WEST SENECA
ZONING BOARD OF APPEALS
1300 Union Road, West Seneca, NY 14224
6:00 PM in the Community Center
December 2, 2026

AGENDA

Meeting # 2026-11

CALL TO ORDER

OPENING OF PUBLIC HEARING

APPROVAL OF PROOFS OF PUBLICATION

APPROVAL OF MINUTES

1. Minutes of Meeting #2026-10

OLD BUSINESS

2026-051
Request of Ari Goldberg with Barclay Damon LLC for interpretation of the proposed use for property located at 1100 Southwestern Blvd.

NEW BUSINESS

ADJOURN

Future meetings are held the fourth Wednesday of the month at 6:00 pm

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WEST SENECA
ZONING BOARD OF APPEALS
1300 Union Road, West Seneca, NY 14224
6:00 PM in the Community Center

October 28, 2026, Draft Meeting Minutes

Start Time: 6:05

CALL TO ORDER
Present:
Zoning Board Member Joette Tronolone
Zoning Board Member Amelia Greenan
Zoning Board Member Edmund Bedient
Zoning Board Member Paul Lang
Chairperson Stephen Stachowski
ZBA Counsel Joseph Trapp
Code Enforcement Representative Doug Busse

Opening of Public Hearing

- **Motioned by:** Greenan
- **Seconded by**: Lang to open the Public Hearing.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Approval of Proofs of Publication

- **Motioned by:** Tronolone
- **Seconded by:** Bedient to approve proofs of publication.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Approval of Minutes from previous meeting

- **Motioned by:** Greenan
- **Seconded by**: Tronolone for approval of the August 2026 Minutes.
- A correction was made to change the spelling under Old Business from for 29 Class Avenue from Klas Avenue. The motion was amended to include this correction.

- **Vote:** Ayes: 4, Noes: 0. The motion carried as amended.

OLD BUSINESS

There was no old business to discuss.

NEW BUSINESS

Application 2026-041 — 33 Florence Avenue

Julie Slisz, the property owner, requested an area variance to construct a roof over a hot tub. The required separation from the existing attached patio roof is 10 feet; the proposed separation is 6 feet.

The applicant said the proposed location aligns with the existing shed, is aesthetically pleasing, and would provide shelter from snow. She stated that moving or reducing the roof would place it too close to the rear property line. She said the new roof would not have gutters; the existing patio roof drains into the house gutters. Code Enforcement Representative Doug Busse said the building department could address drainage concerns if they arise.

Neighbors' signatures were received from 27 Florence Avenue and 39 Florence Avenue. Erie County Planning issued a letter of no objection and determined that the matter was local for the board's consideration. Town counsel had no comment. No public comments were offered.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** The applicant described the location as the most aesthetically pleasing option; neighbor signatures were submitted in support.
2. **Feasible alternatives:** The applicant said moving or reducing the roof was not feasible because it would place the structure too close to the rear property line.
3. **Substantiality:** The variance was characterized as moderate.
4. **Physical or environmental effects:** Code Enforcement said drainage concerns could be addressed if necessary.
5. **Self-created difficulty:** A board member said the difficulty might be self-created but that this was not determinative.

- **Motioned by:** Greenan
- **Seconded by**: Bedient for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-042 — 89 Thorndale Avenue

Property owner Thomas Fitzgerald, accompanied by Tim Elling, requested permission to enclose and insulate an existing porch and add seven windows. Elling said he was helping the owner through the building department process. The work would be limited to the existing porch, with no addition to or removal from its footprint.

The porch is approximately 18 feet from the front property line. Code Enforcement Representative Doug Busse noted that nearby homes have existing porches within the setback and said he saw no issue with the request. An Erie County letter was not required because the property was outside the 500-foot notification area. Town counsel had no comment. Neighbor signatures were submitted from 88 Tindall Avenue, 98 Tindall Avenue, 108 Thorndale Avenue, 88 Thorndale Avenue, 77 Thorndale Avenue, 82 Thorndale Avenue, and 85 Thorndale Avenue. No public comments were offered.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** No. Enclosing an existing porch.
2. **Feasible alternatives:** The porch is already constructed on an existing foundation footprint.
3. **Substantiality:** No. It involves no new encroachment beyond the existing structure footprint.
4. **Physical or environmental effects:** No adverse physical or environmental effects.
5. **Self-created difficulty:** Yes/Partially but based on a pre-existing structural footprint and not precluding relief.

- **Motioned by:** Bedient
- **Seconded by**: Greenan for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-043 — 30 Woodcrest Drive

Emily Kawa requested permission to extend her existing driveway to the property line to create a second parking space. She said on-street parking was limited because of nearby activity at a corner restaurant and that her existing driveway was narrow. The adjacent vacant-lot owner signed in support.

Code Enforcement said parking was difficult in the area and did not anticipate drainage concerns. Driveway drainage would be reviewed during the building-permit process. New York State provided a letter stating that it had no position on the application and considered the matter local. Town counsel had no comment.

Neighbor signatures indicating no objection were submitted. The applicant confirmed that the extension would be concrete and joined to the existing driveway, and that the driveway apron would be widened. A one- or two-foot separation would not provide enough space for the additional vehicle. The board discussed directing runoff toward the existing driveway; Code Enforcement said drainage would be addressed during the permit process. No members of the public spoke.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** No adverse change was anticipated; the additional space could reduce on-street parking.
2. **Feasible alternatives:** A narrower extension would not provide a second parking space.
3. **Substantiality:** A member said the request could be considered substantial but viewed it as the only workable solution.
4. **Physical or environmental effects:** Drainage, including the direction of the driveway pitch, would be reviewed during the building-permit process.
5. **Self-created difficulty:** One member concluded that the difficulty was not self-created in light of limited neighborhood parking. The chair added that vehicle sizes and household vehicle needs had changed over time, while acknowledging that the difficulty could also be viewed as self-created.

- **Motioned by:** Greenan
- **Seconded by**: Lang for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-044 — 168 Charlescrest Court

Trish and Kevin Engleka requested an area variance to place an in-ground pool 7 feet from their deck where 10 feet is required. Code Enforcement explained that overhead utility wires along the rear property line and required clearances limit the available pool location. The applicants had already reduced the pool size to accommodate the utility-wire restrictions.

Neighbor signatures indicating no objection were submitted. No state or county referral was required, and town council had no comment. No members of the public spoke. The board discussed pool safety requirements. Code Enforcement said applicable safety matters would be addressed through the building-permit and inspection process.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** No adverse change was anticipated; the pool was considered consistent with residential use, subject to applicable safety requirements.
2. **Feasible alternatives:** No feasible alternative was identified because overhead wires and required clearances restrict the usable area.

3. **Substantiality:** The reduction from a 10-foot to a 7-foot separation was considered not substantial.
4. **Physical or environmental effects:** No adverse impact was anticipated if utility and electrical clearances are met.
5. **Self-created difficulty:** The difficulty was considered not self-created because the utility pole and overhead wires are pre-existing conditions.

- **Motioned by:** Tronolone
- **Seconded by**: Greenan for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-045 — 95 Thomas Drive

Jeffrey Stange requested an area variance to install a 16-foot white vinyl privacy fence in the backyard of his corner lot. He cited privacy and security, including keeping his young child and the child's friends safely in the yard. Maximum 4' height is allowed. Neighbor signatures were submitted from nearby properties.

Code Enforcement described this as a standard corner-lot fence request and noted that no sidewalk separation requirement applied. No state or county referral was required, town counsel had no comment, and no members of the public spoke.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** The fence was considered consistent with residential fencing commonly found on corner lots.
2. **Feasible alternatives:** A permitted 4-foot fence was technically an alternative but would be less effective for privacy and security.
3. **Substantiality:** The request was considered a relatively routine variance.
4. **Physical or environmental effects:** No significant adverse impact was anticipated.
5. **Self-created difficulty:** A member considered the need for privacy partly self-created but also noted the increased exposure associated with a corner lot.

- **Motioned by:** Lang
- **Seconded by**: Bedient for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-046 — 4350 Seneca Street

- **Applicant/Representatives:** Jason Havens (Owner/Partner & Project Designer), Katie Havens (General Manager), Brian Culp / Culpa (Architect, Waves Architecture and Engineering)

- **Request:** Area variance from the required 25-foot side-yard setback to allow a 5-foot setback (seeking a 20-foot area variance) for a proposed addition, concrete pad, cooler, and associated structures. The 5-foot setback occurs at the building's front southeast corner for approximately 68 feet, with only 15 feet of the building located less than 10 feet from the side lot line.
- **Summary of Discussion:**
    - Applicant noted the use was approved by the Town in 2014; the request concerns only dimensional setback relief.
    - Katie Havens highlighted the brewery's 12-year presence, community involvement, charitable partnerships, and safety needs to modernize operations by separating production areas from the general public.
    - Jason Havens and Brian Culp explained the addition provides indoor space for equipment, materials, and forklift operations currently stored outdoors, eliminating an outdoor shed, reducing clutter, and meeting current building/energy codes for sound mitigation and insulation. Second-floor space is limited to offices, storage, and business meetings; it will not increase production volume, customer capacity, traffic, or parking demand.
    - Site topography sits approximately 38 feet below Main Street, separated by a steep embankment. More than 90% of the addition footprint is on already disturbed/operationally used ground.
    - Water and sanitary services are adequate. Drainage flows toward the brewery property. Two trees over 6 inches (approx. 18 inches in diameter) will be removed and replaced at a 3:1 ratio with additional landscaping planned. Town reviewed as a minor action with no SEQR requirement.
    - Steps taken to mitigate neighbor concerns include adding blinders to parking lot lighting, considering a gas line for the fire pit, and localized speaker systems. Code-required exterior equipment (nitrogenator, exterior compressor, cooler) will remain compliant with the approved site plan.
    - **Public Comments in Support:**
        - Colleen Hutton (West Seneca resident/patron) spoke in support of the business and requested approval.
        - Maureen Wilhelm (West Seneca resident/patron) stated the addition enhances operational efficiency without increasing crowds.
        - Marty Wilkie (neighboring owner of Tax Savvy) noted the cramped nature of the current brewing facility and supported the expansion.
        - Evan (Rusty Nickel bartender, resident of 4649 Seneca) testified to internal space constraints and improved safety/navigation for staff.
        - Emily (former employee) spoke in support of local business growth and community partnership.
    - **Public Comments in Opposition / Inquiries:**
        - Lee (owner of the hill above the brewery, 899 Main Street) raised objections regarding proximity to her property, depicted setbacks, RV overnight parking, and an asserted property boundary dispute. Code Enforcement responded that the property is not a campground and characterized overnight RVs as parking lot visitors.

- Tina (878 Main Street) raised concerns regarding noise and loss of tree/sky views from her home.
- ZBA Counsel and the Board clarified that the Board acts upon the submitted survey measurements and plans before it; Code Enforcement confirmed measuring the proposed addition at approximately 5 feet from the surveyor's flag. Legal boundary disputes are matters for separate legal processes outside the ZBA's scope.

AREA Variance Balancing Test:

1. **Neighborhood character or detriment to nearby properties:** No. The addition modernizes and visually enhances the property, bringing outdoor equipment and storage indoors, improving neighborhood aesthetics. Topography and design mitigate visual impacts.
2. **Feasible alternatives:** No. The property is uniquely constrained by its lot shape, steep embankment, existing equipment/utilities, and parking requirements; the footprint was minimized to the smallest workable option.
3. **Substantiality:** No. While numerically requesting 20 feet of relief from a 25-foot requirement, the 5-foot setback applies only to a single corner of the structure rather than the entire building length, and the physical impact is lessened by topography.
4. **Physical or environmental effects:** No. Building height will not impact sightlines from Main Street due to topography, stormwater drainage will meet code standards and flows toward the brewery, and removed trees will be replaced at a 3:1 ratio.
5. **Self-created difficulty:** Yes. The owner purchased and developed the site knowing its physical limitations; however, this is balanced against site constraints and overall community benefit and is not the sole determining factor.

- **Motioned by:** Stachowski
- **Seconded by**: Bedient for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-047 — 182 Tampa Drive

Debbie Wolcott, owner of 182 Tampa Drive, requested an area variance to construct a roof over an existing deck or patio located 6.5 feet from a detached garage where a 10-foot separation is required. Neighbor support letters from Tampa Drive were received. Code Enforcement confirmed that the existing deck already sat at the 6.5-foot separation and the roof would not expand the footprint any closer.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** The roof would cover a pre-existing, nonconforming deck and was considered consistent with the residential character of the neighborhood.
2. **Feasible alternatives:** A reduced footprint would not allow full coverage and use of the existing deck.
3. **Substantiality:** Although the separation was numerically reduced, the physical impact was considered minor in the context of the property.
4. **Physical or environmental effects:** No significant physical or environmental impacts were anticipated.
5. **Self-created difficulty:** The difficulty was considered self-created but not determinative.

- **Motioned by:** Lang
- **Seconded by**: Tronolone for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-048 — 94 Villa Maria Road

The chair introduced application 26-48, referring to the property as 94 Elmaria Road. Applicant Lawrence Monaco gave his address as 94 Columbia Road and requested a variance to place a whole-house generator 2 feet from the property line where 5 feet is required.

Monaco said the proposed location was the only practical place for the generator because of the home's deck, access limitations, and gas-line location. He cited frequent power outages and the need for reliable power in connection with potential home dialysis treatment. A neighbor's letter was accepted into the record. No state or county letters were required, and no public comments were offered.

A board member moved to approve the variance as requested, and another board member seconded. Their names are not established in the excerpt. A member asked about fire-safety clearances. Code Enforcement said the required clearance from the home is based on the manufacturer's specifications and that no separation requirement from the neighboring property applied in this case.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** The generator was described as a typical accessory structure and necessary given the applicant's circumstances.
2. **Feasible alternatives:** Given the site and utility constraints, the east side of the home was considered the most practical location.
3. **Substantiality:** The requested 3-foot variance was considered not substantial.
4. **Physical or environmental effects:** The installation was expected to comply with applicable building and safety codes, including noise and emissions standards, without affecting drainage, traffic, or environmental conditions.

5. **Self-created difficulty:** The difficulty was attributed to the applicant's choice of location but was not considered determinative.

- **Motioned by:** Tronolone
- **Seconded by**: Lang for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-049 — 238 Schultz Road

The applicant, identified as the property owner, said he was constructing a single-family home on a corner lot. The application concerns a required 40-foot setback; the reported setback is 38.79 feet, a deficiency of approximately 1.21 feet.

The applicant said the house could not be moved as laid out. Code Enforcement explained that the foundation had already been installed and that the house turned out larger than anticipated after being laid out on plans showing a compliant setback. Code Enforcement had no objection to correcting the record to reflect the 38.79-foot setback.

Neighbor letters from 240 Schultz Road and 3 Pine Court were accepted into the record. Code Enforcement clarified that the lot had been vacant after a prior house was demolished following a fire and that the current foundation was new.

Area variance balancing test: Not captured in the excerpt.

1. **Neighborhood character or detriment to nearby properties:** No. Setback deficiency of ~1 foot is not perceptible from the street.
2. **Feasible alternatives:** No. Relocating a poured foundation is economically infeasible.
3. **Substantiality:** No. Characterized as very minor/small.
4. **Physical or environmental effects:** No adverse impact.
5. **Self-created difficulty:** Yes. Construction error, but applicant acted in good faith to correct the record.

- **Motioned by:** Greenan
- **Seconded by**: Lang for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

2026-050 --162 Tampa Drive

Jason Zurek presented a request involving an existing deck that extends 5 feet into the required setback. The deck was being rebuilt without a change in size, and the applicant proposed adding a roof. Code Enforcement reported no objection, noting that similar setbacks are common among pre-existing homes in the neighborhood and that the project would not move the structure closer to the road. The chair reported neighbor signatures of no objection from 165, 161, 166, 153, and 158 Tampa Drive. No comments were offered by the town attorney's office, the board, or the public.

Area variance balancing test:

1. **Neighborhood character or detriment to nearby properties:** No. Do not anticipate an undesirable change and said the project could improve the property.
2. **Feasible alternatives:** The board member did not identify a viable alternative.
3. **Substantiality:** The variance was considered not substantial.
4. **Physical or environmental effects:** The impact was described as minimal; the project could be an improvement.
5. **Self-created difficulty:** A member remarked that such difficulties are often self-created but said this would not affect the vote.

