

**ZONING BOARD OF APPEALS MEETING
November 20, 2018**

PRESENT: Kathy Kiernan, Chairperson
Karl Wick
Vic Barranca
Joseph Guido
James Banks
Frank Skerritt
Glen Kubista

ALSO PRESENT: James Nelson, Esq., of VanDewater & VanDewater, P.C.

Acting Chairman Joseph Guido called the meeting of order with the Pledge of Allegiance to the Flag at 7:03 p.m. Upon roll call by the Secretary, quorum was confirmed.

Joseph Guido queried as to whether all members had an opportunity to review the September and October 2018 draft meeting minutes.

JOSEPH GUIDO CALLED FOR A MOTION TO APPROVE THE SEPTEMBER 16, 2018 MINUTES. UPON MOTION OF MEMBER VICTOR BARRANCA, SECONDED BY MEMBER KARL WICK, AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION PASSED 7-0 WITH THE FOLLOWING VOTE:

Kathy Kiernan	Aye
Joseph Guido	Aye
Glen Kubista	Aye
James Banks	Aye
Karl Wick	Aye
Frank Skerritt	Aye
Victor Barranca	Aye

JOSEPH GUIDO CALLED FOR A MOTION TO POSTPONE THE APPROVAL OF THE OCTOBER 16, 2018 MINUTES TO ALLOW FOR FURTHER REVIEW. UPON MOTION OF VICTOR BARRANCA, SECONDED BY KARL WICK, AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION TO POSTPONE PASSED 7-0 WITH THE FOLLOWING VOTE:

Kathy Kiernan	Aye
Joseph Guido	Aye
Glen Kubista	Aye
James Banks	Aye
Karl Wick	Aye
Frank Skerritt	Aye

Victor Barranca Aye

VOUCHERS:

Lisa K. Mance, Administrative Assistant submitted tally of hours dedicated to ZBA.

UPON MOTION OF KARL WICK, SECONDED BY JOSEPH GUIDO AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION TO APPROVE THE VOUCHER FOR PAYMENT OF ADMINISTRATIVE ASSISTANCE PASSED UNANIMOUSLY.

For the benefit of those present, Member Joseph Guido explained the process for Zoning Board of Appeals application reviews, noting that there were three parts to this process - the Informational Meeting, the Public Hearing and the Decisional Meeting.

INFORMATIONAL

**11-20-18-01 Daniel & MaryEllen Roth
16 Florence Street, Ulster Park
SBL: 63.02-4-32.200
Area Variance – shed and pool**

Applicant Daniel Roth was present as owner of the property and provided details as to what was being proposed and why an area variance pursuant to §123-21(C) (5) of the Town Code was being sought. Mr. Roth indicated that the sides and back of the property dropped off and he would like to place a shed and pool on the property, hoping to place the shed this year. The best location he could find for the shed was to place it on the side/front of the house due to the property drop off. There was shielding by existing trees on the side of the property where he proposed locating the shed.

The property had been surveyed prior to the Roth's purchasing the property and noted the Florence Street was a private road. Joseph Guido inquired as to whether members should call Mr. Roth prior to making a site visit to which Mr. Roth responded affirmatively, indicating that he could be best be contacted through his cell number.

The Applicant had submitted two applications, one for the shed and one for the pool. Joseph Guido inquired of the Members if they would be amenable to combining the files for the purpose of the ZBA review to which all responded affirmatively.

JOSEPH GUIDO CALLED FOR A MOTION TO RETURN THE FEE FOR THE SECOND APPLICATON. UPON MOTION OF GLEN KUBISTA, SECONDED BY FRANK SKERRITT AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION PASSED 7-0 BY THE FOLLOWING VOTE:

Kathy Kiernan Aye
Joseph Guido Aye

Glen Kubista Aye
James Banks Aye
Karl Wick Aye
Frank Skerritt Aye
Victor Barranca Aye

Chairperson Kiernan requested that the Public Hearing Notice be worded to cover the request for a variance for both the pool and the shed and that only one fee will then be charged for the Public Hearing Notice.

