

ZONING BOARD of APPEALS – MINUTES OF MEETING

February 26, 2015

7:30 PM

The regularly scheduled meeting of the Pleasant Valley Zoning Board of Appeals was held on February 26, 2014 at 7:30 p.m. at the Pleasant Valley Town Hall, 1554 Main Street, Pleasant Valley, New York.

Chairman: John J. Dunn
Board Members Present : Kathy Myers
Stephen Kish
Robert Maucher
Sharon Wilhelm
Michael Schroeder
Tim Gerstner
Consultant: Jim Nelson, PB/ZBA Lawyer
Staff: Michael White, Zoning Administrator
Sonia James, Secretary

Chair called the meeting to order at 7:30 pm and explained the Procedure, stating that all proceedings were legal and all the testimonies will be taken under oath. Procedure is to let the applicant present their case first then take comments from the public. Chair, further added that complexity of this application demands one more meeting, we will go thru normal practices then adjourn the meeting to following month.

First Item on the Agenda was:

Special Use Permit – Appeal # 996

Baroni Recycling

Grid # 6463-02-613945

Location: 1913 Route 44, Pleasant Valley NY 12569

Special Use Permit – Non Conforming Scrap Metal Operation

Chair, Mr. Dunn informed that the Board was in receipt of the following:

1. A no-objection letter from the County of Dutchess – Department of Planning and Development. Recommending that the Board rely upon its own study of the facts in this case with due consideration to the comments made by the DCDPD that the Board should consider requiring hardy and attractive landscaping to be placed along the NY 44 road frontage.
2. Referral from Planning Board based on following:
 - a. Baroni Recycling is an existing Grandfathered non-conforming use that has been in operation for over 30 years.
 - b. The operation is licensed on an annual basis by the Town Board and is inspected annually by the Zoning Administrator in connection with such licensing.

- c. The operation has an approved Storm Water Protection Plan that meets the required State standards and has been reviewed and approved by the Zoning Administrator.

The Application will return to the Planning Board for a discussion of the existing Site Plan and consideration of possible improvement

3. Affidavit of Publication from Poughkeepsie Journal,
4. Proof of certified letters sent to the neighbors, notifying them of the public hearing.
5. Also various letters from the concerned neighbor Suzanne Horn,(attached) and Mita Plotnik, Chair, Conservation Advisory Council (attached)
6. Memo from Jeffery Jamison lawyer for applicant. (attached)

Chair, Mr. Dunn invited the applicant to step forward and present his case.

Mr. Jeffery Jamison, represented the Applicant, he introduced himself as the applicants lawyer, explaining that the Baroni was a legal non-conforming use. Baroni's voluntarily agreed to come before the Board, the license is a separate issue and is not included in the Zoning Application. Applicants business is to dismantle vehicles and separate parts. No intensification or modification of the pre-existing business is sought, we are not talking about the construction of the building, and there is no change of use of land/business. Specifics of the operation are dismantling of vehicles, removing liquid which is disposed in accordance with State regulations. The parts are taken off and sold. There are about 20 vehicles a month and the work is conducted during day time and not in the evening. The operation exists from 1968 and has six (6) employees, about 2 or 3 deliveries a day. There are no legal issues, 3 year time is not applicable. We are in compliance with the condition of the Boards. Neither of the boards have placed any conditions. A revised Plan is submitted as requested by the Planning Board. Yearly license has been issued by the Town Board. All inspections are up to date. A site plan was submitted to the Planning Board, we have an Environment Engineer come in for inspections, have all the required licenses and inspections in order.

We are here tonight for the Special Use Permit only not to determine whether it is a non-conforming use or not, now that is an administrative decision. I am open for any questions.

Mr. Robert Maucher wanted to know why the Applicant volunteered to seek a Special Use Permit, if they did not need one.

Mr. Jamison, replied that the Zoning Administrator came and told us that we should apply for a Special Use Permit.