- **Motioned by:** Bedient
- **Seconded by**: Lang for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

Application 2026-051 -1100 Southwestern Boulevard-

Applicant Representative: Corey Hourback (Barclay Damon)

- **Request / Appeal Summary:**
  - Appeal of an administrative interpretation/determination by Code Enforcement regarding a proposed adult-use retail cannabis dispensary in the C-1 zoning district.
  - Applicant's counsel raised a two-part appeal:
    1. Town Chapter 59 proximity/dimensional requirements are preempted by New York State Cannabis Law and state regulations governing time, place, and manner.
    2. Alternatively, if local special-use standards apply, relief from proximity/dimensional requirements must be classified and heard as an **Area Variance** (citing *Real Holdings* and Town Law § 274-b(3)) rather than a **Use Variance**, allowing the applicant to proceed to a special use permit application.
  - Discussion ensued between Applicant's counsel, Town Counsel Joseph Trapp, Code Enforcement, and Board members regarding communication timelines (May 18/19 emails, August 26 Town Attorney letter, October 9 appeal filing), the existence of a formal stamped determination, FOIL requests, and the ZBA's jurisdiction regarding statutory preemption versus variance classification.
  - County Planning returned a letter classifying the matter as local concern. NYS DOT indicated no current opinion, requesting updates on final property use.
- **Balancing Test Framework for Future Variance Review:**
  - *AREA Variance Balancing Test (5 Questions)* if classified as Area Variance:

        1. Undesirable change in neighborhood character / detriment to nearby properties.
        2. Feasible alternative method to achieve benefit.
        3. Substantiality of the requested variance.
        4. Adverse effect on physical or environmental conditions.
        5. Self-created difficulty.
    - *USE Variance Balancing Test (4 Questions)* if classified as Use Variance:
        1. Inability to realize a reasonable return (proven by competent financial evidence).
        2. Unique hardship not applicable to substantial portion of district.
        3. Will not alter essential character of neighborhood.
        4. Hardship not self-created.
- **Motion to Close Public Hearing and Prepare Written Findings:**
- **Motioned by** Chairperson Stachowski, **seconded by** Lang to close the public hearing and direct Board Counsel to draft formal written findings of fact and legal citations for decision at the December 2, 2026 meeting (within the statutory 62-day decision window).
- **Vote:** Ayes: 5, Noes: 0 (Motion carried)

General Discussion and Housekeeping

- **Mandatory board training:** Members were reminded to submit proof or certificates of completed annual training to the Town Clerk's office before the end of 2026.
- **Agenda scheduling footers:** Members discussed removing confusing text from the bottom of standard agendas through the CivicClerk system to avoid schedule misunderstandings around upcoming holidays.
- **Neighbor courtesy signatures:** The board clarified that neighbor signatures are not a statutory requirement, but may be useful supporting evidence when evaluating neighborhood character in area variance applications. Code Enforcement Representative Doug Busse reviewed the administrative practice of identifying adjacent property owners using tax maps.

Adjournment

Moved to close and adjourn the meeting.

- **Motioned by:** Greenan
- **Seconded by**: Lang for approval.
- **Vote:** Ayes: 5, Noes: 0. The motion carried.

End Time: 8:45 pm

$160.00

APPLICATION TO BOARD OF APPEALS

Tel. No. ~~716-858-3801~~ 716-858-3878

Appeal No. 2026-051

Date October 9, 2026

TO THE ZONING BOARD OF APPEALS, WEST SENECA, NEW YORK:

I (we) Ari Goldberg agent/attorney of Barclay Damon LLP 200 Delaware Ave, Suite 1200, Buffalo 14221, HEREBY APPEAL TO THE ZONING BOARD OF APPEALS FROM THE DECISION OF THE BUILDING INSPECTOR ON AN APPLICATION FOR A BUILDING PERMIT, WHEREBY THE BUILDING INSPECTOR DID DENY PERMIT TO: OPERATE CANNABIS DISPENSARY

- [x] A PERMIT FOR USE
- [ ] A PERMIT FOR OCCUPANCY
- [ ] A TEMPORARY PERMIT OR EXTENSION THEREOF
- [ ] A CERTIFICATE OF EXISTING USE
- [ ] A CERTIFICATE OF ZONING COMPLIANCE
- [ ] AREA PERMIT

1. Applicant is the
   - [ ] PROPERTY OWNER
   - [ ] CONTRACTOR FOR THE WORK CONCERNED HEREIN
   - [ ] PROSPECTIVE TENANT
   - [x] OTHER (Describe)

RECD WS TOWN CLERK '25 OCT 9 PM3:04

2. LOCATION OF THE PROPERTY 1100 SOUTHWESTERN BLVD W. SENECA NY 14224
3. State in general the exact nature of the permission required, INTERPRETATION OF CHAPTER 59

4. PREVIOUS APPEAL. No previous appeal has been made with respect to this decision of the Building Inspector or with respect to this property, except the appeal made in Appeal No. NA, dated _____, 20____.

5. REASON FOR APPEAL.

A. A Variance to the Zoning Ordinance is requested because strict application of the ordinance would produce undue hardship, or the hardship created is unique and is not shared by all properties alike in the immediate vicinity of this property and in this use district, or the variance would observe the spirit of the ordinance and would not change the character of the district because: SEE ENCLOSED DOCUMENTS.

B. Interpretation of the Zoning Ordinance is requested because: Interpreting proposed use at current zoning of property

C. A Special or Temporary Permit or an Extension thereof Under the Zoning Ordinance is requested pursuant to Article _____, Section _____, Subsection _____, Paragraph _____ of the Zoning Ordinance, because: _____

X Ari M. Goldberg
Applicant's Signature

TO BE COMPLETED BY THE BUILDING INSPECTOR

1. Provision(s) of the Zoning Ordinance Appealed, including article, section, subsection or paragraph of the Zoning Ordinance CHAPTER 59 OF TOWN CODE DOES NOT PERMIT THIS LOCATION FOR CANNABIS DISPENSARY
2. Zoning Classification of the property concerned in this appeal C-1
3. Type of Appeal:
   - [ ] Variance to the Zoning Ordinance.
   - [x] Interpretation of the Zoning Ordinance or Zoning Map.
   - [ ] Special or Temporary Permit or an xtension thereof under the Zoning Ordinance.
4. A statement of any other facts or data which should be considered in this appeal. _____

Building Inspector _____

* * * RECEIPT * * *

Date: 10/09/26 **Receipt#:** 103722

Quantity	Transactions	Reference	Subtotal
1	Zoning Board of Appeals	20162095	$160.00
		Total Paid:	$160.00

Notes: 1100 Southwestern Blvd.

Payment Type	Amount	Paid By
Credit Card-Ref #VISA	$160.00	Goldberg, Ari

Thank you for allowing the West Seneca Town Clerk's office to serve you. Have a wonderful day!
1250 Union Road, Room 212 West Seneca, NY 14224

Name: Goldberg, Ari
Barclay Damon Llp
200 Delaware Avenue
Suite 1200

Clerk ID: KN

Internal ID: 20162095

BARCLAY DAMON LLP

Corey A. Auerbach
Partner

October 9, 2026

Via Hand Delivery
Jeffrey Schieber, Code Enforcement Officer
and Town of West Seneca Zoning Board of Appeals
West Seneca Town Hall
1250 Union Road
West Seneca, New York 14224

Re: Notice of Appeal of Code Enforcement Determination
Proposed Adult-Use Cannabis Retail Dispensary
1100 Southwestern Boulevard
SBL No. 144.19-7-75

Dear Mr. Schieber and Members of the Zoning Board of Appeals:

Barclay Damon LLP represents Raymond N. Battista III, Brendan Karam, and Cannaspace Inc. (collectively, "Appellant"). Pursuant to Town Law § 267-a(5)(b) and Town Code §§ 120-56(A) and 120-58(B), please accept this correspondence and the accompanying memorandum as Appellant's Notice of Appeal from the Code Enforcement Officer's interpretation and application of Chapter 59 to the proposed adult-use cannabis retail dispensary at 1100 Southwestern Boulevard, including the purported rejection of the proposal and any associated determination that a use variance is required.

This appeal concerns the rejection attributed to the Code Enforcement Officer in the Town Attorney's August 26, 2026 letter, received August 28, including the Chapter 59 restrictions identified in Mr. Schieber's May 19 email. Appellant has not been provided with the underlying determination or evidence of its statutory filing. This protective appeal does not concede that a final determination was previously rendered and filed or that the appeal period has commenced or expired.

The accompanying memorandum and exhibits are incorporated into this Notice of Appeal and set forth the grounds for the appeal and relief requested. Principally, Appellant seeks reversal of the rejection on preemption grounds or, alternatively, a determination that any necessary relief may be pursued through an area variance rather than a use variance.

Please acknowledge receipt and schedule this matter for the next available ZBA hearing. We also request that the Town provide a copy of the underlying determination and associated filing record, as previously requested.

Very truly yours,

Corey A. Auerbach

Enclosures: Memorandum in Support of Notice of Appeal and Exhibits A–J

The Avant Building - 200 Delaware Avenue Suite 1200 - Buffalo, New York 14202 barclaydamon.com
CAuerbach@barclaydamon.com Direct: (716) 858-3801 Fax: (716) 768-2801

BARCLAY DAMON LLP

MEMORANDUM

TO:	Jeffrey Schieber, Code Enforcement Officer, and Town of West Seneca Zoning Board of Appeals
FROM:	Corey A. Auerbach
DATE:	October 9, 2026
RE:	1100 Southwestern Boulevard, SBL No. 144.19-7-75 Notice of Appeal

Raymond N. Battista III, Brendan Karam, and Cannaspace Inc. (collectively, "Appellant") appeal the Town's asserted rejection of the proposed adult-use cannabis retail dispensary at 1100 Southwestern Boulevard ("Property"). The Town has identified residential adjacency and the cannabis-specific proximity restrictions in Chapter 59 as impediments, and the Town Attorney has advised that the proposal was rejected by the Code Enforcement Officer and should be appealed to the Town of West Seneca Zoning Board of Appeals ("ZBA"). Appellant challenges the legal basis for that rejection and any determination that a use variance is required.

Cannabis Law § 131(2) expressly preempts local regulation of licensed cannabis operations, subject to a limited exception for permissible time, place, and manner controls. The implementing regulations identify the authorized local controls. Chapter 59 of the Town Code goes beyond those controls by prohibiting a dispensary merely because it abuts a residential use and by imposing separation requirements from broadly defined "community facilities," including private convenience stores and retail food establishments. To the extent the Town also relies on a school across the street, it must apply the State's statutory school buffer and measurement rules rather than Chapter 59's property-line rule. Appellant seeks reversal of the rejection so that the proposal may proceed through the otherwise applicable approval processes. Alternatively, any necessary relief from dimensional or physical separation requirements should be considered under the area variance standard.

I. Property and Administrative Background

Appellant proposes an adult-use retail dispensary at the Property, which is located in the C-1 district. Cannaspace Inc. is the tenant of the proposed dispensary premises and is aggrieved by the rejection of that proposed use. Town Code § 59-13 permits retail dispensaries in the C-1, C-2, M-1, and M-2 districts, subject to otherwise applicable requirements, including special use permit review under § 59-11(E). The proposal is for retail sales, not an on-site consumption establishment.

In a May 19, 2026 email responding to counsel's inquiry, Code Enforcement Officer Jeffrey Schieber directed Appellant to Chapter 59, stated generally that dispensaries were not permitted adjacent to residential uses, and identified residential uses behind and next to the Property. He also referred to the Town's denial of a different dispensary proposal in a strip plaza containing a convenience store, subsequent amendments addressing convenience stores and retail food establishments, and the Orchard Park School District across the street. He did not identify a measured separation from a particular school entrance or determine whether the State's school restriction applied.

On June 8, 2026, counsel asked whether the identified restrictions could be addressed through area variance relief and requested guidance concerning preemption and the appeal process. Mr. Schieber referred the matter to the Town Attorney and stated that he was unsure of the process. On July 1, 2026, the Town Attorney maintained that the restrictions fell within the Town's zoning authority and expressed the position that any variance would be a use variance. Counsel thereafter repeatedly requested a formal administrative determination if the Town maintained those positions.

By letter dated August 26, 2026, received August 28, 2026, the Town Attorney advised that the Code Enforcement Officer had rejected the proposal and that Appellant should seek ZBA review. Counsel requested identification of the underlying determination and its filing date on August 28 and renewed the request on September 3 and September 9, 2026. The Supervisor directed counsel to the ZBA process but did not provide the determination. Appellant also submitted a Freedom of Information Law request seeking the purported determination and evidence of its filing. Despite these repeated efforts, neither the determination nor evidence of its filing has been furnished to Appellant as of this submission.

The threshold issue presented is the Town's position that Chapter 59 bars the proposed dispensary at this location and that relief requires a use variance. Appellant seeks review of that position so that the proposal may proceed under the legally applicable approval requirements.

II. Determination Appealed From and Preservation of Timeliness

This appeal challenges the Code Enforcement Officer's interpretation and application of Chapter 59 to the Property, as reflected in the May 19 correspondence and the rejection attributed to him in the Town Attorney's August 26 letter. It also challenges any associated administrative requirement that Appellant obtain a use variance. The Town Attorney's and Supervisor's correspondence documents the Town's assertion that the Code Enforcement Officer has rejected the proposal and its direction that Appellant seek review by the ZBA. Appellant seeks review of

that administrative action while requesting production of the underlying determination and filing record.

Town Law § 267-a(5)(a) requires the enforcement official's order, requirement, decision, interpretation, or determination to be filed in that official's office within five business days after it is rendered, unless the Town Board has directed filing in the Town Clerk's office by resolution. Under § 267-a(5)(b), the 60-day appeal period runs from that filing, and the notice must be filed with both the administrative official and the ZBA. Town Code § 120-58(B) likewise requires filing with both and transmission of the underlying administrative record.

Appellant files protectively in response to the Town's express assertion that a rejection has occurred. The record furnished to Appellant does not establish when, where, or whether that rejection was filed as required by Town Law § 267-a(5)(a). Accordingly, Appellant does not concede that the May 19 email constituted a final determination or that the statutory appeal period began to run from that email or any later correspondence. Appellant requests identification of the precise determination, its date and grounds, its filing location and date, and any resolution directing an alternate filing location. Appellant reserves the right to supplement this Notice upon production of that record.

If the ZBA concludes that no appealable administrative determination has yet been made, Appellant requests a written disposition specifying the basis for that conclusion and the application or administrative determination necessary to obtain review of the disputed Chapter 59 restrictions and variance classification. Appellant further requests that the Code Enforcement Officer render and file a determination expressly identifying the restrictions applied to the Property and whether a use variance is required.

III. Grounds for Appeal

a. State Law Limits Cannabis-Specific Local Siting Restrictions

Cannabis Law § 131(2) expressly preempts local laws concerning the operation or licensure of adult-use cannabis businesses, while allowing limited time, place, and manner regulation that does not render operation unreasonably impracticable as determined by the Cannabis Control Board ("CCB"). The exception must be read together with the State's detailed statutory and regulatory siting scheme, not as an unrestricted delegation to impose additional cannabis-specific exclusions.

Under 9 NYCRR § 119.2(a), authorized local controls address operating hours, visual or architectural integrity within historic districts, parking, traffic, odor, noise, and a distance requirement of no more than 500 feet from a public youth facility. A residential adjacency

prohibition, a buffer from private stores or medical offices, and a categorical exclusion from commercial plazas are not among the enumerated controls. The Office of Cannabis Management ("OCM"), in its published Local Law Preemption and "Unreasonably Impracticable" overview, confirms that cannabis-specific restrictions outside § 119.2 are preempted, while generally applicable restrictions remain enforceable.

The challenged provisions are additional restrictions directed specifically at cannabis businesses, rather than generally applicable zoning requirements. Their placement in the Town Code does not exempt them from the State's preemption framework. Appellant does not claim that a State license displaces every local zoning requirement. Rather, Appellant challenges the particular restrictions used to reject this proposal. The existence of dispensaries elsewhere in Town does not answer whether the restrictions applied to this Property exceed the Town's authority.

Matter of 1086 OCR, LLC v Town of Riverhead Zoning Bd. of Appeals, 251 AD3d 1054, 1057 (2d Dept 2026), confirms the governing preemption principle. The Appellate Division affirmed the invalidation of a local school buffer that increased the State distance and measured from property lines. It concluded **that the Legislature had expressly occupied the field of licensed adult-use dispensary operations and that** the additional local restriction conflicted with the State scheme. Specifically, the court held that the local buffer "imposes additional restrictions on rights granted by state law," is "inconsistent with the State's overriding interest," and is therefore preempted. *Id.* at 1057. Significantly, although the particular restriction invalidated in *1086 OCR* concerned school separation, the court expressly recognized the Legislature's broader intent to occupy the field of the operation of licensed adult-use cannabis retail dispensaries, subject to the limited local authority preserved by Cannabis Law § 131(2). The court consequently upheld the determination that no variance from that preempted restriction was needed. The same preemption principle governs this appeal. The Town's retained authority to regulate time, place, and manner does not authorize additional cannabis-specific siting restrictions that conflict with the State scheme. Nor does the absence of an identical State restriction authorize the Town to impose additional cannabis-specific prohibitions outside the scope of permissible local regulation. Chapter 59's challenged exclusions exceed the local authority reserved by Cannabis Law § 131(2) and Part 119. Under the reasoning of *1086 OCR*, the Town cannot enforce those exclusions by requiring Appellant to obtain a variance from restrictions that State law preempts.

b. Residential Adjacency Does Not Supply a Lawful Basis for Rejection

Town Code § 59-8(D) prohibits a cannabis use facility from abutting any property used for residential purposes, including a mixed-use property containing a residence. Appellant challenges that adjacency prohibition as applied to a dispensary proposed in a district permitting the use. Neither Cannabis Law § 72 nor the authorized local controls enumerated in 9 NYCRR § 119.2(a)

provides for a cannabis-specific residential separation requirement. Section 59-8(D) nevertheless makes an adjoining residential use an absolute bar, without regard to the proposed dispensary's design, operations, or actual impacts.

The Town may address actual land use impacts through lawful parking, traffic, noise, odor, and other applicable controls, but that authority does not permit it to convert residential adjacency into a categorical exclusion from a district in which dispensaries are permitted. The prohibition imposes an additional cannabis-specific siting restriction beyond the controls authorized by the State framework and therefore cannot supply a lawful basis for rejecting the proposal or requiring a variance.

