

If this amendment to the Special Use Permit is not exercised within one year of date of issuance, it is hereby declared to be null and void and revoked in its entirety.

Motion seconded by Jim Sumner. Vote 7 – 0.

MATTER OF KENT HANSEN – 1434 WESTERN AVENUE

Chairman Barber recused himself from the application. Chuck Klaer was acting Chairman

Acting Chairman Klaer gave the Board's decision regarding the interpretation request.

**Zoning Board of the Town of Guilderland
1434 Western Avenue, Guilderland
Interpretation Request No. 3999
May 2, 2007**

Preamble to Interpretation

Regarding Interpretation Request No. 3999 for 1434 Western Avenue, Guilderland, the Board held two public hearings, March 21 and April 18th. On April 18th, the Board closed the public hearing, with the expectation that an Interpretation would be rendered this evening.

Before I render the Interpretation, the Board received a letter dated April 29th from Matthew Clyne, Attorney for the Applicant, wherein he indicated that Paige Heating and Cooling LLC is no longer considering or being considered as tenant for the second floor office space, and that the Applicant wants to proceed with the two businesses as proposed.

The following is the:

**Zoning Board of Appeals of the Town of Guilderland
Interpretation No. 3999
May 2, 2007**

Issues Presented for Interpretation:

The Zoning Board of Appeals (“ZBA”) has been presented with the following questions:

- 1. Whether or not a proposed hardwood flooring wholesale/retail outlet with a combination showroom/office/storage space can be considered a continuation of a prior nonconforming use at the site of 1434 Western Avenue, Guilderland.*
- 2. In addition, whether an additional showroom/storage use can be considered a continuation of a prior nonconforming use at the site of 1434 Western Avenue, Guilderland.*

1434 Western Avenue is currently zoned BNRP.

Facts: *(per the public hearings held on March 21 and April 18, 2007 and ZBA records)*

It is undisputed that Tusang-Barhydt conducted business on this site as a wholesale/retail outlet for the sale of heating, electrical fixtures, conduits and related matters well prior to the enactment of the current Zoning Code, and well before the current zoning of the parcel as a BNRP.

In 1993, Tusang-Barhydt sold the premises to a party, who wanted to conduct business under the name of Comfort Mart Distributors, Inc. for it to operate a wholesale/retail business with an emphasis on heating, ventilating and air conditioning, with electrical parts still being sold on the premises.

At that time in 1993, the ZBA file on this parcel reflects that Tusang-Barhydt employed 15 people on site, and conducted business from the hours of M-F, 8am -5pm, and Saturday 8am-12noon. It owned one company truck and three company cars, and had 1 UPS delivery per day, 3 tractor-trailer deliveries per day, and 2 other truck deliveries per day. The average number of retail customers per day was 6, with contractors averaging 25-30 per day, primarily in early morning, lunchtime and after 4pm. Ingress and egress to the back of the property was primarily via a right of way agreement with the property to the west, and not the alleyway on the east.

In turn, Comfort Mart Distributors proposed to have 2-3 employees on site, hours of M-F 8am-5pm, 1 company owned truck, 1 UPS delivery per day, 3 tractor-trailer deliveries per week, and 1 other truck deliveries per day. The average number of retail customers per day was to be 6, with contractors averaging 15-20 per day, primarily in early morning, lunchtime and after 4pm. Ingress and egress to the back of the property was via a right of way agreement with the property to the west, and not the alleyway on the east.

Based upon these facts, the ZBA in 1993 found the Comfort Mart Distributors proposed use to be a continuation of a prior nonconforming use.

From June 2002 to about August 2006, the property and building were occupied by Capital Winair, Inc., which operated a heating and air conditioning wholesale business. It is estimated that it generated 20-25 vehicular visits to the site per day, and 15-20 tractor-trailer deliveries per week. Ingress and egress to the back of the property was via a right of way agreement with the property to the west, and not the alley way on the east.

The current owner of 1434 Western Avenue has proposed the following use for the site, contending that the proposed use is a continuation of the prior nonconforming use:

To lease the approximate 10,080 square feet of building space to two tenants:

1. Hansen's Wood Flooring, LLC for an office and showroom for a non-retail hardwood flooring business

Employees: 1 on site
Hours: M-S 10am-5pm
Deliveries: 1 per month
Customers: by appointment, 3-4 per day
Products: shipped directly to customer homes

2. Sparklin John Tub replacement for an office, a showroom and incidental storage for a non-retail bathtub replacement and ceramic tile restoration business

Employees: 1-2 on site
Hours: M-F 9am-5pm
Deliveries: rare, and only to deliver new showroom product
Customers: by appointment, 3-5 per day
Products: shipped directly to customer homes

Again, as stated in the Preamble of this Interpretation, Paige Heating and Cooling, LLC is no longer considering or being considered for a tenancy on the second floor of the building. As for this space, any proposed tenancy by a new third party will have to come before this Board for a special use permit with respect to its use of the space.

