

**TOWN OF STONY POINT
Zoning Board of Appeals
Minutes September 4, 2014**

PRESENT:

Mr. Anginoli
Mr. Keegan
Mr. Casscles (absent)
Mr. Vasti
Mr. Fox
Mr. Porath

ALSO PRESENT:

Dan Sullivan, Attorney

Chairman Wright

Chairman Wright: Good evening. Welcome back everybody. I see by the clock it is 7:00 PM. I will call this meeting of the Zoning Board of Appeals of the Town of Stony Point to order; please rise for the Pledge of Allegiance.

Chairman Wright: We have one item on the agenda tonight. It's the continued discussion for the request of BHS Associates, LLC.

Request of BHS Associates, LLC – App. #14-05

A variance from the requirements of the Town of Stony Point Zoning Code Chapter 215, Article IV, Section 12-f – Use not permitted in LI zone, for a school, located at 15 Holt Drive, Stony Point, New York.

Section 20.04 Block 11 Lot 6 Zone LI

Chairman Wright: I spoke to Mr. Sullivan and he advises that we should go into Executive Session to discuss some legal matters with reference to this case. So I will take a motion to go into Executive Session.

*****MOTION:** Mr. Anginoli made a motion at 7:00 PM to go into Executive Session, for pending litigation; seconded by Mr. Keegan. Hearing all in favor; the motion was carried.

Chairman Wright: So we will go into Executive Session now. If you want - you will have to leave...it shouldn't be long; but then we will come back in.

Unidentified Female: We have to leave for what reason.

Chairman Wright: Because we are going into Executive Session.

*****MOTION:** Mr. Keegan made a motion at 7:18 PM, to reconvene to regular Zoning Board of Appeals meeting; seconded by Mr. Vasti. Hearing all in favor; the motion was carried.

*****MOTION: Chairman Wright offered the following resolution; seconded by Mr. Vasti.**

DECISION

The Record of the Proceedings

In this matter, the following documents were duly considered and the same constitute the record of the proceedings herein:

1. The Appeal Application submitted by BHS Associates, LLC ("BHS" or the "Applicant");
2. Denial of the Building Permit, dated April 8, 2014;
3. Letter of Ira M. Emanuel, Esq., dated May 5, 2014, including Exhibits A through D;
4. Letter of the County of Rockland, Department of Planning, dated June 12, 2014;
5. Letter of the County of Rockland, Department of Planning, dated July 2, 2014;
6. The Minutes of the meetings at which the Application for the Appeal was considered;
7. The transcripts of the public hearings held on June 5, 2014, June 19, 2014 and July 3, 2014.

Procedural Posture

The applicant filed an appeal from the decision of the Building Inspector as well as an application for a use variance. The property, which is the subject of the application, is designated a tax map Section 20.04, Block 11, Lot 6.

The applicant was represented by Ira M. Emanuel, Esq. The Zoning Board of Appeals was represented by special counsel, Daniel F. Sullivan, Esq. and Joseph G. McKay, Esq. of Catania, Mahon, Milligram & Rider, PLLC.

The proposed appeal/interpretation and requested use variance application was designated as an unlisted action under Part 617. (c)(31) of the regulations promulgated pursuant to the New York State Environmental Quality Review Act (SEQRA").

A public hearing was held on June 5, 2014, and continued on June 19, 2014 and July 3, 2014. The testimony of the following persons was duly considered: William Sheehan, Building Inspector, Ira M. Emanuel, Esq., Jerry Lott, (real estate broker), Dr. Robin Nuzzolo, (director of the proposed school), David Zigler, (engineer for Applicant) and William Helmer (principal of Applicant). Comments made by a number of members of the public were also considered by the Board.

During the public hearing, BHS presented a short form EAF in support of its application. The board discussed the possible adverse environmental impacts that might arise if the use variance was granted, and the potential need for an expanded environmental review. Inasmuch as BHS was hesitant to perform a broader environmental review of the impacts of an approval, such as the submission of a full site plan, long form EAF and/or EIS for the project, in lieu thereof, BHS agreed that should the use variance be granted, it would consent to complete any further site specific SEQRA review as may be required by the Town Planning Board. As such, based upon BHS's agreement, the board's environmental review was necessarily limited to the potential adverse impacts of the possible change in use of the structure itself, and not to any site specific environmental impacts. Therefore, the board determines that a negative declaration is hereby issued as to the possible use variance of the structure itself. Such negative declaration, however, is not made, and would not apply, with respect to any potential site specific adverse impacts that would require review, approval and/or mitigation by the Town Planning Board.

Questions Raised by the Applicant

BHS appeals the decision of the Town's Building Inspector dated April 8, 2014, which denied its application for a building permit for the use of the property as a pre-school. The Applicant requested that this board reverse the decision of the Building Inspector.

BHS's Appeal with Respect to the Building Inspector's Interpretation of Stony Point Town Code Section 215-9(D)

The Building Inspector denied BHS's application for a building permit because the use of the property as a preschool in the LI district was prohibited by the Zoning Code.

The Applicant's attorney argued that the Building Inspector's determination was incorrect and should be overturned because exclusion of school uses in zoning districts has been held to be unconstitutional. Counsel relied on the Appellate Division ruling in Albany Preparatory Charter School v. City of Albany, 31 A.D.3d 870 (2006). Attorney Emanuel stated: "the Appellate Division upheld a Supreme Court finding that the exclusion of schools as a permitted use in commercial districts was unconstitutional on its face."

