

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY
Application of

HARRY WHALEN,
HALEY WHALEN,
CHRISTOPHER SULE and
CAFFE DEI SOGNI, LLC

Petitioners-Plaintiffs,

- against -

CITY OF SCHENECTADY
BOARD OF ZONING APPEALS,
CITY OF SCHENECTADY ZONING OFFICER
and ELECTRIC ERIE DEVELOPMENT, LLC, and

Respondents-Defendants,

For a determination pursuant to CPLR Article 78 and
Declaratory Judgment

**PETITION AND
COMPLAINT**

Index No.

Date Filed:

Petitioners-Plaintiffs, Harry Whalen and Haley Whalen as and for a Petition and
Complaint herein, by their attorneys, Bartlett, Pontiff, Stewart & Rhodes, P.C., state as follows:

1. Petitioner-Plaintiffs Harry Whalen and Haley Whalen are residents of the City of
 Schenectady, residing at and owning the 18 North Church Street in the City of
 Schenectady, County of Schenectady.
2. Petitioner-Plaintiff Caffè Dei Sogni, LLC is a domestic limited liability duly organized
 under the laws of the State of New York.
3. Caffè Dei Sogni, LLC owns two parcels of real property in the City of Schenectady,

1
BARTLETT, PONTIFF, STEWART & RHODES, P.C.
ATTORNEYS AT LAW - ONE WASHINGTON STREET, P.O. BOX 2168, GLENS FALLS, N.Y. 12801-2168

County of Schenectady, State of New York, located at 235-237 Union Street and 301 Erie Boulevard, respectively.

4. Petitioner-Plaintiff Christopher Sule resides at 234 Green Street, City of Schenectady, County of Schenectady.
5. At all times herein mentioned, Respondent City of Schenectady Board of Zoning Appeals (hereinafter "Respondent BZA" or "BZA") is a municipal body formed pursuant to the laws of New York State and is responsible for, among other things, making determinations upon variance applications, appeals of determinations made by the City of Schenectady Zoning Officer and other matters referred to it.
6. Upon information and belief, the City of Schenectady Zoning Officer is an officer of the City of Schenectady who is responsible for, among other things, making determinations and interpretations related to the City of Schenectady Zoning Code.
7. Upon information and belief, Respondent Electric Erie Development, LLC ("EED") is a limited liability company formed and existing under the laws of the State of New York.

AS AND FOR A FIRST SEPARATE AND DISTINCT CAUSE OF ACTION

8. This cause of action is brought pursuant to Article 78 of the Civil Practice Law and Rules for review of a determination of the Respondent BZA denying the Petitioners' appeal of a certain determination of the Respondent Code Enforcement Officer.
9. Upon information and belief, EED is the owner of a parcel of real property located at 1100 Erie Boulevard in the City of Schenectady, Schenectady County, New York ("Subject Property").

10. The Subject Property is located in the C-4 Downtown Mixed Use ("C-4 Downtown") zoning district of the City of Schenectady.
11. Upon information and belief, EED intends to use the Subject Property for, among other things, a Starbucks restaurant featuring a drive-through window where customers can purchase food and beverage.
12. Upon information and belief, EED acquired title to the Subject Property on or about August 23, 2019.
13. Upon information and belief, the Subject Property is located in the C-4 Downtown zoning district of the City of Schenectady.
14. Petitioners-Plaintiffs Harry and Haley WHalen's residence is located just four tenths (.4) miles from the Subject Property.
15. Caffè Dei Sogni, LLC's property, located at 235-237 Union Street, is located just two tenths (.2) of a mile from the Subject Property.
16. Caffè Dei Sogni, LLC's property, located at 301 Erie Boulevard in the City of Schenectady, is located just two tenths (.2) of a mile from the Subject Property and is located in the C-4 Downtown zoning district.
17. Petitioner-Plaintiff Christopher Sule's residence is located just two tenths (.2) miles from the Subject Property.
18. Upon information and belief, in 2021 and 2023, the Zoning Officer determined that the proposed use of the property, which included a drive-through window, constituted a "drive-in establishment" as that term is defined in the Schenectady City Code.

19. City of Schenectady Code § 264-2(b) defines “drive-in establishment” as:
- [a]n establishment which, by design of physical facilities or by service or packaging procedures, encourages or permits customers in vehicles to receive a service or obtain a product.
20. A “drive-in establishment” is not a permitted use in the C-4 Downtown zoning district pursuant to City Code § 264-15 and Schedule B of City Code Chapter 264.
21. Upon information and belief, when the Zoning Officer determined, in both 2021 and 2023, that a restaurant with a drive-through window constituted a “drive-in establishment” under the City Code, EED did not appeal that determination.
22. The City Code requires any appeal from a determination of the Zoning Officer be made in compliance with Article 5-A of the General City Law. City Code § 264-117.
23. General City Law § 81-a (Board of appeals procedure) provides:
- [a]n appeal shall be taken within sixty days** after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken. (emphasis added).
24. Upon information and belief, rather than appeal the Zoning Officer’s determination, EED instead applied for a use variances in both 2021 and 2023, which applications were denied.
25. By virtue of the foregoing, the Zoning Officer’s determination that a restaurant featuring a drive-through window constitutes a “drive-in establishment” became final and binding upon EED.

