth on pages 1 and 2 of the appellants' brief. The appellee submits that this Court is without jurisdiction over this matter as set for...

See More Briefs

Trial Court Documents

In re Daffy's, Inc.

2012 WL 4472427
In re DAFFY'S, INC., Debtor.
United States Bankruptcy Court, S.D. New York.
Aug. 02, 2012

...Chapter 11 Upon the motion (the "Motion") dated August 1, 2012 of Daffy's, Inc., as debtor and debtor in possession (the "Debtor") in the above-captioned chapter 11 case, pursuant to sections 105(a), 3...

In re Radioshack Corp.

2015 WL 641868
In Re RADIOSHACK CORPORATION, et al., Debtors.
United States Bankruptcy Court, D. Delaware.
Feb. 09, 2015

...Upon the motion (the "Motion") of the Debtors for the entry of an interim order (the "Interim Order"), pursuant to Bankruptcy Code sections 105, 363, and 365 and Bankruptcy Rules 2002 and 6004; (a) aut...

In re Namco, LLC

2013 WL 2369865
In re: NAMCO, LLC, Debtor.
United States Bankruptcy Court, D. Delaware.
May 28, 2013

...FN1. The Debtor in this case, along with the last four digits of its federal tax identification number, is Namco, LLC (5145). Ref. Docket Nos. 88, 89, 91, 92 Chapter 11 Upon the motion (the "Motion") o...

See More Trial Court Documents

It has been pointed out by respondent that diners operate on a twenty-four-hour day, seven-day-week work schedule, with resulting increased traffic in the area and disturbance of a kind to the surrounding residents. Assuming that to be so, the town board in its wisdom well might enact legislation to ameliorate the situation.

It cannot accomplish that purpose under any interpretation of the existing ordinance.

In the opinion of the court there is no uncertainty as to the meaning of the word "restaurant" as used in such ordinance. Restaurant clearly embraces diner, and the petitioners are entitled to a permit.

The refusal of the chief inspector of the building department to issue the permit requested went beyond his powers, and was a violation of his duties, and therefore illegal.

Petitioners' application is granted and the chief inspector of the building department of the Town of Hempstead is directed to issue forthwith the building permit heretofore applied for by the petitioners, in accordance with the application and plans now on file, and upon compliance with the applicable rules and regulations of the building department.

Proceed accordingly. ***695***

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KeyCite Red Flag - Severe Negative Treatment
Disapproved of by State ex rel. Sibarco Corp. v. City of Berea, Ohio, July 6, 1966

2 Ohio St.2d 129
Supreme Court of Ohio.

The STATE ex rel. SPICCIA, Appellee,

v.

ABATE, Bldg. Commr., et al., Appellants.

No. 38727.
|
May 5, 1965.

Synopsis

Action to compel issuance of building permit for construction of building to be used for preparation and sale of food items in zone where restaurant use was permitted. The Court of Appeals, Cuyahoga County, 196 N.E.2d 346, directed issuance of writ of mandamus and defendant appealed. The Supreme Court, Paul W. Brown, J., held that proposed business operation in which sandwiches and other food items would be prepared and sold inside building to be eaten at tables provided or away from premises was 'restaurant' within zoning ordinance rather than 'drive-in restaurant', notwithstanding that patrons might eat in automobiles.

Judgment affirmed.

West Headnotes (5)

[1] **Zoning and Planning** ⇐ Restaurants and food services

Whether proposed building would be "restaurant"or "drive-in restaurant" within zoning ordinance was properly determined by considering common and ordinary meaning of those terms.

4 Cases that cite this headnote

[2] **Zoning and Planning** ⇐ Meaning of Language

Since zoning ordinance is police regulation and imposes restrictions upon use of property, language defining permitted use is to be liberally construed in favor of permitting use proposed by property owner.

14 Cases that cite this headnote

[3] **Zoning and Planning** ⇐ Strict or liberal construction in general

Statutes or ordinances which impose restrictions upon use of private property will be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed.

