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STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

DONALD E. STONE and I. KATHRYN STONE,  
Petitioners-Appellants,

-against-

GEORGE MCGOWAN, JAMES MATHIS, DANIEL  
STRAIN, JOSEPH DeSANTIS, and DAVID  
ROBINSON, Constituting the Town of  
Lake George Zoning Board of Appeals,

Respondents.

RECORD ON APPEAL

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STATEMENT PURSUANT TO CPLR 5531 (pp R1-R2)

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

-against-

STATEMENT  
PURSUANT TO  
CPLR 5531

GEORGE MCGOWAN, JAMES MATHIS, DANIEL  
STRAIN, JOSEPH DeSANTIS, and DAVID  
ROBINSON, Constituting the Town of  
Lake George Zoning Board of Appeals,

Respondents.

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1. The index number of the case in the court below assigned by the Warren County Clerk is 26664.

2. The full names of the parties are as set forth above; there have been no changes.

3. The action was commenced in Supreme Court, Warren County.

4. The Notice of Petition and Verified Petition was served upon the Respondent, Town of Lake George Zoning Board of Appeals, on December 8, 1988. The Verified Answer and Objections in Point of Law was served on behalf of Respondents on or about December 30, 1988.

5. That this action was commenced seeking a ruling that the determination by Respondent, Lake George Zoning Board of Appeals, that the change of ownership of the "Stepping Stones

Resort" as proposed by Petitioners, required an area variance. Petitioners had argued that the change in ownership to proposed condominium form was not within the jurisdiction of Respondent under its zoning ordinance and accordingly no approval was required for this change in ownership.

6. This is an appeal from an Order of the Hon. John G. Dier, Justice of the Supreme Court, entered in the Office of the Clerk of the County of Warren on January 9, 1989.

7. This appeal is on full record.

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF WARREN

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

NOTICE OF APPEAL

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

INDEX NO. 26664

Respondents.

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PLEASE TAKE NOTICE that Donald E. Stone and I. Kathryn Stone, Petitioners-Appellants, hereby appeal to the Appellate Division, Third Department, from an Order in the above referenced matter, dated January 9, 1989, and entered in the offices of the Warren County Clerk on January 9, 1989, and from each and every part of the aforesaid Order.

Dated: February 7, 1989

WALTER O. REHM, III  
Attorney for Petitioners-  
Appellants  
175 Ottawa Street  
Lake George, New York 12845

TO: MILLER, MANNIX & PRATT, P.C.  
Attorneys for Respondents  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

ORDER AND  
JUDGMENT

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Index No.

Hon. John G. Dier

Respondents.

Upon reading and filing the Notice of Petition dated December 7, 1988, the Verified Petition dated December 7, 1988 and the Verified Answer and Objections in Points of Law dated December 30, 1988, and after hearing Walter O. Rehm, III for Petitioners in support of the Petition and Mark J. Schachner for Respondents in opposition to the Petition;

NOW, on motion of MILLER, MANNIX & PRATT, P.C., Mark J. Schachner, Esq., of counsel, attorneys for Respondents it is hereby

ORDERED AND ADJUDGED that the relief requested in the Petition be denied and the Petition be dismissed in its entirety.

Signed this 9 day of January, 1989 at Lake George, New York.

ENTER:

15/ John G. Dier

JOHN G. DIER, J.S.C.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents.

---

RESPONDENTS' MEMORANDUM OF LAW

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P.O. Box 765  
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## PRELIMINARY STATEMENT

On September 14, 1988 petitioners submitted an application to respondents, the Town of Lake George Zoning Board of Appeals, for an interpretation of the Town of Lake George Zoning Ordinance. Petitioners sought interpretation as to whether a variance would be required for the proposed change in the use of their property from its current use as tourist accommodations to single family residences which would be owned as condominiums. Their appeal was made after the determination by the Town Zoning Officer that a variance and site plan review would be required for their project.

The matter was heard by respondents on October 20, 1988. Petitioners argued that their project comprised only a change in ownership and not a change in use and that a variance should not be required. After a meeting on November 3, 1988 at which respondents considered petitioners' request, respondents notified petitioners that the change of use from tourist accommodations to single family residences would require an area variance because petitioners' property does not have the 20,000 square feet per unit required for single family dwellings in the Residential Commercial/High Density District as provided by the Lake George Zoning Ordinance.

On December 7, 1988 petitioners served respondents with a Notice of Petition and Verified Petition purportedly in an Article 78 proceeding in which petitioners ask the Court to issue a declaratory judgment that petitioners' proposed change does not require a zoning variance or site plan review. At no time have petitioners made the request for a variance.

## STATEMENT OF FACTS

Petitioners own a motel known as the Stepping Stones Resort on Lake Shore Drive (Route 9N) in the Hamlet of Diamond Point, Town of Lake George. Petitioners own approximately 3.76 acres of land on both sides of Lake Shore Drive. They own a parcel which is substantially undeveloped comprised of approximately 1.66 acres on the westerly side of Lake Shore Drive. Their motel property is comprised of 14 single family cottage units and a year-round main house occupied by petitioners and is on an approximately 2.1 acre parcel on the easterly side of Lake Shore Drive with approximately 200 feet of frontage on Lake George.

Petitioners plan to change the current use of their property from a motel, tourist accommodation to condominium, single family housing. Petitioners asked respondents for an interpretation of the Town of Lake George Zoning Ordinance determining if a variance was required for this change.

Respondents reviewed petitioners' request. A public hearing was held on October 20, 1988 at which petitioners' attorney presented their argument that a variance should not be required. Petitioners argue that their project is merely a change in ownership and not a change in use. Their

attorney acknowledged that site plan approval might be required for the project but stated, "I am not asking you to make a decision on that tonight." Thus respondents only reviewed the variance issue. On November 3, 1988 respondents made the determination that a variance would be required and their decision was filed with the Town Clerk on November 9, 1988.

According to the Town of Lake George Zoning Ordinance ("Ordinance"), petitioners' property is located in the Residential Commercial/High Density (RCH) zone and is currently classified as a tourist accommodation. Pursuant to the Ordinance the conversion of these cottages to condominium units would change the classification to single family residences. The RCH zone permits single family housing provided 20,000 square feet are available for each unit. Petitioners' property does not contain enough acreage to allow for the 15 single family units proposed. Therefore, respondents determined that petitioners would need a variance for their project. Petitioners have never requested this variance from respondents, nor have they ever requested an interpretation regarding the site plan review which would also be required under the Ordinance.

I. PETITIONERS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND ARE NOT AGGRIEVED.

Petitioners have initiated this action by service of a document which purports to be an Article 78 Petition. However, in their request for relief, petitioners asked the Court for a declaratory judgment regarding respondents' interpretation of the provisions of the Town of Lake George Zoning Ordinance. First, petitioners' pleadings are procedurally defective because declaratory judgment is not appropriately sought in an Article 78 proceeding. Phillips v. Oriskany, 57 AD2d 110 (4th Dept. 1977). More importantly, however, petitioners' claim is not ripe for adjudication because they are not aggrieved by respondents' decision and have failed to exhaust their administrative remedies. People ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh, 203 AD 463 (1st Dept. 1922).

Petitioners seek to undertake a project which essentially consists of converting the use of their property from tourist accommodations to single family residences. In furtherance of their opinion that this project can be undertaken without need for approval from the Town of Lake George, petitioners have appealed

the adverse determination of the zoning officer to respondents in their interpretation request function. Respondents agreed with the zoning officer and stated that petitioners cannot undertake their project without first obtaining a variance.

Petitioners obviously disagree with respondents' decision. However, respondents have not conclusively determined that petitioners cannot undertake their project; they have merely determined that petitioners cannot do so without a variance. Until and unless petitioners seek a variance from respondents and such variance is denied, petitioners have not exhausted their administrative remedies and are not truly aggrieved. Respondents have merely decided that petitioners' proposal constitutes a change in use under the Town of Lake George Zoning Ordinance. Respondents have not in any fashion considered or ruled upon the issue of whether or not petitioners are entitled to a variance to pursue their project. In fact, as no variance application has been submitted to respondents for their consideration, it would have been imprudent and inappropriate for respondents to have expressed any opinion with respect to the variance issue.

Therefore, it is incumbent upon petitioners to submit a variance application to respondents for their

consideration prior to any claim of harm to petitioners. Unless any such variance application is denied, petitioners are not harmed or aggrieved, as no final decision prohibiting their project has been issued. The goal which petitioners seek, conversion of their buildings, has not been finally denied and they have failed to exhaust their administrative remedies toward achieving their goal.

II. RESPONDENTS HAVE ACTED WITHIN THE JURISDICTION OF TOWN LAW AND THE LAKE GEORGE ZONING ORDINANCE.

Although it is not clear in petitioners' hybrid petition what sort of relief under Article 78 they are requesting, respondents meet all possible standards of review as their determination was rationally and correctly based upon the provisions of the Town of Lake George Zoning Ordinance. Under the Town of Lake George Zoning Ordinance, the use of petitioners' property would change from tourist accommodations to single family residences regardless of how the property is to be owned.

The Town of Lake George Zoning Ordinance specifically states that the Residential Commercial/High Density District requires 20,000 square feet of land per single family dwelling unit. See Schedule II of the Town of Lake George Zoning Ordinance. Here petitioners are requesting to convert 15 buildings from their present pre-existing use to single family dwellings. As their property is only comprised of 3.6 acres, they are at best entitled to 8 units under the current zoning. Thus respondents were correct in their determination that under the Town of Lake George Zoning Ordinance a variance would be required.

The ability of the Town to control the use of property is set forth in the zoning enabling statute. Town Law §262. The act "[c]learly vest[s] in the legislative bodies of the [towns]...authority to establish residential districts, to differentiate between residential districts on the basis of size or type of building, or extent of occupancy, and to protect such districts by excluding commerce or industry, or both." Robert J. Anderson, New York Zoning Law and Practice (3d ed. 1984) §9.18. In addition respondents have the authority to regulate the height, bulk, and location of buildings, and to impose restrictions upon the size of lots, the coverage of structures and the size of buildings. Town Law §261.

Whether the existing use of petitioners' property is considered a pre-existing nonconforming use or a pre-existing allowed use, once respondents have determined that a change of use would occur, they are required to enforce the area restriction as provided in the Ordinance. In this case, the project constitutes a change in use for which petitioners lack the required density. Therefore, they cannot lawfully proceed without a variance.

III. THIS PROJECT IS A CHANGE  
OF USE AND NOT JUST A CHANGE  
OF OWNERSHIP.

Petitioners are correct that a town cannot regulate solely the type of ownership of property. However, the change of ownership in this project is accompanied by change of use of the property.

In Catharn Realty Corp. v. Town of Southampton, 62 NY2d 831 (1984), the Court found that an amendment to Southampton's zoning ordinance was not invalid merely because it attempted to regulate cooperative ownership of property. The plaintiff in the action was the owner of a seasonal motel who sought to convert its motel from corporate ownership to a cooperative form of ownership. The Town of Southampton amended its zoning ordinance to prohibit conversions into residential condominiums and residential cooperatives in certain zoning districts. The amendment required a special exception to be granted by the Zoning Board of Appeals for any conversion in all the remaining districts. The plaintiff claimed that the amendment should be invalid since it was up to the Secretary of State to regulate cooperatives and condominiums and not to the town. Id. The Court determined that since the amendment defined residential cooperatives as "[a] multiple dwelling in

which residents have an ownership interest in the entity which owns the building(s) and, in addition, a lease or occupancy agreement which entitles the residents to occupy a particular dwelling unit within the building", it was clear that the town board was regulating the type of use of the property and not merely the form of ownership thus the amendment was not invalid. Id. at 832. The Court of Appeals concluded that if, when a building changes form of ownership, its use will also be changed, then the town can regulate that change of use. Id. at 832.

In this case, petitioners argue that the new owners will either be coming to use the units themselves or rent the units out to other visitors and that the use will remain the same. However, contrary to petitioners' position, the use is changing from tourist accommodations to single family houses. No longer would the Stepping Stones Resort be a transient tourist accommodation where units are rented out a part of a business; rather the resort would become second homes to the new owners who would only rent out the property when they were not visiting or never rent out the property if they so chose.

In addition, petitioners are neglecting to consider the different status that new owners would

acquire by rights of being new condominium owners. The new owners could be afforded the status of legal residents of the Town of Lake George and thus would acquire the privileges of residents, placing a greater burden on the Town facilities and adversely affecting the public health and welfare of the community.

Petitioners cite case authority for the proposition that zoning cannot lawfully regulate ownership of property. While this assertion is not incorrect, petitioners seem to rest their argument on the notion that the use of a particular property cannot possibly be changing unless the property is undergoing some type of physical disturbance or modification. However, this notion is blatantly incorrect. For example, a single family residence could be converted into any number of commercial uses (such as professional offices including law offices or real estate offices) without physically modifying the property or the structure in any way. Similarly, various types of commercial and industrial uses can easily occupy identical premises and the use of a particular building could easily be converted from any of a number of non-intrusive permitted uses to many noisy, noxious or hazardous non-permitted uses with no physical modification of the premises. In any of these examples, it would clearly be perfectly lawful and

appropriate for a municipal zoning ordinance to distinguish among the uses and allow some while prohibiting others.

The two cases cited in the petition, North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, aff'd., 93 AD2d 883 (2d Dept. 1983) and FGL&L Property Corp. v. City of Rye et al., 108 AD2d 814, aff'd., 66 NY2 111 (1985), do stand for the proposition that zoning can regulate use and not ownership, but only for that proposition. Neither case considered the situation involving the conversion of a transient rental residential use to a seasonal ownership use. In fact, in the North Fork Motel case, the Court specifically stated that the conversion of ownership did not violate the Town of Southold Zoning Ordinance "provided the property's present use as a motel remains unchanged" (emphasis supplied). North Fork Motel, 93 AD2d at 883. The City of Rye case dealt not with a motel conversion, but with a zoning provision which was interpreted as essentially requiring the condominium form of ownership. The cases do not state that a municipality cannot regulate conversion from a seasonal rental commercial operation to a residential use and, in fact, the North Fork Motel case clearly supports respondents' decision in this case.

## CONCLUSION

Respondents' interpretation of the Town of Lake George Zoning Ordinance has a rational basis and is not arbitrary, capricious or illegal nor does the Ordinance regulate mere ownership of property. Respondents therefore respectfully request that the Petition be dismissed.

Dated: January 3, 1989

MILLER, MANNIX & PRATT, P.C.  
Attorneys for Respondents  
Office and Post Office Address  
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Glens Falls, New York 12801  
(518)793-6611

n;06stp-m1,5

VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW (pp R-21 to R-24)

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents.

VERIFIED ANSWER  
AND OBJECTIONS  
IN POINT OF LAW

Index No.

Hon. John G. Dier

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Respondent Town of Lake George Zoning Board of Appeals,  
by its attorneys, Miller, Mannix & Pratt, P.C., as and for  
an Answer to the Verified Petition of Petitioners, answers  
the Petition as follows:

1. Denies each and every allegation contained in the  
paragraphs of the Petition marked and numbered "7", "8",  
"9", "10", "12" and "13".

2. Denies knowledge and information sufficient to form  
a belief with respect to each and every allegation contained  
in the paragraphs of the Petition marked and numbered "1",  
"2", "3" and "14".

3. Denies the characterizations of official documents  
and cases of each and every allegation contained in the

paragraphs of the Petition marked and numbered "4", "5", "6" and "11" and affirmatively states that the applications, minutes of meetings, approvals, correspondence, resolutions, pleadings and decisions referred to in the Petition speak for themselves.

AS AND FOR A FIRST AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

4. The Petition fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

5. Petitioners have failed to exhaust their administrative remedies.

AS AND FOR A THIRD AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

6. Petitioners have failed to request the Zoning Board of Appeals to make any determination regarding site plan review.

WHEREFORE, Respondent demands that the Petition be dismissed in its entirety and that Respondents be awarded the costs and disbursements of this proceeding and such other

and further relief as to this Court may seem just and proper.

Dated: December 30, 1988

MILLER, MANNIX & PRATT, P.C.  
Attorneys for Respondent  
Office and Post Office Address  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
(518) 793-6611

TO: WALTER O. REHM, III, ESQ.  
Attorney for Petitioners  
Office and Post Office Address  
175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412





PLEASE ALSO TAKE FURTHER NOTICE, that an answer and supporting affidavits, if any, shall be served upon the undersigned at least seven (7) days before the return date hereof.

PLEASE ALSO TAKE FURTHER NOTICE, that pursuant to paragraph (e) of Section 7804 of the Civil Practice Law and Rules, the Respondent, Town of Lake George Zoning Board of Appeals, is directed to file the entire official record of proceedings had before it relative to Interpretation #2-88 - Conversions, on the return date of this proceeding.

PLEASE ALSO TAKE FURTHER NOTICE, that the Petitioners designate Warren County as the place of trial on the basis of the fact that the Petitioners reside within and the causes of action arose in Warren County.

Dated: December 7, 1988

WALTER O. REHM, III  
Attorney for Petitioners  
Office and Post Office Address  
175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412

VERIFIED PETITION (pp R-27 to R-34)

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WARREN

---

DONALD E. STONE and I. KATHRYN STONE,  
Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents.

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VERIFIED PETITION

RJI No.  
INDEX No.

JUDGE ASSIGNED:

TO THE SUPREME COURT OF THE STATE OF NEW YORK

The petition of Donald E. Stone and I. Kathryn Stone  
respectfully alleges:

1. Petitioners reside at Lake Shore Drive in the Town of Lake George, County of Warren, State of New York.
2. That the Petitioners are owners of certain real property situate in the Town of Lake George, County of Warren, State of New York, located on the easterly and westerly sides of New York Route 9N (Lake Shore Drive) which premises are more particularly described in Exhibit "A" annexed hereto and made a part hereof.
3. That the Petitioners' land, also known as the Stepping Stones Resort, includes approximately 3.76 acres of land located on both sides of Lake Shore Drive in the hamlet of Diamond Point in the Town of Lake George. A 1.66 acre parcel including within this 3.76 acres is located on the westerly side of Lake Shore Drive and is substantially undeveloped. A second parcel

containing 2.1 plus or minus acres, with in excess of 200 feet of frontage on Lake George, is improved by fourteen (14) one family cottages, a year-round house occupied by Petitioners, and other improvements, all of which are depicted on the survey map attached hereto and made a part hereof as Exhibit "B".

4. That heretofore and on or about September 14, 1988, application was made to the Town of Lake George Zoning Board of Appeals for an interpretation by the Zoning Board of Appeals of applicable provisions of the Town of Lake George Zoning Ordinance with respect to the proposed conversion of Petitioners' Stepping Stones Resort property from its existing ownership, to that of condominium ownership. As indicated on said application, a copy of which is attached hereto and made a part hereof as Exhibit "C", no new construction was contemplated, no subdivision of land would take place, and no new lot lines would be drawn.

5. By the above referenced application, Petitioners requested an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for such conversion since no subdivision of land would take place and no new lots would be created.

6. Notwithstanding the foregoing, the Lake George Zoning Board of Appeals determined that an area variance was required to convert the existing motel known as the Stepping Stones Resort to a condominium development. A copy of the aforementioned interpretation is attached hereto and made a part hereof as Exhibit "D".

7. It is respectfully submitted that the interpretation of the Town of Lake George Zoning Board of Appeals was affected by error of law, was arbitrary and capricious and an abuse of its discretion as set forth in the following paragraphs:

8. The proposal before the Zoning Board of Appeals was simply to change the form of ownership of the fourteen (14) cottages and the year-round residence from its existing form (fully owned by the Petitioners) to the condominium form under which all of the buildings, with the exception of the Stones' year-round home, will be occupied on only a seasonal basis from approximately May 1 to approximately October 30 of each year. No subdivision of land will take place, no new lots will be created, no new construction is anticipated and, in fact, the property will remain physically as it currently exists. Units will, of course, be offered to the general public for sale, however, deed restrictions filed in the Warren County Clerk's Office and restrictions set forth in the Offering Plan filed with the New York Attorney General's Office will contain the seasonal occupancy limitations as set forth above.

9. It is Petitioners' position that neither an area variance or site plan review is required as the old and new uses fully conform to the use provision of the Town of Lake George Zoning Ordinance. The residential/commercial high density zoning classification specifically includes as a permitted use, single family dwelling. The Zoning Ordinance further defines a single

family dwelling as "building of one or more stories of height above the main grade level which is designed or used exclusively as the living quarters for one family, whether seasonal or year-round."

10. The power to enact and administer zoning ordinances was granted by the Legislature to towns under Section 261 of the Town Law. That statute provides, among other things, that "...the town board is empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...". That statute specifically does not grant to towns the authority to regulate changes in the form of ownership as anticipated by the Stones in the conversion of their resort to the second home condominium form of ownership. That is particularly true since the proposed change will not result in a change of use that would be otherwise prohibited by the Town of Lake George Zoning Ordinance. That is to say, that the use of the property both before and after the change of method of ownership as proposed by the Stones will conform to the use provisions of the Town of Lake George Zoning Ordinance for the zone in which the property is located.

11. A relatively recent series of cases decided by New York Courts support the argument set forth in the preceding paragraph, although that legal proposition has been recognized in other states for some years. North Fork Motel, Inc., vs. Charles Grigonis, Jr., et al, originally decided by the Supreme Court in March of 1982 (46 NYS 2d 414) and later affirmed by the Appellate Division at 93 AD 2d 883 in 1983, was the first definitive case in New York on that subject. In that case, the Court held as follows:

Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations... (Citations omitted). Nor does the mere change in the type of ownership result in the destruction of a valid existing non-conforming use.

Later, in March of 1985, the Appellate Division in FGL & L Property Corp. v. City of Rye et al, 108 AD 2d 814, held that, "As a fundamental principal, zoning is concerned with the use of the land and not with the person who owns or occupied it". The Court in that case citing the North Fork case again reiterated the rule that it is use rather than the form of ownership that is the proper concern of zoning and planning regulations.

The FGL & L Property Corp. case was appealed from the Appellate Division to the Court of Appeals and was decided in October of 1985 at 66 NY 2d 111, affirmed the Appellate Division determination and is of major importance since it not only settles the law in New York in connection with the effect of zoning

ordinances upon changes in the form of ownership as proposed by the Stones, but further contains a rather detailed discussion of the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it". While the FGL & L Property Corp. case related to a zoning ordinance enacted under the enabling provisions of the General City Law, it seems abundantly clear that the same rules apply to zoning ordinances enacted under both the Town and Village Laws.

12. For the reasons set forth above, it appears particularly clear that the conversion of the Stepping Stones Resort from its existing single form of ownership to the proposed second home residential condominium form of ownership is a matter that is not within the jurisdiction of the Town of Lake George under its zoning ordinance and accordingly, no variance, site plan review approval or other zoning approvals are required for this change of ownership.

13. That the actions of the Town of Lake George Zoning Board of Appeals in denying Petitioners' request constituted a act of gross negligence, was in bad faith and that said Board acted with malice in issuing the aforementioned interpretation.

14. No previous application for the relief requested herein has been made to any court or judge and not more than 30 days has elapsed since the filing of the aforementioned Interpretation with the Town Clerk of the Town of Lake George.

WHEREFORE, Petitioners respectfully request a declaratory judgment that the change of ownership, as contemplated by the

Petitioners, does not require a zoning variance nor does it require site plan review.

Petitioners further respectfully request that the Court grant such other and further relief as may be deemed just and proper.

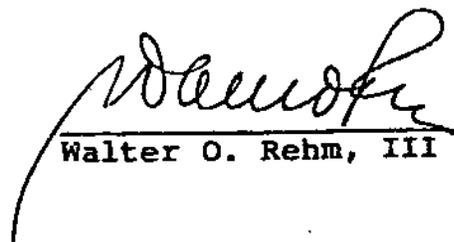
Dated: December 7, 1988

WALTER O. REHM, III  
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175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412

STATE OF NEW YORK )  
VILLAGE OF LAKE GEORGE )  
COUNTY OF WARREN ) ss.:

WALTER O. REHM, III, being duly sworn deposes and says: he is the attorney for the Petitioners in the above-entitled action; he has read the foregoing Petition and the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters he believes it to be true; the reason this verification is not made by said Petitioners is that they are presently in the State of Florida and have been there in excess of thirty days and are not within the County of Warren, which is the county where the deponent has his office.

Deponent further says that the grounds of his belief as to all matters therein stated on information and belief, are derived from admissions of the Petitioners to the deponent, and from letters received from said Petitioners concerning the matters set forth in said Petition and from attendance at the Respondent Town of Lake George Zoning Board of Appeals meeting and correspondence from said Respondent.

  
\_\_\_\_\_  
Walter O. Rehm, III

Sworn to before me this  
7th day of December, 1988.

  
\_\_\_\_\_  
Notary Public

BARBARA Z. SMITH  
Notary Public - State of New York  
Washington County - #4526597  
My Commission Expires: 11/30/90

383. 90

LIBR 606 PAGE 520

# This Indenture

Made the 30th day of June Nineteen Hundred and Seventy-Seven

Between ROBERT H. KAHN and DORIS M. KAHN, his wife, both residing at Lake Shore Drive, Diamond Point, New York, parties of the first part, and

DONALD E. STONE and I. KATHRYN STONE, his wife, both residing at 34 Barney Road, Clifton Park, New York, parties of the second part,

Witnesseth that the parties of the first part, in consideration of ONE and 00/100-----Dollar (\$1.00---) lawful money of the United States, and other good and valuable consideration paid by the parties of the second part, do hereby grant and release unto the parties of the second part, their heirs and assigns forever, all

THAT CERTAIN PIECE OR PARCEL OF LAND with buildings and improvements thereon erected situate, lying and being in the Town of Lake George (formerly Caldwell), County of Warren, State of New York, bounded and described as follows:

"BEGINNING at a point in the center of the Lake George-Bolton Landing State Highway marking the northwest corner of lands conveyed by Louise Hamilton Jacob, now deceased, to Raymond H. Horstman and wife, running thence North 35 degrees 45 minutes East along the center of said highway 94.19 feet; thence North 41 degrees 30 minutes East along the center of said highway 103.65 feet to a point; thence South 61 degrees 3 minutes East passing over an iron pipe monument set in the east side of said highway 443.72 feet to an iron rod monument set about 10 feet from the west shore of Lake George at a point standing North 28 degrees 58 minutes East a distance of 194.84 feet from the north line of the lands formerly of said Horstman, thence continuing South 61 degrees 3 minutes East about 10 feet to the shore of said Lake at high water mark; thence southerly along the shore of said Lake at high water mark as the same winds and turns 222 feet more or less to the northeast corner of the lands formerly of said Horstman, thence North 61 degrees 2 minutes West along the rail fence on the north line of lands formerly of said Horstman, 573.7 feet more or less to the point or place of beginning, containing 2.28 acres of land be the same more or less, including all the right, title and interest of the party of the first part in and to the land in front of and adjacent to the above described parcel of land between high water mark and low water mark of Lake George."

BEING a portion of the premises conveyed in a deed from Walter Phelps Jacob and Leonard Jacob, II, as Executors of the Last Will and Testament of Louise Hamilton Jacob, deceased to Robert H. Kahn and Doris M. Kahn, his wife dated December 19, 1958 and recorded on the 16th day of January, 1959 in Book 383 of Deeds at Page 148 in the Warren County Clerk's Office.

# BEST AVAILABLE COPY

LEFT OVER FROM 261

Together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises,

To have and to hold the premises herein granted unto the parties of the second part, their heirs and assigns forever.

And said PARTIES OF THE FIRST PART

covenant as follows:  
First, That the parties of the second part shall quietly enjoy the said premises;

Second, That said PARTIES OF THE FIRST PART will forever Warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantors will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

In Presence of

ROBERT H. KAHN

DORIS M. KAHN

State of New York  
County of WARREN

On this 30th day of June Nineteen Hundred and Seventy-Seven before me, the subscriber, personally appeared

ROBERT H. KAHN and DORIS M. KAHN

to me personally known and known to me to be the same person described in and who executed the within Instrument, and they acknowledged to me that they executed the same.

RECORDED

RECEIVED  
\$ 923.92  
REAL ESTATE  
JUL 1 1977  
TRANSFER TAX  
WARREN  
COUNTY

Notary Public

JUL 1 1977  
606 DEEDS  
520

KV  
SW



WARREN COUNTY

TO

Dated, 19

STATE OF NEW YORK  
WARREN COUNTY

RECORDED ON THE

1 do not know by J.D. 1927  
at the index L.M.

in LINE: 606 of DEEDS  
at PAGE: 520 and examined

Notary Public

R-36

RR  
Rev: Kante  
190 Page 104

# This Indenture

Made the 21<sup>st</sup> day of December  
Nineteen Hundred and Eighty-three

Between FREDERICK VOGEL, residing at Post Office Box 13,  
Fedhaven, Florida 33854

part y of the first part, and

I. KATHRYN STONE, residing at Lake Shore Drive,  
Diamond Point, New York

Witnesseth that the part y of the first part, in consideration of

part y of the second part.  
----- ONE ----- Dollar (\$1.00--)  
lawful money of the United States, and other good and valuable consideration  
paid by the part y of the second part, does hereby grant and release unto the  
part y of the second part, her heirs  
and assigns forever, all

"ALL THAT CERTAIN PIECE OR PARCEL OF LAND, situate on the West  
Side of New York State Route 9N, Town of Lake George, Warren County,  
State of New York and being a portion of Lot #20 of Section 2 of  
Diamond Point Estates, said parcel being more particularly bounded  
and described as follows:

BEGINNING at an iron pipe on the west boundary of Route 9N  
said point being the northeast corner of lands now or formerly of  
Robert Kahn, thence from said point of beginning: North 52 degrees  
22 minutes 00 seconds West, 373.74 feet along the lands of Kahn to  
an iron pipe on the east line of lands of Louis Hall, thence the  
following three (3) courses along the lands of Hall; (1) North  
37 degrees 49 minutes 00 seconds East, 49.27 feet to an iron pipe;  
thence (2) North 25 degrees 02 minutes 00 seconds West, 119.40 feet  
to an iron pipe; thence (3) North 25 degrees 12 minutes 00 seconds  
East, 105.66 feet to an iron pipe at the south east corner of Lot  
#19, thence running South 37 degrees 34 minutes 30 seconds East  
135.36 feet through Lot #20 to an iron pipe on the west line of  
Lot #15, thence the following four (4) courses along Lot #15:  
(1) South 17 degrees 11 minutes 00 seconds West, 33.80 feet to an  
iron pipe; thence (2) South 70 degrees 15 minutes 00 seconds East  
105.00 feet to an iron pipe; thence (3) South 44 degrees 14 minutes  
00 seconds East, 145.00 feet to an iron pipe; thence South 52 degrees  
26 minutes 00 seconds East, 120.69 feet to an iron pipe on the

west boundary of Route 9N, thence South 39 degrees 11 minutes  
00 seconds West, 153.72 feet along the west boundary of Route 9N  
to the point and place of beginning. Said parcel containing 1.66+  
acres, be the same more or less.

Being the same premises conveyed by warranty deed from  
Marjorie Mesick to Frederick Vogel dated December 27th, 1983  
and recorded in the Warren County Clerk's Office on January 16th,  
1983 in Book 659 of deeds at page 43 .

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,  
To have and to hold the premises herein granted unto the party of the second part, her heirs and assigns forever.

And said Frederick Vogel

First, That the party of the second part shall quietly enjoy the said premises; <sup>covenant as follows:</sup>

Second, That said Frederick Vogel

will forever Warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In Presence of

Frederick Vogel  
Frederick Vogel  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

State of New York }  
County of Polk } ss.  
before me, the subscriber, personally appeared

On this 20th day of December  
Nineteen Hundred and Eighty-three

Frederick Vogel

to me personally known and known to me to be the same person described in and who executed the within Instrument, and he acknowledged to me that he executed the same.

