VILLAGE OF WARWICK
ZONING BOARD OF APPEALS
FEBRUARY 16, 2021

The monthly meeting of the Village of Warwick Zoning Board of Appeals was held on Tuesday, February 16, 2020. Present were: John Graney, John Prego, Jonathan Burley, Scot Brown, Margaret Politoski, Dylan Gieber and Zoning Board attorney, Robert Fink. Others present were: John Christison, John Cappello, David Gordon, Patrick Gallagher, Darlene Brozowski, George Driscoll, Glen Carter, Gene Bowen, Rachel Berlin, James Mezzetti and others.

The meeting was held in Town Hall.

The Board recited the Pledge of Allegiance.

A MOTION was made by John Prego, seconded by Margaret Politoksi and carried to accept the minutes of the November 17, 2020 meeting. (5 Ayes)

3 ELIZABETH ST. AREA VARIANCE REBECCA BANKS

The Board reviewed the application for a proposed garage.
Mr. Graney opened the public hearing.
There was no public comment.

A MOTION was made by John Prego, seconded by Scot Brown and carried to close the public hearing. (5 Ayes)

The Board went through the criteria's:

1) Undesirable Change – No, will not change character of the neighborhood
2) Achieved by Another Method – No, no other location available
3) Substantial – Numerically
4) Adverse Effect – No physical or environmental impact to neighborhood
5) Self-Created – Yes

A MOTION was made by Jonathan Burley, seconded by John Prego and carried to declare this an Unlisted Action with no adverse effect under SEQR. (5 Ayes)

A MOTION was made by John Prego, seconded by Jonathan Burley and carried to grant the area variance permitting the construction of a 20ft. x 20ft. garage with a side yard setback of 9.9ft., a total side yard setback of 40.4ft. and a front yard setback of 32.1ft. (5 Ayes)

16 ELM STREET INTERPRETATION PATRICK GALLAGHER

Mr. Graney read the public hearing notice.
Mr. Fink – Mr. Gordon who represents the applicant had submitted a lengthy letter with various points and Mr. Cappello submitted an answer to that do Mr. Cappello will go first and point out to the Board why Mr. Gordon is incorrect, and Mr. Gordon will then be able to respond. The meeting will then be open to the public. The subject matter really revolves around the interpretation of the Building Inspector in litigation told to your site plan requirement, that and collateral issue having to do with that one point is what this Board is going to consider. It will not consider anything else, whether it is a good project or a bad project, whether it should be modified, that is not before this Board so when you are given a chance to speak please direct yourself to the subject matter, not some extraneous matter because you will be asked by the Chairman to stop.
Mr. Cappello – I am here representing John Christison, 16 Elm St. LLC which is in contract with the property in question. It is not owned by John yet, it would be but for litigation. There is a long history of this which I submitted to you. I would like to go over some of the points here: John is not a developer, he is a small business person who has operated a business person who has operated a business and employed people in the Village for over 34 years. John has been pursuing his dream of relocating his business around the corner to a lot that is zoned Industrial to build a restaurant. He received approval for site plan from the Planning Board in February of 2018 and the plan was signed in May of 2018. Immediately after his approval litigation was brought by Mr. Gallagher and some others to challenge the approval. John who was successful in defending that lawsuit and thereafter dismissed sometime around August of 2018. After the dismissal John who had satisfied all of the conditions in the site plan and that is when it was signed pulled a Building Permit and began construction. The neighbors then appealed to the Appellate Court seeking a Temporary Restraining Order then a Permanent Injunction to stop construction claiming that any further construction would do damage to the neighborhood. We went to the Appellate Court, in the deciding of the Injunction the Appellate Court is required, or any Court, is required to balance the equities and to weigh the likelihood of success of the appeal in granting that determination. The Appellate Court decided not to grant the TRO and they decided not to grant the Permanent Injunction therefore finding the balance in the equities and looking at the likely hood of success of the appeal that there was not much success for an appeal. The neighbors exercised their rights to perfect appeal and go forward. Then Covid hit and the Appellate Court terminations you need to perfect an appeal, you need to argue the appeal and it took time. Although John did everything he could to expedite it. It was in December of 2020 that we finally got the decision which we expected, that the appeal was denied and John could move forward. In the meantime he had extended the Building Permit, he then asked if he would need to apply to extend any site plan approval. The past practice of the Building Dept. is that once a Building Permit is issued you just deal with the Building Dept. but he was told that the date used

