

## ZONING BOARD OF APPEALS

May 5, 2015

Present: Michael Dudick, Chairman, Denise Bagramian, Michael Bloss, Jerry Cifor, Mario Fantini, Chris Lemire

Also Present: Joel Peller, ZBA Counsel  
Steve Myers, Director, Building & Zoning

Absent: Randy Gifford, Jennifer Vucetic

Mr. Dudick called the meeting at 7:07 p.m.

### PLEDGE OF ALLEGIANCE

Mr. Dudick informed the applicants this is a seven member board with one alternate. Tonight six members are present, including the alternate who is sitting in for Mr. Gifford. To receive approval, an application one must receive 4 yeas regardless of the number of members present. There are six voting members present tonight so the applicant must receive four out of six votes for approval.

### OLD BUSINESS

**An application from MJ Properties of Clifton Park for 14 variances to add six warehouses to current site. . Four bldgs. will be located on their own individual parcels and fifth building (now bldgs. 5 & 6) combined with Fairchild I site.**

**Variances required:**

- 1) 208-65E(1) 50' front setback req. Lot #5 has 25' available. Variance=25'**
- 2) 208-65E(1) No parking allowed in front yard. Lots 2, 3, & 4 need variances to park in front yard (all are separate parcels)**
- 3) 208-65E(2) – 25' side & rear yard setback & buffer required.**

- **0' setback available for rear of lot 1A & 1B, the side of lot 1A is 20', 5' variance required; the side of lot 1B is 10', 15' variance required (4 variances)**
- **Lot 2, 5' available on side to sidewalk, 20' variance required (1 variance)**
- **Lot 3; 7' to sidewalk, 14' to parking, 18' variance required (1 variance)**
- **Lot 4; 5' to parking, 20' variance required (1 variance)**
- **Lot 5; 0' available in rear, 25' variance required, 5' available on side, 20' variance required. (2 variances)**

**Property is located at Fairchild Square II, Van Patten Drive & Mapleline Road, Clifton Park, NY 12065 (Permit #80993)**

Attorney, Jacqui Murray, representing MJ Properties of Clifton Park, continued with her presentation. She informed that, as requested by the Zoning Board, they appeared before the Planning Board on April 14 to ask for conceptual approval of the project. She explained they worked with the Planning Board on March 23, at which time they presented a revised site plan that omitted the large 16,250 sq. ft. warehouse and replaced it with two smaller buildings of 8250 and 6750 sq. ft. They added a vegetative buffer between and more between them and the existing school. They presented this to the Planning Board and they received a positive conceptual approval for the project.

She asserted that no other changes affected the variances they originally requested, reminding the only reason they need the variances is because of the subdivision or they wouldn't be needed otherwise. They meet all other requirements of the code, including all the setbacks surrounding the perimeter of the property and adjoining landowners. They would like to complete the project as they did the first phase and achieve an industrial park-like setting and maintain a vegetative buffer.

Mrs. Murray reminded there are alternate plans such as developing one very large warehouse but informed that was not a popular idea and would eliminate the very large buffer. She re-iterated that all the variances are for internal setbacks created by the subdivision.

In meeting the requirements of the variances, she pointed out the practical difficulty is because the area doesn't allow for shared parking and driveways. The request is consistent with the requests they made and discussed with the first phase of the project which were approved.

Mr. Tom Andress, ABD Engineering & Surveyors, reminded they had been before the board in 2009 and 2010 for Phase I, recapping they are asking for the same variances that were granted for Phase I. He described the plan for both phases and repeated they had committed they would not have another curb cut on Ushers Road but would use a shared road on Van Patten Drive as the principal entrance and the already existing road from Ushers. On the plot plan he described the location of the new buildings and the frontage on both Mapleline and Van Patten Drives describing that neither will be used for access because it will be internal. He added they provided the Planning Board with a plan that didn't require variances but it was not desirable to the residents or to Fairchild.

Mr. Andress pointed out the 100' buffers along the residential area, along with some berms on Mapleline Drive. He apprised they will have an emergency access road which the town wanted them to have in case of emergency but it will be gated or signed (to be determined).

He described their plans for the perimeter, pointing out there will be a row of trees between the buildings and Helping Hands School and additional trees will be added. Reminding the larger building is being replaced by two smaller buildings with vegetation between, he said the L shape of the building will allow to them to move it further from the buffer and they are able to put in a berm and trees to screen the building.

He apprised they hope to have the same type of usage on the new building that are being used in Phase I, office warehousing, which is not high traffic. He disclosed they have done another traffic study which shows there is not going to be a lot of impact, only light traffic. He repeated the buffers will screen the site from residents and also Van Patten Drive.

Referring to the plan, Mr. Peller asked if the sidewalks depicted are pre-existing. Mr. Andress said they are not, but are being proposed. Mr. Peller asked about the variances for Lots 2 & 3 inquiring if the sidewalks are there. Mr. Andress answered it is exact same request and it is for the 25' buffer and the parking within it. They are asking the board for a variance allowing them access for anywhere across those areas.

