Town of Sand Lake
Zoning Board of Appeals (ZBA)
August 12, 2021

The minutes, as follows, are intended to provide a general summary of the Agenda items and Public Hearings. Quotes presented are not verbatim, nor is all discussion which occurred presented herein. This document should not be relied upon as a transcript or the actual proceedings. The transcript of this meeting is on a digital voice recorder and available at the Town Hall.

CALL TO ORDER: Melissa Toni opened the meeting at 7:02 PM

MEMBERS PRESENT: Geraldine Burger
Bendett
Amy Lent
Wayne Gendron
Craig Crist, Esq.
Christopher Langlois, Esq – Special Counsel

MEMBERS ABSENT:

OTHERS PRESENT: Melissa & Joseph Jankovic, Ben Neidl, Esq., Matthew Griffin, Julie Hansen, Emily Vandercar, Claire Hanley, Robert Shuey, Monica Ryan (Town Planner)

RECORDING CLERK: Laura Fedoreshenko, Clerk for Planning Board and ZBA

The meeting opened with Chair Melissa Toni (MT) conferring with Special Counsel Christopher Langlois (CL) regarding the ability to seek counsel in an attorney-client meeting to discuss process on a matter before the board. CL responded that it was appropriate for the board to have an attorney-client meeting. The Board went into an attorney-client meeting at 7:01PM. Geraldine Burger (GB) was not in attendance at the opening of the meeting. Board member resumed the meeting at 7:10 PM at which time GB was in attendance.

Appeal Application – Public Hearing

Matthew Griffin (Applicant)
42 Eastern Union Turnpike
Averill Park, NY 12018
R-Residential Zoning District

Project Address:
37 Eastern Union Turnpike
Averill Park, NY 12018
Tax Map #: 159.-1-2.1

An appeal on the classification of a use as determined by the Code Enforcement Officer.

MT made a motion to open the public hearing at 7:15PM; seconded by Wayne Gendron (WG). MT summarized that the ZBA received written comments which will be part of the record from Ben Neidl on 7/13, Emily Vandercar on 7/14 and Matt Griffin on 7/14. CL offered clarification that in addition to these documents the ZBA had the Appeal Application from Matthew Griffin; submissions from law firm Jones Hacker Murphy dated June 10th and July 13th; a letter from Matt Griffin dated July 13; and a letter from Emily Vandercar dated July 13th. Mr. Neidl of law firm Jones Hacker Murphy who represented the Jankovics followed-up that he had also submitted a sworn declaration from Joseph Jankovic with the July 13th submission. CL confirmed receipt.

MT invited Mr. Neidl to speak first if he so chose. Mr. Neidl's public hearing submission of July 13, 2021 is attached herein. He summarized that his clients were before the Planning Board seeking a Special Use Permit (SUP) for the use of the basketball courts. The SUP application was currently on hold because of this Appeal. It was explained that if Mike Wager's determination was upheld, the Jankovic's would return to the Planning Board (PB) for further consideration of the SUP application with regulations as deemed appropriate. Mr. Neidl wished to affirm the determination that the use meets the classification of "open space recreation" as both appropriate and rational. He stated that the definition of "open space recreation" broadly included "any recreational use conducted for other than a personal use" and provides a sample list of illustrative, but not exhaustive, list of uses that would meet the definition. He described the activities on the Jankovic property as clearly recreational as it is basketball and is played for fun all the time. He acknowledged that using the courts could be personal when it's just the family or friends playing but if a larger group used the courts for practice perhaps it is not personal. Regarding the part of the definition describing uses "oriented to and utilizing the outdoor character of an area," he submitted that the basketball courts are built on a property surrounded by fields and trees like you would see in a public park. He referred to the photos in the letter submission. He discussed the example list of uses in the definition clarifying that this is not every use but examples. Mr. Neidl summarized that it's a broad range of uses covering everything from horse trials to baseball.