Charles S. Stevens  
Notary Public  
County of Polk  
State of Iowa  
Commission Expires \_\_\_\_\_

Notary Public, State of Florida of Law  
My Commission Expires June 25, 1927

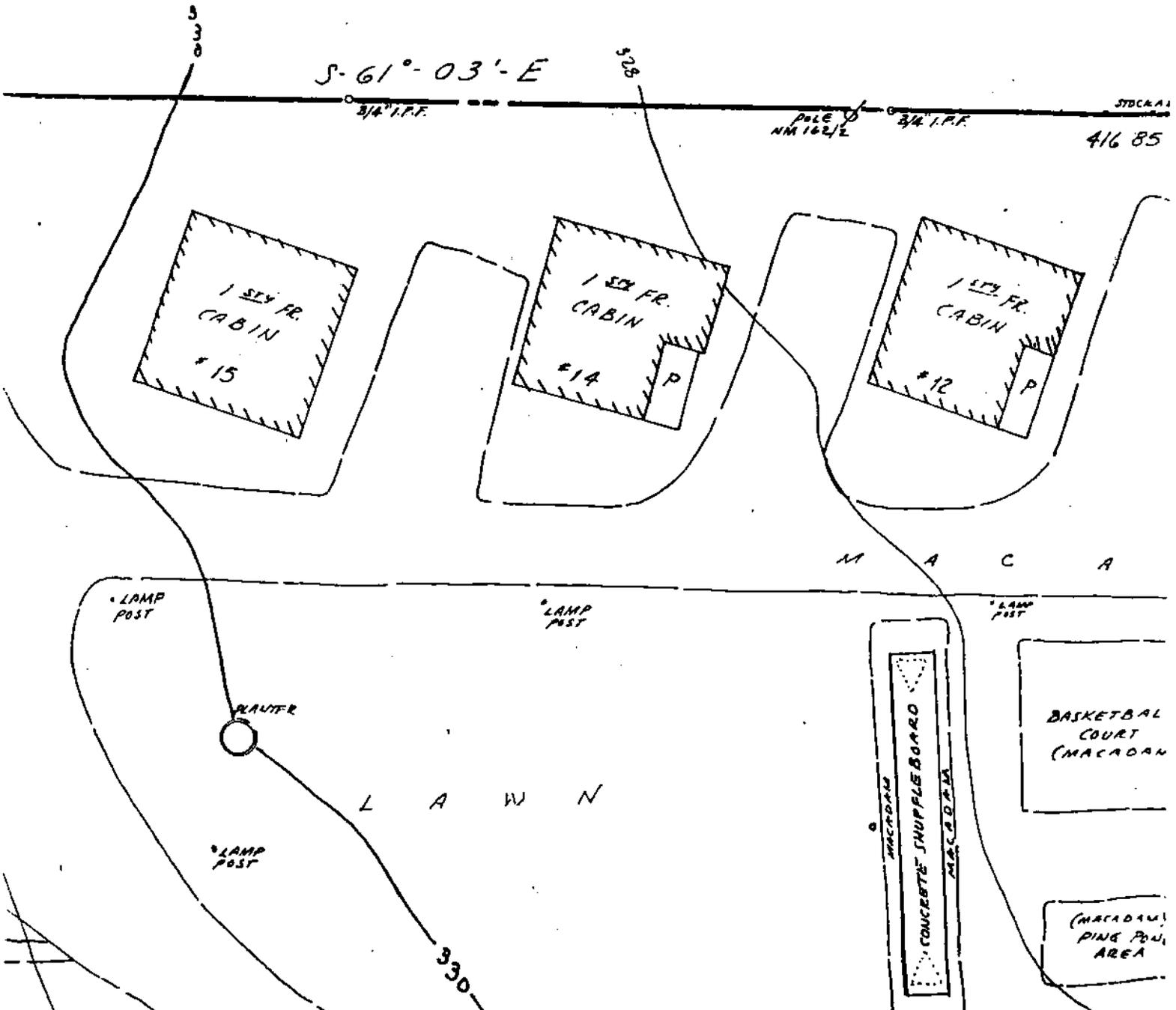
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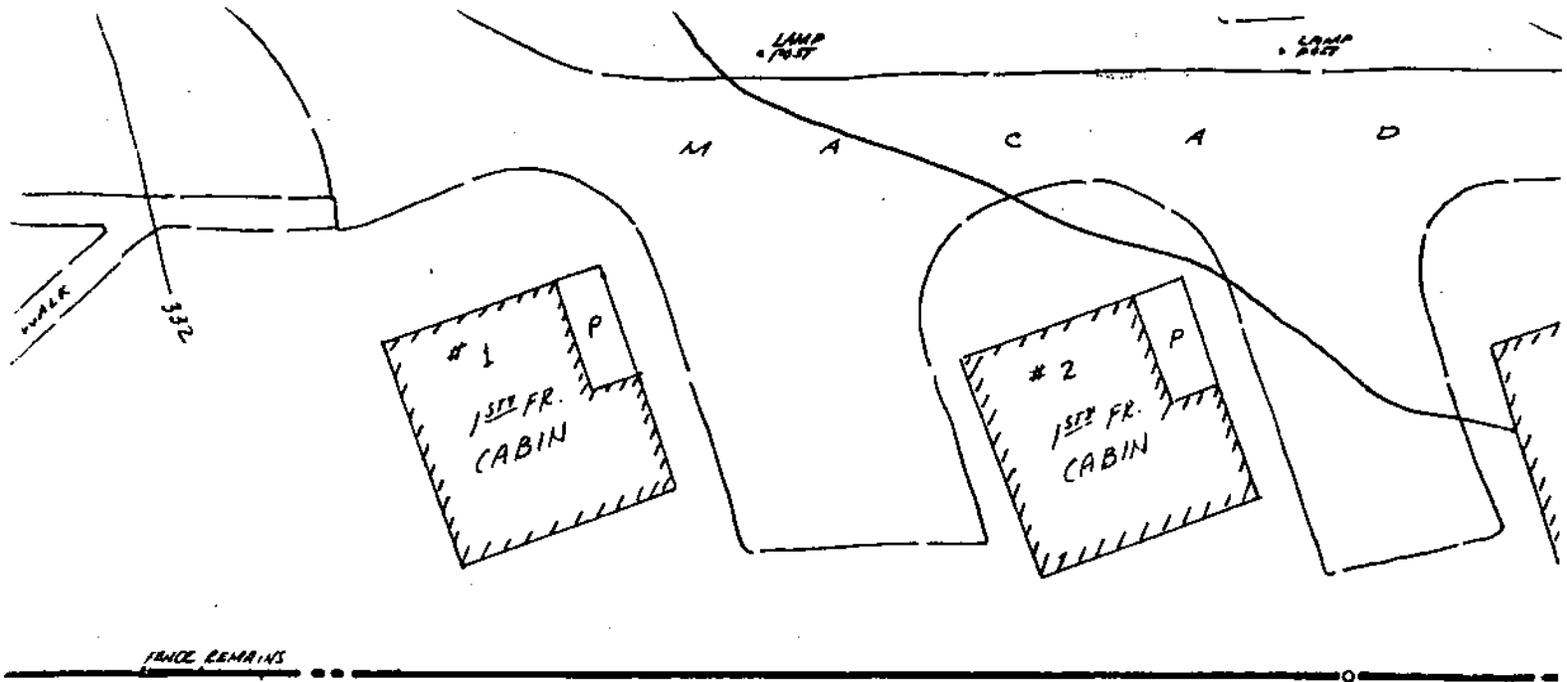




CARRIAGE HILL LAKE  
(664/354)

MAP NO. 43 AR,  
CONSTRUCTION OF  
LANDING COUNTY  
D AT DRAWER "F",  
COUNTY CLERK'S





N. 61° 02' W

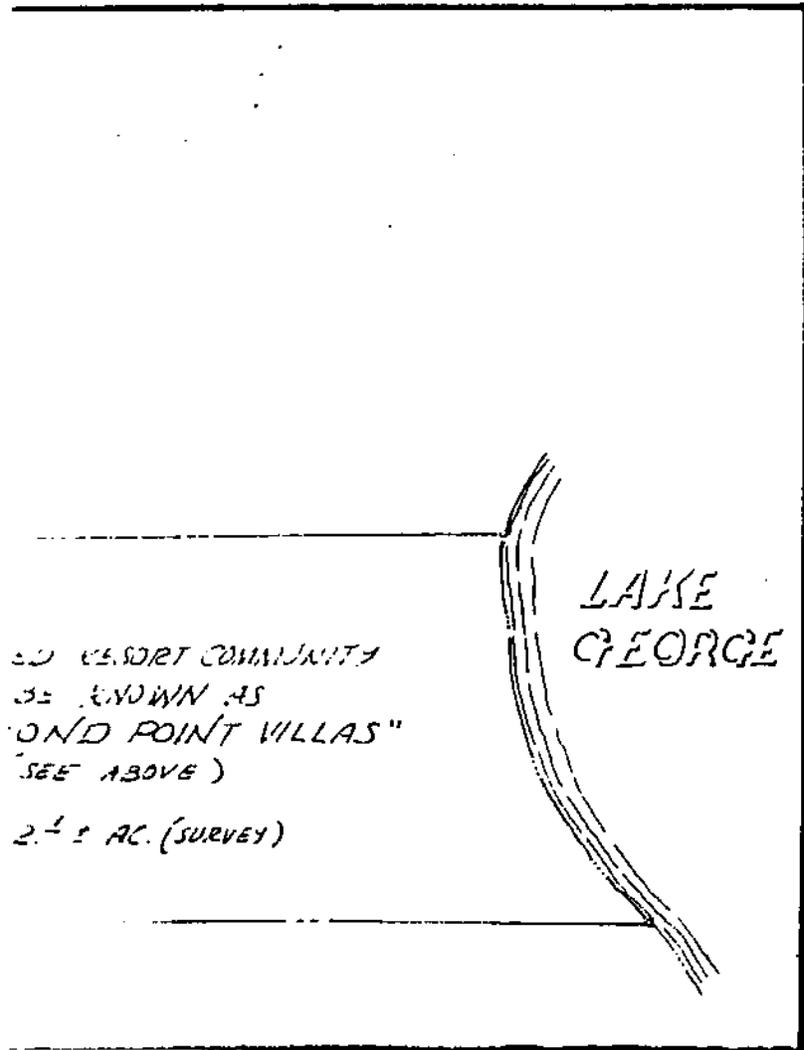
34' I.R.F.

'OLYMPIAN MOTEL'

EL

DEED REFERENCE

ROBERT H. KAHN &  
 DORIS M. KAHN  
 TO  
 DONALD E. STONE &  
 I. KATHRYN STONE  
 DTD. 6/30/1977  
 RCD. 7/1/1977 606/520  
 (± 2.28 AC. TO & H'WAY)



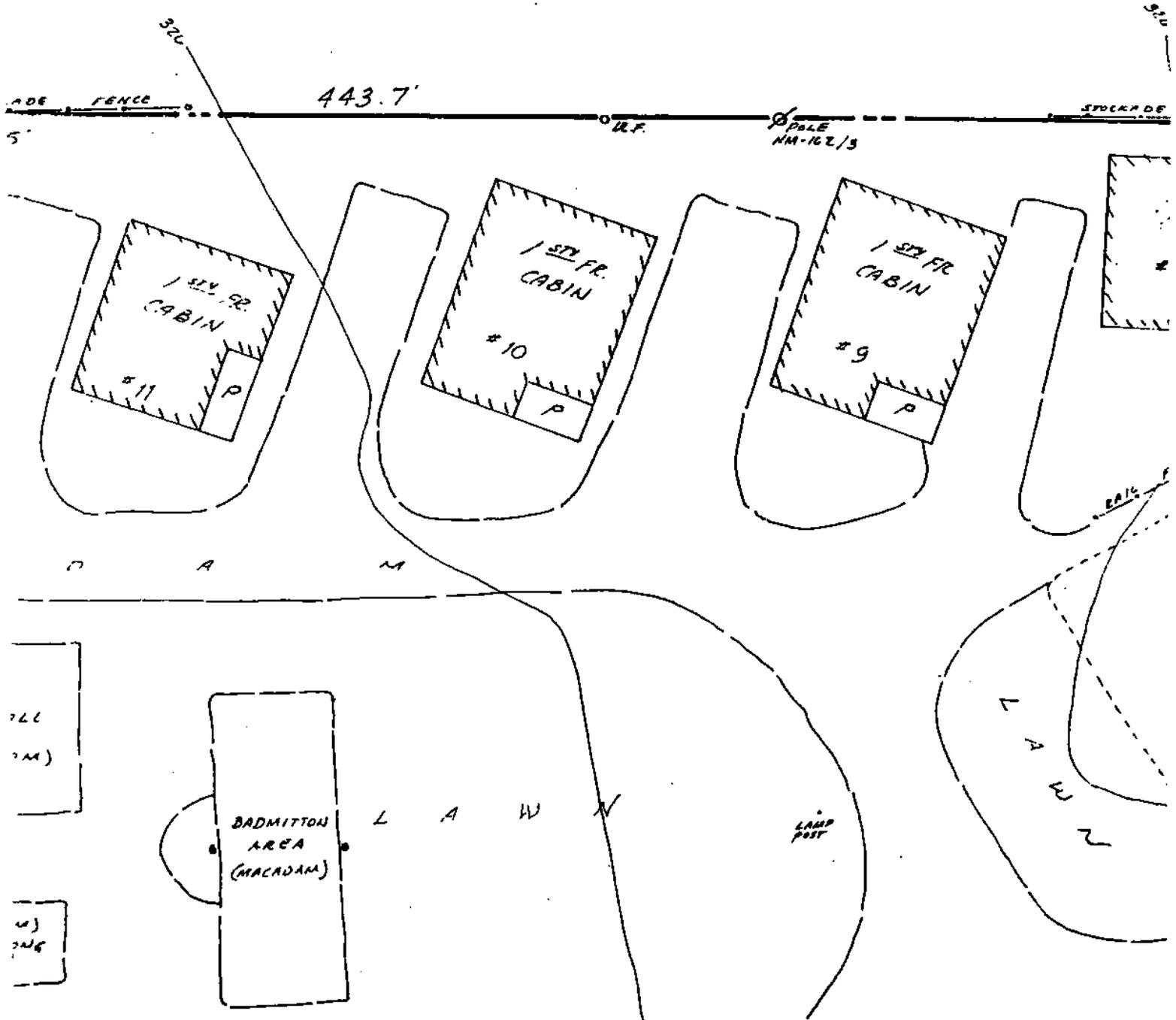
RESORT COMMUNITY  
 BE KNOWN AS  
 "OND POINT VILLAS"  
 (SEE ABOVE)

2.4 ± AC. (SURVEY)

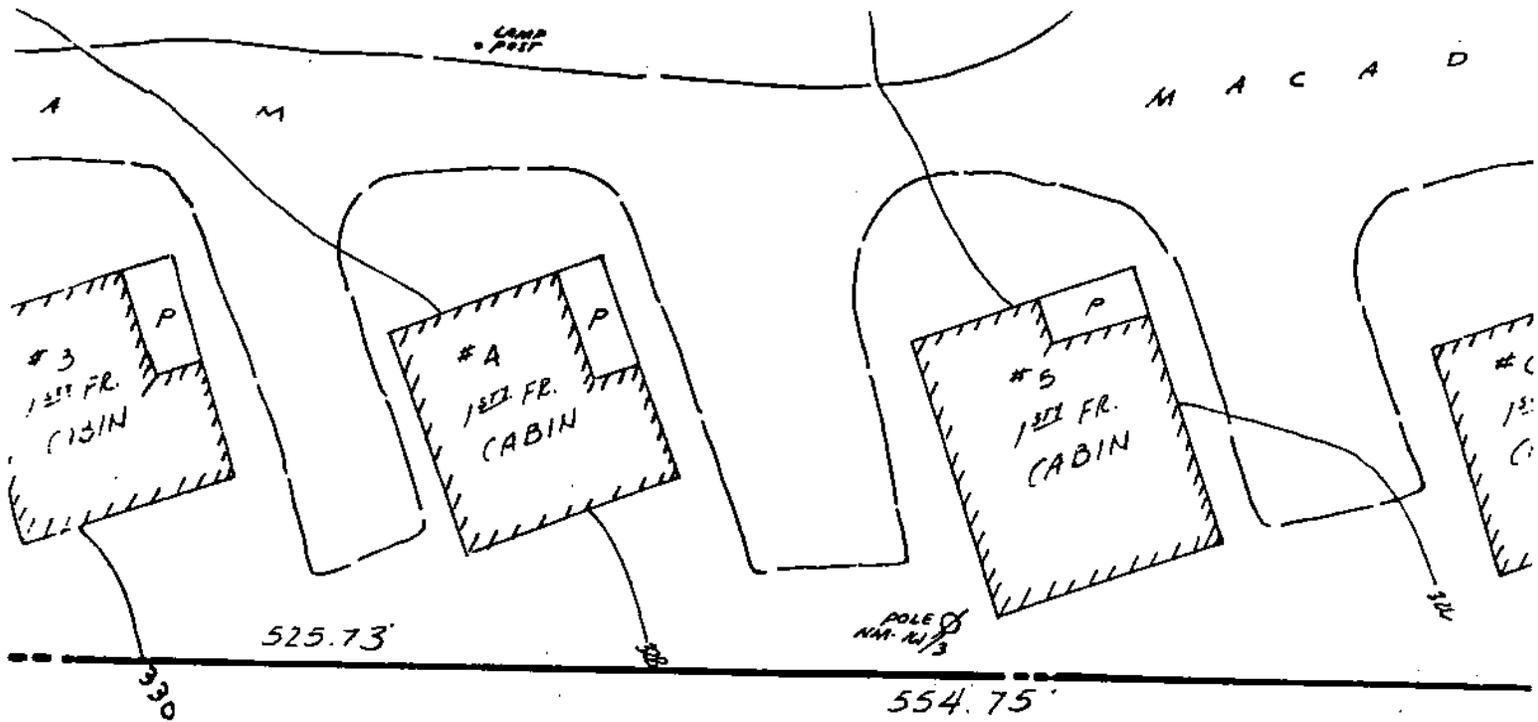
LAKE  
 GEORGE

KE CLUB, INC.

1 )







DSCOTT REALTY CORP.  
( 412/115 )

-NOTES-

- 1.) LANDS OF DONALD & KATHRYN STONE LYING EASTERLY OF ROUTE 9-N NOW UTILIZED AS "STEPPING STONES RESORT."
- 2.) AREA OF LANDS OF STONE LYING EASTERLY OF NY ROUTE 9-N = 2.1 AC.±.
- 3.) CURRENT TOWN OF LAKE GEORGE ZONING: "RCH" - RESIDENTIAL / COMMERCIAL, HIGH DENSITY

“DJAI”

TOWN OF LAKE  
SCALE: 1" = 20'



EXHIBIT C ANNEXED TO VERIFIED PETITION (p R-41)

TOWN OF LAKE GEORGE  
ZONING BOARD OF APPEALS

Case No: \_\_\_\_\_

Date Rec'd: \_\_\_\_\_

To the Zoning Board of Appeals:

A. Statement of Ownership and Interest

DONALD E. STONE and

1. The Applicant(s) I. KATHRYN STONE (is) (are) the owner(s) of property situated at easterly & westerly of NY Route 9N, in the hamlet of Diamond Point, Town of Lake George.
2. The Applicant's appeal concerns the property owned by them and known as the Stepping Stones Resort,

and located at Diamond Point, New York

Section 5 Block 1 Lot 5.292  
Section 51 Block 1 Lot 7 Warren County Tax Map No. 6.

B. Request:

Applicants propose to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen seasonal cottages. No new construction is contemplated, and occupancy of existing cottages will be limited to the period from approximately May 1st until approximately October 30th of each year. No subdivision of land will take place; no new lot lines will be drawn, and pursuant to Section 5.70 of the Town of Lake George Zoning Ordinance, such conversions require site plan review.

Applicants request an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for such conversion, since no subdivision of land shall take place, and no new lots will be created. The second parcel of property located on the westerly side of Lake Shore Drive (Section 5 Block 1 Lot 5.292) containing 1.66 acres, will be included in the project.

Telephone No: (518) 668-5532

Signature Donald E. Stone

K. Kathryn Stone

P.O. Box 52

Mailing Address

Diamond Point, N.Y. 12824

# Town of Lake George

## TOWN OFFICES

LAKE GEORGE, N.Y. 12845

EXHIBIT D ANNEXED TO VERIFIED PETITION (pp R-42 to R-43)

November 9, 1988

Mr. & Mrs. Donald Stone  
P.O. Box 52  
Diamond Point, New York 12824

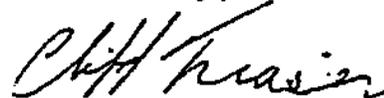
RE: INTERPRETATION #2-88 - CONVERSIONS

Dear Mr. & Mrs. Stone:

The Zoning Board of Appeals for the Town of Lake George, at their meeting held on November 3, 1988 determined that an Area Variance is required to convert the existing motel known as Stepping Stones Resort, into a condominium development, as the Applicant is unable to meet the 20,000 sq.ft. per unit, as required.

If you have any questions concerning the above decision, please do not hesitate to contact this office.

Sincerely,



Cliff Frasier  
Planning & Zoning  
Enforcement Officer

CF/f

cc: Zoning Board  
Town Board  
Town Clerk  
Attorney Walter O. Rehm, III  
file #2-88

EXHIBIT D



CERTIFICATION

I, Walter O. Rehm, III, am an attorney admitted to practice before the courts of this State, and the attorney of record for the Petitioners-Appellants in this matter, and I certify that the contents of this Record on Appeal have been compared by me with the originals and found to be true and complete copies thereof.

Dated: May 16, 1989

  
\_\_\_\_\_  
Walter O. Rehm, III

# 58926

3-89-939

To Be Argued By: John J. Ray  
Time Requested: 10 minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents-Respondents.

---

**PETITIONERS-APPELLANTS' BRIEF**

---

WALTER O. REHM, III  
Attorney for Petitioners-  
Appellants  
175 Ottawa Street  
Lake George, New York 12845  
Tel: (518) 668-5412

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PRELIMINARY STATEMENT

Petitioners-Appellants, Donald E. Stone and I. Kathryn Stone, as owners of premises known as the "Stepping Stones Resort," appeal from an Order of the Hon. John G. Dier, J.S.C., dated January 9, 1989, which denied the relief sought in an Article 78 proceeding brought by Petitioners-Appellants and dismissed the Petition in its entirety.

In the proceeding below, Petitioners sought a ruling by the court declaring as error the determination by Respondent, Lake George Zoning Board of Appeals, that the change of ownership of the "Stepping Stones Resort" as proposed by Petitioners required an area variance. Petitioners had argued that the change in ownership from single form of ownership to proposed condominium form of ownership was not within the jurisdiction of the Town of Lake George under its zoning ordinance and, accordingly, no variance approval was required for this change in ownership. Without any stated rationale or written decision, the lower court ruled from the bench in favor of Respondents and granted an Order denying the relief requested in the Petition and dismissing the Petition in its entirety. Petitioners-Appellants appeal from that Order.

### QUESTION PRESENTED

Was it error for the lower court to uphold the decision of the Zoning Board of Appeals which required an area variance for the change of ownership proposed by Petitioners-Appellants?

### STATEMENT OF FACTS

Petitioners-Appellants, Donald E. Stone and I. Kathryn Stone, are the owners of the real property known as the "Stepping Stones Resort" comprised of 3.76 acres and 200 feet of frontage on Lake George improved by fourteen seasonal one-family cottages and one year-round house occupied by the Stones (R-27). The entire parcel is located in an area designated as residential/commercial high density on the Town of Lake George zoning map (R-29). By application to the Zoning Board of Appeal dated September 14, 1988, the Stones requested an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for the conversion of their property from the existing form of ownership to that of condominium form of ownership (R-41). Such change of ownership was to entail no subdivision of land and no new lot lines were to be drawn (R-29). Under this proposed change of ownership, the fourteen cottages would still be

limited to seasonal use (R-29).

By interpretation #2-88, dated November 9, 1988, Respondent, Lake George Zoning Board of Appeals, determined that an area variance was required to convert the existing "Stepping Stones Resort" into a condominium development (R-42).

On December 8, 1988, a Notice of Petition and Petition were served on George McGowan as Chairman of the Town of Lake George Zoning Board of Appeals and on Rita Dorman as Lake George Town Clerk (R-43). By commencing this Article 78 proceeding, the Stones sought review of the interpretation of the Zoning Board of Appeals and a judicial declaration that said interpretation was made in error.

#### DECISION OF THE LOWER COURT

Upon consideration of the Notice of Petition, Verified Petition, and the Verified Answer and Objections in Points of Law, and after hearing Walter O. Rehm, III, attorney for Petitioners in support of the Petition and Mark J. Schachner, in opposition to the Petition, the Hon. John G. Dier, J.S.C., denied the relief requested in the Petition and dismissed the Petition without written decision.

## ARGUMENT

### POINT I

#### ZONING ORDINANCES ARE PROPERLY CONCERNED WITH USE OF PROPERTY AND NOT FORM OF OWNERSHIP

Recent New York case law makes it clear that zoning ordinances can properly regulate the use of property but cannot discriminate against particular forms of ownership. In North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, aff'd 93 AD2d 883 (2nd Dept. 1983), the Appellate Division Second Department considered this issue and stated:

"Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than form of ownership that is the proper concern and focus of zoning and planning regulations." (citations omitted) North Fork Motel, Inc. v. Charles Grigonis Jr., et al., 93AD2d at 883.

This concept was emphasized by the Court of Appeals when it considered the issue of the empowerment of a city to mandate the manner in which property may be owned or held in FGL & L Property Corp. v. City of Rye, et al., 108 AD2d 814, aff'd, 66 NY2d 111 (1985). The court therein found numerous cases in New York State and elsewhere which supported the fundamental rule that zoning ordinances deal with land use and not with the person who owns or occupies it. The court went on to state that "Most of the out-of-state cases hold, as did

the North Fork Motel case, that a zoning ordinance cannot be used to exclude a condominium." FGL & L Property Corp. v. City of Rye, et al., 66 NY2d at 116.

In view of the above, it was error for the lower court to uphold the decision of the Zoning Board of Appeals which required an area variance for the change in ownership proposed by Petitioners-Appellants.

## POINT II

THE CHANGE PROPOSED BY PETITIONERS-APPELLANTS CONSTITUTED ONLY A CHANGE IN OWNERSHIP FORM AND NOT A CHANGE IN USE SO AS TO REQUIRE AN AREA VARIANCE.

Petitioners-Appellants proposal before the Zoning Board of Appeals was simply to change the form of ownership of the fourteen cottages and the year-round residence from its existing form (fully owned by Petitioners-Appellants) to the condominium form. No changes of use were proposed. After the proposed change in ownership form, the use of the cottages would remain limited to housing individuals and families during their seasonal visits to the Lake George area, a use that is identical to the use prior to any change. The physical plant would remain unchanged, the activities of the individuals and families would be identical to those occurring before the change of ownership, and no new use would take

place. The only discernible difference would be the label used to refer to these visitors. Referring to a visitor as an "owner" as opposed to a "tenant" refers only to the form of ownership and not to any change in use.

In the court below, Respondents argued that the proposed change in ownership form indicates a change in use from tourist accommodations to single family residences. This terminology, however, again relates only to ownership and does not indicate any change to which the property will actually be subjected. The label given to the visitors may change, but the actual use to which the property will be put remains identical to the use prior to the change in ownership.

As this proposed change in ownership entails no change in use, the Zoning Board of Appeals was incorrect in asserting the need for an area variance and the court below erred in failing to declare this assertion as error.

### POINT III

THE LOWER COURT ERRED IN FAILING TO DELCARE AS ERROR THE INTERPRETATION OF THE ZONING BOARD OF APPEALS THAT AN AREA VARIANCE WAS REQUIRED FOR THE CHANGE IN OWNERSHIP FORM PROPOSED BY PETITIONERS-APPELLANTS.

The finding by the Zoning Board of Appeals that the proposal by the Petitioners-Appellants constituted a change in

use was without basis and should have been declared as incorrect by the lower court. Unlike the case of Catham Realty Corp. v. Town of Southampton, et al., 97 AD2d 531, aff'd, 62 NY2d 831 (1983), wherein the Southampton Zoning Ordinance specifically restricted residential uses in the district in question and by amendment addressed co-operatives as a type of use, The Lake George ordinance is silent as to any definition of co-operatives or condominiums which would indicate that their establishment constitutes a change of use. In the absence of such a definition, there exists no justification for regarding the change of ownership as a change of use so as to give use to a need for an area variance.

It is respectfully submitted that in the absence of any indication of a change in use, the Zoning Board of Appeals was mistaken in requiring an area variance and the lower court erred in failing to declare this interpretation as error.

#### CONCLUSION

The Supreme Court abused its discretion in denying the Petition of Petitioners-Appellants seeking an Order declaring as error the determination by the Lake George Zoning Board of Appeals that the change of ownership of the "Stepping Stones

Resort" as proposed required an area variance, thus the Order denying the Petition should be reversed.

Dated: June 7, 1989

Respectfully submitted,

WALTER O. REHM, III  
Attorney for Petitioners-  
Appellants  
175 Ottawa Street  
Lake George, New York 12845  
Tel: (518) 668-5412

**RESPONDENT'S**

**BRIEF**

# 58926

3-89-939

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

APPEAL NO. 58926

Respondent-Respondent.

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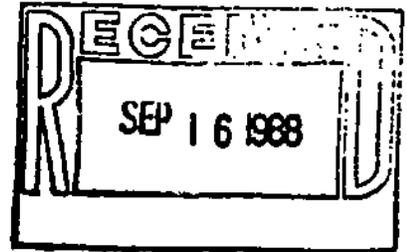
APPENDIX TO  
BRIEF OF  
RESPONDENT-RESPONDENT

---

Miller, Mannix & Pratt, P.C.  
Attorneys for Respondents  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
Tel. (518) 793-6611

July 7, 1989

WALTER O. REHM, III  
ATTORNEY AT LAW  
175 OTTAWA STREET  
LAKE GEORGE, NEW YORK 12845  
518-668-5412  
518-668-5413



JOHN J. RAY

September 14, 1988

Town of Lake George  
Zoning and Planning Administrator  
Old Post Road  
Lake George, New York 12845

Attention:—Clifford Frasier

Re: Stepping Stones Condominium Conversion

Dear Cliff:

You will find enclosed herewith an application submitted in behalf of Mr. and Mrs. Donald Stone of the Stepping Stones Resort in Diamond Point for an interpretation by the Zoning Board of Appeals of the applicable provisions of the Town of Lake George Zoning Ordinance with respect to the proposed conversion of the Stepping Stones property from its existing use to a second home seasonal condominium.

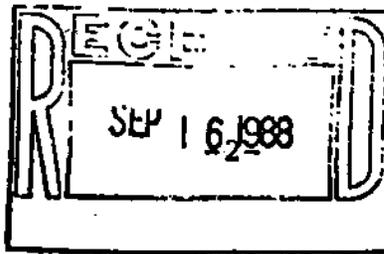
As I have mentioned in the enclosed application, I must reiterate to you that no subdivision of land will take place, and thus, it is the Stones' position that no variance is required for this project.

It is also my understanding that the Zoning Board of Appeals is next scheduled to meet on the evening of October 6th. As I mentioned to you during our last weekend, I will be away on vacation from September 29th until October 12th. Since no other matters are presently scheduled for the current Zoning Board of Appeals Meeting, it would be extremely helpful if the Board would be willing to reschedule a meeting on this matter to a date either prior to September 29th or on or after October 12th.

.....

R 045

Clifford Frasier



September 14, 1988

I realize that the request to reschedule the meeting is somewhat unusual, and I certainly would not want to inconvenience any member of the Board or any other applicant should further business be placed on the October agenda. I will be in Florida, and if necessary, I will fly back on the 6th for that meeting.

It would be most helpful if you could advise me of the Board's decision relative to schedule as soon as possible, so that any necessary travel plans may be made.

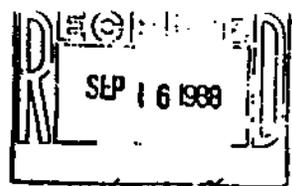
Very truly yours,

Walter O. Rehm III

WOR/cmg  
Enc.

R 046

TOWN OF LAKE GEORGE  
ZONING BOARD OF APPEALS



Case No: 42-88  
Date Rec'd: 9/16/88

To the Zoning Board of Appeals:

A. Statement of Ownership and Interest

DONALD E. STONE and

1. The Applicant(s) I, KATHRYN STONE (is) (are) the  
owner(s) of property situated ~~at~~ easterly & westerly of NY Route 9N,  
in the hamlet of Diamond Point, Town of Lake George

2. The Applicant's appeal concerns the property owned by them and known  
as the Stepping Stones Resort,

and located at Diamond Point, New York

Section 51 Block 1 Lot 5.292  
Section 51 Block 1 Lot 7 Warren County Tax Map No. 6.

B. Request:

Applicants propose to convert the existing Stepping Stones Resort  
from its present transient resort use to a second home seasonal  
condominium development including one year-round house and fourteen  
seasonal cottages. No new construction is contemplated, and  
occupancy of existing cottages will be limited to the period from  
approximately May 1st until approximately October 30th of each year.  
No subdivision of land will take place; no new lot lines will be  
drawn, and pursuant to Section 5.70 of the Town of Lake George  
Zoning Ordinance, such conversions require site plan review.

Applicants request an interpretation of the Town of Lake George  
Zoning Ordinance to the effect that no area variance would be  
required for such conversion, since no subdivision of land shall  
take place, and no new lots will be created. The second parcel of  
property located on the westerly side of Lake Shore Drive  
(Section 51 Block 1 Lot 5.292) containing 1.66 acres, will be  
included in the project.

Telephone No: (518) 668-5532

Signature Donald E. Stone

Kathryn Stone

P.O. Box 52

Mailing Address

Diamond Point, N.Y. 12824

9/16/88 J.M.H.

R 047

BOARD OF APPEALS, HELD THE 618 DAY OF OCTOBER, 1988, AT THE TOWN CENTER, OLD POST ROAD, LAKE GEORGE, NEW YORK, WITH CHAIRMAN GEORGE MC GOWAN, PRESIDING.

MEMBERS PRESENT: GEORGE MC GOWAN, CHAIRMAN  
JOSEPH DE SANTIS  
JAMES MATHIS  
DAVID ROBINSON  
DANIEL J. STRAIN

MEMBERS ABSENT: NONE

ALSO PRESENT: FRAN HEINRICH, CLERK OF PLANNING & ZONING OFFICE  
PAMELA MARTIN, SECRETARY PLANNING & ZONING BOARDS  
ERNEST IPPISCH  
ANTON IPPISCH  
DONALD STONE  
KATHRYN STONE

Roll call was taken at 7:34 p. m.

Joseph DeSantis made a motion to accept the Zoning Board of Appeals Minutes from the September 1, 1988 Meeting and James Mathis seconded the motion.

Motion was carried.

The September 1, 1988 Zoning Board of Appeals Meeting Minutes were accepted.

AREA VARIANCE APPLICATION V26-88 - SUBMITTED BY ALPINE VILLAGE  
TO ADD THREE (3) MOTEL UNITS TO THE REAR OF MAIN LODGE  
IF APPLICATION IS COMPLETE, SCHEDULE PUBLIC HEARING- 10/20/88, 7:00 P. M.

James Mathis read the application which may be found in the Planning and Zoning Office. A letter is also attached.

David Robinson made a motion to accept the application and schedule the matter for public hearing and Joseph DeSantis seconded the motion.

Motion was carried.

The application was accepted and the matter was scheduled for public hearing on October 20, 1988 at 7:00 p. m.

X INTERPRETATION #2-88 - SUBMITTED BY DONALD & KATHRYN STONE, DBA  
STEPPING STONES RESORTS - APPLICANT REQUEST INTERPRETATION OF  
ZONING ORDINANCE ARTICLE 4, SECTION 5.70 - CONVERSIONS  
ACCEPT APPLICATION & SCHEDULE PUBLIC HEARING FOR 10/20/88 AT 7:00 P. M.

Joseph DeSantis read the application which may be found in the Planning and Zoning Office.

James Mathis made a motion to accept the application and schedule the matter for public hearing and David Robinson seconded the motion.

Motion was carried.

The application was accepted and the matter was scheduled for public hearing on October 20, 1988 at 7:00 p. m.

WALTER O. REHM, III  
ATTORNEY AT LAW  
175 OTTAWA STREET  
LAKE GEORGE, NEW YORK 12845  
518-668-5412  
518-668-5413

JOHN J. RAY

September 16, 1988

Town of Lake George  
Old Post Road  
Lake George, New York 12845

ATTN: Clifford Fraiser  
Zoning Administrator

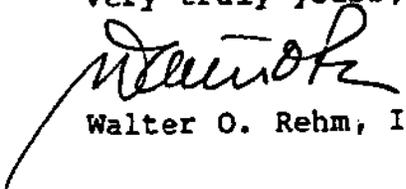
Dear Cliff:

Pursuant to your telephone call of this morning, I have enclosed my check for \$25 representing the filing fee for the interpretation request submitted on behalf of Donald and Kathy Stone.

In addition, it is my understanding that the Zoning Board of Appeals will hold a public hearing on this matter which is scheduled for 7:30 P.M. on the evening of October 20.

Please call me if you should require anything further.

Very truly yours,



Walter O. Rehm, III

WOR/bzs

Enc.

cc: Mr. and Mrs. Donald Stone

R 049

# Town of Lake George

## TOWN OFFICES

LAKE GEORGE, N.Y. 12845

### NOTICE OF PUBLIC HEARINGS

PLEASE TAKE NOTICE, that pursuant to the Zoning Ordinance for the Town of Lake George, the Zoning Board of Appeals will conduct Public Hearings on October 20, 1988 commencing at 7:00 p.m., at the Town Center, Old Post Road, Lake George, New York to consider the following Applications:

AREA VARIANCE APPLICATION V26-88 - submitted by Ernest & Anton Ippisch dba Alpine Village to add three (3) motel units to the rear of main lodge (proposed units have previously been constructed). Applicant proposes to remove four (4) units from the guest house to comply with the zoning requirements.

Said property is located on the east side of Route 9N (corner of Rt. 9N & Morris Lane), in the Town of Lake George, being Section 29, Block 1, Lot 5, Tax Map No. 6 County of Warren.

INTERPRETATION #2-88 submitted by Donald & Kathryn Stone dba Stepping Stones Resort, applicant request interpretation of the Town of Lake George Zoning Ordinance - Article V, Section 5.70 - Conversions. Applicant proposes to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen (14) seasonal cottages. No new construction is contemplated.

