

Meeting of the Zoning Board of Appeals of the Village of Brockport was held in the Conference Room, Municipal Building, 49 State Street, Brockport, New York, Monday, April 28, 2003 at 7:00pm.

PRESENT: Chair Jennifer Skoog-Harvey, Vice Chair / Member Irene Manitsas, Member John Bush, Member Carrie Maziarz, Member Charles Switzer, Building/Zoning Officer Scott C. Zarnstorff, Clerk Leslie Ann Morelli.

EXCUSED:

ALSO PRESENT: Frank A. Alois, Deputy Village Attorney, Benton and Sarah Hart, Laurel Stritzel, Robert Altman, Joan Hamlin, Annette Locke, Mary Pat Musselman, Bill Weber, Rich Miller, Megan & Douglas Bellinger.

CALL TO ORDER: Chair Skoog-Harvey called the meeting to order and led the Pledge to the Flag.

REVIEW OF MEETING MINUTES: March 24, 2003 not ready for review.

CORRESPONDENCE: None

NEW BUSINESS:

Public Hearing:

1. Application of:

Name:	Douglas & Megan Bellinger
Address:	21 Frazier Street
Tax Map #:	069.09-1-38.2
Zoning:	Residential
Lot Size:	85' wide x 132' deep
Purpose:	Area Variance to allow an east side setback of 5.6 feet (instead of the 10 feet required) for the construction of an attached single car garage
Provision of Zoning Ordinance Appealed:	58-9F(3)

Applicant Presentation:

D. Bellinger reviewed the plan for a 15' x 26' single car garage and how 3 feet is needed for the entrance to the house.

Chair Skoog-Harvey read the legal notice (above) and Clerk Morelli confirmed that it was published in the Suburban News, and as a courtesy, mailed to property owners within 500 feet of the application. Member Bush read the following:

AREA VARIANCE TEST

New York State criteria:

In making its determination, the ZBA shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:

- 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 condition 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.

The ZBA, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

⇒Member Maziarz moved, Member Switzer seconded, unanimously carried to close the regular meeting and go to public hearing.

Public Hearing:

Chair Skoog Harvey asked that any member of the public wishing to comment either for or against the application identify their name and address for the record, limit their remarks to the application at hand,

and limit their comments to 3 minutes so everyone who wishes to speak has the opportunity to do so.
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M. Bellinger presented a letter from their neighbors to the east, Dan and Sharon Goodwin, stating that they are fine with the application. Chair Skoog-Harvey read said letter and asked if the applicants had spoken with any other neighbors. M. Bellinger said they had spoken with the neighbors on the other side that told them they were all in favor of any improvements to the neighborhood.

Rich Miller commented that the application makes sense since there is a limited amount of land and the proposal is set up the right way.

S. Zarnstorff said he is fine with the application and reminded them that they would need to apply for a building permit.

No further public comment on this application.

Member Manitsas asked the applicant if there was any way to avoid the area variance. M. Bellinger said any other plan would take up the majority of the yard. They have 2 children and need yard space.

⇒ Member Manitsas moved, Member Bush seconded, unanimously carried that the public hearing be closed and the regular meeting be reopened.

Chair Skoog-Harvey shared that this is a Type II action on SEQRA and not subject to review.

⇒ Member Bush moved, Member Manitsas seconded, unanimously carried that the application be approved and area variance granted to allow an east side setback of 5.6' instead of the 10' required for the construction of an attached single car garage.

OLD BUSINESS:

Chair Skoog-Harvey stated that the public hearings were held and closed February 24th, they allowed further public comment on March 24th and written public comment until April 18th. Applications and all submitted supporting documentation from the applicants was available for public review at the Village Hall through today. The ZBA and support staff has thoroughly reviewed all materials submitted. Each property will be addressed individually.