26. Upon information and belief, in or about 2025, EED requested an interpretation of the City Zoning Code related to its proposed use of the property as a restaurant with a drive-through window, despite having already received such interpretation twice before, in 2021 and 2023.
27. Upon information and belief, on or about April 16, 2025, the Zoning Officer once again determined that the proposed use was a “drive-in establishment” and therefore not permitted in the C-4 Downtown district absent a use variance (“2025 determination”).
28. Upon information and belief, this determination was identical to those rendered in 2021 and 2023, which were never appealed.
29. Upon information and belief, EED appealed the 2025 determination to the BZA (“2025 appeal”).
30. This appeal is a nullity as the time to appeal this interpretation was within 60 days of the 2021 determination or, at latest, within 60 days of the 2023 determination.
31. The 2025 appeal should have been denied as untimely under General City Law § 81-a.
32. Upon information and belief, the BZA heard EED’s appeal at its May 14, 2025 meeting. A copy of the meeting minutes is attached as **Exhibit 1**.
33. Upon information and belief, the public notice posted by the BZA failed to apprise nearby property owners of the substance of EED’s application such that they would be aware of the implications of the BZA’s review of the 2025 appeal. A copy of the meeting agenda is attached as **Exhibit 2**, and states only as follows:

A. Electric Erie Development, LLC seeks an interpretation for 1100 Erie Blvd (tax parcel # 39.64-1-7) located in the C-4 Downtown district to appeal the

administrative official's interpretation to the requirements of §264-2 and §264-15 (Schedule B Use Regulations for Nonresidential Districts) of the City of Schenectady's Zoning Ordinance.

34. The notice was deficient in that, among other things, it failed to notify the public of what specific provisions of City Code § 264-2, which contains numerous definitions of terms used in the Zoning Code, were at issue.
35. In considering EED's appeal, the BZA considered the definition of "restaurant - fast food" contained in City Code § 264-2(b), which states as follows:
- [a] business establishment which sells food, frozen deserts [*sic*] and/or beverages selected by patrons from a limited line of prepared specialty items. Items are ready to consume within the restaurant building or on the premises in designated areas. Items may also be carry-out and consumed off the premises
36. Thus, the City Code contemplates two ways patrons of a fast food restaurant may purchase and consume products, to wit, "within the restaurant building or on the premises in designated areas," or "carry-out."
37. To "carry-out" a product, a patron must necessarily first enter the restaurant.
38. Neither drive-through windows nor "customers in vehicles" are mentioned anywhere in the definition of "Restaurant - Fast Food."
39. Rather, the only definition in the City Code which contemplates a drive through window, or a restaurant serving customers in vehicles, is that of "drive-in establishment," which, again, is defined as:

An establishment which, by design of physical facilities or by service or packaging procedures, **encourages or permits customers in vehicles** to receive a service or obtain a product. (emphasis added).

40. Upon information and belief, the proposed use of the property is a Starbucks restaurant which will encourage or permit customers and vehicles to obtain a product while in their vehicles.
41. Upon information and belief, the design or physical facilities will include a drive-through lane or lanes and drive-through window or windows to encourage and permit customers to obtain products without exiting their vehicles or entering the restaurant.
42. Only the “drive-in establishment” definition could be rationally applied to the proposed use.
43. Despite the foregoing, on or about May 14, 2025 the BZA reversed the Zoning Officer’s April 16, 2025 determination, and determined that the proposed drive-through restaurant was a “fast food restaurant” rather than a “drive-in establishment.” A copy of the BZA’s determination, which was filed with the Schenectady City Clerk on June 17, 2025, is attached as **Exhibit 3**.
44. The BZA’s determination ignores the plain language of the definitions at issue, and constitutes an error of law.
45. The BZA’s determination as set forth above was arbitrary, capricious and constituted an abuse of discretion; lacked a rational basis; was made in violation of lawful procedure; constituted an error of law; and was made upon a lack of substantial evidence.

AS AND FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

46. Petitioners repeat and reallege each and every allegation hereinabove set forth as though each were fully set forth hereat.

47. This cause of action is brought pursuant to both Article 78 and Section 3001 of the Civil Practice Law and Rules seeking a declaratory judgment that EED's proposed use of the Subject Property as a drive-through restaurant is prohibited under the City Code.
48. As set forth above, the Respondent, EED, proposes to use the Subject Property as a restaurant which features a drive-through window to serve customers in vehicles, which is prohibited in the C-4 Downtown zoning district absent a use variance.
49. Based upon the foregoing, the Petitioners-Plaintiffs request judgment declaring that the proposed use is a "drive-in establishment" under the Schenectady City Code; and that, pursuant to Schenectady City Code § 264-2 and 264-15, the proposed use of the Subject Property by EED is not permitted in the C-4 Downtown zone of the City of Schenectady absent a use variance; and permanently enjoining and restraining the use of the Subject Property as a drive-in establishment absent a use variance.

WHEREFORE, Petitioners-Plaintiffs demand judgment as follows:

- A. On Petitioners' First Cause of Action, annulling and vacating the determination by the Respondent BZA which determined that the proposed use is a permitted use in the C-4 Downtown zone of the City of Schenectady;
- B. On Petitioners' Second Cause of Action, declaring that the proposed use is a drive-in establishment under the Schenectady City Code; and that the proposed use of the Subject Property by EED is not permitted in the C-4 Downtown zone of the City of Schenectady absent a use variance pursuant

to City Code § 264-15; and permanently enjoining and restraining the use of the Subject Property as a drive-in establishment absent a use variance;

- C. On all causes of action, the costs and disbursements of this proceeding and such other, further or different relief as the Court shall deem just and proper.

Dated: July 14, 2025

BARTLETT, PONTIFF, STEWART &
RHODES, P.C.

By: 

John D. Wright, Esq.
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VERIFICATION

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

USHA D DINDIAL
Notary Public - State of New York
No. 01DI0028048
Qualified in Schenectady County
My Commission Expires 08/19/2023

HARRY WHALEN, being sworn says: I am a Petitioner in the action herein; I have read the annexed Petition know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

HARRY WHALEN

Sworn to before me this
14th day of July, 2025

Uma Dindial
Notary Public