He stated the definition for "club recreation" did not fit as nothing in it suggested that it embraced an outdoor recreational activity like basketball. Mr. Neidl noted that the definition continued to state that it was for a group of people organized for a not-for-profit purpose to pursue common goals, interests, or activities. At that point, he stated that the Jankovics were a family and not an organization nor non-for-profit. He added that the Jankovics owned the property and not NY HAVOC nor did NY HAVOC have any contracts to utilize the property nor control it. He added that the girls of NYS HAVOC who practiced there were merely guests of the Jankovics who could either let them play or not play. He stated that it was not an organization with membership qualifications and the Jankovics did not charge fees or dues to use the courts rather they allowed guests to use the courts. Mr. Neidl stated out that the only particular example given in the definition of "club recreation" was a lodge used for meetings by paternal organizations and pointed out that there was no lodge, or anything like it, at the property and no meetings were held there. Mr. Neidl stated that last part of the "club recreation" definition actually suggested it was somewhat antithetical to recreational activities as it specifically listed several types of indoor athletic organizations and uses which were not recreational club; thus, between the two definitions "recreation – open space" was a much better fit as it described the activity that took place at the property.

Mr. Neidl talked about NY HAVOC and stated that girls had been allowed to practice as guests of his clients for a few months last year. He added that his clients would like to continue those practices again occasional/seasonally as the PB may permit, conditionalize or allow within the confines of the SUP issued. Mr. Neidl stated that he believed the core premise of the Appeal was that these were NY HAVOC courts however were not nor did they own them or have a contract to utilize them; thus, if his clients wanted, they could stop the use. He added that the Appeal contained many documents to try and persuade that NY HAVOC was a non-for-profit and included travel and games schedules however none of that took place at the Jankovic's property as the girls only practiced there. Mr. Neidl then stated that throughout the Appeal there seemed to be a premise that the project could not be classified as "recreation open space" use as it was not a public park – he noted that nowhere in the definition of "recreation open space" did it suggest that the use was limited to public parks and that term was only shown towards the end buried in with many other examples. He further stated that no writer trying to define a public park only would open with the words "any recreation use other than personal use" – he added that a commercial use (such as recreational club or batting cages where fees are charged) is other than personal use however were not just open to anyone. He concluded by stating that the classification of use determination made by the

CEO matched what his clients did with the property, and that they have every intention of completing their application with the PB.

Matthew Griffin presented a public hearing submission of July 14, 2021 is attached herein. Mr. Griffin referred to Mr. Neidl's statement regarding lodging and stated that the definition read "if there is a lodge it could be recreation club as long as it was not used as a dwelling". He then read the rest of the definition and added that zoning was use and not ownership. He added that principal users of the courts were NY HAVOC Basketball Player Development organization and pointed that they were highly organized and not local. He stated that while not against it, the use did not belong in a residential neighborhood and two full-size courts were not recreational use. He stated that NY HAVOC met every definition of a recreation club – not-for-profit entity, existed to pursue common goals and interests, had membership qualifications, required payments of fees and dues; thus, all the criteria for a club were met. He added it was not a small group that practiced but rather more intense and regulated.

Mr. Griffin then noted that the Jankovics had stated repeatedly that the use of the courts was just for COVID however now learned they wished to continue the use seasonally. Regarding the outdoor nature, he added that basketball at that level was primarily played indoors at a gym or arena. Mr. Griffin stated that the list of uses for recreation open space contained outdoor sports and added that the Zoning Code had been written while basketball existed, yet it was not on the list of uses. He further stated that recreation open space would be best understood as recreation facilities operated by the Town or another governmental entity or non-profit organization open to the general public. Mr. Griffin added that to include into the open space definition recreation facilities owned by a private resident and operated by a non-profit organization only open to bona-fide members of that organization just distorted the definition.

Mr. Griffin restated that the use was only for COVID after which their ability to use the courts would be terminated as they would move back indoors and a barn built in the existing area of the courts. He added that he did not doubt gym space was hard to find during 2020 and the HAVOC teams were able to use the outdoor courts from August until the end of September 2020 then Mr. Florence of NY HAVOC used the courts to hold a youth basketball development and recruitment clinic during the month of October – he believed at that point money changed hands which reflect commercial versus recreation club.