Said property is located on the easterly & westerly sides of Route 9N, in the hamlet of Diamond Point, Town of Lake George, being Section 51, Block 1, Lots 5.292 & 7, Tax Map No. 6 County of Warren.

AREA VARIANCE APPLICATION V27-88 - submitted by John & Suzanne Lustyik to construct a 24'X24' garage located in the front yard, without meeting the rear yard requirement.

Said property is located on the South side of Flat Rock Roads, approximately 2800± feet north of the intersection of Stone Schoolhouse and Flat Rock Roads, in the Town of Lake George, being Section 39, Block 1, Lot 29, Tax Map No. 6 County of Warren.

BY ORDER OF THE ZONING BOARD OF APPEALS, TOWN OF LAKE GEORGE.

GEORGE MCGOWAN,  
CHAIRMAN.

R 050

Lake George... America's Family Playground!

County of Warren, ss.:

Lori J Lewis, being duly sworn, says that she is president for Glens Falls Newspapers, Inc., publishers of THE POST-STAR, a daily published in Glens Falls, Warren County, State of New York, and that the paper attached hereto was cut from the said POST-STAR and that the said notice was therein, namely, October 10

Signed this 18th day of October Lori J Lewis

Sworn to before me this 18th day of October 19 58  
Eleanor V. MacAuley  
Notary Public.

ELEANOR V. MACAULEY  
Notary Public in the State of New York  
Residing in Warren County  
My Commission Expires Oct. 31, 1958

that pursuant to the Zoning Ordinance for the Town of Lake George, the Zoning Board of Appeals will conduct Public Hearings on October 20, 1958 commencing at 7:00 p.m. at the Town Center, Old Post Road, Lake George, New York to consider the following Applications:

AREA VARIANCE APPLICATION V26-58 - submitted by Ernest & Anton Ippisch dba Alpine Village to add three (3) motel units to the rear of main lodge (proposed units have previously been constructed). Applicant proposes to remove four (4) units from the guest house to comply with the zoning requirements.

Said property is located on the east 3/4 of Route 94 (corner of Rt. 94 & Morris Lane), in the Town of Lake George, being Section 28, Block 1, Lot 8, Tax Map No. 8 County of Warren.

INTERPRETATION #2-58 submitted by Dorcas & Kathryn Stone dba Stepping Stones Resort, applicant request interpretation of the Town of Lake George Zoning Ordinance - Article V, Section 5.76 - Conversions. Applicant proposes to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen (14) seasonal cottages. No new construction is contemplated.

Said property is located on the easterly & westerly sides of Route 94, in the hamlet of Diamond Pointe Town of Lake George, being Section 51, Block 1, Lots 5, 202 & 7, Tax Map No. 8 County of Warren.

AREA VARIANCE APPLICATION V27-58 - submitted by John & Suzanne Luslyk to construct a 24'x24' garage located in the front yard, without meeting the rear yard requirements.

Said property is located on the South side of Flat Rock Road, approximately 200' +/- feet north of the intersection of Stone Schoolhouse and Flat Rock Road, in the Town of Lake George, being Section 30, Block 1, Lot 29, Tax Map No. 8 County of Warren.

BY ORDER OF THE ZONING BOARD OF APPEALS  
TOWN OF LAKE GEORGE  
GEORGE MCGOWAN,  
CHAIRMAN  
Pub: Oct. 18, 1958

Donald E. & Kathryn Stone  
P.O. Box 52  
Diamond Point, New York 12824

Walter O. Rehm, III  
Attorney At Law  
175 Ottawa Street  
Lake George, New York 12845

Lake George Park Commission  
P.O. Box 749  
Lake George, NY 12845  
Att: Mr. Karl Parker

N.Y.S. Health Dept.  
21 Bay Street, Roger Building  
Glens Falls, N.Y. 12801  
Att: Mr. Brian Fear

Warren County Planning Board  
Warren County Municipal Center  
Lake George, New York 12845

Adirondack Park Agency  
Box 99  
Ray Brook, N.Y. 12977  
Att: Mr. James Hotaling

Lake George Association  
Fort George Road, P.O. Box 408  
Lake George, New York 12845  
Att: Mona Sieger, Secretary

Dept. of Environmental Cons.  
Hudson Street Ext. Box 220  
Warrensburg, N.Y. 12885  
Att: Mr. Bill Murman

Warren County Dept. of Public  
Works  
Warrensburg, N.Y. 12885  
Att: Mr. Fred Austin

N.Y.S. Dept. of Transportation  
260 Main Street  
Warrensburg, N.Y. 12885  
Att: Mr. Herb Steffens

Lake George Fire Department  
Ottawa Street  
Lake George, New York 12845  
Att: Mr. Rob Hickey

Glens Falls Independent Living  
Center - Quaker Bay Center -  
P.O. Box 453  
Glens Falls, New York 12801  
Att: Mr. Harvey Raymond

where I am from - South Jersey, Atlantic City. You should see the traffic because of the casinos down there. The people at work going back and forth from Atlantic City. And that is what is going to happen here. There is no way of making 9N wider. I am looking down the line. I won't be around but my grandchildren will be coming up here."

There was no further public comment.

The public hearing was closed at 7:33 p. m.

\* INTERPRETATION #2-88 - SUBMITTED BY DONALD & KATHRYN STONE  
DBA STEPPING STONES RESORTS - APPLICANT REQUEST INTERPRETATION OF  
ZONING ORDINANCE - ARTICLE V, SECTION 5.70 - CONVERSIONS

Walter Rehm, III, Esq., said, "I represent the Stones who own the Stepping Stones property in Diamond Point. I think probably most of you are familiar with it. This is a survey map of the property that was recently done. And what there are, is there are 15 cottages, even though they are numbered 15, you notice that 13 is missing for some reason, and a house. Now, this is in an RCH Zone I believe, where the minimum lot size is 20,000 square feet. And if you were to take a total of 15 units, if you include the house, and multiply it by 20,000 sq. ft., obviously there is not a sufficient amount of land to subdivide this property. The proposal that the Stones have is to create a second home, condominium development on this property. And each one of the units, including the house, with the units within the condominium, and you know a condominium is not a thing, it's a form of ownership. And under the condominium form of ownership, there is no subdivision of land. No lot lines change. No new lot lines are created or anything like that. But, if one of you or I or someone from the general public were to purchase one of these condominium units, what they would purchase, if it happened to be #2, would be the interior of this building, not the building itself, just the interior. This is the same as Cannon Point. And also an undivided interest in the balance of the property. And as I said, there would be no subdivision of land.

If you look down in the lower corner of the map, you will see that there is an additional 1.66 acres on the other side of the road which is included in this. The total acreage Don is about 3.7 acres total?"

Donald Stone said, "Just short of 4 acres."

Attorney Rehm said, "So, a little less than 4 acres. Now, the proposal here is to utilize the main house as a year-round residence, but to restrict the rest of these cottages for use only on a seasonal basis. They are units in the summer now, rented on a seasonal basis to people that stay a week, 2 weeks, 3 weeks, or whatever they stay. And the only change that is proposed is to allow individuals to own these and to occupy them during the good weather. So, the proposal would be to sell them off. But, to generally continue either owner occupancy or the owner of a particular cottage through the Stones could rent the cottage just as the Stones are renting it now, or the owner of a particular cottage could rent the cottage themselves. Since the condominium would own all of the buildings, there would be no individualism as far as colors of buildings are concerned or as far as landscaping or any of that type of thing. Everything would be maintained, exteriors, by the condominium.

Now, the question is, what sort of approval is required for this. And I have done these in different communities and I have done them all sorts of different ways. Sometimes I have felt that the path of least resistance was to apply for a variance because if you have 15 units, it is very natural for a Board to say, well the minimum lot size then is 20,000 square feet. Multiply 15 by 20,000 and you don't have enough square feet so you can't do it unless you get a variance. I have said in other cases that because of a chain of Supreme Court cases that are now at the Court of Appeals, no variance is required for this sort of thing.

And I have discussed this with Cliff, and Cliff, in doing his duties properly, as far as he is concerned, a variance is required, which is why we are here tonight.

If this project goes, and you look at this property as you drive by, it is not going to change. It is going to be exactly the same as it is. If you look at the tax map, it is not going to change. It will approximately the same as it is. No new building is required. There is no proposal to take any buildings down. There is simply a change that these will be occupied as in the past, but the difference is that individuals will own.

The law is, and I know that this Board has counsel, the Town has counsel, and I know that you haven't seen these cases, and I wouldn't think that you would at this point, and that you will want to discuss this with counsel. But, the law is this... A town acquires the authority to zone property under the Town Law, Section 261. And that's the section of the Town Law that says a town can enact the zoning ordinance and if that section of the Town Law did not exist, the Town would have absolutely no power to zone because that's a power that the State has. And the State has delegated that to the Town under the Town Law of the Cities under Cities Laws and to the Village under the Village Law. And the court cases say that the Town Law is not delegated to Towns, the authority to control the method of ownership of property. And the corollary of that is that the Town Law, the Legislature when they enacted the Town Law, delegated to Towns the authority to regulate the use of property. So, if this property is used as a residential purpose or if you wanted to change this use in a way that was contrary to the zoning ordinance, there is no question that the variance would be required. And if this was a Commercial Zone, which it is not, its a Residential Commercial, but if this was a Commercial Zone, and we wanted to do this so we would change the use from, at least for argument purposes, a Commercial use to a Residential use, a variance would be required if this was strictly a Commercial Zone. If this was strictly a Residential Zone, and these were little cottages that people owned and somebody wanted to buy them all up, and run a resort, then again a variance would be required. But, to change the method of use from individual ownership to condominium ownership, is not a zoning issue. And the cases, as far as I can see, are very clear on that.

And so we are here tonight to ask this Board to interpret the Lake George Zoning Ordinance to the effect that no variance is required for a conversion of a resort such as this to a second home, single family, condominium ownership. And that is the task before you. Now, I know that you look at me and you say what the heck is that guy talking about. What is he trying to put across on us now. But, that does seem to be the law as I read it. And it is one of the few times in life that it is a little bit clear. Let me see if I can tell you about a couple of cases.

The first case happened in Long Island in Southold. In Southold, they had a motel and these people wanted to convert the hotel into some kind of a condominium. And the local Zoning Authority told them that they couldn't do it. And so an action was commenced against the Town of Southold and the Supreme Court, in this district on Long Island, or perhaps it was the District Court I don't know which, one of the courts held that that was an invalid exercise of the power of the community because all they were doing is changing the form of ownership. And one other thing that you should realize... As far as lot size, these are legal today. And if you can follow the reasoning, they are prior non-conforming. Now, you could not build these today on separate lots on this property. There is no question about that. But, as they exist today, they are perfectly legal. This is a perfectly legal operation. And so, what that case said is, that as long as you don't change the use in a way that violates the ordinance, then you can do this without a variance. I am the first one to realize that this is not what the Town Board had in mind when they enacted the Zoning Ordinance. Because if you look at the definition of subdivision in the Zoning Ordinance, it says any division of land and so on and so on, including condominiums, cooperatives and every other darn thing. It says that. What I am saying to you is, that that is illegal. That provision of the Zoning Ordinance is

illegal. And that is what the courts have said. In October 1985, the Court of Appeals in New York decided a case called FGL & L Property Corp. vs. the City of Rye. And it's the major case on this subject. In the previous case it says, 'Nor the mere change in the type of ownership result in the destruction of the valid existing non-conforming use.' Also, 'Zoning Ordinances cannot be employed by a Municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is the use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations.' And I am not going to bore you with this part of it anymore. That is, as far as I am concerned, the law.

From the local planning point of view, I can say to you that I think that the use of this property, from a planning point of view, as proposed, would probably be a heck of a lot better than the weekly turnover of people in and people out. This happens to be one of those resorts that operates at 100%, or very close to 100% capacity. There is a provision in the zoning ordinance that also says and which I am not asking you to make a decision on tonight, it says if you convert from this type of ownership to single family condominium type ownership, then the matter is subject to site plan review and Cliff knows what that number is. It is in the ordinance."

Cliff Frasier said, "5.70C."

Attorney Rehm said, "So, that is in the ordinance. I am not asking you to make a decision on that tonight. But, the fact of the matter is, it's very likely that if the Town lacks jurisdiction, lacks authority over this, at this level, the variance level, it may very well be that it lacks authority at that level. But, I have been in this business long enough to know that there are certain legitimate concerns as far as planning and community development. And I think that the Stones are willing to test the waters as far as site plan review is concerned and discuss this thing with the Planning Board and solicit recommendations and so on with the Planning Board. And as long as the Planning Board is willing to treat us fairly reasonably, we are willing to not raise that issue at this point. But, we do feel that no variance is required and ask for you to make that determination. I can submit some of these cases to you or to your counsel if you want. I can do whatever and answer any questions you might have."

Chairman McGowan said, "Mr. Rehm, I would appreciate it, our attorney is Mark Schachner, if you would make available to him your arguments because we will be consulting him on the scope of our jurisdiction."

David Robinson asked, "On the examples, were they communities that are like Lake George and are resort communities?"

Attorney Rehm said, "Yes. One is in Southold in Long Island which I believe is on the ocean. One is Westhampton... I guess Rye is also on the ocean, on Long Island Sound, but I think Rye is a city. They are not exactly like Lake George, but the fact of the matter is, it doesn't make any difference."

David Robinson said, "I understand. But, I am just thinking of the rest of the community as a whole, as a resort community, as to what this may start or begin."

Attorney Rehm said, "This is not new to Lake George. It is really a basic question. Is it or is it not something that the Town can regulate? Towns were born with no authority at all. They had no rights to do anything. And then the State provided Towns with certain powers. If you have the power, you have the power. And we have to deal with that. If you don't, you don't. And if you don't, you shouldn't try to exercise it. And I think you have enough problems doing your job as it is, not trying to overstep your bounds. I am surprised frankly, that the law is as clear as it does seem. It makes sense to me as a lawyer but I see these. My interest is different than yours obviously. And yours is different than the Planning Board's."

James Mathis said, "The concern I have Walter is that from your argument, what you are saying is that most of these motels, resorts along the lake, without any problem, would have the right to do what you are proposing for Stepping Stones, without any variance, because it would be grandfathered. The intent of our Zoning Law was to try to regulate the amount of people that are going to live in that space. And yet, because motels were built probably before the Zoning Law was established and put living units in smaller spaces than what we are allowing right now, we are going to have every motel owner who decides he wants to get out of the motel business and cleaning rooms, to come in and want to sell the hotels and make them condominiums and we are going to be helpless to stop this. And I don't want to sit here and be part of a helpless group to stop something like this. I think it is contrary to the purpose and the long-term design that was written into this Zoning Law to make the environs around Lake George a condominium agent for people from who knows where. And part of the argument you have is that the Zoning Law dictates use not ownership. And I agree with you. It is pretty clear. But, part of the argument they are making with the Stepping Stones, is that the condominiums will be a 6-month condominium, that the people will only own it for 6 months of the year and they will not use it in the wintertime. Now, I have a hard time believing that that will happen."

Attorney Rehm said, "There's no problem with that Jim. That phase of it is absolutely no problem."

James Mathis said, "You think you could tell people that spent \$100,000.00 on these things that they can't come up in the winter?"

Attorney Rehm said, "Absolutely. That's the nice thing about condominium ownership. You can control all of those things. First of all, there is no water. It is not winterized."

James Mathis said, "But, they can be."

Attorney Rehm said, "The certificates of occupancy that he is going to issue are going to be limited to 6 months. The condominium declaration and bylaws and also the restrictions on the property will limit it to 6 months. And I'm telling you that they don't have any choice. But, I'll tell you something else. It's not even 6 months because these things are generally occupied, even as condominiums, they are really only occupied during the summer when the kids are free and then on weekends once in a while or maybe for a week in the spring or fall. But, if you look at these that have been done, that is what has happened. If you look at these that have been done, the properties have been upgraded. There are probably less people if you look at the ones that have occurred so far. That is that argument. We could argue about this all night, but I can make very good arguments to the fact that this is much better for the community from lots of points of view. The tax base is horrendously good for the community. It doesn't produce any kids for school. You get people that have the ability to purchase these, financial ability and otherwise and so you tend to get a group of people that will consume more in the more traditional parts of the community, less tourist-oriented type people. If we get to this with the Planning Board, the use of the sewage disposal system and so on, usually is less with these. There seems to be more control, more pride of ownership. And there are lots of good reasons for doing that. The condominiums can also easily control, by rules and regulations that are enforceable as they found out at Cannon Point. You know you can't add on here and add on here and go up a story here, and all that. You have solved all of those problems from the outset. Where with a subdivision, and I don't know if you have been involved in some of the subdivisions, but with some of the subdivisions, people buy a subdivision, a lot with a house on it, and what they say is 'Well, this is no longer big enough. We want to put a second story on it.' That can't happen here. So, there are really some advantages to this, at least from my point of view. But, the other side of the coin is a basic democracy type issue. And that is, if you have the authority then you can exercise it, as you should. If you don't have it, then it's wrong to try to exercise it. It's just like, you know, any other area of government - it's wrong for the police to pull you over on the way home tonight and say 'Get out of the car and spread eagle because I want to

search you.' They don't have the authority to do that. And so, that's the type of thing. And I don't care - I do care as a member of the community and someone who makes a living in the community and sends the kids to school here and all that, I care about the community. But, I care equally as much that the rights of the Stones, and me and you and everybody else, whatever they are, are preserved, and that government doesn't overstep its bounds because it just thinks that that is what the Town Board thought that they were doing when they did that. And yet I understand your feeling, because one of the things that could happen is just as you say - everybody up and down the road could do this. They haven't in the past. It is not terribly feasible with a lot of the properties because a lot of them are motels. Those that haven't already done it through subdivision or condominium, there are very few really good pieces of property left to do this with. But, there is no question, and Cliff knows it, that I am working on a second one. And I don't know if he has told you. And this is a very desirable economic plan as far as owners of property like this are concerned, because this area has changed. And while this was the best use of this land when Bob Kahn built it, the use of this land, the best use of this land, is no longer for this type of use. It just isn't. And it is a heck of a lot more valuable to do that, to do this conversion, and if you can do that without adversely impacting the community and adversely impacting the environment. And if the Planning Board does its job, as I am sure it will, and impose conditions upon approval that make sense and ensure that this is a good project, maybe this is looking at the economic realities. And we have seen areas of this country, for example Old Orchard Beach and other places where communities have not looked at the economic realities and the result has been more adverse. But, I will give Mark (Schachner, Esq.) the stuff and I will answer any further questions."

The public hearing was opened at 8:00 p. m.

Kathryn Stone said, "I would be very, very pleased if we could go in this direction. And the use of it would be less not more. And we have always run a top-grade operation with top-notch people that have come to our resort and I certainly would not sell to anyone that I didn't feel would take care of the property. I intend to live there."

Kathy <sup>Vincent (Mr)</sup> ~~Keenan~~ said, "I am from the Lake George Association. I would like to say that the Lake George Association is strongly opposed to the concept of conversions all of the way up and down Bolton Road. We have seen a lot of them in Bolton and we will see a lot of them in Lake George. It is confusing. I know that the Zoning Ordinance does specify criteria for condominiums. I really believe that if you look at 5.70(c), it says that 'conversions, when made, must conform to the provisions of this Ordinance.' They wrote the word 'must' in there. I was here, working for the Town, when they did that. And the reason they did that was to make it stronger. All the way through the Zoning Ordinance you hear the word 'shall.' They didn't know how to regulate it. Their theory was to do it. If it is taken to court and overturned, fine. But, you have to have a handle on it. You can't just say that you don't have any authority to regulate conversions, because you do. They need a density variance requirement and that is what you should decide. If it is taken to court and it is overturned, fine. Then you will have to change the ordinance. But, you must have a handle on it. The Planning Board will have a handle on it but only as far as aesthetics, erosion, stormwater, stuff like that. They are not going to have anything to do with the density. I think that is very important. I think that Mr. Rehm is wrong in telling you that you have no authority here and making you feel shaky on this. You have a good authority, a good standing here to make a decision on this interpretation. That is what you are here for. If it is wrong, it's wrong. If it's right, it's right. But, you have that authority. The Zoning Ordinance has no special relief granted in square footage, etc, for condominium. They did that for a purpose. Their intentions was not to regulate ownership. It's to regulate development even though the development is there, there is a change. Maybe a change of use is a wrong kind of word, but there is a change. And it's a change that you will lose sight of if you don't make the decision that a variance is required. Thank you."

There was no further public comment. The public hearing was closed at 8:05 p. m.

AREA VARIANCE APPLICATION V27-88 - SUBMITTED BY JOHN & SUZANNE LUSTYIK  
TO CONSTRUCT A GARAGE 24' X 24' LOCATED IN THE FRONT YARD  
APPLICATION WAS APPROVED BY WARREN COUNTY PLANNING BOARD 10-12-88

Chairman McGowan read a letter from a neighbor, Theresa Herzog, stating her support of the project. The letter may be found in the Planning and Zoning Office.

John Lustyik said, "Here is a sketch with the residents. This is our residence here. And what I have presently back here is a swimming pool with a landscaped area. And what we propose to do, rather than put a garage right next to the residence here, we would bring the garage out and align it with... In other words, the south end of the garage would be in line with the north end of the building. And the reason that we want to do that is so that it does not crowd or interfere with the pool which is back here and simply moving it out here, we have had the 4 immediate neighbors discuss this with us. And I think I have letters from all 4 of them. And they all agree that this would enhance the overall beauty of the property, rather than stuff the thing back in here and interfere with the existing pool area."

Chairman McGowan read the letters from Nancy Nichols, Joan Crescente, and Floyd Boyea, all in support of the project. The letters may be found in the Planning and Zoning Office.

David Robinson said, "I was looking at the other homes in the neighborhood and I noticed that a lot of the houses had garages that were connected with a long breezeway. I didn't know if you thought about anything like that."

Mr. Lustyik said, "Well, I think that that would be the plan off in the future, maybe in 3 or 4 years. My wife has discussed the possibility of putting up a sun room. And we could simply extend the roof that you are talking about over to the garage. That is not what we intend to do right now. But, that could be done in the future."

Joseph DeSantis said, "I don't think I have a handle on why you are not going to connect it."

Mr. Lustyik said, "Well, you would have to come up and look at the property. But, to put it adjacent to the house, it would crowd the pool area. And I think it would do it in such a way that I don't think I'd put the garage. I would not erect the garage if I had to put it in that particular spot. I think that by moving it forward, you don't crowd that pool area and also what I am thinking of is the beauty of the property. If you look at the property from the front, and you would put a garage back there, I think it would ruin the appearance of the property. That's really the reason why we want to move it."

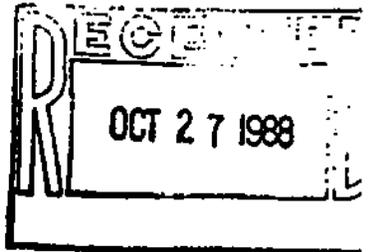
David Robinson said, "The entrance will be facing the house, then."

Mr. Lustyik said, "The entrance would be facing the house. The only other thing that I would like to mention is the residents about 2 houses down from us, the James Stein residence, presently has a garage in the same location, in other words, facing towards the driveway."

James Mathis said, "The main difference between your proposal and theirs, because I looked at theirs after I drove past your house, is that they did connect their house to their garage with a breezeway. It's an attached garage, which would put it in compliance. And it does not look bad. It is an attractive set-up. It is at a right angle to the house."

Chairman McGowan said, "I would advise you all to look into the past

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JOHN J. RAY

October 26, 1988

Zoning Board of Appeals  
Lake George Town Center  
Lake George, New York 12845

Re: Donald E. and I. Kathryn Stone/Stepping Stones Resort

Gentlemen:

Pursuant to your request, I have summarized our clients' legal arguments relative to the conversion of the existing Stepping Stones Resort property to a second home seasonal condominium project. On September 14th, an application was submitted to the Zoning Board of Appeals on behalf of Mr. and Mrs. Stone for an interpretation of the applicable provisions of the Town of Lake George Zoning Ordinance to the effect that no variance would be required for such conversion since no subdivision of land or other change would take place that would require a variance or other zoning approval.

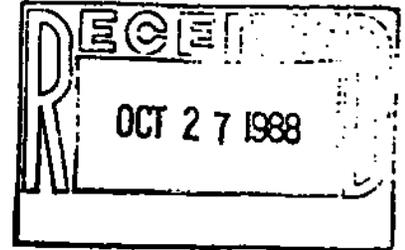
On the evening of October 2nd, the matter was heard by the Zoning Board of Appeals and during our oral presentation, the following points were made:

a. That the Stepping Stones property includes 3.76 plus or minus acres of land located on both sides of Lake Shore Drive in the Hamlet of Diamond Point. A 1.66 acre parcel included within the above is located on the westerly side of Lake Shore Drive and is substantially undeveloped. The second parcel containing 2.1 plus or minus acres with in excess of 200 feet of frontage on Lake George is improved by 14 one family cottages, a year-round house occupied by Mr. and Mrs. Stone and other improvements all of which are depicted on the survey map heretofore submitted to the Board.

b. The proposal is to change the form of ownership of the 14 cottages and the year-round residence from its existing form (wholly owned by the Stones) to the condominium form under which all of the buildings with the exception of the Stones' year-round home will be occupiable on only a seasonal basis from approximately May 1st until approximately October 30th of each year. No subdivision of land will take place, no new lots will be created, no new construction is anticipated and, in fact, the property will physically remain as it currently exists. The units will, of course, be offered to the general public for sale, however, deed restrictions filed in the County Clerk's Office and restrictions set forth in the offering plan filed with the New York Attorney General's office will contain the seasonal occupancy limitations as set forth above.

Zoning Board of Appeals

Page 2

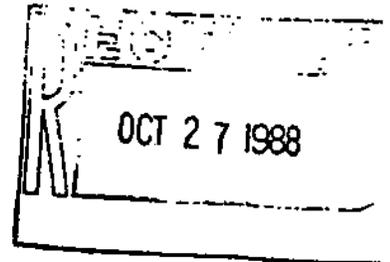


c. It is my clients' position that the conversion of the existing resort from its current form of ownership to the condominium form of ownership does not require approval by the Town of Lake George and more specifically does not require either a variance or site plan review. This matter was originally discussed with Town of Lake George Zoning Administrator Cliff Frasier who determined that both a variance and site plan review would be required for the conversion and it is for that reason that the request for interpretation was made to the Zoning Board of Appeals.

d. The power to enact and administer zoning ordinances was granted by the Legislature to towns under Section 261 of the Town Law. That statute provides, among other things, that "...the town board is empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...". That statute specifically does not grant to towns the authority to regulate changes in the form of ownership as anticipated by the Stones in the conversion of their resort to the second home condominium form of ownership. That is particularly true since the proposed change will not result in a change of use that would be otherwise prohibited by the Town of Lake George Zoning Ordinance. That is to say, that the use of the property both before and after the change of method of ownership as proposed by the Stones will conform to the use provisions of the Town of Lake George Zoning Ordinance for the zone in which the property is located.

e. A relatively recent series of cases decided by New York Courts support the argument set forth in the preceding paragraph, although that legal proposition has been recognized in other states for some years. North Fork Motel, Inc., vs Charles Grigonis, Jr., et al, originally decided by the Supreme Court in March of 1982 (46 NYS 2d 414) and later affirmed by the Appellate Division at 93 AD 2d 883 in 1983, was the first definitive case in New York on that subject. In that case, the Court held as follows:

. . . . .



Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations...(Citations omitted.) Nor does the mere change in the type of ownership result in the destruction of a valid existing non-conforming use.

Later, in March of 1985, the Appellate Division in FGL & L Property Corp. v. City of Rye et al, 108 A.D.2d 814, held that, "As a fundamental principal, zoning is concerned with the use of the land and not with the person who owns or occupies it. The Court in that case citing the North Fork case again reiterated the rule that it is use rather than the form of ownership that is the proper concern of zoning and planning regulations.

The FGL & L Property Corp. case was appealed from the Appellate Division to the Court of Appeals and was decided in October of 1985 at 66 N.Y.2d 111, affirmed the Appellate Division determination and is of major importance since it not only settles the law in New York in connection with the effect of zoning ordinances upon changes in the form of ownership as proposed by the Stones, but further contains a rather detailed discussion of the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it". While the FGL & L Property Corp. case related to a zoning ordinance enacted under the enabling provisions of the General City Law, it seems abundantly clear that the same rules apply to zoning ordinances enacted under both the Town and Village Laws.

For the reasons set forth above, it appears particularly clear that the conversion of the Stepping Stones Resort from its existing single form of ownership to the proposed second home residential condominium form of ownership is a matter that is not within the jurisdiction of the Town of Lake George under its zoning ordinance and accordingly, no variance, site plan review approval or other zoning approvals are required therefor.

. . . . .

1. HOW SUBSTANTIAL THE VARIATION IS IN RELATION TO THE REQUIREMENT: The variance is very substantial - the applicant constructed three (3) units without obtaining the proper permits.

2. THE EFFECT OF THE INCREASED POPULATION DENSITY THUS PRODUCED ON THE AVAILABLE GOVERNMENTAL FACILITIES: There are no increased effects on the governmental facilities; however, there is an increase in population concerning density because applicant added three (3) units.

3. WHETHER A SUBSTANTIAL CHANGE WILL BE PRODUCED IN THE CHARACTER OF THE NEIGHBORHOOD OR A SUBSTANTIAL DETRIMENT TO ADJOINING PROPERTIES CREATED: There was a substantial change produced in the neighborhood without anyone's knowledge.

4. WHETHER THE DIFFICULTY CAN BE OBIATED BY SOME METHOD, FEASIBLE FOR THE APPLICANT TO PURSUE, OTHER THAN A VARIANCE: The difficulty can be obviated if the Applicant had received the proper permits and used the addition for purposes other than accommodations.

5. WHETHER IN VIEW OF THE MANNER IN WHICH THE DIFFICULTY AROSE AND CONSIDERING ALL OF THE ABOVE FACTORS, THE INTERESTS OF JUSTICE WILL BE SERVED BY ALLOWING THE VARIANCE: The interest of justice will be served by not allowing the variance. The applicant should have applied for the proper permits and approvals.

The motion was subject to a roll call vote resulting in the following:

David Robinson	-	Yes
Joseph DeSantis	-	Yes
Daniel Strain	-	Yes
James Mathis	-	No
Chairman McGowan	-	Yes

Motion was carried.

Area Variance Application V26-88 was denied.



INTERPRETATION #2-88 - SUBMITTED BY DONALD & KATHRYN STONE - DBA STEPPING STONES RESORT - CONVERSIONS - DECISION

David Robinson said, "The problem with this to me is that I believe that the Town, or any other governmental body should be in the position to look at a change of use, no matter what you say about the ownership, and that is what we are dealing with here, because this is generally changing the use of the property to a residential use, even if considered a seasonal, residential area. And that is where I have a problem. And I have to look at it from that point of view because I am changing the density of the area from a seasonal residential area and there would generally be ownership of the same parties.... I see it as a residential area. I agree that the ownership question is relevant here because of the fact that the land use itself is going to be the same. The ownership has changed so that it is no longer a seasonal cottage, but changing the owners to a condominium. I think it is both an ownership and use issue."

Daniel Strain said, "Doesn't a condominium call for a lot more footage, like 20,000 square feet?"

Chairman McGowan said, "It calls for 20,000 square feet. A motel requires 2,000 per square foot."

Daniel Strain said, "So, they haven't got the footage then and there isn't much we can do about that."

Chairman McGowan said, "It is certainly within our power but there is a great deal of difference. The way I interpret the law is if you were to build a new condominium from scratch, the requirement with the adjacent properties would be 20,000."

Daniel Strain said, "Well that is what they would be doing, like building new condominiums."

Chairman McGowan said, "They would be changing the structure of the outer shell. In the condominium, they own the interior. I believe they have a deed for the interior of the unit that they occupy. The land, in my understanding, stays in the same ownership. But, a new deed is issued just for the interior of each structure."

Cliff Frasier said, "That's basically it. The property is owned like by a corporation almost."

James Mathis said, "I had to agree with what Walter (Rehm, III, Esq.) said in terms of his argument about the changing in ownership. It is certainly not covered in Zoning Law. But, I think that when we look at the Lake George Zoning Law, I think it's different from the examples that were cited in Walter's presentation, because I think that when our Zoning Law was written, it was written with regard to the concern that the Town of Lake George had, and what could happen, around the lake in terms of conversion. And I think that when they said in Section 570C, that the conversions must conform to the provisions of the Ordinance, and the Ordinance stated 20,000 square feet per dwelling unit in this particular zoning area, I think that what could happen and the thing that would concern me is that by not requiring a variance for this, it would open the door for every motel in the area to say, well, I had a motel for a couple of years with the 2,000 square feet and now I will change it without a variance to a condominium. And it will have a very high density instead of 20,000 square feet per unit, we will have 2,000 give or take a little bit, square feet per unit. And I think that there could be a type of situation that was not intended when the Zoning Ordinance was written and re-written earlier this year. I would feel that again, because of the last sentence when it says said conversions must conform to provisions of the Ordinance. And the provisions of the Ordinance are very clear that this does require a variance in order to go through."

Joseph DeSantis said, "I agree with Jim. I think that if we don't interpret this as saying that it must conform to the provisions of the Ordinance, then what we are doing is opening up a loop hole. I could envision, and this may be far-fetched, but people building as a motel in a couple of years, just switching. If we say we have no jurisdiction over that, then it will happen again and again. And I think that their project may be for the betterment of the Town, but I would at least like the choice to review each one and come to that decision to say that yes in fact, it is a good project and will be a good idea and let's approve it. Other than that, I think that things could get out of hand."

James Mathis said, "I think that the density and usage of those 15 buildings will probably not vary under the new circumstance because apparently Stepping Stones was 90 - 95% occupied between May 1 and October 30 every year. And as a condominium, they will be occupied probably the same amount and maybe not as much because there may be times that the owners not only cannot be here, but they cannot rent it out during those times. But, I think that the point you made of being able to take each one as an individual conversion and keep that power in this body is an important thing."

David Robinson said, "The intent of this, as I read it, was to do just that - to control. Not every motel or units of cottage should be converted into condominiums or whatever. I find this to be a grey area with regard to the 20,000 square feet."

Chairman McGowan said, "There are 3 things here. One is the precedent that this will set. What isn't an issue here is the quality of the place that the Stepping Stones will be running or how well it will serve the community, or even the environmental impact. Those are not to me the

critical questions. The critical questions are, condominiums are designed by our law to have 20,000 square feet per unit. The Antlers was just built down the street. And though they have motel units and so on there, they conformed to the 20,000 plus. That's essentially all I have to say. We do need a motion on this and look at the question before us."

James Mathis made a motion that the Zoning Board of Appeals feels that a variance is in order on Interpretation #2-88, to allow a conversion from a tourist accommodation to a condominium development, as the Applicant is unable to conform with the 20,000 square feet per unit as required by the Town of Lake George Zoning Ordinance.

David Robinson seconded the motion.

Motion was carried.

A variance is required for Interpretation #2-88.