Robert Maucher added that: even though you were not required for the Special use permit as the business predates zoning?

Ms. Kathy Myers wanted to know if the "SCOPE" of the operation has not been changed at all.

Mr. Jamison replied, definitely this is written in the code, we operate under the same code, change or update of machinery is not a change of code or operation. We upgrade machines due to many reason, safety, environmental friendly, etc. That's not the change in use.

Mr. Tim Gerstner wanted to know if there was any gap in the business operation/use, between the owners.

To this Mr. Jamison reply was a "None that he is aware of".

We are here because of the difference of opinion. I do not believe that the law requires us to obtain a Special Use Permit. Our client is here so is the application.

Mr. Steve Kish wanted an explanation that if they say they do not require to get a Special Use Permit, than why were they here, tonight?

Mr. Jamison responded by notifying that the Zoning Administrator asked us to come, plus we do require license from town.

Mr. Kish was confused as to "what we do not know that we have to approve or disapprove?"

At the point Chair, invited Mr. Jim Nelson, Planning Board Lawyer for his legal opinion.

Mr. Nelson stated that the Planning Board had same issues. Special Use permit is not applicable. Planning Board agrees that the permit is not new. In my opinion the applicant has ambiguous language used in the code - "illegal non conformity". He will be working on this and that was the reason the meeting is being carried on over to the next month, there are couple of issues Mr. Michael White, the Zoning Administrator is working on. There are couple of issues we will be working on, that's why the meeting has been postponed to next month.

Chair invited Mr. Michael White, Zoning Administrator for his input.

Mr. White informed that, the present site was operated by Tom Hankamp, and there is documented proof from 1968 and other documental and photographic evidence of their existence in the 70's. When he joined the position of the Zoning Administrator 3 ½ years ago, for the Town of Pleasant Valley, the Town code did not allow junkyards. But, this was allowed as this was a pre-existing use, and was in a

commercial area. The Baroni's purchased it in 2011 from Tom Hankamp and have been operating in the same manner. He further stated that his job was to inspect the premises with other inspectors/machine operators to check the conditions, environmental noise issues, confirm the applicant had the required state permit, insure that the state certificates were obtained and to make recommendation for any compliance needed.

Mr. White further informed the Board that he did not have the final decision, as there were number of documents to be looked at, and he simply ran out of time. Baroni have been constantly monitored and mitigated. We share same concern, as the neighbors, Baroni's are being monitored and addressed. I visit often to check on things. This will be an administrative decision, and it requires a hard look.

Mr. Jamison added that this is not a new project for SEQRA.

Chair, Mr. Dunn asked the Zoning Administrator about the noise issues.

Mr. White acknowledged that the complains were legit the neighbors do hear the noise, but the noise is during the hours of operation from 8 a.m. to 4:30 p.m.

He further stated that in September 2014 he conducted a noise test and when the work was in full process with all the machineries running the sound meter decimal read 64 decimals 20 feet away from the operation. Though whenever the truck would pass on Route 44 the decimal would climb into 70's. The Quarry certainly added to the noise. He conducted another test from neighbors deck at 37 Pleasant View Road, the noise registered at 29-30 decimal, again when a truck passed on Route 44, the decimal climbed to 70's. We cannot justify the sound meter but I am bound by the code they are not in violation of the noise code. Their hours of operation are 8-4:30 Monday thru Friday and 8:30 thru 1 p.m. on Saturday.

At this point the public hearing section of the meeting was opened and public was invited to state their opinions, following spoke:

1. Ms. Mita Plotnik, Chair Conervation Advisory Council was sworn in. She stated that "they are licenced as scrap metal but they have new equipment and it is a noisy, there are concerns of water pollution. Also if they are cutting metal, metal particles go into air. Therefore, environmental conservation advisory council is very concerned .
2. Mr. Raymond, Lawyer representing neighbor at MT6 LLC, located at 1921, Route 44, Pleasant Valley, NY. He demanded the applicant to provide (i) list of all equipment/machinery (ii) documentation on Noise readings, (iii) reports on soil samples. He further added that the the fence was in violation of the code, the code require a the fence to be at least 6 feet high whereas the present fence is 4 feet only. There was a safety concerns for the

children playing as part of the fence that bordered with the neighbors at the side and back of the property was broken. Also that there was a fire hazard, as the storage was set right next to the fence. There should be a parameter of 10 feet for fire department to do their work thus this was a fire hazard.

