



June 13, 2022

VIA EMAIL

Garrett Duquesne
Commissioner, Community Development & Conservation
Town of Greenburgh
177 Hillside Avenue
Greenburgh, NY 10607

Re: Request for Pre-submission Conference

Dear Garrett:

My firm represents David S. Chao and Marianne Landa Chao (the "Chaos"), owners of three undeveloped tax lots off of Clayton Road in the Edgemont section of unincorporated Greenburgh, known as (i) "0 Clayton Road, Scarsdale, New York 10583" with Parcel ID No. 8.400-281-30 (formerly known as Tax Map Designation Sec. 32, Sheet 43E, Lot or Parcel P73E); (ii) "0 Underhill Road, Scarsdale, New York 10583," with Parcel ID No. 8.400-281-27 (formerly known as Tax Map Designation Sec. 32, Sheet 43E, Lot or Parcel P73D), and (iii) "0 Clayton Road, Scarsdale, New York 10583 with Parcel ID No. 8.400-282-31 (formerly known as Tax Map Designation Sec. 32, Sheet 43, Block 1825, Lot or Parcel 12) (also referred to herein as the "Access Strip"), respectively. All three tax lots are situated in the R-30 zoning district.

The Chaos would now like to sell these three tax lots in order to allow for their residential development as one or two legal building lots. For that to occur, in accordance with the Town's Land Use Subdivision Regulations in Chapter 250 of the Town Code, these lots must be merged into either a single one-family lot or two one-family lots, each conforming to R-30 zoning requirements, which merger of lots must be approved by the Town's Planning Board.

We therefore respectfully request a pre-submission conference with the Planning Board to discuss these alternate proposals, and in connection therewith, enclosed as Exhibits 1 and 2, respectively, are two sketches of a preliminary plat, one for a single one-family lot and the other for two one-family lots, along with other relevant documents referenced herein.

The single one-family flag lot option

As the enclosed sketch (Ex. 1) shows, merging the lots for a single one-family lot would result in a total lot area of 86,649 square feet that satisfies the requirements of a flag lot under Town Code § 285-39 [C](10). Subsection (a) thereof states that the minimum lot area of flag lots, exclusive of the access strip, shall be twice the minimum lot area otherwise required. The minimum lot area otherwise required in an R-30 zone is 30,000 square feet. Thus, the minimum lot area, exclusive of the access strip, must be 60,000 square feet. Here, however, the minimum lot area,

exclusive of the access strip, is 86,649 square feet, and all other requirements for a legally permissible flag lot appear to be satisfied as well:

- Driveways to flag lots “shall not exceed 10% in grade.” Here, based on a site plan submitted to the Town in connection with this property in 2003, the grade on the Access Strip appears to be flat. A copy of that map is attached as Exhibit 3.
- Driveways to flag lots “shall not be less than 15 feet in width.” Here, because the access strip is at least 50 feet or more in width from one end to the other, there is ample room for a driveway of at least 15 feet in width.
- Only one flag lot per subdivision plat shall be permitted. Here, only one such lot is being proposed.
- Flag lots are prohibited on certain heavily used Town roads specified. Clayton Road is not one of the Town roads specified.
- Flag lots shall only be permitted for single-family dwellings. That is the only flag lot use for which the Chaos are seeking permission.

The two-lot single family subdivision

Alternatively, the Chaos may seek to merge the lots to create a two-lot subdivision with access to Clayton Road, in accordance with Town Code § 285-39[C](a)(1), by means of a road improved to town standards on the Access Strip which would serve as a fire lane. As the sketch (Ex. 2) shows, one building lot (“New Parcel 1”) would have a lot area of 34,905 square feet, with a stem area of 6,602 square feet, while the other lot (“New Parcel 2”) would have a lot area of 41,802 square feet, with a stem area of 6,501 square feet. We believe all the requirements for a two-lot subdivision would be satisfied.

In sum, we believe that merging these lots to create either a one-lot or two-lot subdivision would meet all requirements under Chapters 250 and 285 of the Town Code, and neither plat should require any variances.

