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July 26, 2017

Honorable Sal Carrera, Chairman
Town of Ossining Zoning Board of Appeals
John-Paul Rodrigues Operation Center
Route 9A
P.O. Box 1166
Ossining, New York 10562

Attention: Sandy Anelli, Secretary

Re: Variance Application of William Butler
(Hillcrest Drive)

Dear Chairman Carrera & Members of the Zoning Board:

We are the attorneys for William Butler, whose application for a variance from the strictures of § 200-25.1(a) of the zoning ordinance of the Town of Ossining (street frontage) is presently before your Board. The purpose of this letter is to establish within the parameters of Town Law, § 267-b (3)(b) that the benefit to the applicant, if the variance should be granted, outweighs any (perceived) detriment to the health, welfare and safety of the neighborhood or community.

We delimit our presentation to the relation of specific facts and circumstances of the project to the respective legal factors as set forth in the pertinent statute:

In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Town Law § 267-b (3)(b)(1-5)).¹

The history of this subdivision project, from its genesis to its current configuration status as it appears before this Board, the changes effected, its physical and engineering and planning specifics and its proceedings before the Town's Planning Board, wherein a negative declaration has been voted, will all be presented and evidenced in a presentation by David J. Sessions, RLA, AICP, a partner in Kellard Sessions Consulting, P.C. It was Mr. Sessions who, subsequent to the applicant's original appearance before your Board, became the project's expert professional. He subsequently altered the original project and orchestrated the application through the Planning Board.²

This two lot subdivision is on your Board's agenda pursuant to a determination of the Town's Building Inspector that, as constituted, the project fails to comply with Town Code § 200-25.1(a) (street frontage) which requires "fifty (50) feet of frontage on a street or highway which has been suitably improved ... or unless a performance guaranty has been posted...." As the plan before this Board has only forty (40) feet of frontage off of Hillcrest Drive, a ten (10) foot variance is needed.³

In that regard, it is respectfully submitted that whether one considers each of the five (5) factors individually or analyzes and balances those factors together, an identical conclusion should result: the inuring benefit to this applicant inuring from a grant of this variance outweighs any purported detriment to the community's or neighborhood's health, safety and welfare. Indeed, there is on this no articulable evidence of any "detriment" whatsoever.

When examining the actual evidence which Mr. Sessions has presented in documentary form, highlighted during the site walks, and which he shall present in detail at the public hearing, and relating the same to the five (5) factors, supra, which cumulatively must be balanced, this Board should be aware of certain undisputed facts: (1) the two (2) lots to be created will be by far the

¹ The courts are clear: the standard factors set forth in Town Law § 267-b (3)(b) alone constitute the parameters of a zoning board's deliberation. (Hampshire Mgt. Co. v. Nadel, 241 A.D.2d 496; Mimassi v. Town of Whitestown, Zoning Board of Appeals, 124 A.D.3d 1329).

² Mr. Sessions will also conduct two site visits to the property for Board Members, during the week of July 24, 2017.

³ As is evident from Kellard Sessions aerial plan, the project's eastern boundary, Route 100, would seemingly satisfy the Town's frontage requirement. However, that "interpretation" is not before the Board. Nevertheless, the existence of this frontage should be considered by the Board in the totality of the circumstances of the application, e.g., when considering the self-created factor. As is apparent from Exhibit B, the NYS DOT determined not to permit Route 100 to access the project due to the presence of a safer 'secondary' road, i.e., Hillcrest Drive.

largest of all developed lots in this 3/4 acre zoned neighborhood; (2) the existing and projected residences are located so as to preclude any further development; (3) the location of the proposed residence and its associated septic system on lot 2 were “relocated” to move the residence further away from its neighbor to the south and to preserve certain trees; (4) the proposed forty (40) foot frontage/access already services other neighborhood residences/lots; and (5) pivotally, the entire project, including the access road (improved Hillcrest Drive), has received a negative declaration from the Planning Board, the lead agency for SEQRA purposes.

With the above facts and considerations in mind, an examination of each of those statutory factors will establish the lack of any detriment to the community at large or to the surrounding neighborhood in particular from the granting of this effective de minimus area variance.

The Factors

Character of the Neighborhood

“Consistency with the neighborhood is the singularly most significant factor in subdivision cases ... if an applicant is seeking variances to conform to that which is prevalent in the neighborhood ... a denial of relief is likely to be found arbitrary”.

