Town of Clifton Park

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Zoning Board of Appeals

APPROVED
6-21-16

ZONING BOARD OF APPEALS

June 7, 2016

Present: Michael Dudick, Chairman, Chris Lemire, Jerry Cifor, Lisa McCoy, Anthony Morelli, Michael Bloss and Mario Fantini

Also Present: Joel Peller, Esq., ZBA Counsel
Steve Myers, Director, Building and Zoning

Absent: Randy Gifford

Mr. Dudick called the meeting to order at 7:15 p.m.

PLEDGE OF ALLEGIANCE
ROLL CALL

Mr. Dudick informed the public that this is a 7 member board with 1 alternate member, in order for an application to be approved, 4 votes of approval are required and that Mr. Fantini would be sitting in place of Mr. Gifford.

OLD BUSINESS

NOTE: Prior to the meeting and at the request of the applicant, the application of **Craig Werner** was postponed to the June 21, 2016 meeting.

1. **Application from Brooks Teele for a use variance from Section 208-53A, permitted uses in B-5 Zone. Residential is not a permitted use in this zone. Owners propose to develop property as a single family residential community. Property is located at Route 146, Tanner Road and Miller Road, Clifton Park, NY. (Permit #81085)**

Jon Lapper, Esq, project attorney with the Bartlett Pontiff law firm in Glens Falls and Joe Dannible, the Landscape Architect from Environmental Design Partnership were again present. Mr. Lapper stated that in speaking with Board counsel, he understood not all of the Board members received their supplemental submission and that perhaps therefore, they would not be comfortable voting on the application tonight. He further stated that since the last meeting, they had received a response from the County Planning Board, who

not only opined there would be no County impact by their proposal, but that they thought the applicant had met the use variance standards.

Mr. Dudick accepted the applicant's offer to come back at a later time to allow the Board a sufficient opportunity to review the additional materials provided.

Mr. Peller confirmed that the public hearing is therefore continued.

Application tabled until the June 21, 2016 meeting.

The secretary read the legal notice as it appeared in the Daily Gazette on June 2, 2016.

2. **Application from Dan Lill and Thomas Lill for a use variance to construct multi-family dwelling units in a B4-A zone. 16 townhouses are proposed on a 1.56 acre lot, which is 2 lots combined. Allowed uses are anything permitted in a B-3 zone except dwellings which will not be allowed by special exception or otherwise. In addition, an area variance is being sought for the front building setback (80' required, 30' available, 50' variance required) and for the rear building setback (30' required, 22' available, 8' variance required). Property is located at 13 and 15 Old Plank Road, Clifton Park, NY 12065. (Permit #81067).**

Dan Lill, Jr. presented the application and handed out a letter to the Board members from Ferdinando Bruno of Realty USA dated April 19, 2016. He introduced himself and the team; Jacqueline Murray, Esq. of the Murray Law Firm, Joe Dannible and Brian Ragone from EDP and his brother and partner, Thomas Lill who were all present. He advised that the owner of 13 Old Plank Road, Reid Miller was not able to attend this evening.

Mr. Lill advised that he considers Ferdinando Bruno of the Realty USA Rubinger team an expert in his line of work as a real estate broker. He reiterated what Mr. Bruno had outlined in his letter, which is that in the 6 years the office building next to the subject property, located at 9 Old Plank Road, had been listed for sale with 2 different brokers; there had been 2 expired listings after having been listed for a total of 2,308 days. He stated that the building is currently listed for sale again and that NY Pain Management had occupied the building for a time, but had moved over to Route 9 near Sitterly Road. He went on to state that this is an intricate and legally complicated project that had initially gone to the Planning Board, and that the submission presently before the Zoning Board incorporates the Planning Board feedback. He believes that this project is complimentary in the terms of the Town Center Zoning and contributory in terms of bringing people into the Exit 9 corridor, and has the potential for a tenfold increase in taxes. He clarified that he and his brother currently own 15 Old Plank Road and have a purchase contract for 13 Old Plank Road with Reid Miller.

Jacqueline Murry, Esq. introduced herself and advised that she was present on behalf of the Lill brothers in furtherance of their application for a use variance to construct multi-family residential units at the combined parcels of 13 and 15 Old Plank Road. She stated that the combined parcels are 1.56 acres; that 13 Old Plank Road is currently developed with a home that is occupied which had been built in 1922 and that 15 Old Plank Road is an abandoned dwelling that the Lill brothers had acquired at auction, which was developed in 1953.

She stated that typically she wouldn't back pedal to the 1920s and the 1950s during any of her Board presentations, especially in Clifton Park, but that those dates were very significant in connection with this

application and the standards they are required to meet in order for the Board to feel comfortable granting the use variance. She went on to state that back in 1922 and 1953 when these residential uses were developed, the Northway and the current Zoning Code did not exist and that these 2 parcels were developed with houses that have since been sandwiched between the Northway, which was developed in 1957, and by the mixed commercial uses that grew along the Route 9 corridor. She explained that as compared to the permitted commercial uses in the Zoning District that surround the subject property, these 2 houses do not have elevation to be visible from the Route 9 corridor and do not have accessibility similar to the commercial uses that are permitted in the Zoning District.

Mr. Fantini asked whether the purchase price for 9 Old Plank Road had been reduced. Ms. Murray stated that the reason Mr. Lill had cited that property was to demonstrate that even an office building, which is a permitted use in the zone, has been unsuccessful and suffers some of the same constraints as the 2 parcels that the applicants are here about tonight, but pointed out that particular property is actually visible from the intersection of Old Plank Road and Fire Road. She advised that even though there is some limited visibility for that office building, 9 Old Plank Road has still been suffering in a distressed state in terms of being marketable and the owner of that property was not getting a reasonable rate of return, which again, is the reason Mr. Lill had submitted the evidence on that brand new office building.

Mr. Lemire asked if 9 Old Plank Road was vacant now and Mr. Lill said he believed it was and that it was currently in transition and for sale right now.

Mr. Lemire asked if 13 Old Plank Road is the smaller parcel and Ms. Murray responded it was and that it is .3 acres.

Mr. Lill then stated that the requested the area variances included in the application are off the table because without further Planning Board feedback and review, they felt it would be a bit much. Ms. Murray added that although the applicants had created a conceptual site plan on recommendation from the Planning Board, typically they would revisit any necessary area variances after they had a further review by the Planning Board because as they stand now, they don't know what the Planning Board is going to accept in the way of setbacks, storm water management and density. She confirmed that for this evening's purposes, they are only requesting the Board to review the use variance application, even though the area variances were originally included as part of the written application, as it would be inefficient otherwise in her experience with this Board, because they don't know what area variances are going to be needed.

Getting back to the conditions of the site, Ms. Murray went on to state that access to the parcels is by way of an older, dead end street. She stated that the B-4 Zoning District was expressly established for the purpose of business uses mainly oriented to automobiles, but that in reviewing the list of the permitted business uses in the B-4 zone, they were hard pressed to find any uses that would be suitable with the existing access on a dead end street that lacks any commercial visibility whatsoever. She stated the reason they are requesting the use variance because of those features and that combined with the letter from the Rubinger Team, the historical sales information and the issues the 2 properties have, the facts adequately support a finding by the Board that there is no reasonable return for the property without the granting of a use variance.

Ms. Murray pointed out that the minutes of the January 12, 2016 Planning Board Meeting reflect that Planning felt a residential use was a good use of the site and that the County Planning Board had met, and had noted that although a use variance is a local decision, they were of the opinion that the applicant was not able to meet the

criteria required for a use variance to be granted. With all due respect to the County Planning Board, Ms. Murray stated they are here tonight to demonstrate to the Board how we can meet the criteria. She stated that the first criteria to be reviewed in granting a use variance is no reasonable return. She reiterated that a written opinion had been submitted to the Board from a licensed real estate broker demonstrating that the adjacent office building, which is a permitted use, has not been able to garner a reasonable return for a very long time. That coupled with the fact that the site's location is on dead end street which cannot support commercial traffic and that the permitted uses are expressly established to be oriented to automobile, presents a situation where the applicant would not get a reasonable return for this property if it were developed for any of the permitted uses.

She went on to explain that the other aspect here is precedent and they understand there has to be a uniqueness to the parcel, adding that we all would be hard pressed to find other houses from 1922 and 1953 that have been sandwiched between a commercial corridor and the Northway corridor, which is the physical situation the applicant is presented with.