Independently, any application of § 59-8(D) must rest on actual abutting parcels, rather than the general presence of residences "behind" or "next to" the Property. If the Town relies on § 59-8(D), the record should identify the relevant parcel boundaries and residential uses. The May 19 email's description of nearby residences does not, by itself, establish that the Property abuts a parcel used for residential purposes within the meaning of that provision.

c. The Community Facilities Buffer Exceeds the Authorized Public Youth Facility Restriction

Town Code § 59-8(B), read together with the definition of "community facilities" in § 59-12, imposes a 500-foot property-line buffer from a broad range of locations, including convenience stores, retail food establishments children regularly frequent, childcare centers, medical practitioners' offices, drug rehabilitation centers, and other places where children or cannabis users gather. That prohibition substantially expands the limited public youth facility restriction authorized by State regulations.

A public youth facility under 9 NYCRR § 118.1(a)(89) is a government-owned location or structure accessible to the public whose primary purpose is to provide recreational opportunities or services to children or adolescents, with a primary population reasonably expected to be age 17 or younger. Private commercial establishments do not qualify merely because children patronize them. The Town cannot enlarge the State's defined category by labeling convenience stores, restaurants, or other private establishments "community facilities."

OCM's November 12, 2024 response to the City of Niagara Falls concerning AJ's Native Wholesale, Inc., submitted here as administrative guidance, expressly addressed the replacement of "community facility" with "public youth facility," the narrower definition, and the need for a local law establishing the authorized restriction. That guidance confirms that the distinction is substantive: the authorized restriction concerns a defined class of public youth facilities, not every

location where children may gather. West Seneca's broader prohibition exceeds that authorization and cannot supply a lawful basis for rejecting the proposal or requiring a variance.

If a qualifying public youth facility is asserted, the Town must identify that facility, the local law establishing the applicable restriction, and whether the same-road requirement and applicable measurement rules are satisfied under 9 NYCRR §§ 119.1(a)(3), 119.2(a)(10), and 119.4. A blanket property-line measurement cannot substitute for the applicable State measurement rules, which distinguish facilities with building entrances from those without buildings or structures. The Town's prior rejection of another applicant's proposal does not establish a lawful basis to reject this Property. The materials furnished to Appellant identify no particular qualifying public youth facility or measurement establishing that the Property is disqualified under those rules.

d. Any School or House of Worship Restriction Must Follow State Law

Cannabis Law § 72(6)(a) prohibits a licensed retail dispensary from locating on the same street and within 500 feet of a building containing a school. Section 72(6)(b) establishes a same-street 200-foot restriction for a building exclusively occupied as a house of worship. Section 72(6)(c) requires straight-line measurement between the centers of the nearest entrances, with further entrance definitions in § 72(6)(d).

Town Code § 59-8(C), by contrast, measures from property lines, applies its school restriction to a school building or property, increases the house-of-worship distance to 500 feet, and contains no same-street limitation. These are substantive expansions of the State's siting restrictions. As *1086 OCR* establishes, the Town cannot substitute a broader local buffer or property-line measurement for the distance and measurement rules prescribed by the Legislature. The same statutory preemption reasoning applies to the expanded house-of-worship restriction. To the extent the rejection rests on § 59-8(C)'s expanded buffer, it should be reversed.

The May 19 email's reference to the "Orchard Park School District" across the street does not, without more, establish a statutory disqualification. The Town must identify the particular building containing a school, determine whether the same-street requirement is met, and establish the distance under the statutory entrance rules. Appellant challenges the Town's expanded local standard, not the applicability of the State's school buffer. Compliance with the State standard must be determined from the relevant building, entrances, and site-specific measurements, rather than a general reference to school district property across the street.

e. Any Reliance on the Stand-Alone Structure Rule Is Also Challenged

Section 59-8(G) requires dispensaries approved after May 1, 2025 to occupy separate, stand-alone structures and bars locations in a building or plaza with other retail establishments. If the purported rejection relies on this provision, Appellant challenges it as an additional cannabis-specific siting restriction outside § 119.2(a). The provision categorically excludes an otherwise permitted retail use based on its placement within a shared commercial building or plaza, rather than regulating an enumerated operational impact. Appellant requests identification of any factual finding that the Property falls within the prohibition.

Tad's Franchises, Inc. v Incorporated Village of Pelham Manor, 42 AD2d 616, 616-617 (2d Dept 1973), provides a useful analogy. Once the municipality permitted restaurants in its retail district, it could not prohibit the licensed sale of alcoholic beverages within them, a matter entrusted to the State Liquor Authority. Although arising under a different statutory scheme, the decision illustrates that local land use authority does not permit a municipality to impose additional restrictions on an activity reserved to State regulation. Here, Cannabis Law § 131(2) and Part 119 establish the limits of that authority, and the stand-alone structure requirement exceeds them.

f. Alternatively, Relief from Dimensional or Physical Separation Requirements Should Be Considered Under the Area Variance Standard

Appellant's primary position is that no variance from a preempted restriction is necessary. If the ZBA determines that the challenged locational restrictions remain enforceable, however, Appellant alternatively challenges the Town's position that relief necessarily requires a use variance.

Town Law § 274-b(3) authorizes the ZBA to grant area variances from dimensional requirements applicable to a proposed special use permit. Such requirements are not converted into use restrictions merely because they govern a special permit use rather than uses permitted as of right. *See Matter of Real Holding Corp. v Lehigh*, 2 NY3d 297, 299-303 (2004).

In *Real Holding*, the proposed gasoline filling station required a special use permit but could not satisfy requirements establishing 1,000 feet of separation from certain residentially zoned lands and 2,500 feet of separation from other gasoline stations. The Court of Appeals held that the ZBA possessed authority to grant area variances from those requirements without a further delegation from the Town Board. It expressly rejected the contention that the separation requirements were use restrictions, identifying them as "dimensional or physical requirements" subject to area variance relief. *Id.* at 300.

Here, Chapter 59 permits retail dispensaries in the C-1 district, subject to special use permit review. Accordingly, Appellant seeks authorization for a permitted use. The numerical separation requirements regulate the physical relationship between that use and neighboring properties or facilities. As in *Real Holding*, the fact that those requirements apply to a particular special permit use does not transform them into use restrictions requiring proof of unnecessary hardship.

Appellant further submits that the residential adjacency prohibition regulates the physical relationship between an otherwise permitted dispensary and neighboring property. Although expressed as an adjacency prohibition rather than a numerical setback, Appellant submits that it is a physical requirement to which the area variance reasoning of *Real Holding* should apply.

Appellant therefore requests a determination that relief from the applicable dimensional or physical locational requirements may be pursued under the area variance standard of Town Law § 267-b(3), with an opportunity to submit the site-specific materials necessary for that review. This alternative request preserves Appellant's preemption challenge and seeks a determination of the applicable variance standard, with any necessary variance application to follow.

IV. Scope of Review and Relief Requested

Appellant requests that the ZBA reverse the administrative rejection to the extent based on the challenged Chapter 59 restrictions; determine that those restrictions cannot lawfully bar the proposed dispensary or require a variance from a preempted provision; and permit Appellant to pursue any otherwise applicable special use permit, site plan, building, and State licensing approvals. Alternatively, Appellant requests reversal of any categorical requirement for a use variance and a determination that relief from the applicable dimensional or physical separation requirements may be pursued as an area variance.

Appellant submits the preemption grounds for consideration in reviewing the legal basis of the administrative rejection and to preserve those grounds in the administrative record. If the ZBA concludes that it cannot grant relief on a particular ground, Appellant requests that its written decision identify that conclusion and separately decide the interpretations within its jurisdiction. In particular, any conclusion concerning the ZBA's authority to address preemption should not foreclose consideration of the alternative variance classification issue. Appellant reserves the right to seek judicial relief and a CCB determination under 9 NYCRR § 119.5, including concerning the cumulative effect of the challenged restrictions.

If the ZBA concludes that any issue cannot be decided without a further application, Appellant requests that its decision identify the required application and explain why it is necessary to resolve that issue.

Appellant further requests transmission of the complete underlying administrative record, an opportunity to supplement upon receipt, a duly noticed hearing, and a written decision addressing each ground and the relief sought. The decision should be filed and furnished in accordance with Town Law § 267-a(9).

EXHIBIT INDEX

Exhibit A – Email correspondence among Appellant's counsel, the Code Enforcement Officer, the Town Attorney, and the Town Supervisor concerning the proposed dispensary, Chapter 59 restrictions, variance classification, and requests for the administrative determination and filing information, including the May 19, 2026 email.

Exhibit B – Town Attorney's letter dated August 26, 2026, received August 28, 2026, communicating the purported rejection and directing Appellant to seek ZBA review.

Exhibit C – September 15, 2026 Freedom of Information Law request seeking the underlying administrative determination and appeal forms, the Town's September 17, 2026 response, and Appellant's September 17, 2026 administrative FOIL appeal.

Exhibit D – Aerial map identifying the Property and surrounding area.

Exhibit E – Town of West Seneca Code, Chapter 59 (Cannabis).

Exhibit F – OCM's Local Law Preemption and "Unreasonably Impracticable" overview.

Exhibit G – OCM's November 12, 2024 letter to the City of Niagara Falls concerning AJ's Native Wholesale, Inc., and the public youth facility restriction.

Exhibit H – Matter of 1086 OCR, LLC v Town of Riverhead Zoning Bd. of Appeals, 251 AD3d 1054 (2d Dept 2026).

Exhibit I – Matter of Real Holding Corp. v Lehigh, 2 NY3d 297 (2004).

Exhibit J – Tad's Franchises, Inc. v Incorporated Village of Pelham Manor, 42 AD2d 616 (2d Dept 1973).

Exhibit A

Auerbach, Corey A.

From: Auerbach, Corey A.
Sent: Wednesday, September 9, 2026 1:33 PM
To: 'Gary Dickson'; cgtrapp; Jeffrey Schieber
Cc: Joseph Trapp; Amelia Greenan; Goldberg, Ari M.; Zakarin, Benjamin R.
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Supervisor Dickson,

Respectfully, my request has not been addressed. I am not asking how to file an appeal. I am asking for the formal written determination from which I am supposed to appeal.

The Town Attorney has advised that "the Code Enforcement Officer rejected the proposal" and that my remedy is an appeal to the ZBA. Yet, despite my repeated requests, I have not been provided with a written determination reflecting that purported rejection. As I explained in my prior email, the Town's own Code provides for an appeal to the ZBA from an "order, requirement, decision or determination" of the administrative official charged with enforcement.

Town Law § 267-a is even more specific. It requires each such order, requirement, decision, interpretation or determination to be filed in the office of the administrative official within five business days after it is rendered, and provides that the 60-day period to appeal runs from that filing. I therefore need the determination the Town contends was made before I can properly pursue the appeal the Town Attorney has directed me to take.

I have to say, I do not understand why the Town is making this so procedurally difficult. My client is attempting to pursue a legitimate business opportunity, and I am simply asking the Town to provide the determination necessary to follow the administrative appeal process it has directed us to pursue.

Jeff, please provide me with a file-stamped copy of the written determination purportedly denying the proposed use at 1100 Southwestern Boulevard so that I can file the appeal.

Best,

C.

From: Gary Dickson <gdickson@westseneca.gov>
Sent: Wednesday, September 9, 2026 1:14 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Mr. Auerbach,

Your request has been addressed.

If you intend to move forward with an appeal to the ZBA, I suggest you bring your relevant documents to Code Enforcement and they will walk you through the process and get you on the agenda once you pay the fee.

Gary Dickson
Town Supervisor
1250 Union Road
West Seneca, NY 14224
Office: 716-558-3203
Cell: 716-777-2504
gdickson@westseneca.gov

This email may be subject to public disclosure per the NY Freedom of Information Law.

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Wednesday, September 9, 2026 10:32 AM
To: Gary Dickson <gdickson@westseneca.gov>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Jeff,

Following up on the below. At this point, I need the formal written determination so that I can file the ZBA appeal.

Thanks,

C.

From: Auerbach, Corey A.
Sent: Thursday, September 3, 2026 4:03 PM
To: 'Gary Dickson' <gdickson@westseneca.gov>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Supervisor Dickson,

Thank you for the response. Respectfully, whether the Town believes the restrictions in Chapter 59 are clear is not the procedural issue I am trying to resolve.

The Town's own Code provides that the ZBA hears appeals from an "order, requirement, decision or determination" made by the administrative official charged with enforcement of the Zoning Code. See Town Code § 120-56(A). That is also consistent with Town Law § 267-a, which provides that the ZBA's jurisdiction is appellate and is invoked by an appeal from an order, requirement, decision, interpretation or determination of the administrative official charged with zoning enforcement.

That is precisely why I have repeatedly requested a formal determination from the appropriate administrative official. Chris has now advised me that the "Code Enforcement Officer rejected the proposal" and that my client should appeal that decision to the ZBA. I am simply asking for the decision he says was made. I do not intend to

put my client before the ZBA and invite a jurisdictional issue by appealing from a decision that has neither been provided to me nor, to my knowledge, formally issued and filed.

I also reviewed the ZBA procedure sheet you provided. It appears to be directed principally toward conventional variance applications and requires, among other things, a survey depicting the proposed variance, drawings of items requiring dimensional relief, photographs and a neighbor signature sheet. Several of those items are plainly inapplicable to an appeal concerning the applicability of Chapter 59 to the proposed use. That is precisely why I asked Jeff for guidance as to what is required for a complete application in this particular circumstance, rather than simply submitting materials that do not fit the nature of the relief being sought.

I also note that the procedure sheet directs applicants to obtain the application from the Code Enforcement Office. If the application truly is not available electronically, I will certainly arrange to have someone obtain it. I would respectfully suggest, however, that in 2026 requiring an applicant or its counsel to physically travel to Town Hall simply to obtain a municipal application form is unnecessarily burdensome and not particularly business-friendly. Frankly, it strikes me as every bit as antiquated as the Town Attorney responding by regular mail to an email inquiry.

Jeff, I would appreciate your assistance in issuing the written determination necessary to pursue the ZBA review the Town Attorney has now directed us toward and in confirming what is required for a complete application so that we can get this matter properly before the ZBA.

Best,

C.

From: Gary Dickson <gdickson@westseneca.gov>
Sent: Thursday, September 3, 2026 3:40 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Mr. Auerbach,

The town code is clear on the restrictions on cannabis dispensary locations. No interpretation is required.

The ZBA process is described here: https://www.westseneca.gov/DocumentCenter/View/343/Zoning-Board-of-Appeals-Procedure-PDF.

The applications are in the Code Enforcement office.

Gary Dickson
Town Supervisor
1250 Union Road
West Seneca, NY 14224
Office: 716-558-3203
Cell: 716-777-2504

gdickson@westseneca.gov

This email may be subject to public disclosure per the NY Freedom of Information Law.

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Thursday, September 3, 2026 2:49 PM
To: cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Jeff,

When I raised these legal and procedural issues with you in June, you referred the matter to the Town Attorney for guidance on the appropriate process. Unfortunately, I have now spent nearly three months trying to get a clear answer from Chris as to how the Town intends to proceed, without success.

Chris's recent snail mail letter now advises that, "since the Code Enforcement Officer rejected the proposal," the appropriate procedure is to seek review of that decision by the ZBA. The problem is that I do not believe you ever issued a formal written determination denying or rejecting the proposed use from which an appeal could be taken.

If the Town's position is that Chapter 59 precludes an adult-use retail dispensary at 1100 Southwestern Boulevard and/or that the proposed use requires a use variance, can you please provide me with a formal written determination reflecting that position so that my client can pursue an appeal to the ZBA?

Can you also please provide me with the applicable filing requirements, including the appropriate application or notice of appeal form, filing fee, number of copies and any required supporting materials, as well as the filing deadline and meeting date for the next available ZBA hearing?

I appreciate your help getting us on the appropriate procedural track. At this point, I simply need to get the matter moving one way or another for my client and would appreciate anything you can do to help us proceed without further delay.

Best,

C.

From: Auerbach, Corey A.
Sent: Friday, August 28, 2026 1:49 PM
To: Chris G. Trapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

I received today, by first-class mail, your letter dated August 26. Given that all of our prior correspondence regarding this matter has been by email, I am not sure why your response to my repeated email inquiries was sent only by regular mail, particularly where your letter suggests that my client pursue an administrative appeal that may be subject to filing deadlines.

More importantly, I do not believe your letter actually answers the question I have been asking. You state that "since the Code Enforcement Officer rejected the proposal," the proper procedure is to seek an interpretation of that decision from the ZBA. I have not, however, received anything identified as a formal written determination from the Code Enforcement Officer denying or otherwise rejecting the proposed use. While Jeff previously identified various provisions of Chapter 59 that he believed presented issues with the proposed location, that correspondence was general in nature and was followed by his referral of the matter to you regarding the appropriate process. Nor does your letter identify the determination you contend is appealable, its date or substance, or the date on which it was filed in the Code Enforcement Officer's office.

I have now been attempting for nearly three months to obtain clarity from the Town on these issues. As I have repeatedly indicated, if the Town's position is that Chapter 59 precludes the proposed dispensary at 1100 Southwestern Boulevard and/or that a use variance is required, I am simply asking that the appropriate Town official issue a formal written determination reflecting that position so that my client can pursue the administrative review you are now suggesting.

