To be argued by Michael H. Sussman
10 minutes requested

Appellate Division – Third Department Case No. 532948

New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

JOSEPH AND DONNA NEMETH, VALERIE GARCIA,

Petitioners-Appellants,

–against–

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS, and ROSA KUEHN,

Respondents-Respondents.

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Appellants respectfully submit this reply brief in further support of their appeal and in response to the arguments raised in opposition by respondents K-Tooling, Kuehn Manufacturing, Co., Rosa Kuehn and the Village of Hancock Zoning Board of Appeals ("ZBA") (collectively "Respondents"). Many of Respondents' arguments echo the reasoning of Supreme Court's Decision and Order below, which Appellants addressed in their opening brief. As such, Appellants do not repeat at length herein their refutation of these arguments.

Since the Amended Petition relates back to the timely filing of the original Petition, Supreme Court's Order should be reversed. And, to the extent this Court reaches the merits, the ZBA's determination to grant the use variance was not supported by substantial evidence and was otherwise arbitrary and capricious, requiring its annulment

ARGUMENT

Point I

Perry Kuehn is not a necessary party and, even if he is, failure to name him does not warrant dismissal of the Petition.

Respondents contend that Perry Kuehn is a necessary party and that petitioners' failure to timely join him warrants dismissal. See Resp. Br. at 7-8 But this argument lacks merit and should be rejected.[1]

Under Section 1001 of the CPLR, a person must be made a party to a proceeding if (1) that person's joinder is necessary to ensure "complete relief" may be accorded between the actual parties, or (2) if the person "might be inequitably affected by a judgment in the action." N.Y. C.P.L.R. §1001(a). If such person "has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." Id. § 1001(b).

Aside from their conclusory assertion that it is "undisputed" that Perry Kuehn is a necessary party, Respondents offer no explanation as to how or why this is, other than their assertion that he was an applicant for the use variance. See Resp. Br. at 1,

[1] Notably, Respondents asserted this argument when they first moved to dismiss the original petition in 2016, arguing that *both* Rosa Kuehn and Perry Kuehn were necessary parties not timely joined. In granting their motion, the Court held only that Rosa Kuehn was a necessary party and was silent as to Perry Kuehn (R-2688-93). Respondents make hay about the fact that petitioners did not seek to join Perry Kuehn on remand from this Court; however, this Court's pervious silence on the issue, petitioner's strong argument that Perry is not a necessary party and the instructions of the Third Department and Supreme Court to join *only* Rosa Kuehn provided petitioners with a good faith basis not to seek to join Perry Kuehn on remand.

7. But this argument is both factually and legally erroneous. To be sure, Perry's name appears on the ZBA application in the space for the applicant's name, but it is clear from the remainder of the application and the ZBA's ultimate determination thereon that Perry was not an individual applicant, but rather applied in a representative capacity on behalf of Kuehn Manufacturing and K-Tooling.

Indeed, the ZBA application seeking the use variance purports to appeal a 2001 decision by the building inspector to grant certain uses to Ray Kuehn, Sr., Kuehn Manufacturing and K-Tooling and says nothing about an appeal of any determination made about Perry Kuehn in his individual capacity (R-103). Further, Perry Kuehn plainly signed the ZBA application in a representative capacity on behalf of Kuehn Manufacturing and K-Tooling (R-104 [signature block]).

Moreover, the ZBA's July 25, 2016 decision granting the use variance demonstrates the fact that Perry Kuehn was not an individual beneficiary of the variance, which benefited the property and the companies using it for manufacturing purposes. Indeed, the decision identifies the "applicant" as "Kuehn Manufacturing Company/K/Tooling" (R-34 [caption]). Further, the decision begins: "Kuehn Manufacturing Company/K-Tooling ("Kuehn") filed an application to the Zoning Board of Appeals . . . on February 5, 2016, requesting a use variance . . . with respect to the property at 396 E. Front Street" (Id.) Nowhere does the ZBA's determination identify Perry Kuehn as an *individual* applicant or beneficiary of the use variance.

