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November 2, 2022

**VIA HAND DELIVERY & EMAIL**

Chairperson, Eve Bunting-Smith, & Members of the Zoning Board of Appeals  
Town of Greenburgh  
177 Hillside Avenue  
Greenburgh, New York 10607  
Attn: Carole Walker

**Re: ZBA Case 22-05 – Orly Gez – O Clarendon Road – Construction of Single-Family Residence (the “Project”)  
Parcel ID: 8.460-324-8 & 9 (the “Property”)**

Dear Chairperson Bunting-Smith and Members of the Zoning Board of Appeals:

This firm represents Orly Gez (“Gez” or “Applicant”) in connection with the above-referenced matter. The Property - which will be a merger of two-existing adjacent vacant lots both owned by the Applicant – is located in a R-7.5 One Family Residence District. The Applicant seeks site development plan approval for the construction of a single-family house. This letter will supplement our letters to the Zoning Board of Appeals (“ZBA” or “Board”) dated April 19, 2022 (the “4/19 ZBA Letter”), and May 11, 2022 (the “5/11 ZBA Letter”), respectively, and is submitted in further support of the Applicant’s amended application to the ZBA to: 1) appeal of the Building Inspector’s June 9, 2021 determination that area variances are required in order for site plan approval of the Project;<sup>1</sup> or, 2) in the alternative, should this Board agree with the Building Inspector’s interpretation, then, the Applicant reiterates the request for area variances from the ZBA in its original application dated February 11, 2022 and, as fully discussed in the 4/19 ZBA Letter; the 5/11 ZBA Letter, and below (see pgs. 3-5).

**Area Variances are Not Required Because the Deed Implicitly Granted Variances to the Zoning Code’s Bulk Requirements**

Area variances are not required for this Project because the Town which originally owned and created the subject lot by Deed,<sup>2</sup> already granted any required variances when it sold the

<sup>1</sup> A copy of the Building Inspector’s Memorandum dated June 9, 2021 is annexed hereto as **Exhibit A**.

<sup>2</sup> A copy of the Deed which has been provided with previous submissions, is also annexed hereto as **Exhibit B**, for the Board’s convenience.

nonconforming lot (specifically created for the purpose of building a single-family residence) two months after the Zoning Code was amended.

On April 29, 1947, the Zoning Code was amended upwardly to adjust the minimum bulk requirements from R-5 to the R-7.5 zoning district as follows. Two months later, the Town knowingly created the nonconforming lot for the specific purpose of building a single-family residence and then sold the lot by Deed dated June 24, 1947.

The unique characteristics of this Deed include not only the creation of a buildable lot for the purpose of a single-family home construction, but it contained restrictions as to the size and cost of such a development, despite the lot being nonconforming as to minimum lot size and width from the outset. Specifically, the Deed provides that “no private dwelling shall be erected on the premises herein containing less than 24,000 cubic feet (3,000 sq. feet) nor costing less than \$12,000 (the equivalent in purchasing power to about \$159,374.53 today).” Importantly, as further consideration to the Town as part of the initial sale of the Property, the Deed contains a sewer easement ten feet in width along the northerly line of the Property. The Deed continues “[t]he covenants conditions and restrictions contained herein shall at all times be deemed and shall be a continuing covenant running with the land and shall be binding upon their heirs, legal representatives and assigns of the parties of the second part.” Finally, the Deed states that the lot created by the Town, for the singular purpose of building a one-family residence, is “[s]ubject to any state of facts an accurate survey may show, to covenants, conditions and restrictions of record, if any; and to existing zoning and building ordinances.”

The lot was tailor made, by the Town, for the purpose of building a single-family home. There is no other viable use for this lot other than what it was created for. Therefore, because the Town created the lot it new was already substandard under the April 1947 Code amendments, in order to realize its vision for this lot and for purposes of future development, the Town granted variances to the “existing zoning and building ordinances” through the Deed. Notably, while the lot has remained vacant, the Town installed the sewer line per the easement and, along with the Property’s neighbors, has and continues to benefit from the sewer easement.

The Applicant’s proposed Project – the construction of a single-family residence - will simultaneously fill a need for additional housing in the Town as well as finally utilizing the lot as the Town intended. Accordingly, this Board should overrule the Building Inspector’s determination that variances are required for the development of a single-family residence and allow the Applicant to proceed with its Building Permit application.

In the alternative, should this Board agree with the Building Inspector’s interpretation, then, the Applicant reiterates the request for area variances from the ZBA.

### **Relevant Procedural History**

As set forth in the 5/11 ZBA Letter, on March 14, 2022, the Planning Board for the Town of Greenburgh (“Planning Board”) declared its intent to serve as Lead Agency for carrying out the State Environmental Quality Review, pursuant to § 8-0101, *et seq*, of the Environmental Conservation Law (“SEQRA”). At its April 20, 2022 public hearing, the Planning Board discussed the use, building location and visual impacts of the Project. The Planning Board closed the public hearing and issued a negative declaration under SEQRA (the “Neg. Dec.”)<sup>3</sup> A copy of the Neg. Dec. (which has previously been submitted into the record) is annexed hereto as **Exhibit C**. Additionally, and of equal import, at that same public hearing, the Planning Board unanimously voted to issue a supportive recommendation for the ZBA’s approval of the area variances. In so doing, the Planning Board specifically acknowledged that other properties in the immediate vicinity were undersized, and that the Project’s “proposed improvements to the site, including, but not limited to, the design of the proposed stormwater management system to exceed the requirements of the Town Code, the inclusion of a pervious surface driveway, and the addition of landscaping, represent a significant upgrade over existing conditions.” (The “Unanimous Recommendation for Approval,” copy of which, previously submitted into the record, is also included herewith as **Exhibit D** for the Board’s convenience.)