UPON MOTION OF VICTOR BARRANCA, SECONDED BY GLEN KUBISTA AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION PASSED 7-0 BY THE FOLLOWING VOTE:

Kathy Kiernan Aye
Joseph Guido Aye
Glen Kubista Aye
James Banks Aye
Karl Wick Aye
Frank Skerritt Aye
Victor Barranca Aye

Joe Guido asked that photographs of the topography with the locations of the shed and pool be staked out to provide at the next meeting. Mr. Roth indicated that the proposed location of the shed had already been staked out. Joe Guido noted that if granted, the variance expired in one (1) year and wanted Applicant to be aware of that if he waited to erect an above ground pool.

Karl Wick requested that the eastern property line be flagged to assist members visiting the site to have an idea where the property line existed. Mr. Roth noted that the property line was about 15' – 20' into the woods and the Board requested that he provide some time of reference as to where the line was.

The Public Hearing on the application was to be held in December 2018.

DECISIONAL:

**05-15-18-01 Jess Hicks
 15 Broadway, Port Ewen
 SBL: 56.044-1-1.1
 Change in Non-Conforming Use (Section 123-30B(3))**

Applicant Jess Hicks and his attorney Urs Broderick Furrer of Harriton & Furrer, LLP were present.

Joe Guido recused himself at 7:20 p.m. and turned the meeting over to Karl Wick. Karl Wick noted that numerous documents had been provided by the Board's attorney and the Applicant's

attorney and queried the Board for their thoughts and comments with regard to putting off a decision until December to allow for time to review the case law and information provided. Attorney for the ZBA, James Nelson, Esq., stated that the Board had 62 days from the close of the Public Hearing to make a decision and even if not made, it would not be an automatic approval. His understanding was that the ZBA would be drawing out the facts, deliberate the facts, not make a decision at this time but to get a sense of where the Board was going, and draft a decision for December. Members of the Board agreed with Karl Wick noting that case law had been cited but not provided for the Board to read. All evidence including Minutes was to be reviewed and determine if case law provided was applicable to the matter before the ZBA.

The September 18, 2018 Memo provided by Kyle Barnett, Esq. was reviewed. Secretary provided copy of Memo to Glen Kubista. Attorney James Nelson (for Kyle Barnett, Esq.) asked if in this situation in which an interpretation was being made, whether the Applicant could make a statement regarding the application (not reopening the Hearing) and whether the Board was amenable to having Attorney Nelson presenting what he believed the issues were.

Mr. Hicks inquired as to the necessity of his and his attorney's presence at the meeting. Attorney Furrer stated that Attorney Barnett had indicated at the previous meeting that if there were questions that needed to be addressed, the Board through their counsel, would reach out to him to present those questions and or legal/issues to allow him the opportunity to respond and disputed the ZBA addressing legal issues at this time and wished to go on record that his opinion was that this was improper.

Attorney Nelson responded that, if the Public Hearing had been closed, the receipt of additional arguments, documents and facts were basically not permitted. He indicated that it was his understanding that the Acting Chairman was requesting that either he or his client make a statement in support of the interpretations they were seeking. Mr. Furrer responded that his statement had been submitted in writing and, that if there were additional issues, he had not been briefed and had not provided any responses. Glen Kubista asked the secretary to confirm that the public hearing was closed to which she responded affirmatively, noting Memo from Attorney Barnett.

Attorney Nelson reiterated that it was the Board's job at this time to deliberate and it was his understanding that the Board was allowing the Applicant an opportunity to speak. Mr. Kennedy was present in the audience and objected. Chairperson Kiernan responded to his objection that the Public Hearing had been properly noticed, adjacent owners had been notified, that it had been posted and published in the newspaper. Chairperson Kiernan noted that his concerns were noted, and he could review the file in the office to determine who had been noticed.