Contrary to Attorney Emanuel's assertion, in the cited decision the Appellate Division held that the provisions of the City of Albany Zoning Ordinance that resulted in a *wholesale* exclusion of educational uses from the commercial districts in question were unconstitutional on their face. Here, the Town of Stony Zoning Point Code permits vocation and trade school uses in its LI district. Since vocation and trade schools are permitted as a Conditional Uses, there is no wholesale exclusion of schools under the Town Zoning Code and the holding in Albany Preparatory is inapplicable to this matter.

The Applicant presented no other evidence or arguments concerning its appeal of the Building Inspector's determination.

The board finds that the Building Inspector's determination was correct.

BHS's Application for a Use Variance

BHS, in the alternative, has applied for a use variance to operate a private preschool on the property. Recognizing that BHS's proposed preschool is prohibited under the clear language of the Town Code, which is not subject to an alternative interpretation, the board may nonetheless consider granting a use variance if sufficient evidence is presented to satisfy applicable statutory requirements.

The board is cognizant of the fact that schools are of an inherently beneficial nature to the community, and that educational institutions enjoy special treatment and are allowed to expand in neighborhoods where nonconforming uses would otherwise not be allowed. The board has reviewed the testimony given by the Applicant's witnesses at the public hearing asserting the benefits of the proposed use to the community, including benefits to students with special needs, and the purported need for an additional preschool in the area. Since the Applicant has applied for a use variance, the board is bound to apply the Town Code's requirements to the testimony provided.

Section 215-124(D)(2) of the Town Code provides that the board may not grant a use variance unless the applicant sufficiently establishes that the applicable zoning restrictions have caused an "unnecessary hardship." Applicants may prove such hardship by demonstrating the following four elements, each of which must relate to each and every permitted use under the zoning ordinance for the LI district:

a) *That the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financials, for each and every use under the zoning ordinance for the LI district:*

The only financial evidence provided to the board were two tax returns showing the loss of \$72,479.00 for the year 2011 and a loss of \$61,003.00 for the year 2012. The tax return only showed the loss, there were no schedules showing anything other than net rental income loss and investment income. No other financial documentation was presented. The only other evidence in this regard was the oral testimony from the owner, Mr. Helmer, who asserted only that "the taxes are extremely high and that [he] cannot rent the building." Furthermore, the Applicant did not submit any financial data or evidence that a financial hardship existed for each and every permitted use for the property.

The board finds that the Applicant did not provide competent financial data or information that the owner could not realize a reasonable return for the use of the property as an office building for business and professional use, for freight and truck transfer terminals, for indoor commercial recreation establishments, or for the installation of wireless communication facilities on existing buildings, all of which are all permitted uses under the Town Code.

The board finds that the Applicant failed to meet its burden to demonstrate by competent financial evidence that it cannot realize a reasonable return for each and every permitted use of the property.

b) *That the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood:*

The Applicant alleged that the design layout of the building makes it unsuitable for warehouse use or for other general industrial uses. However, evidence was presented to indicate that the existing building was specially designed for use by a former electronics company. The board is aware that there are other buildings located in the LI district that are in similar use as small warehouses and manufacturing companies.

The board finds no evidence that the alleged hardship is unique, and in fact, finds that similar limitations apply to a number of other properties in the district and/or neighborhood.

c) *That the requested use variance, if granted, will not alter the essential character of the neighborhood:*

Evidence and testimony were presented to show that the essential character of the neighborhood would not be altered by the proposed school, because there is already a supermarket center, a church and a public school nearby, and, as such, the school use would be consistent with other uses nearby.

The board finds that the requested use variance would not alter the essential character of the neighborhood.

d) That the alleged hardship has not been self-created.

The Applicant testified that he specifically built the building for use by a small electronics company and that the design of the building is not conducive to other industries. There was additional testimony that the increased traffic along Route 9W, along with a lack of nearby access to the New York State Thruway, serve as a deterrent to any industrial tenant renting the space.

The board finds that the alleged hardship was self-created in that the Applicant admittedly constructed the building for a specific type of use. The board also finds that the Applicant exacerbated its own hardship by marketing the property for use as a preschool, which would require a use variance.

Therefore, it is hereby decided by the Town of Stony Point Zoning Board of Appeals that:

1. The determination of the Building Inspector to deny the building permit was proper because use of a preschool in the LI district is clearly prohibited by the Town Code.

2. The application for a use variance for a proposed use as a preschool is denied because the Applicant did not prove a hardship in that:

(1) it did not demonstrate by competent financial evidence that it could not realize a reasonable return for each and every permitted use of the property, and;

(2) it did not demonstrate that the alleged hardship relating to the property in question was unique and did not apply to a substantial portion of the district or neighborhood, and;

(3) it did not demonstrate that the alleged hardship was not self- created.

Upon roll call, the vote was as follows: Mr. Anginoli, yes; Mr. Keegan, yes; Mr. Casscles, absent; Mr. Vasti, yes; Mr. Fox, yes; Mr. Porath, no; and Chairman Wright, yes.

Chairman Wright: The only other item on the agenda tonight is the minutes of July 17, 2014, meeting.

*****MOTION:** Mr. Porath made a motion to accept the minutes of July 17, 2014; seconded by Mr. Fox. Hearing all in favor; the motion was carried.

*****MOTION:** Mr. Fox made a motion to adjourn the meeting of September 4, 2014; seconded by Mr. Anginoli. Hearing all in favor; the motion was carried.

Respectfully submitted,

Kathleen Kivlehan
Secretary
Zoning Board of Appeals