Of note, the ingress and egress to the back of the property will be through the alley way to the east, as there is no current right of way agreement with the property to the west.

The Zoning Code:

The applicable section of the Town of Guilderland's Zoning Code is 280-31 "Nonconforming uses, structures and lots." The code states in pertinent part:

A. Nonconforming structure.

(1) The use of occupancy of a nonconforming structure, which was a lawful structure at the time of the effective date of this chapter, may be continued; provided, however, that no enlargement, change or alteration shall be permitted upon such nonconforming structure, except upon a finding of the Zoning Board of Appeals, that such enlargement, change or alteration will produce greater compliance with this chapter and that the use within such structure is in conformity with the requirements of this chapter; and further provided that no enlargement, change or alteration of a nonconforming structure housing a nonconforming use shall be permitted, except upon a finding by the Zoning Board of Appeals that such enlargement, change or alteration will permit greater compliance with the provisions of this or other appropriate regulations, as required by the Zoning Board of Appeals, and are installed or instituted to

minimize the detrimental effects of the nonconforming use upon adjoining conforming uses.

Although a reading of this sub-division may lead the reader to think that the provision only applies to a “structure,” Subdivision K of Section 280-31 specifically makes the entire Section applicable to “nonconforming uses” as well.

Businesses allowed in the BNRP (Business Non-retail Professional District)

1. insurance offices
2. medical or dental offices
3. veterinary offices
4. attorney offices
5. offices for other licensed professionals including architects, designers, engineers but excluding warehouse or storage areas
6. other types of executive or professional offices
7. mortuaries or funeral homes
8. non-profits for charitable, religious, cultural or community social purposes
9. barber or beauty shops
10. family day care and nonprofit private schools

To name the majority of uses allowed by special use permit.

Case Law:

The courts in New York have held that a continuation of a use exists where the proposed use is “substantially the same” as that which previously existed, and where the “essential character” of the use has not been changed. In addition, while an established lawful nonconforming use may be continued, it may not be exchanged for a different nonconforming use. The courts have also clearly stated that a determination as to whether a permissible continuation of a nonconforming use exists is a factual determination for a zoning board of appeals to be made a case by case basis, and the decision will be sustained if it has rational basis in record and is supported by substantial evidence.

Analysis:

As the courts have made clear, whether the proposed use is a permissible continuation of a nonconforming use is a question of *fact* for the Zoning Board to decide on a case by case basis.

Therefore, in carefully reviewing facts surrounding the proposed use of the space as against the actual use of the space by Tusang-Barhydt, the original holder of the nonconforming use, the Board finds that the businesses are “substantially the same” in nature. First, the businesses are wholesale/retail businesses of services and materials related to home and commercial building construction, rehab and repair. Second, the two new proposed businesses will not require a change in the “essential character” of the building and its use. Although repairs to the interior and upgrades to the exterior are

proposed, these repairs and upgrades are consistent with what typical applicants want to do when they move into business spaces, and are often what the ZBA requires of applicants to keep the Town of Guilderland's properties aesthetically pleasing.

To assist us in our determination, the courts have conveniently listed in their opinions examples of what are and are not "substantially the same" uses. "Substantially the same" uses include: substituting a lobbying office for a medical office; converting a veterans' clubhouse to a youth center; changing a convalescent home for cardiac care children to a school for mentally impaired children; and changing the form of entertainment at a bar from rock bands to "dancing girls." In contrast, the following changes in use were found not to be "substantially the same" and therefore not permissible as nonconforming uses: an 8 truck milk hauling business to a 20 truck general hauling business; a storage and service station for construction equipment to a wholly remodeled automobile service station; a monument and stone cutting business to a gasoline service station through the addition of gas pumps, garage and service building. Further, as the courts have rationalized in their findings of "substantially the same," use, there will be no real change to the building structure at 1434 Western Avenue, and there will not be an increase in the occupants or clientele to affect the character of the neighborhood.

As to this issue of intensity of use, Section 280-31 of the Zoning Code requires the Board to consider whether this change will bring the use into greater compliance with the current code, namely uses allowed in BNRP zones. Again, in carefully reviewing the actual use of the space as proposed, the two businesses are to use the space for business functions more akin to the uses allowed in BNRP: for all two businesses, the services provided on site of a design nature, similar to engineers, architects and the like; while the businesses are wholesale/retail business, on site, none of the business are providing "cash and carry" of products and, in fact, all products are to be directly shipped from the offsite wholesaler to the customer's property. Any storage on site will be incidental to sales, such as samples for customers.

