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February 9, 2016

**VIA IN HAND**

Chairperson and Members of the  
Town of Newburgh Zoning Board of Appeals  
308 Gardnertown Road  
Newburgh, New York 12550

Re: Application of Dr. Payami for Variances  
1 Powelton Road, Newburgh, New York 12550  
(Section 80, Block 6, Lot 7 and Business District Zone)  
An Appeal/Interpretation and/or Variances

Dear Chairperson and Members of the Zoning Board of Appeals:

We represent Dr. Payami (the "Applicant") in connection with her application before your Board for variances and we submit this letter to supplement the submission already made by Dr. Payami's architect, Stephen A. Whalen, Highlands Architecture PLLC.

#### **I. The Project and Variances**

The Applicant seeks to renovate an existing building on an existing lot located in the Business District for use as a dentist's office. After this Board on October 22, 2015, denied the Applicant's request for variances in connection with a prior proposal, the Applicant substantially revised the proposed project to reduce the scope of the proposed structure. As a result, the current project seeks a lesser variance and even eliminates the need for a previously requested variance altogether. Further, the current plan proposes to improve and ameliorate potentially existing drainage issues.

Specifically, the current proposal not only eliminates the need for a side yard setback variance but proposes to make the currently existing nonconforming side yard setback conforming so that it exceeds the required side yard setback by nearly 50%. The existing building has a nonconforming side yard setback of 14.5 feet (where 15 feet is

required<sup>1</sup> under the Town of Newburgh Zoning Code ("Zoning Code"). Although the prior proposal sought to slightly decrease this setback (from 14.5 to 13.5 feet), the Applicant's current plan proposes to reconfigure the stair addition so as to increase the existing nonconforming side yard setback of 14.5 feet to 22 feet even though the Zoning Code only requires 15 feet<sup>2</sup>). Accordingly, the current proposal seeks to bring the currently non-complying side yard setback into more than full Zoning Code compliance.

In addition, although the prior proposal sought to minimally reduce the currently existing nonconforming front yard setback (along Powelton Road) approximately 4.8 feet to propose a front yard setback of 16 feet, the current plan requires a lesser variance as the currently proposed front yard setback is 16.75 feet (and only 4.05 feet less than what is currently existing).

The current proposal also maintains the preexisting legal nonconforming lot area, lot width and front yard setback (along North Plank Road). Although the Applicant's prior proposal sought to reduce the preexisting front yard setback along North Plank Road (to reduce it from 17 feet to 14.5 feet), the current proposal maintains the current preexisting legal nonconforming front yard setback along North Plank Road of 17 feet.

Further, while both the prior proposed plan and current proposed plan fully conform to building height and to lot building and surface coverage, the current proposed plan has also reduced these fully conforming dimensions. The building's overall height has been reduced from 33' to 31'-6" (where 35 is allowed<sup>3</sup>). The Lot Building Coverage has been reduced from 19% to 17% (where 60% is allowed<sup>4</sup>) and the Lot Surface Coverage has been reduced from 66% to 65% (where 85% is allowed<sup>5</sup>).

The prior proposed plan and current proposed plan also fully conform to the parking requirements. However, the current plan proposes to increase parking by adding three (3) additional parking spaces for staff parking and now proposes four (4) more spaces than required under the Zoning Code.<sup>6</sup>

Further, in response to concerns raised by non-experts about drainage at the last zoning board meeting, the current plan proposes to re-grade the parking lot to drain stormwater towards Powelton Road and ultimately to the existing catch basins on Powelton Road. In addition, the Applicant has also retained the engineering firm of Insite Engineering, Surveying & Landscape Architecture, P.C. to perform on-site investigations and that firm determined that the existing subsurface sewage treatment system ("SSTS") was partially clogged due to a crushed pipe. The pipe was repaired to restore the system to its original design intent. And as detailed below, as a result of the proposed project, substantially less volume should be entering the system.

<sup>1</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

<sup>2</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

<sup>3</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

<sup>4</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

<sup>5</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

<sup>6</sup> Town of Newburgh Zoning Code § 185-13(C)(b).

## II. This Board Should Grant the Requested Variances.

This Board should grant the requested variances.

