

**Village of Upper Nyack
Zoning Board of Appeals Meeting
Tuesday, March 8, 2022, 8:00pm**

Minutes

A meeting of the Zoning Board of Appeals of the Village of Upper Nyack was held on the above date via videoconferencing and called to order at **8:09 pm** by the Chairman, Thomas Englert.

Other Board members present: Paul Curley, Meg Fowler and Marion Shaw.

Absent: Stephen Lubeck.

Also present: Noelle C. Wolfson, Esq., Consulting Attorney, and Janet Guerra, Board Secretary.

8:10 pm: The Chairman opened the meeting, and read the Notice of Public Hearing, which was published in The Journal News on March 1, 2022.

8:12 pm: The Chairman called for a motion to approve the minutes from the December 21, 2021 meeting.

Approval of Minutes with changes: Member Paul Curley moved to approve the *Minutes* from December 21, 2021; **SECOND:** Meg Fowler; **VOTE:** 4-0; 1 abstention. **APPROVED**

8:13 pm: Appeal of Mr. John Stickler, 324 North Broadway, County Map No. 60.17-2-48, affecting the Property Commonly Known as Hartell's Jukebox Deli, 326 North Broadway, County Map No. 60.17-2-47 ("Subject Property"). Appeal #2022-01. Appeal from the Village Code Enforcement Official's ("CEO") determination dated November 23, 2021 seeking the following relief: (i) reversal of the CEO's determination that the use of the Subject Property as a deli/food service establishment is a preexisting, nonconforming use under the Village's Zoning Law; (ii) reversal of the CEO's determination that the exhaust fan on the Subject Property complies with the 2020 NYS Mechanical Code, including a determination of whether the Zoning Board of Appeals ("ZBA") has jurisdiction to hear and decide such appeal; and (iii) reversal of the CEO's determination that HVAC systems are not regulated pursuant to the terms of the Village's Sound Law, including a determination of whether the ZBA has jurisdiction to hear and decide such appeal. The Subject Property is in the Village Center (VC) zoning district.

Don Feerick, Esq. represented the Appellant, John Stickler.

Chairman Thomas Englert stated that on the second and third points of the appeal, the determination of the Board is that the Zoning Board of Appeals does have purview over those issues. The Chairman stated that the Board can address the first point; but not the second and third.

Don Feerick, Esq. stated that the applicant understands that the ZBA does not have jurisdiction to review the decisions under the NYS Mechanical Code and the Village Sound Law, but that the applicant is raising those issues because he feels that they are integrated with the special permit determination and mitigation requested.

Chairman Englert again stated that the Board will not be ruling on points two and three because the Board lacks jurisdiction to do so. He summarized the issue that was before the Board – whether the CEO’s determination that the use of the Subject Property as a deli/food service establishment may continue as a nonconforming use was correct. He said the main issue appears to be whether the use of the property as a deli/food service establishment ceased for a period of 6 months or longer. He also asked Mr. Feerick if he had received the Building Inspector’s (Roy Wanamaker) letter in support of his determination wherein he points out that the deli has been in existence for decades as a pre-existing, non-confirming use. The Chairman read the letter into the record (the body of which appears below):

Dear Mr. Englert, Mr. Lubeck, and Members of the Board,

Mr. Stickler is appealing to the Zoning Board of Appeals to seek a reversal of my determinations concerning the operation of the Hartell's Deli.

The exhaust fan, unaltered, meets the requirements of the Mechanical Code of New York State. See attached. In addition, HVAC systems are not covered under the Village Sound Law.

As for the Zoning determination, the grocery store/ deli has existed for decades, as a pre-existing, non-conforming use, going back to the Gerhardt's Grocery Store in the 1950's.

A pre-existing, non-conforming use, as outlined in Section 7 of the Zoning Ordinance of the Village of Upper Nyack, may continue unless the use has been discontinued for a period of six months. (Section 7:6 DISCONTINUANCE)

Louis and Carol Hartell purchased the store in 1976. More recently, the Hartell's have leased the deli space to keep the operation continuing even during the Hartell's retirement years. Frank DeNardo, was operating the deli from 2016 until December 20, 2019, when he decided to end his tenure there. This was the first time there was a discontinuance in operations. The six-month discontinuance period began December, 20, 2019.

