

# Mounted Hydrovac Equipment/Zoning: Supreme Court of the State of New York (Appellate Division) Addresses Request for Permitted Use



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The Supreme Court of the State of New York Appellate Division (Second Judicial Department) (“Court”) addressed in a January 20th Order a zoning issue associated with the storage of vehicles with mounted hydrovac equipment. See *In the Matter of WCC Tank Technology, Inc., et al., v. Zoning Board of Appeals of the Town of Newburgh, New York, et al.* 2019-00563.

The zoning at issue involved the Town of Newburgh, New York (“Town”).

2102 Partners, LLC (“2102 Partners”), owns property in the Town. It operates a fuel tank lining business on the property. The property is zoned Agricultural Residence.

The Zoning Board of Appeals (“Board”) of the Town denied 2102 Partners’ application for an interpretation that the indoor parking and storage of vehicles with mounted hydrovac equipment is a permitted use pursuant to a 1982 use variance. In the alternative, it requested a use variance.

A prior owner had applied for a use variance in 1982 to operate a “fuel tank lining business” on the property. The Board granted a use variance to permit the property to be utilized as a fuel tank lining business subject to certain terms and conditions (1982 use variance).

The Town Code Compliance Department received complaints from residents regarding 2102 Partners’ activities. The company then requested an interpretation from the Board as to whether certain uses and/or activities were permitted under the terms of the 1982 use variance.

The Board subsequently found that the 1982 use variance did not authorize the use of the premises for or in support of a hydro-excavation business. As a result, it held that the outdoor parking of freightliner trucks on which hydrovac equipment was mounted was not appropriate in this zoning district.

The Court held that the Board’s determination that the indoor parking and storage of vehicles with mounted hydrovac equipment was not permitted under the 1982 use variance was not illegal, arbitrary and capricious, or an abuse of discretion. It stated:

A use for which a use variance has been granted is a conforming use and, as a result, no further use variance is required for its expansion, unlike a use that is permitted to continue only by virtue of its prior lawful, nonconforming status.

However, it noted that this does not leave the development of the property unrestrained. The property remains subject to the terms of the use variance.

The 1982 use variance is described by the Court as “very specific” and “limited to the operation of a fuel tank lining business only.” Further, it was held not to matter whether 2102 Partners indicated that the hydrovac vehicles would be used in connection with the fuel tank lining business. The company is stated to have indicated at a public hearing that they were proposing to use the vehicles in connection with a different business (i.e., a hydro-excavation business). This business was not permitted under the terms of the 1982 use variance. Therefore, the Board’s determination was deemed to have a rational basis.

The Court also upheld the Board’s determination to deny 2102 Partners’ application for a use variance. It noted that to qualify for a use variance premised upon unnecessary hardship there must be a showing that:

1. the property cannot yield a reasonable return if used only for permitted purposes as currently zoned,
2. the hardship resulted from unique characteristics of the property,
3. the proposed use would not alter the character of the neighborhood, and
4. the alleged hardship was not self-created

The Court held that 2102 Partners failed to show that it could not yield a reasonable rate of return absent the requested use variance.

A copy of the Order can be downloaded [here](#).