

Op-ed column:

Board ignored law in approving bagel shop for Gillette House

by David Giacalone

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My annual resolution to be less cynical was broken at the January 5th meeting of the Schenectady Board of Zoning Appeals. Ignoring the law and its own Guidelines, the Board gave permission for a fast-food bagel shop in the Gillette House, on the corner of Union and South College Streets, at the gateway to the Stockade Historic District.

One fact seems to explain the Board's decision: the Applicant was John M. "Jack" McDonald, owner of the Stockade Inn and the Van Dyck Lounge, who is a popular Stockade resident, and a generous benefactor of many Stockade causes. If the McDonald's with the golden arches, or anyone else, had asked to sell fastfood at that location, the Board, the Stockade Association, Schenectady Heritage Foundation, and *Gazette* editorial page, would have laughed or booed them out of town.

Instead, those entrusted with protecting the residential nature of the Stockade never took a hard look at the facts before supporting a busy, noisy, smelly commercial establishment on a predominantly residential block.

BACKGROUND. Gillette House was the home of Elizabeth Gillette, Schenectady's first woman physician, and the first woman from Upstate elected to the New York Assembly. A few years ago, Schenectady County spent half a million dollars on the Gillette House, \$300,000 of which was for a facelift that gave an eyesore a lovely façade.

On the last day of 2009, Jack McDonald bought both the residentially-zoned Gillette House and the Millington House next-door, for \$88,000 from the Chamber of Commerce. Comparing their assessments in 2009, I estimate about \$55,000 of that purchase price should be allocated to the Gillette House. Before the purchase, BZA gave Jack a special use permit

to use it for professional offices. Less than a year later, Jack requested a Use Variance to sell bagels, a commercial activity otherwise banned in a residential district.

- Go to tinyurl.com/GilletteHouse for photos and links to relevant documents, and a more detailed version of this tale.

THE LAW. State law makes it difficult to get a Use Variance. An applicant must show, among other things, that he has suffered an “unnecessary hardship” that is not “self-created.” Unless each condition is met, a zoning board has no authority to grant a Use Variance.

Hardship. The statute says an applicant must demonstrate with “competent financial evidence” that he “cannot realize a reasonable return” using the property for any permitted use. Courts demand “dollar and cents” evidence. Nevertheless, the Board:

- put Jack’s application on its Agenda for November 3 and again for January 5, despite its having no financial evidence at all (not one \$ or %), and no mention of a rate of return
- allowed Jack to give the crucial reasonable return information for the first time orally on January 5, with nothing on paper for the Board or the public to review.

At the Hearing, Jack McDonald:

- never said what price he paid for the property or what he had invested since buying it, and stated no estimated rate of return
- gave conclusory expense and income figures, with no details, and only gave figures for the first floor, about 2000 of the total 3800+ sq. ft.
- presented nothing to support a high renovation cost (\$300,000) and low rental estimate (\$10/sq.ft)
- never explained what he had done to find office tenants (other than posting a sign), nor answered a direct question about how much advertising he had done

Despite these inadequacies, BZA asked no hard questions before finding Jack had tried hard enough to find office tenants and had proven hardship.

Self-created Hardship. Our courts agree that a hardship is self-created if the zoning restrictions existed when the owner purchased the property, and a Use Variance request (not to be confused with an Area Variance, which deals with dimensions not use) is “foredoomed” if it is self-created.

BZA chose to ignore the decisive fact that the Gillette House has been zoned residential for decades. It pointed to previous neglect of the building and proclaimed the legally irrelevant status of “partially self-created.” What happened prior to Jack’s purchase might show a property is “unique,” and may be relevant when considering an Area Variance, but it cannot save a Use Variance request from the ban on self-created hardship.

Remarkably, despite the dispute on this crucial legal issue, no one on the Board asked the City’s lawyer, who was sitting at the table, for his opinion -- and he did not offer it.

STREETSCAPE. Jack McDonald stressed that the area around the Gillette House is already so commercial that little would be lost putting a restaurant at a corner on the “periphery” of the Stockade. The photos found at tinyurl.com/GilletteHouse disprove his assertion.

The Gillette House is the most prominent sight when passing through the gateway columns to the Stockade. If it *were* under siege by commercial uses, it would be even more important to vigilantly protect it, to preserve the distinctive style of the first residential historic district in New York State.

DECISION. With the exception of Vickie Hurewitz, all members of the Board voted to grant the Application. As I write this piece, I am considering a lawsuit to challenge the unlawful variance. The integrity of the Stockade and the zoning Board hangs in the balance -- as does the economic viability of a revived Arthur’s Market and perhaps of another small, “grandfathered” eatery already selling bagels, soup and sandwiches in the Stockade.

This grand historic building should be used for residences and/or for professional offices, which fit in well with a residential neighborhood (especially with ample public parking a few yards away across So. College St.). And, finally, while Jack told the BZA he wants larger windows for his fastfood restaurant, the permitted uses would not threaten the Gillette House's expensive tax-payer-funded façade.

David Giacalone is a Stockade resident and retired lawyer.