AREA VARIANCE APPLICATION V27-88 - SUBMITTED BY JOHN & SUZANNE LUSTYIK  
TO CONSTRUCT A 24'X24' GARAGE  
NEGATIVE/POSITIVE DECLARATION AND DECISION

Joseph DeSantis said, "This type of variance, at least the ones up to date, have never really bothered me. They have always seemed to be in line with the character of the neighborhood. I have never seen it as a major variance. I don't think he's asking a lot. I think that he is keeping in the context of the neighborhood and he has a nice looking place. It will continue to be a nice looking place and I just don't have a problem with it. I think he should go ahead with it."

David Robinson said, "I looked this over closely. I think he went through the trouble to get us all the facts and figures that we needed and his neighbors all sent positive letters of approval. Nothing else has been negative. And I think that the location of it would go nicely."

Chairman McGowan said, "I would add to that that if all the applications were as perfectly detailed as this one was, and the clarity, it would make the Board's job a whole lot easier. All the answers are legible and it is pretty simple stuff. I reviewed the site. The houses are well spaced. It preserves the continuity of the neighborhood. There is no jamming. In fact there is a practical difficulty."

Daniel Strain said, "I reviewed it and I think it is just fine."

James Mathis said, "The only problem I have with it... I mean, I agree with most of what you guys said in terms of what is being done. It is not bad. The only concern I would have is in previous and similar decisions that we have had to make concerning garages in front at different places. I think we need to look at this particular situation in the same light that we have as others. Now, in the time I have been here, we have had 2 cases with garages being asked for in front of the property and we disapproved 1 and approved 1. And in both cases, there were good reasons. One of the points in the presentation the other night, which I favor, is that it is similar to a building down the road, the property of the Steins. And the reason that the Stein's was acceptable was that there was a definite structural connection between the house and the garage. And because it was connected, it became approved because it was part of the house. And the garage could be in front as it was not a separate structure. I guess the question I would have is that if it is compared to the Stein's, then why is it not the type of thing that it should be required that it be connected to the house like the Stein's garage was, or placed behind the house on the south side of the pool, the property that they own, there are trees there now. And I certainly would hate to see trees go down, but you know I feel a garage could be placed there. I just bring it up because I feel it's necessary to be brought on the table in terms of the similarity of

# Town of Lake George

TOWN OFFICES

LAKE GEORGE, N.Y. 12845

November 9, 1988

Mr. & Mrs. Donald Stone  
P.O. Box 52  
Diamond Point, New York 12824

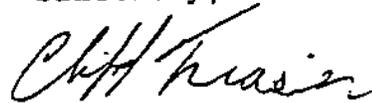
RE: INTERPRETATION #2-88 - CONVERSIONS

Dear Mr. & Mrs. Stone:

The Zoning Board of Appeals for the Town of Lake George, at their meeting held on November 3, 1988 determined that an Area Variance is required to convert the existing motel known as Stepping Stones Resort, into a condominium development, as the Applicant is unable to meet the 20,000 sq.ft. per unit, as required.

If you have any questions concerning the above decision, please do not hesitate to contact this office.

Sincerely,



Cliff Frasier  
Planning & Zoning  
Enforcement Officer

CF/f

cc: Zoning Board  
Town Board  
Town Clerk  
Attorney Walter O. Rehm, III  
file #2-88

R 066

**RESPONDENT'S**

**BRIEF**

# 58926

3-89-933

To Be Argued By: Mark J. Schachner  
Time Requested: 10 Minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

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DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals, .

APPEAL NO. 58926

Respondent-Respondent.

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BRIEF OF  
RESPONDENT-RESPONDENT

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Miller, Mannix & Pratt, P.C.  
Attorneys for Respondents  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
Tel. (518) 793-6611

July 7, 1989

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## PRELIMINARY STATEMENT

Donald and Kathryn Stone ("Appellants") initiated this proceeding and prosecute this appeal against the Town of Lake George Zoning Board of Appeals ("Respondent") ostensibly in protest of Respondent's regulation of the proposed change in ownership of Appellants' property. However, in resting solely on the notion that Respondent can not regulate ownership of property, Appellants merely beg the question actually involved in this matter. Appellants' existing property and business is currently classified as "tourist accommodations" pursuant to the Town of Lake George Zoning Ordinance. Appellants propose to undertake a conversion which would not only change the form of ownership (from one single entity owning the entire property to individual and separate condominium ownerships) of their property and business, but would also change its use from "tourist accommodations" to "single family dwellings".

In ruling in favor of Respondent in the Court below, the Hon. John G. Dier, J.S.C., implicitly found that Appellants' proposal constituted not only a change in ownership but a change in use as well. This finding may be characterized as a Finding of Fact which should not be disturbed. In any event, Respondent's determination that Appellants' proposal constitutes change of use as well as change of ownership is not arbitrary, capricious or without rational basis. In the

Preliminary Statement of their Brief, Appellants describe Respondent's determination as finding that their change of ownership required an area variance. However, this characterization is incorrect. Respondent determined that the proposal entailed change of both ownership and use and that the new use required an area variance, and Supreme Court correctly upheld Respondent's determination.

QUESTION PRESENTED

Did Supreme Court properly uphold Respondent's Decision that Appellants' proposal constituted change in both ownership and use and therefore was subject to regulation under the Town of Lake George Zoning Ordinance?

### COUNTERSTATEMENT OF FACTS

Appellants own a motel known as the Stepping Stones Resort on Lake Shore Drive (Route 9N) in the Hamlet of Diamond Point, Town of Lake George (R-41). Appellants own approximately 3.76 acres of land lying on both sides of Lake Shore Drive. One approximately 1.66 acre parcel is substantially undeveloped and is located on the westerly side of Lake Shore Drive. Their motel property is comprised of 14 single family cottage units and a year-round main house occupied by Appellants and is located on an approximately 2.1 acre parcel on the easterly side of Lake Shore Drive with approximately 200 feet of frontage on Lake George (R-40).

Appellants plan to change the current use of their property from a motel tourist accommodation to condominium, single family housing. On September 14, 1988, Appellants submitted an application to Respondent for an interpretation of the Town of Lake George Zoning Ordinance ("Ordinance"). Appellants sought a determination as to whether a variance would be required for the proposed change in the use of their property from its current use as tourist accommodations to single family residences which would be owned as condominiums (R-41). Their request was made after the determination by the Town Zoning Officer that a variance and site plan review would be required for their project.

Respondent reviewed Appellants' request. A public hearing was held on October 20, 1988 at which Appellants' attorney presented their argument that a variance should not be required (R-53-58). Appellants contend that their project is merely a change in ownership and not a change in use. On November 3, 1988, Respondent made the determination that a variance would be required (R-63-65) and its decision was filed with the Town Clerk on November 9, 1988 (R-42).

According to the Ordinance, Appellants' property is located in the Residential Commercial/High Density (RCH) zone and is currently classified as a tourist accommodation. Pursuant to the Ordinance, conversion of these cottages to single family residences would change their zoning use classification. The RCH zone permits single family dwellings provided that 20,000 square feet of land are available for each dwelling unit. Appellants' property does not contain sufficient acreage to allow for the 15 single family units proposed. Therefore, Respondent determined that Appellants would need an area variance for their project. Appellants have never requested this variance from Respondent, nor have they ever requested the site plan review which would also be required under the Ordinance.

On December 7, 1988, Appellants served Respondent with a Notice of Petition and Verified Petition purportedly in an Article 78 proceeding in which Appellants asked Supreme

Court to issue a declaratory judgment that Appellants' proposed change does not require a zoning variance or site plan review (R-25-43). The matter was heard in Warren County Supreme Court on January 6, 1989. The Hon. John G. Dier, J.S.C., ruled in favor of Respondent and the Order and Judgment dismissing the Petition in its entirety was signed and entered in the Office of the Warren County Clerk on January 9, 1989 (R-4). Appellants filed their Notice of Appeal on or about February 7, 1989 (R-3).

Appellants submit that the use of the property would remain the same, because the proposed use is "a second home seasonal condominium development" (R-41). However, Appellants themselves characterized their proposal as "conver[sion] of] the existing Stepping Stones Resort from its present transient resort use" (R-41) (emphasis supplied). Therefore, although certain similarities exist between the current and proposed uses (such as the fact that both would be of a somewhat seasonal nature), it is clear that the uses are not identical. "Transient resort use" entails short-term rental to out-of-town visitors who frequently use their units for lodging only and seek meals, recreation and other amenities at other commercial establishments. Therefore, Appellants' current transient resort use clearly falls within the Ordinance definition of "tourist accommodation." In contrast, single family condominium owners (even "second home seasonal condominium" owners)

would occupy the units as full-time, citizen residents, at least during the season of occupation, as befits classification as "single family dwellings". In fact, the definition of "single family dwelling" contained in the Ordinance specifically notes that it describes a particular type of use "whether seasonal or year round."

I. APPELLANTS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND ARE NOT AGGRIEVED

Appellants initiated this action by service of a document which purports to be an Article 78 Petition. (R-27-34). However, in their request for relief, Appellants asked the Court below for a declaratory judgment regarding Respondent's interpretation of the provisions of the Ordinance. (R-32). First, Appellants' pleadings are procedurally defective because declaratory judgment is not appropriately sought in an Article 78 proceeding. Phillips v. Oriskany, 57 AD2d 110 (4th Dept. 1977). More importantly, however, Appellants' claim is not ripe for adjudication because they are not aggrieved by Respondent's decision and have failed to exhaust their administrative remedies. People ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh, 203 AD 463 (1st Dept. 1922).

Appellants obviously disagree with Respondent's decision. However, Respondent has not conclusively determined that Appellants cannot undertake their project; it has merely determined that Appellants cannot do so without a variance (R-42). Until and unless Appellants seek a variance from Respondent and such variance is denied, Appellants have not exhausted their administrative remedies and are not truly aggrieved. Respondent has merely decided that Appellants' proposal constitutes a change in use under

the Ordinance which requires an area variance. Respondent has not in any fashion considered or ruled upon the issue of whether or not Appellants are entitled to a variance. In fact, as no variance application has been submitted to Respondent for consideration, it would have been imprudent and inappropriate for Respondent to have expressed any opinion with respect to the variance issue.

Therefore, it is incumbent upon Appellants to submit a variance application to Respondent prior to any claim of harm to Appellants. Unless such a variance application is denied, Appellants are not harmed or aggrieved, as no final decision prohibiting their project has been issued. The goal which Appellants seek, conversion of their buildings, has not been finally denied and they have failed to exhaust their administrative remedies toward achieving their goal.

II. THE FACTUAL DETERMINATION IMPLICITLY  
MADE BY THE COURT BELOW CANNOT BE DISTURBED

Respondent is the Zoning Board of Appeals of the Town of Lake George and, as such, its decisions are entitled to great weight and substantial deference by courts. In addition, the narrow point on which this matter turns may be characterized as a factual determination of both Respondent and Supreme Court and is therefore entitled to even greater deference.

The narrow issue for adjudication in this matter is whether Appellants' proposal constitutes merely a change in ownership or also a change in use. Respondent reviewed Appellants' proposal and their contention that it constitutes only a change in ownership (R-53-58, 63-65). Mindful of the fact that the Ordinance separately defines "tourist accommodation" and "single family dwelling", Respondent made a finding which can be labeled as factual that the proposal also constitutes a change in use.

Although Supreme Court did not issue a written opinion in this matter, the same factual finding is implicit in its dismissal of the Petition. It appears that Supreme Court adopted Respondent's view and implicitly agreed with the factual finding that Appellants' proposal constitutes changes in both ownership and use. Therefore, this Court should not disturb this factual finding as it is clearly

based on the evidence in the Record for consideration by  
both Respondent and the Court below.

III. RESPONDENT HAS ACTED WITHIN THE  
JURISDICTION OF TOWN LAW AND THE  
LAKE GEORGE ZONING ORDINANCE

Although it is not clear in Appellants' hybrid petition what sort of relief under Article 78 they are requesting, Respondent meets all possible standards of review as its determination was rationally and correctly based upon the provisions of the Ordinance. Under the Ordinance, the use of Appellants' property would change from tourist accommodations to single family dwellings regardless of how the property is to be owned.

Section 5.70(C) of the Ordinance, entitled "Conversion of Certain Existing Uses", expressly regulates proposed conversions of tourist accommodations to single family dwellings. This provision explicitly states that "tourist accommodations...shall not be allowed to be converted...to individual single family dwelling units...except through site plan review. Said conversions, when made, must conform to the provisions of this Ordinance." Therefore, the Town of Lake George has expressly determined that such proposed conversions do constitute changes in use and all provisions of the Ordinance, including area restrictions, must apply.

The Ordinance specifically states that the Residential Commercial/High Density District requires 20,000 square feet of land per single family dwelling unit. Here, Appellants are requesting to convert 15 buildings from their present

pre-existing use to single family dwellings. As their property contains only 3.6 acres, they are at best entitled to 8 units under the current zoning. Thus Respondent was correct in determining that a variance would be required under the Ordinance.

The ability of the Town to control the use of property is set forth in the zoning enabling statute. Town Law §262. The act "[c]learly vest[s] in the legislative bodies of [towns]...authority to establish residential districts, to differentiate between residential districts on the basis of size or type of building, or extent of occupancy, and to protect such districts by excluding commerce or industry, or both." Robert J. Anderson, New York Zoning Law and Practice (3d ed. 1984) §9.18. In addition, towns have the authority to regulate and restrict size of buildings, size of lots, coverage of lots by structures and location and use of buildings. Town Law §261.

Once Respondent has determined that a change of use would occur, it is required to enforce the area restriction as provided in the Ordinance. In this case, the project constitutes conversion to a use for which Appellants lack the required land area. Therefore, they cannot lawfully proceed without a variance.

IV. THIS PROJECT IS A CHANGE  
OF USE AND NOT JUST A  
CHANGE OF OWNERSHIP

Appellants are correct that a town cannot regulate solely the type of ownership of property. However, the change of ownership in this project is accompanied by change of use of the property.

In Catharn Realty Corp. v. Town of Southampton, 97 AD2d 531 (2d Dept. 1983), affirmed, 62 NY2d 831 (1984), the Court found that an amendment to Southampton's zoning ordinance was not invalid merely because it attempted to regulate cooperative ownership of property. The plaintiff in the action was the owner of a seasonal motel who sought to convert its motel from corporate ownership to a cooperative form of ownership. The Town of Southampton amended its zoning ordinance to prohibit conversions to residential condominiums and residential cooperatives in certain zoning districts. The amendment required a special exception to be granted by the Zoning Board of Appeals for any conversion in all the remaining districts. The plaintiff claimed that the amendment should be invalid as the Secretary of State regulates cooperatives and condominiums. Id. The Court determined that since the amendment defined residential cooperatives as "[a] multiple dwelling in which residents have an ownership interest in the entity which owns the building(s) and, in addition, a lease or occupancy agreement

which entitles the residents to occupy a particular dwelling unit within the building", it was clear that the town board was regulating the type of use of the property and not merely the form of ownership, thus the amendment was not invalid. Id. at 532. The Court concluded that if the use of a building will also be changed when the form of ownership of the building changes, then the town can regulate that change of use. Id. at 532

In this case, Appellants argue that the new owners will be either coming to use the units themselves or renting the units out to other visitors, and that the use itself will remain the same. However, contrary to Appellants' position, the "use" is changing from tourist accommodations to single family dwellings. No longer would the Stepping Stones Resort be a transient tourist accommodation where units are rented out as part of a business; rather, the resort would become second homes to the new owners who would rent out the property only when and if they so chose.

In addition, Appellants are neglecting to consider the different status that new owners would acquire as single family dwelling residents. The new owners could be afforded the status of legal residents of the Town of Lake George and thus would acquire the rights and privileges of residents, placing a greater burden on Town facilities and possibly adversely affecting the public health and welfare of the

community. Legal resident status certainly could not be conferred upon on the tourist visitors who currently choose the Stepping Stones Resort (or any of the other similar tourist accommodations which line the shore of Lake George) as lodging for their summer vacations.

Appellants cite case authority for the proposition that zoning laws cannot lawfully regulate ownership of property. While this assertion is not incorrect, Appellants seem to rest their argument on the notion that the use of a particular property cannot possibly be changing unless the property is undergoing some type of physical disturbance or modification. However, this notion is blatantly incorrect. For example, a single family dwelling could be converted into any number of commercial uses (such as professional offices, including law offices or real estate offices) without physically modifying the property or the structure in any way. Similarly, various types of commercial and industrial uses can easily occupy identical premises and the use of a particular building could easily be converted from any of a number of non-intrusive permitted uses to many noisy, noxious or hazardous non-permitted uses with no physical modification of the premises. In any of these examples, it would clearly be perfectly lawful and appropriate for a municipal zoning ordinance to distinguish among the uses and allow some while prohibiting others.

The two cases cited in the petition, North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, affirmed, 93 AD2d 883 (2d Dept. 1983), and FGL&L Property Corp. v. City of Rye et al., 108 AD2d 814, affirmed, 66 NY2d 111 (1985), do stand for the proposition that zoning can regulate use and not ownership, but only for that proposition. Neither case considered the situation involving the conversion of a transient rental use to a seasonal ownership use. In fact, in the North Fork Motel case, the Court specifically stated that the change of ownership did not violate the Town of Southold Zoning Ordinance "provided the property's present use as a motel remains unchanged" (emphasis supplied). North Fork Motel, 93 AD2d at 883. In their brief, Appellants set forth that portion of the North Fork Motel decision which states that zoning regulates use rather than ownership, but conveniently fail to refer to the language of the decision which requires the property's use as a motel to remain unchanged. The City of Rye case dealt not with a motel conversion, but with a zoning provision which was interpreted as essentially requiring the condominium form of ownership. The Town of Lake George is neither requiring nor prohibiting any particular form of ownership and the cases do not state that a municipality cannot regulate conversion from a commercial rental operation to a residential use. In fact, the North Fork Motel case clearly supports Respondent's decision in this case.

Contrary to Appellants' assertion, Respondent does not seek in any way whatsoever to exclude the condominium form of ownership. In fact, the Town of Lake George Zoning Ordinance neither condones or encourages nor prohibits condominiums or any other form of ownership, as is appropriate in view of the agreed upon concept that zoning regulates use and not ownership. However, the Ordinance does differentiate between tourist accommodations and single family dwellings, a distinction which is rational and not without basis. Therefore, Appellants' semantic argument regarding Respondent's supposed (but non-existent) use of terms such as "owner" or "tenant" is specious. It is true, as Appellants state, that the Ordinance is "silent" as to any definition of condominiums which would indicate per se that their establishment constitutes a change of use. Respondent submits that any such per se rule would do just what Appellants complain of: namely, regulate ownership rather than use. Instead, the Ordinance properly distinguishes among and regulates various uses.

If Respondent and/or the Court were to adopt Appellants' view, then all of the scores of tourist accommodations which line the shores of Lake George could be converted into single family dwellings without the ability of municipalities to review these conversions. This would result in a substantial influx of additional municipal residents without conformance with the density restrictions

that are reasonably and rationally set forth in municipal zoning ordinances. Such a result would clearly undermine the legitimate goals and intent of this and other similar Ordinances.

CONCLUSION

Respondent's interpretation of the Town of Lake George Zoning Ordinance has a rational basis and is not arbitrary, capricious or illegal, nor does the Ordinance regulate mere ownership of property. Respondent therefore respectfully requests that the Supreme Court Decision be affirmed and the Petition dismissed.

Dated: July 7, 1989

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Tel. (518) 793-6611

N:10STN-BR,9

**REPLY**

**BRIEF**

58926

3-89-939

To be Argued By: John J. Ray  
Time Requested: 10 minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants.

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents-Respondents.

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PETITIONERS-APPELLANTS' REPLY BRIEF

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POINT I

APPELLANTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND ARE, IN FACT, AGGRIEVED.

It is respectfully submitted that a review of the record indicates that the Appellants have, in fact, exhausted their administrative remedies with respect to the relief requested and furthermore have been aggrieved by the decision of the Zoning Board of Appeals. At the outset, it should be noted that in the petition a determination was sought that would annul and declare as incorrect the determination of the Zoning Board of Appeals which held that the change in ownership in question did, in fact, require a zoning variance. Although this was couched in terms of a declaratory judgment, there is ample case law supporting the power of the court to grant relief of the nature requested. In the matter of Strippoli v. Bickal, 21 AD2d 365 (4th Dept. 1964), aff'd 16 NY 2d 653, the court, when faced with a petition in which it was difficult to ascertain what form of relief was requested, held that the liberal provisions of the Civil Practice Law and Rules mandated treating the proceeding as being in the nature of an Article 78 proceeding. It is respectfully submitted that a review of the relief requested in the petition in this proceeding would clearly indicate that the nature of the relief requested was consistent with relief that can rightfully be granted in an Article 78 proceeding.

With respect to Respondents' argument that Appellants are not aggrieved by Respondents' decision, it is Appellants' position that the proposed change in ownership does not require a variance, not that a variance has been unjustly denied. The actions of the Respondent, Zoning Board of Appeals, in determining that the proposed change in ownership requires an area variance, represents a final decision on that matter which cannot be questioned except in the context of an Article 78 proceeding. Were Appellants to apply for a zoning variance, the decision of the Respondents on said variance application could only be appealed with respect to whether or not the variance application was properly granted or denied. A determination of whether or not the variance was, in fact, required, could not be an issue. In light of this, it is respectfully submitted that the Appellants have exhausted their administrative remedies with respect to the question presented to Respondents and that the decision of the Respondents has left the Appellants truly aggrieved.

#### POINT II

THE DETERMINATION MADE BY THE COURT BELOW IS NOT IMPLICITLY FACTUAL IN NATURE AND IS ENTITLED TO NEITHER GREAT WEIGHT NOR SUBSTANTIAL DEFERENCE UPON REVIEW.

As indicated in Respondents' brief, the narrow issue for adjudication in this matter is whether Appellants' proposal

constitutes simply a change in ownership or also a change in use. It is respectfully submitted that a reading of the record contained in the appendix to the brief of Respondents, particularly the minutes of the Zoning Board of Appeals contained on page R-64, clearly indicates that the Board did not make a finding of fact that there was a change in use. Rather, the Boards' decision was based on a reluctance to concede jurisdiction and review of projects of this nature. The comments of Board member, James Mathis, again contained on page R-64 of the record, indicate his thoughts that the usage of the buildings would probably not vary under the new circumstances, but he went on to indicate that keeping power in the Zoning Board of Appeals was an important factor. The comments of the other Board members also support the notion that their decision was not based on a factual finding of change of use but rather was based upon concerns that the Board would have no control over changes of ownership as proposed by the Appellants. As the record is devoid of evidence that would support a finding of a change in use, it is respectfully submitted that the determination of the Zoning Board of Appeals was in error and should have been declared as such by the court below.

### POINT III

RESPONDENTS' JURISDICTION WAS PREDICATED ON A FINDING OF

A CHANGE OF USE WHICH IS NOT SUPPORTED BY THE RECORD.

Contrary to the assertions put forward in Respondents' brief, the determination of Respondents was not rationally and correctly based upon the provisions of the Lake George Zoning Ordinance, but was instead based on an erroneous interpretation of the Ordinance. The interpretation of the Board (R-42) makes no mention of a change of use on this parcel, but simply indicates that an area variance will be required. A further reading of the record, particularly the minutes of the meetings of the Zoning Board of Appeals, clearly indicates that a finding of change of use was not the reason underlying the Board members' decision. Instead, the decision was based upon their rather vague feelings that such a conversion, as proposed, was not to be allowed without their retention of some form of control over this conversion and what they viewed as a potential onslaught of such conversions in the future. Absent the specific findings of a change of use, the Respondents lacked jurisdiction under either the town law or the Lake George Zoning Ordinance to justify the interpretation that was put forward.

#### CONCLUSION

The Supreme Court abused its discretion in denying the petition of Petitioners-Appellants seeking an order declaring as error the determination by the Lake George Zoning Board of

Exhibit B.

# RECORD

3-89-938

58926

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

DONALD E. STONE and I. KATHRYN STONE,  
Petitioners-Appellants,

-against-

GEORGE MCGOWAN, JAMES MATHIS, DANIEL  
STRAIN, JOSEPH DeSANTIS, and DAVID  
ROBINSON, Constituting the Town of  
Lake George Zoning Board of Appeals,

Respondents.

RECORD ON APPEAL

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STATEMENT PURSUANT TO CPLR 5531 (pp R1-R2)

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

-against-

STATEMENT  
PURSUANT TO  
CPLR 5531

GEORGE MCGOWAN, JAMES MATHIS, DANIEL  
STRAIN, JOSEPH DeSANTIS, and DAVID  
ROBINSON, Constituting the Town of  
Lake George Zoning Board of Appeals,

Respondents.

---

1. The index number of the case in the court below assigned by the Warren County Clerk is 26664.

2. The full names of the parties are as set forth above; there have been no changes.

3. The action was commenced in Supreme Court, Warren County.

4. The Notice of Petition and Verified Petition was served upon the Respondent, Town of Lake George Zoning Board of Appeals, on December 8, 1988. The Verified Answer and Objections in Point of Law was served on behalf of Respondents on or about December 30, 1988.

5. That this action was commenced seeking a ruling that the determination by Respondent, Lake George Zoning Board of Appeals, that the change of ownership of the "Stepping Stones

Resort" as proposed by Petitioners, required an area variance. Petitioners had argued that the change in ownership to proposed condominium form was not within the jurisdiction of Respondent under its zoning ordinance and accordingly no approval was required for this change in ownership.

6. This is an appeal from an Order of the Hon. John G. Dier, Justice of the Supreme Court, entered in the Office of the Clerk of the County of Warren on January 9, 1989.

7. This appeal is on full record.



STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

ORDER AND  
JUDGMENT

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Index No.

Hon. John G. Dier

Respondents.

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Upon reading and filing the Notice of Petition dated December 7, 1988, the Verified Petition dated December 7, 1988 and the Verified Answer and Objections in Points of Law dated December 30, 1988, and after hearing Walter O. Rehm, III for Petitioners in support of the Petition and Mark J. Schachner for Respondents in opposition to the Petition;

NOW, on motion of MILLER, MANNIX & PRATT, P.C., Mark J. Schachner, Esq., of counsel, attorneys for Respondents it is hereby

ORDERED AND ADJUDGED that the relief requested in the Petition be denied and the Petition be dismissed in its entirety.

Signed this 9 day of January, 1989 at Lake George, New York.

ENTER:

15/ John G. Dier

JOHN G. DIER, J.S.C.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents.

---

RESPONDENTS' MEMORANDUM OF LAW

---

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Tel. (518) 793-6611

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## PRELIMINARY STATEMENT

On September 14, 1988 petitioners submitted an application to respondents, the Town of Lake George Zoning Board of Appeals, for an interpretation of the Town of Lake George Zoning Ordinance. Petitioners sought interpretation as to whether a variance would be required for the proposed change in the use of their property from its current use as tourist accommodations to single family residences which would be owned as condominiums. Their appeal was made after the determination by the Town Zoning Officer that a variance and site plan review would be required for their project.

The matter was heard by respondents on October 20, 1988. Petitioners argued that their project comprised only a change in ownership and not a change in use and that a variance should not be required. After a meeting on November 3, 1988 at which respondents considered petitioners' request, respondents notified petitioners that the change of use from tourist accommodations to single family residences would require an area variance because petitioners' property does not have the 20,000 square feet per unit required for single family dwellings in the Residential Commercial/High Density District as provided by the Lake George Zoning Ordinance.

On December 7, 1988 petitioners served respondents with a Notice of Petition and Verified Petition purportedly in an Article 78 proceeding in which petitioners ask the Court to issue a declaratory judgment that petitioners' proposed change does not require a zoning variance or site plan review. At no time have petitioners made the request for a variance.

## STATEMENT OF FACTS

Petitioners own a motel known as the Stepping Stones Resort on Lake Shore Drive (Route 9N) in the Hamlet of Diamond Point, Town of Lake George. Petitioners own approximately 3.76 acres of land on both sides of Lake Shore Drive. They own a parcel which is substantially undeveloped comprised of approximately 1.66 acres on the westerly side of Lake Shore Drive. Their motel property is comprised of 14 single family cottage units and a year-round main house occupied by petitioners and is on an approximately 2.1 acre parcel on the easterly side of Lake Shore Drive with approximately 200 feet of frontage on Lake George.

Petitioners plan to change the current use of their property from a motel, tourist accommodation to condominium, single family housing. Petitioners asked respondents for an interpretation of the Town of Lake George Zoning Ordinance determining if a variance was required for this change.

Respondents reviewed petitioners' request. A public hearing was held on October 20, 1988 at which petitioners' attorney presented their argument that a variance should not be required. Petitioners argue that their project is merely a change in ownership and not a change in use. Their

attorney acknowledged that site plan approval might be required for the project but stated, "I am not asking you to make a decision on that tonight." Thus respondents only reviewed the variance issue. On November 3, 1988 respondents made the determination that a variance would be required and their decision was filed with the Town Clerk on November 9, 1988.

According to the Town of Lake George Zoning Ordinance ("Ordinance"), petitioners' property is located in the Residential Commercial/High Density (RCH) zone and is currently classified as a tourist accommodation. Pursuant to the Ordinance the conversion of these cottages to condominium units would change the classification to single family residences.---The RCH zone permits single family housing provided 20,000 square feet are available for each unit. Petitioners' property does not contain enough acreage to allow for the 15 single family units proposed. Therefore, respondents determined that petitioners would need a variance for their project. Petitioners have never requested this variance from respondents, nor have they ever requested an interpretation regarding the site plan review which would also be required under the Ordinance.

I. PETITIONERS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND ARE NOT AGGRIEVED.

Petitioners have initiated this action by service of a document which purports to be an Article 78 Petition. However, in their request for relief, petitioners asked the Court for a declaratory judgment regarding respondents' interpretation of the provisions of the Town of Lake George Zoning Ordinance. First, petitioners' pleadings are procedurally defective because declaratory judgment is not appropriately sought in an Article 78 proceeding. Phillips v. Oriskany, 57 AD2d 110 (4th Dept. 1977). More importantly, however, petitioners' claim is not ripe for adjudication because they are not aggrieved by respondents' decision and have failed to exhaust their administrative remedies. People ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh, 203 AD 463 (1st Dept. 1922).

Petitioners seek to undertake a project which essentially consists of converting the use of their property from tourist accommodations to single family residences. In furtherance of their opinion that this project can be undertaken without need for approval from the Town of Lake George, petitioners have appealed

the adverse determination of the zoning officer to respondents in their interpretation request function. Respondents agreed with the zoning officer and stated that petitioners cannot undertake their project without first obtaining a variance.

Petitioners obviously disagree with respondents' decision. However, respondents have not conclusively determined that petitioners cannot undertake their project; they have merely determined that petitioners cannot do so without a variance. Until and unless petitioners seek a variance from respondents and such variance is denied, petitioners have not exhausted their administrative remedies and are not truly aggrieved. Respondents have merely decided that petitioners' proposal constitutes a change in use under the Town of Lake George Zoning Ordinance. Respondents have not in any fashion considered or ruled upon the issue of whether or not petitioners are entitled to a variance to pursue their project. In fact, as no variance application has been submitted to respondents for their consideration, it would have been imprudent and inappropriate for respondents to have expressed any opinion with respect to the variance issue.

Therefore, it is incumbent upon petitioners to submit a variance application to respondents for their

consideration prior to any claim of harm to petitioners. Unless any such variance application is denied, petitioners are not harmed or aggrieved, as no final decision prohibiting their project has been issued. The goal which petitioners seek, conversion of their buildings, has not been finally denied and they have failed to exhaust their administrative remedies toward achieving their goal.

II. RESPONDENTS HAVE ACTED WITHIN THE JURISDICTION OF TOWN LAW AND THE LAKE GEORGE ZONING ORDINANCE.

Although it is not clear in petitioners' hybrid petition what sort of relief under Article 78 they are requesting, respondents meet all possible standards of review as their determination was rationally and correctly based upon the provisions of the Town of Lake George Zoning Ordinance. Under the Town of Lake George Zoning Ordinance, the use of petitioners' property would change from tourist accommodations to single family residences regardless of how the property is to be owned.

The Town of Lake George Zoning Ordinance specifically states that the Residential Commercial/High Density District requires 20,000 square feet of land per single family dwelling unit. See Schedule II of the Town of Lake George Zoning Ordinance. Here petitioners are requesting to convert 15 buildings from their present pre-existing use to single family dwellings. As their property is only comprised of 3.6 acres, they are at best entitled to 8 units under the current zoning. Thus respondents were correct in their determination that under the Town of Lake George Zoning Ordinance a variance would be required.

The ability of the Town to control the use of property is set forth in the zoning enabling statute. Town Law §262. The act "[c]learly vest[s] in the legislative bodies of the [towns]...authority to establish residential districts, to differentiate between residential districts on the basis of size or type of building, or extent of occupancy, and to protect such districts by excluding commerce or industry, or both." Robert J. Anderson, New York Zoning Law and Practice (3d ed. 1984) §9.18. In addition respondents have the authority to regulate the height, bulk, and location of buildings, and to impose restrictions upon the size of lots, the coverage of structures and the size of buildings. Town Law §261.

Whether the existing use of petitioners' property is considered a pre-existing nonconforming use or a pre-existing allowed use, once respondents have determined that a change of use would occur, they are required to enforce the area restriction as provided in the Ordinance. In this case, the project constitutes a change in use for which petitioners lack the required density. Therefore, they cannot lawfully proceed without a variance.

III. THIS PROJECT IS A CHANGE  
OF USE AND NOT JUST A CHANGE  
OF OWNERSHIP.

Petitioners are correct that a town cannot regulate solely the type of ownership of property. However, the change of ownership in this project is accompanied by change of use of the property.

In Catharn Realty Corp. v. Town of Southampton, 62 NY2d 831 (1984), the Court found that an amendment to Southampton's zoning ordinance was not invalid merely because it attempted to regulate cooperative ownership of property. The plaintiff in the action was the owner of a seasonal motel who sought to convert its motel from corporate ownership to a cooperative form of ownership. The Town of Southampton amended its zoning ordinance to prohibit conversions into residential condominiums and residential cooperatives in certain zoning districts. The amendment required a special exception to be granted by the Zoning Board of Appeals for any conversion in all the remaining districts. The plaintiff claimed that the amendment should be invalid since it was up to the Secretary of State to regulate cooperatives and condominiums and not to the town. Id. The Court determined that since the amendment defined residential cooperatives as "[a] multiple dwelling in

which residents have an ownership interest in the entity which owns the building(s) and, in addition, a lease or occupancy agreement which entitles the residents to occupy a particular dwelling unit within the building", it was clear that the town board was regulating the type of use of the property and not merely the form of ownership thus the amendment was not invalid. Id. at 832. The Court of Appeals concluded that if, when a building changes form of ownership, its use will also be changed, then the town can regulate that change of use. Id. at 832.

In this case, petitioners argue that the new owners will either be coming to use the units themselves or rent the units out to other visitors and that the use will remain the same. However, contrary to petitioners' position, the use is changing from tourist accommodations to single family houses. No longer would the Stepping Stones Resort be a transient tourist accommodation where units are rented out a part of a business; rather the resort would become second homes to the new owners who would only rent out the property when they were not visiting or never rent out the property if they so chose.

In addition, petitioners are neglecting to consider the different status that new owners would

acquire by rights of being new condominium owners. The new owners could be afforded the status of legal residents of the Town of Lake George and thus would acquire the privileges of residents, placing a greater burden on the Town facilities and adversely affecting the public health and welfare of the community.

