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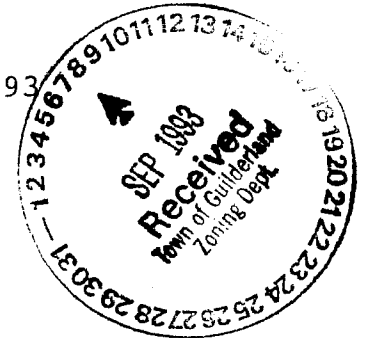
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September 8, 1993



D'Angelis, Kaplowitz, Rice and Murphy, Esqs.
267 Delaware Avenue
Delmar, New York 12054

Attention: Kenneth D. Runion, Esq.,
Counsel Guilderland Zoning Board of Appeals
Town of Guilderland, McCormack's Corners

Re: 1434 Western Avenue

Dear Mr. Runion:

Pursuant to the discussions had in the meeting of the Zoning Board of Appeals held on Wednesday, September 1, 1993 in reference to the above application, we have managed to do significant research concerning the issue of the definition of the continuation of a pre-existing, non-conforming use. To that end, we have also commissioned a detailed analysis between the use of the contemplated Comfort Mart Distributors, Inc., and the pre-existing use of Tusang-Barhydt, Inc. at the above premises. We are annexing and attaching hereto the analysis submitted by Fritz Wezenaar AIA which gives a detailed and accurate comparison the types of business, the hours of operation and the usage of the premises occasioned by both businesses. As you can see, the businesses are quite similar with the Comfort Mart Distributors, Inc. making less intensive use of the property than Tusang-Barhydt, Inc. Points of comparison that jump out are the number of employees, the volume of truck traffic, and the amount of contractor pick up. As you can note from the attachment, Tusang-Barhydt, Inc. employed 15 people on site, while it is anticipated that the Comfort Mart Distributors, Inc. will only employ 2 to 3 people on site. The Tusang-Barhydt, Inc. operation had one truck and three station wagons, and the Comfort Mart Distributors, Inc. will only have one small truck. Truck deliveries at the Comfort Mart will be significantly reduced from what existed at Tusang-Barhydt, and in addition, contractor pick-up time will be approximately one-half of what existed when Tusang-Barhydt operated the location.

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A review of the case law in this area establishes that in order for a usage to be construed as a continuing usage of a pre-existing, non-conforming use, the successive uses need not be identical. In point of fact, most of the cases in this area deal with types of usage such as commercial or non-commercial, rather than specific uses. In the case of Walter v. Harris 163 AD 2nd 619, the Appellate Division Third Department found that the Town of Queensbury erroneously found that the storage of logging vehicles and their repair and maintenance on a premises was not a continuation of a pre-existing, non-conforming use on property that had long had storage of farm and tractor equipment. The Appellate Division upheld the Supreme Court's finding that such storage, although not identical, was a continuation of the pre-existing use. Although the use had changed from the storage of trucks and farm equipment to the storage and repair and maintenance of logging equipment, the Supreme Court and Appellate Division both found that this was clearly a continuation of a pre-existing, non-conforming use.

Similarly, in the case of Itaca v. Hull 174 AD 2nd 911, the Appellate Division Third Department once again found the continuation of a pre-existing, non-conforming use. In this case the issue concerned commercial storage in a barn in a residentially zoned area. The previous storage was of television cables. The new owner changed the use from the storage of television cables to plumbing supplies. Both the Supreme Court and the Appellate Division did not burden itself with differentiating between the kinds of items stored in the barn on the premises, rather they simply dealt with the kind of use. The Appellate Division in finding that this was a continuation of a non-conforming use held that "defendant met this burden, however, by testimony at trial from one of his predecessors in an interest to the affect that the subject barn had been used for commercial storage prior to 1954." Clearly, the Court was concerned with whether the use was commercial storage, or non-commercial storage.

It is apparent from a thorough research of the cases in this area, that the Courts look for a continuation of the type of use, not as to the specific uses in question. In the case of Bekermus v. Nardy 123 Misc. 2nd 378, the Court held that the changeover from a restaurant/tavern to a bar/disco was clearly a continuation of a pre-existing, non-conforming use.

The standard under which the Courts measure such cases are set forth in a case Allen v. Hatrrick, 87 AD 2nd 575 in which the Court held that in order to deviate from a pre-existing use there must be a "change in the nature or character of the use."

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In the case of Town of Islip, 518 NY (2nd) 427, it was held that even though a marina ceased functioning for a few years, the fact that at least one mooring was leased for the period of two years was a continuation of the pre-existing, non-conforming use of the marina.

It is apparent under the laws as established by the Courts of the State of New York, in order for there to be a discontinuance of a pre-existing, non-conforming use, the Board must find that there is a substantial change in the character of the operation as it existed prior to the change. In addition, one of the standards that the Zoning Board may look to is whether there is a significant expansion of the pre-existing use. In the case at hand, there is neither a change in the nature or character of the use nor an expansion. In point of fact, there is a reduction in the usage that is contemplated by the proposed purchaser. Both uses involve wholesale sales to general contractors for construction purposes. The wholesale nature of Tusang-Barhydt is virtually identical to the wholsale nature of Comfort Mart with the exception that Tusang-Barhydt did a far more extensive business than is contemplated by the proposed purchaser. A comparison of the hours of operation and type of operation as set forth in the attached letter, will give the Board a true understanding of the nature of the comparison of the two operations. The Board may feel that it is necessary to set forth by definition that there cannot be an expansion beyond the hours or traffic that was permitted under the Tusang-Barhydt operation. Clearly the applicant would have no difficulty in living with such restrictions as may be required to keep its usage consistent with the previous usage.

We trust we have answered all of the questions raised by the Board, and apologize for not having all of the appropriate information as requested by the Board at the last meeting.

Should any further documentation or information be required, please do not hesitate to contact this office as we will be more than glad to provide same.

Very truly yours,



PAUL H. WEIN

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