was the date of the signing of the map by May 24, 2020 he would have had to apply for an approval. We did apply for that in April of 2020 at that point a memo was issued by the Planning Dept. that said "because they never had a request when construction had started, that there was no provision in Sec. 145-98 to allow that. John approached the Building Inspector and the Building Inspector is the person that the Village has designated to interpret the Zoning Code and enforce the Zoning Code. He consulted with Village attorney and determined that balancing the equities that he would issue the letter saying that " regardless of past practices he believed that he was told because of the pending litigation and the Covid Pandemic hit at that point there was a delay in construction, it could only be essential construction. He appealed is stating that number 1) The Building Inspector did have the authority to do that. That appeal relies on one case in the 4th Department which is Western New York that said the words " equitable tolling has not been recognized in New York" immediately there after the Court went on to apply the facts in that case. The detailed analysis of why the equities would not favor the person who was requesting the toll and inn that case it was a wind company that during the time had changed the turbine and also had stated on the record that the reason they were delayed in that they were waiting for Congress to re-up the wind generation rebates. They like us, had won the lower case lawsuit but the other side cited that they did not want to appeal but still that applicant when discontinued the action because they were trying to manipulate the system to use that as an excuse to get an extension. That is what that court upheld. So we would position to you that it is not that New York has not recognized equitable tolling as of yet based upon that fact decision in Western New York. We provided you a case that says there has been without using the words equitable tolling acknowledgement of the Courts in the 1st Department which is in New York City and the area that in that case there was a provision that said " it is tolled if there is judicial proceedings" there was a judicial proceeding in that case, there was an appeal to the New York City version of you Board of Ethics. The Court in that, extended the recognition of the judicial proceedings to that proceeding because those facts were much more favored of the applicant than the applicant was given up a raw deal so they in essence did apply equitable tolling so we believe that the Building Inspector in looking at these facts and saying that, you had to defend a lawsuit, you spent more money defending a lawsuit, and when he began construction he had won. When he got through the injunction that said it was little likely hood of except, he commenced during that time period. It was only when the banks said "great, that is 99% that you will win, tell us when it is 100%". Then we provided evidence to you that the bank would not go ahead with financing which is why construction could not finish but before that this is the history to finish that. We believe that there is a case for equitable tolling and the Building Inspector's decision is supportable by law in New York State and you have the authority to define that. Having said that, you also, now because of the matter of the expiration of the site plan is before you, you have the jurisdiction to do, if you don't agree exactly with the way the Building Inspector did it, you have the authority to make the determination that you believe he should have been and that is why we analogize to you the past practices of the concept of vested rights and statutory construction. You have two statutes that deal with expiration. The only one that has been discussed in the appeal by Mr. Gordon is 145-98 on expiration of site plan approval. The says that "site plan approval expires if you have not commenced construction within one year or you have not completed it within 2

years" there is another section (B) that says unless it is extended. Section B states " if you have not commenced you can go to the Planning Board and request an extension" Section A states" Every site plan approval shall expire if the work authorized has not commenced within twelve (12) months from the date of its approval, subject to any extension". John commenced construction within 12 months, satisfied his conditions, "or has not been completed in twenty-four (24) months from the date of Site Plan approval unless the applicant has requested and been granted a phased construction schedule". Then Sec. B goes through a long preamble about what to do if you haven't commenced construction to be able to get an extension. John had commenced construction so when he did submit a request for an extension to the Planning Board, the Planning Board attorney recognized the extension request was timely but said we can't because of construction has commenced. I also note that in Sec. (A) it says "12 months or 24 months from the date of site plan approval" Sec. B says "If construction has not commenced" so nothing deals with construction not commencing" and then it defines site plan approval for that section including conditioned site plan approval and conditioned final site plan approval. John had site plan approval subject to 17 conditions in February 2018 so if he was asking to commence or if he had not commenced and was requesting, it is clear under (B) it would included conditional site plan approval. But he commenced. So it said 24 months for site plan approval which the Planning Dept. in a letter to him said that date would run May 24, 2020, it is in a letter and the letter is in the Exhibit. He relied upon that letter, he made the application in April and then in May there was a memo from the Planning Board attorney saying the extension could only be if you had not commenced construction. So in relying upon the determination from the Building Inspector that it hold, John put his request in for an extension in advance, didn't need it, so he relied upon that determination, the Planning Board took no action either way. Now, how has the Building Dept. interpreted that over the years? I would suggest to you that they applied Sec. 145-146 which involves the expiration of Building Permits. Once you have a Building Permit and once you have started construction you are treated differently than if you haven't commenced. In that section is says "Every Building Permit shall expire if the work has not commenced within twelve (12) months from the date of it's issuance unless it is subject to one of the extension conditions below. If construction has commenced within one year from the issuance of the Building Dept. but has not been completed the holder may apply for an extension from the Building Dept." In the next section it talks about "if you haven't commenced construction you need to go to the Planning Board". It does not say you need to go to the Planning Board if you have commenced construction. In the final section says "if you haven't completed the work within 2 years you need a new Building Permit which is a ministerial action and a fee. It is not a review to put someone to go through the whole process with the Planning Board, it is just a fee. That is if you look at the Exhibits here of the Building Dept. has interpreted it. They have interpreted that if you have a Building Permit and you are diligently pursuing it you don't need to go back to the Planning Board and it is not just Mr. Rudzinski, it was Building Inspectors in 1996, Mr. Kelly who wrote a letter to Mr. Kitar which said " you had a site plan approval in 2009 you have been proceeding diligently therefore you do not need to go back to the Planning Board for an extension. That letter was written in 2017. Why do they do that? Because that interpretation allows and recognizes the vested rights which is a well documented right in NYS and most of the Country, that says "once you have your approvals and you compel construction and invested on those approvals, those rights vested you. So when you