Petitioners cite case authority for the proposition that zoning cannot lawfully regulate ownership of property. While this assertion is not incorrect, petitioners seem to rest their argument on the notion that the use of a particular property cannot possibly be changing unless the property is undergoing some type of physical disturbance or modification. However, this notion is blatantly incorrect. For example, a single family residence could be converted into any number of commercial uses (such as professional offices including law offices or real estate offices) without physically modifying the property or the structure in any way. Similarly, various types of commercial and industrial uses can easily occupy identical premises and the use of a particular building could easily be converted from any of a number of non-intrusive permitted uses to many noisy, noxious or hazardous non-permitted uses with no physical modification of the premises. In any of these examples, it would clearly be perfectly lawful and

appropriate for a municipal zoning ordinance to distinguish among the uses and allow some while prohibiting others.

The two cases cited in the petition, North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, aff'd., 93 AD2d 883 (2d Dept. 1983) and FGL&L Property Corp. v. City of Rye et al., 108 AD2d 814, aff'd., 66 NY2 111 (1985), do stand for the proposition that zoning can regulate use and not ownership, but only for that proposition. Neither case considered the situation involving the conversion of a transient rental residential use to a seasonal ownership use. In fact, in the North Fork Motel case, the Court specifically stated that the conversion of ownership did not violate the Town of Southold Zoning Ordinance "provided the property's present use as a motel remains unchanged" (emphasis supplied). North Fork Motel, 93 AD2d at 883. The City of Rye case dealt not with a motel conversion, but with a zoning provision which was interpreted as essentially requiring the condominium form of ownership. The cases do not state that a municipality cannot regulate conversion from a seasonal rental commercial operation to a residential use and, in fact, the North Fork Motel case clearly supports respondents' decision in this case.

CONCLUSION

Respondents' interpretation of the Town of Lake George Zoning Ordinance has a rational basis and is not arbitrary, capricious or illegal nor does the Ordinance regulate mere ownership of property. Respondents therefore respectfully request that the Petition be dismissed.

Dated: January 3, 1989

MILLER, MANNIX & PRATT, P.C.  
Attorneys for Respondents  
Office and Post Office Address  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
(518)793-6611

n;06stp-ml,5

VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW (pp R-21 to R-24)

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF WARREN

DONALD E. STONE and I. KATHRYN STONE,

Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

VERIFIED ANSWER  
AND OBJECTIONS  
IN POINT OF LAW

Index No.

Hon. John G. Dier

Respondents.

---

Respondent Town of Lake George Zoning Board of Appeals,  
by its attorneys, Miller, Mannix & Pratt, P.C., as and for  
an Answer to the Verified Petition of Petitioners, answers  
the Petition as follows:

1. Denies each and every allegation contained in the paragraphs of the Petition marked and numbered "7", "8", "9", "10", "12" and "13".
2. Denies knowledge and information sufficient to form a belief with respect to each and every allegation contained in the paragraphs of the Petition marked and numbered "1", "2", "3" and "14".
3. Denies the characterizations of official documents and cases of each and every allegation contained in the

paragraphs of the Petition marked and numbered "4", "5", "6" and "11" and affirmatively states that the applications, minutes of meetings, approvals, correspondence, resolutions, pleadings and decisions referred to in the Petition speak for themselves.

AS AND FOR A FIRST AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

4. The Petition fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

5. Petitioners have failed to exhaust their administrative remedies.

AS AND FOR A THIRD AFFIRMATIVE  
DEFENSE AND OBJECTION IN POINT  
OF LAW, RESPONDENT ALLEGES THAT:

6. Petitioners have failed to request the Zoning Board of Appeals to make any determination regarding site plan review.

WHEREFORE, Respondent demands that the Petition be dismissed in its entirety and that Respondents be awarded the costs and disbursements of this proceeding and such other

and further relief as to this Court may seem just and proper.

Dated: December 30, 1988

MILLER, MANNIX & PRATT, P.C.  
Attorneys for Respondent  
Office and Post Office Address  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
(518) 793-6611

TO: WALTER O. REHM, III, ESQ.  
Attorney for Petitioners  
Office and Post Office Address  
175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412





PLEASE ALSO TAKE FURTHER NOTICE, that an answer and supporting affidavits, if any, shall be served upon the undersigned at least seven (7) days before the return date hereof.

PLEASE ALSO TAKE FURTHER NOTICE, that pursuant to paragraph (e) of Section 7804 of the Civil Practice Law and Rules, the Respondent, Town of Lake George Zoning Board of Appeals, is directed to file the entire official record of proceedings had before it relative to Interpretation #2-88 - Conversions, on the return date of this proceeding.

PLEASE ALSO TAKE FURTHER NOTICE, that the Petitioners designate Warren County as the place of trial on the basis of the fact that the Petitioners reside within and the causes of action arose in Warren County.

Dated: December 7, 1988

WARREN, NEW YORK  
WALTER O. REHM, III  
Attorney for Petitioners  
Office and Post Office Address  
175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412



containing 2.1 plus or minus acres, with in excess of 200 feet of frontage on Lake George, is improved by fourteen (14) one family cottages, a year-round house occupied by Petitioners, and other improvements, all of which are depicted on the survey map attached hereto and made a part hereof as Exhibit "B".

4. That heretofore and on or about September 14, 1988, application was made to the Town of Lake George Zoning Board of Appeals for an interpretation by the Zoning Board of Appeals of applicable provisions of the Town of Lake George Zoning Ordinance with respect to the proposed conversion of Petitioners' Stepping Stones Resort property from its existing ownership, to that of condominium ownership. As indicated on said application, a copy of which is attached hereto and made a part hereof as Exhibit "C", no new construction was contemplated, no subdivision of land would take place, and no new lot lines would be drawn.

5. By the above referenced application, Petitioners requested an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for such conversion since no subdivision of land would take place and no new lots would be created.

6. Notwithstanding the foregoing, the Lake George Zoning Board of Appeals determined that an area variance was required to convert the existing motel known as the Stepping Stones Resort to a condominium development. A copy of the aforementioned interpretation is attached hereto and made a part hereof as Exhibit "D".

7. It is respectfully submitted that the interpretation of the Town of Lake George Zoning Board of Appeals was affected by error of law, was arbitrary and capricious and an abuse of its discretion as set forth in the following paragraphs:

8. The proposal before the Zoning Board of Appeals was simply to change the form of ownership of the fourteen (14) cottages and the year-round residence from its existing form (fully owned by the Petitioners) to the condominium form under which all of the buildings, with the exception of the Stones' year-round home, will be occupied on only a seasonal basis from approximately May 1 to approximately October 30 of each year. No subdivision of land will take place, no new lots will be created, no new construction is anticipated and, in fact, the property will remain physically as it currently exists. Units will, of course, be offered to the general public for sale, however, deed restrictions filed in the Warren County Clerk's Office and restrictions set forth in the Offering Plan filed with the New York Attorney General's Office will contain the seasonal occupancy limitations as set forth above.

9. It is Petitioners' position that neither an area variance or site plan review is required as the old and new uses fully conform to the use provision of the Town of Lake George Zoning Ordinance. The residential/commercial high density zoning classification specifically includes as a permitted use, single family dwelling. The Zoning Ordinance further defines a single

family dwelling as "building of one or more stories of height above the main grade level which is designed or used exclusively as the living quarters for one family, whether seasonal or year-round."

10. The power to enact and administer zoning ordinances was granted by the Legislature to towns under Section 261 of the Town Law. That statute provides, among other things, that "...the town board is empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...". That statute specifically does not grant to towns the authority to regulate changes in the form of ownership as anticipated by the Stones in the conversion of their resort to the second home condominium form of ownership. That is particularly true since the proposed change will not result in a change of use that would be otherwise prohibited by the Town of Lake George Zoning Ordinance. That is to say, that the use of the property both before and after the change of method of ownership as proposed by the Stones will conform to the use provisions of the Town of Lake George Zoning Ordinance for the zone in which the property is located.

11. A relatively recent series of cases decided by New York Courts support the argument set forth in the preceding paragraph, although that legal proposition has been recognized in other states for some years. North Fork Motel, Inc., vs. Charles Grigonis, Jr., et al, originally decided by the Supreme Court in March of 1982 (46 NYS 2d 414) and later affirmed by the Appellate Division at 93 AD 2d 883 in 1983, was the first definitive case in New York on that subject. In that case, the Court held as follows:

Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations... (Citations omitted). Nor does the mere change in the type of ownership result in the destruction of a valid existing non-conforming use.

Later, in March of 1985, the Appellate Division in FGL & L Property Corp. v. City of Rye et al, 108 AD 2d 814, held that, "As a fundamental principal, zoning is concerned with the use of the land and not with the person who owns or occupied it". The Court in that case citing the North Fork case again reiterated the rule that it is use rather than the form of ownership that is the proper concern of zoning and planning regulations.

The FGL & L Property Corp. case was appealed from the Appellate Division to the Court of Appeals and was decided in October of 1985 at 66 NY 2d 111, affirmed the Appellate Division determination and is of major importance since it not only settles the law in New York in connection with the effect of zoning

ordinances upon changes in the form of ownership as proposed by the Stones, but further contains a rather detailed discussion of the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it". While the FGL & L Property Corp. case related to a zoning ordinance enacted under the enabling provisions of the General City Law, it seems abundantly clear that the same rules apply to zoning ordinances enacted under both the Town and Village Laws.

12. For the reasons set forth above, it appears particularly clear that the conversion of the Stepping Stones Resort from its existing single form of ownership to the proposed second home residential condominium form of ownership is a matter that is not within the jurisdiction of the Town of Lake George under its zoning ordinance and accordingly, no variance, site plan review approval or other zoning approvals are required for this change of ownership.

13. That the actions of the Town of Lake George Zoning Board of Appeals in denying Petitioners' request constituted an act of gross negligence, was in bad faith and that said Board acted with malice in issuing the aforementioned interpretation.

14. No previous application for the relief requested herein has been made to any court or judge and not more than 30 days has elapsed since the filing of the aforementioned Interpretation with the Town Clerk of the Town of Lake George.

WHEREFORE, Petitioners respectfully request a declaratory judgment that the change of ownership, as contemplated by the

Petitioners, does not require a zoning variance nor does it require site plan review.

Petitioners further respectfully request that the Court grant such other and further relief as may be deemed just and proper.

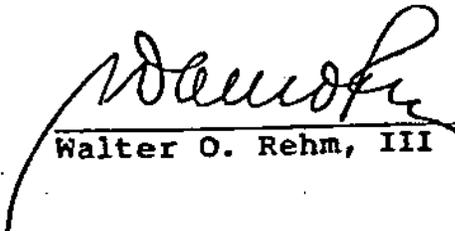
Dated: December 7, 1988

WALTER O. REHM, III  
Attorney for Petitioners  
Office and Post Office Address  
175 Ottawa Street  
Lake George, New York 12845  
(518) 668-5412

STATE OF NEW YORK )  
VILLAGE OF LAKE GEORGE )  
COUNTY OF WARREN ) ss.:

WALTER O. REHM, III, being duly sworn deposes and says: he is the attorney for the Petitioners in the above-entitled action; he has read the foregoing Petition and the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters he believes it to be true; the reason this verification is not made by said Petitioners is that they are presently in the State of Florida and have been there in excess of thirty days and are not within the County of Warren, which is the county where the deponent has his office.

Deponent further says that the grounds of his belief as to all matters therein stated on information and belief, are derived from admissions of the Petitioners to the deponent, and from letters received from said Petitioners concerning the matters set forth in said Petition and from attendance at the Respondent Town of Lake George Zoning Board of Appeals meeting and correspondence from said Respondent.

  
Walter O. Rehm, III

Sworn to before me this  
7th day of December, 1988.

  
Notary Public

BARBARA Z. SMITH  
Notary Public - State of New York  
Washington County - 6452687  
My Commission Expires: 11/30/90

389.90

LEIN 606 REC 520

EXHIBIT A ANNEXED TO VERIFIED PETITION (pp R-35 to R-39)  
66 Barrow St., Albany, N.Y. 12201

# This Indenture

Made the 30th day of June Nineteen Hundred and Seventy-Seven

Between ROBERT H. KAHN and DORIS M. KAHN, his wife, both residing at Lake Shore Drive, Diamond Point, New York, parties of the first part, and DONALD E. STONE and I. KATHRYN STONE, his wife, both residing at 34 Barney Road, Clifton Park, New York, parties of the second part,

Witnesseth that the parties of the first part, in consideration of ONE and 00/100-----Dollar (\$1.00---) lawful money of the United States, and other good and valuable consideration paid by the parties of the second part, do hereby grant and release unto the parties of the second part, their heirs and assigns forever, all

THAT CERTAIN PIECE OR PARCEL OF LAND with buildings and improvements thereon erected situate, lying and being in the Town of Lake George (formerly Caldwell), County of Warren, State of New York, bounded and described as follows:

"BEGINNING at a point in the center of the Lake George-Bolton Landing State Highway marking the northwest corner of lands conveyed by Louise Hamilton Jacob, now deceased, to Raymond H. Horstman and wife, running thence North 35 degrees 45 minutes East along the center of said highway 94.19 feet; thence North 41 degrees 30 minutes East along the center of said highway 103.65 feet to a point; thence South 61 degrees 3 minutes East passing over an iron pipe monument set in the east side of said highway 443.72 feet to an iron rod monument set about 10 feet from the west shore of Lake George at a point standing North 28 degrees 58 minutes East a distance of 194.84 feet from the north line of the lands formerly of said Horstman, thence continuing South 61 degrees 3 minutes East about 10 feet to the shore of said Lake at high water mark; thence southerly along the shore of said Lake at high water mark as the same winds and turns 222 feet more or less to the northeast corner of the lands formerly of said Horstman, thence North 61 degrees 2 minutes West along the rail fence on the north line of lands formerly of said Horstman, 573.7 feet more or less to the point or place of beginning, containing 2.28 acres of land be the same more or less, including all the right, title and interest of the party of the first part in and to the land in front of and adjacent to the above described parcel of land between high water mark and low water mark of Lake George."

BEING a portion of the premises conveyed in a deed from Walter Phelps Jacob and Leonard Jacob, II, as Executors of the Last Will and Testament of Louise Hamilton Jacob, deceased to Robert H. Kahn and Doris M. Kahn, his wife dated December 19, 1958 and recorded on the 16th day of January, 1959 in Book 383 of Deeds at Page 148 in the Warren County Clerk's Office.

# BEST AVAILABLE COPY

1970 JUN 24

Together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises,  
To have and to hold the premises herein granted unto the parties of the second part, their heirs and assigns forever.

And said PARTIES OF THE FIRST PART

covenant as follows:  
First, That the parties of the second part shall quietly enjoy the said premises;  
Second, That said PARTIES OF THE FIRST PART will forever Warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantors will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

In Presence of

*Robert H. Kahn*  
ROBERT H. KAHN  
*Doris M. Kahn*  
DORIS M. KAHN

State of New York  
County of WARREN

On this 30th day of June Nineteen Hundred and Seventy-Seven before me, the subscriber, personally appeared

ROBERT H. KAHN and DORIS M. KAHN

to me personally known and known to me to be the same person described in and who executed the within Instrument, and they acknowledged to me that they executed the same.

RECORDED

RECEIVED  
\$ 33.91  
REAL ESTATE  
JUL 1 1977  
TRANSFER TAX  
WARREN  
COUNTY

Notary Public

JUL 1 11:15 AM '77  
606 DEEDS  
520

45



RECORDED WITH LIEN

TO

Dated, 19 1977

County of WARREN ss.

RECORDED ON THE  
Liber 606 of Deeds  
Page 520 undetermined  
*John P. ...*

RR  
Perry, Warren  
140 Stage NY

# This Indenture

Made the 20<sup>th</sup> day of December  
Nineteen Hundred and Eighty-three

Between FREDERICK VOGEL, residing at Post Office Box 13,  
Fedahaven, Florida 33854

part y of the first part, and

I. KATHRYN STONE, residing at Lake Shore Drive,  
Diamond Point, New York

Witnesseth that the part y of the first part, in consideration of part y of the second part,

-----ONE----- Dollar (\$1.00--)  
lawful money of the United States, and other good and valuable consideration  
paid by the part y of the second part, does hereby grant and release unto the  
part y of the second part, her heirs  
and assigns forever, all

"ALL THAT CERTAIN PIECE OR PARCEL OF LAND, situate on the West  
Side of New York State Route 9N, Town of Lake George, Warren County,  
State of New York and being a portion of Lot #20 of Section 2 of  
Diamond Point Estates, said parcel being more particularly bounded  
and described as follows:

BEGINNING at an iron pipe on the west boundary of Route 9N  
said point being the northeast corner of lands now or formerly of  
Robert Kahn, thence from said point of beginning: North 52 degrees  
22 minutes 00 seconds West, 373.74 feet along the lands of Kahn to  
an iron pipe on the east line of lands of Louis Hall, thence the  
following three (3) courses along the lands of Hall; (1) North  
37 degrees 49 minutes 00 seconds East, 49.27 feet to an iron pipe;  
thence (2) North 25 degrees 02 minutes 00 seconds West, 119.40 feet  
to an iron pipe; thence (3) North 25 degrees 12 minutes 00 seconds  
East, 105.66 feet to an iron pipe at the south east corner of Lot  
#19, thence running South 37 degrees 34 minutes 30 seconds East  
135.36 feet through Lot #20 to an iron pipe on the west line of  
Lot #15, thence the following four (4) courses along Lot #15:  
(1) South 17 degrees 11 minutes 00 seconds West, 33.00 feet to an  
iron pipe; thence (2) South 70 degrees 15 minutes 00 seconds East  
105.00 feet to an iron pipe; thence (3) South 44 degrees 14 minutes  
00 seconds East, 145.00 feet to an iron pipe; thence South 52 degrees  
26 minutes 00 seconds East, 120.69 feet to an iron pipe on the

west boundary of Route 9N, thence South 39 degrees 11 minutes  
00 seconds West, 153.72 feet along the west boundary of Route 9N  
to the point and place of beginning. Said parcel containing 1.66±  
acres, be the same more or less.

Being the same premises conveyed by warranty deed from  
Marjorie Mesick to Frederick Vogel dated December 27th, 1983  
and recorded in the Warren County Clerk's Office on January 16th,  
1983 in Book 659 of deeds at page 43 .

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, her heirs and assigns forever.

And said Frederick Vogel

First, That the party of the second part shall quietly enjoy the said premises; <sup>covenant as follows:</sup>

Second, That said Frederick Vogel

will forever warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In Presence of

*Frederick Vogel*  
Frederick Vogel

State of New York }  
County of Polk } ss.  
before me, the subscriber, personally appeared

On this 20th day of December  
Nineteen Hundred and Eighty-three

Frederick Vogel

to me personally known and known to me to be the same person described in and who executed the within instrument, and he acknowledged to me that he executed the same.

*Frank M. Stevens*  
Notary Public

County of Polk  
State of N.Y.  
Commission Expires

Notary Public, State of Florida at Large  
My Commission Expires Jan. 25, 1922

BEST AVAILABLE COPY

NOTE:

"FOR DETAIL OF PARCEL  
WEST OF HIGHWAY  
SEE INSET MAP  
BELOW."

HIGHWAY BOUND.  
DATED 1931, FOR  
LAKE GEORGE -  
HIGHWAY NO. 41.  
ROLL #2, IN W.  
OFFICE.

LANDS OF I. KATHRYN STONE

ROUTE 9-N

(dead. 103.65')

167.50'

N. 45° 11' 10" E  
30.97'

332

POLE

POLE

PLANTER

LAMP POST

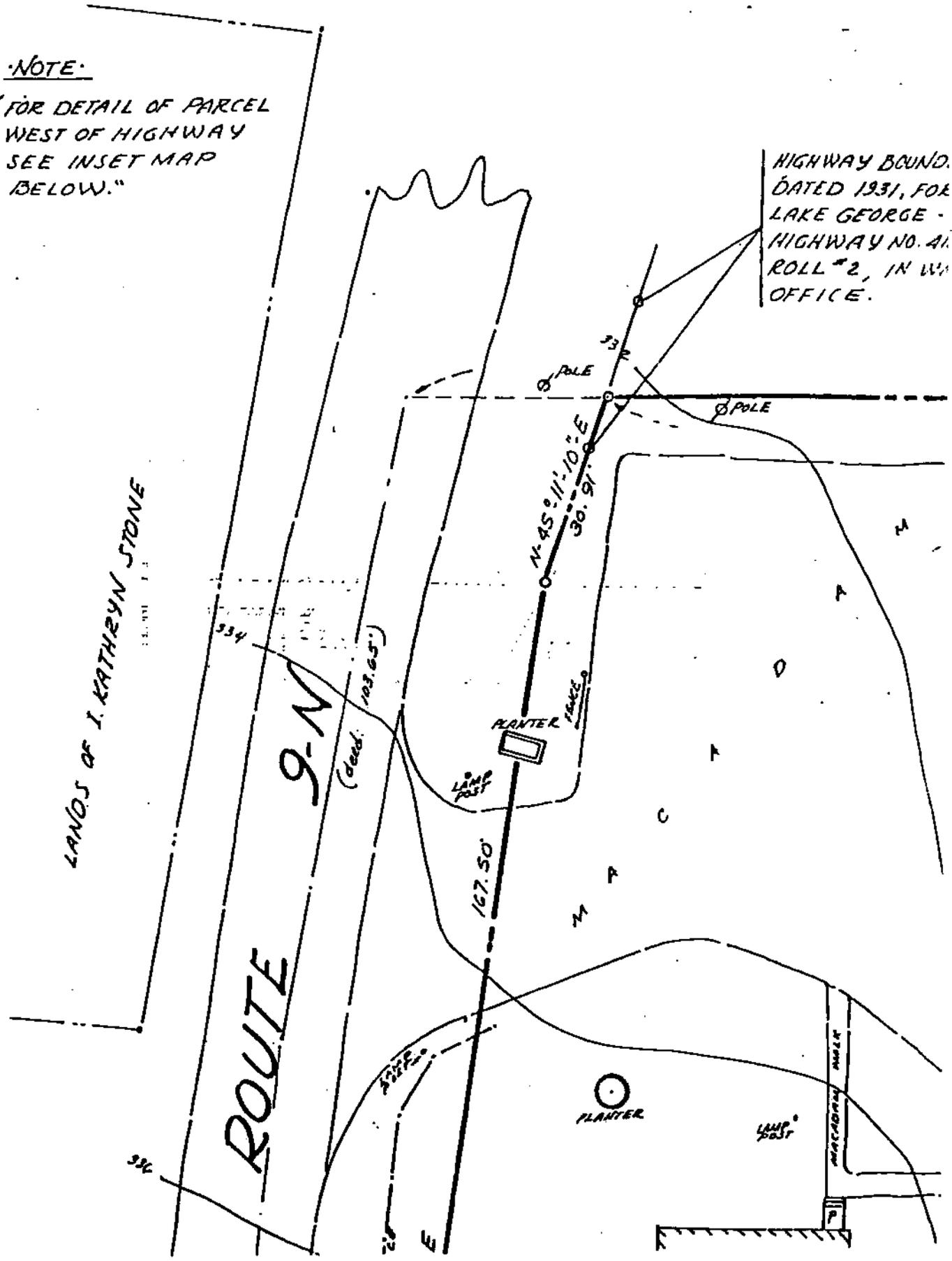
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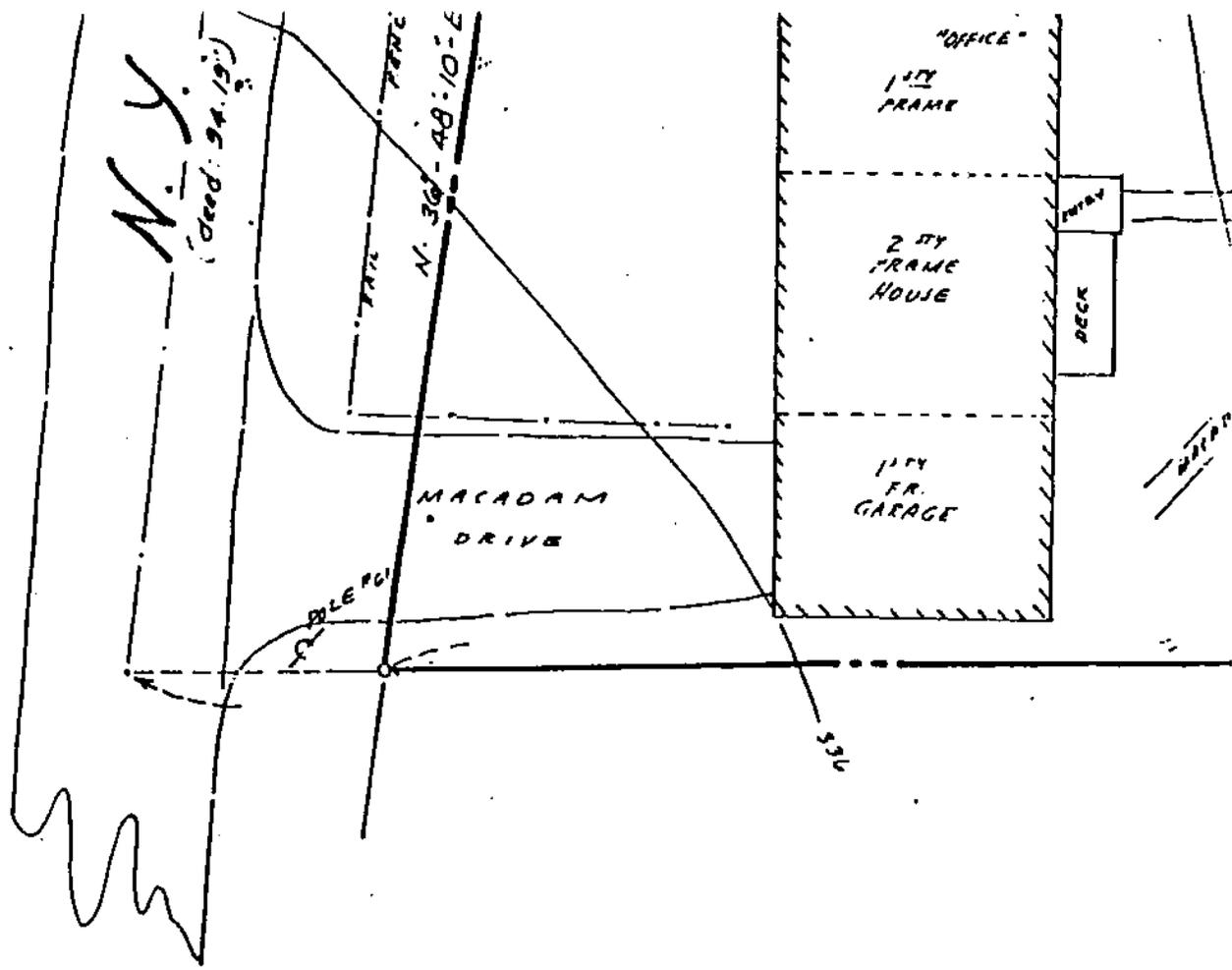
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LAMP POST

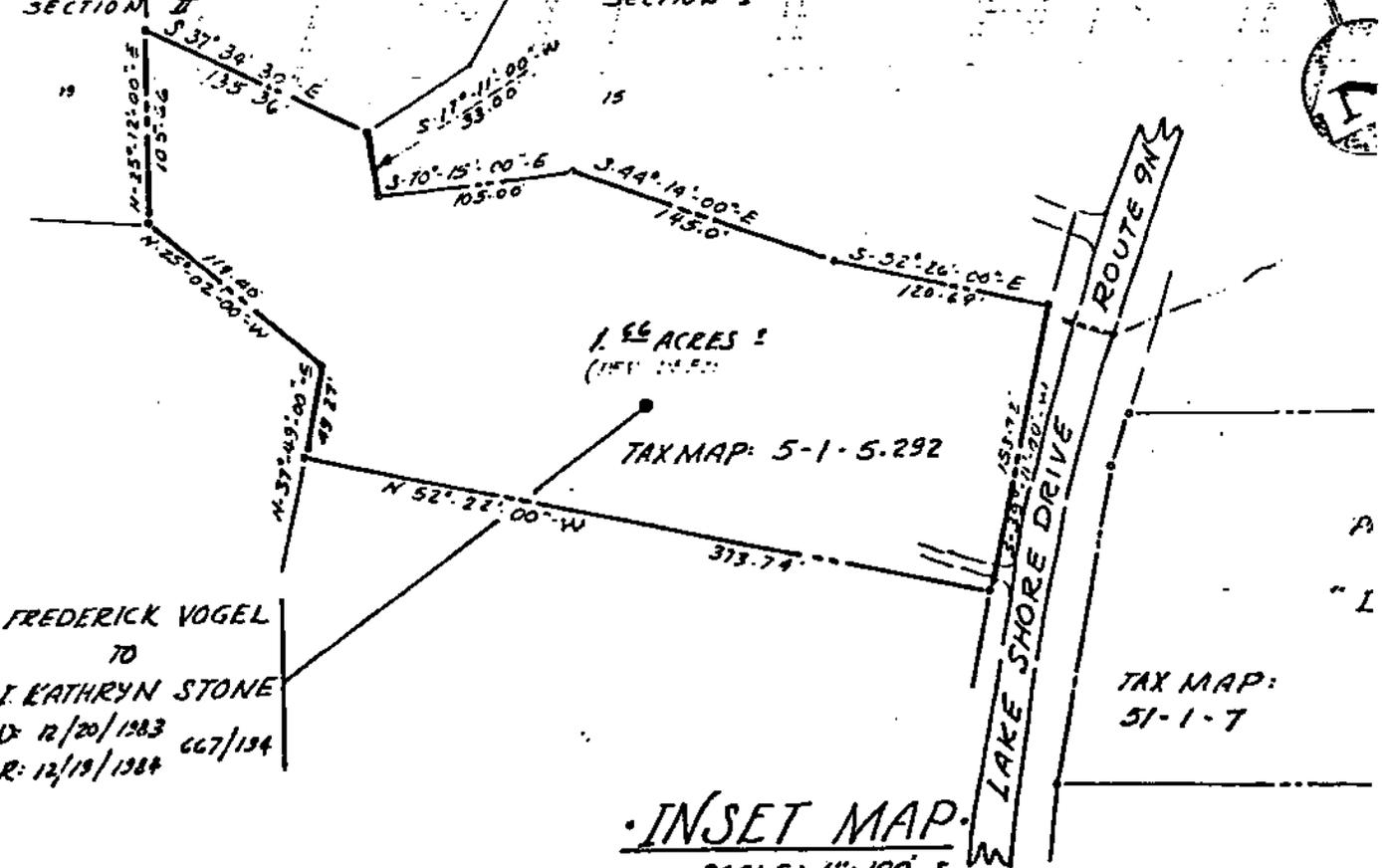
MANICURE MILL

336





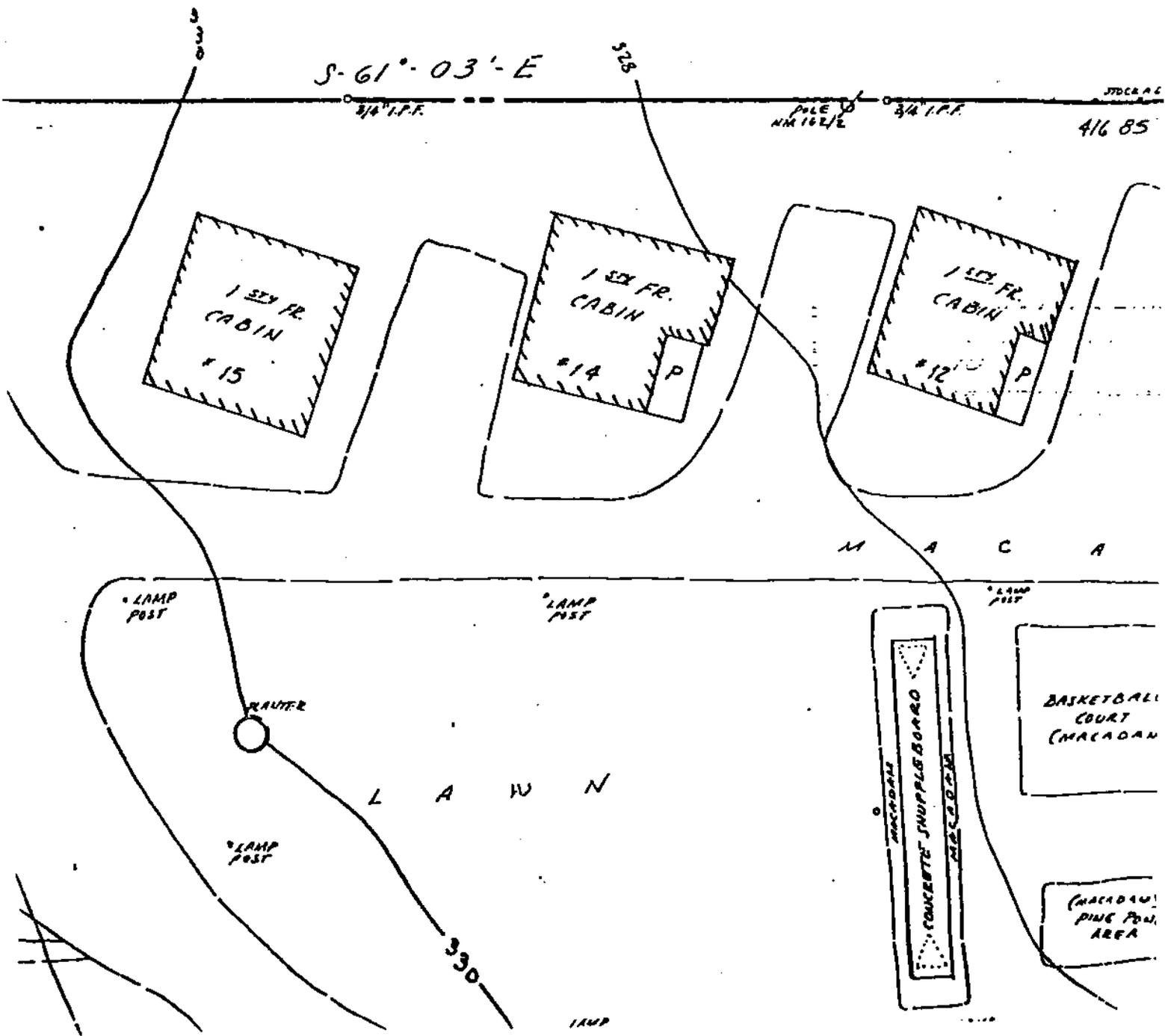
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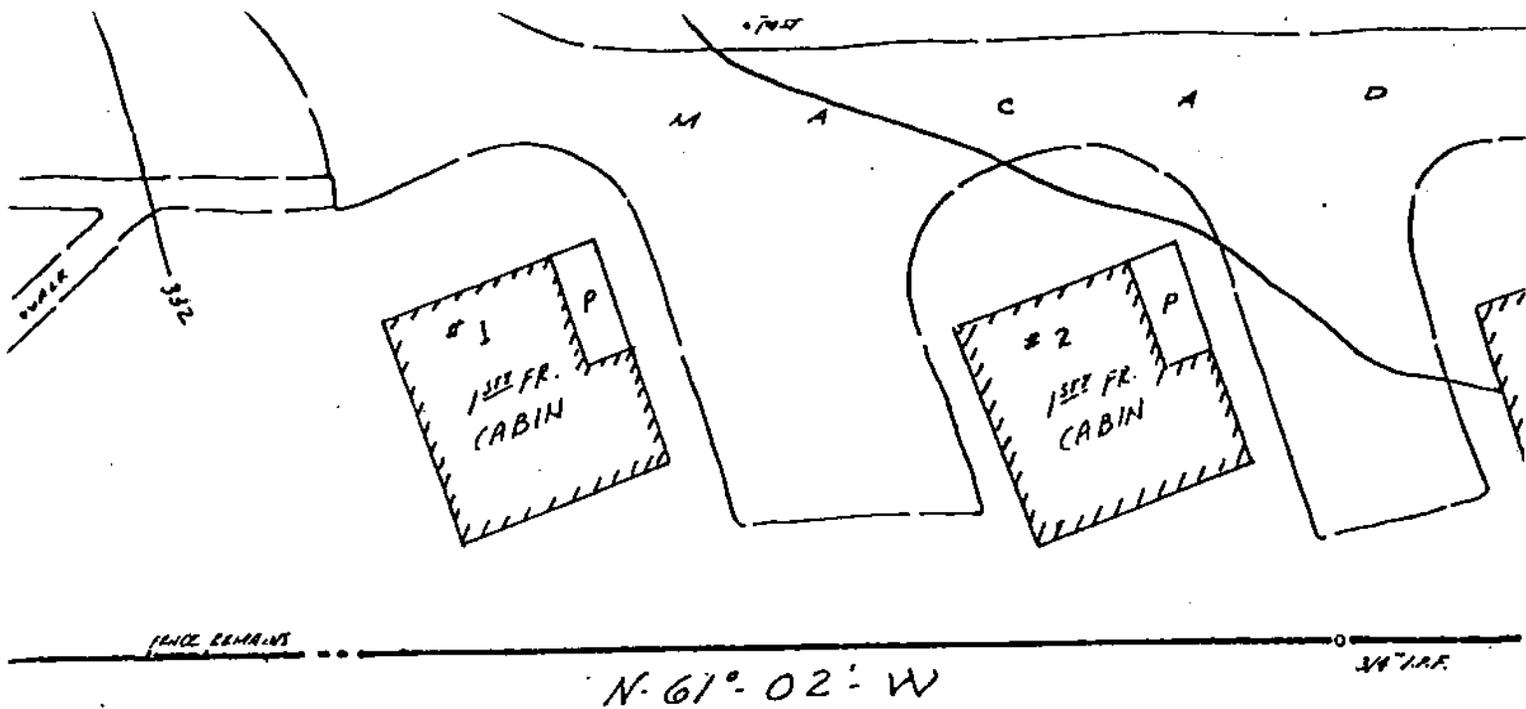