Instead, his only interest is as a representative of K-Tooling and Kuehn Manufacturing, both of which have been named as respondents herein from the outset.

Finally, even if Perry Kuehn is deemed an "applicant" as they suggest, Respondents still have not identified how complete relief could not be afforded the parties or how Perry might be personally inequitably impacted by a judgment invalidating the variance, as was its burden. See N.Y. C.P.L.R. § 1001(a). Again, Perry Kuehn's interests in this matter are entirely aligned with those of K-Tooling and Kuehn Manufacturing, and he has no personal interest in the variance outside of those entities' business interests that would be inequitably affected by loss of use of the variance.[2] As such, Perry Kuehn is not a necessary party, his joinder is not required and his omission as a party hereto does not warrant dismissal of the Amended Verified Petition.[3]

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[2] We also note that Respondents' current counsel, Alan J. Pope, also represents Perry Kuehn and, in fact, appeared in this proceeding on his behalf (R-96 ¶ 1 ("I am an attorney . . . and represent Rosa Kuehn, Perry Kuehn, K-Tooling and Kuehn Manufacturing, Co.").

[3] Should this Court find that Perry Kuehn is a necessary party, which it should not, as this Court has already ruled in this case as to Rosa Kuehn, his omission is not a ground for dismissal and, instead, the Court should order him summoned to appear and allow him to assert whatever defenses he may have. See Matter of Nemeth v. K-Tooling, 163 A.D.3d 1143 (3d Dep't. 2018); See also Windy Ridge Farm v. Assessor of Town of Shandaken, 11 N.Y.3d 725, 726-27 (2008); Matter of White v. County of Sullivan, 101 A.D.3d 1552, 1553 (3d Dep't. 2012).

Point II

Appellants' filing of the Amended Petition adding Rosa Kuehn as a respondent relates back to their timely filing of the original Petition.

In their opening brief, Appellants demonstrated that Rosa Kuehn is united in interest with K-Tooling and/or Kuehn Manufacturing and that their failure to initially join her as a respondent was an inadvertent mistake, making applicable the relation back doctrine.

In opposition, Respondents first contend that Appellants have not established that Rosa Kuehn's interests as the sole landowner are united with those of the manufacturing entities which utilize her property. See Resp. Br. at 8. Specifically, they contend that the manufacturers could move or change their business model, whereas Rosa Kuehn now has a variance that runs with the land and can permit another manufacturer to operate from her property. See Id.

But this argument conflates the issues. Under the relation back test, unity of interest is a proxy for notice and an opportunity to preserve one's defenses. In other words, when a person is united in interest with a named party, such unity is what ensures that the person will not be prejudiced if added to the suit after expiration of the statute of limitations. This is why the inquiry looks to the jural relationship between the parties and their defenses. When the parties share a jural relationship in the matter, they necessarily share the same defenses, and so the later named party

is not prejudiced by late joinder. See Connell v. Hayden, 83 A.D.2d 30, 42-43 (2d Dep't. 1981). Thus, courts have held that the parties need not be affected *identically* by an adverse judgment; rather only that they will be similarly affected such that they rise or fall together. See Prudential Ins. Co. v. Stone, 270 N.Y. 154, 159 (1936).

Here, whether or not Rosa Kuehn obtained an additional benefit from the use variance beyond that obtained by the manufacturing entities, all still share the same jural relationship and defenses in this proceeding, and all would suffer the same fate from an adverse judgment – the inability to use the 800 square foot addition for manufacturing purposes. They are all also represented by the same attorney. In short, from the outset, Rosa Kuehn had notice of this proceeding and has suffered no prejudice in her ability to assert all of her defenses herein, as her defenses are identical to those asserted by the manufacturing entities, who were timely served.

