

Sec. 13, Block 3, Lot 2

TOWN OF CHESTER: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

-----X
In the Matter of the Application of

Broccoli Patch, Inc.

For an interpretation of the Town Zoning
Ordinance as follows:

DECISION

- *That "Catering" is a permitted use in the LB-SL zoning district; and*
- *That multiple principal uses, e.g. restaurant, catering, residence, distillery, are permitted in a single building in the LB-SL zoning district.*

-----X
INTRODUCTION

Broccoli Patch, Inc., by Lewis J. Donnelly seeks an interpretation of the Town of Chester Zoning Ordinance.

The property affected by this application is a parcel located at 1355 Kings Highway in the LB-SL Zoning District and is identified on the Town of Chester tax maps as Sec. 13, Block 3, Lot 2. The property is currently developed and contains presently unused buildings.

This application was submitted to the Zoning Board by the Town Planning Board pursuant to a letter dated February 11, 2019 authored by the counsel to the Planning Board, David A. Donovan, Esq. On referral from the Planning Board, that letter sought the Zoning Board's interpretation of whether a 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 application as submitted also sought an additional area variance seeking to allow construction of a new building within a 100 foot setback area of an existing cemetery on the parcel in question.

The application was modified upon discussion with the Zoning Board and the Applicant. The applicant determined to withdraw the request for the area variance. In addition, the applicant determined to consolidate the requested uses into one building rather than two separate buildings.

Thereupon, the two questions now certified for interpretation by the Board are:

- 1) *Whether “Catering” is a permitted use in the LB-SL zoning district; and*
- 2) *Whether multiple principal uses, e.g. restaurant, catering, residence, distillery, are permitted in a single building in the LB-SL zoning district.*

A public hearing was convened on May 9, 2019 and thereupon closed. Notice of such hearing was duly published and mailed to adjoining property owners as required by Code.

SEQRA

The application is subject to compliance with the provisions of SEQRA and the procedures therefore must be followed. The applicant submitted a short form EAF. The Zoning Board reviewed the EAF and determined that pursuant to 617.5 “Interpreting an existing code, rule or regulation” constitutes a Type II action and therefore no further environmental review was required.

GML 239 REFERRAL

This application was referred to the Orange County Planning Department for review and report. By its letter dated April 12, 2019 the Planning Department reported that this matter is one for local determination there being no significant inter-municipal

or countywide considerations found to exist.

LAW

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, the Zoning Board for the Town of Chester has jurisdiction to hear this application for interpretation.

BACKGROUND

The applicant has submitted a site plan application to the Town of Chester Planning Board whereby it seeks to renovate an existing building into a restaurant and distillery and to construct a second building that would be used as a catering facility and a storage area for the distillery, and a residential apartment above the commercial uses. The Planning Board has referred the matter to the Zoning Board for a determination on whether more than one principal use is permitted on the parcel and whether catering is a permitted use within the permitted use category "restaurant."

As noted earlier, the application has been modified pursuant to the applicant's testimony before the zoning board to withdraw the proposal to construct the second building within a 100 foot setback from an existing cemetery and to consolidate the

proposed uses into one building rather than two buildings.

FINDINGS OF FACT

After receiving all the materials presented by the applicant and his engineer, Ross Winglovitz, P.E., and the testimony of the members of the public being heard from, the Board makes the following findings of fact:

1. The application for use of the site has been modified to withdraw any proposal to construct a building within the applicable 100 foot setback from an existing cemetery on the site.
2. The proposed construction will now include one building rather than two.
3. The proposed uses within the one building will include a restaurant, a catering seating area that may or may not be part of the restaurant dining area, a distillery, a storage area for the distilled products and manufacturing products, and a residential apartment on the second floor of the building.
4. The structure remains currently under rehabilitation and is not occupied.
5. Food will be prepared in an on-site kitchen and served to patrons seated within the restaurant facility.
6. At times the restaurant facility will be used for catered affairs whereby food prepared in the on-site kitchen will be served to guests seated in the restaurant dining room and in a separate dining area set aside for catered affairs.
7. The Board notes that the application for this project is subject to further site plan approval from the Town Planning Board during which it will be subject to

further SEQRA review by that Board.

After hearing the testimony at the public hearing and considering the materials received by the Board, the Board decides as follows:

FINDINGS

*As to the Interpretation That Catering is a Permitted Use Within the Use
Category "Restaurant"*

There were numerous members of the public who voiced their thoughts on the project. The Board does not make this decision in a vacuum. Many were opposed to the project and many were in favor. The general sentiments of the public whether in favor or against the project do not weigh on the Board's determination as set forth herein.

However, from public comments the Board finds that there are currently more than one restaurant operating in the LB-SL zoning district and within the Town of Chester generally which conducts catering services and that catering, in general, is a regular service provided by many restaurants, not just in Chester but elsewhere.

Based upon the testimony of Lewis Donnelly, he proposes to prepare food in a kitchen that will be on-site and serve that food to patrons seated in his restaurant, and, when the occasion calls for it to offer that food to patrons seated within the restaurant dining area on a "catered" basis. That is to say, to persons who are there by invitation for a private gathering. The offering of food to consumers off premises was not ruled out and is also a proposed use.

The Board also finds that within the LB-SL zoning district permitted uses include restaurants. "Catering" as a use is not mentioned and pursuant to Code Section 98-6.C any use not permitted by this chapter shall be deemed to be prohibited.

The Interpretation seeks a determination that catering is a permitted use within the permitted use category of “restaurant”.

The Code contains no definition for “catering”.