Mr. Griffin stated that the NY HAVOC group website reflected that the girls had gym space that March and it reflected regular practices in Clifton Park and at two other gyms. He stated that as this information was known by the Jankovics and Mr. Florence and it should have been shared with the PB to aid them in making the most informed and fair determination within the confines of the law and code however it was not mentioned instead led to believe there was nowhere to practice. Mr. Griffin stated that in the end this was just about a plain language interpretation of the code and added that the use was not obviously recreation open space by any definition. He stated that the PB felt the same when they had asked for an interpretation of the code at their March 17, 2021 meeting.

Mr. Griffin stated that the constant loud noise drove them insane and it was unjust to impose that facility and force the adjacent property owners to pay for it through lower desirability and subsequent market value of their homes in the quite character of the neighborhood. He added that any favorable action given towards the project would reflect a "build first, ask permission later" attitude for residents. Mr. Griffin stated that personal use would be acceptable however it was not, but rather used by an organized not-for-profit group that pulled players from all over New York. Mr. Griffin closed by stating that a barn should be built in its place for the storage of tractors as the NY HAVOC were practicing elsewhere, thus, the courts were not needed and purely preference.

Emily Vandercar stated she did not have any additional to add to her written statement however wanted to know if the Board members had received and viewed the video with audio she had attached to her emailed written statement. MT replied that yes.

Julie Hansen stated that she resided at 42 Eastern Union Turnpike and was in support of the Appeal as the proper designation for the basketballs courts was "recreation club" versus "recreation open space". She added that the average Town resident could not walk on and utilize the courts like they could at Butler Park. She reiterated that the courts had been used by a player development team which was a successful business ran by Terrence Florence for which he received payment for training. She added that there were no trespassing signs on the property and not something seen at the basketball courts at Butler Park. Ms. Hansen stated that she believed much time and effort had gone into developing the Zoning Code for the Town and added that from what she had read they were detailed and clear cut. She stated that she did not believe the issue at hand would be being discussed if those Codes were enforced from day one regarding the basketball courts. She stated she did not understand why the Codes were not being followed and interpreted in this case. She concluded that all the information gathered and submitted by her husband, Matthew Griffin, reflected the proper designation for the courts was "recreation club" not "open space" – she asked that the Zoning Code be interpreted properly and follow suit by enforcing the applicable Zoning Codes.

Joseph Jankovic stated that he had asked for permission for the project. Mr. Jankovic added that AAU ball games had never been played at the site. He explained that they had previously planned to do a fundraiser to help with the payment of the basketball courts however was informed by Town officials that he could not do so. He stated that he had done everything per Town Code. Mr. Jankovic stated that the project was a good thing for young girls in the area and added that it was not true that out of state girls played at the site but rather girls from the Capital District. He added that there was not any money made and in addition to him and his wife, many parents of the girls donated their time to help the kids.

Claire Hanley stated that she resided at 44 Eastern Union Turnpike and while not contiguous with the basketball courts; however, was close enough to hear. Ms. Hanley stated that she was unsure how the project was originally presented to CEO Mr. Wager when the zoning classification of use designation was made. She stated that she had heard from neighbors that originally it had been said that the property would be used for a corn field and a basketball court. She then asked if anyone would have imagined two regulation size basketball courts. She added that when it had been said that the courts would be used by the Jankovic's daughters and friends, would anyone then imagine that it would turn into approximately 50 people who attended daily and created such noise that the neighbors had left their homes to get away from it. She indicated she had watched other PB and ZBA meetings and noted the amount of concern by Board members regarding lights shining onto the neighbors and asked that same amount of weight be given to the noise for this project. She then mentioned the traffic issue and noted 6-8 vehicles lined up waiting to get into the road which was the ingress and egress for the fire department which could cause a problem. Ms. Hanley then spoke of the change in the character of the neighbor as long-standing neighbors not able to enjoy their property; thus, asked the ZBA to consider how the project had been classified.