Respondents next suggest that unity of interest exists only where there is vicarious liability. See Resp. Br. at 9, 10-11. But unity of interest does not depend upon vicarious liability. To be sure vicarious liability is *sufficient* to establish unity of interest, but it is not *necessary*.

Indeed, unity of interest by vicarious liability arises only in the context of tort litigation, where, absent vicarious liability, the late-served party has available at least one defense not available to the timely-served party – namely that the other party is

responsible for the alleged injury. See Connell, 83 A.D.2d at 44-45. As the Second Department explained in Connell:

> With respect to persons *whose only relationship is that of joint tort-feasors*, the courts have held that they are not united in interest. The reason for this rule is that where the proximate cause of an injury is the concurring wrongful acts or omissions of two or more persons acting independently, each is liable to plaintiff for the full amount of his damage, but the liability is only because of his own negligence and the fault of his codefendant is not imputed to him . . . . Although the liability of joint tort-feasors is "joint and several", neither is responsible for the acts or omissions of the other. Either defendant could be held legally liable or not liable without a like finding as to the other defendant . . . . In such a case the defendants' interests are not united because each will seek to show that he was not at fault and that it was the other who caused the injury

Id. at 44-45 (citations omitted) (emphasis added). Indeed, the cases Respondents cite to support their argument are tort cases involving alleged joint tortfeasors. See Zehnick v. Meadowbrook II Associates, 20 A.D.3d 793 (3d Dep't. 2005) (premises liability); Quine v. Burkhead Bros., 167 A.d.2d 683 (3d Dep't. 1990) (negligence).

But in other contexts, the absence of vicarious liability is not dispositive. See, e.g., Losner v. Cashline, L.P., 303 A.D.2d 647 (2d Dep't. 2003) (successor mortgagee united in interest with predecessor mortgagee because they share the same defenses to plaintiffs' challenge to mortgage transaction). Since the present matter is not a tort a claim against alleged joint tortfeasors, the issue of vicarious liability is irrelevant.

Next, Respondents attempt to distance Rosa Kuehn from the manufacturing entities, asserting that Perry Kuehn, not she, owns and operates Kuehn Manufacturing, and that she plays no role in that business. See Resp. Br. at 10-11. But the record demonstrates otherwise. Indeed, notwithstanding Justice Fitzgerald's recitation in her 2010 Decision and Order that Perry Kuehn owns and operates Kuehn Manufacturing, at the February 2013 ZBA hearing, Rosa Kuehn announced that *she* owns the company (R-1222 ("I'm sorry, I'm Rosa Kuehn, owner of Kuehn Manufacturing Company and K Tooling. My son, Perry is the owner of the tooling. So we [sic] both in this together."). Further, she signed the ZBA application on behalf of Kuehn Manufacturing (R-104 ["Rosa Kuehn – Kuehn Manufacturing"]).

In any event, even if she was not so affiliated with the company, she is clearly its landlord, which is a sufficient jural relationship under the circumstances presented here. In other words, as landlord of these manufacturing entities, which sought the use variance to operate from her property, Rosa Kuehn shares the same exact defenses, and stands and falls, with her manufacturing tenants.

As for the third prong of the relation back analysis, Respondents contend that Appellants' failure to initially join Rosa Kuehn was a mistake of law, which does not satisfy the relation back test. Appellants have already addressed this argument in their opening brief. See App. Br. at 15-21.

Respondents add that Appellants' mistake is even less excusable because they knew of Rosa Kuehn's existence and role since they named her as a respondent in their last Article 78 proceeding. But, if anything, this only demonstrates that Appellants' mistake here was inadvertent, not intentional. It also demonstrates that Rosa Kuehn knew or should have known that, but for Appellants' mistake, she would have been named too. Again, the inquiry must focus on *her* state of mind, not Appellants, and they need not demonstrate that their mistake was excusable.

Point III

The ZBA's determination granting the use variance was arbitrary and capricious and contrary to law.

