

**REGULAR MEETING  
ZONING BOARD OF APPEALS**

Nyack Village Hall  
Nyack, New York

January 25, 2016

Present: Catherine H. Friesen, Chair  
Robert Knoebel, Sr.  
John Dunnigan  
Ellyse Berg  
Roger Cohen (alternate)

**In Memoriam:**  
Raymond O'Connell

Absent: Mary Ann Armano

The following resolution was offered by Member Friesen, seconded by Member Knoebel, and carried based upon a review of the evidence presented at the public hearings held on January 25, 2016.

**BOARD OF APPEALS  
VILLAGE OF NYACK, COUNTY OF ROCKLAND**

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In the Matter of the application of 22 South Broadway LLC  
(20 South Broadway) for:

1. Appeal from the Building Inspector's determinations that the application proposes a "bar" use rather than a "restaurant" use and that a variance is required for 17 parking spaces
2. Variance from VON Code Section 360-4.5B(3) to permit a deficit of 5 off street parking spaces, from VON Code Section 360-3.2E(6)(2) to permit outdoor dining within 50 feet of a residential district, and from VON Code Section 360-3.2(7)(c)(3) to permit a sidewalk café within 50 feet of a residential district

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The Zoning Board of Appeals having held a public meeting on January 25, 2016, and due deliberations having been made;

Now, upon said hearing and upon the evidence adduced thereat, it is hereby found and determined that:

## **FINDINGS OF FACT & CONCLUSIONS OF LAW**

**FIRST:** Applicant petitions the Zoning Board for the variances noted above, and it appeals the decision of the Building Inspector related to the use of the property and the parking variance required.

**SECOND:** The ZBA, in reaching its Findings of Fact and Conclusions of Law has taken the following factual testimony and evidence under consideration:

1. The application and supporting documents submitted, including Narrative Summary;
2. Testimony of Ira M. Emmanuel, Esq., Isaac Hershko, owner, and Jan Degenshein, Architect, on behalf of the Applicant;
3. Minutes of the Planning Board dated December 7, 2015;
4. Positive recommendation from the Planning Board in relation to the variance required to permit outdoor dining;
5. Unsigned letter purporting to be from tenants at 36 South Broadway dated December 5, 2015;
6. Unsigned letter purporting to be from “taxpayers/residents of Nyack” dated January 21, 2016;
7. E-mail from Liz Sugg to the Building Department dated January 24, 2016; in opposition to the application;
8. Copy of restrictive covenant for the subject premises dated November 14, 2014, and a copy of the resolution of the Village Board voting to extinguish that covenant dated May 14, 2105.
9. ZBA members knowledge of the site in question, including site visits by all members of the ZBA;
10. There was no testimony from any member of the public:

**THIRD:** The site in question is at the site of the former Tappan Zee Playhouse located in the DMU zoning district. The Applicant, which owns the premises, seeks to convert the ground floor commercial space, most recently used as a retail market, to what it describes as a restaurant space with an outdoor dining area. Both previous attempts to use the space as a commercial market have failed, and the Village Board recently extinguished a recorded covenant requiring a market in this location.

**FOURTH:** Based on the definitions in the Village of Nyack Zoning Code, the Building Inspector determined that the proposed use of the location should be classified as a “bar” as opposed to a “restaurant”. In order to operate a bar at that location, a parking variance of 17 spaces is required, as are variances to operate within 200 feet of a church and a community center. Pursuant to the Building Inspector’s calculations, the Applicant requires a parking variance for 17 spaces regardless whether the use is classified as “restaurant” or “bar”.

**FIFTH:** The Applicant contends that the use should be classified as a “restaurant”, even though alcoholic beverages are sold and consumed on premises, because food service is its

primary purpose and the bar takes up only a small portion of the space. In support of this contention, the Applicant submits its menu, which shows full food service for lunch and dinner, and its New York State Liquor license which classifies the premises as a “restaurant serving beer, wine and liquor.” The Applicant also submitted a copy of the New York State Liquor Authority application form demonstrating that such classification is based on a representation that the sale of food (as opposed to alcohol) is the primary use of the premises.

**SIXTH:** The Code defines a “bar” as “[a] place of business **duly licensed** for the sale and on-premises consumption of alcoholic beverages **by the drink as the principal or primary use**, whether or not food service is also provided. For the purposes of this chapter, a “bar” shall also be deemed a “restaurant” only if food is prepared, served and consumed on the premises.” A “restaurant” is defined in pertinent part as “[a]n establishment where food and drink are prepared, served and consumed, mostly within the principal building. A bar shall also be deemed a restaurant only if food is prepared, served and consumed on the premises.”

**SEVENTH:** With respect to parking, the Building Inspector applied VON Code Section 360-4.5B(3) which discusses how required parking places are to be calculated based on a change of use. When the number of space required by the new use exceeds the number of spaces required by the use that “most recently occupied a building,” “the owner must provide (or receive a variance for) parking **equal to the difference between the parking requirement for the existing use and the parking requirement for the new use**, not the difference between the actual existing parking and the parking requirement for the new use”. The parking requirement for the existing retail use is 10 spaces. The parking requirement for the 4,042 square foot first floor restaurant would be 27 spaces. Accordingly, the Building Inspector determined that a variance was required for 17 spaces.