3. Mr. Thomas Horn, 82 carriage Hill Road, Brewster NY was next to be sworn in. Mr. Horn shared the same concerns of fencing and parameter. Equipment should be neatly stacked as this was a moving operation and the fence should be 6 feet with closed mesh.
4. Ms. Suzzane Horn, 1971 Rt, 44 Pleasant Valley had following to add: Applicant is a grandfather non-conforming use, dealing with the scrap metal, which has adverse environmental impact. 1913 Rt 44 was a salvage yard where owners sold end of life auto part. According to assessor's note, and county maps. The operator of selling parts did engage with the general public, it was a "certified scrap process". Scrap is weighed, cleaned, parts removed, metal sheared and sold it either to a foreign or domestic steel copamies. Both IRS and Taxation have defined the scrap metal processing.

Mr. Dunn wanted to know what the previous owners did to the scrap?

To this Ms. Horn replied that a crusher was used to crush all metal.

Mr. Dunn was of the opinion that the noise of metal crushing would be more evasive than cutting metal.

Ms. Horn wanted inventory of machinery Baroni's are using .

Environmental impact:

Noise: I wanted to be clear that what procedure was going on when the noise test were done.

The shearing machine 200 NS generates lead dust, lead was found on clothing. The operation is outdoors after rain lead is seeping into ground and thus polluting water. Dust is a potential that require mitigation.

Scarp metal is transported in truck , the road is shared by the car wash next door my question is that can that shared driveway accommodate emergency vehicles as well.

Screening: On route 44 the elevation is around 310 feet to the front building as you go behind there is another building ,the elevation rises to 20-30 ft and way in the back the elevation rises to 350 ft. so as you are you can see from the road all of the products or work being done you can even read the printing on the trailer that's behind the building so I would ask that the board address the screening not only for the frontage but for behind and inside also how you do that is another matter but it is environmental esthetic is high on my list.

My property is separated from Baroni by 2 small parcels. Mixed Commercial – MC was conceived as neighborhood strip adding an industrial manufacture facility requires Special Use variance. I would like to see the assessor's report. If this is approved, I do not know what would stop them to expand, if so, that would change the nature of the zoning.

Next to speak was

Mr. Stephen Macnish of 83 Valley View Road. He was sworn in and following was his testimony.

I live 6/10th of a mile from Rt 44. Have seen videos of alligator shear machine, occasional truck backing noise is different but machine noise is constant.

Mr. Dunn added that if there was no Baroni, there would still be noise of trucks

Robyn Credo, 37 Pleasant View Road: under oath she informed that her property backs up to a corner. I am living here since 2005 I did not ever hear Mr. Hankemp. The noise is so loud I cannot sit outside on my deck. The noise is very loud. Even with all our windows shut I can hear it. The noise is intolerable. Due to all this operation our property value has gone down.

Kevin Belote; 29 Pleasant Valley. This noise is not normal it is very loud rattles all windows also annoying are the trucks backing up making hydraulic noises. Dropping of metal, noise is horrible Quarry noise is different we have gotten used to it.

Allison Richards, 11 Pleasant View Road. I have lived little over a year at the present address. Occasionally I hear a crashing noise that shakes up my whole house. My kids are scared my cat goes crazy. Also they can make the premises neater and prettier.

Mr. Gerstner wanted the applicants to explain what the noise was?

Ms. Courtney Baroni was sworn in and she clarified that the noise was from the shearing machine, we cut material and place it at the back of the containers. The shearing was done at least once a day.