Karl Wick stated that the ZBA would be discussing and deliberating the evidence currently before it at this time and new evidence was not being entertained. He was open to the Applicant wished to reiterate what he was seeking from the Board, not asking him to present new evidence. Mr. Hicks responded that he was looking to re-occupy the buildings and carry on with his business. He didn't believe he was saying anything new but requested that the ZBA please advise him if a decision was not going to be made. Mr. Hicks acknowledged that there was a lot of information provided from both sides for review. Acting Chair Wick responded that he

believed that the ZBA could remove any ambiguity and the timing of the submission of some of the material had not allowed for time to be completely reviewed.

The Board then proceeded with the review of Attorney Barnett's Memo, informing the Applicant that he was welcome to stay but it was not necessary and that he could not provide additional input.

Questions presented:

"1. Is the current proposed use permitted in a W district?....."

Members James Banks, Karl Wick, Kathy Kiernan and Victor Barranca responded that it was not. Glen Kubista asked if a special use permit been issued and wouldn't it follow through. Karl Wick responded he didn't believe one had been issued and that if one had been granted, it would have been for a specific use. Attorney Nelson interjected that pursuant to the Code, if the Board finds that the use was discontinued for five (5) years (in terms of the buildings), one avenue of relief for the Applicant would be to go to the Planning Board (in terms of the discountenance).

"2. Was the prior use of the subject property nonconforming?"

Karl Wick noted that the prior use was well before zoning, and when zoning was instituted, it was awarded dependent use, so the question that remained in his mind was when and if the use ceased to become water dependent and if it did cease, it was a nonconforming use that was grandfather in. He believed there was enough evidence to see when that happened. Frank Skerritt mentioned the existence of the pipes under the Rondout Creek to supply the property and it was noted that it should be checked as to whether that information had been submitted into evidence. Attorney Nelson asked Acting Chairman Wick for clarification as to whether the use was legally operating prior to zoning which was responded in the affirmative.

"3. Was the prior nonconforming use discontinued? "

Karl Wick noted that there was conflicting precedent presented on this. The question of what constituted "prior" was raised. Kathy Kiernan inquired as to what entity actually vacated the property. It was noted that Kosco had leased the property from Getty. The question was raised as to what constituted discontinuance and whether the removal of the tanks qualified as the actual discontinuance. The tanks had been removed somewhat recently and had been maintained until their removal. It was Karl Wick's opinion that the answer to this question was "yes" but determination needed to be made as to "when" and more research was needed on the two cases that were cited and what the actual definition of the term "discontinued" was needed.

"4. Was the prior nonconforming use discontinued within the last 5 years?"

Again, it was noted the issue remained as to what defined "discontinuance" and was it when the trucks ceased operating or when maintenance on the tanks stopped and the tanks were removed.

Has the Petitioner met the burden of proof that it has not been discontinued for more than 5 years?

“5. Is the nonconforming use of a similar nature or one which is more in character with surrounding confirming uses than the existing use?”

“6. Does the ZBA accept the opinion of inconsistency with the Waterfront Revitalization Program, (“LWRP”), in whole or in part, of the Waterfront Advisory Board?”

These questions can be reviewed in steps and not move on to next question if any question answered in the negative. Karl Wick noted that the ZBA needed to review a lot of evidence which would take some time, including the case evidence. He stated that if the decision formulated by the ZBA is reasonable and based upon fact, the Courts have upheld those decisions. Attorney Nelson concurred that the duty was to detail the facts which support a decision made upon a rational basis with a statement of the facts, made by persons of average intelligence, could be supported.

Karl Wick asked for any discussion on the points.

