FILED: APPELLATE DIVISION - 3RD DEPT 07/15/2021 03:26 PM
NYSCEF DOC. NO. 17
532948
RECEIVED NYSCEF: 07/15/2021

To be Argued by:
Alan J. Pope, Esq.
(Time Requested: 10 Minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD JUDICIAL DEPARTMENT

JOSEPH AND DONNA NEMETH, VALERIE GARCIA,

Petitioners-Appellants,

Docket No. 532948

-against-

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

Respondents-Respondents.

REPLY BRIEF FOR RESPONDENTS

Delaware County Clerk's Index No. 2016/708

Alan J. Pope, Esq.
Nathan D. VanWhy, Esq.
COUGHLIN & GERHART, LLP
Attorneys for Respondents
99 Corporate Drive
P.O. Box 2039
Binghamton, New York 13902-2039

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF FACTS

It is undisputed that the Appellants failed to name two necessary and indispensable parties to the original underlying Article 78 proceeding, namely, Rosa Kuehn who is the owner and resident of the subject real property, and her son, Perry Kuehn. (R-10; 11; 15; 17; 96; 97, 103; 104). Both were specifically named on the Use Variance application as individual applicants (R-96; 97; 103; 104; 105; 283; 294), but the Appellants simply failed to name either of them in the instant underlying Article 78 proceeding, which was procedurally fatal. (R-9; 10; 11; 15; 17; 96; 97; 103; 104; 105; 283; 294; 2792). Rosa Kuehn, as the sole owner of the real property in question, has been granted a use variance for her real property which now permanently runs with the land. (R-9-11; 74; 91; 92; 2692). Rosa Kuehn was named by Appellants in their 2013 Petition as the property owner. (R-27; 28; 794; 807; 824; 2792). This time, however, Appellants chose not to name Rosa Kuehn in the instant underlying Article 78 proceeding, and therefore, Rosa Kuehn cannot be subjected to any change in the proper grant of a use variance for her real property. (R-15-26; 2692). Perry Kuehn is the owner of the manufacturing business and he was never named in the original underlying Article 78 proceeding or even in the Amended Article 78 proceeding. (R-9-26; 58; 92; 2704-2792). As determined in Justice Fitzgerald's Decision and Order dated August 11, 2010,

Perry Kuehn has been the owner of Kuehn Manufacturing since 2000. (R-1819). No one can dispute an individual is different than a corporation.

The time in which to commence an Article 78 proceeding naming Rosa Kuehn or Perry Kuehn has long since expired. (R-9; 10; 11; 96; 97; 103; 104; 105). Even the Amended Article 78 proceeding still does not name Perry Kuehn as it procedurally and jurisdictionally should have (R-2704-2783), and the time to amend to name Perry Kuehn has long since passed under anyone's interpretation. (R-9; 10; 11; 103; 104; 105).

Rosa Kuehn's interests as the sole owner of the real estate are clearly not aligned with the interests of the other Respondents, and in fact, is completely opposite of the interests of the other Respondents, that being manufacturers and a governmental unit. (R-9; 10; 11). There is no credible or good faith argument that Rosa Kuehn's real estate ownership interests could be the same or in alignment with non-real estate owners-Respondents K-Tooling or Perry Kuehn. (R-9; 10; 11; 2692).

Apart from the above fatal procedural errors by the Appellants, this most recent Article 78 proceeding by the said Appellants Nemeths and Garcia is the latest in a string of unsuccessful lawsuits that the Appellants have filed since 2009. (R-58; 59; 97; 98; 544). The Nemeths are New York City residents who knowingly purchased their property on East Front Street in Hancock next to a fully operational

manufacturing facility, which purchase occurred after the small 800 square foot addition in issue was constructed and being used as part of the overall known manufacturing operations. (R-59; 97; 98; 544). The Nemeths' unsuccessful lawsuits include a nuisance claim against K-Tooling and the Kuehns, which was dismissed after a trial before Supreme Court Justice Fitzgerald in *Nemeth et al vs. K-Tooling et al*, Index No. 2008-0821 and 2009-1418, (August 13, 2010) (R-97; 98; 266; 444-453; 543-552) which was upheld on appeal in *Nemeth vs. K-Tooling*, 100 AD 3d 1271 (3rd Dept; 2012) (R-554-560), and an unsuccessful civil rights action against the Village of Hancock on the same underlying facts, in *Nemeth vs. Village of Hancock*, 2011 US Dist. LEXIS 1563 (NDNY Jan. 7, 2011) (appeal dismissed as well). (R-58-63).

