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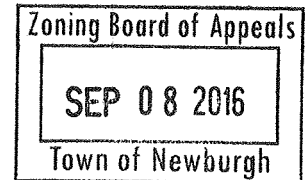
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September 8, 2016

ATTN: JAMES E. MANLEY JR. CHAIRMAN
Town of Newburgh ZBA
308 Gardnertown Road
Newburgh, New York 12550



Re: RAM Hotels, Inc. Application for Variances
Tax Map Parcel: 97-2-37
Our File No.: 14638-67881

Dear Chairman Manley and Board Members:

This office represents the RAM Hotels, Inc., the applicant on the above-referenced application for variances to building height [Table of Use and Bulk Requirements for IB District - Schedule 8] and principal frontage on a state or county highway [Code §185-27(C)(1)]. I am writing pursuant to the Board's authorization at the public hearing last month to comment upon certain objections raised by one member of the public regarding the requested variances.

I. The Variances Sought Are Area Variances, Not Use Variances.

Town Law §267 defines "use variance" and "area variance" as follows:

"Use variance" shall mean the authorization by the zoning board of appeals for the use of land **for a purpose** which is otherwise not allowed or is prohibited by the applicable zoning regulations.

"Area variance" shall mean the authorization by the zoning board of appeals for the use of land **in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.**

[Emphasis and underlining added]. Thus, by statute, a use variance is required only for establishment of a particular use not allowed by the Code's use tables, whereas an area variance is required for any deviation from the Code's bulk tables, design criteria or site standards (i.e., essentially *anything other than use*).

Perhaps the preeminent treatise on zoning in New York is Patricia Salkin's "New York Zoning Law and Practice" (3rd Ed., West Group, 2015). In Volume 2, §29, Professor Salkin discusses the differences between use variances and area variances as follows:

A variance is an authorization for a landowner to engage in construction or maintenance of a building or structure, or to establish and maintain a use of the land which is prohibited by a zoning ordinance.

* * * *

A use variance, as the term implies, permits a use of land that is otherwise proscribed by the zoning regulations.

* * * *

Unlike a use variance, an area variance does not involve a use that is prohibited by the zoning ordinance. The enabling acts define an area variance as "[t]he authorization by the zoning board of appeals for the use of land in a manner which is not allowable by the dimensional or physical requirements of the applicable zoning regulations. Thus, area variances involve matters such as setback lines, frontage requirements, lot-size restrictions, density regulations, and yard requirements.... The Court of Appeals observed: "An 'area' variance is one which does not involve a use which is prohibited by the zoning ordinance, while a 'use' variance is one which permits the use of land which is proscribed. Consolidated Edison Co. of New York, Inc., v. Hoffman, 43 N.Y.2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193 (1978).

In our case, the subject property is located in an IB zoning district. Hotels and motels are uses permitted in the IB District subject to site plan approval. In regard to hotels, Town Code §185-27(C) provides, in pertinent part:

Hotels, motels and accessory restaurants.

* * * *

C. Site planning standards.

- (1) The site shall have principal frontage on a state or county highway.
- (2) Access conditions shall be adequate for the estimated traffic to and from the site to assure the public safety and to avoid traffic congestion in the surrounding neighborhood.

(3) Vehicular entrances and exits shall be clearly visible from the street and shall be at least 150 feet from the center line of any street intersection. At the intersection of such entrances and exits with the main street, sight distances along the main street shall be sufficient to provide a clear line of sight in each direction equal to the distance traveled in 10 seconds at the posted speed limit.

(4) The site shall be served by public sewer and water facilities which shall be approved by all agencies.

Since the use of "hotel" is permitted in the IB zone, and the applicant merely is seeking a variance from the Code's " Site planning standards", the variance sought is quite clearly an area variance (i.e., a variance to use the property in a manner which is not allowed "by the dimensional or physical requirements" of the Town Zoning Code). Of course, the same is true in regard to the variance sought to building height.

It is my understanding that the objector on this application claimed that the application in our case must be deemed a request for a use variance because, allegedly, in a prior decision on an unrelated matter some years ago the ZBA found that a variance from the requirements of Town Code §185-27(C) constitutes a use variance. Since no copy of any such alleged ZBA decision has been produced, I cannot comment on the content of the alleged prior ZBA decision; although I will note that if such a result was reached in the prior unrelated application it seems likely that the matter was simply wrongly decided. However, it is respectfully submitted that even if the alleged ZBA decision does exist, it is not binding in regard to the application for variances in our case. It is well established that a single ZBA decision has virtually no precedential value and the ZBA is free reach a different result on similar facts in subsequent applications as long as there is some rational explanation for the deviation, whether it be distinguishable facts, a change in the law or simply a change in the ZBA's view on how the Code should be interpreted. See Hurley v. Zoning Bd. of Appeals of Village of Amityville, 69 A.D.3d 940, 942, 893 N.Y.S.2d 277, 279 (2nd Dept. 2010).