INSET MAP  
SCALE: 1" = 100'

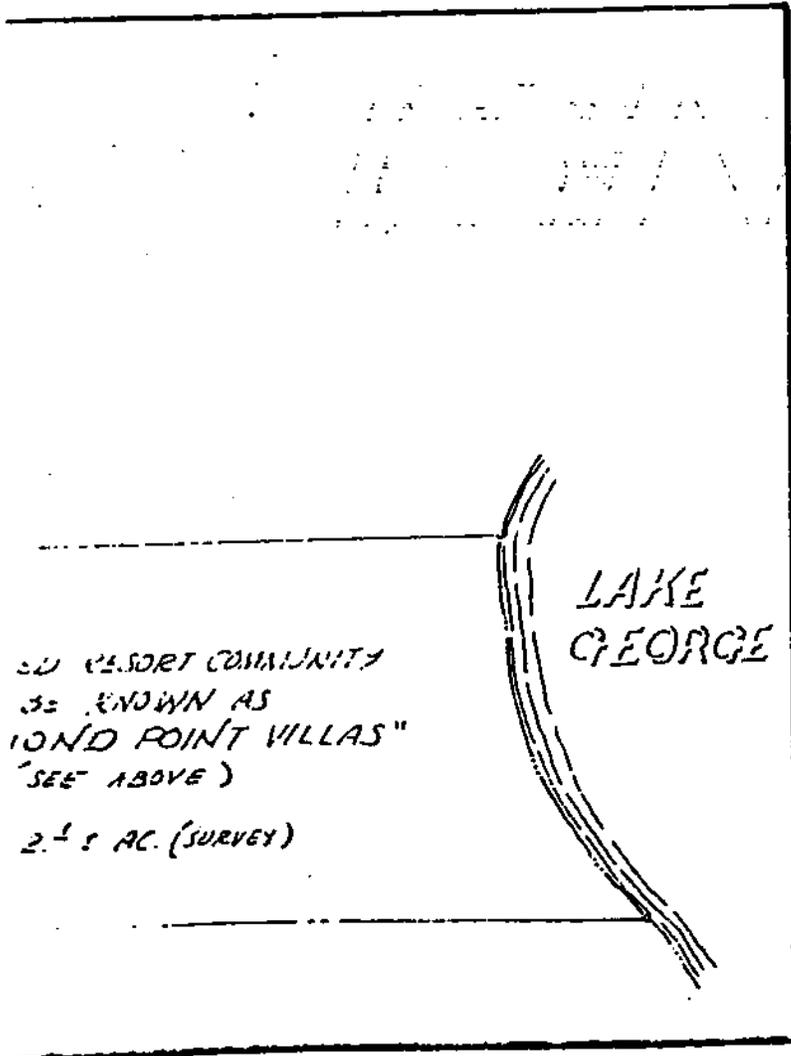
CARRIAGE HILL LAL  
(664/354)

MAP NO. 43 AR,  
CONSTRUCTION OF  
LANDING COUNTY  
D AT DRAWER "F",  
COUNTY CLERK'S





'OLYMPIAN MOTEL'

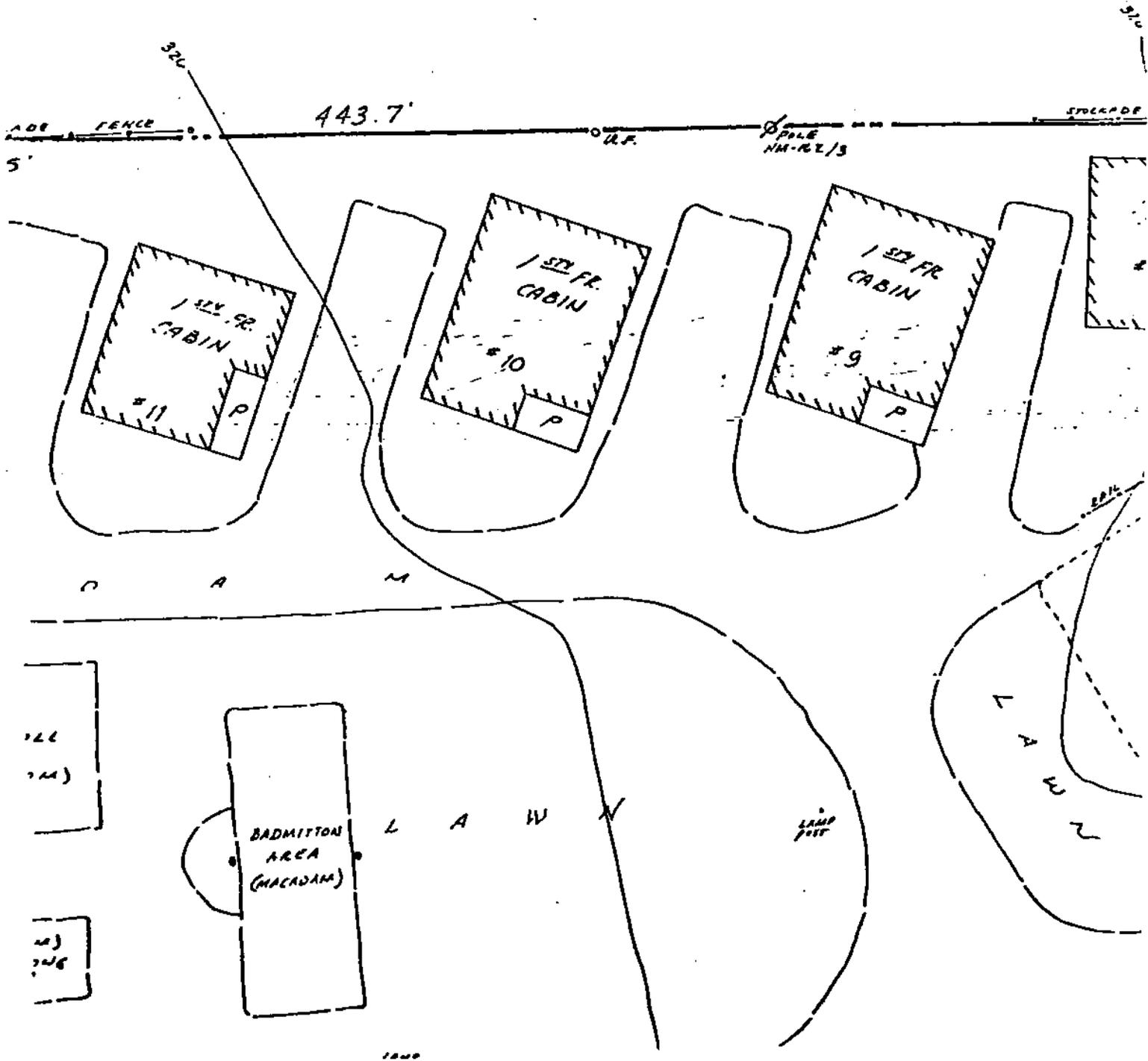


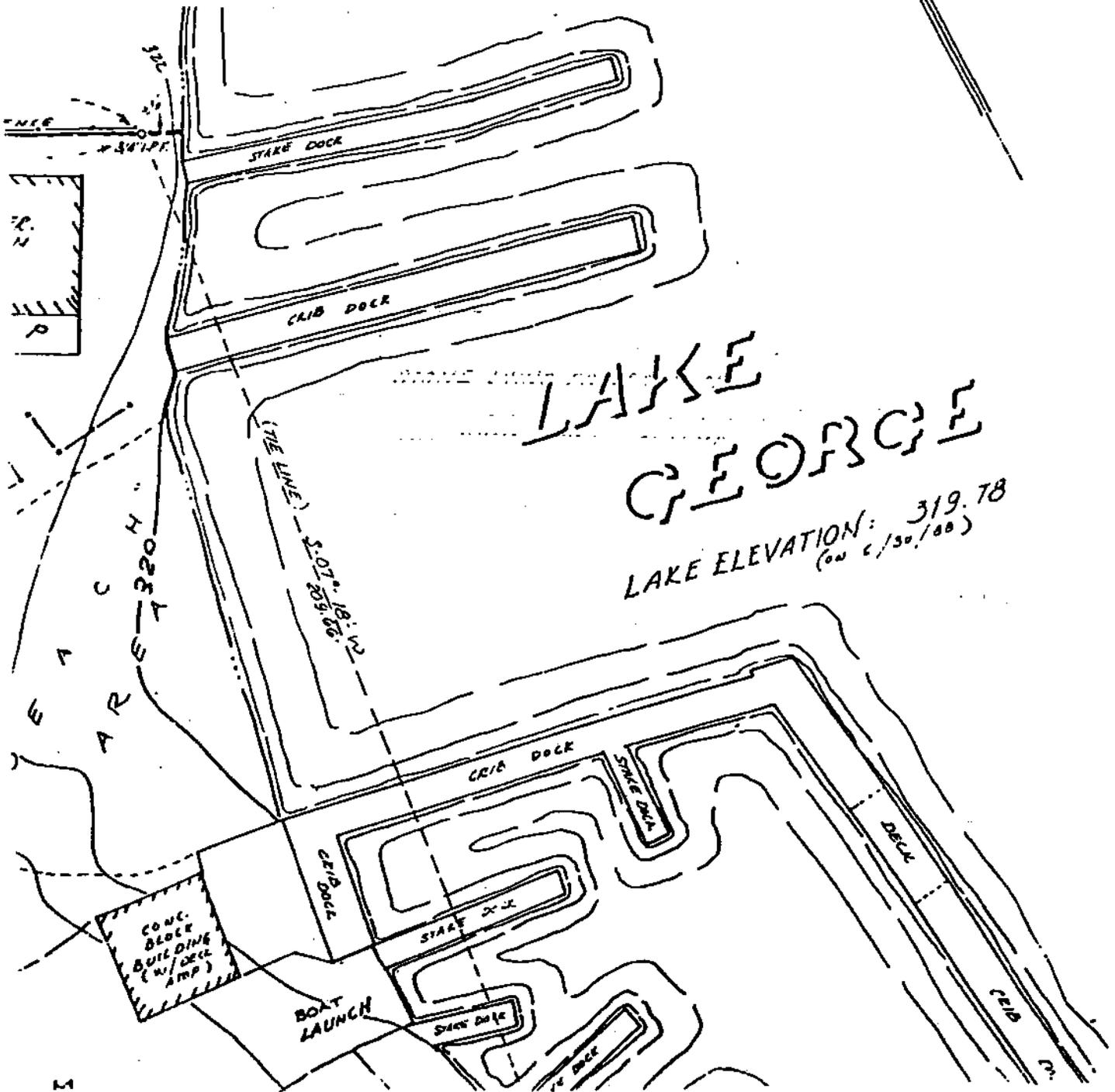
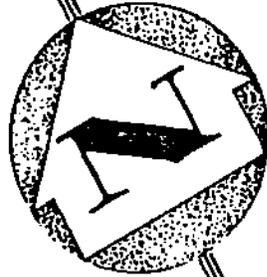
DEED REFERENCE

ROBERT H. KAHN &  
 DORIS M. KAHN  
 TO  
 DONALD E. STONE &  
 I. KATHRYN STONE  
 DTD. 6/30/1977 606/520  
 RCD. 7/1/1977  
 (± 2.28 AC. TO E H'WAY)

KE CLUB, INC.

4 )





LAKE  
GEORGE

LAKE ELEVATION: 319.78  
(on 6/30/00)

CONC.  
BLOCK  
BUILDING  
(w/DECK  
AMP)

BOAT  
LAUNCH

STAKE DOCK

CRIB DOCK

CRIB DOCK

STAKE DOCK

CRIB DOCK

STAKE DOCK

DECK

CRIB DOCK

AREA 3204

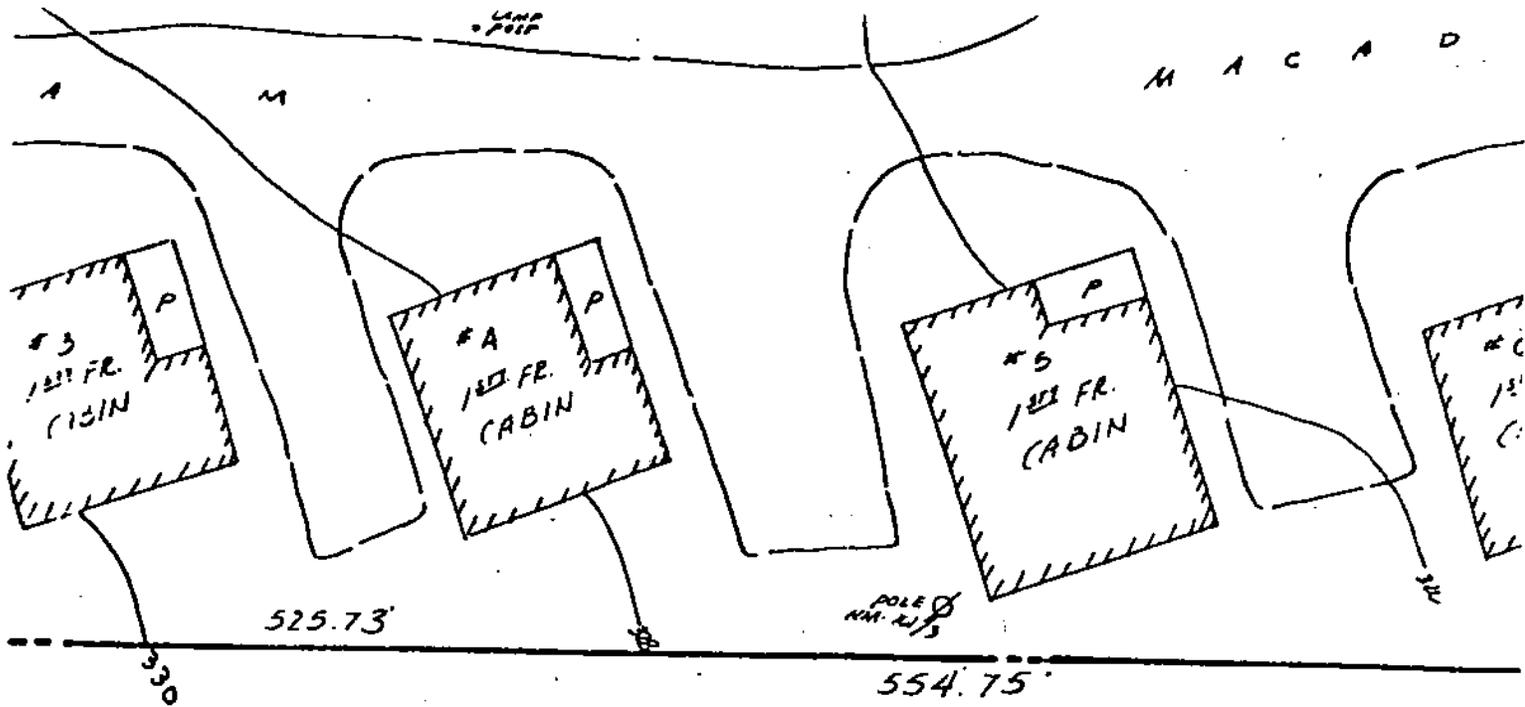
(THE LINE) S.O.T. 18:22  
S.O.T. 20:00

SHIP

NE



M



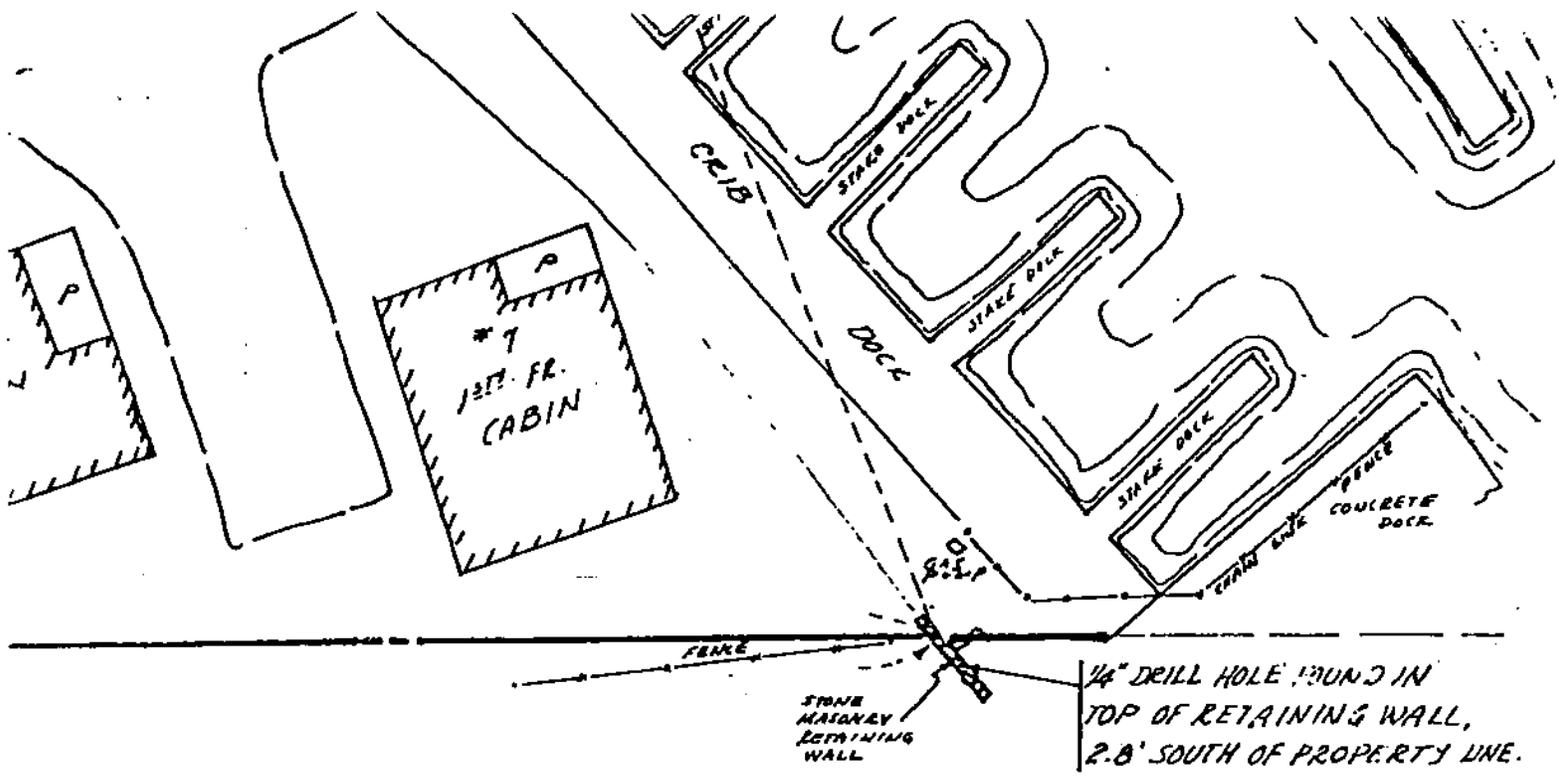
DSCOTT REALTY CORP.  
( 412/115 )

NOTES:

- 1.) LANDS OF DONALD & KATHRYN  
STONE LYING EASTERLY OF  
ROUTE 9-N NOW UTILIZED AS  
"STEPPING STONES RESORT."
- 2.) AREA OF LANDS OF STONE LYING  
EASTERLY OF NY ROUTE 9-N. 2.1 AC.±.
- 3.) CURRENT TOWN OF LAKE GEORGE  
ZONING: "RCH"-RESIDENTIAL/COMMERCIAL,  
HIGH DENSITY

66  
DIAN

TOWN OF LAKE  
SCALE: 1" = 20'



# IMPAID.

of a proposed resort community  
to be known as

## LONG POINT VILLAS

on lake george  
situate in

GEORGE, WARREN COUNTY,

NEW YORK

JULY 18, 1938

SURVEY & MAP BY  
**COULTER & McCORMACK**  
 LICENSED LAND SURVEYORS  
 GLENS FALLS, NEW YORK.

EXHIBIT C ANNEXED TO VERIFIED PETITION (p R-41)

TOWN OF LAKE GEORGE  
ZONING BOARD OF APPEALS

Case No: \_\_\_\_\_

Date Rec'd: \_\_\_\_\_

To the Zoning Board of Appeals:

A. Statement of Ownership and Interest

- DONALD E. STONE and  
1. The Applicant(s) I, KATHRYN STONE (is) (are) the  
owner(s) of property situated east & westerly of NY Route 9N,  
in the hamlet of Diamond Point, Town of Lake George.
2. The Applicant's appeal concerns the property owned by them and known  
as the Stepping Stones Resort,  
and located at Diamond Point, New York  
Section 5 Block 1 Lot 5.292  
Section 51 Block 1 Lot 7 Warren County Tax Map No. 6.

B. Request:

Applicants propose to convert the existing Stepping Stones Resort  
from its present transient resort use to a second home seasonal  
condominium development including one year-round house and fourteen  
seasonal cottages. No new construction is contemplated, and  
occupancy of existing cottages will be limited to the period from  
approximately May 1st until approximately October 30th of each year.  
No subdivision of land will take place; no new lot lines will be  
drawn, and pursuant to Section 5.70 of the Town of Lake George  
Zoning Ordinance, such conversions require site plan review.  
Applicants request an interpretation of the Town of Lake George  
Zoning Ordinance to the effect that no area variance would be  
required for such conversion, since no subdivision of land shall  
take place, and no new lots will be created. The second parcel of  
property located on the westerly side of Lake Shore Drive  
(Section 5 Block 1 Lot 5.292) containing 1.66 acres, will be  
included in the project.

Telephone No: (518) 668-5532

Signature Donald E. Stone

K. Kathryn Stone

P.O. Box 52

Mailing Address

Diamond Point, N.Y. 12824

# Town of Lake George

## TOWN OFFICES

LAKE GEORGE, N.Y. 12845

EXHIBIT D ANNEXED TO VERIFIED PETITION (pp R-42 to R-43)

November 9, 1988

Mr. & Mrs. Donald Stone  
P.O. Box 52  
Diamond Point, New York 12824

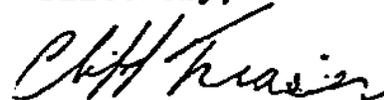
RE: INTERPRETATION #2-88 - CONVERSIONS

Dear Mr. & Mrs. Stone:

The Zoning Board of Appeals for the Town of Lake George, at their meeting held on November 3, 1988 determined that an Area Variance is required to convert the existing motel known as Stepping Stones Resort, into a condominium development, as the Applicant is unable to meet the 20,000 sq.ft. per unit, as required.

If you have any questions concerning the above decision, please do not hesitate to contact this office.

Sincerely,



Cliff Frasier  
Planning & Zoning  
Enforcement Officer

CF/f

cc: Zoning Board  
Town Board  
Town Clerk  
Attorney Walter O. Rehm, III  
file #2-88

EXHIBIT 'D'

Lake George... America's Family Playground!

R-42

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WARREN

DONALD E. STONE and I. KATHERYN STONE,  
Petitioners,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents.

AFFIDAVIT OF SERVICE

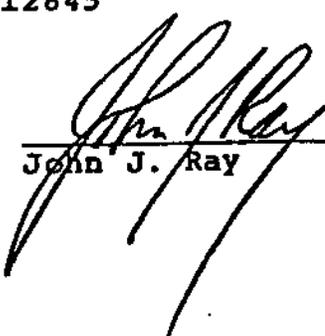
RJI No.  
INDEX No.

JUDGE ASSIGNED:

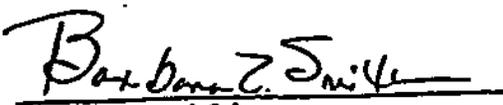
STATE OF NEW YORK )  
COUNTY OF WARREN ) ss.:

John J. Ray, being duly sworn, says: that I am not a party to this action, am over 18 years of age and reside in the Town of Queensbury, New York. That on December 8, 1988, I served a true copy of the annexed Notice of Petition and Verified Petition by delivering the same personally to the persons and at the addresses indicated below:

1. George McGowan,  
Chairman of Town of Lake George  
Zoning Board of Appeals  
175 Ottawa Street  
Lake George, New York 12845
2. Rita Dorman,  
Town Clerk, Town of Lake George  
Lake George Town Hall  
Old Post Road  
Lake George, New York 12845

  
John J. Ray

Sworn to before me this  
8th day of December, 1988.

  
Notary Public

BARBARA Z. SMITH  
Notary Public - State of New York  
Washington County - #452697  
My Commission Expires: 9/30/90

CERTIFICATION

I, Walter O. Rehm, III, am an attorney admitted to practice before the courts of this State, and the attorney of record for the Petitioners-Appellants in this matter, and I certify that the contents of this Record on Appeal have been compared by me with the originals and found to be true and complete copies thereof.

Dated: May 16, 1989

  
\_\_\_\_\_  
Walter O. Rehm, III

RECORDED & INDEXED

**APPELLANT'S**

**BRIEF**

# 58926

3-89-939

To Be Argued By: John J. Ray  
Time Requested: 10 minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents-Respondents.

---

OFFICE OF THE CLERK OF THE SUPREME COURT, THIRD DEPARTMENT  
STATE OF NEW YORK, ALBANY, NEW YORK 12242-1000

**PETITIONERS-APPELLANTS' BRIEF**  
IN OPPOSITION TO THE ORDER OF THE TOWN OF LAKE GEORGE ZONING BOARD OF APPEALS

---

WALTER O. REHM, III  
Attorney for Petitioners-  
Appellants  
175 Ottawa Street  
Lake George, New York 12845  
Tel: (518) 668-5412

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PRELIMINARY STATEMENT

Petitioners-Appellants, Donald E. Stone and I. Kathryn Stone, as owners of premises known as the "Stepping Stones Resort," appeal from an Order of the Hon. John G. Dier, J.S.C., dated January 9, 1989, which denied the relief sought in an Article 78 proceeding brought by Petitioners-Appellants and dismissed the Petition in its entirety.

In the proceeding below, Petitioners sought a ruling by the court declaring as error the determination by Respondent, Lake George Zoning Board of Appeals, that the change of ownership of the "Stepping Stones Resort" as proposed by Petitioners required an area variance. Petitioners had argued that the change in ownership from single form of ownership to proposed condominium form of ownership was not within the jurisdiction of the Town of Lake George under its zoning ordinance and, accordingly, no variance approval was required for this change in ownership. Without any stated rationale or written decision, the lower court ruled from the bench in favor of Respondents and granted an Order denying the relief requested in the Petition and dismissing the Petition in its entirety. Petitioners-Appellants appeal from that Order.

QUESTION PRESENTED

Was it error for the lower court to uphold the decision of the Zoning Board of Appeals which required an area variance for the change of ownership proposed by Petitioners-Appellants?

STATEMENT OF FACTS

Petitioners-Appellants, Donald E. Stone and I. Kathryn Stone, are the owners of the real property known as the "Stepping Stones Resort" comprised of 3.76 acres and 200 feet of frontage on Lake George improved by fourteen seasonal one-family cottages and one year-round house occupied by the Stones (R-27). The entire parcel ~~is located in an area~~ designated as residential/commercial high density on the Town of Lake George zoning map (R-29). By application to the Zoning Board of Appeal dated September 14, 1988, the Stones requested an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for the conversion of their property from the existing form of ownership to that of condominium form of ownership (R-41). Such change of ownership was to entail no subdivision of land and no new lot lines were to be drawn (R-29). Under this proposed change of ownership, the fourteen cottages would still be

limited to seasonal use (R-29).

By interpretation #2-88, dated November 9, 1988, Respondent, Lake George Zoning Board of Appeals, determined that an area variance was required to convert the existing "Stepping Stones Resort" into a condominium development (R-42).

On December 8, 1988, a Notice of Petition and Petition were served on George McGowan as Chairman of the Town of Lake George Zoning Board of Appeals and on Rita Dorman as Lake George Town Clerk (R-43). By commencing this Article 78 proceeding, the Stones sought review of the interpretation of the Zoning Board of Appeals and a judicial declaration that said interpretation was made in error.

disturbance... the condition...  
of ownership, for it is the...  
**DECISION OF THE LOWER COURT**...  
and focus of zoning and planning regulations

Upon consideration of the Notice of Petition, Verified Petition, and the Verified Answer and Objections in Points of Law, and after hearing Walter O. Rehm, III, attorney for Petitioners in support of the Petition and Mark J. Schachner, in opposition to the Petition, the Hon. John G. Dier, J.S.C., denied the relief requested in the Petition and dismissed the Petition without written decision.

ARGUMENT

POINT I

ZONING ORDINANCES ARE PROPERLY CONCERNED WITH USE  
OF PROPERTY AND NOT FORM OF OWNERSHIP

Recent New York case law makes it clear that zoning ordinances can properly regulate the use of property but cannot discriminate against particular forms of ownership. In North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, aff'd 93 AD2d 883 (2nd Dept. 1983), the Appellate Division Second Department considered this issue and stated:

"Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than form of ownership that is the proper concern and focus of zoning and planning regulations." (citations omitted) North Fork Motel, Inc. v. Charles Grigonis Jr., et al., 93AD2d at 883.

This concept was emphasized by the Court of Appeals when it considered the issue of the empowerment of a city to mandate the manner in which property may be owned or held in FGL & L Property Corp. v. City of Rye, et al., 108 AD2d 814, aff'd, 66 NY2d 111 (1985). The court therein found numerous cases in New York State and elsewhere which supported the fundamental rule that zoning ordinances deal with land use and not with the person who owns or occupies it. The court went on to state that "Most of the out-of-state cases hold, as did

the North Fork Motel case, that a zoning ordinance cannot be used to exclude a condominium." FGL & L Property Corp. v. City of Rye, et al., 66 NY2d at 116.

In view of the above, it was error for the lower court to uphold the decision of the Zoning Board of Appeals which required an area variance for the change in ownership proposed by Petitioners-Appellants.

## POINT II

THE CHANGE PROPOSED BY PETITIONERS-APPELLANTS CONSTITUTED ONLY A CHANGE IN OWNERSHIP FORM AND NOT A CHANGE IN USE SO AS TO REQUIRE AN AREA VARIANCE.

Petitioners-Appellants proposal before the Zoning Board of Appeals was simply to change the form of ownership of the fourteen cottages and the year-round residence from its existing form (fully owned by Petitioners-Appellants) to the condominium form. No changes of use were proposed. After the proposed change in ownership form, the use of the cottages would remain limited to housing individuals and families during their seasonal visits to the Lake George area, a use that is identical to the use prior to any change. The physical plant would remain unchanged, the activities of the individuals and families would be identical to those occurring before the change of ownership, and no new use would take

place. The only discernible difference would be the label used to refer to these visitors. Referring to a visitor as an "owner" as opposed to a "tenant" refers only to the form of ownership and not to any change in use.

In the court below, Respondents argued that the proposed change in ownership form indicates a change in use from tourist accommodations to single family residences. This terminology, however, again relates only to ownership and does not indicate any change to which the property will actually be subjected. The label given to the visitors may change, but the actual use to which the property will be put remains identical to the use prior to the change in ownership.

As this proposed change in ownership entails no change in use, the Zoning Board of Appeals was incorrect in asserting the need for an area variance and the court below erred in failing to declare this assertion as error.

### POINT III

THE LOWER COURT ERRED IN FAILING TO DELCARE AS ERROR THE INTERPRETATION OF THE ZONING BOARD OF APPEALS THAT AN AREA VARIANCE WAS REQUIRED FOR THE CHANGE IN OWNERSHIP FORM PROPOSED BY PETITIONERS-APPELLANTS.

The finding by the Zoning Board of Appeals that the proposal by the Petitioners-Appellants constituted a change in

use was without basis and should have been declared as incorrect by the lower court. Unlike the case of Catham Realty Corp. v. Town of Southampton, et al., 97 AD2d 531, aff'd, 62 NY2d 831 (1983), wherein the Southampton Zoning Ordinance specifically restricted residential uses in the district in question and by amendment addressed co-operatives as a type of use, The Lake George ordinance is silent as to any definition of co-operatives or condominiums which would indicate that their establishment constitutes a change of use. In the absence of such a definition, there exists no justification for regarding the change of ownership as a change of use so as to give use to a need for an area variance.

It is respectfully submitted that in the absence of any indication of a change in use, the Zoning Board of Appeals was mistaken in requiring an area variance and the lower court erred in failing to declare this interpretation as error.