have a conflict between 2 provisions 145-98 that doesn't seem to give any outlet to someone who has actually commenced construction versus 145-146 which gives you an outlet where the Building Dept. has historically recognized 145-146 as controlling to say if you have a Building Permit you can get it, so I would say to you that this Board has a right to reconcile those two provisions to say we determine No.1) that the Building Inspector's tolled and that tolling is good or No.2) That Sec. 145-146 controls in this matter and in this situation the Village Board**,** if you don't look at it this way you end up with an absurd bubble, you could have a site plan, begin work, a valid Building Permit and have the permit extended for one year. So you get a site plan in May of 2018, you begin work in August of 2018, you get a year extension on your Building Permit so now you have a Building Permit through August of 2020 but your site plan would expire in May 2020, it just doesn't make any sense for someone to be holding a valid Building Permit doing work and have to look back and say well I have been proceeding diligently and I have extended by Building Permit correctly and I to go back and think about site plan which is not the practice that has been in the Village. You are being asked by Mr. Gordon to apply it that way for the first time and it is written in a way that would in essence confiscate that right without giving anyone any due process to go to the Planning Board and say here is the reason we have extended. The way it was interpreted is that you do not have that right to do because if we did, we would have gotten the extension. This hasn't been something to try to avoid the law. We have been proceeding, discussing with the Building Inspector asking for the appropriate determinations and moving forward in that manner. The issue of vested rights is important to consider because it is a property right and you don't want to take that property away from someone once they have begun. We have given you the record of the case to show you that John has proceeded forward, he has proceeded in compliance with the law, he has asked what is needed, he has successfully defended the lawsuit. My initial line here that I was going to use because I feel like we are coming in here for an appeal of somewhat comes up to you and punches you in the nose and then sues you because they hurt their hand. The reason for the delay is, the reason that the trees aren't planted, the reason that the site is not complete is the lawsuit that was brought by the person who is appealing now and trying to say I want to take advantage now because it didn't occur because of my actions and now it has expired. That would lead to the absurd result that anyone in the Village who has an issue with any kind of development doesn't have to have a winning lawsuit they just have to wait until someone starts construction, file a lawsuit, even if it is a terrible lawsuit and they lose, you have the right in NYS to appeal it to the Appellate Court, any decision. You wait for 4 or 5 months, you file your Notice of Appeal, wait a few months to perfect it, the wheels of justice runs slowly and by the time it is heard and by the time the decision is read, there is two years and if you don't have a chance to defend it you will never ever have an approval, John goes back to the Planning Board, the Planning Board says "we approve it" there is another lawsuit and assume that lawsuit is not victorious and appeal it again, what is the harm. It is absurd the way this statute is written that will put someone on a never ending hamster wheel. That is why we included here an argument and I think **toted that** Mr. Gallagher doesn't even have standing to bring this action because you have to be aggrieved. He may say I am aggrieved because this development is going next door to me but what is the aggrievement on the extension of the site plan? It is the relief he asked for in an injunction. He knew the Building Permit was issued, John submitted an affidavit in that said " I am not able to

close on my financing due to the impact of them" he knew he would not have a likely hood of success because if there was a likely hood of success the court is not going to say "we are not going to grant an injunction if they thought there was a likely hood of success. The problem is if John was a franchise or a large corporation he could have self-financed and he could have been finished by the time the Appellate Court issued their decision, we could have been celebrating with a drink at Yesterdays. But he wasn't and because of that he is penalized by virtue of this statute that states it automatically expires. So, I request that the Board uphold the Building Department's decision or issue an interpretation as such or at least acknowledge that the extension was in reliance upon a determination that hasn't been overturned yet tolled and allowed if you deem necessary for a review by the Planning Board to review not start over. With that I will answer any questions that you may have and I would like if possible to request since it is Mr. Gordon's appeal after he speak to be able to rebut if possible.
Mr. Scott – Do we have any indication if the Building Inspector's common practice was to or has been to grant an extension of Building Permits?
Mr. Cappello – I have in here a letter that it is the past practice of the Building Dept.
Mr. Brown – My question was why the Building Inspector didn't take that route rather than determining then the time of it was Covid?
Mr. Cappello – I don't know of any other instances there was ever litigation involved and it might have just been slow in construction and I think in this case it was the litigation and he just did that and in hindsight would he have said "this is what we have done before". I didn't ask him why he didn't do it differently, but we do have her permits and CO's that were issued more than 2 years after. I have a letter from prior Building Inspector Kelly dated January 24, 2017 stating that work began in 2009 and he did not need to reapply for site plan approval. So, we do have past practices of that is how it is issued but I don't know if litigation was involved so therefore easy to say it's tolling. We submitted a letter saying we believe it was tolled because of the litigation cited in 230.
Mr. Brown – Is that remedy still available to apply to the Building Inspector for an extension on the Building Inspector on a Building Permit rather than going back to the Planning Board?
Mr. Cappello – We are willing to do that but now it is in your hands, so you decide how we proceed. That is why I said that NYS law that says "once the issue is before you, and I agree with Mr. Fink, the statement is limited to the issue that is before you but the issue that is before you is the expiration of site plan and renewal or at least that is what I believe.

Mr. Gordon – I represent Patrick Gallagher in these proceedings. I would say at the outset that I have not received any letter that Mr. Cappello wrote today that Mr. Fink mentioned…
Mr. Cappello – That was not today.
Mr. Gordon – Okay. We submitted a letter today in reply to Mr. Cappello's letter, if the Board has not received it I have some extra copies with colored phots.
Mr. Fink – Does the Board have it?
Secretary – It was e-mailed to the Board and I have one hard copy here.
Mr. Fink – We can take a look at the hard copies.
Mr. Gordon – In the latest letter one of the critical factors in that letter is if we divide the issues that are in place before this Board into 2 categories, 1) is the central legal issues that are at stake here, the issues that were raised in the Building Inspectors decision and any other cases that we