Ms. Murray stated in similar situations, it has been legally determined when there is an inability to get reasonable return, use variances have been upheld. She explained there is a *Fiore* case by the NYS Court of Appeals where it had been held that there was no reasonable return for an existing, dilapidated barn that was not a permitted use in the zoning district, which had impaired the property for a permitted use. She explained that here, we have 2 existing old homes, one of which is abandoned and the other being outdated, neither of which could be converted to a permitted use for any reasonable value. The other case she mentioned was the *Douglaston* case, also out of the Court of Appeals, where the Court had held when physical conditions at a site would increase construction costs so significantly to create a permitted use, there would be no reasonable rate of return. She stated the applicant has both situations here; they can't convert the 2 houses and invest in them to make them suitable for a business use. She stated that the applicants have a situation where the houses would have to be completely torn down and developed for something else and that if they were developed for one of the permitted uses, they could not expect a reasonable rate of return, as further evidenced by the letter they presented from a licensed real estate broker, which documents that the next door permitted business use has not been able to garner a reasonable rate of return.

Ms. Murray reiterated that, combined with the lower elevation, the lack of visibility from Route 9 and the fact that the site does not have sufficient access for commercial traffic for any of the permitted uses in the B4 zone, is their basis for establishing that there is no reasonable rate of return. She further reiterated that in terms of unique circumstances, again they have 2 homes that were built before the Northway and have now become sandwiched between all of these other commercial uses without the visibility that is needed for a commercial use and without the access that you need for commercial traffic.

She stated in terms of material change to the essential character of the neighborhood, this proposed use would be consistent with what is already developed in the neighborhood, which is residential mixed use with commercial. She advised that the Lills had reached out to the one other resident at the end of the dead end street who had no opposition to the project and that in terms of the current houses being outdated, one being abandoned, they submit that any change to the neighborhood would actually be an improvement because there would be new construction in place of these 2 residences.

Lastly she advised in terms of whether or not the hardship was self-created, these houses were there before the changes in the area in terms of the development of the Northway and the development of the Route 9 corridor

and that because of the physical condition of the houses themselves, being at an elevation of about 10 feet lower than other adjacent sites and the lack of access, the applicant submits that this hardship was not self-created, but rather, was created by the way that the rest of the area grew around the houses.

Mr. Cifor asked whether the required notice had been sent to the surrounding neighbors and Mr. Dudick asked if the applicant had anything in writing from the neighbor he had spoken with.

Mr. Myers confirmed that the required notices had in fact been sent to the surrounding neighbors.

Mr. Lill advised he had nothing in writing from the neighbor, Brian McCall, who lives at 17 or 19 Old Plank Road, but that he had met with him at his office and was supportive of the project, but had specifically referenced the need for some fencing to be added because his only concern was the best way to prevent people from going into his yard.

Mrs. McCoy inquired as to when the applicant had purchased the property and what the original purchase price was. Ms. Murray replied that the Lills purchased the property at 15 Old Plank Road at an auction in approximately June of 2015 for $120,000.00 after the property had been on the market in 2012 for $225,000, having been reduced from $235,000.00.

She stated that the property at 13 Old Plank Road was purchased in 2010 at a short sale, and the sale price, per the MLS was $47,700.00, although it had originally been listed for $149,000 and then reduced to $85,000.00. Both Ms. Murray and Mr. Lill questioned the accuracy of the MLS records because they believed Mr. Miller had paid more like $80,0000, but confirmed 13 Old Plank Road was purchased by Mr. Reid Miller, who closed on the property in on June 11, 2010.

Upon further inquiry from Mr. Dudick, Mr. Lemire and Ms. McCoy, Mr. Lill confirmed he has a contract with Mr. Miller, which is an option to buy for $150,000.00, contingent upon governmental approvals, and that he would not be moving forward with him without government approvals associated with the Zoning and Planning.

Mr. Cifor asked the applicant how the situation was not self-created, since he had purchased the property at auction a year ago and knew the buildings were in a B4A zone.

Mr. Lill stated that he feels the conditions pre-existed him getting involved and that ultimately, he is just looking to explore the development and feels they have met the criteria for a use variance.

Mr. Cifor pointed out that one of the criteria is that it is not a self-created situation and advised Mr. Lill it looked like a totally self-created situation to him, because he had bought a property at auction at what he felt was a bargain price, with the existing zoning in place a year ago, and now is trying to redevelop the property by getting a zoning variance, which to him would be 100% self-created situation.

Mr. Murray clarified that Mr. Lill was stating that the hardship existed before he purchased it, because the property was already suffering, was already distressed, was being sold at an auction and that at $120,000, he still can't get a reasonable return even if he improved the house.

Mr. Cifor advised he did not dispute that at all, but the question is that one of the criteria in this situation is that the hardship is not self-created or self-imposed and again asked how the applicant is meeting that criteria. Ms. Murray responded because of the physical conditions of the properties and the way that the property became sandwiched. Mr. Cifor then pointed out that Mr. Lill did not have to buy the property.

Mr. Dudick agreed with Mr. Cifor's comments and further opined, that the property itself has a hardship which the owner, Mr. Lill, consciously assumed, because it was known that it was a distressed property where the previous owner allowed the property to go to auction and it seems that there was a conscious effort to take on the hardship and that therefore this is a self-imposed hardship, adding that Mr. Lill saw the property as a hardship case and took it on by purchasing it, thereby incorporating that hardship as his own.
Ms. Murray stated that it is their position the hardship was created by the development of the Northway and the commercial corridor. Mr. Dudick agreed that the property is distressed from the stand point of the development that has occurred all around it and stated that certainly the owners of the properties in the 1950s when the Northway was developed could have come before the Town or tried to do something at some point when they realized what had happened around them, adding that would not be a self-imposed hardship, because obviously whoever owned the property when the Northway was developed, didn't have any say whether the Northway was going to be next to their property. He further stated that the property had been transferred at least one time since then and that it is not a requirement of this Board to say that all properties must make money.

Ms. Murray advised that she understood that, but even if Mr. Lill were to continue the existing use of the property as a residence in the B4 district, upon purchasing it out of the auction, he discovered that there is not a way to update that property in a way to have any reasonable return from the property because it was abandoned and is in a dilapidated condition and then, looking to other uses that are permitted in the zoning district, converting that existing residence, although he knowingly bought an existing residence at an auction, he did not know the limitations. Mr. Dudick opined that was one of the perils of an auction.

Ms. Murray agreed that it is a peril of an auction and those are the cards that Mr. Lill got, but stated the one house is old and dilapidated and the other was abandoned, pointing out there is case law that says that a use variance can be upheld where the existing use cannot be converted to one of the permitted uses. She went on to state that in one of the Court of Appeals cases she had cited, there was an existing barn in a residential zoning district. The owners wanted to rent out the barn for storage of antiques. They had to apply for a use variance because storage facilities weren't permitted in the residential zoning district and the Court upheld the granting of the use variance on the grounds that with the existing conditions at the barn, it would not be financially practical to change the barn to what the permitted uses were.

Ms. Murray stated that the applicant has the exact same situation here. They have existing houses in a district where they are no longer permitted and to convert those 2 existing houses to a commercial use would not garner a reasonable rate of return and it would be impractical to change them to an auto body shop or a public library.

Mr. Dudick asked what prohibits the owner from either using it as a residence or as a rental, since the residences are permitted by grandfathering.

Ms. Murray explained that the house at 15 Old Plank Road was abandoned and is in a condition where there would need to be a significant investment in the property to make it marketable as a house and that such an

investment is not likely to garner a return that would outweigh the investment. She further explained that they also have an abandoned, outdated house and to make it a habitable, attractive house would cost more than the applicant could ever sell it for, which is the problem they have with using it in its existing capacity. Ms. Murray added that to convert it to any of the commercial uses that are permitted in the B4 Zone would also be financially infeasible. She concluded by stating that they have supporting case law where use variances have been upheld as not self-created, unique and finding that there is no reasonable rate of return, which she indicated she could present to the Board

Mr. Lemire requested clarification of the case law that had been referenced and Ms. Murray advised that the case involved an existing barn in a residential district and that the issue in the case was if it was appropriate to grant the use variance where the barn theoretically could have been transformed into a house which was a permitted use. Ms. Murray stated that is the situation this applicant has; only it is a little reversed because they have a house that is in a commercial district and their position is that it would be financially impractical to make that house into any one of the permitted uses in the zoning district.