Setting aside the fatal jurisdictional, statute of limitations and other procedural issues, the entire analysis of this Amended Article 78 proceeding is much different than the normal analysis of an Article 78 seeking to annul the grant of a Use Variance. The 800 square foot particular parcel of property in issue, as part of the overall manufacturing property, has been used for decades for manufacturing. (R-60; 61; 62). So, in beginning any analysis it must be kept in mind that Rosa Kuehn's land or real property has always had a manufacturing and residential use, including this particular 800 square foot portion of the Rosa Kuehn real property. (R-58-62).

It is simply the small 800 square foot building addition, on that subject Rosa Kuehn land which had a manufacturing use well prior to the 1983 adoption of the Village of Hancock Zoning Code, that is and must be the central issue of this particular Article 78 analysis where the Village of Hancock granted a use variance to property owner Rosa Kuehn. (R-98; 99; 100, 494-515). To reiterate, the focus is on the small eighteen (18) year old building addition, and not the entirety of the manufacturing facility itself, which was the subject of the determination made by the Village of Hancock Zoning Board of Appeals to grant the subject Use Variance. (R-110-112).

Unlike normal Use Variance applications that deal with the entirety of a particular real property, the Village of Hancock Zoning Board of Appeals was necessarily required to focus in on the Respondents' application as to whether the eighteen (18) year old previously approved 800 square foot building addition, on land that always had a manufacturing use, met the normal criteria for a Use Variance. The underlying Village of Hancock Zoning Board of Appeals, in a well reasoned unanimous Decision, determined the 800 square foot building addition, on Rosa Kuehn's real property that had always been used for manufacturing use, did, in fact, meet all of the required criteria. (R-110-112).

In or about 1983, the Village of Hancock enacted a Zoning Code. (R-544). In the 1999 version of the Village of Hancock Zoning Code, there are some relevant provisions. (R-494-515; 807-928).

Section 115-7 defines Nonconforming Use as "Use of ….. land that does not comply with the regulations for the district in which it (the land) is situated and where such use existed and/or was used legally at the time of adoption of this chapter". (R-496-505). As noted above, there really cannot be any dispute that the subject Rosa Kuehn parcel has continuously been used for manufacturing even before there was any zoning.

Section 115-14 is entitled Nonconforming uses. Again, this section of the Code makes a distinction between land and a building. As it relates to the subject Rosa Kuehn land, it states "The lawful use of any land … existing at the time of the adoption of this chapter may be continued, although such use does not conform to the provisions of this chapter". As noted above, there can be no good faith argument other than the subject Rosa Kuehn land has been continuously used as a manufacturing use for the past approximately forty years. Contrary to Appellants footnote on page 3, Respondent K-Tooling still uses the subject real property for part of its manufacturing operations.

The Appellants fail to grasp that Supreme Court Justice Fitzgerald and the Appellate Division have already determined that Rosa Kuehn's land has the rights

of a legally nonconforming manufacturing use and that all buildings on that Rosa Kuehn land are legally nonconforming. (R-554-560). It is only this small eighteen (18) year old 800 square foot addition, and nothing else, which was the reason for the application for a use variance as to this small 800 square foot addition. (R-103-109).

As this Court is well aware, the Village of Hancock Zoning Board of Appeals is given broad discretion in considering applications for variances, and judicial review is limited to whether the action taken by the Zoning Board of Appeals was arbitrary, capricious or an abuse of discretion. The Zoning Board of Appeals gave more than ample opportunity for all persons to present their proof at the two hearing dates, the resulting Zoning Board of Appeals Decision was well reasoned, and it is respectfully submitted that said Zoning Board of Appeals Decision should be upheld in all regards. (R-114-116, R-110-112).

