

VILLAGE OF PELHAM

Zoning Board of Appeals

**50 LINCOLN AVE, LLC
50 Lincoln Avenue
Pelham, New York 10803
Parcel 163.28-1-13**

April 27, 2016

**PRESENT: Chairman Smith, Messrs. Shirreffs, Brown, Diffley & Hartmere,
Deputy Clerk Debra DelGrosso, Attorney Robert G. Wise &
Building Inspector Leonard Russo.**

The applicant sought a variance from the provisions of Section 98-100 A. allowing the applicant to demolish the existing structure on the property located at 50 Lincoln Avenue (consisting of a gas and service station) to construct a new convenience store, to relocate the two existing gas pumps, and to add a third pump. The new proposed structure would have a rear yard setback of ten feet where the Zoning Code requires a minimum rear yard setback of twenty-five feet from a residential district. Chairman Smith advised the Board that since this was a Type II Action, a SEQRA review was not necessary.

Leo Napier, Esq. of Harfenist, Kraut & Perlstein LLP was present on behalf of the applicant. Mr. Napier was accompanied by William Wolf, a principal of the applicant, and Richard Zapolski, the engineer for the project. Mr. Napier told the Board that his client wanted to eliminate the automobile service bays and install a convenience store in the new structure. The client also wished to relocate the existing fuel service pumps. He presented the Board with a letter in support of the application from a proximate property owner, who was not present at the meeting.

Edward Phillips, Esq. of Keane & Beane, representing the owner of the Mobil Service station located at the intersection of Lincoln Avenue and First Avenue, spoke next. He argued the public notice was defective and requested that the meeting be adjourned. Mr. Phillips said the notice incorrectly stated the relevant Zoning Code provision required a twenty-five foot setback when in fact the Code requirement is for a fifteen foot setback. Section 90-100. A. states that a filling station requires a 15 foot setback from any lot line and a 25 foot setback from the boundary of any residential district. He said that therefore the notice should have made reference to two variances being needed. Chairman Smith asked Mr. Napior if he had seen the printed notice. He said he had not and was given a copy. Mr. Napior said that in his opinion the reference to the 25 foot residential setback in effect included the 15 foot setback requirement. Chairman Smith asked the Board for its views on the sufficiency of the notice. The Board generally thought the notice, while not optimal, did provide sufficient notice to the public of the variance being sought and directed the public to the appropriate provision of the Zoning Code. In response to a question, Chairman Smith said the public notice was published in the Gannett Westchester newspaper and notices were sent by certified mail to neighbors located within two hundred feet of the applicant's premises, that the Zoning Code provision cited in the notice provides for a twenty-five foot rear yard setback from a residential district and that therefore in his view satisfactory notice had been given.

Mr. Napior told the Board his client wanted to demolish the existing building and erect a new structure closer to the rear of the parcel with three gasoline service pumps. Mr. Napior said that his client wanted to improve the vehicular flow in and out of the station and to keep all activity in front of

the structure. Mr. Zapolski explained the improved traffic flow to the Board under the proposed plan and said it would be safer. Mr. Napior told the Board there had been a large shift in the service station business as many drivers no longer use the local gas station to service their vehicle, often taking their vehicle to the automobile dealer where they either purchased or leased their vehicle, or to an independent service facility.

Mr. Phillips said that there were two additional issues he felt needed to be mentioned. Mr. Phillips stated that the present structure on the parcel was pre-existing and non-conforming being because it is located within 25 feet of the residential district. Further, he stated, the current gasoline pumps are located within 300 feet of the Hutchinson School, which is a second non-conforming use. Section 98-73. A. of the Zoning Code requires that a filling station use of a premise requires a Special Permit, but a Special Permit is prohibited for any filling station use within 300 feet of a public or parochial school. Mr. Phillips argued that no special permit was ever granted to the applicant's premises, which is therefore a pre-existing non-conforming use. He argued that both of these matters should have been listed on the objection sheet and should be before the Board. Chairman Smith agreed that these were two additional issues raised by the application, but stated that since they were not raised by the Building Inspector in his objection sheet, the Board lacked jurisdiction to consider them at this time. Mr. Smith noted that any decision on the current application by the Board would have no bearing on any non-conforming use issues raised by the application, which would have to be considered at later stage in the review process if a variance or variances were to be granted.

Chairman Smith then asked Mr. Napior whether his client had considered alternative options to remodeling the facility. Mr. Napior

generally indicated that his client had considered other options and the application set out the best alternative.

