

**TOWN OF STUYVESANT
STATE OF NEW YORK ZONING BOARD OF APPEALS**

In the Matter of the Application
Of William Pflaum,

Applicant,

:
:Statement In
:Support of
:Appeal/Interpretation

To Permit the "Glencadia Dog Camp" to
Continue as a Home Occupation-Class 2 Use of
The Premises at 3 Rybka Road

Introduction

Applicant is the owner of the premises located at 3 Rybka Road. An aerial photo depicting the premises is annexed hereto as Exhibit "11". As more fully appears in the photo, Applicant's premise is isolated from its neighbors by fields. In fact, the residence of the closest neighbor is approximately 700 feet from Applicant's home.

Since 2005, Applicant has operated the "Glencadia Dog Camp" at his home, as a home occupation (hereinafter referred to as the "Dog Camp"). In essence, Applicant provides a service to New York City residents who seek to board their dogs in an appropriate rural setting. Applicant picks up and drops off the dogs in New York City, so there is no customer traffic to his home. As a matter of course, Applicant houses the dogs within the enclosed barn from 7:00 P.M. to 7:00 a.m. This procedure was adopted long ago in order to provide appropriate care and shelter for the dogs, as well as to eliminate the possibility that the dogs would constitute a disturbance at night and early morning. Applicant, his wife Anne, and their small children all live in the adjacent house and enjoy the peace and quiet. The family experiences no disturbances during the evening, night, and early morning hours. In 2009, when he applied for the Zoning Permit as more fully set forth below, his neighbors submitted support letters (see Exhibit "7"). In fine, prior to the complaints at issue, Applicant has operated his Dog Camp without complaint.

NOTICE OF VIOLATION AND PERMIT REVOCATION

On August 9, 2010, the Town Zoning Enforcement Officer issued a Notice to

revoke Applicant's Building & Zoning Permit dated July 21, 2009 to operate a "Dog Retreat" as a Class 2 Home Occupation; copies of the Revocation Notice dated August 9, 2010, together with Violation Notices dated December 7, 2009, and April 26, 2010, are collectively annexed hereto as Exhibit "1". The July 21, 2009 Building and Zoning Permit is annexed hereto as Exhibit "2". The within Statement is submitted to supplement Applicant's Appeal/Interpretation dated October 12, 2010 previously filed with this Board; a copy is annexed hereto as Exhibit "3". A public hearing has been scheduled to take place on November 23, 2010; the hearing notice is annexed as Exhibit "4". For the reasons, which more fully appear below, this Board should vacate the foregoing revocation notice.

PERMIT REQUIREMENTS FOR HOME OCCUPATION – CLASS 2

On January 27, 2009, the Zoning Enforcement Officer (hereinafter the "ZEO") advised Applicant that he needed a permit to run the "kennel" as a Home Occupation- Class 2; a copy of the notice and the Ordinance Section 7 criteria for the grant of a permit are collectively annexed hereto as Exhibit "5". In accord with Ordinance Section 10, Part 3, the ZEO has jurisdiction to issue a permit for a Home Occupation, subject to Planning Board approval as more fully discussed below.

Ordinance Section 2 defines "Home Occupation" as follows:

"A profession or occupation that is customarily carried out within a residence or an accessory structure by the residence thereof, that is clearly secondary to the residential use and that does not change the character of the premises as a primarily a residence. The classifications of home occupations are allowed in various zones of the Town pursuant to supplemental requirements outlined in Section 7."

Significantly, Ordinance Section 7, Part 8, item 10 requires Site Plan approval by the Planning Board as a condition to the issuance of a Class 2 Home Occupation permit, i.e. the Planning Board has jurisdiction to approve or disapprove a Home Occupation- Class 2.

PRIOR PROCEEDINGS BEFORE THE PLANNING BOARD

Upon receipt of the permit requirement notice dated January 27, 2009 (Exhibit "5"), Applicant duly filed an application for a Home Occupation Class

2 (see Exhibit "2"). Following proceedings before the Planning Board on March 23, April 27, 2009, May 18, 2009, and June 22, 2009, the Minutes of which are collectively annexed hereto as Exhibit "6", on June 22, 2009, the Planning Board unanimously approved the dog camp business. In so doing, the Board noted that it had received five (5) letters from Applicant's neighbors, who confirmed that noise was not a problem; copies of the following letters are submitted herewith and made a part hereof as Exhibit "7", to wit: Patricia Yerick dated May 17, 2009; Shanna Pickwick dated May 18, 2009; Carl Schools dated 4/28/09; Pamela Herzing dated 4/28/09; and Kate Reddy dated May 18, 2009.