Mr. Lemire pointed out that the applicant is not converting the houses into anything, but rather are planning to rip them down by what they are proposing. Ms. Murray stated that was correct, but explained the reason she was raising the argument is because they are required to show they can't use the property for one of the permitted uses in the zoning district and garner a reasonable return and case law says you can establish that there is no reasonable return if you were going to develop for one of the permitted uses where you have an existing use that can't be made into that use.

Ms. Murray again stated she could provide the case law and understands this is a complicated one and if everybody wants time to look at what those cases hold, she believes it might give everybody a level of comfort as to the fact that there is precedent for granting use variances under these types of situations. She went on to explain that the *Douglaston* case she had cited involved a situation where the Court held it was appropriate to grant a use variance where physical constraints at a site prohibited it from being used for a reasonable rate of return in one of the permitted uses. She described that case as involving a parcel that was wet in a residential zoning district, where the developer sought to create an indoor tennis facility. She said the Court held that because of the swampy conditions of the site, the site didn't lend itself to residential development, which was the only permitted use and upheld the granting of the use variance for the tennis facility. She added that all of these cases involve a lot of different factors and a lot of different criteria, but that she is here to give the Board some examples as to where use variances under similar circumstances were granted and legally sustainable.

Mr. Peller asked if the cases cited were upstate or downstate cases. After discussion Ms. Murray confirmed that they were both downstate cases.

Mr. Fantini noted that he thought the point Ms. Murray was trying to make is that the property cannot be used for any permitted use or its current use, which is supported by the fact that the property adjacent to it was sold at a short sale for a 1/3rd of the price.

Ms. Murray agreed and further stated it was also supported by the Rubinger Team letter provided showing that the adjacent parcel at 9 Old Plank Road, which was developed for one of the permitted uses in the zone, has been distressed for many years and couldn't be rented.

Mr. Lemire asked if the residence at 13 Old Plank Road was occupied and Ms. Murray stated that it was.

Mr. Lemire asked if her clients had marketed the property at 15 Old Plank Road, if they had any evidence of that and whether they had asked Mr. McCall who owns 17 Old Plank Road, if he wanted to buy it.

Mr. Lill responded that they have not marketed the property, that he had not asked Mr. McCall if he wanted to buy it, but that Mr. McCall had asked him to buy his property, which he was not contemplating doing right now.

Ms. McCoy asked Mr. Lill what his intention was for use of the property when he purchased it in 2015 for $120,000.00.

Mr. Lill responded that his initial intention was to evaluate it and look at the zoning and the houses and that to be honest; it was a buyer beware auction, but that his intentions obviously changed based on everything that Jackie explained.

Mr. Dudick asked whether his intention was to purchase the property and then look at the zoning, to which Mr. Lill responded he had done some due diligence, but his intention was to purchase the property and that when the auction went down, he didn't realize all of the plumbing was damaged, that there was mold in the basement, etc.

Mr. Peller asked Mr. Lill if he had been represented by an attorney at the auction and Mr. Lill advised he was not. It was a website based auction called Auction.com.

Mr. Peller asked whether it was a foreclosure short sale and Mr. Lill replied that it was a foreclosure that was offered for sale by auction.com.

Mr. Dudick asked if Mr. Lill knew what the other bids were or if it was a blind auction and Mr. Lill replied that it was a blind auction and that he had no idea of the amount of the other bids being made.

Mr. Dudick opened the Public Hearing and asked for questions or comments. There were none.

Mr. Myers advised that the summation in the letter received from County Planning states that although they believe it was the local Board's decision, they did not feel that any of the criteria for a use variance had been met. Mr. Myers stated he agreed with that statement, but even if it is all narrowed down to just one issue, he does not see how the applicant can get over the criteria of this not being a self-created hardship, adding that Mr. Lill walked into this with his eyes wide open, knowing the area was zoned and now he wants to convert it.

Mr. Myers reminded the Board they must go through a SEQRA review and make a declaration before they take any action and that the Board would need to declare itself lead agency. He advised that he and the Town Engineer had reviewed the environmental forms that were submitted and that although he did not agree with some of the answers on the form, he does not believe there would be any significant impact. Mr. Myers further stated that the applicant doesn't have a real development to know how much discharge for sewage and things of that nature, but advised if it does get to Planning they would address those issues and therefore he believes the Zoning Board could make a negative declaration on this application

Mr. Dudick then read the letter of February 5, 2016 from the Saratoga County Planning Board signed by Director of Planning, Jason Kemper, into the record.

Mr. Lill commented that he knows Mr. Kemper from when he was at the Planning Board and had talked to him on the phone. He further stated that he believed he took some bad advice by not going to the County Planning Board, although he had provided Jason with meeting minutes from the Town Planning Board, explained the project to him, and had asked him if he had any questions, and all seemed well. Mr. Lill indicated that Mr. Kemper was not at the County meeting and that if he had to do over again, he would have gone to the County Planning Board. Mr. Lill then stated that County Planning's opinion was regrettable because their feedback was based on the original submission to the Planning Board, not the revised submission, explaining they had a more dense application previously, without the fire access and only one entrance.

Mr. Myers confirmed that County Planning had received Mr. Lill's second submission on January 26, 2016 which included the area variances which had only been dropped tonight and that their meeting was held in February 2016. Mr. Lill stated that in his opinion, less weight should be taken into consideration of their opinion.

Mr. Dudick then made a motion to close the Public Hearing which was seconded by Mr. Morelli. All voted in favor and the Public Hearing was closed. He then asked the Board if anyone felt they needed to review the case law.

Mr. Morelli advised the Chairman that he believes this is a unique parcel for that zoning district and perhaps the opportunity to review the case law would help, especially if it deals with similarly situated properties that are constrained. He added that the property is unique in both the surrounding area, the timing of what has been developed since the residences were created and that although he certainly understands the required criteria for a use variance, as a resident he is concerned about what is going to happen with those 2 parcels if this Board doesn't ever offer relief and whether there would be a practical opportunity for them to be developed into something other than as an abandoned residence as the one is now. He concluded by stating perhaps the opportunity to review the case law might allow an opportunity for the Board to effect some change in that part of the town.

Mr. Bloss stated that he agreed with Mr. Morelli and added that a concern of his is that this property is in a bad spot and since the applicant didn't make it that way, if there is a way out of it that doesn't set a precedent where we should be doing this all over the place, then the Board should look at it.

Mr. Dudick asked Ms. Murray if she would be willing to postpone and come back at a later date so that the Board could have an opportunity to review this case law. Ms. Murray advised that she would put together a legal analysis explaining the case law which they believe support the granting of a use variance under these types of circumstances so that the Board can see the analogous case law where use variances were upheld.

Mr. Cifor suggested that she might also want to include an analysis showing how all criteria for a use variance has been met, again stating that the biggest issue he sees, is that it is not a self-created hardship. Ms. Murray advised they could include all 4 criteria as well, but had already done that in their application with the factual details of the site, but had just not included the case law.

Mr. Lemire again asked for clarification of the details involved in the cases she had cited and Ms. Murray replied that she would go back and look to see how the Court of Appeals addressed it, but that she believed the issues before the Court were reasonable rate of return and uniqueness.

Mr. Peller noted that because one of the cases cited is from 1968, he assumes it would probably be prior to any of the criteria that is currently being used today. He also stated that the other case cited is from 1980 and that from his quick review, it appears the cases really had to do with the type of property, as Ms. Murray had mentioned, but didn't really get into any of the specifics of the criteria that is currently being used.

Mr. Myers clarified for the Board, that although the applicant had referenced Town Center Zoning, Town Center Zoning does not extend to this parcel and does not come across the Northway. He also pointed out that to develop these parcels would require significant infrastructure improvements for approval and the money that would be involved in that would be fairly significant between the road, the sewer, etc., even if it were a permitted use.

Mr. Lemire asked if the applicant wanted to build a residence on 15 Old Plank Road whether they would be allowed to do so because it's a residential property now. Mr. Myers replied no, you cannot change from one non-conforming use, even if it's the same one, adding that the residence sounds like it has been abandoned, so the use could be considered as being abandoned and therefore you can't restart it, except by variance.

