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Zoning Board of Appeals
City of Saratoga Springs
474 Broadway
Saratoga Springs, NY 12866

RE: Murphy Lane - Parcel 165.84-1-22 – Interpretation Application - South Alley, LLC
Variances Granted 04/02/2015 -

Dear Chairman Moore and Zoning Board of Appeals Members:

Please allow this letter to supplement the above the application for an interpretation. We have requested from City officials, numerous times, a clear explanation of what rule, ordinance, law, etc, has been violated and how such relates to what has been constructed thus far, i.e., why was the Stop Work Order issued? The only explanation we can decipher thus far is that the Building Inspector appears to have issued the Stop Work Order upon an alleged violation of the City of Saratoga Springs Zoning Ordinance §5.4.4 and or §5.5. Those sections state the following:

5.4.4 EXTENSION OR EXPANSION OF STRUCTURE

A. A non-conforming structure may be extended or expanded provided the proposed extension or expansion does not violate any dimensional requirements other than the current nonconformity.

B. A non-conforming structure may not be extended or expanded to increase nonconformity unless dimensional relief is granted by an area variance from the ZBA.

5.5 NONCONFORMING LOTS

A. A lot which lawfully existed and was in compliance with the provisions of the Zoning Ordinance applicable on the date that such lot was recorded in the Saratoga County Clerk's office but which does not conform to the current dimensional requirements of this Chapter shall be considered a legal non-conforming lot of record as follows in "B" and "C".

B. Minimum lot size and minimum average lot width requirements shall not apply to any lawfully recorded lot which was under different ownership from any adjoining land on or before July 6, 1961.

C. The owner of any lot in a residential district which does not conform to the district's minimum lot size and minimum average lot width requirements may erect a single family residence or accessory building if the lot legally existed on or before January 19, 1970 and is not under the same ownership as any adjoining land.

With regard to §5.4.4, the structure upon the lot was initially conforming and the applicant obtained "dimensional relief" "granted by an area variance(s) from the ZBA," so therefore there is no violation of this section.

With regard to §5.5, the lot in question has existed with its current dimensions (and filed in the County Clerk's office) since at least 1927 (see certified title report submitted with application). Pursuant to both dates provided in subsections B and C of 5.5, this lot is therefore considered a "legal non-conforming lot." Pursuant to subsection C, the owner of this lot may erect a single family residence upon the lot. Since the applicant is in fact erecting a single family residence upon the lot, there is no violation of this section as well.

Note that since the maximum height allowed in this UR-3 zone is 60 feet, and the current/proposed structure will be well under that, there is no violation with regard to height. This is so despite any misconceptions surrounding what the Building Inspector, or the surrounding neighbors of this lot, believe what was actually granted, or not granted, by the ZBA to this applicant in March of 2015.

As I stated in my April 11, 2016, letter to Chairman Moore, other than limiting the applicant to the percentages indicated in the relief granted, the resolution granting the variances in 2015, contained no limitations or conditions whatsoever with respect to what the applicant may construct on that site, i.e., *it is unconditional*. Therefore there is no legal impediment for a structure to be elevated to the maximum height of sixty feet per what that district allows.

Please understand that the language in the resolution granting the variances "to permit the renovation and conversion" and "as per the submitted application materials," with no further detail, does not limit an applicant to construct a structure exactly per the plans submitted. Such language is far too vague and imprecise for anyone, including an applicant, building code inspectors, or neighbors to rely on. Case law makes this clear: "[t]he zoning board, however, must clearly enumerate the conditions in the board's decision so that the applicant, neighbors and municipal officials are fully aware of the nature and extent of any conditions imposed. *Hoffmann v. Gunther*, 245 AD2d 511 (2nd Dept, 1997) Conditions must be certain and unambiguous. *Suburban Club of Larkfield v Town of Huntington*, 57 Misc 2d 1051, *affd* 31 AD2d 718.