- 1. Application of: Name: Benton D. & Sarah C. Hart
 Address: 94/96 State St. / 86 State St. / 58 Park Ave.
 Tax Map #: 069.13-2-5 / 069.13-2-3 / 069.53-2-11
 Property Code: 220 / 411 / 220
 Zoning: Residential
 Lot size: .20 / .25 / .25 acres
 Purpose: continuance of non-conforming use
 as 2 family / 4 family / 2 family
 Provision of Zoning Ordinance Appealed: 58-20 A (1)

RESOLUTION

→ Motion by Member Maziarz, second by Member Manitsas, unanimously carried adopting the following resolution regarding the 86 State Street application:

Be it RESOLVED that nonconforming use status for the four family property at 86 State Street in the Village of Brockport, owned by Sarah and Benton Hart has been established as a legally permitted pre-existing nonconforming use under pre-1984 codes (prior to repealer of T-Districts in 1984), and may be continued as a nonconforming use pursuant to section 58-20 A (1) of the Village of Brockport Code;

Be it further RESOLVED that this nonconforming use will run with the land, for so long as it is legally conducted on the property;

Be it further RESOLVED that the Code Enforcement Officer (CEO) of the Village of Brockport is directed to institute and/or continue the process for issuance of a certificate of occupancy for the property at 86 State Street to extend the nonconforming use within the premises to conform as nearly as practical to the requirements for the district in which the property is situated;

SEE FINDINGS OF FACT AND CONCLUSIONS OF LAW AT END OF HART RESOLUTIONS.

RESOLUTION

→ Motion by Member Bush, second by Member Manitsas, unanimously carried, adopting the following resolution regarding the 96/96 State Street application:

Be it RESOLVED that nonconforming use status for the two family property at 94/96 State Street in the Village of Brockport, owned by Sarah and Benton Hart has been established as a legally permitted pre-existing nonconforming use under pre-1984 codes (prior to repealer of T-Districts in 1984), and may be continued as a nonconforming use pursuant to section 58-20 A (1) of the Village of Brockport Code;

Be it further RESOLVED that the owners have continuously maintained the 2d floor apartment as a separate and distinct living unit, and have not discontinued the leasing of that apartment for a period of 9 months or more; nor have the owners evidenced any "intent" to abandon the use of the second floor apartment as a distinct and separate living unit;

Be it further RESOLVED that this nonconforming use will run with the land, for so long as it is legally conducted on the property;

Be it further RESOLVED that the Code Enforcement Officer (CEO) of the Village of Brockport is directed to institute and/or continue the process for issuance of a certificate of occupancy for the property at 94/96 State Street to extend the nonconforming use within the premises to conform as nearly as practical to the requirements for the district in which the property is situated;

SEE FINDINGS OF FACT AND CONCLUSIONS OF LAW AT END OF HART RESOLUTIONS.

RESOLUTION

→ Motion by Member Maziarz, second by Member Switzer, unanimously carried, adopting the following resolution regarding the 58 Park Avenue application:

Be it RESOLVED that nonconforming use status for the two family property at 58 Park Avenue in the Village of Brockport, owned by Sarah and Benton Hart has been established as a legally permitted pre-existing nonconforming use under pre-1984 codes (prior to repealer of T-Districts in 1984), and may be continued as a nonconforming use pursuant to section 58-20 A (1) of the Village of Brockport Code;

Be it further RESOLVED that this nonconforming use will run with the land, for so long as it is legally conducted on the property;

Be it further RESOLVED that the Code Enforcement Officer (CEO) of the Village of Brockport is directed to institute and/or continue the process for issuance of a certificate of occupancy for the property at 58 Park Avenue to extend the nonconforming use within the premises to conform as nearly as practical to the requirements for the district in which the property is situated;

SEE FINDINGS OF FACT AND CONCLUSIONS OF LAW AT END OF HART RESOLUTIONS:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
BENTON HART/SARAH HART**

86 State Street	4 family
94/96 State Street	2 family
58 Park Ave.	2 family

ISSUE: Was the nonconforming use legally established before the abolition of the T-Districts in 1984; does the temporary or occasional vacancy of 2d floor apartment constitutes an abandonment of nonconforming use as to that apartment.

