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September 8, 2022

VIA REGULAR MAIL AND E-MAIL (zoningboard@townofnewburgh.org)

Town of Newburgh Zoning Board of Appeals (ZBA)
21 Hudson Valley Professional Plaza
Newburgh, NY 12550

Attn: Siobhan Jablesnik, Acting Secretary to the ZBA

RE: Continued Commercial Use of WCC/Conklin Property
2102 Route 300: S-B-L 3-1-21.31 (the "Property")
Our File No.: 15236-67082

Dear Chairman Scalzo and Members of the ZBA:

As you know, I represent Douglas Casscles and his entities D. Cass Jr. & Associates, LLC and BlackRock Excavating Corporation ("BlackRock") in his application before the ZBA for an interpretation of a use variance granted previously by the ZBA in 1982 (the "1982 Use Variance"). The public hearing was continued until the ZBA's meeting on September 22, 2022. We would like to use this opportunity to address some comments made last month.

A use variance authorizes a *use of property* that is not permitted by a zoning law. It is well established by New York's highest court, that variances granted by the ZBA are not personal to

the owner-applicant because the variance runs with the land.¹ Thus, the rights granted in the 1982 Use Variance do not end when the owner sells the land. Likewise, a use for which a use variance has been granted is a conforming use, and no further use variance is required for its expansion.² In this instance, BlackRock is not looking to expand, but rather continue the existing commercial use of the property in accordance with the parameters of the 1982 Use Variance. The 1982 Use Variance permitted the storage of equipment and supplies associated with that applicant's fuel tank lining business. The 1982 Use Variance notes that the actual relining of the fuel storage tanks is not done on the Property. See page 2 of the 1982 Use Variance.

BlackRock's business is very similar to WCC's fuel tank lining business. There is a tank lining component associated with BlackRock, but BlackRock also conducts other related work associated with the replacement/repair of a homeowner's septic/sewer system. Although the off-site operations of WCC's and BlackRock's businesses are slightly different (both replace and repair underground tanks), the use of the Property will be the same. BlackRock's proposed use includes: (1) outdoor storage of vehicles and equipment, (2) the use of an existing building for storage, maintenance and office space, and (3) a meeting place for the workers to meet in the morning before traveling to the job site and to meet in the evening to conclude the day. WCC utilizes the Property in the same exact manner. Therefore, the essential character of the use on the Property will not change.

The 1982 Use Variance authorizes the Building Inspector to issue a permit to install underground tanks, a pole building, a stockade enclosure, a chain link fence and *a business use of the accessory building*. See pages 4-5 (emphasis added). It does not specify what type of business use, just the use of the Property.

The 1982 Use Variance also contains many conditions regarding the tanks, pole building, stockade enclosure, chain link fence and screening. See pages 5-6. Although that applicant's business, at that time, involved off-site fuel tank lining, there was no specific condition or limitation limiting it to such a business. BlackRock's similar business should be permitted as a logical outgrowth of the existing business.³ Both fix and replace underground tanks off-site; but more importantly will use the Property in the same manner.

¹ St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988).

² Scarsdale Shopping Center Association, LLC v. Board of Appeals on Zoning for the City of New Rochelle, 64 A.D3d604, 606, 882 N.Y.S.2d 308, 310 (2d Dept. 2009)

³ Unlike the prior application before this ZBA, BlackRock is not looking to add an additional business to the Property. Neither WCC (nor Hydrovac) would be operating at the Property, if BlackRock purchases the Property. In addition, the principles of WCC and Hydrovac have no interest in BlackRock's businesses.

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Conditions imposed by a zoning board must be directly related to and incidental to the proposed use of the property and must be aimed at minimizing adverse impacts on the neighborhood.⁴ Along those lines, a zoning board may not impose conditions which are unrelated to purposes of zoning that seek to regulate the details of the operation of the business; rather than the use of land on which the business is located.⁵ Conditions must relate only to the real estate involved without regard to the person who owns or occupies it.⁶ Therefore, the exact type of business is irrelevant. The ZBA should be focusing on the similar use of the Property by WCC and BlackRock.

Finally, we heard testimony from the neighbors about the past wrongs and empty promises from the previous operations. BlackRock is offering to work with the Town and the neighbors to clean up the Property and re-create a site plan that provides a manageable plan on how the Property should be utilized. BlackRock would be willing to add additional screening via fences or vegetation, ensure the lighting does not spill on neighboring properties, and address any stormwater concerns. We have an opportunity to improve the Property and update the conditions.

We hope that the ZBA recognizes this opportunity and correctly issues an interpretation that BlackRock's proposed continued commercial use of the property is permitted; because it is consistent with the 1982 Use Variance.

Thank you.

Very truly yours,


JOHN W. FURST, ESQ.

JWF/jwf/2165463

Cc: BlackRock Excavating Corporation (via e-mail only)
WCC (via e-mail only to its attorney)

Pursuant to IRS Regulations, any tax advice contained in this communication or attachments is not intended to be used and cannot be used for purposes of avoiding penalties imposed by the Internal Revenue Code or promoting, marketing or recommending to another person any tax related matter.

⁴ St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988)

⁵ See, Id.

⁶ See, Id.