As an initial matter, the only variance request unrelated to an already existing condition is the variance request to allow a proposed front yard setback (along Powelton Road). The Applicant currently proposes a front yard setback (along Powelton Road) of 16.75 feet (where a reduced setback of 16 feet was previously proposed that would have required a greater variance). The currently proposed setback of 16.75 feet is a minimal reduction (of 4.05 feet) from the currently preexisting nonconforming front yard setback. Again the need for a side yard setback variance was not only eliminated, but the current plan proposes to make the currently existing nonconforming side yard setback more than conforming (22 feet is proposed where only 15 feet is required<sup>7</sup>).

As for the remaining "requested" variances relating to lot area, lot width and the front yard setback (along North Plank Road), these all involve currently existing legal nonconforming dimensions. Zoning Code § 185-19(C) provides that a building that is dimensionally nonconforming as to lot area, lot width and front yard setback may be reconstructed and enlarged provided that such expansion does not "increase the degree of or create any new nonconformity":

### C. Nonconformity with bulk requirements.

[Amended 9-23-1998 by L.L. No. 10-1998]

(1) Maintenance, repair, structural alteration, relocation, reconstruction or enlargement. Normal maintenance and repair, structural alteration, relocation, reconstruction or enlargement of a building which does not house a nonconforming use, but is nonconforming as to district regulations for lot area, lot width, lot depth, front, side or rear yards, building height, lot coverage, habitable floor area or other such dimensional regulation, is permitted if the same does not increase the degree of or create any new nonconformity with such regulations in such buildings.

With respect to what is currently existing (lot area, lot width and the front yard setback along North Plank Road), since the current plan does not propose to increase the degree of nonconformity or create a new nonconformity with respect to lot area, lot depth and front yard setback (along North Plank Road) and does not create any new nonconformity with respect to any other dimensional requirement that does not already exist, Zoning Code § 185-19(C) allows the Applicant to expand the existing building without the necessity of obtaining a variance. Significantly, the current plan maintains all the currently existing legal nonconforming dimensions related to lot width, lot depth and front yard setback (along North Plank Road).

<sup>7</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

New York's highest Court has conclusively established that "nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance."<sup>8</sup> The Court of Appeals explained that the "the decisions allowing continuation of an existing nonconforming land use after enactment of a zoning ordinance 'are sometimes put on the ground that the owner has secured a 'vested right' in the particular use – which is but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision."<sup>9</sup> "[E]ven the 'advantage . . . of more complete and effective zoning' does not justify the 'destruction of substantial businesses or structures developed or built prior to the adoption of [the] zoning ordinance."<sup>10</sup>

This Board can certainly determine that with respect to the currently existing dimensions (lot area, lot width and the front yard setback along North Plank Road), there is no requirement for the Applicant to obtain variances in accordance with Zoning Code § 185-19(C). Under New York's Town Law § 267-b(1) this Board has the authority to reverse or affirm any decision appealed from and make the decision that "ought to have been made in the matter by the administrative official charged with the enforcement of" the Zoning Code. It is our understanding that the Building Inspector, who is charged with enforcing the Zoning Code in the Town of Newburgh<sup>11</sup> has not issued a formal letter of denial on the new proposed plan, but rather, that the Planning Board referred this matter to this Board for variances. As this Board is certainly aware, under New York law, "[p]lanning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials [i.e. the Building Inspector] and the zoning board of appeals."<sup>12</sup> Given the clear intent of Zoning Code § 185-19(C), no variances are even required for lot area, lot width and front yard setback (along North Plank Road).

Alternatively, if this Board disagrees and determines variances are required for what is currently existing nonconforming dimensions, this Board should grant the requested variances for lot area, lot width and a front yard setback (from North Plank Road) along with the one variance unrelated to an already existing condition – namely, the variance request to allow a proposed front yard setback (along Powelton Road).

New York State's Town Law § 267-b(3) provides the standards for area variances:

<sup>8</sup> *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 924 N.E.2d 785, 897 N.Y.S.2d 677, 681 (2010), quoting, *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34, 35 (1952).

<sup>9</sup> *Id.*, quoting, *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34, 35 (1952).

<sup>10</sup> *Id.*, quoting, *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34, 35 (1952).

<sup>11</sup> Town of Newburgh Zoning Code § 185-51.