Of note and of import, the facts bear out that the proposed use of the space will actually result in a less intense use of the space by employees, customers, contractors and delivery vehicles than that experienced when either Tusang-Barhydt or Comfort Mart or WinAir occupied the space. The number of employees, deliveries and the like are to be reduced drastically by the use of the space by these two businesses. Granted, one business will now have Saturday hours, but all of the businesses hours begin later than the past business, and overall---deliveries, contractors and customers---will be reduced, even with the Saturday hours. In the end, ironically, the proposed use is likely to result in a less intense use than may be experienced with allowed BNRP uses in this BNRP zone.

Findings, Determinations, and Conditions of the Zoning Board:

Based upon the representations made by the Applicant and its proposed two (2) tenancies at the two (2) public hearings, together with the renderings for proposed improvements to the exterior of the property, and the positive comments from the neighbors immediately

impacted by the use of the building and grounds, the Board determines and finds the following:

Findings:

1. The facts and analysis as fully recited previously in this Interpretation are hereby adopted and confirmed as findings of this Board.

Determinations:

1. The proposed use of 1434 Western Avenue as set forth by the applicant is a continuation of a prior non-conforming use;
2. The proposed use of 1434 Western Avenue brings the use of the property more into compliance with the Code, namely the uses allowed in BNRP zones; and
3. The proposed use of 1434 Western Avenue will result in a less intense use of the property than has been experienced in the last 30+ years, perhaps even less of an intense use than allowed in BNRP zone.

Conditions:

Regarding conditions on the use of the property, the Board imposes the following conditions upon the use of the property:

1. Hours of operation for any and all businesses on the site shall be limited to 7:30am-5pm M-F and 10-5pm on Saturday
2. The alleyway drive shall be posted as a fire lane to prohibit the parking of cars and other vehicles in that drive for any purposes except emergency vehicles
3. Access to and from the building from the alleyway on the east shall be closed, and if necessary, the access shall be moved to the rear of the building
4. Other signs on the delivery doors shall be posted requesting visitors to respect the neighbors by being as quiet as possible
5. Work with the Zoning Administrator to devise an ingress and egress plan from the street and front lot to the back lot which does not involve the honking of vehicle horns
6. Work with the Zoning Administrator on appropriate and acceptable lighting plans, leaving with the Zoning Administrator the sole discretion as to whether to approve the plans or return the matter to this Board for review and approval
7. Submit landscaping plans to the satisfaction of the Department of Community Environment
8. Submit garbage and snow removal plans to the satisfaction of the Zoning Administrator
9. At all times maintain the fences and any other appropriate buffers between this property and the residential properties to the East and to the South (rear) of this property
10. In rehabbing and repairing the exterior of the building, adhere to the specific renderings and plans as submitted to this Board by the applicant

11. Construction/renovation of the building shall be done from 7am-6pm M-F and 8am-5pm on Saturday, with no construction on Sunday
12. Any changes in tenancy of the spaces, or desire to utilize the second floor for a third business, will require approval by the ZBA that the changes are in keeping with the nonconforming use laws and this Interpretation
13. The Zoning Board reserves the right to revisit this site and the adherence to these conditions set forth in this Interpretation, and adherence to other applicable provisions of the Zoning Code, and, if necessary add other appropriate conditions to reduce or eliminate the impact of any activity on the neighbors and on parking on the site

With these determinations and findings having been made, and conditions having been imposed, the Board hereby annuls and revokes any prior special use permits issued for this property and any and all other conditions placed on this property, thereby making these determinations, findings and imposition of conditions the standard for future determinations of prior non conforming use issues to be judged against for this property.

The Zoning Administrative Office is hereby authorized to issue all necessary permits to implement these determinations.

Acting Chairman Klaer made a motion in favor of adopting this Interpretation. Motion seconded by Sue Macri. Vote 7 – 0.

MATTER OF LISA ROMANO – 1847 WESTERN AVENUE

Sue Macri read the legal notice:

"Notice is hereby given that the Zoning Board of Appeals of the Town of Guilderland, New York, will hold a public hearing pursuant to Articles **III & V** of the Zoning Law on the following proposition:

Special Use Permit/Variance Request No. 4004

Request of **Lisa Romano** for a Special Use Permit/Variance under the Zoning Law to permit: **the use of a portion of a single-family home as a mortgage consultant business. Five parking spaces will be provided. Variances are requested for the following: 1) location of parking area within side and rear yard areas; 2) from providing required 20' buffer between a residential district and BNRP district; 3) total number of spaces required and 4) reduction in drive aisle width.**

Per Articles **III & V** Sections **280-19 and 280-51 & 52** respectively

For property owned by **Lisa Romano**

Situated as follows: **1847 Western Avenue Albany, NY 12203**

Tax Map #**52.09-2-41** Zoned: **BNRP**