POINT I
THE AMENDED PETITION SHOULD BE DISMISSED ON THE BASIS OF CPLR 1001, 1003 AND 7802 FOR FAILURE TO NAME TWO NECESSARY PARTIES, NAMELY ROSA KUEHN AND PERRY KUEHN

It cannot be controverted that Rosa Kuehn and Perry Kuehn were named applicants on the Use Variance application before the underlying Village of Hancock Zoning Board of Appeals. The Appellants failed to name either of them as individuals in the original Article 78 Petition which is procedurally fatal. Even now, with the Amended Article 78 proceeding, the Appellants have failed to name Perry Kuehn, which is fatal.

Rosa Kuehn, as the sole owner of the real property in question, was granted a use variance by the Zoning Board of Appeals about five (5) years ago. The Appellants chose not to originally name Rosa Kuehn in the instant Article 78 proceeding, and therefore, she cannot be subjected to any change in the proper grant of a use variance for her real property. The time in which to commence an Article 78 proceeding naming Rosa Kuehn or Perry Kuehn has long since expired.

Even though Rosa Kuehn was served with the Amended Article 78 Petition on March 2, 2020, she did not consent to jurisdiction and she did not waive any of her rights to contest jurisdiction or to raise the statute of limitations defense. Rosa Kuehn has preserved those defenses and has raised those defenses as part of her motion to dismiss this Amended Article 78 proceeding.

Unlike Rosa Kuehn, Perry Kuehn has never been named, or served, or in any way did he consent to jurisdiction. Perry Kuehn is a necessary party that was never named or served in the past almost five (5) years. This fact alone dictates a dismissal of the underlying Amended Article 78 proceeding, and this appeal.

Furthermore, Rosa Kuehn's interests as the sole land owner are completely different from those of K-Tooling or Kuehn Manufacturing as manufacturers. Even though Perry Kuehn was not named, his interests as an owner of either manufacturing company is completely different from the land and the building owner – Rosa Kuehn. The Respondent manufacturers could move to a new location, or change their business model. Rosa Kuehn, on the other hand, as the sole land and building owner, needs to maintain and continue the Use Variance she obtained so that she could permit another manufacturer to operate on her property as the Use Variance allows because it runs with the land.

The Appellants argument about the "relation back" doctrine fails. That "relation back" doctrine certainly cannot apply to Perry Kuehn who has never been named or served in either of the two Article 78 Petitions, especially considering almost five (5) years have elapsed since the Use Variance was granted by the Village of Hancock Zoning Board of Appeals.

The "relation back" doctrine permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of

amendment, only if the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is completely united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her. See *Matter of Sheri Sullivan v Planning Board of the Town of Mamakating*, 151 AD 3d 1518 (3rd Dept; 2017); *Matter of Emmett v Town of Edmeston*, 2 NY 3d 817 (2004); *Buran v Coupal*, 87 NY 2d 173 (1995); *Matter of Sullivan County Patrolmen's v PERB*, 179 AD 3d 1270 (3rd Dept; 2020); *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 AD 3d 1474 (3rd Dept; 2014).

There is no question that the Appellants failed before the Court below to assert uncontested factual issues, much less present the necessary evidentiary proof, to have the relation back doctrine even apply. Supreme Court below properly determined that Appellants had failed to establish prong #2 – unity in interest. The law is clear – "the unity of interests test will not be satisfied unless the parties share precisely the same jural relationship." *Zehnick v. Meadowbrook II Assoc.,* 20 AD 3d 793 (3rd Dept; 2005) (emphasis added). "[T]he unity of interest test will not be satisfied . . . unless the original defendant and new party are 'vicariously liable for the acts of the other.'" *Id*. *citing Quine v. Burkhard Bros.*, 167 AD 2d 683, 684 (3rd Dept 1990). Clearly, Rosa Kuehn does not have the

same jural relationship with the manufacturers and is clearly not vicariously liable for the acts of the two manufacturing companies.