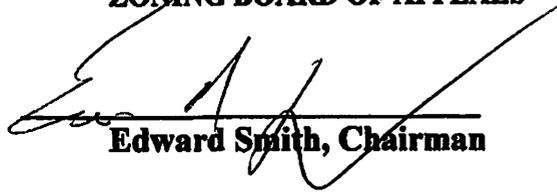
Chairman Smith asked Mr. Napior how the relocation of the structure and pumps would be beneficial to the applicant. Mr. Napior responded that in the current environment vehicle repair facilities at service stations are proving uneconomic, but offered no specific evidence to support this statement. Mr. Napior stated that granting the variances would greatly improve traffic flow through the facility and would hopefully provide economic benefit to the applicant. A discussion of relocating the structure to the easterly lot line ensued. Mr. Zapolski said while not considered specifically prior to submission of the application, that location would not be optimal for traffic flow and safety.

Mr. Hartmere said he was concerned with the safety ramifications of the seeming increased vehicular traffic from the proposed alteration. Mr. Zapolski said the proposed plan was the best business model for the site and the safest traffic pattern. Mr. Napior noted that traffic on Lincoln Avenue is already heavy and the changes requested would not increase traffic, but would facilitate access and safety to the remodeled gas pumps and convenience store.

Chairman Smith read into the record findings of facts and a legal analysis. These factual findings and legal analysis were adopted by the Board, and are attached and incorporated by reference into this decision.

Mr. Shirreffs made a motion that the application be denied. Mr. Brown seconded the motion. The Board voted unanimously that the application for a variance be denied.

**VILLAGE OF PELHAM
ZONING BOARD OF APPEALS**



Edward Smith, Chairman

Kenneth Shirreffs

David Brown

Brian Difley

Michael Hartmere

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Michael Hartmere

50 Lincoln Avenue Hearing

4-27-16 ZBA meeting

Comments by Chairman Edward A. Smith

Findings of Fact

- This application concerns property located at 50 Lincoln Avenue, Pelham NY. Currently located on the property is a Sunoco Service and filling station.
- The applicant, 50 Lincoln Pelham LLC wants to remove all existing improvements on the property and construct a new filling station with an accessory convenience store.
- The applicant purchased the subject property in 2015 or 2016.
- Section 98-100A of the Pelham Zoning Code was in effect when the applicant purchased the property.
- The property is located in the B-1 zoning district.
- Filling stations are a permitted use in the B-1 district.
- The subject property is adjacent to a residential district. In particular, the property adjacent to the southern property line, 220 2nd Avenue, Pelham NY, is located in the Residence A-3 district.
- Section 98-100A of the Pelham Zoning Code provides that a building used as a filling station has to be set back 15 feet from any lot line and 25 feet from the boundary of a residential district.
- Accordingly, section 98-100A Pelham Zoning Code mandates a 25 foot setback from the southerly lot line of the property.
- The applicant proposes to locate the building 10 feet from the southern property line. The applicant therefore seeks a 15 foot setback variance.
- The applicant contends that the applicant is seeking to reduce the setback to the minimum necessary to allow for "appropriate traffic circulation on the site."

- The applicant argues that the variance provides a benefit to the surrounding community because is to keep activity on the site away from the adjacent property to the south on 2nd Avenue while maintaining a landscape buffer area between the building and the adjacent property on 2nd Avenue.
- The applicant has submitted a letter from the owner of the property at 220 2nd Avenue, Mr. Chris Casa, who supports the application for these reasons.
- The subject property is directly across Lincoln Avenue from the Hutchinson School, one of the two elementary schools in the Village of Pelham. The students at the Hutchinson School run from Kindergarten through grade 5.

Legal analysis

This application seeks an area variance

Section 7-712-b of the NYS Village Law directs that the ZBA weigh the benefit to the applicant if the variance is granted as compared to the detriment to the health, safety and welfare of the neighborhood if the variance is granted.

The section provides that the in undertaking this analysis, the board should consider: (i) whether an undesirable change will be produced in the neighborhood or a detriment to nearby properties will be created by the granting of the variance; (ii) whether the benefit sought by the applicant can be achieved by some other method feasible for the applicant to pursue other than the area variance; (iii) whether the area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental condition of the neighborhood or district; and (iv) whether the alleged difficulty was self-created.

Whether the variance is substantial

Let's start with the third factor, whether the variance is substantial.

Some court decisions have said that whether a variance is substantial should be judged considering all of the relevant circumstances. Applicant cites the decision of the Westchester County Supreme Court in the Aydelott v. Town of Bedford Zoning Board of Appeals in his decision, but did not provide the ZBA with a copy of that decision.

Notwithstanding, many if not most decisions hold that whether an area variance is substantial is a function of the percentage magnitude of the request, particularly when the deviation is great.

JPS Enterprises v. Wright, 81 A.D.3d 955 (2d Dep't 2011), for example, the Second Department sustained the denial of an area variance, stated that "the Board's finding that requested variance is substantial, creating a 41% deficiency in the number of off-street parking spaces otherwise required, was rational considering the significant deviation from the zoning ordinance's requirements" This is at page 957.