#### CONCLUSION

The Supreme Court abused its discretion in denying the Petition of Petitioners-Appellants seeking an Order declaring as error the determination by the Lake George Zoning Board of Appeals that the change of ownership of the "Stepping Stones

Resort" as proposed required an area variance, thus the Order denying the Petition should be reversed.

Dated: June 7, 1989

Respectfully submitted,

WALTER O. REHM, III  
Attorney for Petitioners-  
Appellants  
175 Ottawa Street  
Lake George, New York 12845  
Tel: (518) 668-5412

**RESPONDENT'S**

**BRIEF**

# 58926

3-89-939

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

APPEAL NO. 58926

Respondent-Respondent.

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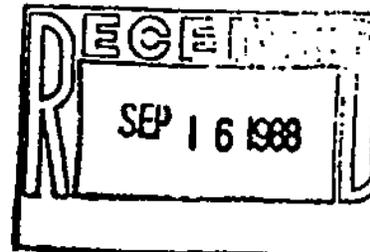
APPENDIX TO  
BRIEF OF  
RESPONDENT-RESPONDENT

---

Miller, Mannix & Pratt, P.C.  
Attorneys for Respondents  
One Broad Street Plaza  
P.O. Box 765  
Glens Falls, New York 12801  
Tel. (518) 793-6611

July 7, 1989

WALTER O. REHM, III  
ATTORNEY AT LAW  
176 OTTAWA STREET  
LAKE GEORGE, NEW YORK 12845  
518-668-5412  
518-668-5413



JOHN J. RAY

September 14, 1988

Town of Lake George  
Zoning and Planning Administrator  
Old Post Road  
Lake George, New York 12845

Attention:—Clifford Frasier

Re: Stepping Stones Condominium Conversion

Dear Cliff:

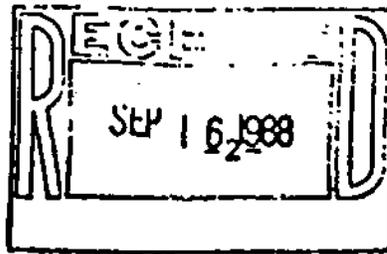
You will find enclosed herewith an application submitted in behalf of Mr. and Mrs. Donald Stone of the Stepping Stones Resort in Diamond Point for an interpretation by the Zoning Board of Appeals of the applicable provisions of the Town of Lake George Zoning Ordinance with respect to the proposed conversion of the Stepping Stones property from its existing use to a second home seasonal condominium.

As I have mentioned in the enclosed application, I must reiterate to you that no subdivision of land will take place, and thus, it is the Stones' position that no variance is required for this project.

It is also my understanding that the Zoning Board of Appeals is next scheduled to meet on the evening of October 6th. As I mentioned to you during our last weekend, I will be away on vacation from September 29th until October 12th. Since no other matters are presently scheduled for the current Zoning Board of Appeals Meeting, it would be extremely helpful if the Board would be willing to reschedule a meeting on this matter to a date either prior to September 29th or on or after October 12th.

.....  
R 045

Clifford Frasier



September 14, 1988

I realize that the request to reschedule the meeting is somewhat unusual, and I certainly would not want to inconvenience any member of the Board or any other applicant should further business be placed on the October agenda. I will be in Florida, and if necessary, I will fly back on the 6th for that meeting.

It would be most helpful if you could advise me of the Board's decision relative to schedule as soon as possible, so that any necessary travel plans may be made.

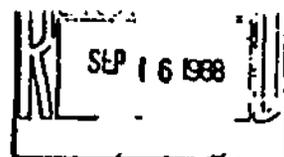
Very truly yours,

Walter O. Rehm III

WOR/cmg  
Enc.

R 046

TOWN OF LAKE GEORGE  
ZONING BOARD OF APPEALS



Case No: 42-88  
Date Rec'd: 9/16/88

To the Zoning Board of Appeals:

A. Statement of Ownership and Interest

DONALD E. STONE and

1. The Applicant(s) I, KATHRYN STONE (is) (are) the owner(s) of property situated ~~at~~ easterly & westerly of NY Route 9N, in the hamlet of Diamond Point, Town of Lake George.

2. The Applicant's appeal concerns the property owned by them and known as the Stepping Stones Resort,

and located at Diamond Point, New York

Section 51 Block 1 Lot 5.292  
Section 51 Block 1 Lot 7 Warren County Tax Map No. 6.

B. Request:

Applicants propose to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen seasonal cottages. No new construction is contemplated, and occupancy of existing cottages will be limited to the period from approximately May 1st until approximately October 30th of each year. No subdivision of land will take place; no new lot lines will be drawn, and pursuant to Section 5.70 of the Town of Lake George Zoning Ordinance, such conversions require site plan review.

Applicants request an interpretation of the Town of Lake George Zoning Ordinance to the effect that no area variance would be required for such conversion, since no subdivision of land shall take place, and no new lots will be created. The second parcel of property located on the westerly side of Lake Shore Drive (Section 51 Block 1 Lot 5.292) containing 1.66 acres, will be included in the project.

Telephone No: (518) 668-5532

Signature Donald E. Stone  
Kathryn Stone

P.O. Box 52  
Mailing Address  
Diamond Point, N.Y. 12824

9/16/88 T.M.H.

TOWN CENTER, OLD POST ROAD, LAKE GEORGE, NEW YORK, WITH GEORGE MC GOWAN, PRESIDING.

MEMBERS PRESENT: GEORGE MC GOWAN, CHAIRMAN  
JOSEPH DE SANTIS  
JAMES MATHIS  
DAVID ROBINSON  
DANIEL J. STRAIN

MEMBERS ABSENT: NONE

ALSO PRESENT: FRAN HEINRICH, CLERK OF PLANNING & ZONING OFFICE  
PAMELA MARTIN, SECRETARY PLANNING & ZONING BOARDS  
ERNEST IPPISCH  
ANTON IPPISCH  
DONALD STONE  
KATHRYN STONE

Roll call was taken at 7:34 p. m.

Joseph DeSantis made a motion to accept the Zoning Board of Appeals Minutes from the September 1, 1988 Meeting and James Mathis seconded the motion.

Motion was carried.

The September 1, 1988 Zoning Board of Appeals Meeting Minutes were accepted.

AREA VARIANCE APPLICATION V26-88 - SUBMITTED BY ALPINE VILLAGE  
TO ADD THREE (3) MOTEL UNITS TO THE REAR OF MAIN LODGE  
IF APPLICATION IS COMPLETE, SCHEDULE PUBLIC HEARING- 10/20/88, 7:00 P. M.

James Mathis read the application which may be found in the Planning and Zoning Office. A letter is also attached.

David Robinson made a motion to accept the application and schedule the matter for public hearing and Joseph DeSantis seconded the motion.

Motion was carried.

The application was accepted and the matter was scheduled for public hearing on October 20, 1988 at 7:00 p. m.

X INTERPRETATION #2-88 - SUBMITTED BY DONALD & KATHRYN STONE, DBA  
STEPPING STONES RESORTS - APPLICANT REQUEST INTERPRETATION OF  
ZONING ORDINANCE ARTICLE 4, SECTION 5.70 - CONVERSIONS  
ACCEPT APPLICATION & SCHEDULE PUBLIC HEARING FOR 10/20/88 AT 7:00 P. M.

Joseph DeSantis read the application which may be found in the Planning and Zoning Office.

James Mathis made a motion to accept the application and schedule the matter for public hearing and David Robinson seconded the motion.

Motion was carried.

The application was accepted and the matter was scheduled for public hearing on October 20, 1988 at 7:00 p. m.

WALTER O. REHM, III  
ATTORNEY AT LAW  
175 OTTAWA STREET  
LAKE GEORGE, NEW YORK 12845  
518-668-8412  
518-668-8413

JOHN J. RAY

September 16, 1988

Town of Lake George  
Old Post Road  
Lake George, New York 12845

ATTN: Clifford Fraiser  
Zoning Administrator

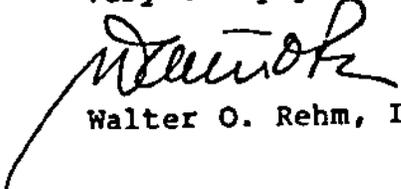
Dear Cliff:

Pursuant to your telephone call of this morning, I have enclosed my check for \$25 representing the filing fee for the interpretation request submitted on behalf of Donald and Kathy Stone.

In addition, it is my understanding that the Zoning Board of Appeals will hold a public hearing on this matter which is scheduled for 7:30 P.M. on the evening of October 20.

Please call me if you should require anything further.

Very truly yours,

  
Walter O. Rehm, III

WOR/bzs  
Enc.  
cc: Mr. and Mrs. Donald Stone

R 049

# Town of Lake George

## TOWN OFFICES

LAKE GEORGE, N.Y. 12845

### NOTICE OF PUBLIC HEARINGS

PLEASE TAKE NOTICE, that pursuant to the Zoning Ordinance for the Town of Lake George, the Zoning Board of Appeals will conduct Public Hearings on October 20, 1988 commencing at 7:00 p.m., at the Town Center, Old Post Road, Lake George, New York to consider the following Applications:

AREA VARIANCE APPLICATION V26-88 - submitted by Ernest & Anton Ippisch dba Alpine Village to add three (3) motel units to the rear of main lodge (proposed units have previously been constructed). Applicant proposes to remove four (4) units from the guest house to comply with the zoning requirements.

Said property is located on the east side of Route 9N (corner of Rt. 9N & Morris Lane), in the Town of Lake George, being Section 29, Block 1, Lot 5, Tax Map No. 6 County of Warren.

INTERPRETATION #2-88 submitted by Donald & Kathryn Stone dba Stepping Stones Resort, applicant request interpretation of the Town of Lake George Zoning Ordinance - Article V, Section 5.70 - Conversions. Applicant proposes to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen (14) seasonal cottages. No new construction is contemplated.

Said property is located on the easterly & westerly sides of Route 9N, in the hamlet of Diamond Point, Town of Lake George, being Section 51, Block 1, Lots 5.292 & 7, Tax Map No. 6 County of Warren.

AREA VARIANCE APPLICATION V27-88 - submitted by John & Suzanne Lustyik to construct a 24'X24' garage located in the front yard, without meeting the rear yard requirement.

Said property is located on the South side of Flat Rock Roads, approximately 2800± feet north of the intersection of Stone Schoolhouse and Flat Rock Roads, in the Town of Lake George, being Section 39, Block 1, Lot 29, Tax Map No. 6 County of Warren.

BY ORDER OF THE ZONING BOARD OF APPEALS, TOWN OF LAKE GEORGE.

GEORGE MCGOWAN,  
CHAIRMAN.

R 050

*Lake George... America's Family Playground!*

Ordinance for the Town of Lake George, the Zoning Board of Appeals will open a public hearing on October 25, 1988 commencing at 7:30 p.m. at the Town Center, Old Post Road, Lake George, New York to consider the following Applications:

**AREA VARIANCE APPLICATION V26-88** - submitted by Ernest & Anton Topisch for Alpine Village to add three (3) motel units to the rear of main lodge. Proposed units have previously been constructed. Applicant proposes to remove four (4) units from the guest houses to comply with the zoning requirements.

Said property is located on the east 1/2 of Route 98 at the corner of Rt. 94 & Morris Lane, in the Town of Lake George, being Section 28, Block 1, Lot 6, Tax Map No. 1 County of Warren.

**INTERPRETATION #2-88** - submitted by Dorinda & Kathryn Stone for Stepping Stones Resort, applicant request interpretation of the Town of Lake George Zoning Ordinance - Article V, Section 1.79 - Conversion. Applicant proposes to convert the existing Stepping Stones Resort from its present transient resort use to a second home seasonal condominium development including one year-round house and fourteen (14) seasonal cottages. No new construction is contemplated.

Said property is located on the easterly & westerly sides of Route 94, in the hamlet of Diamond Point, Town of Lake George, being Section 51, Block 1, Lots 1, 2 & 7, Tax Map No. 1 County of Warren.

**AREA VARIANCE APPLICATION V27-88** - submitted by John & Suzanne Lusty to construct 24'x24' garage located in the front yard, without meeting the rear yard requirement.

Said property is located on the south side of Flat Rock Road, approximately 2000 feet east north of the intersection of Stone Schoolhouse and Flat Rock Roads, in the Town of Lake George, being Section 36, Block 1, Lot 25, Tax Map No. 1 County of Warren.

**BY ORDER OF THE ZONING BOARD OF APPEALS TOWN OF LAKE GEORGE:**  
 GEORGE MCGOWAN, CHAIRMAN  
 Pub: Oct. 16, 1988

STATE OF NEW YORK

County of Warren, ss:

Lori J Lewis

, being duly sworn, says that she is president of Glens Falls Newspapers, Inc., publishers of THE POST-STAR, a daily published in Glens Falls, Warren County, State of New York, and that the pr attached hereto was cut from the said POST-STAR and that the said notice w therein, namely, October 10

Signed this 18th day of October  
Lori J Lewis

Sworn to before me this 18th day of October 1988  
Eleanor V. MacAuley  
 Notary Public.

ELEANOR V. MACAULEY  
 Notary Public in the State of New York  
 Residing in Warren County  
 My Commission Expires Oct. 21, 1991

Donald E. & Kathryn Stone  
P.O. Box 52  
Diamond Point, New York 12824

P.O. Box 749  
Lake George, NY 12845  
Att: Mr. Karl Parker

Walter O. Rehm, III  
Attorney At Law  
175 Ottawa Street  
Lake George, New York 12845

N.Y.S. Health Dept.  
21 Bay Street, Roger Building  
Glens Falls, N.Y. 12801  
Att: Mr. Brian Fear

Warren County Planning Board  
Warren County Municipal Center  
Lake George, New York 12845

Adirondack Park Agency  
Box 99  
RayBrook, N.Y. 12977  
Att: Mr. James Hotaling

Lake George Association  
Fort George Road, P.O. Box 408  
Lake George, New York 12845  
Att: Mona Sieger, Secretary

Dept. of Environmental Cons.  
Hudson Street Ext. Box 220  
Warrensburg, N.Y. 12885  
Att: Mr. Bill Murman

Warren County Dept. of Public  
Works  
Warrensburg, N.Y. 12885  
Att: Mr. Fred Austin

N.Y.S. Dept. of Transportation  
260 Main Street  
Warrensburg, N.Y. 12885  
Att: Mr. Herb Steffens

Lake George Fire Department  
Ottawa Street  
Lake George, New York 12845  
Att: Mr. Rob Hickey

Glens Falls Independent Living  
Center - Quaker Bay Center -  
P.O. Box 453  
Glens Falls, New York 12801  
Att: Mr. Harvey Raymond

R 052

where I am from - South Jersey, Atlantic City. You should see the traffic because of the casinos down there. The people at work going back and forth from Atlantic City. And that is what is going to happen here. There is no way of making 9th wider. I am looking down the line. I won't be around but my grandchildren will be coming up here."

There was no further public comment.

The public hearing was closed at 7:33 p. m.

\* INTERPRETATION #2-88 - SUBMITTED BY DONALD & KATHRYN STONE  
DBA STEPPING STONES RESORTS - APPLICANT REQUEST INTERPRETATION OF  
ZONING ORDINANCE - ARTICLE V, SECTION 5.70 - CONVERSIONS

Walter Rehm, III, Esq., said, "I represent the Stones who own the Stepping Stones property in Diamond Point. I think probably most of you are familiar with it. This is a survey map of the property that was recently done. And what there are, is there are 15 cottages, even though they are numbered 15, you notice that 13 is missing for some reason, and a house. Now, this is in an RCH Zone I believe, where the minimum lot size is 20,000 square feet. And if you were to take a total of 15 units, if you include the house, and multiply it by 20,000 sq. ft., obviously there is not a sufficient amount of land to subdivide this property. The proposal that the Stones have is to create a second home, condominium development on this property.—And each one of the units, including the house, with the units within the condominium, and you know a condominium is not a thing, it's a form of ownership. And under the condominium form of ownership, there is no subdivision of land. No lot lines change. No new lot lines are created or anything like that. But, if one of you or I or someone from the general public were to purchase one of these condominium units, what they would purchase, if it happened to be #2, would be the interior of this building, not the building itself, just the interior. This is the same as Cannon Point. And also an undivided interest in the balance of the property. And as I said, there would be no subdivision of land.

If you look down in the lower corner of the map, you will see that there is an additional 1.66 acres on the other side of the road which is included in this. The total acreage Don is about 3.7 acres total?"

Donald Stone said, "Just short of 4 acres."

Attorney Rehm said, "So, a little less than 4 acres. Now, the proposal here is to utilize the main house as a year-round residence, but to restrict the rest of these cottages for use only on a seasonal basis. They are units in the summer now, rented on a seasonal basis to people that stay a week, 2 weeks, 3 weeks, or whatever they stay. And the only change that is proposed is to allow individuals to own these and to occupy them during the good weather. So, the proposal would be to sell them off. But, to generally continue either owner occupancy or the owner of a particular cottage through the Stones could rent the cottage just as the Stones are renting it now, or the owner of a particular cottage could rent the cottage themselves. Since the condominium would own all of the buildings, there would be no individualism as far as colors of buildings are concerned or as far as landscaping or any of that type of thing. Everything would be maintained, exteriors, by the condominium.

Now, the question is, what sort of approval is required for this. And I have done these in different communities and I have done them all sorts of different ways. Sometimes I have felt that the path of least resistance was to apply for a variance because if you have 15 units, it is very natural for a Board to say, well the minimum lot size then is 20,000 square feet. Multiply 15 by 20,000 and you don't have enough square feet so you can't do it unless you get a variance. I have said in other cases that because of a chain of Supreme Court cases that are now at the Court of Appeals, no variance is required for this sort of thing.

And I have discussed this with Cliff, and Cliff, in doing his duties properly, as far as he is concerned, a variance is required, which is why we are here tonight.

If this project goes, and you look at this property as you drive by, it is not going to change. It is going to be exactly the same as it is. If you look at the tax map, it is not going to change. It will approximately the same as it is. No new building is required. There is no proposal to take any buildings down. There is simply a change that these will be occupied as in the past, but the difference is that individuals will own.

The law is, and I know that this Board has counsel, the Town has counsel, and I know that you haven't seen these cases, and I wouldn't think that you would at this point, and that you will want to discuss this with counsel. But, the law is this... A town acquires the authority to zone property under the Town Law, Section 261. And that's the section of the Town Law that says a town can enact the zoning ordinance and if that section of the Town Law did not exist, the Town would have absolutely no power to zone because that's a power that the State has. And the State has delegated that to the Town under the Town Law of the Cities under Cities Laws and to the Village under the Village Law. And the court cases say that the Town Law is not delegated to Towns, the authority to control the method of ownership of property. And the corollary of that is that the Town Law, the Legislature when they enacted the Town Law, delegated to Towns the authority to regulate the use of property. So, if this property is used as a residential purpose or if you wanted to change this use in a way that was contrary to the zoning ordinance, there is no question that the variance would be required. And if this was a Commercial Zone, which it is not, it's a Residential Commercial, but if this was a Commercial Zone, and we wanted to do this so we would change the use from, at least for argument purposes, a Commercial use to a Residential use, a variance would be required if this was strictly a Commercial Zone. If this was strictly a Residential Zone, and these were little cottages that people owned and somebody wanted to buy them all up, and run a resort, then again a variance would be required. But, to change the method of use from individual ownership to condominium ownership, is not a zoning issue. And the cases, as far as I can see, are very clear on that.

And so we are here tonight to ask this Board to interpret the Lake George Zoning Ordinance to the effect that no variance is required for a conversion of a resort such as this to a second home, single family, condominium ownership. And that is the task before you. Now, I know that you look at me and you say what the heck is that guy talking about. What is he trying to put across on us now. But, that does seem to be the law as I read it. And it is one of the few times in life that it is a little bit clear. Let me see if I can tell you about a couple of cases.

The first case happened in Long Island in Southold. In Southold, they had a motel and these people wanted to convert the hotel into some kind of a condominium. And the local Zoning Authority told them that they couldn't do it. And so an action was commenced against the Town of Southold and the Supreme Court, in this district on Long Island, or perhaps it was the District Court I don't know which, one of the courts held that that was an invalid exercise of the power of the community because all they were doing is changing the form of ownership. And one other thing that you should realize... As far as lot size, these are legal today. And if you can follow the reasoning, they are prior non-conforming. Now, you could not build these today on separate lots on this property. There is no question about that. But, as they exist today, they are perfectly legal. This is a perfectly legal operation. And so, what that case said is, that as long as you don't change the use in a way that violates the ordinance, then you can do this without a variance. I am the first one to realize that this is not what the Town Board had in mind when they enacted the Zoning Ordinance. Because if you look at the definition of subdivision in the Zoning Ordinance, it says any division of land and so on and so on, including condominiums, cooperatives and every other darn thing. It says that. What I am saying to you is, that that is illegal. That provision of the Zoning Ordinance is

illegal. And that is what the courts have said. In October 1985, the Court of Appeals in New York decided a case called FGL & L Property Corp. vs. the City of Rye. And it's the major case on this subject. In the previous case it says, 'Nor the mere change in the type of ownership result in the destruction of the valid existing non-conforming use.' Also, 'Zoning Ordinances cannot be employed by a Municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is the use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations.' And I am not going to bore you with this part of it anymore. That is, as far as I am concerned, the law.

From the local planning point of view, I can say to you that I think that the use of this property, from a planning point of view, as proposed, would probably be a heck of a lot better than the weekly turnover of people in and people out. This happens to be one of those resorts that operates at 100%, or very close to 100% capacity. There is a provision in the zoning ordinance that also says and which I am not asking you to make a decision on tonight, it says if you convert from this type of ownership to single family condominium type ownership, then the matter is subject to site plan review and Cliff knows what that number is. It is in the ordinance."

Cliff Frasier said, "5.70C."

Attorney Rehm said, "So, that is in the ordinance. I am not asking you to make a decision on that tonight. But, the fact of the matter is, it's very likely that if the Town lacks jurisdiction, lacks authority over this, at this level, the variance level, it may very well be that it lacks authority at that level. But, I have been in this business long enough to know that there are certain legitimate concerns as far as planning and community development. And I think that the Stones are willing to test the waters as far as site plan review is concerned and discuss this thing with the Planning Board and solicit recommendations and so on with the Planning Board. And as long as the Planning Board is willing to treat us fairly reasonably, we are willing to not raise that issue at this point. But, we do feel that no variance is required and ask for you to make that determination. I can submit some of these cases to you or to your counsel if you want. I can do whatever and answer any questions you might have."

Chairman McGowan said, "Mr. Rehm, I would appreciate it, our attorney is Mark Schachner, if you would make available to him your arguments because we will be consulting him on the scope of our jurisdiction."

David Robinson asked, "On the examples, were they communities that are like Lake George and are resort communities?"

Attorney Rehm said, "Yes. One is in Southold in Long Island which I believe is on the ocean. One is Westhampton... I guess Rye is also on the ocean, on Long Island Sound, but I think Rye is a city. They are not exactly like Lake George, but the fact of the matter is, it doesn't make any difference."

David Robinson said, "I understand. But, I am just thinking of the rest of the community as a whole, as a resort community, as to what this may start or begin."

Attorney Rehm said, "This is not new to Lake George. It is really a basic question. Is it or is it not something that the Town can regulate? Towns were born with no authority at all. They had no rights to do anything. And then the State provided Towns with certain powers. If you have the power, you have the power. And we have to deal with that. If you don't, you don't. And if you don't, you shouldn't try to exercise it. And I think you have enough problems doing your job as it is, not trying to overstep your bounds. I am surprised frankly, that the law is as clear as it does seem. It makes sense to me as a lawyer but I see these. My interest is different than yours obviously. And yours is different than the Planning Board's."

James Mathis said, "The concern I have Walter is that from your argument, what you are saying is that most of these motels, resorts along the lake, without any problem, would have the right to do what you are proposing for Stepping Stones, without any variance, because it would be grandfathered. The intent of our Zoning Law was to try to regulate the amount of people that are going to live in that space. And yet, because motels were built probably before the Zoning Law was established and put living units in smaller spaces than what we are allowing right now, we are going to have every motel owner who decides he wants to get out of the motel business and cleaning rooms, to come in and want to sell the hotels and make them condominiums and we are going to be helpless to stop this. And I don't want to sit here and be part of a helpless group to stop something like this. I think it is contrary to the purpose and the long-term design that was written into this Zoning Law to make the environs around Lake George a condominium agent for people from who knows where. And part of the argument you have is that the Zoning Law dictates use not ownership. And I agree with you. It is pretty clear. But, part of the argument they are making with the Stepping Stones, is that the condominiums will be a 6-month condominium, that the people will only own it for 6 months of the year and they will not use it in the wintertime. Now, I have a hard time believing that that will happen."

Attorney Rehm said, "There's no problem with that Jim. That phase of it is absolutely no problem."

James Mathis said, "You think you could tell people that spent \$100,000.00 on these things that they can't come up in the winter?"

Attorney Rehm said, "Absolutely. That's the nice thing about condominium ownership. You can control all of those things. First of all, there is no water. It is not winterized."

James Mathis said, "But, they can be."

Attorney Rehm said, "The certificates of occupancy that he is going to issue are going to be limited to 6 months. The condominium declaration and bylaws and also the restrictions on the property will limit it to 6 months. And I'm telling you that they don't have any choice. But, I'll tell you something else. It's not even 6 months because these things are generally occupied, even as condominiums, they are really only occupied during the summer when the kids are free and then on weekends once in a while or maybe for a week in the spring or fall. But, if you look at these that have been done, that is what has happened. If you look at these that have been done, the properties have been upgraded. There are probably less people if you look at the ones that have occurred so far. That is that argument. We could argue about this all night, but I can make very good arguments to the fact that this is much better for the community from lots of points of view. The tax base is horrendously good for the community. It doesn't produce any kids for school. You get people that have the ability to purchase these, financial ability and otherwise and so you tend to get a group of people that will consume more in the more traditional parts of the community, less tourist-oriented type people. If we get to this with the Planning Board, the use of the sewage disposal system and so on, usually is less with these. There seems to be more control, more pride of ownership. And there are lots of good reasons for doing that. The condominium can also easily control, by rules and regulations that are enforceable as they found out at Cannon Point. You know you can't add on here and add on here and go up a story here, and all that. You have solved all of those problems from the outset. Where with a subdivision, and I don't know if you have been involved in some of the subdivisions, but with some of the subdivisions, people buy a subdivision, a lot with a house on it, and what they say is, 'Well, this is no longer big enough. We want to put a second story on it.' That can't happen here. So, there are really some advantages to this, at least from my point of view. But, the other side of the coin is a basic democracy type issue. And that is, if you have the authority then you can exercise it, as you should. If you don't have it, then it's wrong to try to exercise it. It's just like, you know, any other area of government - it's wrong for the police to pull you over on the way home tonight and say 'Get out of the car and spread eagle because I want to

search you.' They don't have the authority to do that. And so, that's the type of thing. And I don't care - I do care as a member of the community and someone who makes a living in the community and sends the kids to school here and all that, I care about the community. But, I care equally as much that the rights of the Stones, and me and you and everybody else, whatever they are, are preserved, and that government doesn't overstep its bounds because it just thinks that that is what the Town Board thought that they were doing when they did that. And yet I understand your feeling, because one of the things that could happen is just as you say - everybody up and down the road could do this. They haven't in the past. It is not terribly feasible with a lot of the properties because a lot of them are motels. Those that haven't already done it through subdivision or condominium, there are very few really good pieces of property left to do this with. But, there is no question, and Cliff knows it, that I am working on a second one. And I don't know if he has told you. And this is a very desirable economic plan as far as owners of property like this are concerned, because this area has changed. And while this was the best use of this land when Bob Kahn built it, the use of this land, the best use of this land, is no longer for this type of use. It just isn't. And it is a heck of a lot more valuable to do that, to do this conversion, and if you can do that without adversely impacting the community and adversely impacting the environment. And if the Planning Board does its job, as I am sure it will, and impose conditions upon approval that make sense and ensure that this is a good project, maybe this is looking at the economic realities. And we have seen areas of this country, for example Old Orchard Beach and other places where communities have not looked at the economic realities and the result has been more adverse. But, I will give Mark (Schachner, Esq.) the stuff and I will answer any further questions."

The public hearing was opened at 8:00 p. m.

Kathryn Stone said, "I would be very, very pleased if we could go in this direction. And the use of it would be less not more. And we have always run a top-grade operation with top-notch people that have come to our resort and I certainly would not sell to anyone that I didn't feel would take care of the property. I intend to live there."

<sup>(M)</sup>  
Kathy Kouspan said, "I am from the Lake George Association. I would like to say that the Lake George Association is strongly opposed to the concept of conversions all of the way up and down Bolton Road. We have seen a lot of them in Bolton and we will see a lot of them in Lake George. It is confusing. I know that the Zoning Ordinance does specify criteria for condominiums. I really believe that if you look at 5.70(c), it says that 'conversions, when made, must conform to the provisions of this Ordinance.' They wrote the word 'must' in there. I was here, working for the Town, when they did that. And the reason they did that was to make it stronger. All the way through the Zoning Ordinance you hear the word 'shall.' They didn't know how to regulate it. Their theory was to do it. If it is taken to court and overturned, fine. But you have to have a handle on it. You can't just say that you don't have any authority to regulate conversions, because you do. They need a density variance requirement and that is what you should decide. If it is taken to court and it is overturned, fine. Then you will have to change the ordinance. But, you must have a handle on it. The Planning Board will have a handle on it but only as far as aesthetics, erosion, stormwater, stuff like that. They are not going to have anything to do with the density. I think that is very important. I think that Mr. Reh is wrong in telling you that you have no authority here and making you feel shaky on this. You have a good authority, a good standing here to make a decision on this interpretation. That is what you are here for. If it is wrong, it's wrong. If it's right, it's right. But, you have that authority. The Zoning Ordinance has no special relief granted in square footage, etc, for condominium. They did that for a purpose. Their intentions was not to regulate ownership. It's to regulate development even though the development is there, there is a change. Maybe a change of use is a wrong kind of word, but there is a change. And it's a change that you will lose sight of if you don't make the decision that a variance is required. Thank you."

There was no further public comment. The public hearing was closed at 8:05 p. m.

AREA VARIANCE APPLICATION V27-88 - SUBMITTED BY JOHN & SUZANNE LUSTYIK  
TO CONSTRUCT A GARAGE 24' X 24' LOCATED IN THE FRONT YARD  
APPLICATION WAS APPROVED BY WARREN COUNTY PLANNING BOARD 10-12-88

Chairman McGowan read a letter from a neighbor, Theresa Herzog, stating her support of the project. The letter may be found in the Planning and Zoning Office.

John Lustyik said, "Here is a sketch with the residents. This is our residence here. And what I have presently back here is a swimming pool with a landscaped area. And what we propose to do, rather than put a garage right next to the residence here, we would bring the garage out and align it with... In other words, the south end of the garage would be in line with the north end of the building. And the reason that we want to do that is so that it does not crowd or interfere with the pool which is back here and simply moving it out here, we have had the 4 immediate neighbors discuss this with us. And I think I have letters from all 4 of them. And they all agree that this would enhance the overall beauty of the property, rather than stuff the thing back in here and interfere with the existing pool area."

Chairman McGowan read the letters from Nancy Nichols, Joan Crescente, and Floyd Boyea, all in support of the project. The letters may be found in the Planning and Zoning Office.

David Robinson said, "I was looking at the other homes in the neighborhood and I noticed that a lot of the houses had garages that were connected with a long breezeway. I didn't know if you thought about anything like that."

Mr. Lustyik said, "Well, I think that that would be the plan off in the future, maybe in 3 or 4 years. My wife has discussed the possibility of putting up a sun room. And we could simply extend the roof that you are talking about over to the garage. That is not what we intend to do right now. But, that could be done in the future."

Joseph DeSantis said, "I don't think I have a handle on why you are not going to connect it."

Mr. Lustyik said, "Well, you would have to come up and look at the property. But, to put it adjacent to the house, it would crowd the pool area. And I think it would do it in such a way that I don't think I'd put the garage. I would not erect the garage if I had to put it in that particular spot. I think that by moving it forward, you don't crowd that pool area and also what I am thinking of is the beauty of the property. If you look at the property from the front, and you would put a garage back there, I think it would ruin the appearance of the property. That's really the reason why we want to move it."

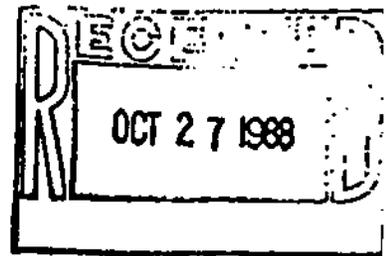
David Robinson said, "The entrance will be facing the house, then."

Mr. Lustyik said, "The entrance would be facing the house. The only other thing that I would like to mention is the residents about 2 houses down from us, the James Stein residence, presently has a garage in the same location, in other words, facing towards the driveway."

James Mathis said, "The main difference between your proposal and theirs, because I looked at theirs after I drove past your house, is that they did connect their house to their garage with a breezeway. It's an attached garage, which would put it in compliance. And it does not look bad. It is an attractive set-up. It is at a right angle to the house."

Chairman McGowan said, "I would advise you all to look into the past

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JOHN J. RAY

October 26, 1988

Zoning Board of Appeals  
Lake George Town Center  
Lake George, New York 12845

Re: Donald E. and I. Kathryn Stone/Stepping Stones Resort

Gentlemen:

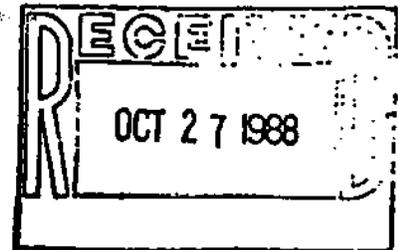
Pursuant to your request, I have summarized our clients' legal arguments relative to the conversion of the existing Stepping Stones Resort property to a second home seasonal condominium project. On September 14th, an application was submitted to the Zoning Board of Appeals on behalf of Mr. and Mrs. Stone for an interpretation of the applicable provisions of the Town of Lake George Zoning Ordinance to the effect that no variance would be required for such conversion since no subdivision of land or other change would take place that would require a variance or other zoning approval.

On the evening of October 2nd, the matter was heard by the Zoning Board of Appeals and during our oral presentation, the following points were made:

a. That the Stepping Stones property includes 3.76 plus or minus acres of land located on both sides of Lake Shore Drive in the Hamlet of Diamond Point. A 1.66 acre parcel included within the above is located on the westerly side of Lake Shore Drive and is substantially undeveloped. The second parcel containing 2.1 plus or minus acres with in excess of 200 feet of frontage on Lake George is improved by 14 one family cottages, a year-round house occupied by Mr. and Mrs. Stone and other improvements all of which are depicted on the survey map heretofore submitted to the Board.

b. The proposal is to change the form of ownership of the 14 cottages and the year-round residence from its existing form (wholly owned by the Stones) to the condominium form under which all of the buildings with the exception of the Stones' year-round home will be occupiable on only a seasonal basis from approximately May 1st until approximately October 30th of each year. No subdivision of land will take place, no new lots will be created, no new construction is anticipated and, in fact, the property will physically remain as it currently exists. The units will, of course, be offered to the general public for sale, however, deed restrictions filed in the County Clerk's Office and restrictions set forth in the offering plan filed with the New York Attorney General's office will contain the seasonal occupancy limitations as set forth above.