If you contend that the Code Enforcement Officer has already issued an appealable determination, please identify that determination and provide me with a file-stamped copy by email, including the date on which it was filed in his office. If no such determination has been issued and filed, please arrange for that to occur promptly so that we can proceed accordingly.

Best,

C.

From: Auerbach, Corey A.
Sent: Tuesday, August 25, 2026 9:26 AM
To: Chris G. Trapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

I am following up again on my emails of July 5, July 21, July 28, and August 18, to which I have not received the courtesy of a response.

As I have repeatedly indicated, if the Town maintains that Chapter 59 precludes the proposed dispensary at 1100 Southwestern Boulevard and/or that a use variance is required, please arrange for the issuance of a formal written determination so that my client may timely pursue an appeal to the ZBA. Otherwise, please let me know the Town's position so that we can determine how best to proceed.

Thank you.

Best,

C.

From: Auerbach, Corey A.
Sent: Tuesday, August 18, 2026 4:03 PM
To: 'Chris G. Trapp' <cgtrapp@grecolawyers.com>; 'Jeffrey Schieber' <jschieber@twsny.org>
Cc: 'Joseph Trapp' <JTrapp@westseneca.gov>; 'Gary Dickson' <gdickson@westseneca.gov>; 'Amelia Greenan' <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

It has now been another three weeks without a response. I have been trying to obtain the Town's position on these issues for more than two months and have repeatedly asked for either a substantive response or a formal written determination so that my client may preserve and pursue its administrative remedies.

At this point, I would appreciate the professional courtesy of a response. If the Town maintains its position that Chapter 59 precludes the proposed dispensary at 1100 Southwestern Boulevard and/or that a use variance is required, please arrange for a formal written determination reflecting those positions so that my client may proceed accordingly.

Thank you.

Best,

C.

From: Auerbach, Corey A.
Sent: Tuesday, July 28, 2026 4:49 PM
To: 'Chris G. Trapp' <cgtrapp@grecolawyers.com>; 'Jeffrey Schieber' <jschieber@twsny.org>
Cc: 'Joseph Trapp' <JTrapp@westseneca.gov>; 'Gary Dickson' <gdickson@westseneca.gov>; 'Amelia Greenan' <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

It's been another week, so I wanted to follow up. If the Town has reached a determination on these issues, I would appreciate your letting me know. Otherwise, if the Town continues to maintain that Chapter 59 precludes the proposed use or that a use variance is required, I would appreciate the issuance of a formal written determination so that my client may timely pursue any available administrative remedies. Thank you, and I look forward to hearing from you.

Best,

C.

From: Auerbach, Corey A.
Sent: Tuesday, July 21, 2026 8:52 AM
To: 'Chris G. Trapp' <cgtrapp@grecolawyers.com>; 'Jeffrey Schieber' <jschieber@twsny.org>
Cc: 'Joseph Trapp' <JTrapp@westseneca.gov>; 'Gary Dickson' <gdickson@westseneca.gov>; 'Amelia Greenan'

<agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

Just following up on the below. If the Town has reached a conclusion on either of the issues discussed, I would appreciate an update. If the Town maintains its prior position, I would also appreciate the issuance of a formal written determination so that my client may timely pursue any available administrative remedies.

Thank you, and I look forward to hearing from you.

Best,

C.

From: Auerbach, Corey A.
Sent: Sunday, July 5, 2026 8:55 PM
To: Chris G. Trapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

Thank you for your response. I appreciate your reference to discussions within the municipal bar. Having served as Associate Counsel to the Association of Towns of the State of New York in another life, I certainly appreciate the importance of preserving municipal zoning authority. I simply do not believe that is the issue presented here.

My firm represents the prevailing petitioner in the attached case, *1086 OCR LLC v. Town of Riverhead Zoning Board of Appeals*, which squarely addressed the issues we have been discussing. Because you asked whether there was authority to the contrary, I thought you would find the decision, together with OCM's June 2025 guidance regarding local law preemption, helpful. Both are attached.

I agree that municipalities retain broad zoning authority. The question, however, is not whether the Town possesses general zoning authority. Rather, it is whether the Town may impose cannabis-specific location restrictions that are not imposed on other retail uses permitted within the same zoning district.

In *Riverhead*, the court concluded that municipalities are limited to the authority granted under the Cannabis Law and its implementing regulations. It held that cannabis-specific separation requirements beyond those authorized by State law are preempted and further held that such restrictions violate the uniformity requirement of Town Law § 262 because they single out cannabis retailers for different treatment within the same zoning district. Accordingly, the court vacated the ZBA's determination, concluding that no variance was required because the local restrictions themselves were invalid.

OCM's published guidance reaches the same conclusion. It explains that municipalities may regulate only the time, place, and manner restrictions identified in 9 NYCRR § 119.2 and expressly provides that "[i]f the municipal restrictions do not fall within the scope of § 119.2, they are preempted by the Cannabis Law and the

Cannabis Control Board regulations." It further explains that generally applicable zoning regulations remain enforceable, whereas restrictions directed specifically at cannabis businesses are preempted.

That is the dispositive distinction here. My client does not challenge the Town's authority to regulate retail uses generally. Chapter 59, however, imposes cannabis-specific adjacency and proximity requirements that do not apply to other retail uses and do not fall within the categories authorized by § 119.2.

I also respectfully disagree that any requested relief would constitute a use variance. Even assuming, solely for purposes of discussion, that the local restrictions were enforceable, the proposed use is otherwise permitted within the zoning district. The only impediment would be compliance with a cannabis-specific locational separation requirement applicable to the parcel. Under those circumstances, I believe any requested relief would be in the nature of an area variance, not a use variance.

While I remain open to further discussion, I also want to preserve my client's right to seek review before the ZBA. Accordingly, if the Town maintains that Chapter 59 renders the proposed dispensary impermissible at 1100 Southwestern Boulevard, or that the proposed use requires a use variance rather than an area variance, please arrange for the issuance of a formal written determination reflecting those positions so that my client may timely appeal to the ZBA.

Best,

C.

From: Chris G. Trapp <cgtrapp@grecolawyers.com>
Sent: Wednesday, July 1, 2026 5:17 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern

While many things dealing with cannabis are under the exclusive jurisdiction of OCM, zoning is not. It has been a common topic of discussion at the Local & State Government Law Section meetings of NYSBA over the years and something that I have discussed at length with Wade Beltramo at NYCOM and other municipal attorneys around the state. Of course, I never tell people that they cannot either seek a change in the law or challenge it in court, but without more, zoning is within the province of the Town. In the Town, there are other areas available for cannabis shops as is evident by the number in town, just not where your client wants to put one.

Of course, if you have some case law to the contrary, we would be happy to review it and we can talk further. I have no need for either side to just spend money on litigation. On your question of an area variance, while I appreciate that you will try to argue that it is an area variance because of where it is located, I will respectfully disagree because it is how your client wishes to use the property which would make it a use variance. cgt

GRECO TRAPP

Chris G. Trapp, Esq.
Greco Trapp, PLLC
1700 Rand Building
14 Lafayette Square
Buffalo, New York 14203
Tel: (716) 856-5800
Fax: (716) 856-5801
Email: cgtrapp@grecolawyers.com

****

In accordance with Internal Revenue Service Circular 230, we advise you that unless otherwise expressly stated, any discussion of a federal tax issue in this communication or in any attachment is not intended to be used, and it cannot be used, for the purpose of federal tax penalties.

****

NOTICE OF CONFIDENTIALITY

THIS TRANSMITTAL AND ACCOMPANYING DOCUMENTS ARE INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is prohibited. If you have received this communication in error, please notify us immediately by collect telephone call to the above telephone number. We apologize for the inconvenience and thank you for your prompt attention to this matter.

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Tuesday, June 30, 2026 3:43 PM
To: Chris G. Trapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern

Chris,

I wanted to follow up to see if you've had a chance to consider the issues raised in my prior email. I would appreciate any update regarding the Town's position or the appropriate process for obtaining a determination. Thank you, and I look forward to hearing from you.

Best,

C.

From: Auerbach, Corey A.
Sent: Sunday, June 14, 2026 2:55 PM
To: Chris G. Trapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Chris,

Thank you for your response. The issue is whether the Town may rely on Chapter 59's cannabis-specific proximity restrictions to prohibit an adult-use retail dispensary at 1100 Southwestern Boulevard based on adjacency to residential uses and other locally created separation requirements that are not contained in the Cannabis Law or the State's implementing regulations.

By way of brief background, my client is evaluating 1100 Southwestern Boulevard for an adult-use retail dispensary. In response to my inquiry, Jeff identified several provisions of Chapter 59 as potential impediments,

including the restriction on locations adjacent to residential uses, proximity to other listed uses, and the Town's prior treatment of similar applications. My concern is that, to the extent Chapter 59 imposes cannabis-specific location restrictions beyond those authorized by State law, those provisions are likely preempted and cannot be used to prohibit the use outright. The Cannabis Law establishes a comprehensive State licensing and regulatory scheme for adult-use cannabis businesses. Under that framework, licensing authority rests with the Cannabis Control Board and the Office of Cannabis Management. Municipalities retain limited authority to regulate the time, place, and manner of adult-use retail dispensaries, but that authority is expressly constrained. Local regulation may not be unreasonably impracticable, may not operate as a de facto prohibition, and may not conflict with the State's licensing and siting framework.

The State framework identifies the specific proximity restrictions applicable to adult-use retail dispensaries. Those include the statutory separation requirements from schools and houses of worship, the regulatory restrictions applicable to certain cannabis licensees, and the limited authority granted to municipalities to impose distance requirements from public youth facilities as defined in the OCM regulations. What the State framework does not authorize, however, is a municipal prohibition on adult-use retail dispensaries merely because a parcel is adjacent to residential use. Nor does it authorize municipalities to create broader cannabis-specific protected categories that effectively eliminate otherwise eligible commercial sites. To be clear, I am not suggesting that municipalities lack authority to regulate licensed cannabis businesses through generally applicable zoning and land use controls. Rather, my concern is with cannabis-specific proximity restrictions that exceed those authorized by State law and regulation.

This is also consistent with the recent direction of the case law and administrative treatment of local cannabis zoning restrictions. Courts and the State have been scrutinizing local cannabis regulations that go beyond ordinary time, place, and manner regulation and instead function as barriers to State licensed cannabis businesses. Local governments are not prohibited from regulating land use impacts, but they cannot use local zoning to frustrate the State licensing scheme or impose additional cannabis-specific siting restrictions that the State did not adopt. For those reasons, I believe there is a substantial preemption issue with any determination that 1100 Southwestern Boulevard is unavailable based upon the cannabis-specific proximity requirements contained in Chapter 59. Separately, assuming for purposes of discussion that those requirements are valid and enforceable, are they subject to area variance relief, or does the Town view them as absolute prohibitions?

Please let me know the Town's position. If a formal zoning interpretation or appeal is required to obtain that determination, please advise and we will proceed accordingly.

Best,

C.

From: Chris G. Trapp <cgtrapp@grecolawyers.com>
Sent: Sunday, June 14, 2026 2:17 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>; Jeffrey Schieber <jschieber@twsny.org>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Gary Dickson <gdickson@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>
Subject: 2030-1 RE: Retail Dispensary - 1100 Southwestern

Since this is the first I am hearing about any of this, what seems to be the issue and if there is an issue with the statute, precisely what is the issue? Without more information, I cannot opine on it. cgt

GRECO TRAPP

Chris G. Trapp, Esq.
Greco Trapp, PLLC
1700 Rand Building
14 Lafayette Square
Buffalo, New York 14203
Tel: (716) 856-5800
Fax: (716) 856-5801
Email: cgtrapp@grecolawyers.com

****

In accordance with Internal Revenue Service Circular 230, we advise you that unless otherwise expressly stated, any discussion of a federal tax issue in this communication or in any attachment is not intended to be used, and it cannot be used, for the purpose of federal tax penalties.

****

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From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Monday, June 8, 2026 12:46 PM
To: Jeffrey Schieber <jschieber@twsny.org>
Cc: Chris G. Trapp <cgtrapp@grecolawyers.com>; Joseph Trapp <JTrapp@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>
Subject: RE: Retail Dispensary - 1100 Southwestern

Thanks, Jeff. I appreciate you connecting me with Chris and Joe. I look forward to hearing their thoughts regarding the appropriate process and next steps.

Best,

C.

From: Jeffrey Schieber <jschieber@twsny.org>
Sent: Monday, June 8, 2026 12:42 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Cc: cgtrapp <cgtrapp@grecolawyers.com>; Joseph Trapp <JTrapp@westseneca.gov>
Subject: RE: Retail Dispensary - 1100 Southwestern

Chris/ Joe, I have included Mr. Corey Auerbach on this email as well has his questions below. It is in regards to a cannabis dispensary. I have outlines chapter 59 of the Town Code, which outlines numerous restrictions. I am not sure, which is why this is being sent to the both of you, on process.

Regards
Jeffrey Schieber
Town of West Seneca

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Monday, June 8, 2026 10:36 AM
To: Jeffrey Schieber <jschieber@twsny.org>
Subject: RE: Retail Dispensary - 1100 Southwestern

Jeff,

Thank you for the additional information. My client's preference remains the original location at 1100 Southwestern Boulevard. Based on your prior email, my understanding is that the Town's position is that a retail dispensary is not permitted at that location because of the residential uses located adjacent to and behind the parcel, as well as the other cannabis-specific location restrictions contained in Chapter 59. As a threshold matter, are any of those issues capable of being addressed through area variance relief, or is the Town's position that the use is prohibited outright?

Since our initial correspondence, I have spent some time reviewing the Cannabis Law, the implementing regulations, and the recent case law in this area. My preliminary view is that there is a substantial argument that certain of the Town's cannabis-specific proximity requirements are preempted by state law. As I read the statutory and regulatory framework, municipalities are afforded only limited authority to regulate the location of licensed cannabis businesses, and the State does not authorize cannabis-specific separation requirements from residential uses.

I certainly appreciate that you are applying the Town Code as written and do not expect you to resolve a legal challenge to the validity of the ordinance. With that in mind, would you recommend that I discuss this issue with the Town Attorney's office? Alternatively, if I need to pursue a formal appeal, can you advise regarding the appropriate process?

I appreciate your guidance regarding the most appropriate path forward.

Best,

C.

From: Jeffrey Schieber <jschieber@twsny.org>
Sent: Monday, June 8, 2026 8:00 AM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Subject: RE: Retail Dispensary - 1100 Southwestern

Residential behind the property and residential to the east of the property.

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Sunday, June 7, 2026 7:21 PM
To: Jeffrey Schieber <jschieber@twsny.org>
Subject: RE: Retail Dispensary - 1100 Southwestern

How about this location: 1492 S Southwestern Blvd?

From: Jeffrey Schieber <jschieber@twsny.org>
Sent: Tuesday, May 19, 2026 7:59 AM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Subject: RE: Retail Dispensary - 1100 Southwestern

Thank you for reaching out.
First, please review chapter 59 to the Town Code. There are many items to review:

- Prohibited locations
- Not permitted adjacent to any residential use
- There is residential behind the parcel and next to the parcel

- Some history....the Town Board entertained a different request for a dispensary in a small strip plaza with an existing convenient store in it. It was denied due to it being deemed that is a "place where children gather."
- Then, the Town Code was amended to include specifically convenient stores.
- Language was also added for "retail food establishments."
- Lastly, and I do not know if this applicable, Orchard Park School District is across the street.

These are the specific items to review.
Regards
Jeffrey

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Monday, May 18, 2026 4:44 PM
To: Jeffrey Schieber <jschieber@twsny.org>
Subject: Retail Dispensary - 1100 Southwestern

Jeff,

I hope all is well. I'm reaching out regarding the proposed retail dispensary location at 1100 Southwestern Boulevard. There has been a shifting landscape in the cannabis regulatory space over the last year, including a recent court decision further clarifying the extent of a municipality's ability to regulate cannabis uses through zoning and local land use controls.

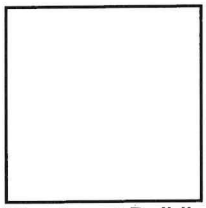
Given those developments, I would like to better understand the specific impediments to proceeding at this address and whether we can chart some sort of a path forward and what that looks like. Thanks for considering and please let me know a good time to connect.

Best,

C.

Corey A. Auerbach

Pronouns: he/him/his
Partner



The Avant Building • 200 Delaware Avenue • Suite 1200 • Buffalo, NY 14202
D: (716) 858-3801 • F: (716) 768-2801 • C: (716) 868-7263
E: CAuerbach@barclaydamon.com

www.barclaydamon.com • vCard • Profile

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Exhibit B

GRECO TRAPP PLLC
1700 Rand Building
14 Lafayette Square
Buffalo, NY 14203

FIRST-CLASS US POSTAGE PITNEY BOWES ZIP 14203 $ 000.78⁰

Barclay Damon, LLP
200 Delaware Avenue
Buffalo, New York 14202

Attn: Corey Auerbach, Esq.

14202$2150 C018

Josephine A. Greco
Chris G. Trapp

GRECO TRAPP PLLC

Joseph Greco Trapp
Jonathan D. Bogey
Richard C. Slisz, of Counsel

Service by electronic means not accepted

August 26, 2026

Barclay Damon, LLP
200 Delaware Avenue
Buffalo, New York 14202

Attn: Corey Auerbach, Esq.