ANSWER: Based on documentation submitted, nonconforming uses were legally established in each of the properties owned by the Harts.

86 State St. [tax ID # 069.13-2-3]
"411" classification from '73 to present;

Acquired from F. Willis Knapp, Frederick H. Knapp, and Carol H. Knapp, on September 18, 2000; Liber 9368/page 657;

Real Property transfer report, 9/28/00, states that property is "230" classification;

Statement from Fred Knapp of his personal knowledge that the property was converted into 4 individual rental units by the early 70's, with each having its own gas & electric, and metered service.

Certificate of Occupancy, 9/19/00, issued for "411" to Willis Knapp;

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Written leases submitted for each unit from Oct/Nov 2000 to present;

94/96 State St.

[069.13-2-5]
"210" classification '73-'74;
"220" classification '75
'220" classification '89 to present;

Acquired from Marjorie B. Grace on 11/4/96;
Liber 8804/page 243;

The Purchase offer for the property dated 10/10/96 indicates
"multiple family (2 units);

The mortgage commitment letter dated December 24, 1996,
stated in paragraph 13 that the commitment was conditioned upon
issuance of a permanent unconditional certificate of occupancy . .
. certifying that the property was a legal two family;

Leases for the upstairs apartment were submitted to the ZBA by
the applicants;

Separate utility bills for the two living areas were submitted to the
ZBA by the applicants;;

Verbal verification from John Lessord, the original tenant of the
upstairs apartment; Mr. Lessord stated that the upper apartment
was constructed in 1959, the year he began his tenancy; he
indicated that the property was owned and occupied by Marge
Grace for many years, and that she occupied the first floor
apartment; further, Mr. Lessord remained Ms. Grace' tenant for 6
consecutive years from 1959 through 1965.

The second floor apartment has been continuously maintained as
an apartment since 1959; there are two separate entrances,
separate kitchens, appliances, bathrooms and living quarters;
there are separate utilities, meters, and mailboxes, as well as
addresses for 94 and 96 State St.

A lease for the upstairs apartment prior to the sale to the Harts in
'96 by Marjorie Grace (to Diane Abel), was submitted;

The Mary Patricia Musselman letter submitted on 2/28/03,
indicates that she moved into property at 90 State St. in 1991, and
knew that Marjorie Grace lived at 94/96 State Street, and rented
the upstairs apartment for "quite some time". "It continued to be
rented through the sale of this property to Sarah and Benton Hart.
I believe they bought it in the fall of 1996."

A Certificate of Occupancy for "220" double - was issued on
1/9/03. A Certificate of Occupancy was issued on 11/1/96 for
"220" use by the prior Building Inspector, William Weber;

Documentation was submitted to show more or less continuous
rental of the upper apartment from September of 1996 to the
present;

The leasing information for the upper apartment includes the
Affidavit of tenant Karen Skinner, sworn to February 27, 2003, and
her letter, indicating her occupancy in the following time periods:

- 9/1 - 9/30, 2000
- 5/1 - 6/1, 2001
- 9/1 - 10/15, 2001

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country.
Sarah Hart
Karen Skinner is a relative of the Harts, and states that “for work related reasons, Benton Hart frequently travels outside the
During his stays abroad, I rent the apartment and assist with caring for their three young children.”

The Skinner leasing information is deemed valid; the consideration for a lease can be monetary or services of value;

There is further leasing information from a male tenant (Richard) for June-July 15, 2002, and March 1, 2003 to present;

There are no interruptions in occupancy of 9 months or more; further, there is no indication of any intent on the part of the Hart’s to discontinue their use of the upper apartment as a rental unit;

LAW - - 94-96 STATE ST. 2nd Floor Apt.

