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September 22, 2016

James Manley, Chairman  
Zoning Board of Appeals  
Town of Newburgh  
308 Gardnertown Road  
Newburgh, New York 12550

***RE: Area variance application of RAM Hotels, Tax Map Designation: 97-2-37***

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Dear Chairman Manley and Board Members:

I write to you in connection with the application of RAM Hotels, Inc. hereinafter referred to as "RAM," and/or the "applicant."

As you are aware, RAM heretofore made application to the Town Building Department for a permit to construct a 5-story, 112-room hotel on the above described premises. The Building Department denied this application for two reasons. First, Town of Newburgh Code Section 185-27-C-1 states that "the site [upon which the hotel will be built] shall have principal frontage on a state or county highway." Second, the applicable bulk tables impose a maximum building height of 50 feet. Neither of these requirements is met as the subject premises do not have frontage on a state or county highway and the building height is proposed at 69.4 feet.

RAM has appealed the Building Department's determination to the Zoning Board pursuant to an application dated July 21, 2016. In its application, RAM seeks *area* variances from the requirements of each code provision so as to allow the construction of the hotel upon the premises as planned.

A public hearing was convened on August 25, 2016 relative to the RAM application. During the hearing, counsel for a neighboring property owner, Charles Bazydlo, Esq., appeared and raised objections to the relief being requested by RAM. Specifically, Mr. Bazydlo advanced the position that a *use* variance was required in order to obtain relief

from the provisions of Newburgh code section 185-27-C-1.

In order to assist the Board in its deliberations, I invited Mr. Bazydlo and representatives from RAM to make written submissions on the issue as to whether or not the relief requested relative to the frontage required was properly characterized as an area variance or a use variance.

In response to this invitation, the Board has received a written submission from Stephen J. Gaba, Esq. on behalf of RAM as well as a written submission from Mr. Bazydlo on behalf of his client.

I will not repeat the arguments advanced by counsel other than to say that I have carefully considered the position advanced by each party. I further note that while it is generally obvious whether a use or area variance is required, there are instances in which the distinction is not readily apparent. As noted in the *Practice Commentaries* to Section 267-b of the New York State *Town Law (Permitted Action by Board of Appeals)* there are certain areas where “Some doubt ha(s) existed as to whether a variance is in the nature of an area or use variance. Because of the significantly different burdens of proof, the conclusion obviously may have a substantial impact on the outcome of an application.”

My research, assisted by the good and able work of Messers Bazydlo and Gaba, reveals no case law that addresses any code provision that is similar to the requirements imposed by the Town of Newburgh Zoning Ordinance in this instance, i.e., the underlying use is permitted conditioned upon the existence of certain physical conditions such as “frontage on a state or county highway.”

I also note, contrary to Mr. Bazydlo’s assertion, it does not appear that this Board addressed this issue directly in connection with the 2013 application of the Hampton Inn on Route 300 that is referenced in his correspondence.<sup>1</sup>

Ultimately, it is my view that because the underlying use, that of a hotel, is a use that is permitted in the IB zoning district, albeit subject to certain restrictions – which are admittedly *not* dimensional, the relief requested should be characterized as an area variance not a use variance. Your deliberations, therefore, should be in accordance with

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<sup>1</sup> In point of fact, and in hindsight, that application seems somewhat confused as the minutes of the planning board meeting of September 5, 2013 wherein the Hampton Inn application was referred to the Zoning Board, counsel for the Planning Board characterized the relief required from Code Section 185-27-C-1 as an “area variance.” (See Minutes of Town of Newburgh Planning Board meeting from September 5, 2013 at page 8.) Additionally, the referral letter of the Planning Board attorney to the Zoning Board regarding the Hampton Inn application simply states that a “variance will be required from Code Section 185-27-C-“ without characterizing this request as either a use or an area variance. The referral letter identifies two other rear yard setback variances, without designating them as either area or use variances and further identifies a use variance that is unrelated to the frontage issue which is the subject of the current application. Contrary to the opinion advanced by the Planning Board attorney, the applicant in the Hampton Inn matter did seek a use variance from Section 185-27-C-1. Ultimately, this application was withdrawn and no determination was ever rendered by this Board and therefore there is no binding decision relative to this issue which, at best, has a confusing past before this Board.

the five part balancing test relative to area variance applications that is employed to determine whether to grant the relief requested by the applicant.

Please contact me should require any further clarification.

Very truly yours,

A handwritten signature in black ink, appearing to read "D.A. Donovan". The signature is stylized with a large initial "D" and "A" and a cursive "Donovan".

DAVID A. DONOVAN

DAD/lrm

cc: Charles Bazydlo, Esq.  
Stephen J. Gaba, Esq.