On March 20, 2020, the Village Hall closed to the public due to the outbreak of the pandemic and the institution of New York State PAUSE. At that point a stay of discontinuance began, and continued until the governor declared that the state re-open. That was June 25, 2021. The period of discontinuance re-started. The deli now had 3 months within which to re-open, that is, by September 25, 2021. The deli re-opened September 15, 2021.

I respectfully submit this information for your consideration in making your determination.

Chairman Englert reiterated that the Board has to take into consideration the COVID PAUSE. He asked if the Board had any comments.

Member Paul Curley commented that this analysis makes sense and that he wasn't sure there was a discontinuance at all because it's unclear if deli uses, including renovations or other work or actions related to the deli use, were ongoing even during the time when the public was not admitted. He continued that he would have come to the same conclusion that the Building Inspector did.

Chairman Englert said that he supports Mr. Curley's position. He continued that the deli was still outfitted and ready to be a deli, there were no changes to the building that would cause it to be unusable as a deli and COVID was the event that made it unable to be operated; but there was no hiatus in use.

Member Meg Fowler agreed that even if it wasn't open to the public, it was still a deli.

Mr. Feerick said that the Hartell's published the closure date as December 2015. They closed in December of 2015 and were closed all of 2016. He continued that Mr. DeNardo got his license March 1, 2017. He stated that the deli was dormant and not used for one year. He continued that when a new user comes in and it's an interruption for more than six months, it triggers a special permit and that is intended to police new users for a three-year window and then have a renewal. Then the new user has to articulate to the Planning Board what has been going on and what has changed and address what consequences will result as of those changes.

He continued that his client, the appellant, Mr. Stickler, bought his house in 1999 and has been a good neighbor to Hartell's which is a long-standing business. However, when they closed in 2015, they lived for one year plus in close proximity to property that was not used as a deli even though it was fit for use as a deli. That interruption triggered your special permit. Appellant understood from FOIL requests that the deli was operating under a special permit; but, when the Appellant retained Mr. Feerick's firm as counsel, instead of prior counsel, Walter Sevastian, the firm was informed that there was no special permit issued based on the assumption that there was no interruption; but there was an interruption which is factually proven by the public records, the statements of the Hartells in the news articles and the proof of the commencement date of the

subsequent user which started on March 1, 2017. Mr. Feerick stated that he feels there is no contest as to whether or not it was dormant for the year plus window before the time that Mr. DeNardo took over.

Noelle Wolfson, Esq., Consulting Attorney, stated that she was not sure that claims about that time period are timely on this application because the appeal of the determination that the use was a valid nonconforming use at that time was not commenced within 60 days of the determination. Mr. Feerick reiterated that in his client's view the public records had been misrepresented and stated that the public official told Mr. Sebastian that the deli was operating under a special permit. Mr. Feerick said that the applicant did not find out until November 2021 that the use was not operating as a special permit use. He said that he would file a supplemental submission to address the issue of the timeliness of this claim. He further stated that as to the second window of time, Mr. Feerick pointed out that the record seems to indicate that the deli ceased operation on December 20, 2019 and that it carried forward until March 20, 2020—that was a window of time of four months. And, then when the COVID stay was lifted in June of 2020 and the use re-started in September of 2020, that is a window of another three months and that would be seven months interruption not six months or less—which would trigger application of the special permit. Mr. Feerick continued to state his opinion that in both instances the facts are wrong and application of the Village's law under the special permit rules would suggest that a special permit is required. He indicated that the appellant is not trying to stop the use, but rather to ensure that a special permit is required so mitigation of impacts can be considered. He said that the deli exhaust fan discharges less than 10 feet from the appellant's house and directly into his building. It discharges from a metal exhaust fan that kicks grease, smoke, smells and odor vapors directly into this property. Mr. Feerick said there is a potential safety hazard under the mechanical code (which he realizes the Board has no jurisdiction over). He continued that the operation starts at 6:45am and continues almost every single day, when the sound law prohibits early morning activity. He advised that in his view the purpose of the Village Code was to further neighbor relations by requiring mitigation of use impacts, that the deli owner should not get preferential treatment as a longstanding member of the community, and that the appellant is also a longstanding member of the community and resident of the Village.