To the same effect are the decisions of the Third Department in Smelyansky v. Zoning Board of Appeals of the Town of Bethlehem, 83 A.D.3d 1267 (3d Dep't 2011) and Probst Family Trust v. Zoning Board of Appeals of the Town of Horicon, 79 A.D.3d 1427 (3d Dep't 2010).

Here, there is a 25 foot setback requirement on the southerly side of the property. The applicant seeks to reduce that setback by 15 feet, to a 10 foot setback. This is a 60% deviation, which is substantial under any interpretation of section 7-712-b.

The sheer substantiality of the variance gives rise to concern about the precedential effect of granting such a variance.

Davydov v. Mammina, 97 A.D.3d 678 (2d Dep't 2012), the Second Department held that a zoning board could properly consider as a factor in its determination whether to grant an area variance "the precedential effect of its decision and the impact of its decision on the 'effectiveness of the zoning ordinance.'"

I am concerned that to grant such a substantial variance would set an adverse precedent that would make it difficult for the Pelham ZBA to enforce the existing 25 yard setback requirement.

There is nothing unusual about this application that would make this variance a unique one. For example, there is nothing unusual about the configuration of the property. The property is a 100 foot by 100 foot lot.

Indeed, the applicant does not seek the variance based on a claim that there is something unusual about the property that argues for a variance. Instead the applicant contends that the variance would allow for better traffic circulation at the front end of the property.

This would arguably be the case with other applicants seeking to construct and operate filling stations on Lincoln Avenue in Pelham. And much of Lincoln Avenue abuts residential districts in Pelham.

Given this, if we were to grant a 60% deviation here to this applicant how would we justify denying any variance request seeking a 60% deviation on similar grounds?

Accordingly, I am concerned about the precedent that granting this variance would set, am concerned that granting the variance would tie this board's hands in future cases and am concerned that granting the variance would have a materially detrimental effect on the existing zoning ordinance at issue here and make it difficult to enforce that provision in the future.

And further, given that the use of the property is for a filling station it seems to me that it is both good policy and very intentional on the part of the Village when it adopted this provision of the zoning code to mandate a 25 foot buffer between the building housing such a business and the border of the residential district.

To reiterate, I am concerned that granting this variance will dilute the effectiveness of the zoning ordinance at issue here by impairing our ability to effectively enforce this provision in future cases.

Whether an undesirable change will be produced in the neighborhood or a detriment to nearby properties will be created by the granting of the variance

The first factor requires that we examine whether an undesirable change will be produced in the neighborhood or a detriment to nearby properties will be created by the granting of the variance.

The more substantial the variance requested, the more likely it is that the proposed variance may have an adverse impact on the neighborhood and be destructive to the community's zoning scheme. National Meritt v. Weist, 41 N.Y.2d 438 (Court of Appeals 1977).

This is clearly that case here. The sheer magnitude of this proposed variance, which is a 60% deviation from what is required under the zoning code, is likely to have an adverse impact on the neighborhood and be destructive to the community's zoning scheme.

As I alluded to, the reason for that is granting such a substantial variance will undermine the effectiveness of the existing 25 foot setback requirement.

In essence, appellant contends that the granting of this variance will be good for his business because it will allow for better traffic circulation, which presumably will increase his revenues.

If we were to grant such a substantial variance for this reason, it will set a precedent that will make it much harder for the zoning board to deny any applicant a variance from similar setback requirement of any size.

The prospect of undermining the effectiveness of the existing setback requirements and potentially tying the zoning board's hands in other, similar variance applications would have an adverse impact on the neighborhood and be destructive to the community's zoning scheme.

Further, as we have discussed, the variance will allow more traffic to access the property at the same time, although the applicant has submitted no evidence concerning how much traffic will result from the granting of the variance.

This increased volume traffic and the resulting congestion is a detriment to the surrounding community, particularly property abuts a residence district at the southerly end of the property and that Hutchinson School is directly across the street from the property on Lincoln Avenue.

Alternatives

The third factor requires that the board look at whether the benefit sought by the applicant can be achieved by some other method feasible for the applicant to pursue other than the area variance.

An applicant seeking an area variance should therefore make a showing that additional alternatives were explored and demonstrate why alternative options not requiring a variance are unavailable.

An applicant's failure to consider alternatives cuts against the granting of the variance. Robbins v. Seife, 215 A.D.2d 665 (2d Dep't 1995).

The applicant has considered alternatives as described during testimony by the applicant's engineer during the hearing, and has concluded that the

alternative proposed in the application is the best one for the applicant's business.

The hardship was self-created

The last factor is whether the hardship was self-created.

A hardship is self-created is the variance applicant purchased the property subject to the zoning restrictions.