Dara-Ayo Burris, 1937 Rt 44, was sworn in she stated that that shearing is 4 hrs a day procedure, I can look out of my window and can see the machine in operation. I have also worried about the water pollution.

Mr. Tim Gerstner asked if she had the water tested.

Her reply was yes, but the water was not polluted.

Here the public portion of the meeting concluded, but:

Chair, informed that the public hearing would remain open till next ZBA Meeting which will be held on Thursday April 2nd 2015 at 7:30 p.m. March meeting was postponed till April due to Zoning Administrators schedule, who was not available end of March, 2015.

Mr. Jeffery Jamison, informed the Board that he will be responding to all the public concerns.

Mr. Kish asked if the Baroni's would be able to operate during this period.

Zoning Administrator informed him that they are able to operate as the Town Hall has already renewed their license for operation.

Mr. Robert Maucher made a motion to keep the public hearing open till next session it was seconded by Mr. Tim Gerstner and all were in favor. Motion was approved 7-0-0.

Appointment of the Vice-Chair:

Next Item on the agenda was nomination of the Vice Chair for ZBA. Appointment will be on and "AS-NEEDED" basis.

Minutes of Meeting:

Minutes of November 20, 2014 meeting were approved with corrections. Motion was made by the chairman seconded by Mr. Kish, motion was approved 7-0-0.

Change of Date/Time of ZBA Meeting:

A motion was made by the Chair to change the ZBA meeting Day/time from 4th Thursdays to 4th Wednesdays of the month and time from 7:30 to 7 p.m. Effective May 27, 2015 motion was seconded by Mr. Tim Gerstner, approved 7-0-0.

Motion was made by Ms. Sharon Wilhelm to adjourn February 26, 2015 at 0930 p.m. seconded by Mr. Rob Maucher, approved 7-0-0.

Town of Pleasant Valley Conservation Advisory Council

February 15, 2015

RECEIVED
FEB 23 2015
TOWN CLERK

To: John Dunn, Chair of Zoning Board of Appeals
Rebecca Seaman, Chair of Planning Board

From: Conservation Advisory Council, Chair Meta Plotnik



Subject: Baroni Recycling

Baroni Recycling is certified by the DMV as a "scrap metal processor." This designation raises environmental concerns such as noise, dust from the process, and water runoff, issues which may warrant a careful SEQR review.

Neighbors recently have complained of much louder noises than previously. Although the sound may be within the Town law, it is clearly disturbing to residents of a development that has existed for around five decades. The operation is also adjacent to a business mall to the west, presently empty.

Shearing metal into scraps may produce toxic dust that could contaminate the air as well as the water runoff that drains to the nearby stream and ultimately into the Wappinger Creek. The scrap metal operation in Ulster County has a large building to control noise and dust.

Town residents need to know that these issues have been evaluated and the business will be conducted in an environmentally safe manner before a special use permit is issued.

Thank you for your attention.

Suzanne Horn
Cedar Crest Farm – 1971 Route 44
Pleasant Valley, NY 12569
845.635.8262

RECEIVED

FEB 03 2015

TOWN CLERK

February 3, 2015

Rebecca Seaman, Chair and
Members of the Planning Board

John J. Dunn, Chair and
Members of the Zoning Board of Appeals

Re: Baroni Recycling, Inc., Special Use Permit, parcel #613945

Dear Chairs Seaman and Dunn and Board members,

In light of disclosures made at the Planning Board meeting of January 13, 2015, I trust it is now apparent to everyone that Baroni Recycling, Inc., does *not* represent a grandfathered use in the Mixed Use Commercial zone, but presents a substantial change from one nonconforming use to a different, more severe nonconforming use.

The disclosure that Baroni has purchased additional machinery essential for its operation, including the [Kobelco] SK-350 and metal shear, demonstrates that the land use at parcel #613945 has changed from salvage auto parts to scrap metal processing.