believe apply to it. 2) is everything else. In Mr. Cappello's letter from Friday, frankly there is some discussion of the core law, the core law doesn't work out very well for them. What I would like to do is at the outset to spend a little time walking you through the core law. In fact in one case I will read the whole law so the Board fully understands the most critical holding which the developer has not done in this presentation including Mr. Cappello's presentation to you. After that to accept that the Board would entertain the other issues we can go through them, they are all addressed in my letter but I am not sure to what extent the Board wants to hear from those but if you do we can discuss them. I would point out at the outset that this is my first time appearing before this Board and I believe you know this but I just want to say it for the record, the Zoning Board of Appeals hearing an appeal is bond by the law. That is your only job is to interpret the law and the Building Inspector as well. The Building Inspector making a zoning interpretation in bond by the law and your job is also to interpret the law. It is not to go through a variety of equitable considerations and to mend the wrongs that are out there as the Board is proudly aware there is a perceived problem with the code and the answer to that problem as Mr. Dickover recommended in his memo is to go to the legislatures, go to the Village Board as would as level of government. I just wanted to say that at the outset, your job is to interpret the law and not to worry about all of the other discussions. We will go through some of the time frames because they were not completely accurately presented in the way that fairs out the two equities but again those are a little bit peripheral. The most important thing in the primary job is to go through the law and the most important case is the law as I am stating it obviously the Building Inspector and we are responsible to review but there are really three sources of law here other than the Village Code. There are two cases, two NY Appellate cases and there is also a treatise, a Bayview treatise which is a compendium of cases. In this case it was from around the Country, it is a National Treatise on Zoning Law. Those are our 3 sources of the law and of the 3 of course is the most important the New York cases. The compendium of national law is really not a reliable source for what we are applying, it might be under certain circumstances and we will take a look at that but we are going to start with the two Appellate cases because that is really what is of issue here and in fact I would submit to you that there is one case that controls this area of law and it is excerpted in both of my letters to the Board, the original and the one I sent today and I am going to read that paragraph and it is also highlighted and Mr. Fink included the case in his memo to you as one of the exhibits and he underlined the same sentence that I am going to underline as well. So this is it and we need to go through it word by word and we will contrast what we read with what Mr. Cappello presented to you. I think Mr. Fink's memo to you, I think the case is Exhibit G. It is the case of Allegany Wind versus the Town of Allegany Planning Board, I believe it is the 3rd page of that case. I am going to read the paragraph which is just a couple of sentences, the most critical sentence is the last one and again this is a case brought by essentially a sole developer who was frustrated because the Planning Board of the Town did not extend the Special Use permit and he was claiming that the extension needed to be granted because he was stuck in litigation against a citizens group very very similar… Here is what the court says, and the developer is also the petitioner because they brought the lawsuit alleging that this equitable right existed. Here is what the court said " we reject Petitioner's further intention that the expiration date of it's Special Use Permit was tolled during the pendency of the lawsuit filed by CCCC", that is a citizens group, "according to petitioner the time period should be tolled because until the litigation was resolved it could not obtain necessary financing and could not

commence construction of the wind farm. We reject that contention." This is the Appellate Division. Here is the critical sentence " Although several states have recognized an equitable doctrine that would allow for the tolling of the time period (see 3 Rathkoph, Zoning and Planning Sec. 58:24 fourth edition.) New York has not done so and in any event this case does not warrant the application of equitable doctrine. What that paragraph and what that sentence means is that the Appellate Court found two reason, two separate reasons not to grant the petition, not to grant that extension 1) New York doesn't recognize equitable tolling and in any event they don't deserve it. That is what this court said, "New York doesn't recognize equitable tolling and in any event they don't deserve it". Mr. Cappello's letter and his presentation to you in the last half of an hour directs your attention solely "and they don't deserve it" and his argument is that Yesterdays does deserve it. I am not going to get into that argument as to compare…because the fact is New York does not recognize it. The other reason New York doesn't recognize it and I want to say a couple of more things about this holding. First of all, obviously, it specifically rejected the exact treatise section that the Building Inspector cited. Rathkopf Zoning and Planning Sec. 58-24, the exact same section that the Building Inspector cited New York does not recognize. In the exact same sentence for the exact same purpose. The second thing about this case is that it is a 2014 case, the other case we are going to discuss is the 230 Tenants case in New York City is a 1984 case and so when this court said in 2014 New York does not recognize equitable tolling it was fully aware of the 230 Tenants case and it happened 3 decades before. It read that case and said New York does not recognize equitable tolling. Well how can that be Mr. Cappello just told you that, that case does recognize equitable tolling. The answer is simple, the New York City case was not a question of whether we should institute equitable tolling, in the New York City case the Municipal Code, the NYC code had a tolling provision in it for litigation, it was in the Municipal Code. The 230 Tenants Court applied that code, that is what the case was about. But why was there a case then, simple right, well the Municipal Code in NYC had a tolled division for litigation. In the NYC case it was not strictly litigation at issue it was actually an appeal to their ZBA and so the questions was whether the Municipal Code that was in the city code would apply also and to an appeal to the ZBA and the Court said sure, the City Council, the Mayor decided that this should be done and so we are going to apply the situation. But it doesn't mean that it is the Municipal Code, if your Municipality doesn't have provision in your law that you can pull it from somewhere, that you can pull it from a treatise? That you can pull it from another state? That is what a treatise really means, is that it is another state and the Court knew that. In the Allegany Wind case there was no provision in the Zoning Code. There was no equitable tolling and the Court said New York doesn't recognize it. That is the critical law of this case, that is the critical difference here. We don't get to what the equities are because the law does not provide for it. Their argument is a diversion. We disagree with their characterization of the equities. There are certain things that they have mentioned that we do need to go through because they have been saying things to mischaracterize the situation and to cast dispersions on the Appellate and to mischaracterize the litigation: Timeline – The case was filed in March of 2018, it was dismissed by the lower court on I believe in July or August, I think it was early August. Everybody who is involved in litigation knows, I know Mr. Cappello knows, when a case is dismissed the people who lose the case have a very narrow timeframe to file what called a Notice of Appeal, that is what preserves your right to Appeal, without… you don't get to appeal. That timeframe is 30 days. If you won