Throughout the proceedings before the Planning Board, Applicant described his dog camp as follows. Applicant uses 1/3 of the existing barn to board dogs. All dogs are picked up and delivered to New York City by the Applicant. There are no signs, and no traffic generated by the business. The business is accessory to Applicant's primary use of the premises as his home. Town Law §274-a (4) grants authority to the Planning Board to impose reasonable restrictions directly related to the use of the land to mitigate demonstrable effects of the Site Plan approval (see St. Onge v. Donovan, 71 N.Y. 2d 507; see also, Sabatino v. Denison, 203 A.D. 2d 781, where the Court held that conditions, if any, must be expressly set forth on the record by the Board, and may not be based on the Applicant's verbal statements to the Board; see generally, New York Zoning Law and Practice, Salkin 4th Ed. Volume 2, §29:29). Notwithstanding its authority to impose conditions on upon Site Plan approval, the Board did not impose any conditions on the business operation and specifically, nor impose any limit on the number of dogs that Applicant could board at any given time. Applicant notes the ZEO alleges: "30-50 dogs is not noise normally produced by a residence" (see Exhibit "1", Notice dated August 9, 2010). Absent any Planning Board condition on the number of dogs allowed, however, it is manifest that the mere listing of the number of dogs in the Complaint, alone, does not serve as a basis to claim a violation. Markku Jaaskelainen of the Institute of Fundamental Studies, Massey University, New Zealand calculates that the dog camp cannot achieve the intensity of sound of dog barking noise experienced by the average resident of Stuyvesant Falls at

any time, given 1) the dynamics of the decay of sound over distance, 2) the distance between the dog camp and the nearest neighbors, 3) the average distance between residents in the hamlet, 4) the normal number of dogs in the hamlet, and 5) the current maximum number of dogs set by the dog camp. The charge that the dog camp "exceeds" the noise level of other residences, as alleged by the ZEO, is impossible according to the laws of physics.

UNDERLYING COMPLAINTS AND RESPONSE LETTERS

The ZEO has identified four (4) complaints in memorandums dated 11/24/09, 12/1/09, 4/23/10, and 7//1/10; copies are annexed hereto as Exhibit "8". In turn, after receiving notice thereof, Applicant polled several of his neighbors, who all confirmed that they did not observe that there was any noise problem associated with the Dog Camp. Copies of letters/e-memos from the following individuals are submitted for consideration by the Board, collectively as Exhibit "9", to wit: Shanna Pickwick dated 4/28/10 and 7/1/10; Pamela Herzing; John Campbell dated 4/28/10; Carol Lebe and David Reynolds dated May 2, 2010; Gretchen Wall dated 4/29/10; Gene and Jan Myszkowski dated 4/29/10; Janardan Culver dated 5/4/10.

THERE IS NO UNUSUAL NOISE IN EXCESS OF NORMAL RESIDENCE

When Applicant was advised of the current complaint, he walked throughout the relevant community to observe existing conditions relative to the existence of dogs. A summary of his findings is annexed hereto and made a part hereof as Exhibit "12". At Applicant's property line, any sounds coming from his dogs is imperceptible, and not in violation of the Ordinance.

ZEO REVOCATION OF PERMIT EXCEEDS HIS STATUTORY AUTHORITY

Ordinance §10 grants authority to the ZEO to issue a zoning permit for a home occupation, in conjunction with the Planning Board's Site plan approval, as set forth above. Ordinance §10, page 37, also grants authority to the ZEO to deem a permit invalid if the permit was invalidly issued in the first instance; there is no such allegation in the Notice of Violation (see Exhibit "1"). Ordinance §10 does not, however, otherwise give the ZEO authority to summarily revoke a permit. Here, the ZEO did not have jurisdiction to unilaterally revoke the permit on the basis of a noise complaint.

Ordinance §10, page 37-38, sets forth the following criteria for the ZEO to follow, if he determines that a violation exists:

- A. Serve, by registered mail....a notice of violation of the owner...;
- B. Require removal of such violation within 10 days...;
- C. If the alleged violation is not removed in the specified time period, the ZEO shall charge the violator with such violation of this ordinance before the Justice Court of the Town;
- D. Any person served a notice of violation...shall have the right to appeal the ZEO's Notice of Violation to the Zoning Board of Appeals pursuant to the interpretation appeal process.

Here, the ZEO failed to follow the prescribed procedure by failing to charge Applicant with a violation in Town Court. The ZEO does not have authority to invoke his own violation process, nor the right to unilaterally vacate the permit upon the basis of a noise complaint (see New York Zoning Law and Practice, Salkin 4th Ed. Volume 2, §36:04, where it is noted, "It is worth reiterating that the zoning enforcement officer's power is limited to the enforcement of local laws/ordinances as written--there is no room for discretion"). Applicant emphasizes that zoning restrictions are otherwise in derogation of property rights, and, as such, Ordinance must be strictly construed in favor of the property owner to allow the use (see e.g. Hess Realty Corp v. Planning Com'n of Town of Rotterdam, 198 AD2d 588 (3d Dept 1993); New York Zoning Law and Practice, 4th Ed., Salkin, Volume 3, §38.01) In fine, the ZEO had no authority to unilaterally revoke the permit on the basis of a noise complaint.