The SK-350 can frequently be seen working outdoors at Baroni Recycling. It is among the very largest crawler excavators Kobelco makes, "engineered to supply massive muscle for heavy-duty applications," in the words of its manufacturer. Combined with attachments such as the alligator shear, the machine can pick up large hunks of steel, swing them to a cutting area, cut the metal into small pieces, and load it onto trucks and into cargo containers.

It is obvious that the current enterprise is a far cry from the salvage auto parts business that operated at the same site until parcel #613945 changed hands in 2011, since which time Baroni Recycling has failed to acquire the requisite Special Use Permit. *Auto dismantlers* buy junked cars and make a profit primarily from the sale of their *salvageable parts*. *Scrap processors*, on the other hand, buy metal from various sources such as vehicles, machinery, industrial waste, demolition, etc., ultimately *shearing or shredding the metal* and selling it to domestic and foreign steel mills.

The unmistakable change of land use from auto dismantling to scrap metal processing—the environmental impact of which is akin to manufacturing—must not be blurred. Indeed, neighbors have already complained of noise, vibrations and unsightliness. Baroni Recycling abuts residential land to the north and is in proximity to a flood hazard affecting numerous residences south of Route 44 between Rossway Road and Mill Lane. Dust from outdoor mechanical scrap processing can emit hazardous air pollutants and, when mixed with rain, can contaminate the surrounding environment. Moreover, Baroni Recycling is a registered Petroleum Bulk Storage site, located just 300 ft. from a drainage swale tributary to Wappingers Creek (DEC file).

I therefore believe Baroni Recycling's application for a Special Use Permit should be considered pursuant to Zoning Code §98-64, Change to Another Nonconforming Use.

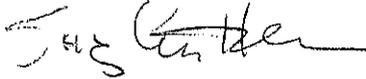
§98-64: A nonconforming use may be changed to another nonconforming use by special use permit upon proper application and upon determination by the Zoning Board of Appeals that the proposed new use will be less detrimental to its neighborhood and surroundings than the use it is to replace. In determining relative detriment, the Zoning Board of Appeals shall take into consideration, among other things, community character, traffic generated; nuisance characteristics, such as emission of noise, dust and smoke; fire hazards; and hours and manner of operation. The issuance of such special use permit shall be predicated on:

A. Forfeiture of all rights to a previous nonconforming use.

B. Site plan approval by the Planning Board as outlined in Article VII of this chapter.

The "grandfathering" provision was never meant to confer an unfettered right to *increase* nonconformity while ignoring environmental impacts or denying they exist. Accordingly, I urge the Board to start a coordinated review of Baroni Recycling, Inc. and to hold a public hearing and I request the Boards' State Environmental Quality Review (SEQR) determination reflect compliance with the Code of Pleasant Valley, including but not limited to §98-80 Submission Requirements for Formal Site Plan Application; §98-53 Water Protection; §98-25 Environmental Performance Standards; §98-81 Standards for Site Plan Approval; and §98-42 Off-Street Parking.

Respectfully,



Suzanne Horn

cedarcrestfarm@gmail.com

MEMORANDUM

To: Pleasant Valley Zoning Board of Appeals
From: Jeffery V. Jamison, Esq. – Attorney for the Applicant
Re: Baroni Recycling, Inc. 1913 Route 44, Pleasant Valley, NY
Date: February 25, 2015

Members of the Board,

I submit this memorandum in further support of the application and in an effort to further clarify any legal issues or discrepancies surrounding this matter.

Legal Nonconforming Use

The existing premises is continuing to operate as a legal nonconforming use. The premises is currently and has always been operating as an auto salvage yard, as defined by the Town of Pleasant Valley; to wit, “Auto Salvage Yard – any activity or business which involves the collection, storage, burning, dumping, disassembling, dismantling, salvaging, sorting or otherwise handling of or arranging for sale, resale, storage or disposal or otherwise of bodies, engines or parts of autos.” This definition is broad and encompasses all past and present uses. There is proof submitted to the administrator that the premises was operating as an auto salvage yard as far back as 1968, prior to enactment of the zoning ordinance, and has continued and continually operates as an auto salvage yard, pursuant to the Town’s definition. At the inception of the use, there were no local zoning restrictions prohibiting the use of the premises as an auto salvage yard.