17 Cases that cite this headnote

[4] **Zoning and Planning** ⇐ Restaurants and food services

Proposed business operation in which sandwiches and other food items would be prepared and sold inside building to be eaten at tables provided or away from premises was "restaurant" within zoning ordinance rather than "drive-in restaurant", notwithstanding that patrons might eat in automobiles.

6 Cases that cite this headnote

[5] **Mandamus** ⇐ Remedy at Law

Mandamus ⇐ Discretion of lower court

Court of Appeals has discretion to issue writ of mandamus although there may be plain and adequate remedy at law, and Supreme Court will not interfere with exercise of discretion in issuing writ.

2 Cases that cite this headnote

****235** *Syllabus by the Court*

***129** What constitutes a 'restaurant' as opposed to a 'drive-in restaurant' for the purpose of determining the permitted use of property under a zoning classification in which those terms are not otherwise defined is determined by considering the common and ordinary meaning of those terms, liberally construing them in favor of the permitted use so as not to

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extend the restrictions of the ordinance to any limitation of use not therein clearly prescribed.

The relator petitioned the Court of Appeals for a writ of mandamus commanding the respondent Joseph Abate, Building Commissioner of the city of Richmond Heights, Ohio, to issue a permit for the erection of a Dairy Queen restaurant on a parcel of real estate in that city. The parcel in question is so classified in the zoning ordinances that a restaurant is permitted, a 'drive-in' restaurant requires another classification. That court heard the matter upon the merits, found upon the evidence that the proposed use of the property constitutes a restaurant which is permitted use under the applicable zoning classification and does not constitute a drive-in restaurant which is a prohibited use under the applicable zoning classification, and proceeded to issue the writ.

Attorneys and Law Firms

Sanford W. Likover, Cleveland, for appellee.

William H. Stein, Director of Law, and Charles E. Merchant, Cleveland, for appellants.

Opinion

PAUL W. BROWN, Judge.

[1] [2] What constitutes a 'restaurant' or a 'drive-in restaurant' is not otherwise defined in the zoning ordinance, hence whether the proposed use constitutes one or ****236** the other ***130** was determined by considering the common and ordinary meaning of those terms. This was proper. Since the ordinance is a police regulation and imposes restrictions upon the use of property, the language defining a permitted use is required to be liberally construed in favor of permitting the use proposed by the property owner.

[3] 'Statutes or ordinances * * * which impose restrictions upon the use * * * of private property, will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed.' State ex rel. Moore Oil Co. v. Dauben, Bldg. Inspr., 99 Ohio St. 406, 124 N.E. 232. See, also, State ex rel. Ice & Fuel Co. v. Kreuzweiser, Inspr. of Bldgs., 120 Ohio St. 352, 166 N.E. 228.

[4] The proposed use of this property is for a Dairy Queen type restaurant in which, in addition to the usual products, sandwiches and french fries are to be prepared and sold, where all services to the purchasers are to take place inside the building, and where it is contemplated that much of the food will be eaten at tables provided for that purpose. This operation was properly held to be permitted by the ordinance, in spite of the fact that it is also contemplated that much of the food may be carried to the parked cars and there eaten or carried out and eaten entirely off the premises. This is particularly true when we consider the rule of construction applicable to the zoning ordinances.

[5] The appellants' argument that the relief was improperly granted because the relator had an adequate remedy at law ignores the often stated proposition that the Court of Appeals has discretion to issue the writ of mandamus, although there exists a plain and adequate remedy at law. State ex rel. Grant, Exr. v. Kiefaber et al., Montgomery County Planning Commission, 171 Ohio St. 326, 170 N.E.2d 848. This court will not interfere with exercise of such discretion by that court. State ex rel. Wesselman v. Board of Elections of Hamilton County, 170 Ohio St. 30, 162 N.E.2d 118; State ex rel. Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1.

The judgment of the Court of Appeal is affirmed.

Judgment affirmed.

***131** TAFT, C. J., and SMITH, MATTHIAS, O'NEILL, HERBERT and SCHNEIDER, JJ., concur.

SMITH, J., of the Sixth Appellate District, sitting for ZIMMERMAN, J.

All Citations

2 Ohio St.2d 129, 207 N.E.2d 234, 31 O.O.2d 228

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