Respondents contend that, even if Supreme Court's procedural dismissal of the Petition was erroneous, the ZBA's determination granting the use variance was proper and should not be annulled. Their arguments should be rejected.

To establish entitlement to a use variance, an applicant must demonstrate that (1) the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned; (2) the hardship results from the unique characteristics of the property; (3) the proposed use will not alter the essential character of the neighborhood; and (4) the hardship is not self-imposed. See Rehab. Supp. Servs., Inc. v. City of Albany ZBA, 140 A.D.3d 1424 (3d Dep't. 2016). Here, the applicants failed on at least three prongs, though failing any one prong dooms them, and the ZBA's ultimate determination is not supported by substantial evidence.

A. The record lacks evidence that the applicants cannot realize a reasonable rate of return without the use variance.

To establish a lack of "reasonable return," the applicant must demonstrate that "the land in question cannot yield a reasonable return if used only for purposes allowed in [the] zone." Matter of Crossroads Recreation v. Broz, 4 N.Y.2d 39, 44 (1958); See also Matter of Nemeth v. Vill. of Hancock Zoning Bd. of Appeals, 127 A.D.3d 1360, 1361 (3d Dep't. 2015). Such a showing must be "established through the submission of 'dollars and cents' proof with respect to each permitted use." Nemeth, 127 A.D.3d at 1361.

Contrary to Respondents' arguments, the record lacks substantial evidence consisting of dollars and cents proof that the applicants would be unable to realize a reasonable return if the property were used for *any* purpose permitted in the R-1 residential zone in which the subject property is located.

As an initial matter, the ZBA assessed only whether the land could yield a reasonable return under its current nonconforming manufacturing use (without the 800 square foot addition) or for a one- or two-family residential use, which are permitted in the zone. But it did not consider, and the applicants did not present any dollars and cents proof regarding, whether the property could be used for *any other use* permitted in the zone.

Notably, under the Village's Zoning Code, the property could be used, not only as a nonconforming manufacturing or residential use, but also for accessory

uses, including solar energy systems and equipment, and, with a special permit, as, *inter alia*, a group home, a retirement home, a home occupation, or a bed-and-breakfast (R-513 [Section 115-28 of the Village of Hancock Zoning Ordinance]). The applicants presented absolutely no dollars and cents proof regarding any of these other uses and the ZBA considered none. For this reason alone the use variance should be annulled.

In any event, the ZBA's determination as to rate of return with respect to the manufacturing and residential uses it evaluated is also unsupported by substantial evidence and is otherwise arbitrary and capricious. The ZBA's determination notes that it assessed scenarios "for both relocating a portion of the facility and sub-contracting a portion of the work" (R-37 [Section 1, ¶ 2]. But it does not indicate that it considered the return the property would yield if it were used as a manufacturing use *without* relocating or subcontracting out the work currently done in the addition. In other words, it does not state that it considered what the return would be if the applicants simply reduced its production and used the entirety of the property, without the addition, for manufacturing. Nor does it appear that the ZBA considered what the return would be if the Kuehn Respondents simply relocated the *entirety* of their operations, as opposed to just the portion performed in the addition. Without such assessments, the ZBA's evaluation was incomplete and insufficient.

Like its assessment of reasonable return if used for nonconforming manufacturing purposes, the ZBA's evaluation of return if the property were used for residential purposes is also insufficient to support its determination. It concluded: "Regarding use of the entire property for residential purposes, the evidence established that the property taxes *presently* exceed the potential income from use as a single-family residence, while the costs of converting the Property to a two-family residence would be prohibitively expensive given the potential income from such use" (R37 [Sec. 1, ¶ 3] [emphasis added]). But these conclusions are irrational.

First, even if the property taxes *presently* exceed the potential income for a single family, the present taxes are based upon the property's present classification as a manufacturing use; the evidence demonstrates that, upon re-classification of the property from a manufacturing use to a residential use, the assessed value of the property would likely decrease, reducing the taxes substantially such the income would exceed this expense (R-2642-43; R-2647).