Landowners have a vested right in the continued operation of the land where the property is nonconforming use. Cobleskill Stone Products, Inc v Town of Schoharie, 95 AD 3d 1636. Property owners engaging in a specific activity have secured a vested right to use their land accordingly. Buffalo Crushed Stone, Inc v Town of Cheektowaga, 13 NY3d 88. A nonconforming use in existence when the zoning ordinance is enacted are permitted to continue despite the contrary ordinance if the pre-existing use was legal when established. Spika v Town of Inlet, 8 AD3d 812.

In the instant case, the issue of whether or not Baroni Recycling, Inc operating at 1913 Route 44 in the Town of Pleasant Valley is a legal nonconforming use is not before the Zoning Board of Appeals (ZBA). That is, the administrator has previously made the determination that the premises enjoys the status as a legal nonconforming use. This determination is illustrated by the letter sent to my client and referral to the ZBA for a cessation of use of a nonconforming salvage yard. This determination of the administrator that the property enjoys the status as a legal nonconforming salvage yard was reiterated to the Town of Pleasant Valley Planning Board at their meeting in January. This was memorialized by the Planning Board’s resolution referring the matter to the ZBA with a positive recommendation.

While the Applicant does not concede that a Special Use Permit is required for the premises (see below), the owner does agree with the determination of the administrator that the property enjoys the status as a legal nonconforming use. Neither the owner of the property, nor any other party, submitted an application to the ZBA challenging the determination and/or interpretation of the administrator that the property is a legal nonconforming auto salvage yard. Under such circumstances, there is no aggrieved party challenging this determination.

A zoning board is without jurisdiction to make a determination which is not an appeal of an order, requirement, decision or determination of the administrator. Barron v Getnick, 107 2d 1017. Where the petitioner makes no application and is not aggrieved, the ZBA has no jurisdiction to consider the matter. Barron, 107 AD2d at 1018. A Zoning Board of Appeals may not *sua sponte* raise an issue that is not before it on appeal, to do so would be in excess of the Board's authority. McDonald's Corp. v Kern 260 Ad2d 578. The powers of a zoning board is limited to appellate jurisdiction. Gaylord Disposal Services, Inc v Zoning Bd. of Appeals fo the Town of Kinderhook, 175 Ad2d 543. The Board may review the determination of the building inspector or administrator; however, this must be on an appeal from an aggrieved person or town officer. Gaylord, 175 Ad2d at 544. It is an absolute necessity that there exists a real controversy regarding the determination to be reviewed and that the appealing party have a real interest in the controversy. Id. At 545. The administrator who made the determination may not seek review of the determination where the other party does not place the issue in controversy and the administrator is not seeking to correct his own error. Id. In such a case, the review of the determination would be an advisory opinion as to whether or not the administrator made the proper decision, which is beyond the jurisdiction of the Zoning board of Appeals. Id.

Based upon the above case law and the fact that the Applicant is not challenging the determination of the administrator that the property is a legal nonconforming use, the issue is not before the Board. Additionally, the administrator has repeatedly set forth the position that the property enjoys this status. That is, each year the administrator has inspected and issued a positive license recommendation to the Town Board for Baroni Recycling. More recently, in January of 2015, the administrator stated to the Planning Board that property enjoys the status of a legal nonconforming use. Under such circumstances, there is no application for an error in the determination, as this application predates the Planning Board meeting.

