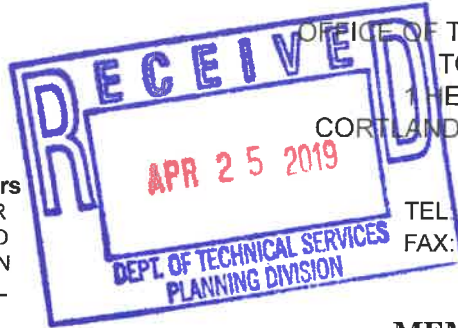




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MEMORANDUM

TO: Chairwoman Taylor & Members of the Planning Board

FROM: Michael J. Cunningham *mjc*
Assistant Town Attorney

RE: PB 2019-3: Application of Andrew Young and Susan Todd for a Special Permit
For an Accessory Apartment

DATE: April 25, 2019

Sent 4/26/19

At the Planning Board public hearing held on April 2, 2019, jurisdictional questions regarding the Planning Board’s ability to hear the above-referenced application were raised by the public. These questions originate from a Decision and Order adopted on September 27, 2017 (“2017 Decision & Order”) by the Town of Cortlandt Zoning Board of Appeals (“ZBA”), which stated, in relevant part, that “[a]n interpretation that a structure (dome) built in 1974 as a principal dwelling and later converted to an accessory structure in 2000, **does not meet** the requirements of Town Code Section 307-45(B)(4)...” For the reasons set forth in this memorandum, the matter was not properly before the ZBA when it rendered the 2017 Decision & Order, and, therefore, the Planning Board is not bound by the 2017 Decision & Order.

I. History of the 2017 Decision & Order

In 2017, Roseann Schuyler, on behalf of Andrew Young and Susan Todd, applied for an “interpretation” from the ZBA, in which the ZBA was asked to determine whether “a structure built in 1974 as a principal dwelling and converted to an accessory structure in 2000, meets the requirement of Town Code Section 307-45(B)(4) which allows an accessory apartment in the R-80 zone, where the accessory apartment building existed prior to April 21, 1979.” Importantly, the Director of Code Enforcement, Martin Rogers, P.E., never made a determination from which Ms. Schuyler, on behalf of Mr. Young and Ms. Todd, appealed from when applying for an “interpretation.” As mentioned above, the 2017 Decision & Order held that the structure did not meet the requirements of Section 307-45(B)(4) of the Town Code.

II. The Memorandum of Thomas F. Wood Was Written to Clarify that Mr. Young And Ms. Todd Should Be Before the Planning Board

After the 2017 Decision & Order, Mr. Young and Ms. Todd sought a rehearing of the 2017 Decision & Order from the ZBA. A rehearing of a decision and order of a zoning board of appeals is permitted pursuant to Section 267-a(12) of the New York Town Law upon a unanimous vote of all members who are then present.¹ After the vote for a rehearing, a decision and order can be reversed, annulled, or modified upon another unanimous vote of all present members, if a zoning board of appeals determines that its original decision was in error.

Before the ZBA was able to vote on whether to rehear Mr. Young and Ms. Todd's application, Thomas F. Wood wrote a memorandum stating that their application should be before the Planning Board. Therefore, although it has been argued that the ZBA twice denied Mr. Young and Ms. Todd the ability to convert a structure into an accessory apartment, the ZBA only took one vote on their application, the 2017 Decision & Order.

III. Legal Authority Supports the Position that the 2017 Decision & Order was Made Without the ZBA Having Jurisdiction

As you are aware, the acronym "ZBA" stands for the "Zoning Board of **Appeals**." The most important word is "Appeals", as the ZBA only has appellate jurisdiction. This means that an applicant cannot apply to the ZBA without appealing some sort of determination from Code Enforcement. As discussed below, this is supported by the relevant legal authority.

a. New York Town Law 267-a(4)

Section 267-a(4) of the New York Town Law states:

Hearing appeals. Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals **shall be appellate only** and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this

¹ Section 267-a(12) of the Town Law reads in full:

Rehearing. A motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur. Such rehearing is subject to the same notice provisions as an original hearing. Upon such rehearing the board may reverse, modify or annul its original order, decision or determination upon the unanimous vote of all members then present, provided the board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby.

article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town. (Emphasis added).

There has been no local law or ordinance passed that would make the ZBA a board of original jurisdiction (i.e. a non-appellate board). Therefore, the ZBA's jurisdiction remains solely appellate.

b. New York Town Law 267-b(1)

Section 267-b(1) of the New York Town Law further supports the position that the jurisdiction of the ZBA is only appellate. It states that:

Orders, requirements, decisions, **interpretations**, determinations. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, **interpretation** or determination **appealed from** and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken. (Emphasis added).

Thus, there are two provisions of the New York Town Law that clearly support the ZBA's jurisdiction as only being appellate.

c. Rita Weeks v. Town of Cortlandt ZBA

Beyond Sections 267-a(4) and 267-b(1) of the Town Law, the case of Rita Weeks v. Zoning Board of Appeals of the Town of Cortlandt (Index No. 3728/14), which was decided on June 15, 2015 and specifically pertained to an interpretation by the ZBA, provides additional support for the position that the 2017 Decision & Order was made without jurisdiction.

In Weeks, the Department of Technical Services ("DOTS") applied to the ZBA for an interpretation as to whether a pre-existing nonconforming five-unit residence located at 1 Hale Road had been in continuous use. The ZBA issued a decision and order which stated that two of the five units had not been continuously used. Thereafter, the petitioner, Rita Weeks, brought an Article 78 proceeding to challenge this "interpretation."

The Honorable Susan Cacace found that there was no jurisdictional authority for the ZBA to make a decision under the Town Law. Her reasoning for this was as follows:

As Town Law §267-a(4) clearly provides, the jurisdiction of the zoning board of appeals is specifically circumscribed to permit it to, insofar as relevant here, hear and decide an appeal from, or to review, an 'interpretation' made by an administrative official who is

responsible for the enforcement of zoning laws. Furthermore, its authority to act is even more narrowly defined by §267-b(1) which allows a zoning board of appeals to reverse, affirm or modify the interpretation appealed from, but the statute expressly confines the zoning board of appeals to undertake such action in an appellate capacity. In this regard, it has been held that the zoning board of appeals must be presented with an adverse determination to review, as **it is without power to render an advisory opinion**. Moreover, in those instances where the zoning board of appeals is called upon to render an 'interpretation' within the meaning of Town Law §267-a(4), it is statutorily constrained to review an application seeking a retrospective determination concerning the propriety of a zoning enforcement official's earlier interpretation of the Town's zoning code. (Internal citations omitted & emphasis added).

The 2017 Decision & Order was analogous to an advisory opinion, as it did not stem from an actual appeal of a determination made by the Director of Code Enforcement. Therefore, it was made without jurisdiction.

IV. This Memorandum About ZBA Jurisdiction Is Not Intended as an Analysis of the Substance of the 2017 Decision & Order

This Memorandum will not analyze whether the 2017 Decision & Order came to the correct conclusion. The Director of Code Enforcement, Martin Rogers, P.E., is writing a separate memorandum regarding locational and dimensional questions raised at the Public Hearing for this application.

Conclusion

The 2017 Decision & Order was made without the ZBA having jurisdiction, since it is not based on a determination made by the Director of Code Enforcement. This is supported by Section 267-a(4) of the New York Town Law, Section 267-b(1) of the New York Town Law, and the Weeks decision. Therefore, the Planning Board is not bound by the 2017 Decision & Order.