Mr. Lemire asked what the distinction between a rehab job and a knockdown job was, in the event the applicant wanted to go in and fix it up and make a residence. Mr. Myers responded that is a continuation of use.

Mr. Lemire asked whether that was okay, but if ripping it down would not be. Mr. Myers responded as long as the foundation stayed and it was part of the original use, you could rebuild, further clarifying that as long as they are building on the existing foundation its never a problem, but as soon as they want to expand it, then a use variance would be required because they would be expanding a non-conforming use

Mr. Lemire inquired if there had been any attempt by the applicant to rebuild from the foundation and Mr. Myers responded not to his knowledge.

Mr. Lill returned to the podium and first stated he hoped it wasn't inappropriate for him to bring up the Town Center Zoning. He stated that the reason he had mentioned it is because he believes the project is complimentary to the Town Center Zoning, adding that he is aware the property is not included in the Town Center Zoning.

Mr. Lill also commented that in his opinion, based upon a review of Jackie's analysis and a review of the permitted uses, in terms of economics, it would be practically impossible to engage in any of the permitted uses and make Old Plank Road happen, adding that the lower impact nature of what they are proposing would be less dense, involve less traffic and less intensity to the road.

Mr. Myers pointed out that he would still have develop a 32-36' wide road, which doesn't exist right now, with utilities that would support this equipment because right now you can't get a piece of emergency equipment if a car or a bike were on the road. Mr. Lill stated they have modified the site plan and the emergency access situation has been addressed. Mr. Myers noted there would be a significant amount of finances involved, even if this was approved.

Stated a different way, Mr. Dudick said that if the application is approved, it is still going to be a financial loss, to which Mr. Lill responded, I guess it will be my loss to engage, adding that he didn't think EDP has even had an opportunity to review that and the relevance here tonight would be the zoning use variance.

Mr. Dudick advised the Board could either plunge forward to have a vote on the application tonight or the application could be tabled because multiple members of the Board have asked to review the case law

Mr. Fantini advised that he thought it would also be useful if the applicant provided information on how much it would cost to knock the properties down to the foundation and re-build residences. Mr. Lill responded that he was not going to do anything on the property other than investigate. Mr. Dudick advised that he was not going to force the applicant to figure out costs for things he's not requesting. Mr. Lill stated that it would be economically unfeasible in terms of stripping it down to the foundation.

Mr. Fantini explained he was not saying such information was necessary, only that it would be supporting evidence from a contractor showing that it would be inappropriately expensive.

Mr. Dudick advised he would never require an applicant to provide evidence of something that he is not requesting and that he is comfortable with the fact that Mr. Lill has stated he has no intention of tearing down the buildings to redevelop them as residences and therefore, he is not going to ask him to assess how much that would cost.

Mr. Lill stated that he builds homes for a living and knows the per square foot prices, so if a ball park was requested or comes up at the next meeting, he did take note. He added that he appreciated the comments and did not want the Board to take the feedback the wrong way and apologized if that was how it came across.

Mr. Dudick reiterated he was comfortable with the answer that was given and that if there was nothing else to be said, the application would be tabled until the next meeting. Upon inquiry from Mr. Myers, Mr. Dudick also confirmed that the SEQRA action was also being postponed until the next meeting on June 21, 2016.

Mr. Myers advised Ms. Murray to send her additional submission to him electronically and he would distribute it to the Board Members.

Application tabled until the June 21, 2016 meeting.

NEW BUSINESS

The secretary read the legal notice as it appeared in the Daily Gazette on June 2, 2016.

3. **Application from Sign Studio, Inc. for an area variance from Chapter 171-Table I which allows 60sf max. for 2 wall signs. Applicant requests 161sf, 101 sf variance required. Property is located at 617 Plank Road, Clifton Park, NY 12065. (Permit #81092).**

Ron Levesque from Sign Studio stated he was here tonight representing 617 Plank Road, Best Western Hotel who is requesting an area variance for additional square feet for signs and as noted on their application, for a height variance, which was not noted on the Agenda. He stated that sign height of 18' is allowed and they are

asking for height of 24.5'. He also stated there are 2 walls signs, the first one for the entrance to the hotel, as there currently is no sign on the front elevation. He advised there is currently a sign on the side of the hotel, which is 70sf and they are asking for 1 sign on the front at 81 sf with a height of 24.5. He then explained that they are going to remove the 70sf sign that is currently on the side of the building and replace it with a second sign which is 81sf and is within the 18' height code limit. He advised that there is a canopy which prevents them from putting the sign on the front elevation any lower and that the most feasible spot to put the sign on the front of the building is in the peak above the canopy, because they did not want to place it above the roof line.

Mr. Levesque advised that if you look at the 81 sf sign, the actual square feet occupying the building is only approximately 53.6. He explained that they had measured the square footage of the circle, as well as the square footage of the words "best" and "western", and that even though they did their calculations from the highest point to the widest point which came out at 81 sf, the sign would actually only occupy 53.6 sf on the building.

Mr. Dudick asked Mr. Myers whether the calculations by the applicant were correct or if it was less because these are individual letters that are not inset into a box, which has come up in the past.

Mr. Myers responded that he used the numbers the applicant put on his application, which was 81sf, but because of the blue circle with the "BW" inside it, he would have used the whole circle no matter what, adding that he believes the applicant is only using the letters inside. He noted that the application says 81 sf in the corner and that is the number he used.

Mr. Levesque replied he was using the area of a circle which is approximately 19.6 sf and that he did encompass the entire circle. He explained that most times when they do this, they take into consideration the highest and widest points and use that in their calculations for square feet, adding that most municipalities require it as well.

Upon inquiry from Mr. Lemire, Mr. Levesque confirmed that each sign is 81 sf, which measurement was obtained by drawing a rectangle around the circle, advising they always come in at the worst case scenario. He added that the freestanding sign by Plank Road is being rebranded as well and they have decreased it by 15 sf under the current permit. He stated that the hotel is located behind the I-Hop and is not a very visible building, adding that although you can get a slight glimpse of the building from Route 146 if you look through the trees, and for practicality reasons, the one sign they do have is on the side because it is the only sign that is going to get any visibility out to the public. Mr. Levesque advised that to entice the people to go to the hotel, they would have to get more of a public view. He stated that there is a Hampton Inn, The Hilton Garden Inn and a new hotel being built next door by BBL which is actually going to share the same driveway as the applicant. He added the applicant is limited because his building is only 2 stories and the Hampton Inn is 4 or 5 stories. He pointed out that the Hampton Inn has 2 signs on their building in excess of the allowed square footage, as does the Hilton Garden Inn.

Mr. Lemire asked whether there is currently a sign for the hotel on the Northway. Mr. Levesque replied there is one on the cell tower that is grandfathered, but they also have one on the entryway into 617 Plank Road. Mr. Myers advised that sign had somehow gotten approved years ago.

Mr. Lemire stated that there is one sign on the back side of the hotel which faces the Northway; there's one on the front side by the I-Hop and there's one on the cell tower, which Mr. Myers confirmed is on a separate

parcel. Mr. Levesque confirmed that was correct, but that you probably really wouldn't notice the sign on the cell tower other than to maybe get a glimpse of it in the fall and winter, as it is barely noticeable in the summertime, and will become less and less noticeable as the years go by, because the trees are really encroaching on it at this point in time. He added that as far as the height limitations, they are not asking for anything that hasn't already been granted by this Board for other hotels in the area that have numerous stories and therefore this is very minor, as they are only asking for 6 more linear feet.

Mr. Lemire asked if the applicant could only get one of the two signs, whether the one on the front or the one on the side would be more important. Mr. Levesque responded that they both are equally as important, explaining that if you look at the best location for the public to know that the hotel is there, that would be Route 146 but for people driving up to the hotel, because there is another hotel to the left and with the Best Western being behind the I-Hop, they would have to have a sign for the main entrance. He explained that because the applicant is buying the I-Hop and there is another hotel being built right next door, you still need to get that public visibility and the only way he is going to get that is on Route146. He said that if somebody were only going to give the applicant a sign on the front of the building, you would have to make that a destination in your GPS to know that there was a sign on that building and therefore, especially with the new hotel being built, the applicant has to distinguish where the new hotel is and where his hotel is.

Mr. Lemire asked whether that means the sign on the front would be more important. Mr. Levesque advised if they had to gain priority, definitely they would do the one on the front. He stated that right now they get people off Route 146, but the public doesn't know which one is going to be Best Western because once you get them there, you have 2 hotels right next to each other and if you don't have a sign on your building, then you are going to direct them to the hotel next door. He added they are entitled to 2 signs on the building and are just looking for additional square footage.