As noted in the Respondents' papers below, Rosa Kuehn's interests as a land owner with a properly granted Use Variance that runs with the land is not the same or united with the Respondent manufacturers or the Respondent Village of Hancock. For over a decade of litigation, the Appellants have consistently taken a position that Kuehn Manufacturing was owned and operated by Ray Kuehn, now deceased. Appellants have no proof that Kuehn Manufacturing is conducting any business, much less their speculation that Rosa Kuehn is somehow operating a manufacturing business. As determined in Justice Fitzgerald's Decision and Order dated August 11, 2010, Perry Kuehn has been the owner of Kuehn Manufacturing since 2000. (R-1819). Appellants did not appeal that factual finding and cannot contest it now a decade later. Appellants' speculation leap in logic is not evidentiary proof and cannot supersede what Justice Fitzgerald has already determined as a matter of law for this case. Likewise, Appellants' citation to *Prudential Ins. Co. v Stone*, 270 NY 154 (1936) is misplaced. That case involved an insurance policy and what the Court had to determine was the issue of "joint contractors". The relevant issue for determining prong #2 is whether Rosa Kuehn is vicariously liable for the acts, omissions and liabilities of K-Tooling, which, of course, Rosa Kuehn is not. The same is true of Kuehn Manufacturing, in that,

Rosa Kuehn had nothing to do with obtaining the permit or constructing the 800 foot addition that was the subject to the underlying Use Variance, and as determined by Justice Fitzgerald, Perry Kuehn has been the owner of Kuehn Manufacturing since 2000. *Facse v Smithen,* 188 AD 3d 1542 (3rd Dept; 2020).

Even though there are some very limited commonalities among Rosa Kuehn and the manufacturing Respondents, the Appellants failed to clearly demonstrate evidence to satisfy the second prong. As the sole real property owner, Rosa Kuehn could not possibly be vicariously liable for the liabilities of these two separate tenant manufacturers or for the liabilities of the Village of Hancock Zoning Board of Appeals. Rosa Kuehn simply owns the property on which the separate corporate manufacturing tenants operate their businesses. Rosa Kuehn is not an officer, director or manager of those manufacturing tenants. Appellants go at length in trying to analyze the similarity of the "defenses" between Rosa Kuehn and the manufacturing Respondents, but completely fail to mention how Rosa Kuehn could possibly be in complete unity of interest with the two separate manufacturing tenants to be vicariously liable with said manufacturers, and completely fail to mention or establish how Rosa Kuehn is united in interest with the Hancock Zoning Board of Appeals. Regardless of some simple similarity of Rosa Kuehn's "defenses" with the manufacturing Respondents, Appellants completely failed to demonstrate how Rosa Kuehn was the exact same jural relationship with the

manufacturers or how Rosa Kuehn would be vicariously liable as a matter of law for the acts of the other Respondents to satisfy the second prong of this doctrine. See *Ayuda Re Funding, LLC, supra; Zehnick, supra; Belair Care ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 AD 3d 1263, 1269 (3rd Dept. 2018).

Furthermore, the Appellants can never sustain the proof necessary for prong #3 because the fatal error was caused only by the Appellants' law firm. This mistake of law continues even to the present, in that, the Appellants still have not named or served Perry Kuehn who was clearly an applicant on the Use Variance. As recently held by this Court, a failure to act on knowledge that the Appellants herein clearly had prior to the expiration of the statute of limitations is not the type of mistake contemplated under the relation back doctrine. *Facse v Smithen,* 188 AD 3d 1542 (3rd Dept; 2020); *Branch v Community Coll. of the County of Sullivan*, 148 AD 3d 1411 (3rd Dept; 2017). Appellants' attorneys were well aware and had the specific knowledge that Rosa Kuehn was an indispensable sole property owner party, but failed to take action within the statute of limitations. See also *Contos v Mahoney*, 36 AD 3d 648 (2nd Dept; 2007). The Appellants' attorneys knew this because they named Rosa Kuehn as the sole property owner in their prior Article 78 litigation involving the grant of a use variance. Accordingly, as Appellants cannot demonstrate the applicability of the relation back doctrine,

the Decision and Order below must be affirmed. *Windy Ridge Farms v Assessor of the Town of Shandaken*, 45 AD 3d 1099, aff'd 11 NY 3d 725 (2008).