Special Use Permit

While Baroni Recycling does not concede that a Special Use Permit (SUP) is required for legal nonconforming uses (based on principles of land use controls and the case law surrounding zoning), my client voluntarily submitted an application to the Zoning Board of Appeals for the issuance of a SUP and an application to the Planning Board for an approved site plan. Baroni Recycling will continue to work with the Boards, town officials and the community to resolve this matter amicably through a transparent process.

Where a use is established prior to the enactment of the zoning ordinance and the legal nonconformity has been established, there is no need for the property owner to apply for the permit. Hoffay v Tiffit, 164 Ad2d 94. Landowners have a vested right to continue the operation of the

premises for the nonconforming purpose. Cobleskill Stone Products Inc., 95 AD3d at 1637. A zoning ordinance cannot prohibit an existing use to which the property has been devoted at the time of the enactment of the ordinance. Syracuse Aggregate Corp. v Weise, 51 NY2d 278. In the absence of amortization legislation, the right to continue a nonconforming use runs with the land. Amortization periods are the exception; in the absence of such a period the owners are free to continue the nonconforming use indefinitely. Village of Valatie v Smith, 83 NY2d 396.

The Town of Pleasant Valley did not enact an amortization period for nonconforming uses. Based upon this fact, and the above case law, Baroni Recycling has an inherent right and vested interest in continuing the operation of the premises as a legal nonconforming salvage yard, without being subjected to the restrictions of the zoning ordinance, including the need for a SUP.

Assuming arguendo that a Special Use Permit is required for the continued legal nonconforming use of the property as a salvage yard, there has been an issue raised relating to a three year time period from the enactment of amending legislation in 2010. Within the Zoning Ordinance of the Town of Pleasant Valley, codified in the Town Code, § 98-63 provides for a "cessation of uses". The language relating to the SUP is as follows:

"Notwithstanding any other provisions of this chapter, any automobile wrecking yard, salvage yard or junkyard operating in conformity with any existing Town ordinance at the date of the enactment of this chapter shall be allowed to continue as an operating business under a special use permit granted by the Board of Appeals at the date of the chapter's adoption."

This language specifically states that the business will automatically be considered to be operating as a special use permit. There is no provision that requires the applicant to submit an application and gain approval. To do so would fly in the face of all zoning principles. What the language of the statute does continue to state is that (a) the operation must comply with other existing Town ordinances, and (b) comply with special screening or other individual requirements established by the Planning Board or the Zoning Board. The legislation further states that compliance with (a) and (b) must occur within three (3) years from the date of the chapter's adoption. Further provisions add that failure to comply shall result in revocation of the SUP.

There is no language in the ordinance requiring a legal nonconforming operation to file for SUP within a three year period. To deduce such an interpretation is outside of the scope of the language. Rather, the language suggests that a SUP is automatically granted at the adoption and inception of the ordinance. Further, the special screening, planting or individual requirements referenced in subsection (b) would have to be issued to the operator/owner of the legal nonconforming premises. In this case, Baroni Recycling has not received any special screening, planting or individual requirements from either the Planning Board or Zoning Board, and as such there is no merit to any allegation that Baroni Recycling has failed to comply with this requirement. Further, the owners have received no correspondence or notice from any Board or town official stating that the Baroni Recycling is not complying with other ordinances. To the contrary, the administrator has stated

that Baroni Recycling applies for and receives a yearly license after inspections are performed and a review is conducted of independent environmental engineering reports.