The self-created nature of this the hardship is a significant factor in the balancing test under section 7-712-b, but is not determinative and does not in and of itself preclude the granting of relief. Byron Assoc. v. Zoning Board of Appeals of the Town of Mamaroneck, 142 A.D.2d 642 (2d Dep't 1988).

A purchaser does not have to have actual knowledge of the zoning restriction as the knowledge of those restrictions is imputed.

As the Second Department has stated "[a] prospective purchaser of property is chargeable with knowledge of the applicable restrictions of the zoning law and is bound by them and by the facts and circumstances which can be learned by the exercise of reasonable diligence, even where there are harsh results." McGlasson Realty, Inc. v Town of Patterson Board of Appeals, 234 A.d.2d 462 (2d Dept 1996). See also Weisman v. Zoning Board of Appeals of the Town of Kensington, 260 A.D.2d 487, 488 (2d Dep't 1999).

Here, the applicant purchased the subject property in 2015 or 2016, when section 98-100A of the Pelham Zoning code was in effect. Therefore, the hardship was self-created.

This weighs against granting the variance, but is not dispositive.

Economic considerations

While the economic impact of compliance with an area variance is not listed as one of the statutory considerations and is not a prerequisite for granting a variance, but financial considerations may be relevant in some circumstances in balancing the benefit to the applicant against the detriment to the community.

To the extent that the applicant argues that economic considerations are relevant, the applicant is required to provide dollars and cents proof of all relevant aspects to demonstrate the financial impact of the variance.

The applicant argues that granting the variance will provide a benefit because it will allow for better traffic circulation and increase the revenues of the business.

But applicant has provided no dollars and cents proof to support this argument and in any event the mere fact that the property would be worth more or would be more profitable if an area variance is granted does not provide a basis for granting an area variance. Ianucci v. Casey, 140 A.D.2d 343 (2d Dep't 1988).

VILLAGE OF PELHAM

Zoning Board of Appeals

STEPHEN & ASHLEY DOLAN

116 Cliff Avenue

Pelham, New York 10803

Parcel 164.45-1-10

April 27, 2016

PRESENT: Chairman Smith, Messrs. Shirreffs, Brown, Diffley & Hartmere, Deputy Clerk Deborah DelGrosso, Attorney Robert G. Wise & Building Inspector Leonard Russo.

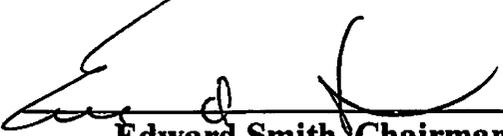
The applicant sought a variance from the provisions of Section 98-108.2 to construct an addition to the first floor of their one family residence. The addition of the space would increase floor area ratio of 38.94 per cent where the Zoning Code allows a maximum floor area ratio of 35 per cent in the A-1 residential district. Chairman Smith advised the meeting that since the application was for an area variance on a one family residence it was a Type 2 SEQRA action and did not require Environmental Assessment review.

Mr. Dolan was present on behalf of the application. He told the Board that he and his wife wanted to expand their kitchen to add a mud room. The patio outside the kitchen would be reduced in size but no green space would be lost. He said the addition would not have any impact on the neighborhood and he had not received any objections or comments from neighbors. There were no members of the public present to comment on the application. Chairman Smith asked the Board if any member had any questions for the applicant. There were no questions. He then listed the

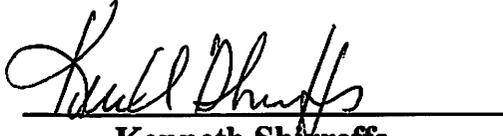
criteria to be considered in the Boards' consideration of a variance application, noting that the size of the variance, any undesirable circumstances resulting from a grant of the variance, and whether the situation was self created, which is significant, but not determinative. He asked Mr. Dolan if he and his wife had considered alternative alterations. Mr. Dolan said he and his wife had considered alternative alterations but this was the smallest size that would accomplish their objectives and it wasn't visible from street.

Mr. Shirreffs made a motion the Variance be granted as requested. Mr. Diffley seconded the motion, which was unanimously approved.

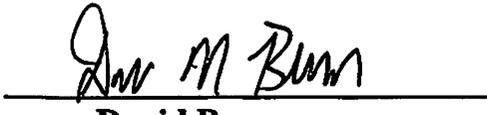
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ZONING BOARD OF APPEALS**



Edward Smith, Chairman



Kenneth Shirreffs



David Brown



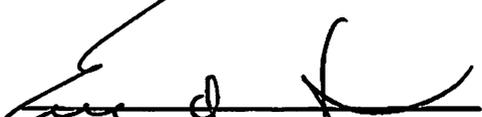
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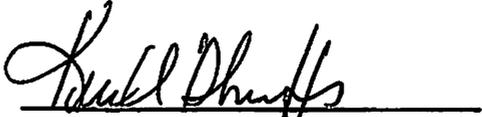
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