POINT II
THE VILLAGE OF HANCOCK ZONING BOARD OF APPEALS HAD BROAD DISCRETION IN CONSIDERING VARIANCE APPLICATIONS

It is well recognized in New York that local zoning boards have broad discretion in considering applications for variances. Judicial review of local zoning board decisions is limited to whether the action taken by the local zoning board of appeals was arbitrary, capricious, or an abuse of discretion. *Matter of Isfrah vs. Utschig*, 98 NY 2d 304 (2002); *Matter of Sasso vs. Osgood*, 86 NY 2d 374 (1995). Accordingly, on judicial review, the determination of a local zoning board should be sustained if it has a rational basis and is not arbitrary or capricious. *Wen Mei Lu v City of Saratoga Springs*, 162 AD 3d 1291 (3rd Dept; 2018); *Matter of Cooperstown Eagles, LLC v Village of Cooperstown Zoning Bd of Appeals*, 161 AD 3d 1433 (3rd Dept; 2018); *Rehabilitation Support Services, Inc. v. City of Albany Bd of Zoning Appeals,* 140 AD 3d 1424 (3rd Dept; 2016); *Fund for Lake George, Inc. v. Town of Queensbury Zoning Board of Appeals,* 126 AD 3d 1152 (3rd Dept; 2015); *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta*, 90 AD 3d 1280 (3rd Dept; 2011).

The Court of Appeals has consistently held that the scope of judicial review in a CPLR Article 78 proceeding of a determination by a zoning board is limited to an examination of whether the determination has a rational basis and is supported by substantial evidence. (see *Matter of Fuhst vs. Foley,* 45 NY 2d 441 (1978); *Matter of New Venture Realty vs. Fennell,* 210 AD 2d 412 (2nd Dept; 1994). In deciding an Article 78 proceeding, the Supreme Court may not weigh the evidence or reject the choice made by the zoning board "where the evidence is conflicting and room for choice exists". *Matter of Stark Restaurant vs. Boland,* 282 NY 256 (1940). See also *Sundial Asphalt Co., Inc. vs. Dark,* 294 AD 2d 585 (2nd Dept; 2002).

Courts who review the decisions of local zoning boards must refrain from substituting their own judgment for the reasoned judgment of a zoning board, even if the court would have decided the matter differently in the first instance. *Matter of Pecoraro vs. Board of Appeals of Town of Hempstead,* 2 NY 3d 608 (2004); *Matter of Sasso vs Osgood,* 86 NY 2d 374 (1995); *Matter of Cowan vs. Kern*, 41 NY 2d 591 (1977); *Smelyansky vs. Zoning Bd of Appeals of Town of Bethlehem,* 83 AD 3d 1267 (3rd Dept; 2011).

Except in the rare situation where the only issue is one of pure legal interpretation, a zoning board's interpretation is entitled to great deference and will

not be disturbed where it is not shown by clear proof to be irrational or unreasonable. *Avramis vs. Sarachan,* 97 AD 3d 874 (3rd Dept; 2012).

In the situation at hand, the Village of Hancock Zoning Board of Appeals allowed proof to be evenly and fairly presented by all interested persons over two separate hearing dates. The Zoning Board of Appeals then discussed and determined in public each of the four elements applicable to a use variance. In all cases, the Village of Hancock Zoning Board of Appeals determinations on each of the four elements was unanimous.

The written Decision of the Village of Hancock Zoning Board of Appeals was based on the proof presented, was well reasoned, was rationally based, and is entitled to great deference. The Decision and Order below which dismissed the Appellants' Amended Petition must be affirmed. There is no basis to bifurcate the appellate process. The underlying Zoning Board of Appeals, which granted the Use Variance, should be given great deference, especially considering the overall litigation has extend over a decade.

POINT III
EACH OF THE FOUR NECESSARY ELEMENTS FOR A USE VARIANCE WERE PRESENTED AS PART OF THE RECORD AND SERVED AS A RATIONAL BASIS FOR THE ZONING BOARD OF APPEALS GRANT OF THE VARIANCE

In order for an applicant to sustain its burden to obtain a use variance, the applicant must make a showing 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 characteristic of the property, (3) the proposed use will not alter the essential character of the neighborhood, and (4) the hardship has not been self-imposed. The two most recent cases decided by the Third Department addressing such elements are *Rehabilitation Support Services, Inc. v. City of Albany Bd of Zoning Appeals,* 140 AD 3d 1424 (3rd Dept; 2016) and *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta,* 90 AD 3d 1280 (3rd Dept; 2011).