Temporary vacancies or occasional vacancy are not enough to justify an abandonment; there must also be an intent to abandon (which we do not have on our facts - nothing objective, i.e., renovating, integrating into main apartment, tearing out kitchen, integrating utility services)

Marzella –vs.- Monroe, 69 NY2d 967 (1987) (where a three-family dwelling and a single-family dwelling were maintained on a lot as a nonconforming use, a period during which the single-family dwelling remained vacant did not constitute an abandonment of the nonconforming use. Abandonment does not occur unless there has been a complete cessation of the use)

Daggett –vs.- Putnam, 40 AD2d 576 (4th Dept. 1972) (owner had nonconforming use to maintain two trailers on his property; from 1964 to 1970, he only maintained a single trailer, and then again attempted to maintain the second trailer; the court held that “[a]bandonment does not result unless the discontinuance of use is complete . . . Since the petitioner had one trailer on his property at all times, there was no a complete cessation of his nonconforming use and his right to maintain two trailers had not been abandoned)

Hackett –vs.- Roos, 196 NYS2d 197 (Sup Ct. 1959) (“the mere temporary non-use of the property as a two-family house unaccompanied by other acts referable only to an intent to abandon such use in favor of another is insufficient to destroy such a substantial right”)

58 Park Avenue [tax ID # 069.53-2-11]
“220” classification from ‘73 to present;

Acquired from Richard A. Hill (who acquired property in tax foreclosure from Barbers) on June 11, 1998; Liber 9024/page 529;

Purchase Offer dated 4/20/98 states use as 2-family;

Verbal evidence submitted by applicant that Bonnie Hugelmaier was former tenant who lived in the property when the Barbers owned it. Ms. Hugelmaier lived there for many years going back to the time period before the repealer of the T-Districts in 1984; Ms. Hugelmaier stated that the property was used as a two family during the time she lived there; the Barbers occupied one unit; she occupied the other. There were separate utilities and two water meters.

Leasing information submitted showing more or less continuous occupancy of both units by tenants from July of 1998 to present;

Certificate of Occupancy, 8/23/02, for “220” 2-family classification;

Certificate of Occupancy, 8/28/98, for “220” classification;

- 2. Application of: Name: Laurel E. Stritzel
- Address: 44 Smith Street
- Tax Map #: 068.52-1-5

Property Code 210
Zoning: Residential
Lot size: .20
Purpose: continuance of non-conforming use as 2 family
Provision of Zoning Ordinance Appealed: 58-20A (1)

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RESOLUTION

→ Motion by Member Bush, second by Member Manitsas, unanimously carried adopting the following resolution regarding the 44 Smith Street application.

Be it RESOLVED that the owner of the property at 44 Smith Street, Laurel E. Stritzel, has not submitted proof sufficient to establish that the property is a legally pre-existing non-conforming use (2-family) under the prior codes of the Village of Brockport (before 1984 repealer of the T-Districts), and may be continued as such;

Be it further RESOLVED that in light of the submission by the owner of 44 Smith Street, Laurel E. Stritzel, of an alternative ground to support the continuance of her nonconforming use of the property as a double under section 58-20 A (1) of the Code of the Village of Brockport - - that it was legal under prior code(s) as "Family plus two" - - her application will be tabled to permit further study by the Board of the legal basis for her application;

SEE FINDINGS OF FACT AND CONCLUSIONS OF LAW:

**PENDING APPLICATIONS FINDINGS OF FACT
CONCLUSIONS OF LAW**

LAUREL E. STRITZEL

44 Smith Street

ISSUE: Was the nonconforming (2-family) use legally established?