II. The Variances Sought Should Be Granted.

Under Town Law §267, in making its determination on an application for an area variance, the ultimate determination to be made by the ZBA is whether the benefit to the applicant if the variance is granted outweighs the detriment, if any, to the health, safety and welfare of the neighborhood or community that granting the variance would cause. In making this determination the ZBA is required to consider the following five factors, none of which is determinative by itself and not all of which must be met in order to justify grant of the requested variance:

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

- (2) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (3) Whether the requested area variance is substantial;
- (4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) Whether the alleged difficulty was self-created (which, although a relevant consideration, does not need to be met in order for the variance to be granted).

Here, consideration of the above-listed five factors demonstrates that the benefit to the applicant if the requested variances are granted outweighs the detriment, if any, to the health, safety and welfare of the neighborhood or community that granting the variances would cause.

(1) **Granting the requested variances would not produce an undesirable change in the character of the neighborhood or be a detriment to nearby properties.**

The subject property is located a short distance from the intersection of N.Y.S. Route 17K (a major commercial thoroughfare) and Unity Place, which was designed and is being developed as a commercial off-shoot of Route 17K. Indeed, the property abuts a large Honda automobile dealership. The character of the neighborhood is most decidedly commercial, and the construction of the proposed hotel on Unity Place would not change the character of the neighborhood, much less create an undesirable change.

Further, the construction of the proposed hotel to a height of 69'4" rather than the allowed 50' would likewise not produce any change in the character of the neighborhood or be a detriment to nearby properties. The 19'4" height differential will not cause any adverse visual impacts and it is anticipated that the overall appearance of the hotel structure will be a valuable asset in future development of this commercial strip.

(2) **The benefit sought by the applicant cannot be achieved by some method, feasible for the applicant to pursue, other than an area variance.**

The "benefit" sought by the applicant is construction of a hotel upon the subject property. Obviously, the benefit cannot be obtained without the requested variance from Town Code §185-27(C)(2) because the applicant has no means of having a state or county highway built next to its land. Building the hotel without the requested height variance is simply not feasible for the applicant. As was explained at the public hearing, the franchise for the proposed hotel is a Hilton Garden Inn, and the height variance is needed to meet the franchisor's building specifications. Further, building the hotel to a lower height would require substantially expanding the "footprint" of the structure, thereby greatly increasing impervious building surface (which is contrary to DEC regulations) while generating no substantial benefits.

(3) The requested area variances are not substantial.

While the subject property may not front on a state or county road, its location on Unity Place meets all of the criteria upon which the road frontage requirement was based. That is, the subject property is located only a short distance from a signalized intersection with N.Y.S. Route 17K, and Unity Place itself is built to specifications capable of handling substantial traffic flow. This is not a case where a property owner is attempting to build a hotel on a rural local roadway that is simply not able to bear the reasonably anticipated traffic flow. Rather, the rationale for which Town Code §185-27(C) was enacted is being substantially complied with.

The height variance requested (19'4") while perhaps being somewhat substantial in a strict numerical sense, is nevertheless not qualitatively substantial. That is, the difference in impacts and overall appearance between a 50' high hotel and a 69'4" hotel is simply not that great.

(4) The proposed variances will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

As was discussed at the public hearing, the proposed hotel will not have any adverse impacts on the physical or environmental conditions in the neighborhood or district. Traffic and visual impacts might be the most prominent potential impacts, and neither of these presents any problems due to the characteristics of the neighborhood and Route 17K/Unity Place roadway interchange in which the property is located.


(5) Although the difficulty in complying with the Town Zoning Code's provisions is self-created, this factor alone does not warrant denial of the requested variances.

The applicant acknowledges that under New York State law a party who purchase real property with knowledge of the applicable zoning restrictions is deemed to have a "self-created hardship." E.g., Lim-Kim v. Zoning Bd. of Appeals of Vill. of Irvington, 185 A.D.2d 346, 347, 586 N.Y.S.2d 633, 635 (2nd Dept. 1992). However, in our case, the fact that the difficulty in complying with the Zoning Code's provisions is technically "self-created" does not warrant denial of the application.

The IB zoning applicable to the subject property was specifically imposed with the idea that the land might eventually be developed as hotels. The land along Unity Place is desirable and suitable for development as a site for hotels, a use of which the Town of Newburgh is much in need. Likewise, the ZBA has previously granted height variances for several hotels in the Town, which tacitly recognizes that the Code's height requirement should be varied to accommodate the unique architectural requirements of modern hotel structures in proper circumstances.

We look forward to discussing this matter with you further at the upcoming continued public hearing.

Respectfully,



STEPHEN J. GABA

SJG/ev/525879

cc: David Donovan, Esq.,
Client
Mercurio-Norton-Tarolli-Marshall, PC