Mr. Peller commented it looks like the sidewalks are to be conveyed to the Town. Mr. Andress disagreed, saying the sidewalks are purely internal for the use of the occupants and there is access for pedestrians walking on the bike path along Ushers Road and Van Patten Drive. He added they are not proposing to do any dedication of sidewalks to the town. Mr. Peller asked if there is any dedication to the town. Mr. Andress said there is no dedication to the Town on this site, but there are water and sewer line easement dedications to the water and sewer authority. Mr. Peller asked if there is a common driveway or right of way between the lots. Mr. Andress explained that for the first two phases, working with Paul Pellagalli, they created a common easement document that allows for utilities across all the lots and creates a methodology for payment for common items like plowing and maintaining property. He said the main drives are outlined in the agreement for maintenance so no matter who owns the properties they are under the same obligation to participate in the maintenance and utilities.

Mrs. Murray informed they have received the document used for the first phases and they will mimic that for the balance of the park.

She referred to Section 208-65 E (2) for which they are requesting variances "25' side and rear setbacks from each property and where parking is prohibited."

She suggested it is a unique site and repeated that if they pursued other developments which did not require variances they would lose the screening. She asserted they received positive comments on the design because the smaller buildings actually create a lower intensity industrial park since there is not a lot of space for high intensity industrial use. She informed that was attractive to the Planning Board.

Mr. Peller asked Mr. Myers to comment about the sidewalks being private and internal. Mr. Myers responded they are not in the buffer area.

Mrs. Murray informed the sidewalks were requested by the Planning Board for internal conductivity between buildings so they had to add them.

Mr. Lemire questioned whether the two buildings, which had formerly been one building, were now going to be part of Lot 1. Mr. Address answered it was always part of that, just that they had reduced the size of the buildings. Mrs. Murray commented on the map she distributed explaining she created it just to show what the layout will be without the lines and engineering details.

Mr. Lemire referred to the previous letter Mr. Scavo had submitted to the board (in which Mr. Scavo recommended the board not approve the variances) and asked if the letter dated May 5 replaces the letter of March 3. Mr. Lemire indicated he had not been present at the March 3 meeting but had read the minutes and was familiar with the project.

Mr. Peller answered the May 5 letter replaced the previous one.

Mr. Dudick read into the record the May 5 letter from Mr. Scavo, the gist of which is that the plan is generally acceptable to the Planning Board with three conditions 1) no rear access to the proposed buildings 2) add gated access to Van Patten Drive if acceptable to Fire/Safety officer 3) deed restrict no further access on Mapleline Road. The letter requested if the same three conditions can be considered as possible conditions of approval to the area variance requests. (letter placed in the record)

Mr. Dudick questioned whether there were any conclusions regarding the safety access commenting it seems more clear. Mr. Address responded they are ok with placing a gate but the final decision is made by the Fire/Safety Officer.

Mr. Peller asked if there would be any reason why they wouldn't want to put a gate. Mr. Address explained that in certain instances they wouldn't want gate access for instance; if there is a problem getting a vehicle in, or if there are high rise apartments when there is a loss of life issue when they wouldn't want to spend the time to open a gate. He added they are open to whatever they want.

Mr. Myers asserted the gate will be discussed with the fire department and they would determine if they want a key or remote access to the gate. He reminded the Planning Department's goal is to prevent general traffic coming up that road. He said it is a condition of the Planning approval and has nothing to do with Zoning.

Mr. Peller questioned what Zoning has to say on the conditions Planning wants. Mr. Myers answered that the Zoning Board has nothing to say on it, that it is Planning's purview.

Mr. Fantini referred to the changes made, asking if the largest change is changing from five to six buildings but it will be less visible to the residents. Mr. Address agreed, saying they also put in additional buffering and berming on Mapleline Drive, and some minor tweaks moving the buildings a little further away.

Mr. Dudick reiterated if it were not for the planned subdivision, it would not be necessary for any variances. Mrs. Murray confirmed that is correct.

Mr. Lemire asked for corroboration that none of the variances are for the outside perimeter, and whether buildings 5 & 6 with the buffer meet code. Mr. Murray assured that is correct.

Mr. Dudick asked Mr. Myers about the parking will meet code. Mr. Myers answered the number of spaces haven't been considered yet, that there are some discrepancies, but nothing that can't be managed.

Mr. Lemire wanted confirmation that Planning had approved the plan, asking if it would be appropriate for the Zoning Board to place Planning's conditions on approval.

Mr. Peller informed they can put whatever conditions they would like, but this (type of condition) has never been looked at before because it is a Planning issue. Mr. Myers commented again "it is not our purvue".

Mr. Address assured they represented to the Planning Board that they are ok with the conditions and those will be put into the final approval.