ANSWER: Based on documentary evidence submitted in support of the application and the Village records, the property has been carried as a single by the Village; original building permits were for single family use; original certificates of occupancy were for single family use; an application to rezone the property to multi-family use was denied; the owner advises that he believes the property is nonetheless nonconforming because it was used as a "Family plus two", a use permissible under prior ordinances;

Property acquired from Gross on June 6, 1992, Liber 8254/520;

Equalization and assessment form shows property as "one family residential;"

Assessment classification - "210" - single family;

Building permit applications and certificates of occupancy issued in May and September '71 respectively to Mr. Gross state 1-family use; although building permit applications do state that the intended use and occupancy is "Family - rental";

An application by Mr. Gross to have the property rezoned to a T-District in June of '71 was denied;

Builder and prior owner submitted statement, 2/9/03, stating that he owned the property in question. "In 1972, I had three double homes added to the property. The homes were built equipped with gas and water piping on the first and second floors to accommodate double dwellings. I believe the zoning at the time was "O-Residential" or "Family plus two". I transferred the ownership of the property to my three daughters under a land contract in the year of 1982 or 1983. Through out the years, they have been maintained with visual updates; however, concerning any major part, the homes remain in the same demise as when they were built."

A statement from tenant who leased downstairs apartment in 1983 was submitted (Joan E. Traber);

Other leases for periods '98/'99, '86/'87, and "91/'92 were submitted;
Property currently insured as 2-family dwelling;
Certificate of occupancy, 1/13/03, - 107 Clark St. for "220"
2-family;

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3. Application of: Name: Robert & Grace Altman
 Address: 26 Brockway Place
 Tax Map #: 068.76-1-12
 Property Code: 210
 Zoning: Residential
 Lot size: .10
 Purpose: continuance of non-conforming use as 2 family
 Provision of Zoning Ordinance Appealed: 58-20 A (1)

RESOLUTION

→ Motion by Member Maziarz, second by Member Bush, unanimously carried, adopting the following resolution regarding the 26 Brockway Place application:

Be it RESOLVED that the owner of the property at 26 Brockway Place, Robert Altman, has not submitted proof sufficient to establish that the property is a legally pre-existing non-conforming use (2-family) under the prior codes of the Village of Brockport (before 1984 repealer of the T-Districts), and may be continued as such;

Be it further RESOLVED that in light of the submission by the owner of 26 Brockway, Robert Altman, of an alternative ground to support the continuance of his nonconforming use of the property as a double under section 58-20 A (1) of the Code of the Village of Brockport - - that it was legal under prior code(s) as "Family plus two" - - his application will be tabled to permit further study by the Board of the legal basis for his application;

SEE FINDINGS OF FACT AND CONCLUSIONS OF LAW:

**PENDING APPLICATIONS FINDINGS OF FACT
CONCLUSIONS OF LAW**

ROBERT ALTMAN

26 Brockway Place

ISSUE: Was the nonconforming (2-family) use legally established?

ANSWER: Based on documentary evidence submitted in support of the application and the Village records, the property has been carried as a single by the Village, with the exception of a "220" tax classification; a variance for approval of 2-family use was denied in 1976; the owner advises that he believes the property is nonetheless nonconforming because it was used as a "Family plus two", a use permissible under prior ordinances;

Property acquired from Boyst' in a series of conveyances in '75 and '76;

Tax classification "220" - double;

Based on documentary evidence as submitted and in Village records, a variance was applied for by Mr. Altman for status as a double; the ZBA denied the variance on October 7, 1976, on the ground that the hardship was self-imposed.

On December 2, 1983, the prior Building Inspector wrote the owner and advised that the variance to convert to 2-family use had been denied, and that an inspection should be scheduled;

The failure of the application for a variance would seem to negate any anecdotal evidence that the house acquired nonconforming status by continued use after the denial of the variance - illegal use as a double.

Owner submits as additional ground for nonconforming use status that

property was used as “family” plus 2 under prior code;

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**CONCLUSIONS OF LAW
JURISDICTION**

There a number of codes (in this geographic area) which include provisions for the certification or continuance of non-conforming uses. For example, these codes include the following:

Section 290-50-I of the Village of Albion Code, which provides for Certification of Non-Conformance, either on written request of the owner, or at the instance of the Code Enforcement Officer (“CEO”); the CEO’s findings then go to the ZBA, and the ZBA issues a certificate fixing the nature and extent of the use.