### **Request for Area Variances**

Based on the foregoing, area variances are not required. However, if the Board chooses to entertain the variance request, the Applicant seeks area variances pursuant to Town Law § 267(b)(3) for a) Minimum Lot Area; and b) Minimum Lot Width. This Property is situated in the R-7.5 Residential Zoning District. The permitted minimum lot area is 7,500 sq. feet. The Applicant is seeking a variance to 6,105 sq. feet. The permitted minimum lot width is 75 feet. The Applicant is seeking a variance to 62.5 feet.

As the Zoning Board is aware, in making its determination, the Board shall take into consideration the benefit to the Applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination for an area variance, the Board shall 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.

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<sup>3</sup> This means that the Planning Board determined that the Project would not have an adverse effect on the environment.

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.
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.

N.Y. Town Law § 267(b)(3).

We reiterate our reasoning set forth in the 4/19 ZBA Letter and in the 5/11 ZBA Letter, as follows:

#### **Past Precedent Warrants the Granting of the Variances**

As we stated in the 5/11 ZBA Letter, examples of past ZBA precedent granting similar variances within the R-7.5 Zoning District were provided by the Applicant in the 4/19 ZBA Letter. New York law has long provided that a decision of a zoning board that did not adhere to its own prior precedent on essentially the same facts was arbitrary and capricious and mandated reversal – even if there was otherwise evidence in the record to support the determination. *See Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985); *see also Matter of Lucas v. Board of Appeals of Village of Mamaroneck*, 57 A.D.3d 784 (2d Dep’t 2008).

In the 5/11 ZBA Letter we also reiterated that there are at least 40 examples of substandard properties located within the R-7.5 Zoning District. Two of these substandard lots are situated in the immediate vicinity of the Applicant’s Property. 71 Clarendon Road and 4 Clarendon Road both have total lot sizes of less than 7,000 sq. feet.

Accordingly, granting area variances for this Project will allow the Applicant to develop the Property in the exact way the Town intended, and will result in the markedly improved condition of the lot and the immediate area.

#### **Balancing the Five Factors Enumerated in N.Y. Town Law § 276(b)(3) Requires the Granting of the Variances**

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.

As detailed in the 5/11 ZBA Letter, the proposed Project meets the use criteria of this Property as intended by the Town. Indeed, all of the neighboring properties contain

houses that are of similar dimensions to the proposed Project. As such, there will be no undesirable change to the character of the neighborhood, nor will there be a detriment to nearby properties. In fact, as confirmed by the Planning Board's unanimous and positive recommendation for approval of the variances, this Project will be an exponential improvement to the neighborhood. (See Exhibit C.)

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.

Aside from the ZBA overruling the Building Inspector's determination, there is no other method to pursue as the deeded lots making up the Property are fixed in area and geometry. The existing area is maxed at 6,105 sq. feet. Likewise, the frontage geometry is maxed at 62.5 sq. feet. The requested area variances are the only way for the Applicant to construct the proposed single-family house; which – it must be reiterated – is the only viable use for the Property.

3) Whether the requested area variance is substantial.

The variances are not substantial. The variances are the minimum required in order for the Applicant to build the proposed single-family home on the Property.

4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental condition in the neighborhood or district.

As noted in the 5/11 ZBA Letter and above, the Planning Board issued a Negative Declaration finding that the proposed Project "will not have a significant effect on the environment," and unanimously supported the approval of the variances as to minimum lot area and minimum lot width. (See Exhibits C & D.)

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.

As noted above, the Applicant purchased the Property which was initially owned and created by the Town for the purpose of constructing a single-family residence with specific size and height requirements. The Town, along with the Property's neighbors, have and continue to benefit from the sewer easement which was part of the consideration for the Town's sale of the Property. While the Applicant did not self-create the hardship of a pre-existing substandard lot, even if the ZBA were to find that the Applicant did create the hardship, that factor alone, when balanced against the other criteria cannot form the basis for denying the variances.

## Conclusion

Based on the foregoing, this application presents an appropriate request for relief from the Building Inspector's determination, or alternatively, for area variances for lot area size and lot width. Due to the facts and circumstances set forth herein, the nature of the Property's location and the fact that the Property was created by the Town for the specific purpose of constructing a single-family residence, i.e., this Project, this Board can establish a reasonable and rational basis for overruling the Building Inspector's determination or, in the alternative, granting the variances. There will be no detriment to the health, safety and welfare of the neighborhood or community, rather, this Project, when complete, will constitute a significant improvement to the neighborhood and only serve to increase the value of the neighboring properties.

The strict application of the Code provisions to this Project would not be in keeping with the purpose of this Board which is to provide relief from strict code interpretations that would cause unnecessary hardship on property owners. Accordingly, the facts and circumstances of this matter weigh in favor of granting the application.

Thank you for your consideration and attention to this matter. We look forward to meeting with the Board and would hope the Board looks favorably on this application.

Very truly yours,

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*Attorneys for Applicant*

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Enclosures

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