

APPLICATION TO BOARD OF APPEALS

Tel. No. _____

Appeal No. 2022-061
Date 11/9/2022

TO THE ZONING BOARD OF APPEALS, WEST SENECA, NEW YORK:

I (we) Daniel T. Warren of 836 Indian Church RD, West Seneca, NY

_____, HEREBY APPEAL TO THE ZONING BOARD OF APPEALS FROM THE DECISION OF THE BUILDING INSPECTOR ON AN APPLICATION FOR A BUILDING PERMIT, WHEREBY THE BUILDING INSPECTOR DID ~~DENY PERMIT TO~~ issue a permit to Canisius High School, Permit #20220685 on July 25, 2022

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|--|---|
| <input checked="" type="checkbox"/> A PERMIT FOR USE | <input type="checkbox"/> A CERTIFICATE OF EXISTING USE |
| <input type="checkbox"/> A PERMIT FOR OCCUPANCY | <input type="checkbox"/> A CERTIFICATE OF ZONING COMPLIANCE |
| <input type="checkbox"/> A TEMPORARY PERMIT OR EXTENSION THEREOF | <input type="checkbox"/> AREA PERMIT |

1. Applicant is the PROPERTY OWNER
 CONTRACTOR FOR THE WORK CONCERNED HEREIN
 PROSPECTIVE TENANT
 OTHER (Describe) Aggrieved Person

2. LOCATION OF THE PROPERTY 2448 and 2885 Clinton Street, West Seneca, NY 14224

3. State in general the exact nature of the permission required, See attached STATEMENT OF GROUNDS FOR APPEAL

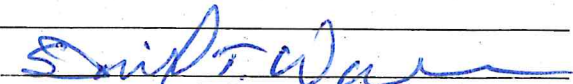
4. PREVIOUS APPEAL. No previous appeal has been made with respect to this decision of the Building Inspector or with respect to this property, except the appeal made in Appeal No. 2007-051, dated August 3, 2007.

5. REASON FOR APPEAL.

A. A Variance to the Zoning Ordinance is requested because strict application of the ordinance would produce undue hardship, or the hardship created is unique and is not shared by all properties alike in the immediate vicinity of this property and in this use district, or the variance would observe the spirit of the ordinance and would not change the character of the district because: _____
N/A

B. Interpretation of the Zoning Ordinance is requested because: See attached STATEMENT OF GROUNDS FOR APPEAL

C. A Special or Temporary Permit or an Extension thereof Under the Zoning Ordinance is requested pursuant to Article _____, Section _____, Subsection _____, Paragraph _____ of the Zoning Ordinance, because: _____


Applicant's Signature

TO BE COMPLETED BY THE BUILDING INSPECTOR

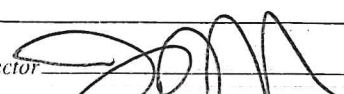
1. Provision(s) of the Zoning Ordinance Appealed, including article, section, subsection or paragraph of the Zoning Ordinance
120-17 - PERMITTED USES R-100A

2. Zoning Classification of the property concerned in this appeal R-100A

3. Type of Appeal:

- Variance to the Zoning Ordinance.
 Interpretation of the Zoning Ordinance or Zoning Map.
 Special or Temporary Permit or an extension thereof under the Zoning Ordinance.

4. A statement of any other facts or data which should be considered in this appeal. _____

Building Inspector 

ZONING BOARD OF APPEALS
TOWN OF WEST SENECA

Appeal of the Issuance of a Building Permit
and Appeal for Interpretation,
Daniel T. Warren
Appellant,

: STATEMENT OF GROUNDS FOR APPEAL
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This is an appeal of the code enforcement officer’s issuance of Permit #20220685 on July 25, 2022, and appeal for interpretation. The Code Enforcement Officer relied on the opinion in Zoning Board of Appeals #2007-051 (a copy of which is attached hereto as Exhibit “A”). This was error because this prior opinion was issued based upon the representations of what the property would be used for back in 2007 rather than its current actual use. Now after 15 years of history of the actual use of this property as recreational and not an educational use as the property owner represented back in 2007 it is clear that what is currently taking place on this property is inconsistent with the applicable residential zoning. It is now clear that the principal use of this property is for impermissible recreational use rather than permissible educational uses.