. . . . . R 059

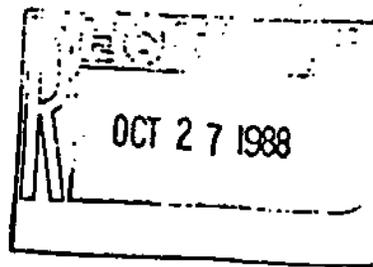


c. It is my clients' position that the conversion of the existing resort from its current form of ownership to the condominium form of ownership does not require approval by the Town of Lake George and more specifically does not require either a variance or site plan review. This matter was originally discussed with Town of Lake George Zoning Administrator Cliff Frasier who determined that both a variance and site plan review would be required for the conversion and it is for that reason that the request for interpretation was made to the Zoning Board of Appeals.

d. The power to enact and administer zoning ordinances was granted by the Legislature to towns under Section 261 of the Town Law. That statute provides, among other things, that "...the town board is empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...". That statute specifically does not grant to towns the authority to regulate changes in the form of ownership as anticipated by the Stones in the conversion of their resort to the second home condominium form of ownership. That is particularly true since the proposed change will not result in a change of use that would be otherwise prohibited by the Town of Lake George Zoning Ordinance. That is to say, that the use of the property both before and after the change of method of ownership as proposed by the Stones will conform to the use provisions of the Town of Lake George Zoning Ordinance for the zone in which the property is located.

e. A relatively recent series of cases decided by New York Courts support the argument set forth in the preceding paragraph, although that legal proposition has been recognized in other states for some years. North Fork Motel, Inc., vs Charles Grigonis, Jr., et al., originally decided by the Supreme Court in March of 1982 (46 NYS 2d 414) and later affirmed by the Appellate Division at 93 AD 2d 883 in 1983, was the first definitive case in New York on that subject. In that case, the Court held as follows:

. . . . .



Zoning ordinances cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than the form of ownership that is the proper concern and focus of zoning and planning regulations...(Citations omitted.) Nor does the mere change in the type of ownership result in the destruction of a valid existing non-conforming use.

Later, in March of 1985, the Appellate Division in FGL & L Property Corp. v. City of Rye et al, 108 A.D.2d 814, held that, "As a fundamental principal, zoning is concerned with the use of the land and not with the person who owns or occupies it. The Court in that case citing the North Fork case again reiterated the rule that it is use rather than the form of ownership that is the proper concern of zoning and planning regulations.

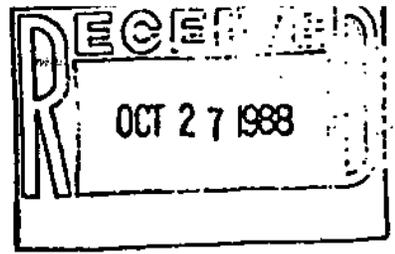
The FGL & L Property Corp. case was appealed from the Appellate Division to the Court of Appeals and was decided in October of 1985 at 66 N.Y.2d 111, affirmed the Appellate Division determination and is of major importance since it not only settles the law in New York in connection with the effect of zoning ordinances upon changes in the form of ownership as proposed by the Stones, but further contains a rather detailed discussion of the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it". While the FGL & L Property Corp. case related to a zoning ordinance enacted under the enabling provisions of the General City Law, it seems abundantly clear that the same rules apply to zoning ordinances enacted under both the Town and Village Laws.

For the reasons set forth above, it appears particularly clear that the conversion of the Stepping Stones Resort from its existing single form of ownership to the proposed second home residential condominium form of ownership is a matter that is not within the jurisdiction of the Town of Lake George under its zoning ordinance and accordingly, no variance, site plan review approval or other zoning approvals are required therefor.

. . . . .

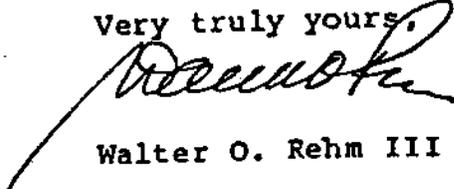
Zoning Board of Appeals

Page 4



As requested by the Board, a copy of this memorandum is being forwarded to Town of Lake George Zoning Attorney Mark Schachner and I would be more than happy to provide either the Board or Mr. Schachner with any additional information that may be required regarding this matter. It is my understanding that a determination will be made by the Zoning Board of Appeals at its November meeting.

Very truly yours,



Walter O. Rehm III

WOR:bar

cc: Mark Schachner, Esq.  
Mr. and Mrs. Donald E. Stone

R 062

1. HOW SUBSTANTIAL THE VARIATION IS IN RELATION TO THE REQUIREMENT: The variance is very substantial - the applicant constructed three (3) units without obtaining the proper permits.
2. THE EFFECT OF THE INCREASED POPULATION DENSITY THUS PRODUCED ON THE AVAILABLE GOVERNMENTAL FACILITIES: There are no increased effects on the governmental facilities; however, there is an increase in population concerning density because applicant added three (3) units.
3. WHETHER A SUBSTANTIAL CHANGE WILL BE PRODUCED IN THE CHARACTER OF THE NEIGHBORHOOD OR A SUBSTANTIAL DETRIMENT TO ADJOINING PROPERTIES CREATED: There was a substantial change produced in the neighborhood without anyone's knowledge.
4. WHETHER THE DIFFICULTY CAN BE OBIATED BY SOME METHOD, FEASIBLE FOR THE APPLICANT TO PURSUE, OTHER THAN A VARIANCE: The difficulty can be obviated if the Applicant had received the proper permits and used the addition for purposes other than accommodations.
5. WHETHER IN VIEW OF THE MANNER IN WHICH THE DIFFICULTY AROSE AND CONSIDERING ALL OF THE ABOVE FACTORS, THE INTERESTS OF JUSTICE WILL BE SERVED BY ALLOWING THE VARIANCE: The interest of justice will be served by not allowing the variance. The applicant should have applied for the proper permits and approvals.

The motion was subject to a roll call vote resulting in the following:

David Robinson	-	Yes
Joseph DeSantis	-	Yes
Daniel Strain	-	Yes
James Mathis	-	No
Chairman McGowan	-	Yes

Motion was carried.

Area Variance Application V26-88 was denied.



INTERPRETATION 12-88 - SUBMITTED BY DONALD & KATHRYN STONE  
DBA STEPPING STONES RESORT - CONVERSIONS - DECISION

David Robinson said, "The problem with this to me is that I believe that the Town, or any other governmental body should be in the position to look at a change of use, no matter what you say about the ownership, and that is what we are dealing with here, because this is generally changing the use of the property to a residential use, even if considered a seasonal, residential area. And that is where I have a problem. And I have to look at it from that point of view because I am changing the density of the area from a seasonal residential area and there would generally be ownership of the same parties.... I see it as a residential area. I agree that the ownership question is relevant here because of the fact that the land use itself is going to be the same. The ownership has changed so that it is no longer a seasonal cottage, but changing the owners to a condominium. I think it is both an ownership and use issue."

Daniel Strain said, "Doesn't a condominium call for a lot more footage, like 20,000 square feet?"

Chairman McGowan said, "It calls for 20,000 square feet. A motel requires 2,000 per square foot."

Daniel Strain said, "So, they haven't got the footage then and there isn't much we can do about that."

R 063

Chairman McGowan said, "It is certainly within our power but there is a great deal of difference. The way I interpret the law is if you were to build a new condominium from scratch, the requirement with the adjacent properties would be 20,000."

Daniel Strain said, "Well that is what they would be doing, like building new condominiums."

Chairman McGowan said, "They would be changing the structure of the outer shell. In the condominium, they own the interior. I believe they have a deed for the interior of the unit that they occupy. The land, in my understanding, stays in the same ownership. But, a new deed is issued just for the interior of each structure."

Cliff Frasier said, "That's basically it. The property is owned like by a corporation almost."

James Mathis said, "I had to agree with what Walter (Rehm, III, Esq.) said in terms of his argument about the changing in ownership. It is certainly not covered in Zoning Law. But, I think that when we look at the Lake George Zoning Law, I think it's different from the examples that were cited in Walter's presentation, because I think that when our Zoning Law was written, it was written with regard to the concern that the Town of Lake George had, and what could happen, around the lake in terms of conversion. And I think that when they said in Section 570C, that the conversions must conform to the provisions of the Ordinance, and the Ordinance stated 20,000 square feet per dwelling unit in this particular zoning area, I think that what could happen and the thing that would concern me is that by not requiring a variance for this, it would open the door for every motel in the area to say, well, I had a motel for a couple of years with the 2,000 square feet and now I will change it without a variance to a condominium. And it will have a very high density instead of 20,000 square feet per unit, we will have 2,000 give or take a little bit, square feet per unit. And I think that there could be a type of situation that was not intended when the Zoning Ordinance was written and re-written earlier this year. I would feel that again, because of the last sentence when it says said conversions must conform to provisions of the Ordinance. And the provisions of the Ordinance are very clear that this does require a variance in order to go through."

Joseph DeSantis said, "I agree with Jim. I think that if we don't interpret this as saying that it must conform to the provisions of the Ordinance, then what we are doing is opening up a loop hole. I could envision, and this may be far-fetched, but people building as a motel in a couple of years, just switching. If we say we have no jurisdiction over that, then it will happen again and again. And I think that their project may be for the betterment of the Town, but I would at least like the choice to review each one and come to that decision to say that yes in fact, it is a good project and will be a good idea and let's approve it. Other than that, I think that things could get out of hand."

James Mathis said, "I think that the density and usage of those 15 buildings will probably not vary under the new circumstance because apparently Stepping Stones was 90 - 95% occupied between May 1 and October 30 every year. And as a condominium, they will be occupied probably the same amount and maybe not as much because there may be times that the owners not only cannot be here, but they cannot rent it out during those times. But, I think that the point you made of being able to take each one as an individual conversion and keep that power in this body is an important thing."

David Robinson said, "The intent of this, as I read it, was to do just that - to control. Not every motel or units of cottage should be converted into condominiums or whatever. I find this to be a grey area with regard to the 20,000 square feet."

Chairman McGowan said, "There are 3 things here. One is the precedent that this will set. What isn't an issue here is the quality of the place that the Stepping Stones will be running or how well it will serve the community, or even the environmental impact. Those are not to me the

critical questions. The critical questions are, condominiums are designed by our law to have 20,000 square feet per unit. The Antlers was just built down the street. And though they have motel units and so on there, they conformed to the 20,000 plus. That's essentially all I have to say. We do need a motion on this and look at the question before us."

James Mathis made a motion that the Zoning Board of Appeals feels that a variance is in order on Interpretation 12-88, to allow a conversion from a tourist accommodation to a condominium development, as the Applicant is unable to conform with the 20,000 square feet per unit as required by the Town of Lake George Zoning Ordinance.

David Robinson seconded the motion.

Motion was carried.

A variance is required for Interpretation 12-88.

AREA VARIANCE APPLICATION V27-88 - SUBMITTED BY JOHN & SUZANNE LUSTYIK  
TO CONSTRUCT A 24'X24' GARAGE  
NEGATIVE/POSITIVE DECLARATION AND DECISION

Joseph DeSantis said, "This type of variance, at least the ones up to date, have never really bothered me. They have always seemed to be in line with the character of the neighborhood. I have never seen it as a major variance. I don't think he's asking a lot. I think that he is keeping in the context of the neighborhood and he has a nice looking place. It will continue to be a nice looking place and I just don't have a problem with it. I think he should go ahead with it."

David Robinson said, "I looked this over closely. I think he went through the trouble to get us all the facts and figures that we needed and his neighbors all sent positive letters of approval. Nothing else has been negative. And I think that the location of it would go nicely."

Chairman McGowan said, "I would add to that that if all the applications were as perfectly detailed as this one was, and the clarity, it would make the Board's job a whole lot easier. All the answers are legible and it is pretty simple stuff. I reviewed the site. The houses are well spaced. It preserves the continuity of the neighborhood. There is no jamming. In fact there is a practical difficulty."

Daniel Strain said, "I reviewed it and I think it is just fine."

James Mathis said, "The only problem I have with it... I mean, I agree with most of what you guys said in terms of what is being done. It is not bad. The only concern I would have is in previous and similar decisions that we have had to make concerning garages in front at different places. I think we need to look at this particular situation in the same light that we have as others. Now, in the time I have been here, we have had 2 cases with garages being asked for in front of the property and we disapproved 1 and approved 1. And in both cases, there were good reasons. One of the points in the presentation the other night, which I favor, is that it is similar to a building down the road, the property of the Steins. And the reason that the Stein's was acceptable was that there was a definite structural connection between the house and the garage. And because it was connected, it became approved because it was part of the house. And the garage could be in front as it was not a separate structure. I guess the question I would have is that if it is compared to the Stein's, then why is it not the type of thing that it should be required that it be connected to the house like the Stein's garage was, or placed behind the house on the south side of the pool, the property that they own, there are trees there now. And I certainly would hate to see trees go down, but you know I feel a garage could be placed there. I just bring it up because I feel it's necessary to be brought on the table in terms of the similarity of

# Town of Lake George

TOWN OFFICES

LAKE GEORGE, N.Y. 12845

November 9, 1988

Mr. & Mrs. Donald Stone  
P.O. Box 52  
Diamond Point, New York 12824

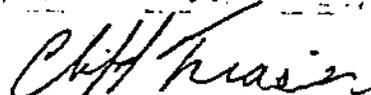
RE: INTERPRETATION #2-88 - CONVERSIONS

Dear Mr. & Mrs. Stone:

The Zoning Board of Appeals for the Town of Lake George, at their meeting held on November 3, 1988 determined that an Area Variance is required to convert the existing motel known as Stepping Stones Resort, into a condominium development, as the Applicant is unable to meet the 20,000 sq.ft. per unit, as required.

If you have any questions concerning the above decision, please do not hesitate to contact this office.

Sincerely,



Cliff Frasier  
Planning & Zoning  
Enforcement Officer

CF/f

cc: Zoning Board  
Town Board  
Town Clerk  
Attorney Walter O. Rehm, III  
file #2-88

R 066

Lake George . . . America's Family Playground!

**RESPONDENT'S**

**BRIEF**

58926

3-87-727

To Be Argued By: Mark J. Schachner  
Time Requested: 10 Minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

APPEAL NO. 58926

Respondent-Respondent.

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BRIEF OF  
RESPONDENT-RESPONDENT

---

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July 7, 1989

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PRELIMINARY STATEMENT

Donald and Kathryn Stone ("Appellants") initiated this proceeding and prosecute this appeal against the Town of Lake George Zoning Board of Appeals ("Respondent") ostensibly in protest of Respondent's regulation of the proposed change in ownership of Appellants' property. However, in resting solely on the notion that Respondent can not regulate ownership of property, Appellants merely beg the question actually involved in this matter. Appellants' existing property and business is currently classified as "tourist accommodations" pursuant to the Town of Lake George Zoning Ordinance. Appellants propose to undertake a conversion which would not only change the form of ownership (from one single entity owning the entire property to individual and separate condominium ownerships) of their property and business, but would also change its use from "tourist accommodations" to "single family dwellings".

In ruling in favor of Respondent in the Court below, the Hon. John G. Dier, J.S.C., implicitly found that Appellants' proposal constituted not only a change in ownership but a change in use as well. This finding may be characterized as a Finding of Fact which should not be disturbed. In any event, Respondent's determination that Appellants' proposal constitutes change of use as well as change of ownership is not arbitrary, capricious or without rational basis. In the

Preliminary Statement of their Brief, Appellants describe Respondent's determination as finding that their change of ownership required an area variance. . However, this characterization is incorrect. Respondent determined that the proposal entailed change of both ownership and use and that the new use required an area variance, and Supreme Court correctly upheld Respondent's determination.

QUESTION PRESENTED

Did Supreme Court properly uphold Respondent's Decision that Appellants' proposal constituted change in both ownership and use and therefore was subject to regulation under the Town of Lake George Zoning Ordinance?

PROPERTY FROM A PUBLIC ROAD TO BE RECLASSIFIED AS RESIDENTIAL

## COUNTERSTATEMENT OF FACTS

Appellants own a motel known as the Stepping Stones Resort on Lake Shore Drive (Route 9N) in the Hamlet of Diamond Point, Town of Lake George (R-41). Appellants own approximately 3.76 acres of land lying on both sides of Lake Shore Drive. One approximately 1.66 acre parcel is substantially undeveloped and is located on the westerly side of Lake Shore Drive. Their motel property is comprised of 14 single family cottage units and a year-round main house occupied by Appellants and is located on an approximately 2.1 acre parcel on the easterly side of Lake Shore Drive with approximately 200 feet of frontage on Lake George (R-40).

Appellants plan to change the current use of their property from a motel tourist accommodation to condominium, single family housing. On September 14, 1988, Appellants submitted an application to Respondent for an interpretation of the Town of Lake George Zoning Ordinance ("Ordinance"). Appellants sought a determination as to whether a variance would be required for the proposed change in the use of their property from its current use as tourist accommodations to single family residences which would be owned as condominiums (R-41). Their request was made after the determination by the Town Zoning Officer that a variance and site plan review would be required for their project.

Respondent reviewed Appellants' request. A public hearing was held on October 20, 1988 at which Appellants' attorney presented their argument that a variance should not be required (R-53-58). Appellants contend that their project is merely a change in ownership and not a change in use. On November 3, 1988, Respondent made the determination that a variance would be required (R-63-65) and its decision was filed with the Town Clerk on November 9, 1988 (R-42).

According to the Ordinance, Appellants' property is located in the Residential Commercial/High Density (RCH) zone and is currently classified as a tourist accommodation. Pursuant to the Ordinance, conversion of these cottages to single family residences would change their zoning use classification. The RCH zone permits single family dwellings provided that 20,000 square feet of land are available for each dwelling unit. Appellants' property does not contain sufficient acreage to allow for the 15 single family units proposed. Therefore, Respondent determined that Appellants would need an area variance for their project. Appellants have never requested this variance from Respondent, nor have they ever requested the site plan review which would also be required under the Ordinance.

On December 7, 1988, Appellants served Respondent with a Notice of Petition and Verified Petition purportedly in an Article 78 proceeding in which Appellants asked Supreme

Court to issue a declaratory judgment that Appellants' proposed change does not require a zoning variance or site plan review (R-25-43). The matter was heard in Warren County Supreme Court on January 6, 1989. The Hon. John G. Dier, J.S.C., ruled in favor of Respondent and the Order and Judgment dismissing the Petition in its entirety was signed and entered in the Office of the Warren County Clerk on January 9, 1989 (R-4). Appellants filed their Notice of Appeal on or about February 7, 1989 (R-3).

Appellants submit that the use of the property would remain the same, because the proposed use is "a second home seasonal condominium development" (R-41). However, Appellants themselves characterized their proposal as "conver[sion of] the existing Stepping Stones Resort from its present transient resort use" (R-41) (emphasis supplied). Therefore, although certain similarities exist between the current and proposed uses (such as the fact that both would be of a somewhat seasonal nature), it is clear that the uses are not identical. "Transient resort use" entails short-term rental to out-of-town visitors who frequently use their units for lodging only and seek meals, recreation and other amenities at other commercial establishments. Therefore, Appellants' current transient resort use clearly falls within the Ordinance definition of "tourist accommodation." In contrast, single family condominium owners (even "second home seasonal condominium" owners)

would occupy the units as full-time, citizen residents, at least during the season of occupation, as befits classification as "single family dwellings". In fact, the definition of "single family dwelling" contained in the Ordinance specifically notes that it describes a particular type of use "whether seasonal or year round."

I. APPELLANTS HAVE NOT EXHAUSTED THEIR  
ADMINISTRATIVE REMEDIES AND ARE NOT  
AGGRIEVED

Appellants initiated this action by service of a document which purports to be an Article 78 Petition. (R-27-34). However, in their request for relief, Appellants asked the Court below for a declaratory judgment regarding Respondent's interpretation of the provisions of the Ordinance. (R-32). First, Appellants' pleadings are procedurally defective because declaratory judgment is not appropriately sought in an Article 78 proceeding. Phillips v. Oriskany, 57 AD2d 110 (4th Dept. 1977). More importantly, however, Appellants' claim is not ripe for adjudication because they are not aggrieved by Respondent's decision and have failed to exhaust their administrative remedies. People ex rel. Broadway & Ninety-Sixth St. Realty Co. v. Walsh, 203 AD 463 (1st Dept. 1922).

Appellants obviously disagree with Respondent's decision. However, Respondent has not conclusively determined that Appellants cannot undertake their project; it has merely determined that Appellants cannot do so without a variance (R-42). Until and unless Appellants seek a variance from Respondent and such variance is denied, Appellants have not exhausted their administrative remedies and are not truly aggrieved. Respondent has merely decided that Appellants' proposal constitutes a change in use under

the Ordinance which requires an area variance. Respondent has not in any fashion considered or ruled upon the issue of whether or not Appellants are entitled to a variance. In fact, as no variance application has been submitted to Respondent for consideration, it would have been imprudent and inappropriate for Respondent to have expressed any opinion with respect to the variance issue.

Therefore, it is incumbent upon Appellants to submit a variance application to Respondent prior to any claim of harm to Appellants. Unless such a variance application is denied, Appellants are not harmed or aggrieved, as no final decision prohibiting their project has been issued. The goal which Appellants seek, conversion of their buildings, has not been finally denied and they have failed to exhaust their administrative remedies toward achieving their goal.

II. THE FACTUAL DETERMINATION IMPLICITLY  
MADE BY THE COURT BELOW CANNOT BE DISTURBED

Respondent is the Zoning Board of Appeals of the Town of Lake George and, as such, its decisions are entitled to great weight and substantial deference by courts. In addition, the narrow point on which this matter turns may be characterized as a factual determination of both Respondent and Supreme Court and is therefore entitled to even greater deference.

The narrow issue for adjudication in this matter is whether Appellants' proposal constitutes merely a change in ownership or also a change in use. Respondent reviewed Appellants' proposal and their contention that it constitutes only a change in ownership (R-53-58, 63-65). Mindful of the fact that the Ordinance separately defines "tourist accommodation" and "single family dwelling", Respondent made a finding which can be labeled as factual that the proposal also constitutes a change in use.

Although Supreme Court did not issue a written opinion in this matter, the same factual finding is implicit in its dismissal of the Petition. It appears that Supreme Court adopted Respondent's view and implicitly agreed with the factual finding that Appellants' proposal constitutes changes in both ownership and use. Therefore, this Court should not disturb this factual finding as it is clearly

based on the evidence in the Record for consideration by  
both Respondent and the Court below.

III. RESPONDENT HAS ACTED WITHIN THE  
JURISDICTION OF TOWN LAW AND THE  
LAKE GEORGE ZONING ORDINANCE

Although it is not clear in Appellants' hybrid petition what sort of relief under Article 78 they are requesting, Respondent meets all possible standards of review as its determination was rationally and correctly based upon the provisions of the Ordinance. Under the Ordinance, the use of Appellants' property would change from tourist accommodations to single family dwellings regardless of how the property is to be owned.

Section 5.70(C) of the Ordinance, entitled "Conversion of Certain Existing Uses", expressly regulates proposed conversions of tourist accommodations to single family dwellings. This provision explicitly states that "tourist accommodations...shall not be allowed to be converted...to individual single family dwelling units...except through site plan review. Said conversions, when made, must conform to the provisions of this Ordinance." Therefore, the Town of Lake George has expressly determined that such proposed conversions do constitute changes in use and all provisions of the Ordinance, including area restrictions, must apply.

The Ordinance specifically states that the Residential Commercial/High Density District requires 20,000 square feet of land per single family dwelling unit. Here, Appellants are requesting to convert 15 buildings from their present

pre-existing use to single family dwellings. As their property contains only 3.6 acres, they are at best entitled to 8 units under the current zoning. Thus Respondent was correct in determining that a variance would be required under the Ordinance.

The ability of the Town to control the use of property is set forth in the zoning enabling statute. Town Law §262. The act "[c]learly vest[s] in the legislative bodies of [towns]...authority to establish residential districts, to differentiate between residential districts on the basis of size or type of building, or extent of occupancy, and to protect such districts by excluding commerce or industry, or both." Robert J. Anderson, New York Zoning Law and Practice (3d ed. 1984) §9.18. In addition, towns have the authority to regulate and restrict size of buildings, size of lots, coverage of lots by structures and location and use of buildings. Town Law §261.

Once Respondent has determined that a change of use would occur, it is required to enforce the area restriction as provided in the Ordinance. In this case, the project constitutes conversion to a use for which Appellants lack the required land area. Therefore, they cannot lawfully proceed without a variance.

IV. THIS PROJECT IS A CHANGE  
OF USE AND NOT JUST A  
CHANGE OF OWNERSHIP

Appellants are correct that a town cannot regulate solely the type of ownership of property. However, the change of ownership in this project is accompanied by change of use of the property.

In Catharn Realty Corp. v. Town of Southampton, 97 AD2d 531 (2d Dept. 1983), affirmed, 62 NY2d 831 (1984), the Court found that an amendment to Southampton's zoning ordinance was not invalid merely because it attempted to regulate cooperative ownership of property. The plaintiff in the action was the owner of a seasonal motel who sought to convert its motel from corporate ownership to a cooperative form of ownership. The Town of Southampton amended its zoning ordinance to prohibit conversions to residential condominiums and residential cooperatives in certain zoning districts. The amendment required a special exception to be granted by the Zoning Board of Appeals for any conversion in all the remaining districts. The plaintiff claimed that the amendment should be invalid as the Secretary of State regulates cooperatives and condominiums. Id. The Court determined that since the amendment defined residential cooperatives as "[a] multiple dwelling in which residents have an ownership interest in the entity which owns the building(s) and, in addition, a lease or occupancy agreement

which entitles the residents to occupy a particular dwelling unit within the building", it was clear that the town board was regulating the type of use of the property and not merely the form of ownership, thus the amendment was not invalid. Id. at 532. The Court concluded that if the use of a building will also be changed when the form of ownership of the building changes, then the town can regulate that change of use. Id. at 532

In this case, Appellants argue that the new owners will be either coming to use the units themselves or renting the units out to other visitors, and that the use itself will remain the same. However, contrary to Appellants' position, the "use" is changing from tourist accommodations to single family dwellings. No longer would the Stepping Stones Resort be a transient tourist accommodation where units are rented out as part of a business; rather, the resort would become second homes to the new owners who would rent out the property only when and if they so chose.

In addition, Appellants are neglecting to consider the different status that new owners would acquire as single family dwelling residents. The new owners could be afforded the status of legal residents of the Town of Lake George and thus would acquire the rights and privileges of residents, placing a greater burden on Town facilities and possibly adversely affecting the public health and welfare of the

community. Legal resident status certainly could not be conferred upon on the tourist visitors who currently choose the Stepping Stones Resort (or any of the other similar tourist accommodations which line the shore of Lake George) as lodging for their summer vacations.

Appellants cite case authority for the proposition that zoning laws cannot lawfully regulate ownership of property. While this assertion is not incorrect, Appellants seem to rest their argument on the notion that the use of a particular property cannot possibly be changing unless the property is undergoing some type of physical disturbance or modification. However, this notion is blatantly incorrect. For example, a single family dwelling could be converted into any number of commercial uses (such as professional offices, including law offices or real estate offices) without physically modifying the property or the structure in any way. Similarly, various types of commercial and industrial uses can easily occupy identical premises and the use of a particular building could easily be converted from any of a number of non-intrusive permitted uses to many noisy, noxious or hazardous non-permitted uses with no physical modification of the premises. In any of these examples, it would clearly be perfectly lawful and appropriate for a municipal zoning ordinance to distinguish among the uses and allow some while prohibiting others.

The two cases cited in the petition, North Fork Motel, Inc. v. Charles Grigonis, Jr., et al., 46 NYS2d 414, affirmed, 93 AD2d 883 (2d Dept. 1983), and FGL&L Property Corp. v. City of Rye et al., 108 AD2d 814, affirmed, 66 NY2d 111 (1985), do stand for the proposition that zoning can regulate use and not ownership, but only for that proposition. Neither case considered the situation involving the conversion of a transient rental use to a seasonal ownership use. In fact, in the North Fork Motel case, the Court specifically stated that the change of ownership did not violate the Town of Southold Zoning Ordinance "provided the property's present use as a motel remains unchanged" (emphasis supplied). North Fork Motel, 93 AD2d at 883. In their brief, Appellants set forth that portion of the North Fork Motel decision which states that zoning regulates use rather than ownership, but conveniently fail to refer to the language of the decision which requires the property's use as a motel to remain unchanged. The City of Rye case dealt not with a motel conversation, but with a zoning provision which was interpreted as essentially requiring the condominium form of ownership. The Town of Lake George is neither requiring nor prohibiting any particular form of ownership and the cases do not state that a municipality cannot regulate conversion from a commercial rental operation to a residential use. In fact, the North Fork Motel case clearly supports Respondent's decision in this case.

Contrary to Appellants' assertion, Respondent does not seek in any way whatsoever to exclude the condominium form of ownership. In fact, the Town of Lake George Zoning Ordinance neither condones or encourages nor prohibits condominiums or any other form of ownership, as is appropriate in view of the agreed upon concept that zoning regulates use and not ownership. However, the Ordinance does differentiate between tourist accommodations and single family dwellings, a distinction which is rational and not without basis. Therefore, Appellants' semantic argument regarding Respondent's supposed (but non-existent) use of terms such as "owner" or "tenant" is specious. It is true, as Appellants state, that the Ordinance is "silent" as to any definition of condominiums which would indicate per se that their establishment constitutes a change of use. Respondent submits that any such per se rule would do just what Appellants complain of: namely, regulate ownership rather than use. Instead, the Ordinance properly distinguishes among and regulates various uses.

If Respondent and/or the Court were to adopt Appellants' view, then all of the scores of tourist accommodations which line the shores of Lake George could be converted into single family dwellings without the ability of municipalities to review these conversions. This would result in a substantial influx of additional municipal residents without conformance with the density restrictions

that are reasonably and rationally set forth in municipal zoning ordinances. Such a result would clearly undermine the legitimate goals and intent of this and other similar Ordinances.

CONCLUSION

Respondent's interpretation of the Town of Lake George Zoning Ordinance has a rational basis and is not arbitrary, capricious or illegal, nor does the Ordinance regulate mere ownership of property. Respondent therefore respectfully requests that the Supreme Court Decision be affirmed and the Petition dismissed.

Dated: July 7, 1989

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N:10STN-BR,9

**REPLY**

**BRIEF**

58926

3-89-934

To be Argued By: John J. Ray  
Time Requested: 10 minutes

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

---

DONALD E. STONE and I. KATHRYN STONE,

Petitioners-Appellants.

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

GEORGE MCGOWAN, JAMES MATHIS,  
DANIEL STRAIN, JOSEPH DeSANTIS,  
and DAVID ROBINSON, Constituting  
the Town of Lake George Zoning  
Board of Appeals,

Respondents-Respondents.

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PETITIONERS-APPELLANTS' REPLY BRIEF

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POINT I

APPELLANTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AND ARE, IN FACT, AGGRIEVED.

It is respectfully submitted that a review of the record indicates that the Appellants have, in fact, exhausted their administrative remedies with respect to the relief requested and furthermore have been aggrieved by the decision of the Zoning Board of Appeals. At the outset, it should be noted that in the petition a determination was sought that would annul and declare as incorrect the determination of the Zoning Board of Appeals which held that the change in ownership in question did, in fact, require a zoning variance. Although this was couched in terms of a declaratory judgment, there is ample case law supporting the power of the court to grant relief of the nature requested. In the matter of Strippoli v. Bickal, 21 AD2d 365 (4th Dept. 1964), aff'd 16 NY 2d 653, the court, when faced with a petition in which it was difficult to ascertain what form of relief was requested, held that the liberal provisions of the Civil Practice Law and Rules mandated treating the proceeding as being in the nature of an Article 78 proceeding. It is respectfully submitted that a review of the relief requested in the petition in this proceeding would clearly indicate that the nature of the relief requested was consistent with relief that can rightfully be granted in an Article 78 proceeding.

With respect to Respondents' argument that Appellants are not aggrieved by Respondents' decision, it is Appellants' position that the proposed change in ownership does not require a variance, not that a variance has been unjustly denied. The actions of the Respondent, Zoning Board of Appeals, in determining that the proposed change in ownership requires an area variance, represents a final decision on that matter which cannot be questioned except in the context of an Article 78 proceeding. Were Appellants to apply for a zoning variance, the decision of the Respondents on said variance application could only be appealed with respect to whether or not the variance application was properly granted or denied. A determination of whether or not the variance was, in fact, required, could not be an issue. In light of this, it is respectfully submitted that the Appellants have exhausted their administrative remedies with respect to the question presented to Respondents and that the decision of the Respondents has left the Appellants truly aggrieved.

#### POINT II

THE DETERMINATION MADE BY THE COURT BELOW IS NOT IMPLICITLY FACTUAL IN NATURE AND IS ENTITLED TO NEITHER GREAT WEIGHT NOR SUBSTANTIAL DEFERENCE UPON REVIEW.

As indicated in Respondents' brief, the narrow issue for adjudication in this matter is whether Appellants' proposal

constitutes simply a change in ownership or also a change in use. It is respectfully submitted that a reading of the record contained in the appendix to the brief of Respondents, particularly the minutes of the Zoning Board of Appeals contained on page R-64, clearly indicates that the Board did not make a finding of fact that there was a change in use. Rather, the Boards' decision was based on a reluctance to concede jurisdiction and review of projects of this nature. The comments of Board member, James Mathis, again contained on page R-64 of the record, indicate his thoughts that the usage of the buildings would probably not vary under the new circumstances, but he went on to indicate that keeping power in the Zoning Board of Appeals was an important factor. The comments of the other Board members also support the notion that their decision was not based on a factual finding of change of use but rather was based upon concerns that the Board would have no control over changes of ownership as proposed by the Appellants. As the record is devoid of evidence that would support a finding of a change in use, it is respectfully submitted that the determination of the Zoning Board of Appeals was in error and should have been declared as such by the court below.

### POINT III

RESPONDENTS' JURISDICTION WAS PREDICATED ON A FINDING OF

**A CHANGE OF USE WHICH IS NOT SUPPORTED BY THE RECORD.**

Contrary to the assertions put forward in Respondents' brief, the determination of Respondents was not rationally and correctly based upon the provisions of the Lake George Zoning Ordinance, but was instead based on an erroneous interpretation of the Ordinance. The interpretation of the Board (R-42) makes no mention of a change of use on this parcel, but simply indicates that an area variance will be required. A further reading of the record, particularly the minutes of the meetings of the Zoning Board of Appeals, clearly indicates that a finding of change of use was not the reason underlying the Board members' decision. Instead, the decision was based upon their rather vague feelings that such a conversion, as proposed, was not to be allowed without their retention of some form of control over this conversion and what they viewed as a potential onslaught of such conversions in the future. Absent the specific findings of a change of use, the Respondents lacked jurisdiction under either the town law or the Lake George Zoning Ordinance to justify the interpretation that was put forward.

**CONCLUSION**

The Supreme Court abused its discretion in denying the petition of Petitioners-Appellants seeking an order declaring as error the determination by the Lake George Zoning Board of

Appeals that the change of ownership of the "Stepping Stones Resort", as proposed, required an area variance, thus the order denying the petition should be reversed.

**END  
OF  
CASE**