the case but you are uncertain whether you firm footing to move forward and given the uncertainty of litigation you want to know whether you should be able to move forward, you need to wait 30 days, it is actually a little bit longer because of basically how you mail it. That case was decided in early August of 2018 the developer applied for his Building Permit almost immediately afterwards. There are several dates that was actually issued but I don't know how to parcel that but essentially there were 3 different dates in August of 2018 that the developer got the Permit. Clearly withing the timeframe to appeal, in fact Mr. Gallagher and the other neighbors filed that Notice of Appeal the first week of September, within the 30 day timeframe, that Notice of Appeal basically means this is an appeal and we reserve the right to what is called "perfect the appeal" which means to ultimately write that brief so by Sept. 4, 2018, the developer was fully on notice that the petitioners intended to appeal or at least were preserving their rights to do so and there was every reason to believe that they would do so because as everyone acknowledges the dismal of the case by the Supreme Court was not on the merits, it was not on the issues that were brought up, or the argument that this was a bad project, it was on a procedural technicality that the Respondents successfully convinced the court to apply. Having been frustrated in the lower court it was easily forcible that the Petitioners would bring that case to the Appellate Court. The point is that Notice of Appeal was filed on Sept. 4, 2018, the developer commenced construction and by their own admission appeals take a long time, they knew that, the developer commenced construction in October of 2018. According to his own affidavit that was filed on Friday, he self-financed it, he did not have bank financing, he self financed his commencement of construction and then he stopped because his financing ran out. After a couple of weeks or a month but from the construction starting in October it might have last a month or two and then stopped. Your code and this was completely clear from Mr. Dickover's memo on these provisions, your code places a fundamental distinction in terms of the expiration of the site plan approval whether or not construction has commenced and that is entirely rational because a development site where construction has commenced is a completely different animal than a site where construction has not commenced. The commencement of construction raises all of the issues of hazard and nuisance and everything else and if you have not finished it after 2 years, your Village Board has decided that you need to go and reapply for site plan approval. These people knew that, there was nothing hidden about it at all. They chose to do this, they tore up that site, they also illegally tore out the buffer, much of it but not all of it, some of it and they put in a foundation and then they stopped. Now they are here telling you that it is essentially the Petitioner's fault that they are in a pickle. Those are the facts. They have a skilled attorney and he is going to come in and spin those facts the best way he can the same way he was trying to spin the law in the best way that he can but I have read you the law and I have told you the facts. I want to make one final point about the law, when the Building Inspector cited the treatise provision, that is what is cited as his basis, that and the NYC case, when he cited the treatise he said he was recognizing what the treatise called the prevailing rule, that also was not true and that treatise when they discussed this idea and I look around the country there were two states that recognize this and there were two that did not, there is no prevailing rule. There were two states and that is what treatise reported because that is what treatises do. That was not true, that was not a reasonable application of the law and you need to know that as you review the Building Inspectors determination. The other area of law that the Building Inspector recognizes almost as a side which was the Executive Order suspending construction during the

Pandemic. The two points made by that is first of all it actually didn't explicitly grant a tolling of the Building Permits it just suspended construction, that is another concession that the Building Inspector made on his own but the major point here is that the time frame for that extension was wrong. It was essentially 67 days suspension until Orange County was brought back on line for construction extending the site plan approval 67 days from last year but doesn't bring us anywhere near right now but that is really not an issue because the numbers don't work. As I discussed the core law with you and the controlling case of Allegheny Wind, I want to state clearly that, that is all you need to reverse the Building Inspector, that is the law, he is unfortunately incorrect, he was using the wrong interpretation of the law, he never even cited the Alleghany Wind case which is the only case which discusses the situation where the Municipality does not have tolling provision in its Code and he is really mischaracterized a treatise section which he should not have been using anyway because all it was, was a reporting laws from other states. Collateral legal arguments, they need to be addressed because they were raised. 1) Standing – is statutory, it is defined in all of the laws related to appeals to the Zoning Board in Village and Town law and also the law of the code, it always says the same thing, an aggrieved person can bring an appeal. What is an aggrieved person? Well all know what that means and by that statement these folks are obviously aggrieved. What does it mean legally? Whatever it means it is not as strict a rule as you would find in court to stand and bring a judicial challenge. A person has more standing in general before a local administrative body than court but even under the court standard it is completely clear that these folks have standing in this case. I have also included 2 photographs which show the proximity of the project to Mr. Gallagher's home and the other homes and the rule of the state actually says "you need to have an injury different than the public at large, the injury could be visual intrusion, potential for noise or run-off or any of the other things that are commonly considered in Zoning Codes and in SEQR. Different than the public at large and in the Seminole case which has been filed for more than 30 years which I quote in my letter, it is presumed if you live near the project you have an injury different than the public at large. The goad standard for standing is a neighbor especially a next door neighbor which is different than the public at large. What the courts are trying to do is prevent a case from being brought into an Article 78 by someone from Buffalo. The next door neighbors are the right people that is the picture in the dictionary. We show the photographs where you can see through his window the foundation and the other neighbors as well, all the nuisances that were argued about which are clearly going to be more impacting to Mr. Gallagher than anyone else and so the grief standard is at least as little as that. Mr. Cappello is trying to argue and with zero law that Mr. Gallagher and these other folks were in this other case and therefore they don't have standing. They have also stated over and over again that these issues have been heard in the court at the preliminary injunction, wrong on both counts. The lower court dismissed the petition on a technical procedure, it had nothing to do with merits. It was actually our failure, my failure, to name the landlords in the lawsuit. When we filed the lawsuit we named the Village Planning Board who we were suing, we named the developer but we did not name the landowner, that was a omission that was and could have been easily corrected but we did not correct it under the statue of limitations because they didn't notify anybody about the statute of limitations, that was their right, but I am just saying that is the basis of which it was dismissed, it had nothing to do with your too close, too far, too loud, nothing. Mr. Cappello has