Appellant’s standing to challenge the zoning decisions of the property located at 2448 and/or 2885 has been judicially established on the prior appeal of Zoning Board of Appeals #2007-051 in *Grasso v. Town of West Seneca, et al*, 63 AD3d 1629 (4th Dept. 2009).

The principle, dominant, and primary use of this land has been and is planned to be is as athletic fields. In fact, according the Canisius High School Student Handbook “the purchase of 63 acres on Clinton Street for an outdoor athletic facility in 2003.” (<https://canisiusrowing.com/wp-content/uploads/2018/07/CHSSStudentHandbook.pdf>).

While Phase I of this project was permitted to go forward based on Respondent Canisius’

representations that it will be used for educational classes there is at best a de minimis number of educational classes, if any at all, held on this site since the completion of Phase 1.

This property is zoned as 100-A Residential. The permitted principle and accessory uses for this property is defined in West Seneca Town Code § 120-17.

The only permitted principal purpose that comes close to the proposed use in this case is set forth in West Seneca Town Code § 120-17(A)(5): “Commercial picnic grove, provided that no amusement devices shall be permitted other than customary playground apparatus.”

The Subject Parcel would therefore need to be rezoned to C-1 or C-2 because such use is specifically permitted by West Seneca Town Code §§ 120-19, 120-20, 120-21 and 120-22 or pursuant to a use variance.

Since the use of this land as athletic fields is a non-conforming use, if not unauthorized, it may not be enlarged or extended pursuant to West Seneca Town Code § 120-45[c].

This project is not compatible with the surrounding neighborhood and not in harmony with the Comprehensive Plan of the Town of West Seneca because portions of the site are shown as part of an extensive Greenway / Preservation Area that recommends limiting development along the creeks to protect the floodways and to preserve them for implementation of a trail system (

[http://westseneca.net/sites/default/files/WS%202016%20Comprehensive%20Plan%20ADOPTED\(3\).pdf](http://westseneca.net/sites/default/files/WS%202016%20Comprehensive%20Plan%20ADOPTED(3).pdf)).

In *Cornell Univ. v Bagnardi*, 68 NY2d 583, 593 [1986] The Court of Appeals held that “[t]he controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare. Although the special treatment afforded schools and churches stems from their presumed

beneficial effect on the community, there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals. In those instances, the institution may be properly denied. There is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects. The presumed beneficial effect may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like" (citations omitted)"

The last flooding event in the Lexington Green Neighborhood prior to Phase 1 of this project was in 1979. Since the completion of Phase 1 it has impacted a number of adverse environmental effects such as traffic has been an issue on Clinton Street during various athletic events held on the property. Flooding has increased in frequency and intensity necessitating periods of temporary evacuation of neighboring residents and attendant property damage to others in the neighborhood. The proximity of this property to the Oxbow wetland and conservation area has a negative impact to it as far as noise and its effect on the red headed woodpecker which is a species of special concern.

Therefore, any use variance should not be granted or considered.

The Code Enforcement Officer failed to confirm that the intended use as represented by Respondent Canisius in the prior proceedings for Phase 1 is actually being used as represented and to the same degree to establish its current use as educational.

Pursuant to West Seneca Town Code § 120-5(A) "If a use is specifically named as a permitted use could also be construed as being incorporated within a more general listing, the more specific listing shall control and such use shall not be deemed to be included in the more general listing."

Pursuant to West Seneca Town Code § 120-5(B) "No use shall be permitted in any

zoning district unless it is listed specifically or generally as a permitted use in said zoning district.”