UPON MOTION OF VICTOR BARRANCA, SECONDED BY GLEN KUBISTA AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MOTION TO PUT OFF A DECISION UNTIL THE DECEMBER MEETING PASSED 7-0 BY THE FOLLOWING VOTE:

Kathy Kiernan	Aye
Joseph Guido	Aye
Glen Kubista	Aye
James Banks	Aye
Karl Wick	Aye
Frank Skerritt	Aye
Victor Barranca	Aye

Attorney Nelson asked if the Board would like a decisional resolution be drafted for the December meeting. Chairperson Kiernan indicated that would be desired. Attorney Nelson added that expression by the Members of the facts supporting their opinion for or against were provided, the information would be helpful in drafting the resolution and provide a sense of where the Board was headed. Karl Wick noted his initial thought (pending further research of the evidence) was that the change didn't constitute a total discontinuance but at this point, he didn't think it was discontinued more than five (5) years but that opinion could changes upon his review of the documentation. He noted on a separate topic, it was his opinion that the currently proposed use was less intrusive then the prior use to which Glen Kubista and James Banks concurred. Acting Chair noted for all to keep in mind that the Deed provided as part of evidence contained numerous restrictions as to what was allowed in addition to what the Town Code cited.

Vice-Chairman Wick entertained a motion to close the discussion.

James Nelson, Esq. confirmed for his notes that he understood that Kosco was a prior legal non-conforming use to which the ZBA answered affirmatively. He went on to confirm that the proposed use by the Applicant is not an allowed use under the Code which Board responded “correct” due to its classification of water dependent. Attorney Nelson inquired as to whether there were facts submitted indicating that the use had continued to which the response was that the date of maintaining the tanks, decommissioning them, spill mitigation and dated satellite photos from 2016 had been submitted. Attorney Nelson then asked if facts had been provided suggesting that the use did not continue. The Board responded that there was testimony that trucks stopped operating from the location (should be in the minutes) since 2010. Attorney Nelson reminded the Board, in reaching their decision, that §123.30(c) (3) discussed nonconforming uses occupying a building and the discontinuance of building usage. He went on that basically there were two sections the ZBA should be looking at - §123.30(c) (3) and §123.30(b) (3) with the core issue being “discontinuance.” The suggestion was that two decisions be drafted which provided for a decision either way. Attorney Nelson remarked that if the Board determined that the use was discontinued under §123.30(c) (3), the Applicant could then apply to the Planning Board for a Special Use Permit. If the ZBA was to find that the use had continued under §123.30(b)(3), the Code then calls for the ZBA to decide if the proposed use is of a similar or one of the uses more in character with surrounding conforming uses that the current use. Chairperson Kiernan stated that if both resolutions were drafted, each Member would then vote on the Resolution that they supported with specific reasons supporting their vote. She then went on to reflect that only one resolution may be needed which would be worded in a particular manner and if Members were not in agreement, they could then not support the resolution. Glenn Kubista remarked that the bottom line was that the ZBA needed to determine what constituted the discontinuance— was it when the physical characteristics of the property ceased to exist or was it when the business as a whole ceased to operated from that property and case law was needed to make that decision.

Attorney Nelson indicated that a letter brief could be provided to the ZBA on the case law that dealt with discontinuance.

Clarification of the law as to whether the business could be considered discontinued even though the tanks were physically on the property until 2016 or does the law read that the business had ceased operation even though the property was maintained.

Administrative Assistant indicated that all minutes and the 10/3/18 Memo of Harriton & Furrer , LLP and the 9/18/18 and 10/16/18 Memos of Kye Barnett, Esq. would be mailed to all Members.

UPON MOTION OF VICTOR BARRACA, SECONDED BY MEMBER GLEN KUBISTA, AND THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE DISCUSSION OF THIS APPLICATION WAS CONCLUDED 7-0 AS FOLLOWS:

Kathy Kiernan Aye
Joseph Guido Aye
Glen Kubista Aye
James Banks Aye
Karl Wick Aye
Frank Skerritt Aye
Victor Barranca Aye

**UPON MOTION OF VICTOR BARRACA, SECONDED BY GLEN KUBISTA, AND
THE AFFIRMATIVE VOTE OF ALL MEMBERS, THE MEETING WAS ADJOURNED
AT 8:14 PM.**

Lisa K. Mance, Administrative Assistant
Respectfully Submitted on December 5, 2018
Minutes Approved: December 18, 2018