Re: Town of West Seneca/Planning Board
Our File No.: 2030-1

Dear Mr. Auerbach:

Technically, since the Code Enforcement Officer rejected the proposal, the proper procedure, as you know, is to seek an interpretation of that decision from the ZBA. I plan on discussing this issue with them in advance and explaining to them about the Court decisions and the statutory limitations. Quite frankly, that is faster and less expensive than either an Article 78 proceeding or a revision to the local law, both of which would be well after the ZBA meeting at the end of September. You might make the August meeting, but I do not know their timing requirements.

If you have any questions, or if you would like to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

GRECO TRAPP, PLLC

Chris G. Trapp

CGT/rgg
cc: Hon. Gary A. Dickson, Town Supervisor
Amelia Greenan, Deputy Town Supervisor
Joseph Greco Trapp, Esq.
Diane Webber, Legal Clerk

1700 Rand Building • 14 Lafayette Square • Buffalo, NY 14203 • Tel: 716.856.5800 • Fax: 716.856.5801

Exhibit C

Auerbach, Corey A.

From: Auerbach, Corey A.
Sent: Thursday, September 17, 2026 4:22 PM
To: Joseph Trapp
Subject: RE: FOIL 2026-186
Attachments: doc20260917150000.pdf

VIA EMAIL

Town Attorney
Town of West Seneca
1250 Union Road
West Seneca, New York 14224

Re: FOIL Appeal – FOIL Reference No. 2026-00186 – 1100 Southwestern Boulevard

Dear Town Attorney:

My request sought the following two categories of records:

1. Any orders, requirements, decisions, interpretations, determinations, denials, rejections, or other records concerning 1100 Southwestern Boulevard issued or made by the administrative official charged with enforcement of the Town's zoning regulations, from May 1, 2026 through the present.

2. The current application form, notice of appeal form, or other form required to commence an appeal to the Town of West Seneca Zoning Board of Appeals from a determination of the administrative official charged with enforcement of the Town's zoning regulations.

On September 17, 2026, the Town advised that my FOIL request had been "filled" and that the attached documents were the documents requested. However, the Town's response did not include any record responsive to either of the two requests above. The only substantive record provided was correspondence from the Town Supervisor, who is not the administrative official charged with enforcement of the Town's zoning regulations.

Accordingly, I appeal the constructive denial of access to the requested records and request that the Town either provide the responsive records or certify that no responsive records can be located after a diligent search.

Thank you.

Best,

C.

From: Kate Newton <Knewton@westseneca.gov>
Sent: Thursday, September 17, 2026 3:14 PM
To: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Subject: FW: FOIL 2026-186

This message needs your attention

- This is their first email to your company.

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09/17/2026

200 Delaware Ave
Buffalo, NY 14202

RE: FOIL Reference # 2026-00186
1100 Southwestern Boulevard

FREEDOM OF INFORMATION REQUEST FILLED

Dear ,

The Freedom of Information records request you submitted to West Seneca as referenced above has been filled.

Attached you will find the documents you requested.

Kate Newton
Town Clerk | Receiver of Taxes
Town of West Seneca
1250 Union Road
West Seneca, NY 14224
716.558.3215
knewton@westseneca.gov

TOWN OF WEST SENECA
"PROUD PAST - UNLIMITED FUTURE"

From: Autumn Kopciowski <AKopciowski@westseneca.gov> **On Behalf Of** Kate Newton
Sent: Wednesday, September 16, 2026 11:00 AM
To: Kate Newton <Knewton@westseneca.gov>; cauerbach@barlcaydamon.com
Subject: FOIL 2026-186

09/16/2026

200 Delaware Ave
Buffalo NY 14202

RE: FOIL Reference # 2026-00186
1100 Southwestern Boulevard

FREEDOM OF INFORMATION REQUEST RECEIVED

Dear :

Your FOIL request dated 09/16/2026 was received by the Town of West Seneca on 09/16/2026. The information will be reviewed and I anticipate you will be contacted regarding your request by 10/14/2026.

Access to the records in whole or part will be determined in accordance with Article 89, Section 5 of the Freedom of Information Law. I will notify you when the research is complete, and if necessary, set a time and date for pick up of copies if available.

Pursuant to FOIL, a fee of $.25 per page for photocopies not exceeding 9"x14" will be charged. All other fees will be based on the material requested. You may make an appointment to view the records prior to copying to avoid cumbersome fees.

Sincerely,

Kate Newton
Town Clerk/Records Access Officer

From: noreply@civicplus.com <noreply@civicplus.com>
Sent: Tuesday, September 15, 2026 4:44 PM
To: Kate Newton <knewton@westseneca.gov>; Molly Martin <mmartin@westseneca.gov>; Autumn Kopciowski <akopciowski@westseneca.gov>
Subject: Online Form Submittal: Freedom of Information Request

Freedom of Information Request

The Town Clerk also acts as the Records Access Officer for the Town of West Seneca. All requests for access to or copies of Town records or information shall be directed to this office using the below application. The Town Clerk will respond to all requests pursuant to the Freedom of Information Law.

If you are referring to the West Seneca Police department records, please send the request to tenhagen@westsenecapolice.org Here is their website for more information: https://wspolice.com/records-department/
This office **DOES NOT** maintain records for the Court or the Police Department.

An initial response to the request shall be provided with five business days of receipt. Such acknowledgement may be that additional time is required in order to determine if such records exist and, if so, to review any responsive documents. In the event of a denial of the request for documents, an appeal, in writing must be submitted within thirty (30) calendar days of such denial.

To appeal denial of a FOIL request, please submit a written appeal via mail to Deputy Town Attorney Joseph Greco Trapp at 1250 Union Road, West Seneca, NY 14224.

Freedom of Information Law Page

Online submission of a **FOIL** may **not** be used for Police or Court Records.

For POLICE records, please contact the police records department at 716-674-3357.

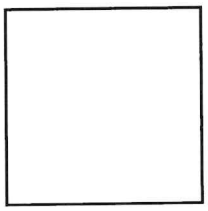
For COURT records, please contact the courts clerks at 716-558-3262.

Full Name	Barclay Damon LLP
Address	200 Delaware Ave
City	Buffalo
State	NY
Zip Code	14202
Phone Number	7168687263
Email Address	cauerbach@barlcaydamon.com
I Hereby Apply To	Obtain a copy of the following records
Records Requested	Pursuant to the New York Freedom of Information Law, Public Officers Law Article 6, I request electronic copies of the following records: Any orders, requirements, decisions, interpretations, determinations, denials, rejections, or other records concerning 1100 Southwestern Boulevard issued or made by the administrative official charged with enforcement of the Town's zoning regulations, from May 1, 2026 through the present. The current application form, notice of appeal form, or other form required to commence an appeal to the Town of West Seneca Zoning Board of Appeals from a determination of the administrative official charged with enforcement of the Town's

zoning regulations.

Please provide the requested records electronically by return email. If no records responsive to either request exist, please confirm that in writing.

Email not displaying correctly? View it in your browser.



Jeffrey Schieber

From: Gary Dickson
Sent: Wednesday, September 9, 2026 1:14 PM
To: 'Auerbach, Corey A.'; cgtrapp; Jeffrey Schieber
Cc: Joseph Trapp; Amelia Greenan; Goldberg, Ari M.; Zakarin, Benjamin R.
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Mr. Auerbach,

Your request has been addressed.

If you intend to move forward with an appeal to the ZBA, I suggest you bring your relevant documents to Code Enforcement and they will walk you through the process and get you on the agenda once you pay the fee.

Gary Dickson
Town Supervisor
1250 Union Road
West Seneca, NY 14224
Office: 716-558-3203
Cell: 716-777-2504
gdickson@westseneca.gov

This email may be subject to public disclosure per the NY Freedom of Information Law.

From: Auerbach, Corey A. <CAuerbach@barclaydamon.com>
Sent: Wednesday, September 9, 2026 10:32 AM
To: Gary Dickson <gdickson@westseneca.gov>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M. <AGoldberg@barclaydamon.com>; Zakarin, Benjamin R. <BZakarin@barclaydamon.com>
Subject: RE: 2030-1 RE: Retail Dispensary - 1100 Southwestern [IMAN-ACTIVE.FID8036735]

Jeff,

Following up on the below. At this point, I need the formal written determination so that I can file the ZBA appeal.

Thanks,

C.

From: Auerbach, Corey A.
Sent: Thursday, September 3, 2026 4:03 PM
To: 'Gary Dickson' <gdickson@westseneca.gov>; cgtrapp <cgtrapp@grecolawyers.com>; Jeffrey Schieber <jschieber@westseneca.gov>
Cc: Joseph Trapp <JTrapp@westseneca.gov>; Amelia Greenan <agreenan@westseneca.gov>; Goldberg, Ari M.

Exhibit D

Erie County On-Line Mapping Application





Legend

- Parcels

0 0.07 0.1 Miles

WGS_1984_Web_Mercator_Auxiliary_Sphere
THIS MAP IS NOT TO BE USED FOR NAVIGATION

ERIE COUNTY
DEPARTMENT OF ENVIRONMENT & PLANNING
OFFICE OF GIS

This map is a user generated static output from an Internet mapping site and is for reference only. Data layers that appear on this map may or may not be accurate, current, or otherwise reliable.

1: 4,514

Exhibit E

Chapter 59

CANNABIS

ARTICLE I
Cannabis On-Site Consumption Establishments Opt-Out

§ 59-1. Legislative intent.
§ 59-2. Statutory authority.
§ 59-3. Local opt-out.
§ 59-4. Severability.
§ 59-5. Permissive referendum/ referendum on petition.
§ 59-6. When effective.

ARTICLE II
Permitted Cannabis Uses

§ 59-7. Purpose; legislative intent.
§ 59-8. Restrictions.
§ 59-9. Security.
§ 59-10. Signage.
§ 59-11. General regulations.
§ 59-12. Definitions.
§ 59-13. Locations.

[HISTORY: Adopted by the Town Board of the Town of West Seneca as indicated in article histories. Amendments noted where applicable.]

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ARTICLE I
Cannabis On-Site Consumption Establishments Opt-Out
[Adopted 11-1-2021 by L.L. No. 9-2021]

§ 59-1. Legislative intent.

It is the intent of this article to opt out of allowing on-site cannabis consumption sites in the Town of West Seneca that would otherwise be allowed under New York State Cannabis Law Article 4.

§ 59-2. Statutory authority.

This article is adopted pursuant to New York State Cannabis Law § 131 that expressly authorizes the Town Board to adopt a local law requesting the Cannabis Control Board to prohibit the establishment of cannabis on-site consumption licenses within the jurisdiction of the Town.

§ 59-3. Local opt-out.

The Town Board of the Town of West Seneca hereby opts out of allowing on-site cannabis consumption sites from being established and operated within the Town's jurisdiction as authorized under New York State Cannabis Law Article 4.

§ 59-4. Severability.

If any clause, sentence, paragraph, subdivision, or part of this article or the application thereof to any person, firm or corporation, or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such order or judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, or part of this article or in its application to the person, individual, firm or corporation or circumstance directly involved in the controversy in which such judgment or order shall be rendered.

§ 59-5. Permissive referendum/referendum on petition.

This article is subject to a referendum on petition in accordance with New York State Cannabis Law § 131 and the procedure outlined in New York State Municipal Home Rule Law § 24.[1]

§ 59-6. When effective.

This article shall take effect immediately upon filing with the Secretary of State.

1. **Editor's Note: No valid petition for referendum was filed.**

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ARTICLE II
Permitted Cannabis Uses
[Adopted 5-12-2025 by L.L. No. 4-2025[2]]

§ 59-7. Purpose; legislative intent.

In order to promote the health, safety and general welfare of the residents of the Town of West Seneca, including property values, community character, quality of life, business climate and the prevention of crime, this article is intended to restrict cannabis uses to being located in certain zoning districts as more fully set forth herein. Further, that all cannabis uses proposed to operate within the Town shall be required to obtain a special use permit, regardless of the zoning classification, to ensure the strict compliance with these regulations.

§ 59-8. Restrictions.

Cannabis uses, including retail dispensaries, storage facilities, warehouses, cultivators, nurseries, processing facilities, distributors and distribution centers, adult-use cooperatives, adult-use microbusinesses, and delivery services and operations shall be permitted subject to the following restrictions.

A. No such cannabis uses shall be located within 1,000 feet of another existing cannabis facility set forth above, as measured from each property line.

B. No such cannabis use shall be located within 500 feet of the property line at locations of community facilities and/or where children and cannabis users are known to gather, including, but not limited to, public parks, convenience stores and other retail/food establishments which children regularly frequent, childcare centers, playgrounds, drug rehabilitation centers, medical practitioner's offices, community centers, and other dispensaries.

C. No such cannabis use facility shall be located within 500 feet of a school building or property and/or within 500 feet of a church or other similar place of worship as measured from each property line.

   (1) In the event that a school existing and authorized by the State Education Department is located on property where a place of worship also exists, no such cannabis use facility shall be located within 500 feet of the school building or property onto which the building is located.

D. No cannabis use facility shall be located in any area zoned residential in any form nor shall such facility be permitted to abut any property used for residential purposes, including, but not limited to single-family residences, duplexes, multifamily residences, or any mixed-use property that contains any residence.

E. No cannabis use facility may be located in any historic district.

F. No retail dispensaries and/or distribution centers may operate between the hours of 1:00 a.m. and 7:00 a.m.

G. Cannabis retail dispensaries approved after May 1, 2025, shall only be located in separate, stand-alone structures and shall not be located in the same building as any other retail establishment or within a plaza where other retail establishments exist.

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2. **Editor's Note: This local law also superseded former Art. II, Permitted Cannabis Uses, adopted 3-13-2023 by L.L. No. 3-2023.**

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§ 59-9. Security.

Any cannabis use set forth above, regardless of its location, shall take all necessary security measures at any facility permitted by a special use permit. Unless otherwise required as a condition of the special use permit, the following requirements must be met.

A. All facilities where a cannabis use shall be established shall provide for fencing and/or other screening or security feature acceptable to the Town Board around the perimeter of the property at the height and type established by the Planning Board.

B. All facilities where a cannabis use shall be established shall install a fully operational 4K camera system, at a minimum, sufficient to be used at night and covering all areas on the property to be so used. The system used shall be capable for recording and all recordings must be kept for a minimum of 30 calendar days.

C. (Reserved)

D. In any facility where a cannabis use is established where the general public and/or customers are invited shall provide for secure locations where cash is to be kept on the premises.

E. In the event of deliveries from the cannabis use facility, provisions shall be made for adequate security consistent with these regulations which must be provided in advance to the West Seneca Police and any local, state, and/or federal police agency. The implementation of deliveries shall require an amended special use permit and a review by the Planning Board which may impose additional security measures, including, but not limited to, security guards and safe boxes in any transport vehicle.

F. Home cultivation cannabis shall be screened from view from neighboring properties and shall otherwise be secured with appropriate fencing to deter removal by third parties.

(1) No cannabis shall be cultivated, grown, planted, and/or maintained in any front or side yard.

(2) (Reserved)

(3) Sufficient setbacks shall be maintained at all times of no less than 15 feet from any property line.

§ 59-10. Signage.

A. Only one sign advertising the business shall be permitted on the building and same shall not exceed 10% of the size of the wall upon which the sign is located. No freestanding signs, including, but not limited to A-frame signs, shall be permitted without the express prior approval of the Planning Board and Town Board, or its designee.

(1) The ability to add any additional signage shall otherwise comply with Chapter 120 of the Town Code, with the exception that any additional signage must be approved by the Town Planning Board and the Town Board. One additional sign may be permitted upon approval of the Town Board after a review by the Planning Board.

B. Any illuminated sign shall not be flashing, rotating, or otherwise have any movement whatsoever as to not distract highway traffic or disturb any adjoining and/or nearby residential properties.

C. Motor vehicles, vans, trucks, trailers, and/or similar items may be parked on the property which advertise the business beyond the name of the business in lettering not to exceed 12 inches per letter.

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Such vehicles shall not be left on the premises except in a fully enclosed garage or in the rear of the property such that the vehicle, truck, van, trailer or similar item is not visible from the street during any period of time that the cannabis use facility is not open to the public.

D. Any murals or other painting options shall be set forth in the application for a special use permit and are subject to the further reasonable requirements of the Planning Board. No paintings or murals that might distract drivers on any public highway or that could reasonably be interpreted as advertising to minors shall be permitted.

§ 59-11. General regulations.

A. Odor at the facility where a cannabis use shall be established shall be maintained to limit odors onto adjoining properties to the greatest extent possible.

B. Sufficient parking shall be provided on premises for any customers and employees such that no on-street parking shall be required or permitted.

C. Mobile sales shall be strictly prohibited. Nothing herein shall prevent licensed delivery vehicles with sufficient security features from making deliveries. All delivery operations shall be listed and described as part of the special use permit application.

D. No on-site use, consumption, sampling (other than for testing purposes), ingestion, injection, or similar functions shall be permitted at any time.

E. Any permitted use shall be pursuant to a special use permit as provided for under the Zoning Code of the Town of West Seneca.

(1) Reasonable conditions with respect to lighting, signage, hours of operation, parking, and other restrictions may be applied as part of the special use permit grant.

(2) Sufficient setbacks shall be maintained at all times of no less than 15 feet from any property line.

F. Drive-through service windows and/or customer pick-up lanes must provide sufficient security features and shall not provide for direct access between a vehicle in the drive-through and the cannabis employee.