ENFORCEMENT PENALTIES AND PROCEDURES UNDER THE CRIMINAL PROCEDURE LAW

As set forth above, the correct procedure for the ZEO to follow if he believes that there has been a permit violation is to file a complaint in Town Court. Ordinance §10, page 38, specifies that a violation "shall be deemed misdemeanors" and the penalty is a "fine of not more than \$250 or imprisonment for a period not to exceed six (6) months, or both". Moreover, "each week's continued violation shall constitute a separate, additional violation".

Clearly, the prosecution of a violation falls under the provisions of the Criminal Procedure Law (see People v. Agatha Home for Children, 47 N.Y. 2d 46; see also, New York Zoning Law and Practice, Salkin 4th Ed. Volume 2, §36:25 to 27). In that regard, the Violation notice must allege facts rather than conclusions, and must sufficiently charge the violation claimed (see e.g. New York Zoning Law and Practice, Salkin 4th Ed. Volume 2, §36:25, citing People v. Multari, 135 Misc.2d 913). Moreover, the burden of proving all of the elements of the zoning offense is proof beyond a reasonable doubt, and the Applicant is entitled to a jury trial (see e.g. New York Zoning Law and Practice, Salkin 4th Ed. Volume 2, §36:26). In light of such constitutional protections, the ZEO is simply not authorized to side step his burden of proof, nor deprive Applicant of his jury trial right, by unilaterally revoking the permit.

ZEO FAILS TO ALLEGE SUFFICIENT FACTS TO ESTABLISH VIOLATION

Ordinance Section 7, at page 27, describes the criteria for a Home Occupation-Class 2, including item 7 thereof, which provides:

"7. No unusual appearances, noise, vibration, smoke, dust, odors, heat, glare or electrical disturbances that exceed those normally produced by a residence shall be permitted". (underscoring added)

In the December 7, 2009 Violation Notice (see Exhibit "1"), the ZEO alleges, "since November 24th, this office has received several complaints about the noise coming from the dogs on your property, and it is causing these people to loose sleep". In the April 26, 2010 Violation Notice (see Exhibit "1") the ZEO repeated the foregoing allegation and added "and it disturbs them during the day...The noise level definitely exceeds those normally produced by a normal residence". In the August 9, 2010 Violation Notice (see Exhibit "1") the ZEO alleged, " this is your third violation and 30-50 dogs is not noise 'normally produced by a residence' and the complaints continue". Significantly, there is absolutely no allegation that any of the noise was "unusual" as restricted by Section 7, item 10 above. Accordingly, on the face of the notice, the ZEO has failed to allege facts to establish that a violation of subsection 7 has occurred in the first instance. If the ZEO followed the Ordinance procedure and filed a complaint in Town Court, the alleged facts simply do not support a

claim that a violation exists (see e.g. People v. Alejandro, 70 NY2d 133, where the Court held, inter alia: "...an information which fails to contain nonhearsay allegations establishing 'if true, every element of the offense charged and the defendant's commission thereof it CPL 100.40 [1][c] is fatally defective").

ORDINANCE SECTION 7 HOME OCCUPATION-CLASS 2 ITEM 7 IS UNCONSTITUTIONAL

It is well settled that "to pass constitutional review, a zoning ordinance must be: (1) in furtherance of a legitimate governmental purpose, and (2) reasonably related to that purpose" (see Matter of Genesis of Mount Vernon v. Zoning Board of Appeals, 81 N.Y. 2d 741, at 743-744). Here, Ordinance Section 7, item 7 (at page 27 of the Ordinance) fails the second prong of the foregoing test, for it lacks objective standards and is thus not reasonably related to any legitimate governmental purpose.

As aforementioned Ordinance Section 7, at page 27, item 7 provides:

"7. No unusual appearances, noise, vibration, smoke, dust, odors, heat, glare or electrical disturbances that exceed those normally produced by a residence shall be permitted". (underscored emphasis added)

There is no objective standard or criteria, or definition for that matter, to determine what constitutes an "unusual noise". Absent definition, or objective standards, the enforcement of the ordinance is effectively and unlawfully left to the unfettered discretion of the ZEO. Accordingly, the Ordinance is void for vagueness and constitutes an improper delegation of authority, all in violation of the Due Process clauses of Article 1 §6 of the New York State Constitution and the 5th and 14th Amendments of the United States Constitution. For example, in Doe v. Buffalo, 56 N.Y. 2d 926, the Court held an Ordinance unconstitutional facially invalid, stating, inter alia:

"in effect, [the Ordinance] confers open-ended discretionary power upon the director of licenses and permits in an area potentially affecting the free exercise of First Amendment rights. AS such, this portion of the ordinance is void on its fact...Nor is plaintiff's challenge to the ordinance premature inasmuch as it is the mere existence of such unbridled discretion, as opposed to its actual use, which renders this provision of the ordinance constitutionally offensive" (underscored emphasis added);

see Bakery Salvage Corp v. City of Buffalo, 175 A.D. 2d 608 [4th Dept 1991], where the Court invalidated the "Offensive or Noxious Odors" provisions of the

Ordinance as unconstitutional under the void for vagueness doctrine due to the lack of objective standards and potential for arbitrary enforcement)

In People v. Pethick, 21 Misc. 3d 787, where the court held that an Ordinance which provided that no boat could be "stored" in the front yard was unconstitutional due to the lack of definition or criteria to determine the meaning of "stored"). In so doing, the Court stated,

"There must be an objective standard by which an enforcement officer can make a determination that an individual is in violation of a particular ordinance. On the other hand, a citizen must be in a position to reasonably determine exactly what activity is prohibited. Without those conditions in place, enforcement of such ordinance would violate a defendant's right to substantive due process..."

As applied, absent objective standards to measure appropriate noise levels, the Ordinance is unconstitutionally vague, and violates due process. Applicant notes that the Town Board has not enacted a Noise Ordinance (Town Law Section 130 (11) and (15)), so there is no objective standard to measure the noise requirement at issue.

HEARING LIMITED TO ISSUES RAISED IN THE VIOLATION NOTICE

By letter dated October 29, 2010, copy annexed as Exhibit "10", this Board, through counsel, advised that it would exercise its jurisdiction to review issues in accord with Town Law Section 267-b. This broad-brush notice violates the express provisions of the Ordinance. With respect to notice of claimed violations, Ordinance section 10 provides, inter alia: "This notice shall include the description of the alleged violation, including the section of the ordinance being violated". Here, the Violation Notices are annexed as Exhibit "1". The hearing must be limited to the issue raised in the Notice as a matter of substantive due process, i.e. whether the ZEO had authority to revoke Applicant's zoning permit.

PLANNING BOARD JURISDICTION

As aforementioned, the Planning Board has jurisdiction to issue Site Plan Approval for a Home Occupation- Class 2 (see Ordinance Sections 7 and 9). While the Planning Board has the power to impose conditions on a site plan

approval, it chose not to do so in this case. The Zoning Board does not have jurisdiction to impose conditions on a Site plan approval.

In Marx v. Zoning Board of Appeals, 137 A.D. 2d 333 [2d Dept 1988], the issue was whether the Zoning Board had the authority to modify conditions imposed by the Planning Board on a subdivision plan. The Court held "it is clear, therefore, that the power to control the subdivision of land has been entrusted to Planning Boards and not to Zoning Boards of Appeals... and the ...Zoning Board of Appeals...was without jurisdiction to waive or modify a condition imposed upon a subdivision by the Planning Board" (137 A. D. 2d 339-340).

Here, the Ordinance gives the power to control the grant of Home Occupations-Class 2 to the Planning Board in accord with Ordinance Section 7 and 9. The Ordinance does not grant authority to the Zoning Board of Appeals to regulate Home Occupations-Class 2. Notably, Ordinance Section 12 simply gives authority to the Zoning Board of Appeals to act in accord with Town Law Section 267-a and 267-b. Site Plan approval for Home Occupations are regulated by Town Law §274-a. In fine, the Zoning Board does not have jurisdiction to impose conditions on Home Occupations-Class 2.

Conclusion

The ZEO's revocation of the permit for Applicant's Dog Camp should be reversed for the following reasons, to wit:

1. The ZEO failed to allege any facts to evidence that the Zoning Permit was mistakenly issued in the first instance, and thus lacks jurisdiction to unilaterally revoke the Zoning Permit;
2. The ZEO failed to allege any facts to establish that Applicant violated the Ordinance restriction against "unusual...noise...that exceed those normally produced by a residence" (underscored emphasis added) (Ordinance Section 7, Home Occupation-Class 2, Item 7, page 27).
3. The ZEO failed to follow the enforcement procedure set forth in Ordinance Section 10;
4. The Zoning Board of Appeals does not have jurisdiction to regulate Home Occupations-Class 2, for such jurisdiction has been vested in the Planning Board in accord with Ordinance sections 7 and 9; and
5. Ordinance Section 7 Home Occupation - Class 2, item 7 is void for vagueness and effects an improper delegation of authority, in violation of the due process clause of Article 1, Section §6 of the New York State Constitution and the 5th and 14th Amendments of the Unites States Constitution.

Date: November 11, 2010

YOURS ETC.,

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