Lot width issue on neighboring property at 315 Clayton Road

However, in discussions with town staff, we were told that even if the proposed merger of the three tax lots here at issue into one or two buildable lots were to satisfy the requirements of both Chapters 250 and 285 of the Town Code, and we believe they do, the Town may further require as a condition of approval that the applicant persuade a third party to obtain a variance because that third party’s property at 315 Clayton Road, Parcel ID No. 8.400-281-29, which abuts the Access Strip (Parcel ID No. 8.400-282-31), has a lot width which does not satisfy Town requirements for an R-30 zone. Specifically, 315 Clayton Road has a lot-width on Clayton Road of only 107.87 feet, instead of 135 feet as required. Town staff said that, because the Chaos had

previously owned 315 Clayton Road, improved it almost twenty years ago by building a single family home thereon, and then sold it earlier this year (on February 22, 2022) without obtaining a variance for the property's substandard lot width, any post-sale application by the Chaos to merge the neighboring tax lots into one or more buildable lots might need to be conditioned on the Chaos now persuading the new owner of 315 Clayton Road, who has no interest in the tax lots here at issue, to apply for and obtain a lot width variance. We think that would be unwarranted under the Town's Zoning Code.

The property at 315 Clayton Road has had a lot-width on Clayton Road of 107.87 feet dating back to when the lot was first sold pursuant to a deed dated December 10, 1935, which was recorded in the Register of the County of Register as Liber 3482, Page 402, a copy of which is attached hereto as Exhibit 4. We do not believe the Town established any minimum lot width requirements until at least 1957. When the Chaos acquired the property in 2001, it was undeveloped except for an old tennis court built in the 1940s. Shortly after they acquired the property, the Chaos submitted plans to the Town's Building Department to construct a single family home thereon. In connection with those plans, the Chaos submitted a site plan dated March 12, 2003, showing that the lot had a lot-width on Clayton of 107.87 feet. The plan also shows the old tennis court. A copy of that site plan is attached as Exhibit 3.

On June 29, 2006, after construction of the single family home thereon was completed, then Town of Greenburgh Building Inspector John Lucido issued a "permanent" Certificate of Occupancy for a "New Single Family Residence – Detached" located at "315 N. Clayton Rd." A copy of that Certificate of Occupancy is attached as Exhibit 5.

When the Chaos sold 315 Clayton Road on February 22, 2022, the purchaser's title insurer obtained a copy of Certificate of Occupancy issued on June 29, 2006, and, based on a new survey of the property, performed January 31, 2022, confirmed the lot width on Clayton of 107.87 feet, and found no issues of non-compliance with the Town's Zoning Code for which exception to title insurance coverage was warranted. A copy of that survey and clean title report is attached as Exhibit 6.

The issuance of an unconditional permanent Certificate of Occupancy for 315 Clayton Road, even though it had a lot-width on Clayton of only 107.87 feet, was in accordance with Town Code Section 285-40(C)(8), which expressly creates an exception for lot width provided certain conditions are met. I have confirmed with our licensed professional engineer, Eliot Senor, that all such conditions for application of that code section are present here and would have been present when Mr. Lucido issued the Certificate of Occupancy. A copy of that code section is attached for your review as Exhibit 7.

Section 285-40 of the Town Code, entitled "Exceptions and Modifications," creates in subsection C(8) thereof, an exception to a parcel of land's lot width requirement permitting construction of a single family dwelling, provided the following requirements are satisfied:

- a. Such parcel is situated in a residence district. Here, 315 Clayton is in the R-30 zone, which is a residential district.