Pursuant to West Seneca Town Code § 120-10(B) “Whenever any provision of this chapter is at variance or in conflict with any other provision of this chapter or any other statute, local ordinance or regulation covering any of the same subject matter, the most restrictive provision or the one imposing the higher standard shall govern.”

West Seneca Town Code § 120-64 defines “ACCESSORY USE OR STRUCTURES — A use or structure customarily incidental and subordinate to the principal use or building and (except as otherwise provided) located on the same lot with such principal use or building.”

For a use to be a proper accessory use it must be incidental to a permitted use of the land. The athletic field cannot be considered an accessory use to a school/educational use because Canisius does not intend to build a school or educational use on the property for academic study that will be the principal use thereof. Rather the intended principal use of the subject property is as an athletic field which either falls within a permitted use under the zoning classification of C-1 under amusements if it is to be conducted in an enclosed building or C-2, M-1, or M-2 if it will not be in an enclosed building.

Whether or not the property owner is a religious or educational institution is not the issue. The issue is whether the use of the property is currently being used as a permissible educational use or an impermissible recreational use (Matter of Sid Jacobson Jewish Community Ctr., Inc. v Zoning Bd. of Appeals of the Inc. Vil. of Brookville, 192 A.D.3d 693 (2nd Dept 2021).

The Appellate Division Second Department has held that “[w]hile an educational use may not be wholly excluded from a residential district (*Matter of New York Inst. of Technology v Le Boutillier*, 33 N.Y.2d 125, 130), case law in this State reveals that the concept of

"educational use" does not include activities which are primarily recreational in nature (see, *Matter of Schoen v Bowne*, 298 N.Y. 611, affg 273 App Div 1020; *Matter of 4M Club v Andrews*, 11 A.D.2d 720; 12 NY Jur 2d, Buildings, Zoning, and Land Controls, § 179, at 178). Moreover, it has been held that instructional programs involving classes in ceramics and horsemanship are not educational in nature (*Matter of Schweizer v Board of Zoning Appeals*, 8 Misc 2d 878; *Village of E. Hampton v Mulford*, 188 Misc 1037; see also, *Matter of Donegan v Griffin*, 270 App Div 937 [where an order granting a variance for a limited time to permit the operation, on property in a residential zone, of a riding academy was reversed on the ground that the record failed to disclose adequate facts for the determination]). More recently, courts have recognized, albeit in dictum, that the activities of a riding academy are not educational in nature (see, *Matter of Imbergamo v Barclay*, 77 Misc 2d 188, 191-192; *Incorporated Vil. of Muttontown v Friscia*, 58 Misc2d 912, 913). Such instruction does not constitute a school in the sense intended by the use of that term in zoning regulations, where the emphasis is on the academic rather than the recreational (I Anderson, *New York Zoning Law and Practice* §§ 11.17, 11.19 [3d ed 1984])." (*Asharoken v. Pitassy*, 119 A.D.2d 404, 412-413 (N.Y. App. Div. 1986)).

The Code Enforcement Officer failed to make the requisite inquiry and findings that the building permit issued based on the current actual use of the property and did not properly apply the zoning code to those facts and erroneously relied on the August 3, 2007, decision of the West Seneca Zoning Board of Appeals decision based on Respondent Canisius anticipated use of the property.

DATED: August 18, 2022
West Seneca, New York

Yours, etc.



Daniel T. Warren
836 Indian Church Road
West Seneca, New York 14224
716-288-6724

Exhibit “A”



TOWN OF WEST SENECA

PATRICIA C. DEPASQUALE, RMC/CMC
TOWN CLERK

REGISTRAR OF VITAL STATISTICS
NOTARY PUBLIC
RECORDS MANAGEMENT OFFICER

SUPERVISOR
PAUL T. CLARK
TOWN COUNCIL
CHRISTOPHER F. OSMANSKI
VINCENT J. GRABER, JR.
CRAIG J. HICKS
CHRISTINA WLEKLINSKI BOVE

August 3, 2007

Mr. Donald Grasso
64 Lexington Green
West Seneca, NY 14224

Re: Zoning Board of Appeals #2007-051
Property located at 2448-2869 Clinton Street

Dear Applicant:

Enclosed please find a copy of the written decision of the Zoning Board of Appeals with regard to the above matter.

