CITY OF ALBANY
NEW YORK
DEPARTMENT OF PLANNING AND DEVELOPMENT

MAYOR: KATHY M. SHEEHAN
COMMISSIONER: CHRISTOPHER P. SPENCER

MEMORANDUM

TO: PLANNING BOARD

DATE: OCTOBER 13, 2020

FROM: CHRIS SPENCER

SUBJECT: 2 COLVIN AVENUE

PREVIOUS APPLICATION FOR 2 COLVIN AVENUE:

§ 375-5(D)(12)(e)(ii) or the USDO notes that "If an application requiring a public hearing is denied, no application proposing the same or similar development on all or part of the same land shall be submitted within one year after the date of the denial." As Amy Levine, Assistant Corporations Counsel notes in her accompanying memo, "principles of administrative finality do not preclude zoning and planning boards from considering a new application that seeks different relief, and approval may be granted on a second application as long as there has been some substantial change of circumstances since the prior application denial." It is my determination that this shall be viewed as a new application based on the following:

- In the previous application, the building was oriented with its long axis along Colvin Avenue;
- The building in the previous application, was more urban in nature, with a similar massing and design consistent with many of the commercial buildings along Colvin Avenue;
- The pedestrian entrance on Washington Avenue in the previous application was more of a side door entrance;
- The gas canopy in the previous application contained four (4) pump islands;
- The site plan, in the previous application, was fully occupied by the proposed development;
- The building responded more to Colvin Avenue than the residential structures along Western Avenue;
- There was a connection to the parking lot on the adjoining parcel at 8 Colvin Avenue;
- The Curb cut on Washington Avenue was in excess of 25 feet and
- The entrance / egress on Washington Avenue did not limit turns coming in or out of the site.

NEW APPLICATION FOR 2 COLVIN AVENUE :

The following changes have been made to the the proposed development, allowing for it to be considered a new application:

- The entire building was rotated 90 degrees;
- The building orientation is identical to the existing bank building;
- The primary elevation and pedestrian entrance face Washington Avenue;
- The building is more consistent with the residential character found along Washington Avenue;
- The number of gas pump islands under the canopy have been reduced to three (3).
- The connection with the adjoining lot at 8 Colvin Avenue has been eliminated;

- Five (5) feet along the western property boundary is being proposed to be given to the abutting property owners along Rosemont Street;
- The curb cut along Washington Avenue has been reduced and contains a center island; and
- The egress / ingress from Washington Avenue allows for only right in and right out.

SUPPORTING DOCUMENTATION:

See attached me from Amy Lavine, Assistant Corporations Counsel, containing references to New York State law and relevant court cases.

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MAYOR: KATHY M. SHEEHAN
DIRECTOR: CHRISTOPHER P. SPENCER

LEGAL CLARIFICATION

DATE: October 7, 2020
FROM: Amy Lavine, Assistant Corporation Counsel
ACTION: No action required

ISSUE / QUESTION

If a development application is denied by the Planning Board, can the applicant submit a new application or request reconsideration of the decision?

APPLICABLE USDO SECTION

USDO 375-5(D)(12)(e)(ii) PRIOR APPLICATION DENIAL

INTERPRETATION

Unlike the BZA, which can grant rehearings under General City Law §81-a(12), there is no statutory authorization for the Planning Board to reconsider prior application denials. When the Planning Board denies an application, the only remedy specifically mentioned in General City Law §27-b(9) is for the applicant to seek judicial review. The USDO also limits reapplications in section 375-5(D)(12)(e)(ii), which provides that "If an application requiring a public hearing is denied, no application proposing the same or similar development on all or part of the same land shall be submitted within one year after the date of the denial."

Prior application restrictions like USDO 375-5(D)(12)(e)(ii) are intended to bolster the finality of Planning Board decisions and ensure that planning policies are applied consistently. It is well settled law, however, that principles of administrative finality do not preclude zoning and planning boards from considering a new application that seeks different relief, and approval may be granted on a second application as long as there has been some substantial change of circumstances since the prior application denial. *See, e.g., Matter of Town of Mamakating v Village of Bloomingburg,* 174 A.D.3d 1175, 1178-1179 (3d Dept 2019); *Vill. Estates Condo. Ass'n v. Planning Bd.*, 298 A.D.2d 665, 667 (3d Dept 2002); *1066 Land Corp. v. Planning Bd.,* 218 A.D.2d 887, 887 (3d Dept 1995); *Carter v. Adirondack Park Agency*, 203 A.D.2d 788 (3d Dept 1994). Accordingly, in determining how to interpret and apply the restriction in USDO 375-5(D)(12)(e)(ii) barring subsequent applications for "the same or similar development," the CPO and the Planning Board should look to existing caselaw on administrative finality for guidance.

The prior application rule and administrative finality were recently addressed by the Third Department in *Matter of Town of N. Elba v New York State Dept. of Envtl. Conservation,* 160 A.D.3d 74 (3d Dept 2018). As the court explained there, "an agency has the inherent authority to reconsider a prior determination... upon owing of new information or changed circumstances." It

was not enough for the agency in that case to formally admit its master plan into the record, since the plan "did not constitute newly discovered evidence or new information that was not in existence at the time of the [prior] determination." The court found that the agency basically took up the subsequent review so that it could "accord more weight to the Master Plan," but this was not a valid basis for reconsidering its prior final decision. "Succinctly stated," the court held, "an administrative body's 'mere change of mind is insufficient.'" *See also Town of Clifton Park v. Sarris,* 81 A.D.3d 1207, 1208 (3d Dept 2011); *Korbel v. Zoning Bd. of Appeals of Town of Horicon,* 28 A.D.3d 888, 889 (3d Dept 2006)*; Freddolino v. Village of Warwick Zoning Bd. of Appeals,* 192 A.D.2d 839, 840 (3d Dept 1993; *Eldoma v City of Albany,* 2011 N.Y. Misc. LEXIS 4424, *7-8 (Sup Ct Albany County 2011).

In contrast, the Third Department found sufficient changed circumstances in *Freeman v. Ithaca Zoning Bd. of Appeals,* 61 A.D.2d 1070 (3d Dept 1978). The petitioners in that case contested the approval of a clinic based on a prior application denial. The court disagreed with the petitioners, however, and explained that "it is for the board to determine whether or not changed facts or circumstances are presented and, in so doing, it may give weight even 'to slight differences not easily discernible.'" Because the subsequent application rotated clinic building by 90 degrees and changed the location of the parking lot, the court found that the prior application rule did not apply, since "[i]t is settled law that there can be a new application and determination by a zoning board when 'new plans materially change the aspects of the case.'" *See also Allegany Wind LLC v. Planning Bd. of Town of Allegany*, 115 A.D.3d 1268, 1269 (4th Dep't 2014); *Matter of Hunt v. Board of Zoning Appeals of Vil. of Malverne*, 27 A.D.3d 464, 465 (2d Dept 2006); *Clute v. Town of Wilton Zoning Bd. of Appeals*, 197 A.D.2d 265, 268 (3d Dept 1994); *Reed v. Board of Standards & Appeals*, 255 N.Y. 126, 134 (1931).