repeatedly leaned on this idea that we applied for preliminary injunction and one of the issues of preliminary injunction is the likelihood of success and it is. But he is not telling you a bunch of things, when you apply for a preliminary injunction, which means that if you file an Article 78 you want to make sure the developer doesn't jump the gun and build the project while you are still in court, you ask the court for a preliminary injunction. The court looks at several factors and one of them is does it have merit to it, does it make sense to go to court. Another factor is which party is hurt more, the developer is stymied or the people who will suffer? So court weighs the evidence and no court will ever say that its decision for or against the preliminary injunction is a decision on the merits, it just isn't. A preliminary injunction is considered an extraordinary remedy, it is an equitable remedy. The fact that you don't get one doesn't mean you have a lousy case. In the preliminary injunction that Mr. Cappello mentioned that was a preliminary injunction on the appeal and the issue on appeal it wasn't a claim that the zoning was wrong or would cause these nuisances it was whether the lower court used that technicality to dismiss it the case and there were reasons we reconfigured the case in the lower court and it was that reconfigured case that was actually dismissed again and that is what we appealed on. When we filed the original petition before it was a procedural problem that was revealed we also moved for an injunction call a temporary restraining order actually TRO and the court granted that and it stayed in place until the court dismissed the case. So there was one injunction that was granted and one that was denied. During the appeal after the preliminary injunction was denied and after in Oct,,Nov, Dec 2018 the developer filed a motion to dismiss the appeal. That is a rare thing to do, usually you wait. What was their motion about when they filed a motion to dismiss the appeal. They said the exact same things they told you, this case is frivolous, they are just doing this to waste time, money and we can't develop and you shouldn't allow this at all. That was sometime late 2018 early 2019. The court rejected that motion. I am not going to say that the rejections of these motions is something that the ZBA can take as some sort of operative fact. I don't think that is true but that is what he is telling you. Therefore I will go through the other facts, this is all fluff, all nonsense, it means nothing, they are grasping at straws and that alone should tell you something. The bottom line is that there was a valid appeal on legal issues filed in September of 2018, there was every reason to believe that the Petitioners would perfect that appeal meaning file their briefs and we did, in Oct. of 2018 they started construction but they had no money to finish. Why? They told you the answer so they could claim vested rights and that is one of the issues that they raised in so doing so created a whole pile of nuisances, they did it in ways that violated their site plan approval particularly in tearing out the buffer that was actually going to help solve this problem.

Mr. Fink – Excuse me but you are really going far off field.

Mr. Gordon – Fair enough. Vested rights – means I have put all of this effort into this project. It is typically used after a developer puts money into a project and changes the zone. The developer is essentially now saying they are applying situations where you are enforcing a permanent condition in a way that they feel deprives them of their rights. Vested rights does not compel you to accept this determination. The code not only allows them to but actually tells them to as a remedy to apply to the Planning Board for site plan approval. Nobody is taking anything away, nobody said you can't build it. You have to go to the Planning Board to reassess the project and perhaps put in new conditions whatever is appropriate. That is what this is about. They are