Mr. Lemire asked if the applicant would be willing to do a 40 sf sign on the front and 20 sf sign on the side which would fit the peak. Mr. Levesque advised that would not be feasible and that if you look at the overall height and width, and look at what is physically occupying square footage on the building, it is 53.6 sf., because there is a lot of negative space on there that is not being used. He added that if they put a box on the sign with a flat panel, that sign would be 81 sf., but this is not a box sign, this is raised channel letters.

Mr. Dudick asked the applicant to clarify the square footage of the sign and Mr. Levesque advised it would be 53.6 sf. Mr. Myers then asked if he was subtracting the spaces between the letters to get to that area measurement. Mr. Levesque again stated that he had taken 3 calculations; the area of the circle was one; the word "best" was 2 and the word "western" was 3 and that he used the overall height and width of "best" and "western" and then squared those off to show that its below 60 sf. Mr. Myers advised that is what he should have applied for then, because if he had done the calculation himself, he probably would have gotten that figure as well.

Mr. Dudick asked whether the 53.6 sf in actuality would be 107.2 total sf. Mr. Myers responded that was correct and that is should be 108 sf, which would then be a variance of 48 sf. Mr. Dudick commented that that resulted in a significant drop in the variance requested without changing the sign whatsoever and Mr. Levesque agreed.

Upon inquiry from Mr. Dudick Mr. Levesque advised that he was directed by Best Western corporate to present the higher number or the worst case scenario, because they felt could always stipulate to the square footage being less.

Mr. Dudick referred the applicant to the 3rd to last page of his application which is an aerial photograph with numbers 1 through 5 on it in red circles, and asked if the intention was for the signs to be placed where numbers 1 and 2 are. Mr. Levesque responded that was correct.

Mr. Dudick asked if the sign represented by number 3 already existed and Mr. Leveque responded that was correct, it is the permitted sign that is off site and grandfathered and there is an easement there, as well as a long standing contract with the owner for that. He explained that the applicant was part owner of that property at one time, but when he sold it, he retained the right to have a sign there forever. He advised that the sign represented by number 5 on the aerial photograph is the pre-existing Best Western sign that they are going to remove, which is currently located on the property of the new hotel being built and that the sign represented by number 4 is the intended location of the new sign which is already permitted.

Mr. Dudick asked Mr. Myers whether he had any issues or if anything needed to be done by the Board with regard to that removal. Mr. Meyers advised that the sign represented by number 5 is partially on the Marriott property and partially in the Town right of way and that number 4 will still be in the Town right of way, adding that it is a situation similar to the Price Chopper freestanding sign, which is also in the Town right of way.

Mr. Dudick opened the Public Hearing and asked for comments or questions. There were none. Mr. Dudick made a motion to close the Public Hearing. Mr. Cifor seconded. All voted in favor and the Public Hearing was closed.

Mr. Myers stated that this is a Type II action and therefore, no further SEQRA review by the Board is required and that he would defer to Mr. Peller with regard to the fact that the height variance the applicant spoke of was not in the application or in the public notice. He said that when the application was first submitted in March, it included the height variance request, which he had denied and that when the application was resubmitted, the height request did not get included in his write up and therefore, was not included in the public notice. Mr. Myers stated he did not believe it was that significant, as we are only talking about 6'.

Upon inquiry from Mr. Lemire, both Mr. Myers and Mr. Levesque confirmed that the side sign was at 18' in height, which is within code requirements.

After a five minute recess, Mr. Peller advised Mr. Levesque that the application needed to be re-noticed because there was no indication that height was of concern. Mr. Peller's recommendation to the Chairman and to Mr. Myers was also to correct or revise the actual variance that is being requested because of the issues with the amount of square footage and that he thought it best to clean the whole thing up and have it re-noticed.

Mr. Levesque advised that he understood, waived the requirement of the Board to make a decision on his application within 61 days, advised he would get the information together and get it to Mr. Myers and come back before the Board on June 21, 2016.

Application tabled until the June 21, 2016 meeting.

Chairman Dudick announced that because he runs Core Chiropractic and Massage, he was recusing himself from the Ruffigan Enterprises d/b/a Elements Massage application and designated Michael Bloss as Acting Chairman.

The secretary read the legal notice as it appeared in the Daily Gazette on June 2, 2016.

4. **Application from <u>Ruffigan Enterprises d/b/a Elements Massage</u> for an area variance from Chapter 171(C) (1)(a) and (b): 1) 2 max. window signs per building tenant; applicant requests 7 signs, variance required = 5 signs; 2) No more than 50% of windows covered or 8 SF whichever is less; applicant requests 159sf; 151sf variance required; and 3) 100% coverage requested, 50% variance required. Property is located at 5 Southside Drive, Clifton Park, NY 12065. (Permit #81094)**

The application was presented by Tim Miller and Bob Miller from Windsor Development. Tim advised they were present in their capacity of landlord on behalf of Elements Massage who is a tenant at the Shops at Village Plaza. Tim stated that Elements Massage is seeking an area variance for static cling signage to be placed on the interior windows of their space. He stated that a strict application of the zoning regulations in this instance results in a practical difficulty given the southern exposure of the demised premises. He explained that the sun glare creates a very bright and hot waiting room which the clients find disturbing when they come into this space to try to relax before their sessions. He added that a strict application of the dimensional requirements results in significant economic injury due to the lost revenues the business will sustain and that the roller shades that are currently installed, are not providing enough protection from the sun glare. He added that Elements Massage had received numerous complaints that it is too bright in the waiting area and that some of the clients are now refusing to come during the daylight hours. He stated that the granting of the variance is not going to result in a substantial detriment because the static cling signs are consistent with what other businesses have been doing in the commercial corridor, such as the G-Box and Redwing Shoes, and that they believe it is in keeping with the neighborhood character.

Mr. Cifor advised Mr. Miller that the window signage the Board has approved to date, have been kept to generic images, meaning it is not directly selling the business and that from what he sees in the application, the applicant is advertising massage all over the window.

Tim responded that he had pictures of The G-Box signage with him, which he believes also has images of people working out and contains verbiage which talks about working out. Mr. Cifor advised The G-Box has a figure of a male and a female which doesn't specifically reference exercising.

Mr. Bloss noted that the proposed wording of "introductory offer for $49.00" is very large and is the size of window sign all by itself.

Mr. Peller asked the applicant whether the pictures in the application are the ones they are looking to have approved or if they were just renderings of what the images would look like. Mr. Miller deferred to Beth from Elements Massage who was also present and she advised they were just an idea and confirmed the signs are not already up.

Mr. Fantini asked the applicant if he could review the pictures of The G-Box signage to refresh his memory and Mr. Miller presented the photographs to the Board members.

Mr. Cifor clarified that the applicant has the right to cover 50% of the windows and that the Board had considered The G-Box signage to be generic, not representing what was going on inside the place. Mr. Bloss added that The G-Box did not have dollar signs or numbers on the front either.

Mr. Fantini pointed out that the Elements proposal did contain verbiage stating "no contract or sign up fees". Mr. Bloss agreed the G-Box did have information contained within their signage, but again noted they did not have any dollar signs or numbers. He added that he felt that the Elements pictures seemed very in your face.

Mr. Fantini asked whether the Board thinks the words "no fees" is not the same as a dollar sign and a zero. Mr. Bloss advised he was not sure, but that the images seemed to him to be more aggressive and that The G-Box images seemed a little softer to him than this proposal, particularly if it is something that could be altered.

Mr. Bloss opened the Public Hearing and asked for comments or questions.

Bob Miller advised that the artwork hasn't been ordered and is not something that is up now. He explained it is something that is an indication of the direction the tenant would like to go in with this signage. He stated he has heard the Board's comments about the images of a male and a female, it being a little more aggressive and advised that this type of signage is really important to the tenants. The question he had for the Board is what their issue was with it and why it was a bad thing. Bob mentioned that he had read the minutes from the Redwing Shoes application and noted there had been a discussion about painting the windows black, which really doesn't look good and stated that is not what they are looking to do. He added that as the operator of the center and the building, they are trying to create a nice environment and in his personal opinion, he didn't see anything wrong with the proposed signage. He said it is not like they are looking to put up blinking neon signs all over the place and he personally looks at it more as artwork. He mentioned a discussion that he had with Mr. Myers back when Market 32 was going up and they had put up pictures of vegetables and other things in their windows, when he inquired as to whether or not that was considered actual signage. Bob advised that Mr. Myers had interpreted those images to be signage, which he personally didn't agree with that, because he thought it was artwork and that he is looking at this the same way.

