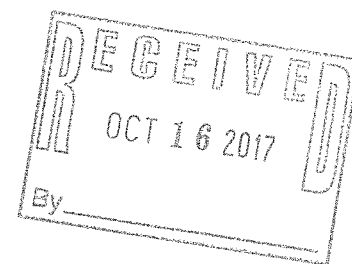


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September 28, 2017

William Moore
Chairman, Zoning Board of Appeals
City Hall
Saratoga Springs, NY 12866

RE: Application of Pepper's Corner, LLC, 173 Lake Ave.

Please be advised that I have been retained by Jean Brophy, who resides at 171 Lake Ave, and Dillon Moran, residing at 177 Lake Ave., with regard to the above application. I have reviewed the submitted application with supporting documents as well as the video replay of the July 24, 2017, ZBA meeting. I respectfully request that ZBA consider the issues herein before any decision is made on the application and that you make this letter of part of the record.

THE PUBLIC NOTICE OF THE July 24, 2017, ZBA MEETING IS DEFECTIVE

The Public Notice to surrounding property owners states that the applicant has applied for an "area variance to demolish the existing structure and construct a new 1,960 sq. ft. market for *two retail tenants* and two wall signs" (emphasis added). This notice is silent as to any variance for Parking. Since the public notice is silent on the issue of parking, in order to grant any variance for parking, there would have to be another public notice and meeting/hearing before any such variance could be granted.

THE SUBMITTED APPLICATION WOULD REQUIRE A USE VARIANCE IN ADDITION TO AREA VARIANCES.

The Public Notice reflects that *two retail tenants* and two wall signs are proposed. The cover letter to the application from the Landscape Architect states:

Enclosed please find an application for an area variance and sign variance for a proposed convenience store (market) at 173 Lake Avenue (former Pepper's Market, currently Moby Rick's Seafood Market). The existing building is proposed to be razed and *replaced to house two stores* (Moby Rick's Seafood Market and 9 Mile East). A variance is requested for

insufficient on-site parking, partially locating one parking space in a side yard setback, and two signs (one for each business) (emphasis added).

The actual Application to the ZBA however only requests an Area Variance for:

1. Relief from Local Zoning Code: Sections 6.2.6 (Off Street Parking) and 2. 6.1.5.2 (Signs). Despite what the applicant says or how it wishes to frame the issues, there is no question that what is being proposed is new construction to house *two* separate and distinct businesses when there has always only been one. Therefore, a use variance would be required to allow such.

The Applicant is attempting to double the use, from one non-conforming use to TWO non-conforming uses. There is now proposed to be two structures, two separate and distinct business, two signs, two sets of employees, two sets of hours of operations, etc. The amount of traffic and deliveries in and out will be doubled.

Stephen Shaw's (Zoning and Building Inspector) letter of May 4, 2017, to the applicant that determines that the applicant's proposal as submitted would qualify for the convenience sales status with an accessory use for eating and drinking is wrong for the above, and below, reasons. Notwithstanding, Mr. Shaw's erroneous application, he then goes on to state that the "presence of two kitchens, although concerning, is allowable as long as most of what is being produced is for take-out or to supplement the convenience sales by offering pre-cooked items." The fact that an applicant needs two kitchens, when there is currently one, is enough for anyone to understand that the proposed use will be doubled and therefore a use variance is required.

With regard to City Zoning Ordinance 6.4.2 OUTDOOR EATING AND DRINKING FACILITIES: "Outdoor eating and drinking facilities shall be a permitted accessory use in association with approved eating and drinking establishments in districts where that use is permitted under Article 2 of this Chapter." Since outdoor eating is not allowed as an accessory use in an UR-3 zone, the applicant would have to apply for a use variance to in order to conduct any outdoor eating or drinking as well.

THE CHANGE AND DISCONTINUANCE OF THE CURRENT USE ALSO REQUIRES A USE VARIANCE

Section 5.3.4 of the Zoning Ordinance, entitled EXTENSION OR EXPANSION OF USE, provides:

A non-conforming use shall not be extended or physically expanded. Extension or expansion of a non-conforming use shall include expansion of the area or volume occupied by a non-conforming use, including expansion into previously underutilized, vacant or newly constructed space, or the increase of any parking related to the use.

This is an absolute. The applicant is seeking to extend and expand a non-conforming use. Although the applicant may say it is ending the non-conforming use and starting a new, allowed use under UR-3 "convenience sales" via special use permit (if they get one from the planning board), it's really substance over form: the real substance here is that the applicant is

taking advantage of the existing fish market and looking to expand its USE into two separate business. Because the applicant is seeking to place two separate and distinct businesses on that tiny lot, it clearly needs a use variance. Just because one building now exists there does not translate into allowing two separate uses through an application for an area variance.

Pursuant to Zoning Ordinance **5.3.5 CHANGE IN USE**: “If a non-conforming use is to be replaced or augmented by another use, the new and any future use shall conform to this Chapter.” Since the applicant is changing, or at the very least augmenting the use, in order to conform with the Chapter means it would have to obtain one, or more, use variances per this section as well.

The Public notice and the application reflect that the existing building will be demolished and replaced with a new structure. Per City Zoning Ordinance 5.3.2 DISCONTINUANCE:

A non-conforming use shall be deemed discontinued if it is not operated for at least thirty (30) days in a calendar year and any future use of the property shall conform to this Chapter.

It’s a given that it will take more than 30 days to operate any new business after the old business shuts down and is demolished.