Mrs. Murray requested that any conditions recommended by the Planning Board have some kind of safety valve in case the Planning Board "tweaks them further" as they go forward, so they don't have to come back if something changes.

Mr. Peller said he agrees that is necessary.

Mr. Cifor asked about the extra buffering behind buildings 1 & 2. Mr. Address explained it is to provide further buffering between the building and Helping Hands school. He said it will be smaller office warehouse tenants.

Mr. Dudick asked about traffic patterns with regard to drop-off of children, wondering if there is any risk to the children. Mr. Address said they are setting up additional curbing and greenspace with additional trees. He declared there will be sidewalks to go to the park, reminding this is a hand to hand transfer of children to the building.

Mr. Address indicated the rear access to the buildings have been re-designed to not have emergency rear access by having internal corridors. He would feel more comfortable if it is not a condition of the Zoning Board but rather the Planning Board in case they have to come back.

Mr. Dudick answered if the board placed a condition, it would be phrased in such a way so that it is the purvue of the Planning Board. Mr. Peller repeated this is why we don't get involved with Planning issues.

Discussion ensued as to what is considered the front and rear of buildings. Mr. Myers explained the Building department considers the south side of the building the rear so if the board passed conditions about that, it would interfere with the loading docks. He advised the board to be

careful about passing conditions explaining the concepts of what is considered the front and rear of buildings.

Mr. Peller advised the board members to concern themselves only with the variances on the agenda and not to condition anything that is the purview of the Planning Board. He explained it would be doing a disservice to the applicant because they would be working with the Planning Board and there may be revisions.

Mr. Myers said he will speak to Mr. Scavo about the conditions in the letter. Mr. Peller counseled the board should just take from the letter that Mr. Scavo's position has changed and the Planning Board conceptually agrees to it.

Mrs. Murray commented it would be as if the Zoning Board would be putting conditions on it that the Planning Board had to agree to without completing the site plan review. She reminded the likelihood of changes would be low as they proceed, but they could happen.

Mr. Peller said it is also be setting a precedent that the Board would not want to do.

Mr. Dudick asked for public comment. There was none. He made the motion to close the public hearing, seconded by Mr. Cifor. All approved. Public hearing closed.

Mr. Fantini asked, if the board approves the application and there are substantial changes, would they be required to come back to Zoning.

Mr. Dudick countered if a substantial change required a variance they would have to come back, otherwise it would not.

Mr. Myers offered his opinion that Phase I was done in what he calls "incremental creep" first one building and then another and he didn't have a grasp of the whole project until it was completed. He continued, in this case, they are giving them the whole thing at once and you can see the whole configuration but he does not see how it is not a self-created hardship. He added this does not stop the board from approving it even if it is. He indicated he has some issues with it altering the character of the neighborhood as some of the residents have. He said he thinks it is too tight but Planning seems to think they can make it work.

Mr. Dudick asked Mr. Myers, this being an industrial zone property, what would be the effect the neighborhood.

Mr. Myers answered that Fairchild I is a significant distance from the neighborhood and he understands their concern that now these buildings are within 100 feet of their property lines. He said there will truck traffic and it is closer to their homes than it was in the past. He clarified he is not saying they shouldn't build on their property, but he does think there will be some changes there.

Mr. Dudick argued that this is a residential neighborhood bordering on an industrial property and whereas this board does look at the character of the neighborhood they can't consider

undeveloped industrial property as the buffer zone. Mr. Myers agreed, but affirmed it is significant.

Mr. Lemire asked Mr. Myers if they built one big giant warehouse that was 25' from the setbacks with access off Van Patten Drive, would he have a say in that. Mr. Myers said he would have no say in it, more or less. Mr. Lemire questioned if the access could be off Mapleline Road. Mr. Myers said they might control access as he believes the town has that right but, in theory, they could do it.

Mr. Lemire asked if the buffer they are proposing along Mapleline Road is more than 25'. Mr. Andress answered yes, and there is a minimum buffer between the industrial and the residential 100' and they moved the buildings another 10-15 feet away from the buffer after discussion with the Planning Board to make sure they allow for grading so they don't disturb the buffer.

Mrs. Murray declared they meet the minimum setback for all perimeters of the property. Mr. Andress said the setback from Mapleline Road is 50' but they have some additional buffering past that and they moved the buildings further away. He reminded in the beginning they had the buildings on the setback line but moved them after discussions with the Planning Board.

Mr. Lemire asked whether the Planning Board wanted the emergency exit to be with or without a gate. Mr. Andress said there was a lot of discussion but they all agreed on the location and they didn't want any access on Mapleline.

Mr. Lemire pronounced he agrees that the density is too much but he thinks they worked with the Planning Board and it is consistent with Phase I (which he indicated he opposed) and it seems to him to be the best alternative for the property. He said he would be in favor of it as long as there is a contingency that there is no access to Mapleline Road.

