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November 1, 2018

*Via Hand Delivery*

Hon. Sal Carrera, Chairman, and  
Members of the Town of Ossining  
Zoning Board of Appeals  
John-Paul Rodrigues Operations Center  
101 Route 9A - P.O. Box 1166  
Ossining, NY 10562

*Re: Application of Briarcliff Manor Partners, LLC, for Sign Variances in Connection with  
The Learning Experience Child-Care Facility  
530 North State Road, Section 90.15, Block 2, lot 18*

Dear Chairman Carrera and Members of the Board:

We represent Briarcliff Manor Partners, LLC (the "Applicant"), the contract vendee for an approximately one-acre property located at 530 North State Road and identified on the Town of Ossining Tax Map as Section 90.15, Block 2, Lot 18 (the "Property"). Pending before the Town of Ossining Planning Board (the "Planning Board") is the Applicant's application to redevelop the Property<sup>1</sup> with a 10,000-square foot child-care facility known as The Learning Experience (the "Center").<sup>2</sup> The Applicant is applying to your Board for the area variances necessary to permit the proposed signs for the Center.

### *Supporting Materials*

Enclosed with this letter as the application materials are 10 paper copies and one PDF file of the following:

1. The executed Zoning Board of Appeals application form, dated October 18, 2018;

<sup>1</sup> The Applicant has applied to the Planning Board for site plan approval and a freshwater wetlands permit and architectural review and the Planning Board is currently holding public hearings with respect to those applications. The Property, which is located in the GB (General Business) zoning district, was formerly used as a garden center, but it is currently largely dormant. Portions of it are used to store equipment for the neighboring Bobcat of Westchester construction equipment sales and rental business.

<sup>2</sup> The Learning Experience is a national chain of child-care centers headquartered in Boca Raton, Florida. There are more than 200 centers in the United States, with an additional 100 centers currently under development.

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2. The executed authorization from the owner of the Property, NSRR Realty LLC, authorizing this application, dated October 18, 2018;
3. The electronic mail correspondence received from the Town of Ossining Building Inspector, John Hamilton (the "Building Inspector"), dated September 19, 2018, listing and explaining the sign variances which are needed;
4. The Site and Utilities Plan Drawing No. C-300, Sheet 4 of 12, last revised October 26, 2018;
5. Three plan sheets titled: Exterior Elevations, SA-3.2, last revised October 16, 2018; and Main Entry Details/Site Signage, SA-3.3 and Renderings, SA-3.4, both last revised September 11, 2018; and
6. Photographs of signs in proximity to the Property.

Also enclosed is Applicant's check in the sum of \$250.00 for the application fee.

### ***The Requested Variances***

This application for area variances for three signs is made to your Board in accordance with the referral of the Planning Board and on appeal from the determination of the Building Inspector (Attachment 3). All of the signs, their coloring, dimensions and locations are shown on sheets SA-3.2 and SA-3.3 (Attachment 5).

The first variance is for a wall sign on the north facade of the building. The sign reads "The Learning Experience Academy of Early Education" and features a depiction of "Bubbles the Elephant," the Center's trademarked mascot. While this sign complies with the applicable restriction on length and is not subject to any area limitation, Section 200-18C(2) of the Town of Ossining Zoning Ordinance (the "Zoning Ordinance") imposes a 2-foot limit on the height of wall signs in the GB district. As the proposed sign is approximately 3 feet 6 inches tall, a variance is required.

The second variance would allow the four stacked "building blocks" in various orientations on the two pillars on each side of the main entrance on the building's northern façade. (See Attachment 5) Each block is 2 feet by 2 feet in area and, from the top down, the blocks on each column are red, yellow, blue and green. The blocks read A, B, C, D, in descending order in white text on one column, and 1, 2, 3, 4, in descending order in white text on the other. Due to the fact that the "building blocks" include letters and numbers, the Building Inspector has determined that they are, in fact, signs, which are 9 feet, 8 inches in height. This interpretation triggers the need for a variance under the same 2-foot height restriction of Section 200-18C(2) of the Zoning Ordinance that is referenced above.

The third and final variance is for a monument sign located perpendicular to the Property's front boundary with the right of way of North State Road. (See Attachment 5, Sheet SA-3.3 and Attachment 4). Each face of the sign is 39.7 square feet in area. The variance is necessitated because

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the sign exceeds the limitation of 20 square feet per sign face for freestanding signs imposed by Section 200-18C(3) of the Zoning Ordinance.

***The Area Variances Should Be Granted Under the Controlling Standard***

As your Board is aware, when deciding an application for an area variance a zoning board must weigh the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the neighborhood or community flowing from the grant of the variance. To aid in performing the requisite balancing, a zoning board must consider the following subsidiary factors that are discussed in the subheadings below:

(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); *see* Zoning Ordinance §200-45B(3)(b).

