

Memo

To: Alexa Burchianti – Secretary to Town of Chester Zoning Board
From: Robert J. Dickover
Date: 2/21/2019
Re: Broccoli Patch, Inc. / Interpretation & Area Variances / 1355 Kings Highway

1. The Relief Requested.

Broccoli Patch, Inc. has filed an application seeking relief from the Town of Chester Zoning Board of Appeals (“ZBA”) in the nature of an *Interpretation* and an *Area* variance.

The requested *Interpretation* is two-fold. First, a request that the ZBA determine that the applicant’s proposed catering facility is a permitted use under the use category “restaurant”; and, second, that more than one building is permitted on a single lot.

The requested *Area* variance seeks to allow construction of a new building within a 100 ft. setback area of an existing cemetery on the lot.

2. The Application/Jurisdiction.

At inception it must be noted that as to the request for an *Interpretation*, that pursuant to Chester Town Code Chapter 98 “Zoning” § 98-37 “Powers and duties” that:

The Board of Appeals shall have all the powers and duties prescribed by law and by this chapter, which are more particularly specified as follows, provided that none of the following provisions shall be deemed to limit any power of the Board that is conferred by law:

A. Interpretation. On appeal from an order, requirement, decision or determination made by an administrative official or on request by any official, board or agency of the Town, to decide any of the following questions:

(1) Determination of the meaning of any portion of the text of this chapter or of any condition or requirement specified or made under the provisions of this chapter.

Pursuant to the foregoing provision the Town Planning Board, by its attorney, David A. Donovan, Esq., has submitted a letter dated February 11, 2019 requesting of the ZBA that it undertake the foregoing interpretation. As such, the ZBA has jurisdiction over this portion of the application.

As to the request for an area variance to allow construction of a new structure 60 ft away from an existing cemetery where Town Code Chapter 40A requires a 100 ft setback it is noted that the Board's authority to hear an appeal is limited to the matters set forth at Chester Town Code Chapter 98 "Zoning" § 98-37 "Powers and duties" that:

The Board of Appeals shall have all the powers and duties prescribed by law and by this chapter, which are more particularly specified as follows, provided that none of the following provisions shall be deemed to limit any power of the Board that is conferred by law:

B. Variances.

(1) To authorize, upon appeal in specific cases, such variance from the terms of this chapter as will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, there are unnecessary hardships in the way of carrying out the strict letter of this chapter, subject to terms and conditions to be fixed by the Board of Appeals; provided, however, . . . "

Because the provision of law prohibiting the construction within 100 ft of the cemetery is found in Chapter 40 of the Town Code and not contained in Chapter 98 (The Zoning Ordinance), it is the opinion of the undersigned that the Zoning Board of Appeals is without jurisdiction to hear that portion of the application. The Board is free to accept or reject this opinion. If the Board accepts this opinion a Decision should be so issued.

3. The Property.

Address: The property is located at 1355 Kings Highway and shown on the tax maps as: Sec. 13, Block 3, Lot 2.

Zoning District: The property is located in the LB-SL zoning district.

Parcel Size: The property consists of a singular lot 2.199 +/- acres in size.

4. The Project.

The owner proposes to use the property for the mixed use of a distillery, a catering hall, and a residence.

5. The Law.

As to the Area Variance

As to the requested area variance I have noted above that the Zoning Board is without jurisdiction to hear that portion of this appeal.

The ZBA obtains its authority to hear appeals from NYS Town Law section as well as Town of Chester Code § 98-37 the terms of which are reproduced below. ¹ Notably, the Boards authority to issue area variances is limited to area requirements created by Chapter 98 of

the Town Code. The 100 ft setback from cemetery lands is found at Town of Chester Code Chapter 40 - not 98. Therefore, in the absence of other empowerment the ZBA is without jurisdiction to hear that portion of the appeal.

As to the Interpretation

The Board has jurisdiction on request by any board (here the Planning Board) to decide “the meaning of any portion of the text of this chapter.

The application seeks an interpretation that the use “catering” is included in the use “restaurant.” And, that more than one building housing a separate permitted use is permitted on a single lot.

The pertinent sections of Town of Town of Chester Zoning Code with respect to the procedures of the ZBA are reproduced in full on the annexed endnotes. ii

The Board members should familiarize themselves with the requirements.

6. SEQRA.

This application is subject to compliance with the provisions of SEQRA and the procedures therefore must be followed.