MT then went over the options at that point. She stated that the Public Hearing could be closed or held open to have Mr. Wager weigh in on his determination. CL stated that while Mr. Wager had been invited to address the Board, however his absence from the Town due to a medical issue prevented that from happening. MT then stated that there would not be any guarantee of Mr. Wager's ability to attend a future ZBA meeting to provide a verbal or even written comment. WG stated that he felt it was important to hear from Mr. Wager on why/how he had come to his determination and MT agreed as she felt there was an actual discrepancy in the use of the property. GB stated she believed it to be a good idea to keep

the public hearing opening and try to have Mr. Wager explain his point of view. MT agreed and stated that should Mr. Wager be absent at that future meeting, then the ZBA would have to prepared to move on. MT then opted not to close the public hearing for purposes of hearing from Mr. Wager at the next meeting and allow the public to respond to Mr. Wager's comments.

Mr. Jankovic stated that at a previous PB meeting they had been told they could use the courts and asked if that remained true. MT was unaware and Ms. Ryan replied that Mr. Wager's letter to the Jankovic's indicated that they had to file the SUP application to the PB which they had done. MT strongly suggested that the Jankovic's clarify that information with Mr. Lawrence in Mr. Wager's absence.

WG asked Mr. Jankovic if hired coaches showed up at the practices and organized the sessions. Mr. Jankovic replied only the kid's parents showed up – no coaches and added that his daughter had assisted in mentoring the girls.

MT asked CL if when the ultimate decision was rendered, could it be stated that there were no professional coaches and that it was a volunteer led. CL stated that the decision could be done in a couple of ways. He explained that a motion could be stated to either approve or deny the application and afterwards a written decision issued by the Board that would explain the basis for the conclusion. He then noted that in other situations, the Board had a bit of a roundtable discussion on their thoughts along with the reasoning prior to a motion being made.

MT then stated that if the decision was made based on no professional coaches and asked what if there were later. CL replied that the basis of the decision would be made on the information presented by the applicant as well as from the public (pros and cons) with the assumption that it was all factually accurate and how it tied into the Board's determination for the interpretation based on the Zoning Code. He added that he supposed that if there was a material fact that was crucial to how the ZBA reached their decision and it turned out to be demonstratively wrong, there is some mechanism where that decision could be re-evaluated.

Mr. Jankovic stated that if the girls returned to playing the following week, he invited the Board members to visit the site. It was discussed and agreed that the Jankovic's would notify the Planning Office when the girls may be scheduled to play so it may be disseminated to the Board members for a site visit. Emily Vandercar stated if such a site visit were to happen with 50 participants, she also invited the Board members to listen to the noise from the living room or bedroom of her home. CL explained that the ZBA's role was to decide purely on a code interpretation and not to weigh the impacts as that was not part of their decision making however may be looked at by the PB. Ms. Vandercar replied she understood and was appreciative of the clarification. CL stated that he would not recommend a site visit unless it was believed that information gathered would be important to the decision. He added that the courts should not be visited by separate Board members on different dates as information/attendees could vary.

Claire Hanley asked if the normal set of criteria would be considered for this situation. MT explained that the process for an appeal on a code Interpretation was completely different than the normal area variance process which viewed a set of criteria prior to a decision being rendered. Ms. Ryan added that the process and set of criteria for an area variance was all pre-set up by State regulations.

MT asked that CEO Michael Wager be invited/requested to either come to the September 9, 2021 meeting or provide a written discussion of what he had reviewed to make the classification of use decision. CL stated that it would be preferable for Mr. Wager to be in-person at the meeting to allow for a dialogue. He added, if not feasible, then something in writing would need to be provided ahead of the Sept. 9th meeting in order that it could be provided to the parties involved. It was agreed that MT would send an

email to Ms. Ryan asking that Mr. Wager be present at the Sept. 9th meeting. MT closed by stating that the ZBA's role would be to determine if the classification of use was "recreation club" or "recreation open space".

APPROVAL OF DRAFT MINUTES
Scott Bendett (SB) motioned to approve the April 15, 2021 minutes as submitted; seconded by MT and all approved.

ADJOURMENT
MT motioned to adjourn the meeting at 8:16pm; seconded by SB and all approved.