The Code does contain a definition for two types of “restaurants” as follows:

Town Code §98-2.B. RESTAURANT, FAST-FOOD

An establishment where food and/or beverages are sold in a form ready for consumption and where, by design or packaging techniques, all or a significant portion of the consumption can or does take place outside the confines of the building.

Town Code §98-2.B. RESTAURANT, STANDARD

Any establishment, however designated, whose primary use is preparation and sale of food for consumption to patrons seated within an enclosed building or on the premises. However, a snack bar or refreshment stand at a public or quasi-public community swimming pool, playground, playfield or park operated by the agency or group or an approved vendor operating the recreational facilities and for the convenience of the patrons of the facility shall not be deemed to be a restaurant.

Town Code §98-2.B. ACCESSORY BUILDING, STRUCTURE OR USE

A permitted subordinate building, structure or use which is clearly incidental to, customarily in connection with and located on the same lot as the principal permitted use. . .

Based upon the foregoing definition of “Restaurant, Standard”, an establishment, whether designated as a restaurant or as a “catering facility”, whose primary use is preparation and sale of food for consumption to patrons seated within an enclosed building or on the premises, is a permitted use as a “restaurant.”

From the foregoing, the Board determines that the catering activity as described by the applicant to be the preparation of food in the restaurant’s on-site kitchen, for

service to patrons on-site whether in the restaurant dining room or a separate dining area reserved for catered affairs, is a permitted use within the use category “restaurant” in the LB-SL zoning district.

Further, catering may be a permitted accessory use to a restaurant use if it is deemed to be “clearly incidental to, customarily in connection with” the restaurant. Pursuant to the description of the catering activity that will take place within the contemplated building the Board finds that the proposed catering use is also a permitted accessory use to the permitted restaurant use.

*As to the Interpretation That More than One Permitted Use is Permitted in a
Single Building*

From comments received from the public and from the Board members personal observations, the Board notes that there are several establishments within the LB-SL zoning district and elsewhere within the Town of Chester where more than one principal use is taking place on a single lot and within a single building.

The Board also notes that from its review of the Town Zoning Code that there is no prohibition against the use of a single lot or a single building for more than one permitted principal use.

The Board is cognizant of the ruling in *Matter of Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 676 N.E.2d 862, holding that “although zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguities are to be resolved in favor of the property owner (*Matter of Brancato v. Zoning Bd. Of Appeals of City of Yonkers*, N.Y., 30 A.D.3d 515, 516, 817 N.Y.S.2d 361).

The Board notes the following definitions within the Town of Chester zoning

code:

Town Code §98-2.B. PRINCIPAL BUILDING OR USE

The primary purpose for which a lot or building is designed or used or in which the principal use is conducted. In certain cases, more than two principal uses may be located in a single building or on a single lot. [underline not original text but added for emphasis]

Town Code §98-2.B. LOT

One or more contiguous parcels of land united by common interest or use, considered as a unit, designed to be used by one use or structure or by a related group of uses or structures and the accessory uses or structures customarily incident thereto, including such open spaces as are required. A lot may be or may not be the land shown as a single lot on a duly recorded plat or other official record. [underline not original text but added for emphasis]

From the foregoing definitions the Board determines that the definition of a Principal Building or Use contemplates by the language therein that “more than two principal uses may be located in a single building”.

Further, the definition of “lot” contemplates by the language therein that a “lot” may be designed for use ‘by a related group of uses and the accessory uses or structures customarily incident thereto” and therefor that more than one permitted use is allowed in a single building in the LB-SL zoning district.

Further, the Board finds that if the restaurant, catering, distillery and storage are “designed to be used by one use or by a “related group of uses” they are all permitted on the same lot.

CONCLUSIONS

*As to the Interpretation That Catering is a Permitted Use Within the Use
Category “Restaurant”*

The Board answers the question in the affirmative and determines that catering is a permitted use in the LB-SL zoning district under the category "restaurant" provided that the catering service is a part of and related to the restaurant use of the premises.

*As to the Interpretation That More than One Principal Use is Permitted in a
Single Building in the SL- Zoning District*

The Board answers the question in the affirmative and determines that more than one permitted use is allowed in a single building in the LB-SL zoning district.

Dated: June 18, 2019



Dan Doellinger, Acting Chair
Town of Chester ZBA

By roll call a motion to adopt the decision was voted as follows:

AYES: Dan Doellinger Dan – Acting Chairman
Walter Popailo
Julie Bell
Tom Atkin
Bob Favara

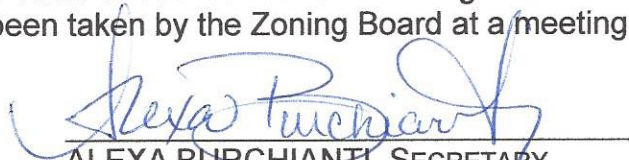
NAYS: None

ABSENT: Gregg Feigelson

STATE OF NEW YORK)

) ss:
COUNTY OF ORANGE)

I, ALEXA BURCHIANTI, Secretary to the Zoning Board of Appeals of the Town of Chester, do hereby certify that the foregoing is a true and exact copy of a Decision maintained in the office of the Town of Town of Chester Zoning Board of Appeals, said resulting from a vote having been taken by the Zoning Board at a meeting of said Board held on June 13, 2019.


ALEXA BURCHIANTI, SECRETARY

TOWN OF TOWN OF CHESTER ZONING BOARD OF APPEALS

I, Linda Zappala, Clerk of the Town of Chester, do hereby certify that the foregoing Decision was filed in the Office of the Town Clerk on June 18, 2019


Linda Zappala, CLERK

TOWN OF CHESTER