The *Hoffman*, case above is directly on point to the facts of this application. There, the ZBA of the Town of Mamaroneck granted an area variance "to allow the construction" of an addition "in strict conformance with plans filed with this application provided that the applicant complies in all other respects with the Zoning Ordinance and Building Code of the Town of

Mamaroneck." In annulling the ZBA's decision with regard to the "strict compliance" language, the Appellate Division stated:

The ZBA had the authority to attach conditions to the granting of the area variance (*see, Matter of Kumpel v Wilson*, 241 AD2d 882). However, it also had the obligation to clearly state any conditions imposed, so that the petitioners, their neighbors, and Town officials, would be fully aware of the nature and extent of any conditions imposed (*see, Matter of Sabatino v Denison*, 203 AD2d 781, 783; *Matter of Proskin v Donovan*, 150 AD2d 937, 939; *South Woodbury Taxpayers Assn. v American Inst. of Physics*, 104 Misc 2d 254, 259), without reference to the minutes of the proceeding leading up to the granting of the variance (*see, South Woodbury Taxpayers Assn. v American Inst. of Physics, supra*, at 259). Here, it is not apparent from the language of the 1979 resolution granting the side-yard variance, that the variance was granted on condition that the petitioners leave the addition constructed in accordance with the plans on file unchanged in perpetuity. Nor did the 1979 variance impose any height conditions other than those imposed by the zoning ordinance.

Since the project in issue here was within the height limitations of the zoning ordinance, did not deviate from or increase the building's footprint, and did not encroach upon the required side yards established by the 1979 variance, once the ZBA granted the necessary front-yard variance, it should have authorized issuance of a building permit and a certificate of occupancy.

The facts in *Hoffmann*, are exactly the facts of this application: although the ZBA here had the authority to attach specific conditions to the resolution, it did not do so. Here, as in *Hoffmann*, it is not apparent from the language of the (2015) resolution granting the area variances that those variances were granted on condition that the applicant construct the new single family residence in any way that would resemble the original barn. Nor did the 2015 resolution impose any height conditions. *Note too that the plans submitted contain no height dimensions whatsoever.* Thus legally, this applicant could construct a single family residence on this legal non-forming lot to a height of 60 feet.

Other relevant case law sheds more light on the issue:

Zoning regulations are in derogation of the common law and must be strictly construed against the municipality. Thus, any ambiguity in the language used in zoning regulations must be resolved in favor of the property owner (*see, Matter of Allen v Adami*, 39 NY2d 275, 277, 383 N.Y.S.2d 565, 347 N.E.2d 890; *Matter of Hess Realty Corp. v Planning Commn. of Town of Rotterdam*, 198 AD2d 588, 603 N.Y.S.2d 95 [3rd Dept., Nov. 4, 1993]; *Matter of Chrysler Realty Corp. v Orneck*, 196 AD2d 631, 632-633, 601 N.Y.S.2d 194, *supra*; *Matter of Barkus v Kern*, 160 AD2d 694, 695-696, 553 N.Y.S.2d 466). Contrary to the contention of the intervenor-respondent Fifth Avenue of Long Island Realty Associates, we find that no inference can logically be drawn from the language of the

variances granted that they were conditioned upon strict adherence to all aspects of the site plan submitted at that time and could not be modified unless approval was first obtained from the Board. If the Board intended to condition either variance on the maintenance of a certain number of spaces in a certain location, it could have done so in its determinations. Zoning regulations may not be extended by implication (see, *Matter of Chrysler Realty Corp. v Orneck*, supra, at 633; *Matter of Exxon Corp. v Board of Stds. & Appeals of City of N.Y.*, 128 AD2d 289, 296-297, 515 N.Y.S.2d 768, supra; cf., *Matter of Town of Sullivan v Strauss*, 171 AD2d 980, 981, 567 N.Y.S.2d 921).

KMO-361 Realty Ass. v. Davies, 204 AD2d 547 (2d Dept, 1994),

See also, Fuentes v Village of Woodbury 82 AD3d 883 (2nd Dept, 2011): “The zoning board of appeals has the authority to attach conditions to the granting of the area variance. However, it also has the obligation to clearly state any conditions imposed, so that petitioners, their neighbors, and town officials are fully aware of the nature and extent of any conditions imposed without reference to the minutes of the proceeding leading up to the granting of the variance.” (citing *Hoffman, supra*).

Sabatino v. Denison, 203 AD2d 781 (3rd Dept, 1994): “We disapprove of respondents' (ZBA) assumption that every item discussed at the public hearings on the application became an express condition of the approval. To the contrary, it was the Zoning Board's obligation to clearly state the conditions it required petitioners to adhere to in connection with the approval (see, *Holmes v Planning Bd. of Town of New Castle*, 78 AD2d 1, *South Woodbury Taxpayers Assn. v American Inst. of Physics*, 104 Misc 2d 254).”

Based upon all of the facts and the law, it is clear that no violation has occurred. We respectfully request that the ZBA rescind the Stop Work Order and reinstate the building permit. Thank you.

Sincerely,

James A. Fauci

cc: South Alley, LLC