Significantly, an applicant is not required to demonstrate how its request meets each factor listed above; rather, the factors are designed to inform the manner in which a zoning board applies the overarching balancing test. In fact, an area variance should be granted unless it can be clearly demonstrated “‘how’ and ‘in what manner’ the granting of a variance would be improper.” *Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Bd. of Appeals*, 129 A.D.3d 841, 842–43, 11 N.Y.S.3d 232, 233 (2d Dep’t 2015).

Here, granting the variances will benefit the Applicant by allowing The Learning Experience to erect its trademarked signage on the Center in a manner that is appropriate given the size, scale and positioning of the proposed building, and which the Applicant believes is necessary to support the successful operation of the Center.

In contrast, as described more fully below, it is respectfully submitted that there will be no negative impacts to the health, safety and welfare of the community if the requested variances are granted. The Property is located in the GB District, with commercial uses on both sides and across the street. Both the sign over the main entrance and the “building blocks” on the pillars on either side of the entry are set back more than 80 feet from the Property’s front lot line adjoining the right of way of North State Road. They are oriented in the northerly direction toward the Center’s parking lot, rather than directly facing North State Road or for that matter, the residentially-zoned land to the east. Moreover, the signs are

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designed to fit with the architecture of the proposed building and, perhaps most importantly, to make the building welcoming to the children who are cared for at the Center.

***Granting the Variances Will Not Cause Any Negative Impacts to the Neighborhood or Surrounding Properties, Nor Will it Have Any Negative Impacts on the Physical Environment***

Nearby businesses feature wall and monument signs near North State Road, several of which include logos. A number of the monument signs in proximity to the Property feature directories of multiple businesses located within a given plaza. Such signs are less attractive and, due to the size of the lettering and numerous lines of text, more likely to distract drivers on North State Road than the monument sign being proposed by the Applicant. As should be evident from the submitted photographs (Attachment 6) the proposed signs compare favorably with much of the existing commercial signage on North State Road in proximity to the Property. In short, the Center's proposed building signs are in keeping with both the nearby signs and the predominately commercial character of the "neighborhood."<sup>3</sup>

Although the area of the monument sign and the heights of the wall and "building block" signs exceed the limits in the Zoning Ordinance, the signage should have a nominal, if any, visual impact on the surrounding community. Their proposed heights and size do not exceed that which is visually appropriate for the proposed building and location. Additionally, while the Planning Board, acting in its capacity as the ARB, has not yet approved the signage (and cannot finally do so without the requested variances), its members have expressed the view that they have no reservations about the sizes of the proposed signs.

In sum, the proposed signs will adversely impact neither the character of the neighborhood or community, nor the physical environment.

***The Benefit Sought by the Applicant Cannot be achieved by Alternative Means***

The benefit that the Applicant is trying to achieve is the installation of The Learning Experience's trademark signage on the Center to enable it to identify fully and market itself to the community. To accomplish this objective, the Applicant, based on its experience, believes that the signs as proposed are necessary. Such signs, of course, can only be permitted by area variances.

***The Magnitude of the Requested Variances Presents No Basis for Denial***

In light of the absence of any discernable negative impact from the requested variances, they cannot be deemed large enough to warrant denial. Case law recognizes that consideration of the "substantiality" component of the area variance test is primarily dependent on whether the deviation from the zoning

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<sup>3</sup> As alluded to above, none of the signs is oriented toward the residentially-zoned property to the east (rear) of the Property. The sign which is closest to the rear property line (one of the two columns of building blocks) is roughly 100 feet therefrom. In addition, as also noted above, the wall sign faces the Center's parking lot, rather than the rear lot line. The building is located between the monument sign and the Property's rear boundary so that there is no view of the monument sign from the residential lots to the east.



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standard has substantial impacts, not simply the extent of the numerical deviation from the regulation to be varied. Even if the requested variances are deemed to be mathematically significant, because they will not result in any substantial negative impacts their extent is of no consequence in the balancing test.