A. There Was Proof of Unnecessary Hardship.

The Appellate Division, Third Department has already established the test that we submit Rosa Kuehn, Perry Kuehn, K-Tooling, Inc. and Kuehn Manufacturing Co., Inc. met at the Zoning Board of Appeals, namely that the Kuehn Respondents "**had the burden of proving that their property could not yield a reasonable return if used as a presently existing nonconforming use—i.e., as a manufacturing facility without use of the addition for manufacturing**

purposes". (See *Nemeth v. Village of Hancock Zoning Bd. Of Appeals,* 127 AD 3d 1360 (3rd Dept; 2015)).

Contrary to the contention of the Petitioners' attorney, the test is not a reasonable return **on investment**. The Appellate Division did not so state. The Appellate Division clearly set the test as the **property could not yield a reasonable return if used as a presently existing nonconforming use—i.e., as a manufacturing facility without use of the addition for manufacturing purposes.** The Court of Appeals in *Village Board of the Village of Fayetteville v. Jarrold,* 53 NY 2d 254 (1981) did not even reference return "on investment". Village Law Section 7-712-b(2) also does not even reference return "on investment".

According to *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta,* 90 AD 3d 1280 (3rd Dept; 2011), all that the Kuehns and K-Tooling had to do to meet its "dollar and cents" burden was to provide a reasonable rate of return analysis and offer proof of current market conditions. This is exactly the nature of the detailed proof that was presented to the Zoning Board of Appeals. Again, it must be kept in mind that the dollar and cents proof did not need to involve the 800 square foot addition, because the Appellate Division made clear that the correct proof to present had to relate to **a manufacturing facility without use of the addition for manufacturing purposes**.

In particular, the Zoning Board of Appeals specifically found that the "dollar and cents" proof demonstrates that the applicant cannot realize a reasonable rate of return without the use variance.

The Respondents "dollars and cents" proof at the Zoning Board of Appeals hearing was not only overwhelming, but uncontroverted. A detailed financial analysis was presented by the applicants to the Zoning Board of Appeals. This is exactly the type of proof that was required by the most recent Appellate Division, Third Department case involving a use variance. *Rehabilitation Support Services, Inc. v. City of Albany Bd of Zoning Appeals,* 140 AD 3d 1424 (3rd Dept; 2016) and *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta,* 90 AD 3d 1280 (3rd Dept; 2011). The Appellate Division, Third Department sustained the same basic proof in the *Jones* case where the applicant submitted proof of the unreasonable costs to convert the property to residential and agricultural use, that the acreage could not be subdivided for residential use, and that no reasonable rate of return could be had should the property be converted to such residential and agricultural use.

While the Appellants argue the proof submitted by the Respondents Kuehn Manufacturing and K-Tooling to the Zoning Board of Appeals was not sufficient, the law is clear that issues of credibility of such "dollars and cents" proof are within the sole province of the local Zoning Board of Appeals to resolve. The Third Department made this abundantly clear in the case of *Jones vs. Zoning Bd.*

Of Appeals of Town of Oneonta, 90 AD 3d 1280 (3rd Dept; 2011). See also *Matter of Supkis vs. Town of Sand Lake Zoning Bd. Of Appeals,* 227 AD 2d 779 (3rd Dept; 1996). The case of *Cougevan vs. Martens,* 85 AD 2d 890 (4th Dept; 1981) is certainly instructive, in that, it recognizes that expenditures made in good faith by a property owner in reliance on an invalid building permit may be considered by a zoning board on the application for a variance as proof of unnecessary hardship. See also *Matter of Jayne Estates vs. Raynor,* 22 NY 2d 4117 (1968).

Furthermore, it was not unreasonable for Hancock's Zoning Board of Appeals to accept the Kuehns economic analysis over the bare conclusory assertions by the Appellants' attorney that some different or better analysis should have been presented, when the Nemeths presented nothing to the contrary. See *Matter of Center Square Assoc vs. City of Albany Bd of Zoning Appeals,* 19 AD 3d 968 (3rd Dept; 2005).

There was more than substantial evidence in the record before the Village of Hancock Zoning Board of Appeals to reach its fully rational determination on this element or issue. Accordingly, the Decision and Order below should be affirmed dismissing the Amended Article 78 Petition.

B. There Was Proof that the Hardship is Unique to This Property.

It is again important to keep in mind that this element of uniqueness revolves around the small 800 square foot addition and not to the uniqueness of the overall

property. The overall land is already considered a legally nonconforming manufacturing use. There was no countering evidence to that submitted by K-Tooling that this 800 square foot addition is entirely unique to only this property.