Mr. Cifor stated that what he was missing is that the variance zoning world is changing and the Town Board ultimately decides on the zoning for the Town. He stated this Board is here to grant variances to that zoning and the problem with any type of variance that the Board grants, is that if you do it for one business, you've got to do it for every other business out of fairness and the standard that this Board has held other applicants to is that the Board will allow them to put artwork on their building, but they don't want it to be directly marketing the services that are being provided. He noted that Redwing Shoes has an image of a guy climbing and a factory. He noted that from what he sees here, the applicant has images of 3 people laying down for a massage and it is very obvious that people are going into a place that provides massage therapy and therefore, they are marketing the services directly in the window, adding that right now, the Town considers those to be signs and this isn't the right venue for us to change the zoning.

Mr. Miller advised he is not asking for anyone to change the Town Zoning, they are simply asking for a variance and discussing the subject matter of the signs themselves.

Mr. Lemire asked Mr. Myers if no more than 50% of windows can be covered or 8 sf whichever is less and because there's a variance requested for 100% coverage of the windows and there's a variance request for 150 sf of signage, if that was because we don't know which is less or whether the applicant needed both of them.

Mr. Myers advised he had addressed both requests in the notice and explained they are requesting to go from 50% window coverage to 100% and are also requesting going from 8 sf of window signage to 159 sf.

Mr. Myers also stated that this is Type II action and therefore no further SEQRA by the Board review is required. He noted that in comparing this application to the others that the Board has granted in the past, he agrees that the Board has tried to keep this type of signage as non-descript as possible. He pointed out that the words "Elements Massage" over the doors is similar to what the Board allowed at The G-Box. He added that he has already spoken to the business owner and told her that the $49.00 on the window was probably not going to work and that if perhaps these were put up as plain panels with no words other than the name of the business, we probably wouldn't be having this discussion. He stated that although there are probably some other figures that could be used to meet the criteria of the Board, we don't have them here tonight and I don't know how we are going to control that from this point forward if the Board agrees to the variances to cover the windows. He further stated that he has been inside the business and the applicant definitely needs the window coverage, but again, asked how the Board is going to control what actually ends up there. He said he didn't know if that would take another meeting or if the Board would want to leave it up to him, knowing that he is aware of the criteria the Board is looking for. With regard to the verbiage that is on the overlay, Mr. Myers said that the Board had quite a discussion a couple of meetings ago about trademarks being on the window and imprints that the Board didn't want because it was advertising and that therefore the Board has to also decide if they want just non-descript figures with no verbiage whatsoever.

Mr. Bloss indicated that his notion is that these are actual photographs of people being in massage and that even if they were reduced to a gray scale or black and white so that they weren't so crisp and weren't an actual photograph of someone that might be somebody's sister, he didn't know how that would work. He noted that The G-Box had plenty of verbiage in their signage, which Mr. Myers indicated was mainly about their store and was contained within the door area of the facility. Mr. Bloss advised that the applicant's approach to the verbiage, including the 3 descriptive adjectives, were all fine with him, but that it is the crispness of the actual images that he has a problem with.

Mr. Myers suggested that the Board could go as far as agreeing with the concept, approving covering the windows and that if the applicant provided him with the actual figures that they wanted to use, he could e-mail them out to the Board for review.

Mr. Lemire asked if the applicant needed a variance to cover the windows, even if it was just a shade with nothing on it. Mr. Myers replied that do if they want more than 50% or 8 sf of their windows covered.

Mr. Peller confirmed the way the code is written, it says a variance is required if there is a shade, drape or rendering of covering more than 50% or 8 sf whichever is less.

Mr. Fantini opined that it would make sense to postpone the application until the applicant has more definitive images. Mr. Myers asked if the Board really want to be involved in the schematics of what the figures really looked like, because that is not a real zoning issue. He added that he knows what the Board wants and he could let the Board see the images once he thought they were okay.

Mr. Lemire asked if the first line of deciding whether something is a sign or not was Mr. Myers' decision. Mr. Myers responded that was correct. Mr. Lemire then said that he assumed the application is here, not because it's a shade, but because you believe all 7 of those things are signs. Mr. Myers responded that was correct. Mr. Lemire then said that if the applicant comes back with a different design and 2 of them are signs under your decision, then maybe we don't need to be here. Mr. Myers reminded him we would still need to be here because the applicant is also looking to cover more than 50% of the windows.

Mrs. McCoy suggested that perhaps the Board could agree that the words "calm", "soothe", "relax" and "Elements Massage" over the door were okay and have the applicant take out the $49.00 introductory offer verbiage, which is a huge sign and then just add a restriction for more non-descript pictures in 2 spots. Mr. Myers advised if that is what the Board wants to do that would be fine. Mr. Lemire noted that the Board would still have to grant the variance for more than 50% shadage or coverings.

Bob Miller stated that he had just spoken to the applicant who advised him she would be willing to tone down the images and make them more non-descript, get rid of the $49.00 introductory offer verbiage and that they would be willing to work with Steve to figure out what is acceptable for the images.

Mr. Peller suggested that any action the Board takes could be made subject to the discretion of the Code Enforcement Officer.

Mr. Myers stated that if the applicant came back with a blank one, the 50% would still apply, but maybe he wouldn't call it a sign anymore, which would just reduce the amount of area of the variance that had to be granted. He added that assuming the applicant comes back with 3 figures of some type, he thinks the Board should go for this and they wouldn't have to revisit it again.

Mr. Lemire asked if Mr. Myers was suggesting that the Board vote on the size of the variance. Mr. Myers stated that if the Board is going to approve this, it should be approved as submitted, and perhaps specifically state that the sign over the door and the 3 words are allowed, but that the pictures have to be toned down.

Mr. Bloss asked if there were any other comments or questions from the public. There were none. Mr. Lemire made a motion to close the Public Hearing and Mr. Fantini seconded. All voted in favor and the Public Hearing was closed.

Mr. Lemire advised he just wanted to be perfectly clear and asked whether the Town Code says there can be no more than 50% of window coverage by shades, blinds. Mr. Peller advised it just says coverings. Mr. Lemire stated that therefore, every business in Town that has a south facing front is going to have the same or similar situation.

Mr. Myers confirmed the code states - total area of all windows signs on each building side shall not exceed 50% of the area of the window or 8 sf. He added that since the code does specifically say window signs and therefore, if the applicant came back with blanks for all of the windows, he probably would not be able to call them signs.

Mr. Lemire asked if that was something similar to what Redwing Shoes had done. Mr. Myers responded that the Board absolutely called what they did a sign, adding that the definition of a sign is anything that draws attention to the business.

Mr. Peller stated that he believes architecture has changed in commercial buildings and that years ago when the Town passed such an ordinance, it wasn't vogue to have all glass store fronts and that when the Town Center Zoning went through, that was a big part of the discussion.

Mr. Lemire advised that knowing what the Board's concerns are and knowing what Steve's interpretation is, he personally would feel more comfortable if the applicant went back, figured out some sort of generic image or whatever they want, and then came back to the Board so we can vote on the specifics.

Mr. Fantini agreed that he would like to see to what they are actually proposing to put up.

Mr. Peller asked Mr. Miller if he was willing to adjourn the matter and come back with actual renderings or if he'd like to the Board to vote now.

Mr. Miller responded they could certainly do that and would defer to Elements, but they would prefer to get the area variance granted on the square footage and then work with Steve on the images, understanding what the Board's concerns are and have some contingency that it has to satisfy Mr. Myers.

Mr. Morelli asked Mr. Peller if the Board was not voting on the actual image and approved the variance, whether it would be sustainable and further, if the applicant gave the Board a specific softer, generic photo, so as to have the Board approve the variance in addition to the square footage variance, what would stop them from changing that photo at a later time.

Mr. Peller advised that Mr. Myers would be the one to enforce any variance that was granted.

Mr. Myers explained it would depend on what they wanted to change the image to, adding that freestanding signs and wall signs change all the time to update the face for businesses, which does not even involve a fee, but as long as they are not changing the size, they would not need a variance.

