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May 11, 2012

Town of Allegany Planning Board  
Frank DeFiore, Chairman  
Peter Hellier  
Rick Kavanagh  
Helen Larson  
John Sayegh

Town Hall  
52 West Main Street  
Allegany, NY 14706

**Re: Everpower request for an extension of time**

Dear Mr. DeFiore and Members of the Board:

On behalf of Concerned Citizens of Cattaraugus County, please accept the following comments on the adequacy of a request by Everpower, by letter to you dated April 3, 2012, for an extension of the twelve-month term of its special use permit and site plan approvals, which were issued on July 11, 2011.

Everpower states in its letter three grounds it asserts supports its request: “[1] the litigation delay and [2] the Town Board review . . . as well as [3] the fact that there have been no changes in circumstances regarding the Project.” (July 11 letter, page 2). As authority for the sufficiency of these grounds Everpower cites the leading treatise on zoning law in New York, Salkin’s New York Law of Zoning Practice, §29:34, at page 29-63. I have attached here the entire three-page section containing the page cited.

As Salkin’s treatise makes clear, the law in New York governing Everpower’s request requires Everpower to provide you with a demonstration that the circumstances of the project have not changed. Without proof that circumstances have not changed, the Planning Board may deny the request. This is because the Board must determine that an extension is supported by the findings made when the permit was issued in the first place. If circumstances have changed, those circumstances may need Planning Board review.

Thus, Everpower should provide you with an account of what has happened since the zoning permit was issued. Why hasn’t Everpower commenced construction?

As explained in greater detail below, it is respectfully submitted that the three reasons offered by Everpower fail to explain why there has been no construction. The first and second reasons do not explain the delay, and the third reason simply asserts there have been no changes in the project or its circumstances. Everpower makes no attempt to provide any account of what has happened to the project since last July. Everpower simply asks you take on faith its assertion that circumstances have not changed.

### **1. Litigation delay**

CCCC's lawsuit, pending on appeal, has not imposed delay on Everpower's project. The truth is that Everpower has had the ability to expedite the appeal but has done nothing to do so. The fact that the appeal is still pending today is Everpower's fault. Everpower's assertion that the appeal caused a delay in construction is therefore disingenuous.

The procedure governing appeals in our judicial division (the Fourth Department) require that:

all appeals shall be perfected pursuant to 22 NYCRR 1000.3 within 60 days of service on the opposing party of the notice of appeal. An appeal not perfected within the 60-day period is subject to dismissal on motion pursuant to 22 NYCRR 1000.12 (a). An appeal or cross appeal not perfected within nine months of service of the notice of appeal is subject to dismissal without motion pursuant to 22 NYCRR 1000.12 (b). [22 NYCRR §1000.2(b)]

Thus, if Everpower wanted to force CCCC to perfect its appeal, it needed only to file a short motion, with no legal brief, exhibits or other supporting information, to dismiss the appeal once the first 60 days expires. Because Everpower failed to file the motion, CCCC has nine months to perfect its appeal.

CCCC served its Notice of Appeal (a two-page paper, with no brief, exhibits or other supporting information), on December 5, 2011. Therefore, Everpower could have brought a motion to dismiss on or after February 5, 2012. Had it done so, we could have been in and out of the appeals court by now.\* Pointing to CCCC's lawsuit as the reason for its delay in commencing construction is therefore disingenuous.

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\* A unanimous decision by the appeals court would mean no further appeal is available to CCCC.

## **2. The Town Board review of the zoning law**

The Town Board's review of its zoning law, including consideration of a moratorium, has not imposed delay on Everpower's project. Had Everpower commenced construction, it would be protected from changes, if any, in the local law. This is because commencing construction under a valid permit vests Everpower's right to be governed under the zoning law as it existed at the time the permit was issued. Failing to commence construction leaves the Town Board free to change the local law. If the zoning law changes prior to Everpower commencing construction, Everpower will need to comply with the new law.

Thus, the Town Board's review of the zoning law, by itself, posed no obstacle to Everpower commencing construction. Indeed, it is surprising Everpower has not done anything to advance its project, given the dire consequences of allowing the Town to change the law. This reason for delay is thus equally disingenuous.

## **3. Changes in the circumstances surrounding the project**

As noted above, Everpower's letter asserts no circumstances have changed, but fails to demonstrate that or to provide any account whatsoever of circumstances since its permit was issued last July. However, in advance of Everpower offering such an account, the Planning Board may inquire whether circumstances have changed.

One important change in circumstances is the effect project approval, even prior to any construction, has had on real property in the vicinity of the project. Several residents near the project area who are CCCC members have stated at our meetings that the threat of project impacts has adversely affected their and others' decisions to stay and invest in their property or move away. Thus, the project has already resulted in a change in the real value of residential property in the Town.