The record also demonstrates that the ZBA's conclusion that the cost of converting the property to a two-family dwelling would be "prohibitively expensive given the potential income for such use," is also irrational. Indeed, even accepting the applicants' assertion that such conversation would cost just over $187,000, which seems absurd on its face given that the entire property was then assessed by

the tax department at $189,000 as a manufacturing use (R-2643), the applicants note that they would only put about $18,700 down, financing the remaining 168,600 (R-2647). The same analysis demonstrates an annual operating income of $1,559.16 if the property were used as a two family rental.

The ZBA does not explain why this is not a reasonable return, especially when considering the use and benefit respondents have made of the property for the last several decades, and, indeed, the record provides no explanation. Indeed, the return on investment must be made as against the actual "initial investment" of $18,737.70 as indicated by the analysis. And an annual return of $1,559.16 on an $18,737.70 investment is about is 8.32%, which far surpasses the return on any other reasonable investment and, indeed, likely even the stock markets. This is especially so when considering that converting the property to a two-family dwelling will likely also increase the value of the property.

Respondents contend that the "return" evaluated under this prong is not a return on *investment*, but simply a "return" in the abstract. But the inquiry is about a "rate of return," which suggests that the return is relative to something, such as the investment. Indeed, one of the cases Respondents cites actually supports this conclusion. In Jones v. Zoning Bd. of Appeals of Oneonta, 90 A.D.3d 1280 (3d Dep't. 2011), this Court concluded that an applicant satisfied its burden of establishing inability to earn a reasonable rate of return using the property solely as

permitted under the zoning ordinance. In doing so, it explained: "According to these submissions, the market value of the parcel, if subdivided and sold for residential purposes, was $16,000 (or $1,000 per acre), which is significantly less than Clark's total investment in the property of $125,000." Id. at 1282. Thus, this reasoning evaluated return on investment.

Finally, there is no evidence the ZBA considered what the return would be if the manufacturing entities simply ceased their operations and the property owner, Rosa Kuehn, continued to live in the premises and use it as a single-family owner-occupied residence, as she had for decades. The property is presumably worth substantially more than she bought it years ago, and her historical and continued use of the property has a substantial value.

In the end, the question must focus on "the value of the parcel as presently zoned, rather than upon the value that the parcel would have if the variance were granted [or, here, lost]." See Cowan v. Kern, 41 N.Y.2d 591, 597 (1977). And the fact that the property might achieve a more profitable return with the variance is insufficient. See Id. Here, the evidence presented at the ZBA hearings falls far short of constituting substantial dollars and cents proof that the applicants could not earn a reasonable return on the property if used for any purpose permitted in the zone. Thus, the ZBA's determination to grant the use variance should be annulled.

B. The purported hardship is not unique to the subject property.

In determining whether a purported hardship is unique, "[w]hat matters is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land." Douglaston Civic Assoc. v. Klein, 51 N.Y.2d 963, 965 (1980). In conducting this evaluation, however, "it is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight which is the criterion." Fasini v. Rappaport, 30 A.D.2d 588, 589 (3d Dep't. 1968). Thus, "proof of peculiarities of size or shape, inherent in the considered land, which exclude its adaptability for any permitted use, have been required." Matter of Congregation Beth El v. Crowley, 30 Misc.2d 90, 94 (Sup.Ct. Monroe Cnty. Jul. 24, 1961).

In attempting to establish the uniqueness of the applicants' asserted hardship, Respondents focus on the fact that variance relates only to the 800 square foot addition and that the properly is otherwise a nonconforming use. See Resp. Br. at 19-20. But this argument is belied and undermined by its later argument that granting the variance would not change the essential character of the neighborhood, which already consists largely of mixed uses. See Resp. Br. at 21. Since the neighborhood sits in a residentially zoned district, those other businesses and mixed

uses must necessarily be operating under a grandfathered non-conforming status. Accordingly, the non-conforming status of the subject property is not unique in this zoning district at all.