**EIGHTH:** The Applicant agrees that 3,995 square foot first floor space requires a total of 27 parking spaces if used as a restaurant.<sup>1</sup> The Applicant contends, however, that the site has 30 spaces still “grandfathered” from its prior use as a theater, and, based on its calculation, requires a variance of only 5 parking spaces. Alternative, the Applicant argues that the prior use of the space was, in fact, as a restaurant, not retail, and that no parking variance is required at all.

**NINTH:** The site has 10 parking spaces that are designated for the 10 residential units. This area will remain unchanged.

**TENTH:** The Nyack Planning Board has issued a positive recommendation to this Board in relation to the variance request for outdoor dining with conditions, but did not make a recommendation as to the parking variance. The Applicant has agreed to the conditions imposed by the Planning Board prohibiting amplified music, limiting the tables in the rear to 4, and closing the outdoor dining area at 11 pm by removing the table and chairs. The Applicant also agreed during the ZBA hearing to go before the Architectural Review Board to request permission to install an awning to mitigate sound and smoke, especially to the second floor tenants.

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<sup>1</sup> The first floor area was originally calculated at 4,042 square feet. At the Zoning Board meeting, the Building Inspector recalculated the total as 3,995 square feet.

**ELEVENTH:** The ZBA has previously determined in similar applications that there are no available parking spaces from nearby establishments by which the Applicant could take advantage of VON Code Section 360-4.5(E). The ZBA further notes that the site in question is located within walking distance of metered public parking lots owned and maintained by the Village.

**TWELTH:** This is a Type II action under SEQRA with no environmental impact.

These Findings of Fact were moved and passed (5-0).

### **CONCLUSIONS OF LAW:**

#### **1. Appeal**

As to the applicant's appeal from the determination of the Chief Building Inspector that the premises constitutes a "bar" as opposed to a "restaurant" under the Code, Zoning Board of Appeals reaches the following Conclusions of Law:

**First:** It is black-letter law that statutory interpretation by a judicial body requires the evaluation of the statute using the plain-language meaning of the words comprising the statute. (5-0)

**Second:** Having considered VON Code 360-6.1 in light of the rules of construction set forth in VON Code Section 360-1.6(E), the Zoning Board of Appeals finds that the premises at issue are not "duly licensed for the sale and on-premises consumption of alcoholic beverages as the principal or primary use," but rather is licensed by the New York State Liquor Authority as a restaurant where food service is the primary use. (5-0)

**Third:** Having considered VON Code Section 360-3.2B(7)(b), the plain language of that provision applies to uses classified as "bar or tavern" under the Code, not to restaurant uses. While a bar may also be classified as a "restaurant" under the plain terms of the definition ("For purposes of this chapter, a bar shall also be deemed a 'restaurant' only if food is prepared, served and consumed on the premises"), there is no parallel provision in the definition of restaurant deeming restaurants to be classified as "bars" for purposes of the Code. (5-0)

Thus, based on the above, the Zoning Board of Appeals finds that in the interest of justice the appeal of the building inspector's determination is **SUSTAINED**. (5-0)

As to the applicant's appeal from the determination of the Chief Building Inspector that the premises require a parking variance for 17, as opposed to 5, spaces under the Code, the Zoning Board reaches the following Conclusions of Law:

**First:** Having considered VON Code Section 360-4.5B(3), the Zoning Board finds that the “use which most recently occupied the building” was retail – not theater or restaurant - and that the Applicant must provide (or receive a variance for) parking equal to the difference between the most recent retail use (10) and the proposed restaurant use (27)

Thus, based on the above, the Zoning Board finds that in the interest of justice, the appeal of the Building Inspector’s determination is **DENIED**.

## 2. Variances

On oral motion, the Zoning Board voted to consider the variances in an omnibus fashion.<sup>2</sup>

The Zoning Board considered the factors set forth in Section 7-712-b(3)(b) of the Village Law of the State of New York as follows:

**(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.**

**FIRST:** That the proposed variance does not create an undesirable change in the character of the neighborhood or a detriment to nearby properties. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraphs 3 and 10. (3-2)(Dunnigan and Berg, dissenting).

**SECOND:** That the Applicant has demonstrated, on balance, that there are no other means by which it could achieve its purpose without the requested variances. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraphs 3 and 7. (5-0)

**THIRD:** That the variance is substantial in light of the current conditions on the site. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraph 3 and 7. (5-0)

**FOURTH:** That the proposed variances will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. This conclusion was

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<sup>2</sup> The Applicant orally modified its variance request for parking to 17 spaces after the ZBA denied its appeal in that regard.

reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraphs 3, 9 and 10. (5-0)

**FIFTH:** That the hardship is self-created. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraphs 3 and 4. (5-0)

The Board has weighed the findings of fact and the conclusions of law against one another as required under Section 7-712-b of the Village Law of the State of New York and finds in the interest of justice that the variance applied for should be GRANTED

**with the following condition to which the Applicant has agreed:**

- 1) No amplified music;**
- 2) Not more than 4 tables in the rear, each seating a maximum of 2 people;**
- 3) Outdoor dining area to be closed with tables and chairs removed by 11 pm;**
- 4) The Applicant will request permission from the ARB to install an awning (or umbrellas) over the rear tables;**
- 5) The directives of the Planning Board and the ARB, if any, are to be followed.**

On a roll call, the vote was as follows:

Ayes: 5 (Friesen, Knoebel, Dunnigan, Berg, Cohen)

Nays: 0

Abstain: 0

Catherine H. Friesen  
CATHERINE H. FRIESEN, Chairperson  
Zoning Board of Appeals, Nyack.