Section 95-64 of the Riga Code, is the same as Albion.

Section 135-32 of the East Bloomfield Code, is the same as Albion.

Section 165-90 of the Parma Code, is the same as Albion.

Section 105-1301 of the Town of Canandaigua Code, is the same as Albion, and that provision has been upheld in the Appellate Division, 4th Department. **Gardner -vs.- Town of Canandaigua CEO**, 261 AD2d 910 (4th Dept. 1999)

Likewise, the Town of Clarendon Code is the same as Albion, and that provision was upheld by the Appellate Division, 4th Department in **Forjone -vs.- Bove et al/Members of Clarendon Town Board**, 280 AD2d 948 (4th Dept. 2001); also Court upheld imposition on reasonable restriction on use as part of certification process.

The Village of Brockport code provision, section 58-20, amended 7/1/96, LL #3, 1996, is essentially the same as the code provisions for certification of nonconforming uses upheld by the Appellate Division, as above:

58-20 A (1)

Any nonconforming use existing at the time of the enactment of the Zoning Code may be continued, and, upon application to and approval by the Zoning Board of Appeals, the Zoning Board of Appeals may direct the Building Inspector to issue a certificate of occupancy extending said nonconforming use within the premises as prescribed by the Zoning Board of Appeals to conform as nearly as practical to the requirements for the district in which the building, structure or use is situated.

ON THE FOREGOING, THE ZBA OF THE VILLAGE OF BROCKPORT DOES HAVE JURISDICTION OF THE APPLICATION FOR CONTINUANCE OF THE NONCONFORMING USE.

Furthermore, in the context of code provisions dealing with “certification” of nonconforming uses, “extension” must mean “temporal limits”, not physical or structural changes in the nonconforming use.

QUESTION OF CONFLICT OF INTEREST

Two of the members of the ZBA are owners of multi-family properties in the Village of Brockport. The fact of their ownership of such properties does not disqualify them from deliberating and voting on the nonconforming use issues involved in the instant applications. See **Byer -vs.- Town of Poestenkill**, 232 AD2d 851 (3rd Dept. 1996) (member who owned land which could be used for mining, part of which he had previously applied for and obtained a mining permit, and who continued to own land possibly adaptable for mining, was not disqualified to vote on application to rezone property from residential to “mining” use. It made no difference that precedent in the case might aid member if he ultimately decided to apply for a change of zone for his land to “mining”).

The member, his spouse, their brothers, sisters, parents, children, grandchildren, or the spouse of any of them is not

- a. the applicant;
- b. an officer, director, partner or employee of the applicant, or

- c. legally or beneficially owns or controls stock of a corporate applicant, or is a member of a partnership or association applicant, or
- d. is a party to an express or implied agreement with such an applicant whereby he or she may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of the application, petition or request.

Gen Mun L. section 809(2), (3).

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QUORUM/ADJOURNMENT/CONTINUANCE

Each of the applications was heard and then adjourned to a second hearing date for submission of additional proofs and documentary evidence in support of and in opposition to the applications. Three members were in attendance at the first meeting. The public hearing was duly noticed and held at the first meeting, and closed prior to adjournment. The matters were then reopened at the second hearing date. All members were in attendance at the second hearing date. The Chair did not reopen the public hearing, but did permit comments from the floor and several persons who had attended and stated positions at the public hearing again reiterated their positions. At the end of the second hearing, the Chair advised the persons present that all documentary submissions to the Board could be reviewed by the public at the Village Clerk's office, and could be supplemented until April 18, and that public comments in writing on those submissions could be made until April 18. The Chair indicated that the applications would be on the ZBA's calendar for 4/28/03 for disposition.

The complete record of the proceedings, documentary submissions, and transcribed comments from the public (and written comments from the public) at both hearings (and until April 18) is available to all members for their review, and has been reviewed by all members prior to the April 28 disposition date.