In any event, the respondents have not presented evidence that anything unique about the 800 square foot addition prevents it from being used for a permitted purpose in the district. Thus, while the plight of the applicants might be unique, such plight is not caused by a unique condition of the property.

The claimed historic manufacturing use of the footprint upon which the addition has been built, which Appellants vehemently dispute, and the nonconforming use of the overall property are irrelevant because, again, these issues go to the plight of the applicants and not the *physical characteristics* of the property, and, thus, may not be considered in the uniqueness inquiry. Likewise, even if the Kuehns had initially built the addition in reliance upon an invalid building permit, this would be of no moment. See Bright Horizon House, Inc. v. Zoning Bd. of Appeals of the Town of Henrietta, 121 Misc.2d 703, 714 (Sup.Ct. Monroe Cnty. Nov. 16, 1983) (rejecting petitioner's argument that hardship was unique because it purchased subject property only after receiving assurances from town officials that nonconforming uses for which it sought variance would be permitted because such claim goes only to plight of owner and not nature of property).

Since the record fails to establish with substantial evidence that the purported hardship is unique and the ZBA's contrary determination is arbitrary and capricious, its determination granting the use variance should be annulled.

C. The purported hardship was self-inflicted.

In seeking to establish that the applicants' purported hardship was not self-inflicted, Respondents argue principally that the addition was built in reliance upon an invalid building permit Ray Kuehn had applied for before erecting the structure. See Resp. Br. at 22-23. But this argument is unpersuasive.

First, Respondents' assertion that it "was uncontroverted that the Code Official issued the building permit," Resp. Br. at 23, is false because Appellants expressly controvert this assertion. No such permit has ever been produced, and Ray Kuehn admitted under oath that he never received a certificate of occupancy for the addition (R-1083-84), which undermines the argument that any Village officer ever issued a building permit.

Second, Perry Kuehn testified under oath that he was aware in 2001 that the property was a grandfathered manufacturing use in a residential R-1 zone (R-1949). He had been with the company since 1993, full time since 1999 (R-1947). At the time, he discussed with his father, Ray, the prospect of expanding (R-1948). In short, Perry Kuehn was integrally involved with his father's family-owned business at the time the addition was added, and he knew at that time that the property was a

nonconforming use. Thus, the building permit application, and putative granting thereof, do not demonstrate due diligence and reasonable reliance, as Respondents claim, but rather, at best, willful ignorance, which is no excuse and does not save respondents from their self-inflicted hardship.

Since any purported hardship was self-inflicted, and the ZBA's contrary determination is arbitrary and capricious, its determination granting the use variance should be annulled.

Point IV

Respondents may not relitigate this Court's ruling that the construction of the 800 square foot addition constituted an unlawful expansion of a non-conforming use.

Probably the most baffling aspect of Respondents' brief is Point IV of their Argument, wherein they contend that "there was no expansion of a non-conforming manufacturing use as a result of the construction of the 800 square foot addition on land or property which was already determined to allow for such legally non-conforming manufacturing use" (R-24).

That argument is contrary to what this Court held in its November 29, 2012 Memorandum and Order, where it concluded: "Construction of this addition violated the provision that a nonconforming building or use not be added to or enlarged unless made to conform to the residential district where it is located." Nemeth v. K-Tooling, 100 A.D.3d 1271, 1275 (3d Dep't. 2012). Indeed, this holding caused Respondents

to apply for the use variance that is the very subject of this appeal. Thus, the matter is *res judicata*, and respondents may not attempt to relitigate it herein.

CONCLUSION

For all of the foregoing reasons, and those set forth in Appellants' opening brief, Supreme Court's Order should be reversed and vacated.

Dated: Goshen, New York
August 4, 2021

Respectfully submitted,

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