Chairman Englert asked what the prior situation was with the exhaust fan. They obviously had a grill there previously.

Mr. Feerick agreed but stated that the reason for the code and the special permit is that when a use is interrupted, you have to bring your matter up to code. He said that even though there was no change in the configuration of the building, it is his position that the use was discontinued and therefore these matters could have been addressed.

Noelle Wolfson, Esq., Consulting Attorney, pointed out that the code enforcement official has determined that the fan is compliant with the mechanical code. So the Board shouldn't make assumptions that it is not in compliance with the Mechanical Code; it doesn't have jurisdiction over that determination.

Mr. Feerick agreed that the Board doesn't have jurisdiction; but it is subject to appeal and the Appellant may take an appeal and involve Clarkstown. He said his client is not seeking a

protracted appeals process, but is looking for a resolution that will mitigate the impacts to his property.

Member Meg Fowler pointed out the math earlier was incorrect. She said December 2020 to March 2020 is three months; not four.

Mr. Feerick acknowledged that three months was correct.

Chairman Englert stated that the only thing that we have to address is the question of discontinuance. He continued that as the Village Consulting Attorney pointed out, the window on the 2015-2016 closing was missed. The Chairman stated that there is no reason not to support Mr. Wanamaker's decision. He stated that his sense was that the Board agrees that the discontinuance of use did not exceed 6 months. Unless the Appellant has more to say, we should open the public hearing.

Motion to open the public hearing.

MOTION: Paul Curley

SECOND: Marion Shaw

VOTE: 4-0, 1 abstention. APPROVED.

No public comments.

Motion to close the public hearing.

MOTION: Marion Shaw

SECOND: Paul Curley

4-0, 1 abstention. APPROVED.

Chairman Thomas Englert stated that the Board is supporting Roy Wanamaker's determination as far as special permit and non-conforming use. He asked Noelle Wolfson, Esq. how the Board should word the motion.

Noelle Wolfson, Esq. stated that the Board can confirm the decision that the use can continue as a non-conforming use under the zoning law for reasons Mr. Wanamaker provides in his March 8, 2022 letter. If they wanted to add additional reasons to support the decision those could be expressed in the resolution as well.

Member Paul Curley stated that he reiterates his support of the building inspector's determination. He said that he feels it was a conservative approach. Mr. Curley stated that there may have been an even shorter discontinuance period than was stated because even though the space may have appeared dormant, there may have been activity going on, such as renovations. Mr. Curley summarized by saying that depending on the facts, it's even possible that there was no discontinuance at all.

Mr. Feerick asked if he could see Mr. Wanamaker's March 8th letter.

Chairman Englert asked Noelle Wolfson, Esq. if the Board could share the letter and Ms. Wolfson said the Board should share it.

Board Secretary, Janet Guerra, stated that she would send Mr. Feerick the letter tomorrow.

Mr. Feerick said that he was only asking because if the Board was relying on that letter as to the facts of the discontinuance, he hasn't seen it. Mr. Feerick asked if the appeal could be held open until he can see the letter.

Member Paul Curley said that the Chairman read the letter.

Noelle Wolfson, Esq. advised that it was her sense that Mr. Feerick was asking for some additional time to review and understand the March 8th letter.

Chairman Englert said we are not totally dependent on that letter.

Noelle Wolfson, Esq. said that it is reasonable for the Appellant to put in a supplemental submission and hold open for one month.

Chairman Englert asked for a motion to re-open the public hearing.

Motion to re-open the public hearing and adjourn it to the Board's April meeting.

MOTION: Paul Curley

SECOND: Marion Shaw

4-0, 1 abstention. APPROVED.

Mr. Feerick thanked the Board.

8:45pm Village Consulting Attorney, Noelle Wolfson, Esq. discussed the New Zoning Code adopted February 10, 2022, effective April 15, 2022.

9:03pm Motion to adjourn the meeting.

MOTION: Meg Fowler

SECOND: Paul Curley

VOTE: 4-0, 1 abstention. APPROVED.

The meeting was adjourned at 9:03 PM.

Respectfully submitted,

Janet Guerra
Board Secretary