On the foregoing, all members of the ZBA in attendance at the 4/28/03 meeting are eligible to vote on the applications.

ONCE ESTABLISHED, A NONCONFORMING USE RUNS WITH THE LAND AND IS NOT EXTINGUISHED BY A CHANGE OF OWNERSHIP

Section 6.40, page 610-611, Anderson, American Law of Zoning (4th ed. Young)
 "The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Accordingly, a change in the ownership or tenancy of a nonconforming business or structure does not affect the right to continue the nonconforming use. A sale of land occupied by a nonconforming use is not an abandonment of the use. The right of nonconforming use can be exercised equally by the purchaser."

Biener -vs.- Thomaston, 85 AD2d 730 (2d Dept 1981), app dismd 59 NY2d 750 (1981) (the right to continue a nonconforming use is not affected by a transfer of ownership)

STANDARD FOR DETERMINING NONCONFORMING USE

A USE ILLEGAL AT ITS INCEPTION, CANNOT ACQUIRE NON-CONFORMING USE PROTECTION

Section 6.11, at 511, Anderson, American Law of Zoning (4th ed. Young)

"The courts have recognized that ordinances which protect existing uses are intended to protect only those uses which were legally established before the enactment or effective date of the restrictive regulation. Such ordinances are not intended to protect uses which were not legally commenced or continued."

Old Westbury -vs.- Alljay Farms, Inc. 100 AD2d 574 (2d Dept. 1984) order aff'd as modified, 64 NY2d 798 (1985) (landowner raising defense of a legal nonconforming use to violate current zoning ordinance must demonstrate that the use was legally established before the proscriptive ordinance became effective)

Besthoff -vs.- Zoning Board of Appeals Town of Clarkstown, 34 AD2d 782 (2d Dept. 1970) (a valid vested right cannot be created through an existing use illegally established)

Town of North Hempstead -vs.- Levitt & Sons, Inc., 24 Misc.2d 393 (Sup.Ct. 1959), aff'd, 13 AD2d

989 (2d Dept. 1961) (where a building used as a real estate office was illegal in that only streets intersecting business zoned streets could be used for business, under the ordinance, the subsequent extension of the street on which the business was located to an intersection with the nearest business zoned street did not validate the previously illegal nonconforming use)

Section 6.14, at 517-518, Anderson, American Law of Zoning (4th ed. Young)

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“A nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance. A use which offends a properly enacted zoning ordinance is not an existing lawful use within the meaning of an ordinance which protects lawful uses, and no right to continue such use is established. The rule applies not only to uses maintained in violation of zoning regulations which exclude them from the districts in which they are situated, but equally to those maintained without approvals or consents required by law.”
[emphasis added]

Heimerle -vs.- Bronxville, 168 Misc.2d 783 (Sup. Ct. 1938), aff'd 256 App Div 993 (2d Dept 1939) (the owner of a dwelling which was converted to a funeral home without an occupancy permit required by law was not entitled to continue the use under a subsequently enacted ordinance which prohibited funeral homes within 200 feet of a residence)

Smalls -vs.- Board of Standards and Appeals of City of New York, 28 Misc.2d 147 (Sup.Ct. 1961), aff'd 14 AD2d 548 (2d Dept. 1961), aff'd 11 NY2d 698 (1962) (the lack of a certificate of occupancy prevented the establishment of a lawful nonconforming use)

Rapasadi -vs.- Phillips, 2 AD2d 451 (3d Dept. 1956)
(maintenance of a garage in violation of a zoning regulation does not establish a lawful existing use entitled to be continued as a nonconforming use)

NEXT MEETING: none in May – June meeting to be announced if needed

Adjournment:

→ Member Manitsas moved, Member Maziarz seconded, unanimously carried that the meeting be adjourned at 7:30pm.

Leslie Ann Morelli, Village Clerk