In addition, the Board should direct Everpower, as part of a supplement to its request, to demonstrate it has all the property use agreements the project requires. We believe Everpower does not have all the necessary agreements. In fact, we believe Everpower misrepresented to the Planning Board last summer that it had obtained all such agreements.

Changed circumstances that should be considered by the Board thus include a fresh look at Everpower's prior representations about property owners within the project area and a 2,500-foot radius around the project area. I note that Everpower misrepresented the need for local approvals before the fall season last year. We are now well beyond that time and Everpower claims it still has a viable project. It therefore did not need local approvals before the fall season last year.

There may be additional changes in circumstances, such as access to a viable road route.

We look forward to commenting on a supplemental account of the project's circumstances, once Everpower submits one.

#### 4. Conclusion

Because Everpower has provided no account whatsoever of the actual circumstances that account for its failure to commence construction, the Planning Board should not act at this time on its request for an extension. Instead, the Board should direct Everpower to supplement its request with an adequate account of current circumstances surrounding the project, and how these compare to those that existed last July.

Sincerely,

  
Gary A. Abraham

gaa/attachment:

P. Salkin, New York Law of Zoning Practice, §29:34 (2012).

cc: John Hare, Town Supervisor  
Carol Horowitz (via email)

# New York Zoning Law and Practice

**Fourth Edition**

by

Patricia E. Salkin

**First, Second, Third Editions**

by

Robert M. Anderson

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is issued has been sustained.<sup>8</sup> A zoning board may grant a limited variance that will lapse if not acted upon within a specified time.<sup>9</sup> Moreover, an applicant is not entitled to the grant of a variance solely on the ground that a temporary variance has expired.<sup>10</sup>

The duration of a variance may be limited by conditions other than the lapse of a specific period of time.<sup>11</sup> For example, a use of land may be permitted until development of the area permits profitable use in conformity with the zoning regulations.<sup>12</sup> Such a temporary variance of uncertain duration is useful to permit the productive employment of property in a potentially residential area that has not fully developed. In one case, the landowner was permitted to maintain a nonresidential use only as long as the area remained unsuitable for its intended purpose.<sup>13</sup> Another court ruled that a special permit could not be limited to one year unless the board had been given authority to grant temporary permits.<sup>14</sup>

### § 29:34 Granting time extensions

Where a zoning board of appeals has limited the time within which a variant use must be initiated, it may grant an extension of time.<sup>1</sup> Conversely, the zoning board of appeals also has the

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<sup>8</sup>Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 196 Misc. 1005, 96 N.Y.S.2d 380 (Sup 1949).

<sup>9</sup>See Blum v. Board of Zoning and Appeals of Town of North Hempstead, 8 Misc. 2d 403, 166 N.Y.S.2d 32 (Sup 1957).

<sup>10</sup>See Holthaus v. Zoning Bd. of Appeals of Town of Kent, 209 A.D.2d 698, 619 N.Y.S.2d 160 (2d Dep't 1994).

<sup>11</sup>See People ex rel. St. Albans-Springfield Corporation v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931).

<sup>12</sup>People ex rel. St. Albans-Springfield Corporation v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931).

<sup>13</sup>Barrett v. Bedell, 255 A.D. 874, 7 N.Y.S.2d 987 (2d Dep't 1938). Where vendor promised to obtain variance to allow vendee to install a second kitchen in the dwelling, vendor did not receive a variance, but received a temporary permit, which permitted the installation of that kitchen so long as the purchasers occupied the dwelling. Balodis v. Fallwood Park Homes, Inc., 54 Misc. 2d 936, 283 N.Y.S.2d 497 (Sup 1967).

<sup>14</sup>Scott v. Zoning Bd. of Appeals of Town of Salina, 88 A.D.2d 767, 451 N.Y.S.2d 499 (4th Dep't 1982).

#### [Section 29:34]

<sup>1</sup>Blum v. Board of Zoning and Appeals of Town of North Hempstead, 8 Misc. 2d 403, 166 N.Y.S.2d 32 (Sup 1957).

power to refuse a request for such an extension of time.<sup>2</sup> Where, however, an applicant has made a timely application for an extension of time, they must be afforded an opportunity to show that circumstances have not changed,<sup>3</sup> and a denial of extension will only be sustained if proof of such circumstances is lacking.<sup>4</sup> Furthermore, an applicant does not need to demonstrate the type of proof required for the granting of the original variance to receive a time extension for the commencement of the variant use.<sup>5</sup> Additionally, the zoning board of appeals need not observe all of the formalities necessary for the application of a variance when entertaining a request for such a time extension.<sup>6</sup>

Where a variance was set to expire after a certain period of time, the zoning board of appeals could grant an extension of the variance,<sup>7</sup> but such extension must be supported by the findings necessary for the grant of the variance in the first place.<sup>8</sup> For

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<sup>2</sup>*Gina Petroleum, Inc. v. Zoning Bd. of Appeals of Town of Wappinger*, N.Y., 127 A.D.2d 560, 511 N.Y.S.2d 363 (2d Dep't 1987).