T. Rice, Practice Commentaries to McKinney’s Town Law § 267-b, p. 120).

In this regard, it is readily apparent from the plans submitted to this Board that: the proposed subdivision will yield the two (2) largest lots in this 3/4 acre zoned neighborhood (see Frank v. Scheyer, 227 A.D.2d 2558); each of the proposed two lots will be at least 1.34 acres;⁴ no other neighboring residential lot reaches a single acre in size. Indeed, many of the neighborhood properties, especially to the northwest of the proposed subdivision are approximately quarter acre lots. Moreover, it is significant that it is not the applicant alone whose property utilizes the forty (40) foot Town owned Hillcrest Drive as its legal frontage.⁵ Most telling is the fact that the Planning Board has voted a negative declaration pursuant to SEQRA upon the plan in its entirety and access road in particular (Lubaric v. Zoning Board of Appeals of Village of Irvington, 106 A.D.3d 824).

⁴ Compare Rossney v. Zoning Board of Appeals of Inc. Village of Ossining, 79 A.D.3d 894, where the subdivision would have created two substandard lots and each of the (five) factors were negatively impacted by the application.

⁵ See Niceforo v. Zoning Board of Appeals of the Town of Huntington, 147 A.D.2d 483, lv. denied 74 N.Y.2d 612.

Such an imprimatur positively reflects upon each of the five factors to be considered by this Board Schaller v. New Paltz Zoning Board of Appeals, 108 AD3d 821).

In a somewhat similar factual scenario, the Court of Appeals reversed the lower appellate court and the zoning board which had denied a variance which would have allowed, as here, a two (2) lot subdivision:

Nothing in the record supports the Board's denial of the variances. In determining whether or not to grant area variances, the Board is required "to engage in a balancing test, weighing the 'benefit to the applicant' against 'the detriment to the health, safety and welfare of the neighborhood or community' if the area variance is granted" (Matter of Sasso v. Osgood, 86 N.Y.2d 374, 384).

Here, a review of the record reveals undisputed testimony... that this was the only lot of its size in the neighborhood; that if the variance to subdivide were granted, one parcel would be greater than one acre (the minimum lot size), the other parcel would be only slightly smaller than one acre and both would be "indistinguishable" from other neighborhood lots; that there are three other lots directly across the street that are smaller; and, finally, that the variances present no adverse impact on the neighborhood....

(Tall Trees Construction Corp. V. Zoning Board of Appeals of the Town of Huntington, 97 N.Y.2d 86). In concluding his decision, Judge Wesley also noted that therein, as here, there were other "flagstaff lots" in the area (supra, at 93).

In sum, on this record it seems readily apparent that this simple two (2) lot subdivision will not produce any undesirable change to this neighborhood. As such, this factor inures to the benefit of the application (see Quintana v. Board of Zoning Appeals of Inc. Village of Muttontown, 120 A.D.3d 1248, lv. to appeal den. 24 N.Y.3d 918; Baker v. Brownlie, 248 A.D.2d 527; see also Lim-Kim v. Zoning Board of Appeals of the Village of Irvington, 185 A.D.2d 346; Cassano v. Zoning Board of Appeals of the Inc. Village of Bayville, 263 A.D.2d 506).

Feasible Alternatives to the Variance

Given the forty (40) foot width of the unimproved Town street (Hillcrest Drive), there is no alternative here but a variance in order to proceed with the subdivision.⁶ (See Baker v. Brownlie, supra). Nevertheless, as will be detailed to this Board by the applicant's expert, David J. Sessions, numerous changes have been effected over the last eighteen (18) months or so in response to queries from neighbors and from the members of the Planning Board. In short, there is on this record no hint of any alternative, feasible or otherwise, which can secure the applicant his benefit but the requested variance. The variance application and the project in general have been effectively pared down to produce the minimal impact possible (see Town Law Section 267-b(3)(d)).

Substantiality

As noted above, the size of the variance, here 20%, arises from the dimensions of the Town street as laid out on the filed map (1930) (see Exhibit A). In any event, the magnitude substantiality of a proposed variance "cannot be judged solely by a comparison of the percentage deviation ..." (T. Rice, Practice Commentary to Town Law, § 267-b at pg. 139, et seq.). Rather one must look at its overall impact. Here, the Planning Board has acquiesced to the access road as presented; other lots in the neighborhood already utilize Hillcrest Drive as frontage and access. The size of this variance has no negative impact upon either the community at large or the extant neighborhood. (See North Country Citizens For Responsible Growth, Inc. V. Town of Potsdam Planning Board, 39 A.D.3d 1098; Kleinhaus v. The Zoning Board of Appeals of the Town of Cortlandt, NYLJ, 3/26/96, p. 37, col. 71, Sup. Ct. Westchester Co.).

Impact Upon the Environment

This project has gone through a protracted journey with the town's Planning Board resulting in the latter's negative declaration. This SEQRA determination by the lead agency establishes a clear presumption of the absence of any negative environmental impacts. (See Schaller v. New Paltz Zoning Board of Appeals, supra; Luburic v. Village of Irvington Zoning Board of Appeals, supra).