Mr. Myers said it will be controlled and the emergency exit is necessary, explaining the gate is only to make sure there is no through traffic. Mr. Andress re-iterated they have no problem with the conditions and they have already agreed to no access to Mapleline Road and only the emergency exit on Van Patten.

Mr. Bloss remarked on Mr. Myers comment about the density is consistent that there will be no tractor trailer traffic because it doesn't look like there is enough room for large vehicles.

Mrs. Murray said Planning Board reviewed the plans and there was talk of phasing out one of the buildings. She explained the Planning Board was in favor of keeping it because it does constrain the intensity of traffic. Mr. Bloss asked if it would be panel trucks rather than tractor trailers. Mr. Andress informed it has been designed for tractor trailers but their point is it not set up for easy parking for more than one large trailer because the owner does not want to rent these out for heavy duty use. He added that is not what they have in the first phase and the design is not set up for maneuvering.

Mr. Andress added one more point – that all the properties meet the 40% minimum for greenspace.

Mr. Cifor made the motion to approve the application as submitted with one contingency that there be no access on Mapleline Road. Mr. Lemire seconded the motion.

Mrs. Murray and Mr. Andress indicated the contingency is acceptable.

Ayes: Bloss, Fantini, Dudick, Cifor, Bagramian, Lemire Noes: none  
Application approved with stipulation no access on Mapleline Road.

### **NEW BUSINESS**

*The secretary read the legal notice as it appeared in the Daily Gazette on April 28, 2015*

**An application from AJ Signs for a variance from Chapter 171, Table I of the sign law which has a 20' height limit for wall signs. Proposed = 50', variance requested =30' Property is located at 42 Clifton Country Road, Clifton Park, NY (Permit #81020)**

The application was presented by Tom Wheeler, AJ Signs. Mr. Wheeler explained they would like to install a sign on top of the hotel with internally lit channel letters. He asserted if a person is from out of town, with all the development in that area, they need to be able to find it so they want to put the sign on top. He said the signage is similar to most of the other hotels in town.

Mr. Myers stated it is decent looking and points down Clifton Country Road, adding the Hilton sign is 20' above this. He had no issue with the sign, saying the hotel has very few signs.

Mr. Dudick asked how many stories, and Mr. Myers confirmed it is four stories.

Mr. Lemire asked if the Hilton sign was part of the mall site plan or did they need a variance for their sign. Mr. Myers said they have a variance for their signs.

Mr. Dudick announced the public hearing asking for comments. There were none. Mr. Dudick made the motion to close the public hearing, seconded by Mr. Bloss. All approved. Public hearing closed.

Mr. Lemire rhetorically asked Mr. Wheeler whether the building was designed to have the sign in that location and where would they put it if they did not have a variance approved. Discussion ensued and Mr. Myers said none of the hotels or movie theater have come to the board for a variance before they built the building. He informed they will open in June and the sign is actually smaller than a lot of the signs in town.

Mr. Lemire commented it is not size they are reviewing, but height.

Mr. Cifor asked if the hotel has the same owner as the Hilton and was told it is.

Mr. Dudick said he has no problem with the application and made the motion to approve it as submitted. Mr. Fantini seconded the motion.

Ayes: Lemire, Bagramian, Cifor, Dudick, Fantini, Bloss Noes: none  
Application approved as submitted.

*The secretary read the legal notice as it appeared in the Daily Gazette on April 28, 2015*

**An application from Robert Tufano for a use variance from Section 208-37B, permitted uses in a B-3 zone. Applicant wishes to change convenience store to wine/liquor store which is not a listed allowed use and does not fit the definition of a convenience store. Property is located at 1543 Crescent Road, Clifton Park NY (Permit #81022)**

Mr. Peller pointed out the legal notice had a typographical error. The code in the legal notice indicated Section 203-37B, when it is actually 208-37B. The error was corrected in the records.

The application was presented by Robert Tufano. Mr. Tufano informed he owns a successful pizzeria shop and would now like to purchase the Stewarts store on Crescent Road and make it into a liquor store. He explained there had been a liquor store in the strip mall at Exit 8, but it had closed and residents have indicated there is a need for one in that area. Mr. Tufano said he intended to clean up the dated building.

Mr. Peller asked if the negotiations for the building are contingent upon receiving the variance. Mr. Tufano said they haven't gotten that far yet, but he could possibly buy the building anyway. Mr. Dudick asked if there would be a problem getting a license. Mr. Tufano informed he had already checked with investigators and there will be no issue at all.

Mr. Lemire looked at the code and commented a liquor store is a personal service establishment. Mr. Myers disagreed saying a person service establishment is not a liquor store. Mr. Tufano said this is all new to him.

Mr. Dudick commented he would like to know why the code is the way it is.

Mr. Myers explained that when Mr. Tufano originally came to him, when he read the code, he didn't think there was going to be a problem. He then realized that the definition of a convenience store didn't quite fit so he reached out for legal advice from more than one attorney in town and they agreed. They came to the conclusion he is trying to provide a service that used to be in the shopping center which allowed the liquor store.