THE APPLICANT CANNOT OVERCOME THE AREA VARIANCE CRITERIA

With regard to the criteria (State law and local ordinance) that an applicant must address to be granted an area variance:

1. Whether the benefit sought by applicant **could be achieved by other feasible means**. Identify what alternatives to the variance have been explored (alternative designs, attempts to purchase land, etc) and why they are not feasible.
 - a. the applicant gives no reference to alternative designs (to create more parking, for example).
 - b. the applicant gives no mention of attempts to purchase or locate this project on a more suitable location. Why would a different, more suitable location not be feasible?
2. Whether granting the variance will produce an **undesirable change in the character of the neighborhood** or a detriment to nearby properties.
 - a. Vehicle Traffic: Will increase significantly.
 - b. Pedestrian Traffic: will increase
 - c. As proposed, there will now be TWO businesses: more garbage, noise, traffic, etc.
 - d. As proposed, there will be an eating and drinking establishment which is completely different from prior uses and will completely change the character of

the neighborhood adversely.

3. Whether the variance is **substantial**

Not only is this request for an “area” variance substantial, it’s clear that what really is being sought is a change in use which would require an appeal for a use variance which by its very nature is substantial. Just the area variance being asked for is substantial: seeking to limit the parking in an already very condensed area. The applicant often attempts to soften the off street parking requirement by claiming that on street parking is available and will be able to handle all the traffic that will be coming. Note that due to the plan of having an eat in establishment, customers will not be simply parking for 10 minutes, they could be parking for an hour leaving a real problem for the entire neighborhood.

4. Whether the variance will have **adverse physical or environmental effects** on neighborhood or district.

From the doubled amount of use, and the change of use from the current use, there is no question that there will be adverse physical and environmental effects upon the neighborhood.

5. Whether the alleged difficulty was **self-created**. From the application itself: “The existing conditions have been long-standing in the neighborhood for more than 100 years. The property was *purchased with full knowledge of the code requirements*, but was done so in recognition of the fact that the project would be developed in a manner to improve upon existing conditions and reduce adverse impacts.”

- The Applicant admits that the “difficulty” was self created – they can not overcome this criteria;
- As presented, the project does NOT improve exiting conditions and instead it will significantly increase the adverse impacts in the neighborhood.

What is actually required from this applicant is a use variance, in addition to the area variances requested.

PARKING

Pursuant to City Zoning Ordinance 6.2.6 OFF-STREET PARKING and the applicable SCHEDULE, off-street parking spaces shall be provided and maintained by the owner of the property as follows:

1. Convenience sales 1 per 200 sq. ft. of sales floor area plus 1 per 2 employees

Or

2. Eating & drinking establishments 1 per 4 seats plus 1 per 2 employees

Which parking standard is the applicant being held to? Mr. Shaw's letter is silent as to any issues regarding parking. The application itself self imposes only NINE off street spaces. Presumably then, the applicant is holding itself to the Convenience Sales standard for parking. However, we do not know the total proposed "Sales Floor area" or the number of employees for BOTH business to properly compute the amount of parking spaces needed. How did the applicant come up with only 9 spaces?

City Zoning Ordinance, 6.2.3 CALCULATION OF REQUIRED PARKING, provides:

B. Multiple uses

In instances of multiple uses, the required off-street parking calculation shall include the minimum standards that apply to each use.

Since the applicant is proposing two uses, the amount of parking spaces needed is doubled.

E. Number of employees

When calculating the required number of parking spaces on the basis of the number of employees or staff, the maximum number present at any one time (greater than 30 minute period) shall govern.

Once again, what are the number of employees being proposed for both businesses?

From the applicants narrative: "Both purveyors will sell market products associated with their operations and provide freshly prepared take-out food *and food for on premises consumption*" (emphasis added). However, the amount of parking is sought to be reduced – this is in contravention of the Zoning Ordinance's parking requirements.

Note that no prior business at the subject location had on premises consumption. On premises consumption is not a convenience store, that's a restaurant which is clearly a change in use requiring a use variance AND which would require the applicable amount of parking spaces.

SIGNS

6.1.5.2 AWNING SIGNAGE A sign that is incorporated into an awning attached to a building. A. NUMBER – COMMERCIAL, INSTITUTIONAL OR INDUSTRIAL DISTRICTS. One awning sign may be permitted for each window or door of the façade.

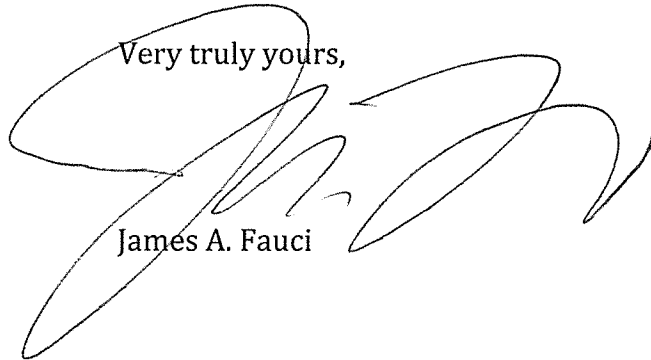
This is the section of the City's Zoning Code that the applicant cites in it's appeal

application: Is there to be an awning? Is this section even relevant? What do the proposed signs look like? Color, graphics, etc?

I also note that with regard to the definition of Convenience Sales in the City's Zoning Ordinance: "A small retail establishment providing a limited line of groceries and household items, and catering primarily to nearby residential areas. The use may have up to twenty seats for customers consuming food sold or prepared on-premise." This definition does not include *take out* food.

Thank you for reviewing this and considering the impact that proposed project will have on the neighborhood and the City.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'James A. Fauci'. The signature is written over the typed name and extends upwards into the 'Very truly yours,' line.

James A. Fauci

Cc: Joan Brophy
Dillon Moran