protesting that. That is not a denial of vested rights. Moving on, they want you to grant the variance, you can't grant the variance here they haven't applied for a variance, more over they wouldn't comply with the requirements for a variance which you know very well. They brought this on themselves, this would be a substantial variance because it would completely change the provision moreover, this is not a provision that is susceptible to a variance. This is not a bulk requirement or a use question. That is the core of the extraneous issues. This was our appeal, they have made their points, I understand that you don't want to go through them all but none of them are valid and none of it takes away from the legal insufficiency and inaccuracy of the determination made by the Building Inspector. That is the issue before you. I would finally point out that Mr. Cappello a detailed argument relating to the specific provisions of the Village Code that end this permit. The two points there is there is no inconsistency, Mr. Dickover made it very clear what the code meant, inconsistent with the Building Permit or inconsistency with these provisions with the subdivision rules or the Special Use permit rules does not create an inconsistency with the code that is the provision for site plan approvals even if there was an inconsistency in the code that is not your job. Mr. Dickover in his memo at the very end says " we should take this to the Village Board" that is who is responsible for dealing with inconsistencies in the code. It is not the job of this Board to write new code especially not on an appeal of a Building Inspector determination. I would like to take any questions from the Board. Again, I would restate that they have thrown an awful lot of extraneous issues at the Board. I believe it is in an attempt to divert your attention from the core legal issues and I would advise the Board to not get caught up in that.
Mr. Brown – In the Village Code 145-98, the expiration of site plan and I don't have the sec for expiration of Building Permit.
Mr. Fink – As I read it, it is not specific and is general as to Building Permits and I believe that any issue regarding Building Permits and site plan approval is contained in the relevant section.
Mr. Brown – My question is whether you have a comment of the claim which appears to me to be true that the Sec. 98 doesn't address the expiration of site plan or how the developer would deal with the expiration of site plan if construction had commenced as in this case?
Mr. Gordon – I am not sure I understand but I will make two points 1) I thought Mr. Dickover did a very thorough job parsing the section of the site plan very carefully and we have no objection to it. 2) To the extend that the developer feels that they are at a dead end or the Board might feel they are at a dead-end, the code is abundantly clear there is they must apply to the Planning Board for a site plan approval and put the matter before the Planning Board to put all of the equities there and figure those out. They are basically telling you they don't want to deal with your Planning Board. They have also told you that dealing with the Planning Board is futile, they know what is going to happen and this is should not even be before you. We cited in our letter a section of your authority that says you don't have the authority to relieve the requirement to go back to site plan approval. We miscited the code section, it is Sec. 151.
Mr. Brown – The question I posed to Mr. Gordon is whether his view of extending the Building Permit is similar to Mr. Cappello's?
Mr. Gordon – I can address that, and the answer is no.
Mr. Brown – I think you did address that.
Mr. Burley – Why do you think they can't get site approval?
Mr. Gordon – I didn't say they couldn't, I said they need to go back and apply for it.

Mr. Burley – But I am asking you, you are saying they brought it here instead of over there?
Mr. Gordon – Right.
Mr. Burley – Why is it that you think they are coming here thinking we will give them something they can't get from the site plan approval?
Mr. Gordon – There are two reasons, it is easier, if they go after site plan approval they will have to argue all of the facts of the case and now they are in a worse position because have torn out part of the buffer so all those issues related to impact and how we will protect the neighbors will come up and it will be more difficult. Another issue is this is actually a terrible site for…
Mr. Fink – No, I said in the beginning that we are not getting into the merits of the site plan or any other issues.
Mr. Gordon – OK. This developer throughout this process has done what they could to avoid
Mr. Fink – No. Please.
Mr. Gordon – OK, I understand.

Mr. Graney we appreciate everyone's emotions and feelings and we understand that the case is difficult but unless you have something to add that has not been mentioned by the attorneys please do not just stand-up to read your letters.
Mr. Graney opened the public hearing.
Mr. Hartigan – I was approached by a Realtor and was told that my house is worth $150,000 more than what I paid for it and the only reason I bring this up is because in NYC…
Mr. Fink – How does that have anything to do with…
Mr. Hartigan – I am trying to say that I think that commercial is definitely coming into Warwick and…
Mr. Fink – Sir, this is not the Board to re-argue whether or not that should be there or the zoning is good. I appreciate it but not before this Board.
Mr. Carter, 11 Van Buren St. – The house is immediately adjacent to 16 Elm St. and I would like to read something that I wrote down and simply like to say that I appreciate that the law the Building Inspector is circumventing it helps people like me and my neighbors who are next to other construction sites as well. If an applicant starts construction as Mr. Chrisitson did he has to finish it without further extension…
Mr. Fink – No, that is not what the law says. You can get extensions for Building Permits and can get an extension for your site plan approval.
Mr. Carter– Thank you for that point. In this case Mr. Christison not only started construction with no way to finish he cleared the trees that was…
Mr. Fink – Please that is really not an the issue before this Board. What he did or didn't do is not an issue. What the issue is was the statute in regard to finishing construction, finishing the project in a 2 year period. What do you have to deal with that, that is really the central issue. The way he handled his construction the neighbors are not happy with and we all appreciate that but that is for the Building Inspector. If he did something that was not in conformance with site plan approval it is up to the Building Inspector to enforce it. This Board has no enforcement. I don't mean to interrupt but please try to restrict yourself to what is before the Board.
Mr. Bowen, 12 Van Buren St. – I have been homeowner since 2000, I run a non-profit organization, I do a numerous amount of outreach events at the High School and Middle School.

The point I want to make is that is makes no sense that the developer can start construction during the course of litigation…
Mr. Fink – Please, it was up to the developer, he was able to construct, he wasn't stayed, whether or not it made sense is not before this Board. The developer can do what he wants as long as he did it within the site plan plan and if he didn't then the Building Inspector had to stop it. I appreciate your feelings…
Mr. Bowen – These are not feelings, these are facts.
Mr. Fink – Alright, I appreciate your facts, but those facts are not relevant to this hearing.