<sup>12</sup> *Swantz v. Planning Bd. of Vill. of Cobleskill*, 34 A.D.3d 1159, 1160, 824 N.Y.S.2d 781, 782 (3d Dep't 2006) (*emphasis added*); see also *E. Moriches Prop. Owners' Ass'n, Inc. v. Planning Bd. of Town of Brookhaven*, 66 A.D.3d 895, 897, 887 N.Y.S.2d 638, 640 (2d Dep't 2009) (acknowledging that the town planning board is not authorized to interpret the local zoning law).

In making its determination, a Town zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:

**(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;**

Granting the requested variances will not create an undesirable change in the character of the neighborhood. The proposed front yard setback of 16.75 feet (from Powelton Road) is in keeping with the character of the neighborhood as many of the surrounding buildings also have non-complying front yard setbacks (attached as Exhibit "A" is the Orange County GIS Map evidencing that many of neighboring parcel are non-complying with respect to front yard setbacks). In fact, the immediately adjacent parcel appears to have a non-complying front yard setback (attached as Exhibit "B" is an enlarged partial section of the Orange County GIS Map with the approximate location of the setback). With respect to any variance necessary for lot area, lot width and front yard setback (from North Plank Road) there can be no undesirable change in the character of the neighborhood as the proposed plan maintains the currently existing nonconforming setbacks that have existed for decades.

Further, from purely a zoning perspective, the current proposal not only eliminated the need for a side yard setback variance but proposes to make the currently existing nonconforming side yard setback more than conforming. The existing building has a nonconforming side yard setback of 14.5 feet and the Applicant's current plan proposes to reconfigure the stair addition so as to increase the existing nonconforming side yard setback of 14 feet to 22 feet even though only 15 feet is required by the Zoning Code<sup>13</sup>). Further, as discussed below, there are more benefits to the neighborhood from the Applicant's proposal.

**(2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;**

The benefit of developing the proposed addition cannot be achieved without the requested area variances. The Applicant needs to modernize the building to bring even better dental services to the community. The Applicant is seeking to reuse the already existing building on an existing lot and therefore, has to work within the context of what is existing, which necessarily means working with the context of those aspects of both the existing lot and existing building that are preexisting nonconforming. And therefore, virtually any renovation or expansion would require variances.

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<sup>13</sup> Town of Newburgh Zoning Code Chapter 185 Attachment 11.

**(3) whether the requested area variance is substantial;**

Although the proposed front yard setback of 16.75 feet (from Powelton Road) may be considered substantial, it is only 4.05 less than the existing nonconforming front yard setback and is offset by providing a greater side yard setback than currently exists or is required. Further, the 16.75 setback only relates to a portion of building as other parts of the building are setback further from the Powelton Road.

More importantly, even if the variances requested for the proposed front yard setback of 16.75 feet (from Powelton Road) is considered substantial, this in and of itself is not a basis to deny the requested variances. The Appellate Division, Second Department (the appellate Court from this jurisdiction) has conclusively established that even though: (i) petitioner's difficulty was self-created; and (ii) the requested variance was "arguably substantial," the denial of the area variance was arbitrary and capricious because there was "no evidence that granting the variance would have an undesirable effect on the character of the neighborhood, adversely impact on physical or environmental conditions, or otherwise result in a 'detriment to the health, safety and welfare of the neighborhood or community.'"<sup>14</sup> In reaching its determination, the Court relied upon the fact that there were other lots in the "immediate neighborhood" that also did not comply with the dimensional requirements. This is the case here also as lack of compliance with front yard setbacks are representative of the types of developments in the neighborhood and therefore, it would be arbitrary for this Board to deny the requested front yard variance (from Powelton Road).

As for the requested variances (to the extent they are necessary) for lot area, lot area, lot width and front yard setback (from North Plank Road) are not substantial as the Applicant is not altering what currently exists.

