

**Village of Upper Nyack
Zoning Board of Appeals Meeting
Tuesday, April 5, 2022, 8:00pm**

DRAFT 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 **8:06 pm** by the Chairman, Thomas Englert.

Other Board members present: Paul Curley and Marion Shaw (via telephone).

Absent: Stephen Lubeck (abstention), Meg Fowler.

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

8:06 pm: The Chairman opened the meeting, and read the Notice of Public Hearing, which was published in The Journal News on March 29, 2022.

8:08 pm: The Chairman called for a motion to approve the minutes from the March 8, 2022 meeting.

Approval of Minutes: Member Paul Curley moved to approve the *Minutes* from March 8, 2022; SECOND: Marion Shaw; VOTE: 3-0; 1 absent; 1 abstention. APPROVED.

8:09 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. *Continuation from March 8, 2022.* 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.

Donald Feerick, Esq. represented the appellant, John Stickler.

Donald Feerick, Esq. thanked the board for allowing him the opportunity to review and comment on Roy Wanamaker's letter of March 8th. He said that at the last session of the hearing he misunderstood the duration of time that Mr. Wanamaker was commenting on. He believed the window of time was from June of 2020 through September of 2020. He did not fully appreciate that Mr. Wanamaker was applying the PAUSE all the way through September of 2021. He said that he, on Mr. Stickler's behalf, submitted a letter dated March 29, 2022 attempting to explain to the Board the true import of PAUSE and how it was lifted as of July 20, 2020 and that municipalities throughout the State had the ability to extend it for a period of up to 120 days but the Village Board did not do so.

Mr. Feerick advised the Board that his letter of March 29, 2022 addressed the cessation of use argument. He referred the Board members to that letter for the argument. He acknowledged receipt of Consulting

Counsel's memorandum to the Board dated April 5th. He said that caselaw cited in that memorandum holds that the board may assume that there is no cessation of use where the facts in the record do not provide otherwise. However, he argued that a use chronology provided on behalf of the Hartell's property owner acknowledged that the deli was not open to the public for the period of at least January 2020 through August 1, 2021 and therefore argued that the deli use was discontinued for that period, which exceeded six months.

Mr. Feerick asked Mr. Stickler if he had anything to add, and he did not, so Mr. Feerick said they had nothing further.

Chairman Englert said that Mr. Wanamaker has some discretion in how he interprets the PAUSE. He further explained that the Village's zoning ordinance includes a definition of "USE" that differs from the definition cited by the appellant's counsel. The Chairman reviewed the definition of "USE" and said that the deli was outfitted and ready to be used as a deli during the time period of the PAUSE as interpreted by Mr. Wanamaker so the "USE" was not discontinued, but rather continued because it was equipped and ready to be opened as a deli at the relevant times. The Chairman asked if any other board members had comments.

Member Paul Curley said that he agreed with the Chairman and that it's incredibly important to the look at the definition of "USE" in the Village Zoning Ordinance to evaluate whether the "USE" had been discontinued. He continued that just because a business has a change in tenants or shuts down for any period of time, for whatever reason, does not mean it's not in "USE" under the Village Zoning Ordinance's definition of that term.

Member Marion Shaw asked for clarification about the term "USE". The Chairman explained that it's in the Village's code and says that "USE" is the specific purpose for which land or a building is designed, arranged, intended or for which it is or may be occupied or maintained.

Mr. Feerick said that there's another sentence in the zoning ordinance's definition of use.

Chairman Englert agreed that the definition of use has a second sentence but said that it applied to what constitutes a "permitted use" and that is not what we are discussing here.

Mr. Feerick said that he respectfully disagreed.

Member Paul Curley said that the second sentence is irrelevant because it refers to the term "permitted use".

Mr. Feerick said that he once again, disagreed because the definition has two sentences. He deferred to Village counsel.

Noelle Wolfson, Village Consulting Attorney, said that the definition has two sentences. The first sentence defines the term "USE" the second sentence provides that the term "permitted use" does not include nonconforming uses. The first sentence is the one that is relevant for the purpose of this appeal, as it defines use. The second sentence is just a clarification that "permitted uses" do not include nonconforming uses because the code in later sections regulates "permitted uses" and nonconforming uses differently. For the purposes of the definition of "Use", the first sentence would be controlling.

Member Marion Shaw said that she understood and agreed that just because the deli was not open, did not mean that the use was discontinued.

Chairman Englert asked if there were any comments from the public. There were none. And, the Chairman asked for a motion to close the public hearing.

Motion: Marion Shaw

Second: Paul Curley

VOTE: 3-0; 1 absent; 1 abstention. APPROVED.

Chairman Englert said that it was his sense from the two sessions of the hearing that the board was inclined to find that the deli use was not discontinued because it was at all relevant times outfitted and ready for use as a deli.

Member Paul Curley said he agreed and that he believed there were grounds to support the argument that there was no discontinuance because the property remained fully outfitted and ready to be used as a deli which conforms with the definition of use, which is a purpose for which a building is designed, arranged, intended. Further, he said that there was information in the record to show that there was an ongoing attempt to find a tenant to operate that equipment and operate that business, so there are multiple reasons why he would find that the use continued as defined in the zoning ordinance.

Noelle Wolfson, Esq. advised the Board that it is not confined to the code enforcement officer's rationale when deciding and it could affirm the finding that the use had not been discontinued for the reasons Mr. Curley stated.

Chairman Englert asked Noelle Wolfson, Village Consulting Attorney, to draft a resolution for the Board's consideration at the May meeting.

Chairman Englert called for a motion to adjourn.

Motion to adjourn the meeting.

MOTION: Paul Curley

SECOND: Marion Shaw

VOTE: 3-0, 1 absent, 1 abstention. APPROVED.

The meeting was adjourned at 8:27 PM.

Respectfully submitted,
Janet Guerra
Board Secretary