To be sure, as will be established by Mr. Sessions' presentation, as this project has evolved over time great care has been taken to mitigate or negate even minimal impacts.

⁶ As previously noted, the availability of the requisite frontage via Route 100 is not before this Board at this time, but should remain a factor, in the interests of justice when balancing the various factors. This is especially so considering the DOT's refusal to permit access via Route 100 due to the availability of a safer alternative, i.e., Hillcrest Drive (see Exhibit B).

Self-Created

In this regard, it is clear that the property was purchased when the applicant was bound by the Town's fifty (50) foot wide frontage requirement. This, however, has not prevented other property owners from utilizing that same frontage to develop their properties. Moreover, unlike other properties, the applicant's property is bounded by Route 100, which clearly should satisfy the legal width requirement. Both of these minimize any impact of the variance being self-created. (See Daneri v. Zoning Board of Appeals of the Town of Southold, 98 A.D.3d 508, lv. denied 20 N.Y.3d 852; see also, Borwnlie v. Baker, *supra*; Hampshire Mgt. Co. v. Nadel, *supra*; see also Exhibit B).

Finally, it is clear from the controlling statute (Town Law, Section 267-b(3)(b)) and the cases reported thereupon, that a zoning board must consider actual evidence relevant to each of the factors and, concomitantly, cannot rely upon speculative or conclusory assertions or community opposition or pressure (NIMBY) in reaching their determination. Such reliance will not withstand judicial scrutiny (e.g., DAG Laundry Corp. v. Board of Zoning Appeals of the Town of North Hempstead, 98 A.D.3d 740; Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Board of Appeals, 129 A.D.3d 841; see generally, Doyle v. Amster, 79 N.Y.2d 592; Lessings, Inc. V. Scheyer, 16 A.D.3d 418).

In conclusion, based upon all of the above and the evidence presented and to be adduced at the Public Hearing, it is respectfully submitted that it will be established that the health, welfare and safety of the neighborhood and the wider community will not be adversely impacted by this project and the granting of this minimal variance. (See Filipowski v. Zoning Board of Appeals of the Village of Greenwood Lake, 38 A.D.3d 545, 547).

Respectfully submitted,



Gerald D. Reilly

GDR:dr
Enclosure
cc: William Butler
David Sessions



Court Street Abstract, Inc.

The Inns Of Court
99 Court Street
White Plains, New York 10601

Tel (914) 328-6206
Fax (914) 328-6207

August 11, 2015

William Butler
2 Hillcrest Drive
Briarcliff Manor, NY 10510

Re: Hillcrest Drive
Town of Ossining

Dear Mr. Butler:

You have asked us to conduct a title search of the above premises. We report as follows:

✓ Hillcrest Drive was laid out as per Filed Map #3557 entitled map of Briarcliff Hills, Section 1-8 filed in the County Clerk's Office, Division of Land Records, Westchester County, New York.

↓ In the conveyances of the filed map lots each of the owners take title via lot number(s) and many include a metes and bounds description. Each description tracks the "side" of Hillcrest Drive which adjoins the lot. In addition, each lot as designated on filed map #3557 abuts the street and does not encroach onto the street.

A "Street Report" was ordered from the Town of Ossining in connection with premises on Hillcrest Drive and the Town confirmed that said street is, in fact, a public street.

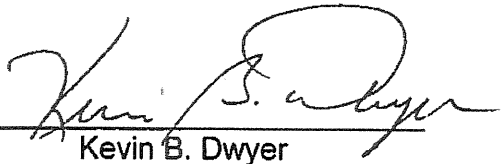
The search of records at the Office of the County Clerk does not show any abandonment of the street by the Town nor does it reveal any action by adjoining lot owners to acquire title to any portion of the street.

E & A

Should you require additional or further information, please do not hesitate to contact us.

Very truly yours,

COURT STREET ABSTRACT, INC.

By 
Kevin B. Dwyer

KBD/mc

February 12, 2015

To the Town of Ossining

Dear Sir,

The question has been raised regarding the limits of ownership of certain properties along the westerly side of Hillcrest Drive and whether their ownership is to the westerly line of Hillcrest Drive or to the centerline thereof. The lots in question are identified on the Town of Ossining tax map as section 90.19, block 2, lots 60, 61, 62, 63, 64, 65 and 66. The lots are further designated as lots 201-226 as shown on a certain map entitled "Map of Briarcliff Hills Sect. 1-8..." filed in the Westchester County Clerk's Office, division of land records on January 17, 1930 as map number 3557.