Mr. Myers explained it is a free standing building not in the shopping center which is why it doesn't work. He clarified it is not a convenience store but it is something that is lacking in that area. He opined it would not make sense to put another convenience store in that area and Stewart's would not allow it. He rationalized it makes sense but because of the way the code reads it needs a use variance. He added he does not think there is any other viable kind of store you could put there that would give a reasonable rate of return you would need to go through the process.

Mr. Peller volunteered that it was also his opinion that the code would require a use variance.

Mr. Tufano advised he did try to negotiate for the liquor store before they went out of business and it was a "done deal" on a handshake, but in the last minute the landlord pulled out and gave it to Artique, which expanded into that space. He said the landlord promised him the next open

space, but it has been a year and nothing has opened up. The plaza is full and no one is going anywhere. He said there is no opportunity anywhere else and it is a needed business.

Mr. Dudick inquired the size of the building and Mr. Tufano replied 3200 sq. ft.

Mrs. Bagramian asked if he had a lease. Mr. Tufano said they are waiting for the variance.

Mr. Dudick read a letter from John Scavo, Planning Department into the record, in which he indicates he has no issues with the application and is recommending that the B-3 legislation be updated. (letter on record)

Mr. Lemire, referring to the code 208-37B, commented that a bar would be allowed. Mr. Myers said any unique establishments in the plaza meets the code or has a variance and he couldn't, based on legal review, fit the liquor store into the code.

Mr. Lemire asked Mr. Tufano if he owned the property. Mr. Tufano responded the plan is to buy it but Stewarts wants to make sure he gets the variance, and he has Stewart's permission to be here.

Mr. Cifor stated he doesn't see the unnecessary hardship because he doesn't have to buy the property. He said he has a problem with it because the criteria for a use variance is pretty strict and it isn't like he owns the property. He indicated he doesn't see unnecessary hardship because the problem is self-created.

Mr. Tufano said the presence of the liquor store would help his business and the other businesses because it would bring new people to the area and they can all use the help. He promised he would clean it up and make it nice, just as he has done with his other business.

Mr. Cifor said he doesn't have any doubts about that, but it doesn't meet the criteria and the town should probably be changing the rules.

Mr. Tufano countered he had spoken to Town Supervisor, Phil Barrett, about it. He stated Mr. Barrett responded he thinks it would be a good addition to the area and was completely in favor of it.

Mr. Dudick asked if the law specifically refers to the hardship of the applicant. Mr. Myers answered he doesn't agree with Mr. Cifor because the situation is unique and does not apply to a substantial portion of the district and neighborhood.

Mr. Cifor argued that the criteria requires demonstrating unnecessary hardship. He said he doesn't necessarily agree that you can't realize a reasonable rate of return with another use. He asked how do you get around the hardship not being self-created.

Mr. Myers informed they have been discussing doing something with the law, as Mr. Scavo mentioned, but nothing quick enough to help Mr. Tufano.

Mr. Dudick asked if Mr. Tufano could move his pizza shop into the Stewart's building and put the liquor store in where the pizza shop is. Mr. Tufano answered it would be an additional \$200,000 out of his pocket. Mr. Dudick said that would be the hardship.

Mr. Fantini said for every use variance in the past they have received written financial evidence. Mr. Myers disagreed they have not done it for every application, but they have done it when it is necessary. Mr. Fantini said they have received some kind of a report.

Mr. Dudick speculated he doesn't see how that could be presented. Mr. Myers suggested a real estate agent could file a report indicating no other decent value could be achieved because of everything else that is around that area. He suggested it might say this is one of the best uses of property based on what other services are there.

Mr. Cifor argued that the other liquor store went out of business. Mr. Tufano informed it went out of business due to poor management and they ran out of money and were invested in another project in Saratoga. He said there was no product on the shelf. He stated it is an expensive investment and he is ready to invest about \$750,000 in the project.

Mrs. Bagramian asked, if he is approved, how long before he would start working on the building or would it sit for a while. Mr. Tufano said Stewart's does not want to do anything until they are out of the building. Mr. Myers volunteered that Stewart's plan for the new building is in his office and they would be open in 90-120 days.

Mrs. Bagramian clarified she was asking how long he would take to start the project when they were out. Mr. Tufano responded it would not be sitting vacant and as soon as he received approval he would apply for the liquor license. He said if Stewart's gave it to him in October he would hopefully be open in November. He said there are many people who want the building and he was just lucky to be the first one in line for it.

Mr. Lemire, reading Section 208-37 commented it is clear that the code left out a pretty obvious use in this district because it allows a restaurant, a drive-in, and a barroom asking how it doesn't allow a liquor store because it doesn't make any sense.

Mr. Myers said they have all come to that conclusion prior to the meeting.