**(4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and**

The proposed variances will not have any significant effect on the physical or environmental conditions of the neighborhood. In addition, the project will have a beneficial effect on the neighborhood as the Applicant proposes to make improvements to the existing parking lot and drainage in connection with this work. It is our understanding that some of the neighbors raised issues at the last zoning board meeting about potential drainage issues stemming from the existing parking lot. In response to these concerns, the Applicant's current plan proposes to re-grade the parking lot to drain stormwater towards Powelton Road and ultimately to the existing catch basins on Powelton Road. In addition, the Applicant has also retained the engineering firm of Insite Engineering, Surveying & Landscape Architecture, P.C. to perform on-site investigations and that firm determined that the existing SSTS was partially clogged due to a crushed pipe. The pipe was repaired to restore the system to its original design

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<sup>14</sup> *Easy Home Program v. Trotta*, 276 A.D.2d 553, 714 N.Y.S.2d 509 (2d Dep't 2000).

intent. Accordingly, by restoring the existing SSTS to its original design intent, the Applicant has already improved an existing condition. Also, as part of the proposed project, the Applicant seeks to replace the existing four older dental chairs with four modern highly-efficient and water-saving dental chairs. As a result, substantially less volume will be entering the system and the proposed modern dental chairs coupled with the renovations already performed, will also greatly improve a currently existing condition. In addition, with the proposed re-grading to be undertaken as part of the project, the project will further improve a potentially currently existing adverse condition. In addition, additional off-street parking is being provided as a result of the proposed project.

**(5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.**

Here, the difficulty was not self-created as the building and lot are preexisting legal nonconforming. Also, part of the difficulty stems from the fact that the lot is corner lot and as a result, has two front yards and greater setbacks are required for front yards. If one of the front yards could be considered a side yard no variance would even be required. Nonetheless, a self-created hardship does not preclude the granting of area variances.

Further, the Applicant is requesting the "minimum variance necessary and adequate" in accordance with Town Law § 267-b(3)(c). The Applicant has substantially revised its proposal to reduce the scope of her project, which in turn, has negated the need for a side yard variance altogether and has enabled a lesser front yard variance (from Powelton Road).

It is respectfully requested that this Board grant the requested variances. Thank you for your consideration.

Very truly yours,

SILVERBERG ZALANTIS LLP



Katherine Zalantis

KZ:  
Attachments

# **EXHIBIT A**





Latitude: 41.523173 Longitude: -74.030886



Mid Valley Mall

WINDING I

MEADOW ST

32

32

32

2

3

4

5

East Middle Road (ma) INCREMENT P

# **EXHIBIT B**

Latitude: 31.523883 Longitude: -74.025531



27 JANUARY

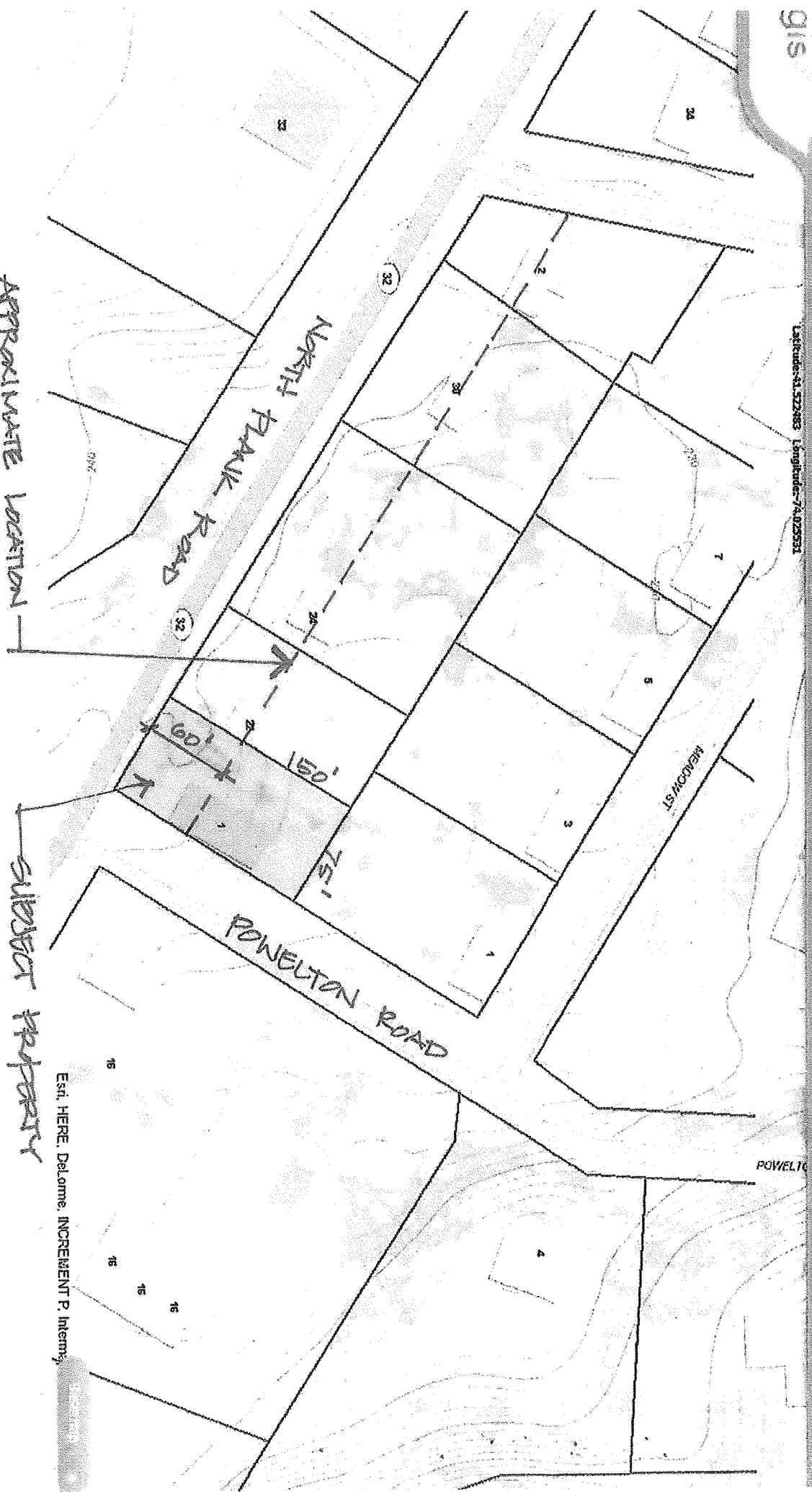
APPROXIMATE LOCATION  
OF 60'-0" SETBACK  
FROM NORTH PLANK ROAD