(1) License plate recognition cameras shall be placed such that they record the rear license plate of the vehicle while the vehicle is at the drive-through window and at the entrances to the property. Such placement shall be reviewed by the West Seneca Police Department at the time of installation. Videos must be retained for a minimum of 30 days.

(a) The West Seneca Police Department shall be provided access to the monitoring system upon request. Alternatively, the cannabis use facility may provide a direct link of such camera system to the Police Department.

(2) No sliding windows may be used for drive-through access. Windows must provide sufficient protection from breaking from the outside.

(3) There shall be no direct contact between the employee and the customer. Retractable receipt/ delivery devices shall be used at all times the drive-through window is used.

(4) There shall be adequate space on any site which uses a drive-through window to provide for the stacking of vehicles to prevent vehicles from waiting on any public roadway and/or blocking

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any other sidewalk or area of ingress and egress.

G. Prior to opening any cannabis use facility, the Code Enforcement Office, Engineering Office, and the West Seneca Police Department shall have the right to inspect all premises to ensure compliance with these provisions and all other provisions of law.

(1) As a condition of the issuance of a special use permit, the Town of West Seneca and its respective departments shall have the right to periodically inspect all cannabis use facilities to ensure compliance with these provisions and all other provisions of law without the necessity of an administrative search warrant.

§ 59-12. Definitions.

CANNABIS USE FACILITY — Any location, property, building, structure, accessory structure, or facility where cannabis, cannabis products, and/or related materials are located, stored, warehoused, sold, manufactured, used, smoked, ingested, processed, grown, cultivated, bartered, used, delivered, transported, advertised, or stored, including retail dispensaries, cultivators, nurseries, processing facilities, distributors and distribution centers, adult-use cooperatives, adult-use microbusinesses, warehouses, and delivery services and operations.

COMMUNITY FACILITIES — Any location where children congregate, including, but not limited to, playgrounds, libraries, public parks, bicycle paths, convenience stores and other retail/food establishments which children regularly frequent, public pools, splash pads, athletic facilities and fields, and childcare centers.

CONSUMPTION — Any building, structure, location, property, business, or entity that is licensed by the state for the purposes of consuming, smoking, ingesting, injecting, or otherwise using cannabis, any cannabis product, and/or any cannabis related product.

COOPERATIVE — A state-issued cooperative license authorizes the acquisition, possession, cultivation, processing and sale from the licensed premises of the adult-use cooperative by such licensee to duly licensed distributors, on-site consumption sites, registered organization and/or retail dispensaries, but not directly to cannabis consumers.

CULTIVATOR — The growing, cloning, harvesting, drying, curing, grading, and trimming of cannabis plants. A state-issued cultivator's license authorizes the acquisition, possession, distribution, cultivation and sale of cannabis from the licensed premises of the adult-use cultivator to a licensed processor.

DELIVERY — A state-issued delivery license authorizes the delivery of cannabis and cannabis products by licensees, independent of another adult-use cannabis license, to cannabis consumers. Delivery licenses may not have a total of more than 25 individuals, or the equivalent thereof, providing full-time paid delivery services to cannabis consumers per week under one license.

DISTRIBUTOR — Any person who sells at wholesale any cannabis product for which a license is required. A state-issued distributor's license authorizes the acquisition, possession, distribution and sale of cannabis from the licensed premises of a licensed adult-use processor, adult-use cooperative, microbusiness, or registered organization authorized to sell adult-use cannabis to duly licensed retail dispensaries, on-site consumption sites and adult-use delivery licensees.

HOME CULTIVATION — Growing cannabis on any residential property for personal use.

MICROBUSINESS — A licensee that may act as a cannabis producer for the cultivation of cannabis, a cannabis processor, a cannabis distributor, and a cannabis retailer. A microbusiness license authorizes the limited cultivation, processing, distribution, delivery, and sale of their own adult-use cannabis and cannabis products.

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NURSERY — A licensee that produces only clones, immature plants, seeds, and other agricultural products used specifically for the planting, propagation, and cultivation of cannabis by licensed adult use cannabis cultivators, microbusinesses, cooperatives and registered organizations. A state-issued nursery license authorizes the production, sale and distribution of clones, immature plants, seeds, and other agricultural products used specifically for the planting, propagation, and cultivation of cannabis by licensed adult-use cultivators, cooperatives, microbusinesses, or registered organizations.

PROCESSOR — A licensee that extracts concentrated cannabis and/or compounds, blends, extracts, infuses, or otherwise manufactures concentrated cannabis or cannabis products. A state-issued processor's license authorizes the acquisition, possession, processing, and sale of cannabis from the licensed premises of adult-use cultivators to licensed distributors.

RETAIL DISPENSARY — Any person who sells at retail any cannabis product, to cannabis consumers. A state-issued retail dispensary license authorizes the acquisition, possession, sale and delivery of cannabis from the licensed premises of the retail dispensary by such licensee to cannabis consumers.

WAREHOUSE — Any building, structure, location, property, business, or entity where any cannabis and/or cannabis product is maintained and/or stored for any length of time.

§ 59-13. Locations.

The following zones shall be used for specific cannabis businesses as described above:

A. Zones M-1 and M-2: retail dispensary, cultivator, nursery, processor, distribution, microbusiness, delivery, warehouse.

B. Zone C-2: retail dispensary, cultivator, nursery, distribution, microbusiness, delivery.

C. Zone C-1: retail dispensary.

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Exhibit F

NEW YORK STATE | Office of Cannabis Management

AN OVERVIEW

LOCAL LAW PREEMPTION & "UNREASONABLY IMPRACTICABLE"

LOCAL LAW PREEMPTION: MEANING & IMPACT

State preemption is a concept that comes out of the New York State Constitution, Article IX, §2 and Cannabis Law §131(2). Preemption of a local law means that, where there is a conflict between a local law or rule and the law of New York State, or where a local law attempts to legislate where state law already has, State law will override and apply (i.e., control), not the local law.

TYPES OF CANNABIS BUSINESSES & LOCAL ACTION

If a municipality has enacted a local law prohibiting adult-use retail dispensary and/or on-site consumption license—known as **"opting-out"**—Cannabis Law §131 (2) still puts limitations on what kinds of local actions the municipality can take toward other types of cannabis businesses. A municipality that has opted-out cannot adopt any local law regarding the operation of licensed registered organizations (e.g. a medical cannabis operator), supply-side adult-use cannabis businesses (e.g. cultivator, processor, distributor), or cannabinoid hemp businesses.

If a municipality did not opt-out of allowing adult-use retail dispensaries and/or on-site consumption, Cannabis Law §131 (2) **does** permit local laws regarding the time, place, and manner of operation of adult-use retail dispensaries and on-site consumption licenses. However, the local law cannot make the operation of the licensed cannabis business "unreasonably impracticable." Unreasonably impracticable is a determination that the Cannabis Control Board (CCB) makes. See, 9 NYCRR, §119.2, §119.5.

HOW TO SUBMIT A 'UNREASONABLY IMPRACTICABLE' CLAIM

If an applicant, licensee, or other entity believes a municipality has passed a local law that makes the operation of the licensed cannabis business unreasonably impracticable, they can submit a claim to the CCB.

Similarly, if a local government wants the CCB to review a law, they may submit it using the same procedures.

An entity must provide the following criteria to initiate an unreasonably impracticable claim:

- Summarize the municipal law or code you believe is unreasonably impracticable.
- Provide a copy of the local ordinance or law you believe is unreasonably impracticable.
- Provide any applicable case law/studies and arguments regarding your claim.
- Provide claims with findings on why you believe the local ordinance or law is unreasonably impracticable.
- Provide supporting arguments and documentation on your claim.

Once all the criteria are gathered, send the documentation to the Office of Cannabis Management (OCM) at **municipalities@ocm.ny.gov**.

NEXT STEPS AFTER SUBMITTING AN 'UNREASONABLY IMPRACTICABLE' CLAIM

After claim submission to **municipalities@ocm.ny.gov**:

- OCM with review and analyze the claim and all supporting information;
- OCM will send the claim to the Cannabis Control Board (CCB) for a final determination;
- The CCB will review and deliberate on the claim. The Board will calendar the claim for discussion at a public Board meeting.
- The Board will vote on the claim at the Board meeting, issue an advisory opinion, and send notice to the claimant and municipality.

See, 9 NYCRR §119.5.

IF THE CANNABIS CONTROL BOARD DETERMINES THAT A LOCAL LAW IS UNREASONABLY IMPRACTICABLE

- If the municipality adopted the local law before the Board issued its advisory opinion, the advisory opinion will be presumptive evidence that the municipality has acted in violation of Cannabis Law §131 (2); and
- If the local law has been proposed, but not yet adopted, the municipality will be preempted from adopting the local law.

WHERE LOCAL GOVERNMENTS ARE PERMITTED TO ACT

The actions that constitute the permissible time, place, and manner restrictions that a municipality can impose are listed in 9 NYCRR §119.2. These are:

- Retail hours of operation;
- The visual or architectural integrity of the building if located within historical districts;
- Parking;
- Traffic control, including but not limited to pedestrian and vehicular traffic;
- Odor, pursuant to article 13-E of the Public Health Law and the Clean Indoor Air Act;
- Noise; and
- Distance requirements between a retail dispensary, microbusiness, or a Registered Organization Dispensing (ROD) and a public youth facility, if, that the distance requirement is no greater than 500 feet from the retail dispensary, microbusiness, or ROD. The distance requirements for a public youth facility do not apply to Conditional Adult-Use Retail Dispensary (CAURD) licensees, see 9 NYCRR §116, et seq.

If the municipal restrictions do not fall within the scope of § 119.2, they are pre-empted by the Cannabis Law and the Cannabis Control Board regulations. Municipal restrictions and requirements that are generic–not specific to businesses licensed by the Board–are not preempted.

Please reach out to municipalities@ocm.ny.gov for any further questions.

Exhibit G

NEW YORK STATE | Office of Cannabis Management

KATHY HOCHUL	TREMAINE WRIGHT	JESSICA GARCIA	HOPE KNIGHT	CRYSTAL J. RODRIGUEZ DABNEY	JENNIFER GILBERT JENKINS	FELICIA A.B. REID
Governor	Cannabis Control Board Chair	Board Member	Board Member	Board Member	Board Member	Acting Executive Director

November 12, 2024 **SENT VIA EMAIL**

City of Niagara Falls
745 Main Street
Niagara Falls, NY 14301

Re: Response from the New York State Cannabis Control Board under Cannabis Law Section 76(4)

Dear City of Niagara Falls:

This letter is in reference to the Cannabis Control Board's decision to approve the license for AJ's Native Wholesale, Inc. located at 118 87th Street, Niagara Falls, NY 14304.

Pursuant to Article 4 of the Cannabis Law, the Cannabis Control Board (Board) is authorized to issue registrations, licenses, and permits related to adult-use retail dispensaries, registered organization with dispensary (ROD), or for on-site consumption (License) within the State. Section 76(4) of the Cannabis Law provides that when a city, town, or village within New York State (Municipality), or a community board within New York City (Community Board), expresses an opinion (Opinion) either for or against the Board's issuance for a License authorizing retail cannabis sale within their geographic bounds, the Board shall respond in writing with an explanation as to how it considered the Opinion. Furthermore, Part 119 of Title 9 of New York Codes Rules and Regulations (9 NYCRR) proscribes the timeframe of thirty (30) days, with the option to request thirty (30) additional days, in which a Municipality or Community Board may submit their Opinion to the Board.

On or about January 17, 2023, the Board received an Opinion from your office (Office) outlining concerns on the review and issuance of a license to AJ's Native Wholesale, Inc. and the Board is responding as follows:

Pursuant to 9 NYCRR, the Board implemented distance and proximity requirements between licensed retail dispensaries, including RODs, on-site consumption sites, and microbusiness retail locations, from other similarly licensed entities, houses of worship, schools, and public youth facilities, where applicable.

The Municipality Rulemaking regulations (9 NYCRR) require:

- A proposed adult-use cannabis retail dispensary location to not be located in a municipality that opted out of allowing retail dispensary locations.
- A minimum distance of 2,000 feet between adult-use cannabis retail dispensaries in municipalities with a population less than 20,000.
- A minimum distance of 1,000 feet between adult-use cannabis retail dispensaries in municipalities with a population 20,000 or more.
- A minimum straight-line measurement of 200 feet between any cannabis dispensary and a

building exclusively used as a house of worship.
    - The two entities must be located on the same street for the 200-foot requirement to be applicable.
- A minimum straight-line measurement of 500 feet between any cannabis dispensary and a public youth facility or building exclusively used as a school.
    - The two entities must be located on the same street for the 500-foot requirement to be applicable.
    - Public Youth facility means a location or structure owned by a government or government subdivision or agency, that is accessible to the public, where the primary purpose is to provide recreational opportunities or services to children or adolescents of whom the primary population is reasonably expected to be seventeen (17) years of age or younger. Please note, in order of a location to be considered a public youth facility it must be designated as such by a local municipality via the passage of a local law.

In the attached municipality opinion, your Office raised concerns regarding distance from the proposed site, 118 87th Street, Niagara Falls, NY 14304, to a "Community Facility." The term Community Facility was replaced with Public Youth Facility in the Cannabis Adult-Use Regulations and defined as "a location or structure owned by a government or government subdivision or agency, that is accessible to the public, where the primary purpose is to provide recreational opportunities or services to children or adolescents of whom the primary population is reasonably expected to be seventeen (17) years of age or younger." Under § 119.2(a)(10) of the Regulations, "municipalities are authorized to adopt local laws and regulations governing the time, place, and manner; provided however, that such local laws and regulations shall not be unreasonably impracticable. The following activities constitute the permissible time, place, and manner restrictions that may be imposed by a municipality: distance requirements between the retail dispensary, microbusiness, or ROD and a public youth facility, provided, however, that such distance requirement is no greater than 500 feet from the retail dispensary, microbusiness, or ROD." The Board has been made aware from the Office of Cannabis Management (OCM"), that the City was informed of the previous definition use and to provide a copy of their Local Law. However, OCM has not received a copy of the revised local law. Please note, to effectively implement distance requirements from public youth facilities, OCM would require you to submit a copy of the Local Law.

At the time of review of the proposed location, OCM did not receive a copy of a local law adopted by the City establishing distance requirements from a Public Youth Facility. As such OCM did not determine any disqualify distance requirement violations. In its consideration of the proposed license, the Board reviewed and confirmed the foregoing proximity requirements in its decision to grant the licensee to the applicant.

After careful review and consideration of the opinion received from your Locality, and pursuant to the Cannabis Law and related regulations, a license was approved for AJ's Native Wholesale, Inc. located at 118 87th Street,

Niagara Falls, NY 14304.

If you have any questions regarding this letter, please contact the New York State Office of Cannabis Management at municipalities@ocm.ny.gov.

Sincerely,
Cannabis Control Board

Exhibit H

Neutral
As of: October 9, 2026 4:55 PM Z

Matter of 1086 OCR, LLC v. Town of Riverhead Zoning Bd. of Appeals

Supreme Court of New York, Appellate Division, Second Department

July 29, 2026, Decided

2025-12945, (Index No. 618489/25)

Reporter
251 A.D.3d 1054 *; 2026 N.Y. App. Div. LEXIS 4992 **; 2026 NY Slip Op 04763 ***; 2026 LX 494713; 2026 WL 2178928

In the Matter of 1086 OCR, LLC, et al., petitioners/plaintiffs-respondents, v Town of Riverhead Zoning Board of Appeals, et al., appellants, New York State Office of Cannabis Management, et al., respondents/defendants-respondents.

Prior History: *1086 OCR LLC v. Town of Riverhead Zoning Bd. of Appeals, 2025 NYLJ LEXIS 3462, 2025 LX 495423 (Sept. 16, 2025)*

Core Terms

preempt, state law, cannabis, dispensary, retail, foot, license, local law, distance, local government, preemption, adult-use, nearest, stark, void

Case Summary

Overview
Key Legal Holdings

- Town of Riverhead Code § 301-283.20(A)(1), requiring cannabis dispensaries to be 1,000 feet from schools measured property-line-to-property-line, was preempted by Cannabis Law § 72's 500-foot requirement measured center-to-center of entrances, because the town provision imposed additional restrictions beyond state-granted rights and the Legislature had specifically addressed school-distance requirements in the Cannabis Law.
- Town of Riverhead Code § 301-283.20(A)(1), (4), and (5)—regulating cannabis establishment distances from schools, spacing between establishments, and proximity to residential properties—did not violate *Town Law § 262*'s uniformity requirement, and Supreme Court erred in declaring them invalid and void on that basis.

Material Facts

- Brian Stark Enterprises held conditional retail dispensary license for property 733 feet from Riverhead High School.
- Cannabis Law § 72 prohibits dispensaries within 500 feet of schools, measured center-to-center of entrances.
- Town Code § 301-283.20(A)(1) required 1,000-foot minimum measured from property lines.
- Town Planning Department denied building permit based on 1,000-foot requirement.
- Zoning Board of Appeals denied area variance application after hearing.

Controlling Law

- Cannabis Law § 131(2).
- Cannabis Law § 72(6)(a), (c).
- *Town Law § 262*.
- *Matter of Cohen v. Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395*.
- *Glen Oaks Vil. Owners, Inc. v. City of New York, 44 NY3d 468*.

Court Rationale

Legislature expressly stated intent to occupy field of adult-use cannabis dispensary operation. Legislature specifically set school-distance requirements and measurement methods in Cannabis Law § 72. Town's 1,000-foot requirement imposed additional restrictions on state-granted rights. Companion case established Town Code provisions comply with *Town Law § 262* uniformity requirements.