Mr. Cappello – One fact I would like to discuss is in the Alleghany Wind case that everyone has mentioned is a Fourth Dept. case in Western NY to say that its controlling in the Second Dept. is not entirely correct, I believe and the point I made is yes, they did say NYS does not recognize equitable tolling yet, they did not say you are prohibited from it, they did not say if you do it in the Second Dept. you can't do it, they didn't say the Building Inspector based upon those facts could not do it. It does not stand for that proposition. That is a legal argument that set forth in it, you can read the case, you can read the full analysis. But this case is just not true, it is clear in Alleghany Wind that they were trying to gain the system. There has been a lot attributed to Mr. Chrisiton motives. He got the foundation in, in Oct. because he wanted to get the foundation in before the ground froze so he could potentially complete construction and be up and operating when he won the lawsuit. One fact I would like to clarify is TRO is in the documents with the Judges crossing out the request for the TRO so that is an incorrect fact that Mr. Gordon stated or maybe it was his misunderstanding, but it is in your package with the cross-out over the restraining order that what the Judge signed in the TRO and then the Court denied it. They did Judge it on the equities, there were discussions about the impact. I am not disparaging the neighbor, we understood their concern and we would like to be able to address it. If they don't want this or, some of them we have asked, we have reached out and it couldn't be discussed with them. One other case that I would like to read and when you asked what are we looking for here, that why we are coming to you to ask you for site plan? This is not our appeal. We didn't come here, we are responding to the appeal of Mr. Gallagher. The Building Inspector made the determination…
Mr. Burley – That is why my question was directed to him.
Mr. Cappello – When you do have statues that seem to conflict itself, you are right the ultimate body that should fix it is the Village Board but in the mean time you do have the power of interpretation. You do have to construe the statute in a way that makes sense and does not end in an absurd result. This case is old but it is clear on statutory construction it's Gusthal, it says "the court compelled and the it is not permitted to give absolute and unqualified effect to a single section or clause of a stature however direct, plain and unambiguous considered by itself, the language may be, if there are other provisions inconsistent with the literal and unrestricted interpretation of such clause. It is the duty of the court to preserve the paramount intent so far as consistent with the rules of law. There are a few cases there that say you need to interpret this in a way that does not result in an absurd action and the way they are asking you to interpret this is someone who begins construction in compliance with the law, in full compliance with the laws that exist is penalized versus the person who does nothing at all. The person who acts on his

rights actually has less rights in the Village of Warwick then the person who doesn't which leads to the resolve that anyone on any application that is for the Village where someone has started construction the way to stop it in the Village of Warwick, is to sue..
Mr. Fink – It is that way everywhere.
Mr. Cappello – There is not automatic expiration. We don't have the opportunity to go under Mr. Dickover's rule to go for an extension. I said and the Board interpreted that and reliance upon it was told and we need to go to the Planning Board for an extension and I said we will go for an extension but the reason we are here and we are saying it is not fair and it is not right and not a rational interpretation to go, and I think you heard what Mr. Gordon said, that the rationale behind this is that they want another bite of the apple. They want to raise all those issues that they properly lost before the court again and go through the whole process again with the Planning Board to sue again. I wish we could resolve it, I have reached out to Mr. Gordon that I would like to resolve it but it is an absurd result. The Building Inspector has made not only this Determination, he made a Determination in issuing a Building Permit that this site plan requires of the law, the was not appealed to you so that is a law in this case. That is what I am talking about with rationale. They believe a couple of trees, or buffer was ripped up, it was perceived in Mr. Gordon's submission to the Board. The Village Board has taken that up, Mr. Christison has provided a plan to them and we will discuss that with the neighbors, I don't have a problem with that and Mr. Christison doesn't have a problem with that but that is not the issue here. The point is this interpretation that they are requesting has the absurd result penalizing someone who moves forward with construction in good faith and in good results versus someone who does nothing. The person who exercises, acts on his approvals should not be put in a different or worst position then the person who doesn't.

Mr. Gordon – the Alleghany Wind case is indeed a 4th Dept. case. The case that they are relying on which is 230-10 is a 1st Dept. case. Here in Orange County where are in the 2nd Dept. so the two things I would point out is 1) The Alleghany Wind case did not say " there is no equitable tolling in the 4th Dept. or they don't recognize it. It says New York State doesn't recognize it. 2) They only tell you which Dept. it is in when it is a problem for them. They didn't tell that the 230-10 was not in your jurisdiction.

Mr. Cappello – Actually I did, not to interrupt.

Mr. Gordon – I believe Mr. Cappello has actually crystalized the case. He is actually correct that Alleghany Wind does not say "we can never have this in New York State, it said New York State does not recognize this" The question for you is whether in Appellate jurisdiction, you are willing to affirm the first time that this is recognized in New York State is by your Building Inspector without any thought to guide him other than his interpretation. You are the ZBA, it is up to you to decide whether this is an applicable, given the law, applicable exercise of the Building Inspector's ability to interpret the Village Code. That is what is before you.

A MOTION was made by John Prego, seconded by Margaret Politoski and carried to close the public hearing. (5 Ayes)

Mr. Fink – I submitted my memorandum, and it is what I believe the issues were and what the answer to those issues were and I stand by that and at the end I say you don't have to follow what I say but whatever decision that you come up with should be supported by the law. Unless everybody can tell me that they have read my memorandum and supporting documentation, that they have read Mr. Cappello's letter and supporting documentation and that they have read the letter and documentation submitted by Mr. Gordon I submit to you that the Board is not ready to discuss it or take a vote. There is no criteria, this is just an interpretation. The Board needs to fully understand what the issues are and then we can rationally discuss it.

A MOTION was made by John Prego, seconded by Margaret Politoski and carried to continue the public hearing until March 16, 2021. (5 Ayes)

A MOTION was made by John Prego, seconded by Jonathan Burley and carried to adjourn the meeting. (5 Ayes)

Respectfully submitted,

Maureen J. Evans,
Zoning Board secretary