Very truly yours,

Patricia C. DePasquale, RMC/CMC
Town Clerk
cc: Harris Beach

DECISION OF THE WEST SENECA ZONING BOARD OF APPEALS

APPEAL NO 2007-051

Before the Zoning Board of Appeals is the appeal of Donald Grasso of 64 Lexington Green, West Seneca, New York challenging the determination of the Town of West Seneca Building Inspector, William Czuprynski, issuing a building permit to Canisius High School for construction of a athletic facility with classroom at 2448-2869 Clinton Street, West Seneca New York.

DECISION

It is the decision of the West Seneca Zoning Board of Appeals that the Building Inspector, William Czuprynski, properly issued a building permit to Canisius High School. Section 120-17 of the West Seneca Town Code permits school uses in property zoned R-100A by private, non-profit elementary or secondary schools accredited by the New York State Department of Education.

This decision was made after considering a number of factors. First, a public hearing was properly held on July 25, 2007 at the regularly scheduled monthly Zoning Board of Appeals meeting. At the public hearing testimony was presented by the Appellant, Donald Grasso, representatives of Canisius High School and members of the public. Second, the Board reviewed the documents presented at the public hearing by Mr. Grasso and Canisius High School. Finally, the Board reviewed a number of New York State Court Cases directly related to the application of local zoning ordinances to school or educational uses.

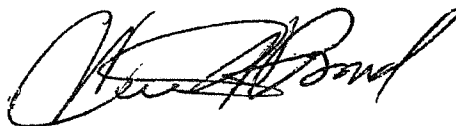
Based on the testimony presented at the hearing and documentation provided Canisius High School is a legally chartered by the New York State Department of Education and Accredited by the Commission on Secondary Schools of the Middle States Association. Related to its mission, the school has a curriculum, a plant consisting of adequate facilities and a staff appropriately qualified to meet educational objectives. The Clinton Street Athletic and Classroom facility will directly assist in the Canisius having accomplishing its educational objectives.

Finally, the case history supports the determination made by the Building Inspector when the building permit was issued. There are a number of New York State Court cases which hold that school uses and religious uses enjoy a special treatment as to residential zoning ordinances. The Court has allowed schools and religious institutions to expand its uses in a residentially zoned neighborhood where other non conforming uses would not be allowed. These cases are based on the fact that schools by their very nature further public health, welfare, morals and safety. In effort to keep this decision brief, a list of cases relied upon is attached hereto and made a part herof.

Exhibit A

Supporting Cases Appeal No.2007-051

1. New York Institute of Technology, Inc. v. Ruckgraber, et al., 65 Misc.2d 241
2. The Harvey School v. Town of Bedford, 34 A.D.2d 965
3. Town of Islip v. Dowling College, 275 A.D.2d 366
4. Cornell University v. Bagnardi et al., 107 A.D.2d 398
5. Rorie et al. v. Woodmere Academy, 52 N.Y.2d 200
6. Incorporated Village of Asharoken v. Pitassy, et al. 119 A.D.2d 404
7. Cornell University v. Bagnardi, 68 N.Y.2d 583
8. Association of Zone A & B Homeowners Subsidiary, Inc. et al. v. Zoning Board of Appeals of City of Long Beach, et al., 298 A.D.2d 583
9. Richmond, et al., v. City of New Rochelle Board of Appeals on Zoning, 24 A.D.3d 782
10. Albany Preparatory Charter School, et al. v. City of Albany, 31 A.D.3d 870

A handwritten signature in black ink, appearing to read "Christopher Bond". The signature is written in a cursive, flowing style with a large initial "C".