The applicant has submitted a Short Form EAF.

At the first opportunity the Board should declare itself to be Lead Agency. Because this is an application for an *interpretation* of an existing code, rule or regulation it is by definition a Type II action. Upon so finding no further environmental review on this application is required. See, NYCRR 617.5 (31).ⁱⁱⁱ

7. GML 239-m:

This project must be referred to the Orange County Planning Department pursuant to NYS GML section 239-m because the property is located along a County Highway. No decision on this matter should be made until the County has commented upon the application or failed to have commented within 30-days of the date of referral.

8. Public Hearing:

A Public Hearing on this application is required. The applicant must produce proof of mailing the required public notice to all property owners within 300’ of the project property boundaries. Proof of that mailing should be placed in the Zoning Board file on this application.

Publication of the Public Notice is also required. The affidavit of publication of the Public Notice must also be secured and placed in the Zoning Board file on this application.

The public hearing should not be concluded until the OC Planning Department has had 30 days to respond to the Sec. 239-m referral, if required.

9. The Law

The Code should be examined to determine whether any of the words “catering” are defined within the Code. If so, that definition may be definitive of the issue. The word “restaurant” should also be examined to see if it encompasses the definition of “catering”.

Such a review is appropriate and may be dispositive of the question.

Further, the Board should compare the activities normally associated with the defined meanings of “catering” and “restaurant” and determine if they are reasonably similar.

Failing to find any definitions within the Code, resort to the Webster Dictionary or other word composition is appropriate in the Board’s efforts on that portion of the application.

As to the second part of the interpretation request, that more than one use may be permitted in more than one building, the Board needs to examine the Code to determine whether any assistance is therein.

The Board should also inquire of the Planning Board and Building Department as to whether there have been other instances within the Town where such an application has been approved.

Finally, the applicant has the burden with respect to these two issues and if they have any information on the matter they should present same to the Board for its consideration.

Respectfully,

Robert J. Dickover, Esq.

Counsel to the Zoning Board

ⁱ § 98-37 Powers and duties.

The Board of Appeals shall have all the powers and duties prescribed by law and by this chapter, which are more particularly specified as follows, provided that none of the following provisions shall be deemed to limit any power of the Board that is conferred by law:

A. Interpretation. On appeal from an order, requirement, decision or determination made by an administrative official or on request by any official, board or agency of the Town, to decide any of the following questions:

(1) Determination of the meaning of any portion of the text of this chapter or of any condition or requirement specified or made under the provisions of this chapter.

(2) Determination of the exact location of any district boundary shown on the Zoning Map.

B. Variances.

(1) To authorize, upon appeal in specific cases, such variance from the terms of this chapter as will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, there are unnecessary hardships in the way of carrying out the strict letter of this chapter, subject to terms and conditions to be fixed by the Board of Appeals; provided, however, that no such variance shall be granted unless said Board finds:

(a) That there are physical conditions, such as in the case of an exceptionally irregular, narrow, shallow or steep lot, fully described in the findings of said Board, applying to the land or building for which the variance is sought, which conditions are peculiar to such land or buildings and have not resulted from any act of the applicant or any prior owner.

(b) That, for reasons fully set forth in the findings of said Board, the aforesaid circumstances or conditions are such that the strict application of the provisions of this chapter would deprive the applicant of the reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building, and that the variance as granted by said Board is the minimum variance that will accomplish this purpose.

(c) That the granting of the variance under such conditions as said Board may deem necessary or desirable to apply will be in harmony with the general purpose and intent of this chapter, will not represent a radical departure therefrom, will not be injurious to the neighborhood, will not change the character thereof and will not be otherwise detrimental to the public welfare.

(2) The needs or desires of a particular owner or tenant or of a particular prospective owner or tenant shall not, either alone or in conjunction with other factors, afford any basis for the granting of a variance. The fact that the improvements already existing at the time of the application are old, obsolete, outmoded or in disrepair or the fact that the property is then unimproved shall not be deemed to make the plight of the property unique or to contribute thereto.

(3) Where said Board finds the zoning classification of a particular property to be conducive to the deprivation of the reasonable use of the land or buildings and where said Board finds the same condition to apply generally to other land or buildings in the same neighborhood or zoning district, said Board shall call this condition to the attention of the Planning Board.

(4) In all cases where the Board of Appeals grants a variance from the strict application of the requirements of this chapter, it shall be the duty of such Board to attach such conditions and safeguards as may be required in order that the result of its action may be as nearly as possible in accordance with the spirit and intent of this chapter.

ii § 98-38 Procedure.

