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September 18, 2018

Mark Torpay, Chairman  
Saratoga Springs Planning Board  
474 Broadway  
Saratoga Springs, NY 12866

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

Dear Chairman Torpay and Planning Board members:

Please be advised that I have been retained by Joseph Tychostup and Joan Brophy, neighbors to the above proposed project. I have reviewed the submitted application with supporting documents in the record. I respectfully request that Planning Board consider the issues herein before any decision is made on the application and that you make this letter part of the record.

## **THE APPLICATION STILL REQUIRES A USE VARIANCE IN ADDITION TO AREA VARIANCES AND A SPECIAL USE PERMIT**

Included in the record is a letter from myself dated September 28, 2017, to ZBA Chairman reflecting, among other things, that the proposed use at that time required the applicant to seek a use variance. Since then, other than the applicant retreating from two separate and distinct businesses, not much has changed. This applicant still requires a referral the ZBA for a use variance to conduct its stated business: "9 Miles East will sell market products associated with its operations and provide freshly prepared take-out food and food for on premises consumption *and delivery*" (emphasis added) (see narrative of Special Use Permit Application). Delivery is not an allowed use under any definition 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" (emphasis added). 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 in order to conduct any outdoor eating or drinking.

Also, 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.

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, the real substance here is that the applicant is taking advantage of the existing fish market and looking to expand its USE into a new and different business. The fact that the applicant now wishes to expand the current use to include outdoor eating into an area of the lot which was “underutilized, vacant or newly constructed,” AND the parking required for this new use will increase (see below), the use proposed is clearly in violation of 5.3.4 and a use variance is needed. Just because one business now exists does not translate into allowing a new and distinct use through the guise of a permitted use under a special use permit.

#### **“ZONING DETERMINATION” Letter from Assistant Zoning Code Officer**

The “Zoning Determination” letter from Assistant Building Code/Zoning Officer Patrick Cogan, dated August 30, 2018, to the Planning Board, erroneously states that “the function of food delivery is a common and expected practice amongst Eating and Drinking Establishments.” On the contrary, most eating and drinking establishments do not provide for delivery service. There is no question that food delivery is the exception (perhaps Mr. Cogan was thinking about “take out” rather than delivery). It’s an important point since the Applicant here represents that delivery, i.e., commercial vehicle(s), will be permanently utilizing the premises and traveling the surrounding neighborhood well into the evening hours. Mr. Cogan is therefore also in error in determining that food delivery can reasonably be allowed within the Convenience Sales use. To put it another way, since food delivery is not common or expected amongst Eating and Drinking Establishments, food delivery can not reasonably be allowed within the Convenience Sales use. Once again, if the Applicant wishes to pursue food delivery, it must seek a use variance.

Mr. Cogan is correct in pointing out that the Planning Board may impose reasonable restrictions and conditions necessary to minimize the impact on the surrounding neighborhood. One common condition is restricting the hours of operation. The Application is incorrect in stating . There are many examples of Courts upholding the granting of a special use permits conditioned on specific hours of operation: *Matter of Ehrlich v Incorporated Village of Sea Cliff*, 2008 NY Misc. LEXIS 9324; *Taylor Tree, Inc. v Planning Bd.*, 272 AD2d 336 (2<sup>nd</sup> Dept, 2000); *Cummings v. Town Bd. of North Castle*, 62 NY2d 833 (1984).

#### **PARKING – THE APPLICANT REQUIRES AN AREA VARIANCE**

Pursuant to City Zoning Ordinance 6.2.6 OFF-STREET PARKING and the applicable

SCHEDULE, off-street parking spaces shall be provided 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

Once again, it's not clear which parking standard is the applicant being held to. City Zoning Ordinance, 6.2.3 CALCULATION OF REQUIRED PARKING, further provides:

#### 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.

What are the number of employees being proposed for the business? Since the use proposed will surely increase both the number of customers and employees, there is no question that the applicant does not have enough off-street parking and will be required to seek an area variance.

### **THE APPLICANT DOES NOT MEET THE CRITERIA FOR A SPECIAL USE PERMIT**

Notwithstanding that use and area variances are needed, in even considering granting a Special Use Permit, the Planning Board must take into account the following per City Zoning Code:

#### 7.1.3 EVALUATION CRITERIA FOR SPECIAL USE PERMITS

A. To ensure that the proposed use will not adversely affect surrounding properties and community character, the Planning Board's evaluation of Special Use applications shall include the following:

1. The extent to which the use is in harmony with and promotes the general purposes and intent of the Comprehensive Plan and this Chapter.
2. The density, intensity and compatibility of the use with the neighborhood and community character.
3. Safe and efficient pedestrian and vehicular access, circulation and parking.

It's clear that from a full review of the record that's before the Planning Board, the

proposed use is not compatible with the neighborhood and that there are still significant questions with regard to safe and efficient vehicle access, circulation and parking. Overall, from what is before this Board, there must be at least a referral to the ZBA for variances or a denial of the Special Use Permit.

Very truly yours,

James A. Fauci

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