Mr. Lemire argued you have a shopkeeper who wants to put a business in a place that seems perfect for that location. It's not in our code and in order to get permission to do what he wants to do, when everyone including the town supervisor thinks it's a great idea, he has to ask for a use variance. The Board is put in a spot of having to ask him to meet every one of the 4 elements on the checklist, some of which don't make sense.

Mr. Myers said he doesn't disagree and in the past they have allowed leniency on some of these particulars when it doesn't make sense.

Mr. Lemire asked how can he prove financial hardship that he can't get a reasonable rate of return, answering his own question, saying "he can't". He asked how can you say it is not self-created because it is, but only because it is not an allowed use in the code and it obviously should

be allowed. He said #2 & 4 can't be met because it doesn't make any sense but he can meet 2 & 3.

Mr. Fantini said the law is the law and it is written that way and we should interpret it as it is. He summarized that is why the criteria is not met.

Mr. Dudick answered back to Mr. Fantini saying the law is the law and that is the reason variances are granted. If they use the criteria of the law is the law than the board is obligated to deny all variances because they are outside the scope of the law.

Mr. Peller confirmed that is the purpose of the board.

Mr. Tufano said, as a police officer in Los Angeles, they had the spirit of the law and the letter of the law and sometimes had to make a decision which was right but not necessarily following the letter of the law.

Mr. Lemire read the description of a convenience food store "retail sale of food and beverages for consumption off premises". He asked what is the definition of a beverage store, saying a beverage is a beverage whether it is liquor or a soda but according to the town code, not the state code, it is not an allowed use. Mr. Myers said he didn't make the decision on his own and it was so gray it could have gone either way but he always errs on the side of caution which is why he asked for legal opinion.

Mr. Lemire said under this situation the only logical thing to do is grant the use variance. Mr. Cifor disagreed, asking what do you do when the next applicant wants to come in and put a liquor store in a B-3 zone.

Mr. Myers commented every application is unique.

Mr. Lemire countered, asking Mr. Cifor if he thinks this would change the essential character of the neighborhood. Mr. Cifor argued it is supposed to meet all four criteria.

Mr. Dudick called a five minute recess at 8:40.

Upon return at 8:45, Mr. Dudick asked Mr. Tufano if he had sent a mailing notice to neighbors. Mr. Tufano confirmed he had.

Mr. Fantini returned to the criteria of "no reasonable rate of return" stating it hasn't been on the market for six months or two months and in fact it is not for sale or lease, which is the reason he does not agree.

Mr. Tufano disagreed, saying it is for sale and they have agreed on a price.

Mr. Dudick clarified that Mr. Fantini was saying it isn't on the market yet, explaining they sometimes use a long term listing as hardship when a property doesn't sell.

Mr. Dudick gave his perspective on the criteria of not being able to realize a reasonable rate of return with proof of financial evidence. He said the issue is, there is no space available for a

liquor store and no reasonable expectation that a space will become available. He said he rationalizes that there is no way he can open a store because of this.

With regard to the unique situation, Mr. Dudick said the zoning is unusual and there is a significant lack of space for an approved use.

With regard to whether it would alter the essential character of the neighborhood he said the other liquor store was in the plaza for at least 15 years.

As far as the hardship not being self created, he believes it goes back to the unusual aspect of the definition of what a beverage. He indicated he has a high comfort level as to the high degree of uniqueness with regard to this particular application.

Mr. Bloss said he agrees with all the points Mr. Dudick made and suggests if they approve the application they go back to the Town Board to fix the code.

Mr. Myers volunteered that this has been in discussion with Mr. McCarthy, himself and John Scavo about this. Mr. Dudick suggested they could make an amendment to the town law.

Mr. Dudick asked for public comment. There was no comment. Mr. Dudick made the motion to close the public hearing, seconded by Mrs. Bagramian. All approved. Public hearing closed.

Mr. Fantini asked Mr. Dudick's intent on the next application. Mr. Dudick said he makes no promise on any application.

Mr. Cifor suggested if they don't approve the application it might force the town to make a change in the law.

Mr. Myers said "not necessarily" as changes to town law move as they deem necessarily.

Mr. Dudick repeated there are two aspects the level of relief that they deem necessary with regard to the scope, and some applicants need greater relief than others and when he sees the law being obtuse he thinks this is the case.

Mr. Cifor reminded this is not a hardship, its an opportunity and he commends Mr. Tufano for that, but still thinks it doesn't meet use variance criteria. Mr. Fantini agreed.

Mr. Lemire commented that when the Zoning Board turns to the code for interpretation for what is or not an allowed use and they read Section 208-37 and the definition of a convenience store and it says "retail sale of food and beverage to be consumed off premises" that is what this gentleman is asking for – permission to sell beverages to be consumed off premises.