Courts have routinely interpreted the “substantiality factor” to be of little import, even when the application involves a significant percentage deviation from a zoning law’s requirements, where there is no concomitant showing of significant impacts. *Hargraves v. City of Rye Zoning Board of Appeals*, 162 A.D.3d 1022, 1024, 81 N.Y.S.3d 72, 74 (2d Dep’t 2018)(upholding the grant of area variances and reasoning that “[w]hile the proposed variances were substantial, there was no evidence that the granting of the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community); *Wambold v. Village of Southampton Zoning Board of Appeals*, 140 A.D.3d 891, 893, 32 N.Y.S.3d 628, 630 (2d Dep’t 2016)(upholding an area variance on the same reasoning); *L & M Graziose, LLP, v. City of Glen Cove Zoning Board of Appeals*, 127 A.D.3d 863, 865, 7 N.Y.S.3d 344, 346 (2d Dep’t 2015)(invalidating denial of area variances under the same principle); *Quintana v. Zoning Board of Appeals of Incorporated Village of Muttontown*, 120 A.D.3d 1248, 1249, 992 N.Y.S.2d 332, 334 (2d Dep’t 2014), *lv denied*, 24 N.Y.3d 918, 4 N.Y.S.3d 604 (2015)(employing the same rationale to invalidate denial of an area variance); *Borok v. Town of Southampton*, 130 A.D.3d 1024, 14 N.Y.S.3d. 471 (2d Dep’t 2015); *Goodman v. City of Long Beach*, 128 A.D.3d 1064, 1066, 10 N.Y.S.3d 302, 304 (2d Dep’t 2015), *lv. denied*, 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015); *see* 61 McKinney’s Consolidated Laws of N.Y., Practice Commentaries to Town Law §267-b (2018 Supp.), p.14 (“Although the substantiality of variances sought are a relevant consideration, the substantiality cannot be judged solely by a comparison of the percentage deviation from the mandated requirements of a zoning regulation. Instead, the overall effect of the granting of relief is the relevant inquiry”).<sup>4</sup>

For the reasons discussed above, the proposed variances will have no tangible impact on the surrounding community. Thus, notwithstanding the numerical size of the variances, they are not “substantial” within the meaning of the variance standard.

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<sup>4</sup> Indeed, case law is full of examples where, when looking strictly at the numbers, variances might seem substantial, but when taken in the context of the application and the existing character of the community, the courts have held them not to be. *See, e.g., Sasso v. Osgood*, 86 N.Y.2d 374, 384, 633 N.Y.S.2d 259, 264 (1995) (upholding the grant of area variances reducing the required 12,000-square-foot minimum lot area to 5,200 square feet and the required lot width from 100 feet to 72 feet at the waterfront and 50 feet at the street line); *Beekman Delamatar Properties v. Village of Rhinebeck Zoning Board of Appeals*, 150 A.D.3d 1099, 57 N.Y.S.2d 57 (2d Dep’t 2017)(confirming the grant of a 296-foot variance which allowed a building to be set back 302 feet, where the maximum permitted front-yard setback was 5 feet); *Baker v. Brownlie*, 248 A.D.2d 527, 528-529, 670 N.Y.S.2d 216, 218 (2d Dep’t 1998)(reversing the denial of a 27.6-foot variance from the required 40-foot rear-yard setback); *Aydellott v. Town of Bedford Zoning Board of Appeals*, 6/25/03 NYLJ p. 21, col. 4 (Sup. Ct. Westchester Co. 2003)( annulling denial of a variance that would have allowed, among other things, building coverage of 7.1 percent, where only 3 percent was permitted by zoning (a 137 percent variance)); *Kleinhaus v. Zoning Board of Appeals of the Town of Cortlandt*, 3/26/96, NYLJ p.37, col. 3 (Sup. Ct. Westchester Co. 1996) (annulling a zoning board’s denial of a variance to allow a 120-foot-tall freestanding antenna in a residential yard, where the zoning height limitation was 35 feet (a 283 percent variance), based on the reasoning that “the deviation only becomes relevant if it relates to the adverse effect in the neighborhood.”).

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***Self-Created Hardship Presents No Basis for Denial***

To the extent the need for the variances is self-created, this factor should be afforded little weight. Town Law §267-b(3)(b)(5) itself provides that the self-created nature of a hardship does not preclude the grant of an area variance. *See Sasso v. Osgood*, 86 N.Y.2d at 385, 633 N.Y.S.2d at 265 ("the fact that the applicant's difficulty was self-created does not necessarily preclude the granting of the area variance."); *Millpond Management, Inc. v. Town of Ulster Zoning Board of Appeals*, 42 A.D.3d 804, 805, 839 N.Y.S.2d 355, 356 (3d Dep't 2007); *see also Quintana*, 120 A.D.3d at 1249, 992 N.Y.S.2d at 334; *Easy Home Program v. Trotta*, 276 A.D.2d 553, 553, 714 N.Y.S.2d 509, 510 (2d Dep't 2000).

***Conclusion***

As the requested variances will benefit the Applicant and cause no corresponding detriment to the health, safety and welfare of the community, they should be granted. We would respectfully request that your Board schedule a public hearing on this application on the earliest available date.

Respectfully submitted,

Hocherman Tortorella & Wekstein, LLP

By:

  
Adam L. Wekstein

ALW:hc

Enclosures

cc: *Via Electronic Mail with Enclosures*  
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