Mr. Bloss pointed out that the applicant has confirmed that these are not the actual images they intend to install and that they are just something representing what they'd like to do.

Tim Miller advised that he believes he has a clear understanding of the concerns of the Board.

Mr. Cifor advised Mr. Miller that with regard the other 2 variances the Board had approved, the applicants had come in with the specific images they intended to put on their windows and that is what was approved, adding to approve without the specific intended images would be a departure from what the Board has done in the past.

Mr. Miller again advised he was confident they could work with Mr. Myers on appropriate signage that would be mutually beneficial and acceptable to everybody, if they were able to secure an area variance for the square footage and that he didn't think it was necessary for them to have to come back before the Board for that. Mr. Cifor pointed out the risk would be that the variance request could get voted down.

Mr. Miller then stated they wanted to do whatever they could to help secure the area variance and that if the Board is saying they are not confident that we can work with Steve on creating the right images, then of course we're going to come back before the Board.

Mr. Myers advised Mr. Miller that he believed the Board wanted to know exactly what they are voting on and that he understands their issue, because in the past they have known exactly what they were voting on.

Mr. Miller stated that they would come back before the Board with the actual images and Mr. Bloss opined that would certainly be the safer route.

Mr. Peller then asked Mr. Miller if he wanted to come back for the next meeting in June or wait until July and further inquired whether the applicant would be willing to waive the 61 days the Board has within which to make a decision on their application.

Mr. Miller stated they would like to get back before the Board as quickly as possible and agreed to waive the 61 day requirement.

Application tabled until the June 21, 2016 meeting.

The secretary read the legal notice as it appeared in the Daily Gazette on June 2, 2016.

5. **Application from Gerald J. Rego for an area variance from Section 208-12A which requires an 80' front setback for accessory structures. Setback requested = 16.5'. Variance required = 63.5'. (corner lot with 30' front setback required for main buildings). Property is located at 1 Equinox Court, Clifton Park, NY 12065. (Permit #81095)**

The owner of the subject property, Gerald J. Rego, presented the application. He advised he is seeking an area variance to place a 12' x 10' shed next to his garage and that he doesn't seem to have the setback that is required by the zoning.

Mr. Lemire asked if his house was on a corner lot and where his front door and garage door face. Mr. Rego replied he is on a corner lot, that the front door faces Equinox Court, the garage door faces Carriage Drive and his driveway is off Equinox Court.

Mr. Lemire asked the applicant if he was putting the shed in front of the house. Mr. Rego responded that if you were standing on Equinox Court looking at his house, you would be looking at the side of the garage and the shed would be right next to it, adding that he is trying to place the shed so it looks similar to the shape of the garage without looking out of place.

Mr. Lemire asked if there was a retaining wall behind the garage and if he could physically get the shed back there. Mr. Rego responded there was a retaining wall that is about 54" and he is not able to get the shed back there. He added that the wood retaining wall is there because of a 15' foot high hill in that area and that on the Carriage Road side, there is also a hill which nobody can get up, so he would have to have construction on the property for additional money.

Mr. Dudick opened the Public Hearing and asked for questions or comments. There were none. Mr. Dudick made a motion to close the Public Hearing. Mr. Morelli seconded and the Public Hearing was closed.

Mr. Myers stated this is a Type II action and therefore, no further SEQRA review by the Board is required. He stated this is a normal corner lot issue; that Mr. Rego has some real issues with the back yard and that personally, he does not have any issues with the variance requested.

Mr. Bloss made a motion to approve the application as submitted. Mr. Cifor seconded.

Mr. Bloss stated that he doesn't find that the requested variance would produce an undesirable change in the character of the neighborhood or district; that the benefit sought by the applicant could not be achieved by some other method feasible because of the issues with the lot; that the requested area variance is not substantial enough to overwhelm the other factors; that the proposed variance would not have an adverse impact to the neighborhood or district and that the difficulty is in fact self-created, but does not overwhelm the evidence.

The secretary called the Vote:
Ayes: Mr. Lemire, Mr. Cifor, Mrs. McCoy, Mr. Dudick, Mr. Fantini, Mr. Morelli and Mr. Bloss
Noes: one.

Application approved.

The secretary read the legal notice as it appeared in the Daily Gazette on June 2, 2016.

✓6. **Application from MJ Properties of Clifton Park, Inc. for area variances from Section 208-6E(2) which requires 1) a 25' setback for building #8 and #10, 8.2' available, 16.8' variance required; and 2) requires a 25' setback for parking for building #4, 0' available, 25' variance required. Property is located at 1, 4, 8, 10, and 12 Fairchild Square, Clifton Park, NY 12065. (Permit #81097).**

The application was presented by Tom Andress of ABD Engineers. He advised he was representing MJ Properties as the Engineer and that Jackie Murray, Esq. was also present representing MJ Properties as attorney of record. Mr. Andress stated that the Fairchild Square project, Phases 1 and 2 has been around since 2009, which is when he believes they obtained their first variance from this Board; that they had obtained variances in 2010 and one last year in 2015 and that all of them are essentially the same, although this is a slightly different variance from what the Board has done in the past.

Mr. Andress presented a plan for Phase 2 of the development which is currently under construction, showing that access is off of Van Patten Drive and comes to a private driveway with everything being internally accessed. He indicated there is also emergency access that is not available for regular use. He identified for the Board the buildings on the plan that were already constructed, that are in the process of being constructed and the ones that are planned to be built. He indicated that because of the internal access, the Board had granted variances for the parking setbacks and that the 25' buffers off the property lines, run right through the middle of the parking lots. He advised that up to this point, they have met all of the area requirements for the setbacks of the sides and fronts of the buildings from Ushers Road.

He explained that what we are dealing with for tonight are the buildings outlined in yellow in the far corner of the plan presented. He pointed out Mapleline Road and showed that Van Patten Drive goes up to Ushers Road. He also identified for the Board the locations where previous variances had been granted, which were for the 2 buildings at the top of the plan and for the Helping Hands building.

Mr. Andress stated that they had subdivided those into different lots that all have frontage on the public highway, but have access through the internal road network which is set up through common easements for both access and utilities. He advised that the Helping Hands building is part of the large Fairchild site but that they had received approval for the 2 small buildings, which were actually subdivided and became part of the overall parcel which they call 1 and 4, but that there was actually a potential for 4 buildings there. He advised that MJ Properties was proposing to subdivide them out so the Helping Hands building could be on its own site, which would work from not only a tax standpoint, but also from a financing standpoint, as well as the potential for Helping Hands to be able to purchase the building om the future if they wanted to.

Mr. Cifor asked whether 1 and 4 Fairchild Square were both the Helping Hands building. Mr. Andress advised it was not and pointed to where the Helping Hands building is on the plan (4 Fairchild Square), explaining that years ago it was the Shen administrative offices and is now a mixture of professional offices with a separate manufacturing use at one end where Everett Charles Technologies was located, but that the parking between them is shared. He advised that creating this lot gave them the frontage they need to meet the front setback requirements and to meet the 150' setback requirements for the width at the front yard setback. He added that the subdivision meets all of the requirements, except that by creating the line through the middle, it's obviously not the 25' buffer for green space on each side, because it's parking. He explained that one of the variance request before the Board tonight is to obtain relief from the 25' offset for parking back to 0', because the line runs down the middle of the parking lots.

He went on to explain that the second variance requested relates to them creating a green lot, which will then be a separate lot that would be available to be sold and could be financed differently, adding that one of the problems is, the more buildings you have on one lot, the more financing issues you have. Mr. Andress advised that the variance requested does not change the lot line and that the other 2 buildings still meet the setback requirements for the front and everywhere else, but it does create a lot line that is less than 25' because these buildings are only 8.2' apart off the property line, and that obviously relief is required from the 25' setback down to 18'.

Mr. Dudick asked the applicant if he was requesting a variance for the setback of a building that has not yet been built and Mr. Andress replied that was correct. Mr. Dudick inquired as to why they couldn't just build a smaller building. Mr. Andress replied that there was a ruling from the very beginning of the project that each lot, as opposed to the whole development, had to meet the 40% green space requirement and that they have very carefully made sure each lot has the right amount of parking and the right amount of greenspace in order to remain in conformance and that with this subdivision being proposed, they would still meet the 40% minimum and meet the required amount of parking. He advised that if they cut it back 25' feet, they would end up with a building that really wouldn't fit.