The powers and duties of the Board of Appeals shall be exercised in accordance with the following procedure:

A. The Board of Appeals shall not decide upon any appeal for a variance or interpretation of this chapter without first holding a public hearing, notice of which hearing and of the substance of the appeal or application shall be given by publication in the official newspaper of the Town at least five days before the date of such hearing. In addition to such published notice, the Board of Appeals shall cause such notice to be mailed at least five days before the hearing to all owners of property which lie adjacent to that owned by the applicant in the immediate area and to all other owners as the Board of Appeals may deem advisable.

(1) The names of said owners shall be taken as they appear on the last completed tax roll of the Town.

(2) Even though due notice shall have been published as above provided and there shall have been complete compliance with the remaining provisions of this section, the failure to give notice in exact conformance herewith shall be deemed to invalidate action taken by the Board of Appeals in connection with the granting of any appeal or variance.

B. All appeals and applications made to the Board of Appeals shall be in writing, on forms prescribed by said Board, and shall be accompanied by a fee of not less than the actual and necessary costs of advertising and holding a public hearing. The Board of Appeals may, at its discretion, return to the applicant part or all of the fee paid by him in the event that his appeal under § 98-37A is partially or wholly successful. The fee filed in connection with applications under § 98-37B shall not be returnable regardless of disposition of the ease by the Board. A review fee of \$100 shall be paid for an interpretation or a dimensional variance, and a fee of \$300 shall be paid for a use variance. The costs of publication and certified mail shall be paid for by the applicant.

C. Each appeal or application shall fully set forth the circumstances of the case. Every appeal or application shall refer to the specific provision of the chapter involved and shall exactly set forth, as the case may be, the interpretation that is claimed or the details of the variance that is applied for and the grounds on which it is claimed that the same should be granted.

D. Notice of hearing to state, county or other officials.

(1) Should any appeal involve either of the two following conditions, the Secretary of the Board of Appeals shall transmit to the designated office or official a copy of the official notice of the public hearing not later than 10 days prior to the date of the hearing.

(a) Any change in the boundaries of any district, which change would occur within a distance of 500 feet of any village, town or county or any boundary of a state park or parkway.

(b) Any change in the regulations prescribed for any district, any portion of which is located within 500 feet of the boundaries listed in Subsection D(1)(a) above.

(2) The designated official for counties shall be the Clerk of the County Legislature. In villages and Towns, the designated official shall be the Clerk of the municipality. In the case of state parks or parkways, the designated office shall be the Palisades Interstate Park Commission.

E. Prior to the date of any public hearing, the Secretary of the Board of Appeals shall transmit to the Chairman of the Planning Board a copy of any appeal or application, together with a copy of the notice of such hearing. The Planning Board may submit to the Board of Appeals an advisory opinion on said appeal or application at any time prior to the rendering of a decision by the Board of Appeals.

F. Should any action by the Board of Appeals involve any of the areas specified in Article VIII, § 98-39E(1)(a) through (f), then the matter shall be referred, prior to final action by the Board of Appeals, to the Orange County Planning Department in accordance with §§ 239-1 and 239-m of Article 12-B of the General Municipal Law.

[Amended 3-6-2007 by L.L. No. 4-2007]

G. Every decision of the Board of Appeals shall be recorded in accordance with standard forms adopted by the Board and shall fully set forth the circumstances of the case and shall contain a full record of the findings on which the decision is based. Every decision of said Board shall be by resolution, and each such resolution, together with all documents pertaining thereto, shall be filed in the office of the Town Clerk by case number under one of the following headings: "interpretation" or "variances." Regarding its decision in each case, the Board of Appeals shall notify the Building Inspector, Town Board, Town Planning Board and the Municipal Clerk of any affected municipality given notice of hearing as set forth in Subsection D of this section.

H. All the provisions of this chapter relating to the Board of Appeals shall be strictly construed. Said Board, as a body of jurisdiction, shall act in full conformity with all provisions of law and of this chapter and in strict compliance with all limitations contained therein.

I. Unless construction is commenced and diligently pursued within six months of the date of the granting of a variance, such variance shall become null and void.

ⁱⁱⁱ 617.5 Type II actions.

(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies.

(c) The following actions are not subject to review under this Part:

(31) Interpreting an existing code, rule or regulation;