Outcome
Procedural Outcome

Appellate Division modified Supreme Court judgment by deleting declaration that Town Code provisions violate Town Law § 262, affirmed preemption finding, and remitted for amended judgment declaring no Town Law § 262 violation.

LexisNexis® Headnotes

Education Law > Administration & Operation > School Safety > Illegal Third Party Activities

HN1 **School Safety, Illegal Third Party Activities**

N.Y. Cannabis § 72 prohibits a cannabis retail dispensary from locating within 500 feet of a school, as measured from the center of the nearest entrance of the premises sought to be licensed to the center of the nearest entrance of the school. § 72[6][c].

Constitutional Law > State Constitutional Operation

Governments > Local Governments > Ordinances & Regulations

Governments > Police Powers

Governments > State & Territorial Governments > Relations With Governments

HN2 **Constitutional Law, State Constitutional Operation**

Although a local government is constitutionally empowered to enact local laws relating to the welfare of its citizens through its police power, it is prohibited from exercising that power through the adoption of local laws that are inconsistent with the New York State Constitution or any general law of the state. Thus, the law-making power

conferred upon local governments, albeit broad, is limited by the preemption doctrine. State law can preempt local law in one of two ways: either through conflict preemption, which occurs when the local and state laws directly conflict, or field preemption, which occurs when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility.

Constitutional Law > State Constitutional Operation

HN3 Constitutional Law, State Constitutional Operation

The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt. Courts will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations. Once it has been determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law.

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Property

HN4 Local Governments, Ordinances & Regulations

As part of the Marihuana Regulation and Taxation Act of 2021, the Legislature enacted *N.Y. Cannabis § 131*, which expressly provides that, with one exception, all county, town, city and village governing bodies are hereby preempted from adopting any law, rule, ordinance, regulation or prohibition pertaining to the operation or licensure of adult-use cannabis licenses. However, towns, cities and villages may pass local laws and regulations governing the time, place and manner of the operation of licensed adult-use cannabis retail dispensaries and/or on-site consumption site, provided such law or regulation does not make the operation of such licensed retail dispensaries or on-site consumption sites unreasonably impracticable as determined by the board. Thus, the Legislature has expressly stated its intent to occupy the field of the operation of licensed adult-use cannabis retail dispensaries.

Constitutional Law > State Constitutional Operation

HN5 Constitutional Law, State Constitutional Operation

Although the Legislature allowed for local regulation of time, place, and manner of the operation of cannabis retail dispensaries, it has specifically set the distance of such dispensaries from a building containing a school and provided the manner in which to measure that distance. *N.Y. Cannabis § 72*. So much of Code of the Town of Riverhead, N.Y., § 301-283.20(A)(1) as purports to set that distance as 1,000 feet as measured from the property line imposes additional restrictions on rights granted by state law, is inconsistent with the State's overriding interest, and is therefore preempted by the state law.

Counsel: **[**1]** Certilman, Balin, Adler & Hyman, LLP, Hauppauge, NY (John M. Wagner of counsel), for appellants.

Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP (Martha F. Reichert and Barclay Damon, LLP, New York, NY [Benjamin R. Zakarin], of counsel), for petitioners/plaintiffs-respondents.

Letitia James, Attorney General, New York, NY (Ester Murdukhayeva and Anagha Sundararajan of counsel), for respondents/defendants-respondents.

Judges: Valerie Brathwaite Nelson, J.P., Barry E. Warhit, Phillip Hom, Lisa S. Ottley, JJ. BRATHWAITE NELSON, J.P., WARHIT, HOM and OTTLEY, JJ., concur.

Opinion

[*1054] [*1]** DECISION & ORDER

In a hybrid proceeding pursuant to *CPLR article 78* to review a determination of the Town of Riverhead Zoning Board of Appeals dated June 12, 2025, which, after a hearing, denied the application of the petitioners/plaintiffs 1086 OCR, LLC, and Brian Stark Enterprises, LLC, for an area variance, and action for declaratory relief, the appeal is from a judgment of the Supreme Court, Suffolk County (Paul M. Hensley, J.), dated September 16, 2025. The judgment granted the petition, annulled the determination, declared that so much of Code of the Town of Riverhead § 301-283.20(A)(1) as provides that a cannabis **[*1055]** retail establishment may not be located within 1,000 feet of a school **[**2]** is preempted by state law, and declared that Code of the Town of Riverhead § 301-283.20(A)(1), (4), and (5) are invalid and void as violative of *Town Law § 262*.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof declaring that Code of the Town of Riverhead § 301-283.20(A)(1), (4), and (5) are invalid and void as violative of *Town Law § 262*; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of an amended judgment, inter alia, declaring that Code of the Town of Riverhead § 301-283.20(A)(1), (4), and (5) do not violate *Town Law § 262*.

The petitioner/plaintiff Brian Stark Enterprises, LLC (hereinafter Stark Enterprises), holds a conditional retail dispensary license to operate a cannabis dispensary at certain property owned by the petitioner/plaintiff 1086 OCR, LLC (hereinafter the owner), located in the Town of Riverhead. The property is located approximately 733 feet from Riverhead High School. ***HN1*** *Cannabis Law § 72* prohibits a cannabis retail dispensary from locating within 500 feet of a school (*see id. § [***2] 72[6][a]*; former *§ 72[6]*), as measured from the center of the nearest entrance of the premises sought to be licensed to the center of the nearest entrance of the school (*see id. § 72[6][c]*). Code of the Town of Riverhead (hereinafter Town Code) § 301-283.20(A)(1) purports to set that minimum distance at 1,000 feet, measured from the nearest property lines of each affected **[**3]** parcel.

The Town of Riverhead Planning Department denied an application for a building and use permit to operate a cannabis retail dispensary at the property because it was located within 1,000 feet of a school, as measured by the Town Code. Stark Enterprises, of which the petitioner/plaintiff Brian Stark is a member, and the owner applied to the Town of Riverhead Zoning Board of Appeals (hereinafter the ZBA) for an area variance for relief from Town Code § 301-283.20(A)(1). After a hearing, in a determination dated June 12, 2025, the ZBA denied the application.

The petitioners/plaintiffs commenced this hybrid proceeding pursuant to *CPLR article 78* to review the determination and action for declaratory relief against the ZBA, the Town, the Town Board of the Town of Riverhead, and certain Town officials in their official capacities (hereinafter collectively the municipal respondents), the New York State Office of Cannabis Management, and the New York State Cannabis Control Board **[*1056]** (hereinafter the board). The petitioners sought declarations that so much of Town Code § 301-283.20(A)(1) as provides that a cannabis retail establishment may not be located within 1,000 feet of a school is preempted by state law and that Town Code § 301-283.20(A)(1), (4), and (5) violate the uniformity requirement **[**4]** of *Town Law § 262* and are void. Town Code § 301-283.20(A)(4) requires 2,500 feet between cannabis establishments and precludes more than one such

establishment in certain commercial corridors of the Town. Town Code § 301-283.20(A)(5) prohibits a cannabis establishment from locating within 1,000 feet of an existing residential property, except for properties with frontage along and located within one of five commercial corridors.

In a judgment dated September 16, 2025, the Supreme Court granted the petition, annulled the determination, declared that so much of Town Code § 301-283.20(A)(1) as provides that a cannabis establishment may not be located within 1,000 feet of a school is preempted by state law, and declared that Town Code § 301-283.20(A)(1), (4), and (5) are invalid and void as violative of Town Law § 262. In light of its declarations, the court determined that no variance was necessary. The municipal respondents appeal.

HN2 "Although a local government is constitutionally empowered to enact local laws relating to the welfare of its citizens through its police power, it is prohibited from exercising that power through the adoption of local laws that are inconsistent with the New York State Constitution or any general law of the state" (*People v Torres, 37 NY3d 256, 265, 155 N.Y.S.3d 548, 177 N.E.3d 973* [internal quotation marks omitted]). Thus, the law-making power conferred upon local governments, **[**5]** albeit broad, is limited by the preemption doctrine (*see id.*; *Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377, 546 N.E.2d 920, 547 N.Y.S.2d 627*). "State law can preempt local law in one of two ways: either through conflict preemption, which occurs when the local and state laws directly conflict, or field preemption, which occurs when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility" (*Glen Oaks Vil. Owners, Inc. v City of New York, 44 NY3d 468, 473, 248 N.Y.S.3d 460, 274 N.E.3d 245* [internal quotation marks omitted]; *see Woodbury Hgts. Estates Water Co., Inc. v Village of Woodbury, 111 AD3d 699, 700, 975 N.Y.S.2d 101*).

HN3 "The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed **[*1057]** statutory scheme may be evidence of the Legislature's intent to preempt" (*Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395, 400, 795 N.E.2d 619, 764 N.Y.S.2d 64*; *see Glen Oaks Vil. Owners, Inc. v City of New York, 44 NY3d at 473*). Courts will examine "whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations" (*Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d at 400*; *see Glen Oaks Vil. Owners, Inc. v City of New York, 44 NY3d at 473-474*). "Once it has been determined that the State has preempted an entire field, a local **[***3]** law regulating the same subject matter is deemed inconsistent with the State's overriding interests **[**6]** because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law" (*Glen Oaks Vil. Owners, Inc. v City of New York, 44 NY3d at 474* [internal quotation marks omitted]; *see Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 97, 518 N.E.2d 903, 524 N.Y.S.2d 8*).

HN4 As part of the Marihuana Regulation and Taxation Act of 2021, the Legislature enacted *Cannabis Law § 131(2)*, which expressly provides that, with an exception not relevant here, "all county, town, city and village governing bodies are hereby preempted from adopting any law, rule, ordinance, regulation or prohibition pertaining to the operation or licensure of . . . adult-use cannabis licenses . . . . However, towns, cities and villages may pass local laws and regulations governing the time, place and manner of the operation of licensed adult-use cannabis retail dispensaries and/or on-site consumption site, provided such law or regulation does not make the operation of such licensed retail dispensaries or on-site consumption sites unreasonably impracticable as determined by the board." Thus, the Legislature has expressly stated its intent to occupy the field of the operation of licensed adult-use cannabis retail dispensaries. **HN5** Moreover, although the Legislature allowed for local regulation **[**7]** of time, place, and manner of the operation of such businesses, it has specifically set the distance of such dispensaries from a building containing a school and provided the manner in which to measure that distance (*see id. § 72[6][a], [c]*). So much of Town Code § 301-283.20(A)(1) as purports to set that distance as 1,000 feet as measured from the property line imposes additional restrictions on rights granted by state law, is inconsistent with the State's overriding interest, and is therefore preempted by the state law (*see Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d at 402-403*; *Woodbury Hgts. Estates Water Co., Inc. v Village of Woodbury, **[*1058]** 111 AD3d at*

703; Matter of Chwick v Mulvey, 81 AD3d 161, 171-172, 915 N.Y.S.2d 578). In light of this determination, we need not reach the parties' remaining contentions regarding whether regulations adopted by the board preempt the Town Code and whether such regulations were properly enacted.

As set forth in a related appeal decided herewith, Town Code § 301-283.20(A)(5) does not violate the uniformity requirement of Town Law § 262 (*see Matter of Tink & E. Co., Inc. v Town of Riverhead*, __ AD3d __ [decided herewith]). For similar reasons, we find that Town Code § 301-283.20(A)(1) and (4) comply with the uniformity requirements of Town Law § 262. Accordingly, the Supreme Court erred in declaring that Town Code § 301-283.20(A)(1), (4), and (5) are invalid and void as violative of Town Law § 262 (*see Matter of Tink & E. Co., Inc. v Town of Riverhead*, __ AD3d __).

In light of the foregoing, the Supreme Court properly **[**8]** determined that the petitioners did not need a variance to operate a cannabis establishment at the property.

BRATHWAITE NELSON, J.P., WARHIT, HOM and OTTLEY, JJ., concur.

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Exhibit I

Positive
As of: October 9, 2026 4:55 PM Z

Real Holding Corp. v. Lehigh

Court of Appeals of New York

March 24, 2004, Argued ; May 6, 2004, Decided

No. 58

Reporter
2 N.Y.3d 297 *; 810 N.E.2d 890 **; 778 N.Y.S.2d 438 ***; 2004 N.Y. LEXIS 979 ****

In the Matter of Real Holding Corp., Respondent, et al., Petitioner, v. Alan Lehigh et al., Appellants.

Prior History: [****1] Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 7, 2003. The Appellate Division affirmed a judgment of the Supreme Court, Westchester County (Francis A. Nicolai, J.), entered in a proceeding pursuant to CPLR article 78, which had granted a petition to review the respondents' determination denying petitioners' request for an area variance, annulled the determination, and remitted the matter to respondents for further proceedings.

Matter of Real Holding Corp. v. Lehigh, 304 A.D.2d 583, 756 N.Y.S.2d 893, 2003 N.Y. App. Div. LEXIS 3705 (N.Y. App. Div. 2d Dep't, 2003), affirmed.

Disposition: Order of the Appellate Division affirmed.

Core Terms

special use permit, variance, zoning, area variance, town board, waive, zoning regulation, zoning board, filling station, planning board, gasoline, modify, vest, empower

Case Summary

Procedural Posture
Appellant town zoning board of appeal (ZBA) challenged the decision of the Appellate Division (New York), which affirmed a trial court holding that granted respondent developer's petition. The developer had commenced a N.Y. C.P.L.R. art. 78 proceeding to seek annulment of the ZBA's determination and judgment directing the ZBA to hear and decide its application for area variances.

Overview

The developer had sought a variance from the ZBA to build a gasoline filling station. The ZBA concluded that it was powerless to grant an area variance from special use permit requirements absent an express grant of authority from the town board, and it denied the developer's application. The ZBA contended that N.Y. Town Law § 274-b(3) and (5) clashed and that, at most, it was permitted to grant an area variance from general zoning requirements, but not from a special use permit requirement unless express authorization to do so had been bestowed by a town board in the town's zoning code. The court disagreed and held that § 274-b(3) plainly stated that application could be made to the ZBA for an area variance in those cases where a proposed special use permit did not comply with the zoning regulations. Moreover, a ZBA was permitted to grant area variances notwithstanding any provision of the law to the contrary. As a result, the court held that the ZBA erred in determining it had no authority to grant the developer's area variance request.

Outcome
The court affirmed the order.

LexisNexis® Headnotes

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

HN1 *N.Y. Town Law § 274-b(3)* vests a zoning board of appeals with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN2 See *N.Y. Town Law § 274-b(3)*.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN3 An "area variance" is defined as the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations. *N.Y. Town Law § 267(1)(b)*.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN4 See *N.Y. Town Law § 274-b(5)*.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN5 N.Y. Town Law § 274-b is entitled "Approval of special use permits," and § 274-b(3) directs that application for an area variance may be made to a zoning board of appeals (ZBA) pursuant to N.Y. Town Law § 267-b, which supplies the procedures for a ZBA to follow when issuing an area variance. § 267-b(3). Thus, N.Y. Town Law § 274-b authorizes ZBAs to issue area variances from special use permit requirements, following the statutory procedures applicable to ZBAs in the exercise of their area variance jurisdiction. ZBAs are vested with the exclusive power to grant or deny, in the first instance, a variance from the zoning ordinances. The board of zoning appeals is a quasi-judicial body created by state law. It provides a forum for the mitigation of harsh effects which zoning laws may have in exceptional cases. Section 274-b(5) vests a town board with discretion to empower an authorized board to waive any requirement of a special use permit. The waiver authority in § 274-b(5) is broader than a ZBA's authority in § 274-b(3), which is restricted to granting area variances. The "authorized board" referred to in § 274-b(5) is the planning board or such other administrative body that the town board shall designate. § 274-b(2). In effect, § 274-b(5) allows a town board to establish one-stop special use permitting if it so chooses.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN6 Where a town board exercises its discretion under N.Y. Town Law § 274-b(5), an applicant may have two avenues to address an inability to comply with a given requirement in connection with a special use permit, but this overlap does not create discord in the Town Law or render either § 274-b(3) or (5) superfluous.

Real Property Law > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Variances

Business & Corporate Compliance > Real Property > Zoning > Regional & State Planning

Real Property Law > Zoning > Regional & State Planning

HN7 A zoning board has no authority, absent an application for a variance, to waive or modify the explicit conditions laid down in the town code for a special use permit. A zoning board of appeal has no authority to waive or modify a setback requirement for a special use permit in the guise of a variance.

Headnotes/Summary

Headnotes

Municipal Corporations -- Zoning -- Special Use Permit -- Authority to Grant Area Variance from Special Use Permit Requirements

Respondent zoning board of appeals (ZBA) had the authority to grant petitioner's request for an area variance from two distance standards for a gasoline filling station special use permit. Town Law § 274-b (3) vests a ZBA with authority to grant an area variance from any requirement in a zoning regulation, including requirements for a special use permit. This authority is clear from the plain language of the statute, and is consistent with the statutes and

case law emphasizing that ZBAs are vested with the exclusive power to grant or deny a variance from zoning ordinances.