- b. It shall have access to a street which access what not exceed 300 feet in length or be less than 25 feet in width throughout its entire length. Here, the access is on the street itself.
- c. The area of such parcel, excluding the land lying within any access strip, shall not be less than that specified for the district in which such parcel is specified. An R-30 zone must have a minimum of 30,000 SF. Here, the area of the parcel at 315 Clayton, which is and always has been its own tax lot, is 40,564 SF. That area does not include any of the area represented by the adjoining Access Strip which the Town has recognized as a separate tax lot going back to at least 1935.¹
- d. The maximum coverage of land by buildings, excluding the land lying within any access strip, shall not be more than specified for the district in which such parcel is situated. The maximum coverage requirements for the R-30 district are set forth in Town Code §285-11[B](3), i.e., principal building 16%, accessory building 4%, all buildings 20% and impervious surfaces: 25%. Ms. Senor has confirmed to me that none of these coverages are exceeded here.
- e. The minimum width and depth of any front or rear yard and the minimum width of any side yard, measured in every case from the nearest points of such one-family dwelling to the nearest points on any front, side or rear lot line, shall not be less than the respective minimum yard dimensions set forth in the district in which such parcel is situated. Mr. Senor has confirmed to me that the single-family dwelling at 315 Clayton satisfies all front, rear and side yard requirements. Moreover, the front and rear lot widths, when averaged together, are also well in excess of the minimum required.
- f. The minimum distances from the nearest point of any accessory building, or off-street parking area to any principal building and lot line, as set forth in the district in which such parcel is situated, shall be complied with. Here, the only accessory building is the tennis court, but it appears to have been constructed long before the Town enacted any minimum distances between it and any lot lines. Thus, such use would have been grandfathered under Town Code §285-42[A], entitled, "Nonconforming buildings and uses." That section defines a legal nonconforming building as any building structure "whether of a building or tract of land or both, which does not conform to the regulations respecting permitted uses as set forth in this chapter for the district in which it is situated but which lawfully existed prior to the enactment of this Zoning Ordinance or any revisions or amendment thereto and which is maintained after the effective date thereof although it does not conform to the use regulations of this district in which it is located."

Town staff posited that Mr. Lucido may have issued the permanent Certificate of Occupancy based on the assumption that because the abutting Access Strip was also

¹¹The Access Strip first appears on the Town's tax map in 1935 as Block 1825, Sheet 43, Parcel No. 76M. In 1936, the Town relabeled the Access Strip as Block 1825, Sheet 43, Lot 12. A copy of the Town's tax map showing these designations for the Access Strip is attached as Exhibit 8.

owned in 2006 by the Chaos, he could have used that property to satisfy the lot width requirement. We do not believe that is likely because (i) we have seen no documentation to that effect,(ii) if lot width were truly an issue – and for the reasons provided above, we do not believe it was – Mr. Lucido could have insisted as a condition for issuing the Certificate of Occupancy that the lots be merged, which he obviously did not do, and (iii) Mr. Lucido never informed the Chaos orally or in writing that the permanent Certificate of Occupancy he issued was conditioned on the Chaos not selling 315 Clayton Road without making the abutting Access Strip part of any such sale, or that any such sale would result in the creation of an *unlawful* non-conforming lot for which the purchaser would need a variance.

We were therefore quite surprised that town staff would suggest to us today that any subdivision of the adjoining lots to create one or two buildable lots be conditioned on an unrelated third party obtaining a variance for their own property or otherwise be required to accept additional land to avoid having to obtain such a variance.

Not only do we believe such requirement would be unwarranted, but requiring that an unrelated party obtain a variance, or that land be transferred to that unrelated party to cure any non-compliance and thereby avoid a variance as a condition of any application for subdivision could be an impossibility if the neighbors do not want to cooperate as the Town cannot force an unrelated third party to be part of an application or require someone to take land it does not want.

For these reasons, we respectfully that the Planning Board give favorable consideration to the proposed merger of the tax lots here at issue into either a single buildable lot or alternatively, a two-lot subdivision, and without conditioning such approval on the Chaos having to obtain a variance on behalf of a third party they do not control to cure a lot width requirement for property the Chaos no longer own and had no reason to believe would have required a variance before they sold it.

Respectfully,

A handwritten signature in black ink, appearing to read 'Robert B. Bernstein', written in a cursive style.

Robert B. Bernstein