The Zoning Board of Appeals correctly determined that "the hardship with respect to the 800 square foot area is unique to only the applicants' Property. The Property as a whole has been used for manufacturing since the 1970's and the 800 square foot area has also historically been used in this endeavor. The manufacturing use of the Property is pre-existing, nonconforming and, therefore, does not apply to a substantial portion of the district or neighborhood".

Once again, the best that the Appellants' attorney can argue on this element – now after the fact – is some general testimony by Ray Kuehn who is deceased. However, the underlying Supreme Court trial did not focus on the 800 square foot addition other than as it related to the Nemeths' fanciful, and Court determined unfounded, allegations about odors, fumes and noise. The solid credible proof at the Village of Hancock Zoning Board of Appeals hearings was that this 800 square foot land area had been used exclusively for manufacturing purposes well prior to 1983.

Such issues of credibility of the proof at the Zoning Board of Appeals hearings are within the sole province of the local Zoning Board of Appeals to

resolve. *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta,* 90 AD 3d 1280 (3rd Dept; 2011).

C. There was Proof that Granting the Variance Will Not Alter the Essential Character of the Neighborhood.

Despite a Trial Court and an Appellate Court confirming the fact that there were no odors, fumes or noise (minimal, if any, noise as described by Justice Fitzgerald), the Appellants continued with a half hearted argument at the Zoning Board that there were noxious fumes, odors and noise emanating from the K-Tooling facility. The Kuehns proof at the Zoning Board of Appeals included the expert testimony of Dr. Richard E. Berg, New York State Industrial Hygienist Leonard D. Swartz, and professional engineer Ronald Lake.

The Appellants knew of this highly credible expert proof and yet did not produce a single shred of expert or scientific evidence to counter the expert testimony or reports presented by the applicants to the Zoning Board of Appeals.

Importantly, while the property is located in a residential zoning district, Justice Fitzgerald found that the area is actually mixed use with several neighborhood businesses. Moreover, the trial testimony of these experts and factual findings by Justice Fitzgerald in the prior litigation were important factors in the current Zoning Board's Decision. As noted in the Zoning Board record, Justice Fitzgerald cited the trial testimony of Dr. Richard E. Berg, the former

Village of Hancock Health Officer, who inspected the K-Tooling manufacturing facility due to the Appellants' complaints of noxious odors and noise, and found none exist. In addition, Justice Fitzgerald noted the testimony of Leonard D. Schwartz, an industrial hygienist employed by the NYS Department of Labor, who visited the site and determined that the business was in full compliance with OSHA noise levels, which noise levels did not even require ear protective gear. It is worthy to note that Justice Fitzgerald actually toured the manufacturing facility while it was in full operation – all with the consent of Appellants' attorney – and Judge Fitzgerald specifically found that the noise was, at most, minimal, and the fumes and odors non-existent.

Upon weighing the evidence, the Zoning Board properly found that the variance will not alter the essential character of the neighborhood.

As noted above, the law is clear in New York that issues of credibility of the proof at the Village of Hancock Zoning Board of Appeals hearing are within the sole province of that local Zoning Board of Appeals to resolve. *Jones vs. Zoning Bd. Of Appeals of Town of Oneonta,* 90 AD 3d 1280 (3rd Dept; 2011).

D. There was Proof that the Hardship Was Not Self Created.

As everyone is well aware, where a municipality's zoning requires, a property owner is to complete a building permit application and present the same to the Code Official. If the Code Official determines that the building permit

application cannot be approved because a use variance, an area variance or a special use permit is needed, then it is incumbent on the Code Official to deny the building permit which then gives the applicant the right to apply for the variance or special use permit. That is exactly what the Kuehns did. In year 2000, Ray Kuehn hired an engineer to prepare engineered plans and to submit for a building permit to build the 800 square foot addition. The proof was uncontroverted that the Code Official issued the building permit as the Code Official had the authority to do. There was no proof by anyone that Ray Kuehn did anything improper in obtaining the building permit.