Mr. Cifor countered by asking if that is the case, why does it need a variance. Mr. Lemire answered in his opinion "it doesn't" but he is limited to the book that is the town code. He commented, that being said, if the way to get here is to consider it a convenience store or barroom then it seems ridiculous to go through this process.

Mr. Dudick said he is going to call for the vote, that the arguments made for and against are both reasonable. Different applications and different applicants, some require more relief, because of the circumstances than others and it has to be weighed.

Mr. Bloss made the motion to approve the application as submitted. Mrs. Bagramian seconded the motion.

Mr. Lemire asked if he could vote that he doesn't believe they need to vote. Mr. Peller said he could not and he has to vote on the use variance application that is before him, yes or no.

Mr. Dudick explained that the only way they could do as Mr. Lemire suggested would be if the applicant withdraws his application and re-submits instead for an interpretation vote.

Mr. Peller explained to Mr. Lemire that Mr. Myers has the discretion to interpret the code, and the board has the discretion to review his interpretation. Mr. Lemire commented this is not what they are here to do today and suggested giving Mr. Tufano the opportunity to do that.

Mr. Peller informed he can do that, but it is a completely different application. He would have to withdraw this one and submit another application for an interpretation and it would have to be re-noticed and Mr. Myers would have to make a formal interpretation.

Mr. Peller responded to Mr. Lemire's inquiry as to what happens if the board disagrees with Mr. Myers' interpretation. He explained that because the other application had been withdrawn he would be entitled to revise it.

Mr. Bloss remarked if he is denied he cannot come back to the board. Mr. Peller corrected that he can come back for an interpretation. Mr. Myers informed this is a time factor and Mr. Tufano said Stewart's is waiting for him and if he doesn't get approved he will lose the opportunity.

Mr. Lemire questioned how long that would take, and Mr. Myers said it would take about 3 weeks. He added he had told the attorneys his interpretation but they didn't agree with him. Mr. Dudick said it would be an open meeting and they had done one about a year ago.

Mr. Peller reminded that the applicant is saying he would need a decision tonight so he can move forward.

Mr. Bloss said one interpretation is that a liquor store included as a convenience store was the intent of the law. Mr. Dudick agreed that is one aspect, no retail space available that can be utilized for approved use in that area, there has already been a liquor store without incident recently, review of the zoning is questionable, and a time sensitive issue with the owner of the property as far as availability.

Four yes votes needed for approval.

Yeas: Bagramian, Dudick, Bloss Noes: Cifor, Fantini, Lemire  
Application not approved.

Mr. Dudick reminded the applicant that they had discussed two other options: to re-submit for interpretation or to change the code.

*The secretary read the legal notice as it appeared in the Daily Gazette on April 28, 2015*

**An application from Dave & Melissa Scagnelli for a use variance from Section 208-37 A&B, permitted uses in a B-3 zone. Applicant wishes to continue to use the building for light manufacturing which is not an allowed use in a B-3 zone. Property is located at 821 Main Street, Clifton Park, NY (Permit #81024)**

The application was presented by Mr. Scott Ronda, attorney for Dave Scagnelli and Melissa Scagnelli, owners of the property. He informed his clients purchased the property (formerly housing Snap Fitness) in October 2014 and have been utilizing the property as a small machine shop. A month ago they were approached by a member of the town who informed the operation did not meet with code so they are coming to the board for a use variance.

He informed he believes they meet all of the four criteria for a use variance.

Mr. Cifor, referring to the application, mentioned it says that when the applicants purchased the property they thought it was approved for light manufacturing.

Mr. Scagnelli discussed the sale, saying it was a short sale property and there were banks involved. He informed it was a year-long process and he had his personal attorney, a real estate attorney and the bank attorney involved. He asserted the underwriting went through and everyone misread a document received from the county. The document indicated the property was zoned O5 commercial which was interpreted as a B-5 zone which was approved for manufacturing. Because of this, Mr. Scagnelli did not go to Mr. Myers for a variance because they were told by counsel (not Mr. Ronda) it was not necessary.

The business was in Mechanicville for 10 years and then Curtis Industrial Park, neither of which they needed to go to the town for a permit. They moved in after Thanksgiving and the business is family owned, Mr. & Mrs. Scagnelli sole owners. They buy metal stock, cut it, drill holes and turn into manifolds and sell through distributors.

Mr. Scagnelli informed they bought the business in 2005 when it was located at 111 Blue Barns Road and they were there for two years. Mr. Dudick informed it was a pre-existing use. Mr. Myers said that because the business stopped, that the pre-existing use ended.

Mr. Scagnelli said when he was in college in 1991 he worked for someone at the Jonesville location and at that time they built machinery. Mr. Myers said the zoning changed but he was pre-existing as well. Mr. Peller commented the use then changed.

Mr. Scagnelli asserted after that it was an office copy business and warehouse, and then it was a business to customize cars, then an office warehouse type business and finally Snap Fitness. Mr. Peller said that, unfortunately, they don't get the benefit of the pre-existing prior use because it changed. Mr. Scagnelli stated they understand that.