SUBJECT PROPERTY

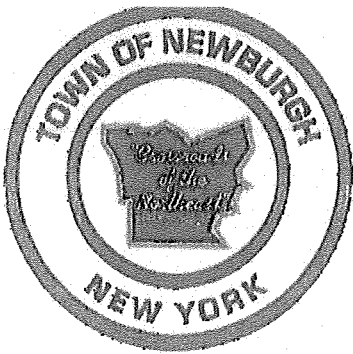
PARTIAL ORANGE COUNTY

FILE MAP.

NO SCALE



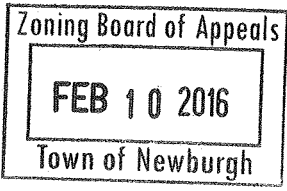
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# TOWN OF NEWBURGH

*Crossroads of the Northeast*

ZONING BOARD OF APPEALS  
OLD TOWN HALL  
308 GARDNERTOWN ROAD  
NEWBURGH, NEW YORK 12550



## PROXY

Jennifer Blair - Payami, DEPOSES AND SAYS THAT

HE/SHE RESIDES AT 4 Martine Ave., #406, White Plains, NY

IN THE COUNTY OF Westchester AND STATE OF New York

AND THAT HE/SHE IS THE OWNER IN FEE OF \_\_\_\_\_

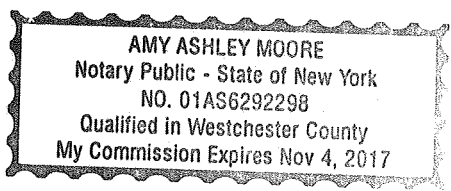
1 Powelton Road, Newburgh, NY 12550

WHICH IS THE PREMISES DESCRIBED IN THE FOREGOING APPLICA-  
TION AND THAT HE/SHE HAS AUTHORIZED Katherine Zalantis c/o Silverberg Zalantis LLP

TO MAKE THE FOREGOING APPLICATION AS DESCRIBED THEREIN.

DATED: \_\_\_\_\_  
[Signature]  
OWNER'S SIGNATURE

[Signature]  
WITNESS' SIGNATURE



STATE OF NEW YORK: COUNTY OF Westchester ~~ORANGE~~

SWORN TO THIS 9<sup>th</sup> DAY OF Feb 20 16

[Signature]  
NOTARY PUBLIC