<sup>3</sup>Where an ordinance provided that special use permits shall become null and void if the permit holder does not receive an occupancy or compliance certificate within one year after the resolution granting the permit, but gave the issuing board power to extend the time if it found extenuating circumstances, the board erred in refusing to consider an application for extension filed after the special permit expired. Nothing in the ordinance prevented the issuing board from considering the application. *Woodbury Holding Corp. v. Burke*, 53 A.D.2d 617, 383 N.Y.S.2d 909 (2d Dep't 1976). In the event that the application is made timely, the zoning board has the authority to vote on the application after the expiration of the initial timeframe. *420 Tenants Corp. v. EBM Long Beach, LLC*, 41 A.D.3d 641, 838 N.Y.S.2d 649 (2d Dep't 2007).

<sup>4</sup>Where an area variance has been conditioned upon the commencement of construction within one year, and the applicant has failed to begin but has made timely application for an extension, a denial will be sustained only where the circumstances have changed in such a way that the facts upon which the variances was granted no longer exist. *Dil-Hill Realty Corp. v. Schultz*, 53 A.D.2d 263, 385 N.Y.S.2d 324 (2d Dep't 1976).

<sup>5</sup>*Scarpati v. Feriola*, 8 A.D.2d 111, 186 N.Y.S.2d 927 (2d Dep't 1959).

<sup>6</sup>*Haberman v. Zoning Bd. of Appeals of City of Long Beach*, 9 N.Y.3d 269, 849 N.Y.S.2d 189, 879 N.E.2d 728 (2007) (citing *New York Life Ins. Co. v. Galvin*, 35 N.Y.2d 52, 358 N.Y.S.2d 724, 315 N.E.2d 778 (1974)) (holding that a meeting and vote are not required to grant an extension to commence improvements permitted by a variance granted by a previous vote by the zoning board of appeals).

<sup>7</sup>*See Ellsworth Realty Co. v. Kramer*, 268 A.D. 824, 49 N.Y.S.2d 512 (2d Dep't 1944).

<sup>8</sup>*420 Tenants Corp. v. EBM Long Beach, LLC*, 41 A.D.3d 641, 838 N.Y.S.2d 649 (2d Dep't 2007) (holding that included in the zoning board's authority to issue variances is the authority to modify time limitation if an application for such time extension are made while the variance is still valid, and in that

example, where a variance issued to a prior owner has lapsed by the passage of time, the new owner does not have a right to automatic renewal but must demonstrate that they are entitled to the renewal by existing circumstances that meet the requirements necessary for the grant of the variance.<sup>9</sup> Thus, a two-year extension of time for a two-year variance is proper where the underdeveloped nature of the land, which justified the initial variance, has remained unchanged since the original variance was granted.<sup>10</sup> An extension is properly denied, however, where land that was underdeveloped when the temporary variance was granted has developed consistently with zoning regulations.<sup>11</sup> An applicant suffers no hardship through the refusal of a zoning board of appeals to extend a temporary variance, where they were aware that the permit might be terminated upon development of the area.<sup>12</sup>

## E. PROCEDURAL ISSUES

### § 29:35 Time frames for rendering decisions, filing of decisions, and filing of appeals

The zoning board of appeals must file a decision on an application for a variance within 62 days of the hearing of the application for the variance, but the time to render a decision may be extended by mutual consent of the board and the applicant.<sup>1</sup> Those decisions must be filed with the clerk of the municipality within five business days after they are rendered.<sup>2</sup> The statute of limitations to file an Article 78 proceeding to review an adverse decision of a zoning board of appeals is 30 days from the filing of that decision with the clerk of the municipality where that deci-

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event, the application need not be treated like a new application subject to public notice and hearing); *Elwood Properties, Inc. v. Bohrer*, 216 A.D.2d 562, 628 N.Y.S.2d 799 (2d Dep't 1995); *New York Life Ins. Co. v. Murdock*, 8 A.D.2d 191, 186 N.Y.S.2d 778 (1st Dep't 1959).

<sup>9</sup>*Holthaus v. Zoning Bd. of Appeals of Town of Kent*, 209 A.D.2d 698, 619 N.Y.S.2d 160 (2d Dep't 1994).

<sup>10</sup>*William Borea Contracting Co. v. Murdock*, 250 A.D. 262, 294 N.Y.S. 19 (1st Dep't 1937).

<sup>11</sup>*Burke v. Connell*, 242 A.D. 795, 274 N.Y.S. 745 (2d Dep't 1934).

<sup>12</sup>*Ardella v. Evershed*, 16 Misc. 2d 261, 182 N.Y.S.2d 491 (Sup 1959).

#### [Section 29:35]

<sup>1</sup>General City Law § 81-a; Town Law § 267-a; Village Law § 7-712-a.

<sup>2</sup>General City Law § 81-a; Town Law § 267-a; Village Law § 7-712-a.