Mrs. Bagramian asked if he had gone to the town and done the research or did he rely on others. Mr. Scagnelli answered he was relying upon his counsel however on the county website it says O-5 commercial and when he looked up town code he saw B-5 was industrial. He later found out O-5 is a real estate code which has nothing to do with the zoning code in Clifton Park. He said they went through Sunmark Federal Credit Union and no one caught it but they knew what they wanted to use it for. He added that if they had caught it it would have been different. He explained they had also looked at other properties including Blue Barns Road, but they knew they would have to come before the board because of the usage change and they decided not to do that. That is why they purchased this one.

Mr. Scagnelli said the fire inspector happened to drive by and stopped in. That is when they found out they needed a permit and talked to Mr. Myers.

Mr. Lemire asked about B-5. Mr. Myers said that is Corporate Commerce zoning.

Mr. Dudick asked if the attorney who represented them for the purchase of the property, or Mr. Scagnelli knew they needed a tenancy permit. Mr. Scagnelli said he relied on his attorney who did not instruct him to do anything except to notify the water department to switch over the meter.

Mr. Peller asked who owns the property. Mr. Scagnellis informed he and his wife own the property and lease the building to the O & S Corporation.

Mr. Lemire, referred to Mr. Scagnelli's comment, that he had talked to Mr. Myers about other properties but he didn't move on them because they didn't fit the zoning. Mr. Scagnelli confirmed that is correct, and mentioned they were interested in one on Waite Road but they couldn't come to terms with the owner. Mr. Lemire asked if he had discussed the property on Main Street with Mr. Myers.

Mr. Rhondo, answering for Mr. Scagnelli, said he did not, based on the fact of what they were told and believing it was B-5 industrial. Based on the county, the code listed, the real estate listing they were under the belief it was a permitted use.

Mr. Lemire and Mr. Myers discussed the date changes of when light manufacturing was permitted.

Mr. Myers said this is an unusual situation and obviously would be a great financial hardship. This business was there prior to him and is not allowed now because it was discontinued. In this case, because it is something that was there before, one way to look at this is "the intent of zoning is to eventually eliminate things that are not allowed in the zone, and maybe this could be allowed with a sunset clause."

Mr. Scagnelli said they are not here to increase the value of the property but to continue to run a business which supports his family. He explained they had given up trying to find rental space and took their life savings for the business which is 7 minutes from their home, and the building has everything they need. He said they moved in and didn't change anything. He asserted they

have zero impact on the neighborhood with only three people coming in the morning and leaving at five, a DS truck that comes at noontime and four for pickups and every three weeks a truck to deliver material. He explained the truck can pull right in the driveway and is there for ten minutes and they store nothing outside.

Mr. Cifor asked Mr. Scagnelli if he understands what a sunset clause is. He responded he understands that if, after 20 years, they retire and go to sell the building, anyone who purchases it can only use it for B-3 zone allowed uses and they would have to put in a sales contract so the buyer would know the variance would cease to exist. He said he has no problem with that.

Mr. Dudick asked if he had notified all property owners within 500 feet of the building. Mr. Scagnellis said he did not know it was a public hearing tonight but he had mailed all of them. He said he thought he was going to be notified of the public hearing and he mailed them all by regular mail.

Mr. Peller asked if he had filed an affidavit of service with Mr. Myers, and Mr. Ronda said he did. Discussion ensued regarding legal requirements of mailing. Mr. Peller informed the notices must be sent certified, return receipt requested either certified or registered. Mr. Dudick said in the past they have just adjourned and that this is not the first time this has happened where there was a misunderstanding that it needed to be certified mail.

Mr. Ronda informed they had not been notified of the meeting. Review of the application showed the address of the applicant was incorrect with a Clifton Park zip code instead of Rexford (subsequently the notification letter to the applicant was returned to sender – Town Hall) The correct addresses were obtained.

Mr. Scagnelli agreed to come back on May 19, and to waive the 62 days.

Mr. Dudick asked Mr. Scagnelli if he might have proof that he had done that kind of work there in the past, adding it would help with the application. Mr. Scagnelli answered he might have an old tax return.

Mr. Dudick said they would leave the public hearing open and adjourn the application until the May 19, 2015 meeting.

Mr. Dudick made the motion to approve the minutes for the April 21, 2015 meeting, seconded by Mr. Cifor. All approved with Mr. Lemire abstaining as he had not been present at that meeting.

The next meeting is May 19, 2015.

Mr. Fantini made the motion to adjourn. The motion was seconded by Mr. Bloss. The meeting was adjourned at 9:35

Respectfully Submitted,

Susan White  
Secretary

cc: Town Clerk, Town Board, Town Attorney, Zoning Board Members, Joel Peller, Counsel,  
Steve Myers, Department of Building and Development, \_\_\_\_, ECC, Assessor, Highway