Counsel: *Vergilis, Stenger, Roberts, Pergament & Viglotti, LLP,* Wappingers Falls (*Karen P. MacNish* and *Albert P. Roberts* of counsel), for appellant. I. This Court should look to the legislative history of Town Law § 274-b because section 274-b (3) and (5) are in apparent conflict. II. The legislative history, prior case law, and dictionary meanings of "dimensional" and "physical" support a finding that a zoning board of appeals may not grant an area variance from specific special use permit criteria without the zoning board of appeals first being granted such authority by the town board. (Matter of Knadle v Zoning Bd. of Appeals of Town of Huntington, 121 A.D.2d 447, 503 N.Y.S.2d 141; Matter of Jewish Reconstructionist Synagogue of N. Shore v Levitan, 34 N.Y.2d 827, 316 N.E.2d 339, 359 N.Y.S.2d 55; Matter of Cappadoro Land Dev. Corp. v Amelkin, 78 A.D.2d 696, 432 N.Y.S.2d 51, *54 N.Y.2d 833*; Matter of Cathedral of Incarnation v Glimm, 97 A.D.2d 409, 467 N.Y.S.2d 241; Matter of Wegmans Enters. v Lansing, 72 N.Y.2d 1000, 530 N.E.2d 1292, 534 N.Y.S.2d 372; Matter of Tandem Holding Corp. v Board of Zoning Appeals of Town of Hempstead, 43 N.Y.2d 801, 373 N.E.2d 282, 402 N.Y.S.2d 388; Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 774 N.E.2d 727, 746 N.Y.S.2d 662.) III. The Appellate Division, Second Department, erroneously determined that the Zoning Board of Appeals of the Town of Wappinger has authority to waive specific special use permit criteria enumerated in the Town's zoning code pursuant to Town Law § 274-b (3). (Matter of AA&L Assoc. v Casella, 207 A.D.2d 1012, 616 N.Y.S.2d 825; Matter of Jewish Reconstructionist Synagogue of N. Shore v Levitan, 34 N.Y.2d 827, 316 N.E.2d 339, 359 N.Y.S.2d 55; Matter of Knadle v Zoning Bd. of Appeals of Town of Huntington, 121 A.D.2d 447, 503 N.Y.S.2d 141; Wisoff v Amelkin, 123 A.D.2d 623, 506 N.Y.S.2d 778.)

Keane & Beane, P.C., White Plains (*Judson K. Siebert* of counsel), for respondent. New York State Town Law § 274-b (3) authorizes a zoning board of appeals to issue an area variance from special use permit requirements. (Matter of State of New York v Ford Motor Co., 74 N.Y.2d 495, 548 N.E.2d 906, 549 N.Y.S.2d 368; Doctors Council v New York City Employees' Retirement Sys., 71 N.Y.2d 669, 525 N.E.2d 454, 529 N.Y.S.2d 732; Majewski v Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 696 N.E.2d 978, 673 N.Y.S.2d 966; Drelich v Kenlyn Homes, 86 A.D.2d 648, 446 N.Y.S.2d 408; Dennis v Zoning Bd. of Appeals of Vil. of Briarcliff Manor, 167 Misc. 2d 555, 637 N.Y.S.2d 266; Matter of Sasso v Osgood, 86 N.Y.2d 374, 657 N.E.2d 254, 633 N.Y.S.2d 259; Matter of AA&L Assoc. v Casella, 207 A.D.2d 1012, 616 N.Y.S.2d 825.)

Judges: Opinion by Judge Read. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur.

Opinion by: READ

Opinion

[*439] [**891] [*298]** Read, J.

We are asked to decide whether Town Law § 274-b (3) **[*299]** authorizes a zoning board of appeals (ZBA) to grant area variances from special use permit requirements. For the reasons that follow, we hold that Town Law § 274-b (3) ***HN1*** vests a ZBA with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit.

I.

In 1992, Real Holding Corp. (RHC) acquired a one-half-acre parcel of land situated within a "Highway Business District" as shown on the Town of Wappinger's zoning map. This parcel had served since the mid-1960's as the site of a gasoline filling station, which closed shortly before RHC's purchase of the land. After cleaning up the property

to the satisfaction of state environmental authorities, RHC opted to develop a new gasoline filling station **[****2]** on it.

In order to undertake this proposed use, RHC was obliged by the Town Code to obtain a "gasoline filling station" special use permit from the Town Planning Board; however, RHC was unable to satisfy two distance standards for this permit. Specifically, the applicable Town Code provisions mandated 1,000 feet between a gasoline filling station and the boundary line of certain residentially zoned lands, and 2,500 feet between gasoline filling stations. In 1995, RHC asked the Town's ZBA for variance relief from these two standards. The ZBA turned RHC down in early 1996, opining that it lacked jurisdiction to waive or modify zoning requirements specific to a special use permit.

In 2000, RHC revived its campaign to reestablish a gasoline filling station on the property by applying to the Planning Board for a special use permit. The Planning Board denied the application for failure to conform with several zoning requirements, including the two distance standards for the special use permit, and advised RHC to seek variances from the ZBA.

RHC requested the necessary variances, and the ZBA voted to entertain the application. After several months of review, however, the ZBA concluded **[****3]** that it was powerless to grant an area variance from special use permit requirements absent an express grant of authority therefor from the Town Board. Accordingly, on June 19, 2001, the ZBA denied RHC's application.

RHC then commenced this *CPLR article 78* proceeding to seek annulment of the **[**892]** **[***440]** ZBA's determination and a judgment directing the ZBA to hear and decide its application for area variances. Supreme Court granted RHC's petition and remitted the matter to the ZBA for further proceedings, holding that **[*300]** *Town Law § 274-b (3)* explicitly authorizes a ZBA to grant area variances from special use permit requirements. Upon the ZBA's appeal, the Appellate Division affirmed (*304 A.D.2d 583, 756 N.Y.S.2d 893 [2d Dept 2003]*). We granted the ZBA leave to appeal, and now affirm.

II.

In the early 1990's, the Legislature authorized the Joint Legislative Commission on Rural Resources to develop recommendations for recodifying local zoning laws. In 1991, the provisions concerning ZBAs in the Town Law were substantially revised as a result (*see* L 1991, ch 692, §§ 1-4; *Town Law §§ 267-267-c*). The following year the **[****4]** Legislature enacted companion legislation, which, as relevant here, included new *Town Law § 274-b* (*see* L 1992, ch 694, § 2). This provision defines and governs approval of special use permits, a widely used zoning device previously unmentioned in state statute.

Two subdivisions of *section 274-b* come into play on this appeal. The first--*subdivision (3)*--addresses the circumstances under which application may be made to a ZBA for an area variance from special use permit requirements:

> ***HN2*** "Application for area variance. Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section two hundred sixty-seven-b of this article,* without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations" (*§ 274-b [3]*).

[**5]** The second--*subdivision (5)*--addresses the waiver of special use permit requirements:

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* ***HN3*** An "[a]rea variance" is defined as "the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations" (*Town Law § 267 [1] [b]*). Contrary to the position taken by the ZBA, the distance standards at issue here, which specify how many feet must separate a gasoline filling station from certain residentially zoned areas and from other gasoline filling stations, are clearly "dimensional or physical requirements" subject to area variance relief.

> ***HN4*** "Waiver of requirements. The town board may further empower the authorized board to, when reasonable, waive any requirements for the approval, **[*301]** approval with modifications or disapproval of special use permits submitted for approval. Any such waiver, which shall be subject to appropriate conditions set forth in the ordinance or local law adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular special use permit" (*§ 274-b [5]*).

In the ZBA's view, *subdivisions (3)* and *(5)* clash and, at most, establish that a ZBA may grant an area variance from general zoning requirements, but not from a special use permit requirement unless express authorization to do so has been bestowed by a town board in the town's zoning code. We disagree.

First, *subdivision (3)* plainly states that "application may be made to the [ZBA] for an area variance" in those cases "where a proposed special use permit ... do[es] not comply with the zoning regulations. **[****6]** " **[**893]** **[***441]** Moreover, a ZBA may grant these area variances "[n]otwithstanding any provision of law to the contrary."

Next, *subdivision (3)* refers to "zoning regulations" without qualification. Nothing in the statute's language suggests that area variances for special use zoning regulations should be treated differently than area variances from general, so-called bulk, zoning requirements. To hold that a ZBA may vary certain zoning provisions only if expressly empowered to do so by the town board overlooks the entire purpose of the ZBA, which is to provide relief in individual cases from the rigid application of zoning regulations enacted by the local legislative body.

Finally, *section 274-b* is entitled ***HN5*** "Approval of special use permits," and *subdivision (3)* directs that application for an area variance may be made to the ZBA "pursuant to" *section 267-b* (entitled "Permitted action by board of appeals"), which supplies the procedures for a ZBA to follow when issuing an area variance (*see Town Law § 267-b [3]*). Thus, *section 274-b* authorizes ZBAs to issue area variances from special use permit requirements, following the statutory procedures applicable to ZBAs **[****7]** in the exercise of their area variance jurisdiction. This is not only clear, but entirely consistent with the statutes and case law emphasizing that ZBAs are "vested with the exclusive power to grant or deny, in the first instance, a variance from the zoning ordinances" (*Matter of Commco, Inc. v Amelkin, 62 N.Y.2d 260, 266, 465 N.E.2d 314, 476 N.Y.S.2d 775 [1984]*; *see also Jewish Reconstructionist Synagogue of **[*302]** N. Shore v Incorporated Vil. of Roslyn Harbor, 40 N.Y.2d 158, 162, 352 N.E.2d 115, 386 N.Y.S.2d 198 [1976]* ["(T)he board of zoning appeals is a quasi-judicial body created by State law . . . . It provides a forum for the mitigation of harsh effects which zoning laws may have in exceptional cases"]).

Nor does *subdivision (5)* in any way conflict with *subdivision (3)*, or diminish a ZBA's independent jurisdiction under *subdivision (3)*. *Subdivision (5)* vests a town board with discretion to empower an "authorized board" to waive any requirement of a special use permit. The waiver authority in *subdivision (5)* is broader than a ZBA's authority in *subdivision (3)*, which is restricted to granting area variances. The "authorized board" referred to in *subdivision (5)* is "the planning board or such other administrative body **[****8]** that [the town board] shall designate" (*see Town Law § 274-b [2]*). In effect, *subdivision (5)* allows a town board to establish one-stop special use permitting if it so chooses. As Supreme Court observed, ***HN6*** where a town board exercises its discretion under *subdivision (5)*, an applicant may have "two avenues to address an inability to comply with a given . . . requirement in connection with a special use permit," but this overlap "does not create discord in the Town Law or render either [*subdivision (3)* or *subdivision (5)*] superfluous."

Because we rely on the plain meaning of the relevant statutory text, we need not consult legislative history. Not surprisingly, however, *section 274-b*'s legislative history clearly contemplates the distinct purposes of *subdivisions (3)* and *(5)*. Specifically, Senator Cook's memorandum in support notes that this legislation was intended to "authorize[] town . . . boards to empower their planning board (or other authorized body) to waive, subject to appropriate conditions, any requirements for the approval of site plans" (Sponsor's Mem, Bill Jacket, L 1992, ch 694, at 6). In addition, "in the event local site plan or **[****9]** special use permit requirements present dimensional difficulties to a particular applicant, an area variance may be applied for to the zoning board of appeals" (*id.*).

Further, "by allowing appeal to the zoning **[**894]** **[***442]** board of appeals the bill provides applicants faced with dimensional difficulty an opportunity for administrative relief" (*id.* at 7).

Finally, *section 274-b*'s legislative history does not, as the ZBA argues, portray any intention to incorporate existing case law wholesale. Indeed, this case law was not entirely consistent (*compare* *Matter of Holy Spirit Assn. for Unification of World Christianity v Rosenfeld, 91 A.D.2d 190, 195, 458 N.Y.S.2d 920 [2d Dept 1983]* ***HN7*** ["the **[*303]** zoning board had no authority, *absent an application for a variance*, to waive or modify the explicit conditions laid down in the town code" for a special use permit (emphasis added)] *with* *Matter of Knadle v Zoning Bd. of Appeals of Town of Huntington, 121 A.D.2d 447, 503 N.Y.S.2d 141 [2d Dept 1986]* [ZBA has no authority to waive or modify a setback requirement for a special use permit in the guise of a variance]). The ZBA cites *Matter of Jewish Reconstructionist Synagogue of N. Shore v Levitan (34 N.Y.2d 827, 316 N.E.2d 339, 359 N.Y.S.2d 55 [1974])* **[****10]** for the proposition that a ZBA may not waive or modify any of the explicit conditions mandated by a town or village board for a special use permit; however, in this memorandum decision we expressly declined to address whether a ZBA might have authority to issue a variance from special use permit requirements, noting that the issue was not presented on the appeal (*id. at 829*).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur.

Order affirmed, with costs.

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Exhibit J

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Tad's Franchises, Inc. v. Pelham Manor

Supreme Court of New York, Appellate Division, Second Department

June 25, 1973

No Number in Original

Reporter
42 A.D.2d 616 *; 345 N.Y.S.2d 136 **; 1973 N.Y. App. Div. LEXIS 4096 ***

Tad's Franchises, Inc., Appellant, v. Incorporated Village of Pelham Manor et al., Respondents, and Julius J. Dworschak, Defendant

Prior History: **[***1]** In an action for a declaratory judgment and related relief, plaintiff appeals from an order of the Supreme Court, Westchester County, dated June 27, 1972, which denied plaintiff's motion for summary judgment, granted the respondents' cross motion for summary judgment and dismissed the amended complaint.

Disposition: Order reversed, on the law, with $ 20 costs and disbursements, respondents' motion denied, plaintiff's motion granted to the extent that judgment is directed to be entered declaring that (1) plaintiff may use its restaurant premises, located in a district zoned "Retail Districts", for the sale of alcoholic beverages for on-premises consumption in accordance with the terms and provisions of the Alcoholic Beverage Control Law and the provisions of the restaurant liquor license issued to it by the State Liquor Authority and (2) respondents and their building inspector shall not refuse to issue a certificate of occupancy for plaintiff's premises on the ground that the sale therein of alcoholic beverages for on-premises consumption is prohibited by the village zoning ordinance.

Core Terms

on-premises, restaurant, consume, liquor, village, sale of alcoholic beverages, retail, exclusive jurisdiction, public eating place, conforming use, liquor license, proper case, circumscribe, eligible, outright

Case Summary

Procedural Posture
In an action for a declaratory judgment and related relief, plaintiff appealed from an order of the Supreme Court, Westchester County (New York), which denied plaintiff's motion for summary judgment, granted respondents' cross motion for summary judgment, and dismissed the amended complaint.

Overview
Plaintiff brought a complaint for a declaratory judgment and related relief. The trial court denied plaintiff's motion for summary judgment, granted respondents' cross motion for summary judgment and dismissed the amended complaint. On appeal, the court held that a portion of defendant village's zoning ordinance was invalid and ineffective insofar as it allowed the use of property in "retail districts" for a restaurant or other establishment serving food and drink for on-premises consumption but, at the same time, prohibited such restaurant or other establishment from selling alcoholic beverages for on-premises consumption. The court held that once the village permitted a restaurant or other public eating place to be conducted in retail districts as a conforming use, it could not turn around and regulate such incidental or extended activities as the sale of alcoholic beverages for on-premises consumption, which activities were solely within the exclusive jurisdiction of the State Liquor Authority.

Outcome

The court held that plaintiff was entitled to use its restaurant premises for the sale of alcoholic beverages for on-premises consumption in accordance with the license previously issued to it by the State Liquor Authority.

LexisNexis® Headnotes

Business & Corporate Compliance > Governments > Agriculture & Food > Distribution, Processing & Storage of Food & Agricultural Products
Governments > Agriculture & Food > Distribution, Processing & Storage

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > State & Territorial Governments > Licenses

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN1 Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Once a village permits a restaurant or other public eating place to be conducted in retail districts as a conforming use, it cannot turn around and regulate such incidental or extended activities as the sale of alcoholic beverages for on-premises consumption, which activities are solely within the exclusive jurisdiction of the State Liquor Authority. While the latter's power to determine the locations where liquor may be sold might, in a proper case, be circumscribed by outright exclusion of the class of establishments eligible to seek liquor licenses, once these establishments are permitted to operate, the Authority's power cannot be limited.

Judges: Munder, Acting P. J., Latham, Gulotta, Christ and Benjamin, JJ., concur.

Opinion

[*616] [137] [***2]** In our opinion, paragraph (a) of subdivision 1 of section 45 of the defendant village's Zoning Ordinance is invalid and ineffective insofar as it allows the use of property, in "Retail Districts", for a restaurant or other establishment serving food and drink for on-premises consumption but, at the same time, prohibits such restaurant or other establishment from selling alcoholic beverages for **[*617]** on-premises consumption. **HN1** Once the village permits a restaurant or other public eating place to be conducted in retail districts as a conforming use, it cannot turn around and regulate such incidental or extended activities as the sale of alcoholic beverages for on-premises consumption, which activities are solely within the exclusive jurisdiction of the State Liquor Authority. While the latter's power to determine the locations where liquor may be sold might, in a proper case, be circumscribed by outright exclusion of the class of establishments eligible to seek liquor licenses, once these establishments are permitted to operate, the Authority's power cannot be limited (cf. *Town of Onondaga v. Hubbell, 19 Misc 2d 999*, affd. *9 A D 2d 1024*, revd. on other grounds *8 N Y 2d 1039*). **[***3]** Therefore, plaintiff is entitled to use its restaurant premises for the sale of alcoholic beverages for on-premises consumption, in accordance with the license previously issued to it by the State Liquor Authority; and, if all other requirements are met, the village building inspector must issue plaintiff a certificate of occupancy.

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