Tax lots 60-62 are lands now or formerly of Joseph Kelly & Dara Steinberg, title acquired by deed control number 520443112. The deed conveys lots 219-226 as shown on a map filed in the Westchester County Clerk's Office, division of land records, as map number 3557. With regards to Hillcrest Drive, the deed specifically recites "thence along the said westerly line of Hillcrest Drive" as the boundary of the property.

Tax lot 63 is lands now or formerly of Scott & Michele Kantrowitz, title acquired by deed control number 463240381. The deed conveys lots 209-218 (along with other lots) as shown on a map filed in the Westchester County Clerk's Office, division of land records, as map number 3557. With regards to Hillcrest Drive, the deed specifically recites "to the Westerly or Northwesterly side of Hillcrest Drive; thence running along the same" as the boundary of the property.

Tax lots 64-65 are lands now or formerly of Nancy Worden, title acquired by deed liber 8013 page 165, more particularly Parcel 2 and Parcel 1 respectively. The deed conveys lots 206-208 (Parcel 2, tax lot 64) and lots 204-205 (Parcel 1, tax lot 65) as shown on a map filed in the Westchester County Clerk's Office, division of land records, as map number 3557. There are no metes and bounds description in this deed, however, in the description for Parcel 1, tax lot 65, the deed specifically recites "No part of any road, Street or avenue shown on the above mentioned map is conveyed or intended to be conveyed, except easements rights and rights of ingress and egress in and over said roads, streets and avenues. It being understood that the title to all streets, roads and avenues as shown on said map is reserved and shall remain in Briarcliff Hills Improvement Corp."

Tax lot 66 is lands now or formerly of Judith Harris, title acquired by deed liber 11857 page 97. The deed conveys lots 201-203 (along with other lots) as shown on a map filed in the Westchester County Clerk's Office, division of land records, as map number 3557. With regards to Hillcrest Drive, the deed specifically recites "thence along the westerly side of Hillcrest Drive" as the boundary of the property.

Additionally, each deed recites "together with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof." This statement simply quitclaims whatever interest the grantor may have in the bed of the street, and if they have none, then none is conveyed. It is my opinion that the intentions of the above deeds are to convey only the listed lots of filed map number 3557, and not any portion of Hillcrest Drive. It may be necessary to complete an abstract of title to further determine the ownership of Hillcrest Drive.

Respectfully,

Scott B. Gray, L.S.

SG/cmp



Department of
Transportation

ANDREW M. CUOMO
Governor

MATTHEW J. DRISCOLL
Commissioner

TODD WESTHUIS, P.E.
Regional Director

November 15, 2016

Mr. James J. Vanoli, PE
Consulting Engineer
16 Fenbrook Road
Old Saybrook, CT 06475

RE: Butler Subdivision
2 Hillcrest Drive
Town of Ossining, County of Westchester

Dear Mr. Vanoli,

In accordance with your request, I have reviewed your plans for the three (3) lot subdivision located at 2 Hillcrest Drive. You have requested that the additional two (2) lots be allowed access directly onto NYS Route 100.

It is against department policy to allow access to a state route when access to a secondary road is available. This policy is based on safety considerations, vehicles then enter the state roadway at a controlled intersection.

If you have any questions, I can be reached at (914)232-5065.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne Darelus".

Anne Darelus, PE
Permit Engineer
Northern Westchester Residency 8-8
New York State Department of Transportation

Exhibit B

JAMES J. VANOLI, PE
CONSULTING ENGINEER
16 FENBROOK ROAD
OLD SAYBROOK, CONNECTICUT 06475
TELEPHONE (860) 391-8456
EMAIL jivanoli@gmail.com

October 30, 2016

NYS DOT
85 Route 100
Katonah, New York 10536

Attention: Ms. Anne Darelus

Re: **Butler Subdivision**
2 Hillcrest Drive
Ossining, New York

Dear Ms. Darelus:

Thank you for the telephone conversation on October 17th regarding the possibility of gaining a DOT permit on Route 100 to access a residential common driveway.

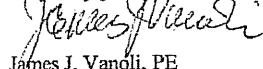
The applicant, Mr. Butler, is proposing a three (3) lot subdivision, with the current residence located at 2 Hillcrest Drive. The two (2) new proposed lots would share the proposed common driveway.

I have prepared a preliminary plan showing:

- the two new lots
- the common driveway
- a mile marker for Route 100
- the appropriate sight distances for a 50 mph speed limit as stated in Table 3, measured 10 feet behind the edge of the existing blacktop

Please find enclosed two (2) prints of that plan. Thank you again for your consideration this matter.

Very truly yours,



James J. Vanoli, PE

Enclosure

Cc: Mr. Wm. Butler

w/encls

ButlerSubdivision\161030\NYS\DOT\Darelus