The time periods that are provided for in Section 98-63 are not amortization time periods. The legislature could have created specific amortization time tables for nonconforming uses within the zoning ordinance based upon relevant factors and specific criteria, but it chose not to. The three (3) year time period in § 98-63 relates to a revocation of a special use permit, not the amortization of a legal nonconforming use. The twelve (12) month time period in the same section relates to the time period for notice of removal regarding the revocation of the SUP, not the amortization period of a nonconforming use. Where the language is clear, there is no place to add or reference a separate intent on the part of the legislature. Any ambiguity in the zoning ordinance must be resolved in favor of the land owner. New York SMSA Limited Partnership v town of Islip Planning Bd., 300 AD2d 307. "Zoning restrictions are in derogation of the common law and, as such, must be strictly construed against the municipality which enacted and seeks to enforce them, and that any ambiguity in the language employed must be resolved in favor of the property owner." Bonded Concrete, Inc v Zoning Bd. of Appeal of Town of Saugerties, 268 AD2d 771 *citing* Matter of Allen v Adami, 39 NY2d 275. "Where, as here, a particular provision in a zoning ordinance is ambiguous and its context convincingly demonstrates that the ambiguity is properly resolved in the landowner's favor, the court will strictly construe it against the municipality, particularly where a contrary interpretation would subject the landowner's property to a lengthy and involved process contemplated by site plan approval." Id. at 775.

Expansion or Alteration of Nonconforming Use

A member of the public submitted a letter to the Planning Board and the Board of Zoning Appeals that the current use of the premises by Baroni Recycling is not a "grandfathered" nonconforming use, but rather that the operation has been expanded or altered. The author of the letter basis her position predominately on the machinery or equipment change. While I appreciate the interest in the application, her comments are misplaced and without law to support the conclusion. A Board may not deny a Special Use Permit application based upon generalized community objections. Eddy v Neifer, 297 AD2d 410.

As stated previously, the issue of whether or not the premises enjoys the status as legal nonconforming use is a determination/interpretation that was made by the administrator and is not the subject of this application. The author of the letter did not challenge the initial interpretation of the administrator. A party wishing to challenge the interpretation of the administrator may do so by filing an appeal with the Board within thirty (30) days of the date of the determination. Even if the author would like to challenge or raise the issue at a subsequent hearing by filing an application, she would be time-barred, as the thirty day statute of limitations has expired.

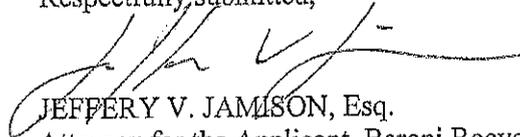
Assuming that the issue of expansion or alteration were before the Board (which we do not concede), the adding of machinery or the changing of machinery does not amount to an expansion or alteration of a nonconforming use. Syracuse Aggregate v Weise, 72 AD2d 254 *aff'd* 51 NY2d 278; *see also* Hoffay, 164 Ad2d at 98. An increase in the intensity of the same legal nonconforming use does not constitute an impermissible expansion of the nonconforming use.

Town of Clarkstown v MRO Pump & Tank, Inc., 32 Ad3d 925. Introduction of new types of machinery into the operation does not amount to an expansion of the nonconforming use. James H. Maloy, Inc. v Town Bd. of Guilderland, 92 AD2d 1056.

CONCLUSION

The premises in question enjoys the status as a legal nonconforming auto salvage yard. The Applicant has vested rights in the continued use and operation of said legal nonconforming use. There has been no expansion or alteration of the legal nonconforming use. These two issues were determined and interpreted by the administrator. There has been no appeal of that interpretation/determination and those issues are not before this Board for review or interpretation. There is no specific three year time period for the nonconforming use to submit an application to this Board for a Special Use Permit. Rather, there is a three year time period for an owner that is issued a SUP to comply with the screening requirements listed as a condition of the SUP. In this case, no screening or any other individual conditions have been placed on the property by either the Planning Board or the Zoning Board. The premises has, and continues to operate in conformity with all other Town ordinances. The Town has annually issued a license to the premises for the legal nonconforming use of an auto salvage yard to continue. Accordingly, and based upon all the previous submissions, I request the Board grant the Special Use Permit to the Applicant.

Respectfully submitted,



JEFFERY V. JAMISON, Esq.

Attorney for the Applicant, Baroni Recycling, Inc.

Of Counsel

Girvin & Ferlazzo

20 Corporate Woods Boulevard, 2nd Floor

Albany, New York 12211

(518) 462-0300