Mr. Lemire asked if 3 lots were originally proposed. Mr. Andress advised that it is 2 new lots and that a portion of an existing lot is getting cut off, but that each lot still met the 40% greenspace requirements. He also pointed to green area on the plan and indicated there is a 100' buffer there that creates a lot of the green space. Mr. Lemire asked whether the 2 little extensions shown were for ingress and egress and Mr. Andress advised

there was a specific restriction they could not be, but that they do meet the code from the standpoint of having public access from the highway and that ingress and egress is required internally, which he believes was an action taken by this Board. He further advised that he assumes when they go back Planning Board hopefully after this meeting, it will be again a restriction and they have made a notation on the plan to that effect.

Mr. Lemire asked whether the 4 buildings outlined in yellow had always been part of the plan. Mr. Andress replied that was correct and that all they are doing now is subdividing those buildings out. He added that when Mr. Rekucki bought the Phase 2 portion, he actually combined 1 and 4 Fairchild 1 to make a bigger lot, because there really wasn't a way to look at the frontage, although they did eventually look at it after having some issues and some inquiries to purchase, and found there is a way to do that. He stated that have some odd shaped lots that meet the code and that obviously there are little narrow strips and things like that, but that there is no change at all to the plans from a construction standpoint, explaining that they are just putting basically putting in 2 new lines.

Mr. Lemire asked if building 12 was a part of a larger parcel or if it was a separate parcel and not a part of 14, 16 and 18. Mr. Andress replied that it is a separate parcel and they created that lot as part of the original subdivision, and are just taking a portion of that off, so it still leaves the lot that is conforming.

Upon further inquiry from Mr. Lemire, Mr. Andress confirmed that what they are looking at is actually creating 2 new parcels, the parcel in green on the plan and the parcel in pink in the plan, both of which are currently part of the main Fairchild parcel.

Mr. Dudick asked the applicant what was necessitating the request at this time and whether there is a sale pending. Mr. Andress responded that there have been inquiries on the small buildings and there has been an issue with the Town Assessor on the Helping Hands building because right now it is a lease arrangement and the Town Assessor actually wanted to try to have that defined as something different because it makes it very difficult from a tax standpoint.

Jackie Murray, Esq. confirmed one of the current issues is also financing. Mr. Dudick stated that if there is no request for purchase at this time, there is nothing that is creating an issue for financing right now and it appears that this is just a request to create a subdivision based upon previous plans, despite the fact that there is no requirement for the subdivision, other than hypotheticals. He went on to state that this Board grants variances to provide relief from situations that property owners have and he is trying to figure out what problem relief is being requested from, as there is no problem that he can recognize, other than hypothetically there may be a problem sometime in the future.

Mr. Andress advised that Jackie could go into that a little bit more, but pointed out at the time the last 3 variances were requested, there was no specific sale at the time either, and those variances had been granted. He added that over the years, the Zoning Board has allowed the creation of each of the lots in anticipation that they could be sold and that Mr. Rekucki does have people looking, but there is no one there saying they want to build tomorrow.

Mr. Lemire said that he believes the difference in the earlier variances, was that the lot lines were already there and the Board was granting variances through parking lots. Mr. Andress advised that was not correct because if they already had the lot lines, they would never have been required to come before the Board. He said they were creating the lot lines, which then required variances, because by putting those lot lines through the middle

of the parking lots, it created the situation where they didn't meet the code, reiterating that all those lot lines were created and this Board acted on it last year in 2015.

Mr. Bloss asked why the Board wasn't presented with these variances when the applicant was last here when they had the whole package and were creating sellable lots. Mr. Andress replied that they really didn't know what they were going to create at that time. Mr. Dudick asked if those buildings were in existence when they were last before the Board and Mr. Andress advised they were not, everything was hypothetical, and each time this Board granted a variance, it was a blank slate because at that time, we didn't know what we were going to develop here.

Mr. Dudick asked if the Helping Hands building pre-existed and Mr. Andress advised that the Helping Hands was built brand new and that as Mr. Rekucki is proceeding with the development, he sees different things and has different demands. He added they have had the issue with taxing and that they'd like to get the Helping Hands parcel on its own lot so that it can be taxed the correct way.

Upon inquiry from Mr. Lemire, the applicant advised that the parcel is currently fully taxed, but that when the owner gets the bill he has to break it out for the tenants for CAM charges and other items, but advised Ms. Murray could explain that part of it better.

Jackie Murray, Esq. then advised that aside from the fact that they do have a precedent of coming before this Board for variances before the buildings are developed, the reason this has come up now is not only because of the tax issue, but also because of financing issues, which is the main reason. She explained that Mr. Rekucki is trying to obtain financing and doesn't want the financing lumped together for all of the parcels. He wants to be able to finance the development of these 2 warehouses separately and have the mortgage lien only be for that parcel in order to provide a clean financing scheme, so that when he does go forward to sell in the future, he will not have to have the financing re-cast for all of the properties. Therefore, the immediate reason for the application is due to the need to finance these 2 buildings and the desire to finance them separately and then be able to separately finance future phases of development. She advised they have done similar things in the past, because otherwise what happens is they end up with these formulas that are very difficult to work through in order to just refinance a portion of the project.

Ms. Murray also advised that the other issue with regard to the question on the taxes and CAM charges, is that in their Declaration of Restrictive Covenants which governs all of the common charges for access and maintenance through the parcel, is to allocate based on square footage and acreage and this would also give them the opportunity to not get into that discussion with the tenants. The Assessor will be able to say this is what that parcel is going to be assessed for.

Because there was no one left in the audience, Mr. Dudick made a motion to close the Public Hearing. Mr. Cifor seconded. All voted in favor and the Public Hearing was closed.

Mr. Myers stated that this is a Type II action and therefore, no further SEQRA review by the Board is required. He also stated that this is just a continuation of the subdivision of the parcels and that he has no real concerns about what they are proposing.

Ms. Murray then advised that when they went to the Planning Board for a recommendation , they deemed this generally acceptable at their April 12th meeting and that the applicant had worked with them in order to create this cluster of development which gave rise to some of the prior area variance requests from the setbacks for parking and property lines, because they were trying to keep as much of the buffer around the perimeter as possible. But again, this isn't going to change anything in the site plan. This is just the lines on paper.

Mr. Cifor made a motion to approve the area variances as requested. Mr. Fantini seconded. Mr. Lemire asked if the area variances were granted, what restrictions the next owner would have from putting a driveway in. Ms. Murray advised that as part of the subdivision approval, the Planning Board wanted the applicant to deed restrict those parcels so that there would never be an ability for access from Mapleline Road.

Mr. Cifor then made an amended motion to approve the area variances contingent upon a deed restriction that there will never be access off Mapleline Road in compliance with the Planning Board approval. Mr. Fantini seconded the amended motion.

Mr. Cifor then stated that he did not believe the variances would produce an undesirable change in the character of the neighborhood; that the benefit sought could be not be achieved by some other method feasible for the applicant to pursue due the financing issues, which he understands very well as a CPA; that the proposed variances were not substantial and would not have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district; and that although the alleged difficulties were self-created, it doesn't preclude the Board from granting the variance requests.

The secretary called the Vote:
Ayes: Mr. Cifor, Mrs. McCoy, Mr. Dudick, Mr. Fantini, Mr. Morelli and Mr. Bloss
Noes: Mr. Lemire

Application approved.

Mr. Dudick advised that Board counsel had suggested that the Zoning Board set up some sort of rule like Planning has, to state the latest time the Board would start review of any applications. After discussion amongst the Board members it was agreed that the Zoning Board of Appeals would not start review of any applications after 11:00 p.m. and the secretary was directed to change the wording on the meeting Agendas to reflect the same, and to reflect that any remaining applications would be placed first on the next meeting agenda.

Mr. Dudick made a motion to adjourn the meeting. Mr. Morelli second. All voted in favor and approval was unanimous. The meeting was adjourned at 9:53 p.m. The next meeting is June 21, 2016.

Respectfully submitted,
M. Kathleen Smith
Secretary, Zoning Board of Appeals

cc: Town Clerk, Town Board, Town Attorney
Zoning Board Members, Joel Peller, Esq., Steve Myers
Department of Building and Development
Town Assessor, Town Highway Department