In fact, the proof was that K-Tooling continued the manufacturing use for the next fifteen (15) years after 2001 in this 800 square foot addition without any objection or problem raised by the Village of Hancock. Even when the Appellants complained to the Village of Hancock in year 2007 or 2008, and even though the Village of Hancock investigated those complaints, at no time did the Village of Hancock raise any concern about the approved legally nonconforming use of the 800 square foot addition.

There can be no dispute that this entire situation involving the 800 square foot addition was not self created. The factual and credibility determinations by the Village of Hancock Zoning Board of Appeals should not be disturbed. The

Decision and Order below which dismissed the Appellants' Amended Petition must be affirmed.

POINT IV
APART FROM THE GRANT OF THE LEGALLY VALID USE VARIANCE THERE WAS NO EXPANSION OF A NONCONFORMING USE

As further legal support for the Village of Hancock Zoning Board of Appeals Decision, it is respectfully submitted that there was no expansion of a nonconforming 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 a legally nonconforming manufacturing use.

The case of *Piesco vs. Hollihan,* 47 AD 3d 938 (2nd Dept; 2008) is on point and instructive. In the *Piesco vs. Hollihan* case, the marina/restaurant business erected a tent and canopy over an existing outdoor dining area. The Court determined that simply putting a cover in the form of a canopy over an existing dining area did not constitute an expansion of a nonconforming use. The Court noted that an increase in volume or intensity of the same nonconforming use as has occurred for decades on the property is not an expansion of that nonconforming use.

The case of *Clarkstown vs. MRO Pump & Tank, Inc.,* 32 AD 3d 925 (2nd Dept; 2006) holds for the same proposition. In that case, the property owners

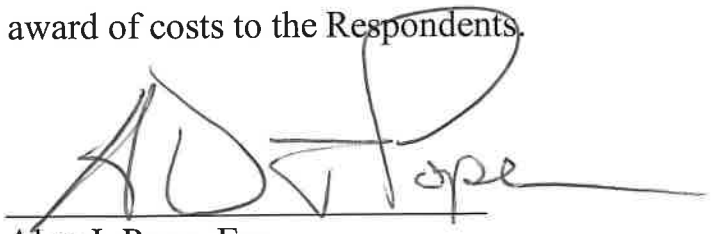
purchased the property in 1995 and continued the operation of a construction yard. The nonconforming use as a construction yard had been on going since the 1930's. The Court held that although the current owner's use of the property is of greater intensity than the previous owners, the increase in volume in the same kind of nonconforming use as has occurred for over sixty years, does not constitute a per se impermissible expansion of the nonconforming use.

Similarly, merely increasing the volume of business does not amount to an expansion of a nonconforming use. *Tartan Oil Corp. vs. Board of Zoning Appeals of Town of Brookhaven,* 213 AD 2d 486 (2nd Dept; 1995); *Ruhm vs. CP Craska,* 59 AD 2d 208 (4th Dept; 1977). Furthermore, modernizing of equipment and introducing new types of machinery will not amount to an expansion of a nonconforming use. *Syracuse Aggregate Corp. vs. Weise Town of Camilus,* 72 AD 2d 254 (4th Dept; 1980) aff'd 51 NY 2d 298 (1980). *Tartan Oil Corp. vs. Board of Zoning Appeals of Town of Brookhaven,* 213 AD 2d 486 (2nd Dept; 1995).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Decision and Order below which dismissed the Appellants' Amended Petition must be affirmed in all respects, with an award of costs to the Respondents.

Dated: July 14, 2021



Alan J. Pope, Esq.
Nathan D. VanWhy, Esq.
Coughlin & Gerhart, LLP
Attorneys for Respondents
99 Corporate Drive
PO Box 2039
Binghamton, NY 13902
(607) 723-9511

To: Michael H. Sussman, Esq.
Sussman & Associates
Counsel for Petitioners
1 Railroad Avenue, Suite 3
P.O. Box 1005
Goshen, New York 10924
(845) 294-3991

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:
Name of typeface: Times New Roman
Point Size: 14
Lines Spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, signature block, proof of service and this statement is 5,856.

Dated: July 14, 2021

Alan J. Pope, Esq.
COUGHLIN & GERHART, LLP
Attorney for Respondents
99 Corporate Drive
PO Box 2039
Binghamton, NY 13902
Tel: (607) 723-9511