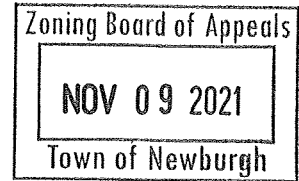


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November 9, 2021

VIA EMAIL

Darrin J. Scalzo Chairman
Town of Newburgh Zoning Board of Appeals
21 Hudson Valley Professional Plaza
Newburgh, NY 12550

**Re: Newburgh Commerce Center – 124 NYS Route 17K
Request for Area Variance**

Dear Chairman Scalzo and Members of the Zoning Board of Appeals (“ZBA”):

This firm represents Scannell Properties, LLC (“Scannell”) in connection with its proposed development in the Town of Newburgh to be known as Newburgh Commerce Center (the “Project”). The Project will be constructed on an approximately 13.832± acre parcel located at 124 NYS Route 17K designated Tax Map Parcel # 95-1-58 (the “Project Site”), which is located in the Town’s IB zoning district. We appeared before the Town’s Zoning Board of Appeals (“ZBA”) on October 28, 2021 in furtherance of Scannell’s request for an area variance from the Zoning Code’s 500-foot setback requirement for “warehouse, storage and transportation facilities, including truck and bus terminals” uses along Route 17k (collectively referred to herein as the “Warehouse Use”).

As discussed at length in our September 23, 2021 submission (the “Application”), Scannell proposes a commercial building that may contain a Warehouse Use to be located 381 feet from NYS Route 17K. The Project will be a multi-tenant use building that may include several commercial/industrial uses permitted in the IB zoning district. Because the proposed building may include a Warehouse Use, Scannell is seeking a 119-foot front yard setback variance. At this time, no tenants have been identified for the Project. Scannell seeks to obtain the necessary approvals from the Town for the Project in order to market the Property as a “pre-approved” multi-use building that can accommodate various types of tenants meeting the use requirements of the Zoning Code

While Scannell's Application and related exhibits demonstrates that the requested area variance should be granted, we respectfully submit this letter to address comments made by ZBA members at the October 28, 2021 meeting.

The Requested Area Variance is Not Substantial

The requested 119-foot front yard variance setback is 24% of the overall 500-foot requirement and will result in a 381-foot front yard setback. Importantly, only approximately 20% of the building is within this 500-foot setback area (approximately 25,440 SF). The Healy Kia car dealership (SBL: 95-1-53), which is just east of the Project Site and directly adjacent a residence along Route 17k is set back approximately 145-feet from Route 17K. Further, the Big Shine LED commercial building, which use is classified as "storage" on Orange County records is located approximately 334 feet from Route 17K. Accordingly, you have two nearby commercial/storage uses that are closer to Route 17k that that the Project and are similar in size to the area of the proposed Scannell building that is within the required 500-foot setback. As such, and notwithstanding the significant visual and noise buffers proposed, the requested area variance is not substantial.

Even from an inherently numerical analysis the requested area variance is not substantial. In *N. Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Plan. Bd.*, the Court upheld an area variance that was 27% of the required setback because visual and noise buffers were provided to mitigate any impact. *See* 39 A.D.3d 1098 (3rd Dep't 2007). Likewise, here, the request is 24% of the required setback and impacts have been mitigated through substantial buffering.

That said, it is well settled in New York that a ZBA, when assessing whether an area variance is substantial, should review the totality of the circumstance and not simply the numerical request. *See Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner*, 56 A.D.3d 883, 886 (3rd Dep't 2008) (holding that "[a]lthough the variances sought are substantial, the ZBA determined that the development will not have a substantial impact on the community[.]"); *see also Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 21 Misc. 3d 1120(A), 873 N.Y.S.2d 512 (Sup. Ct. Steuben Co.), *aff'd*, 43 A.D.3d 1447, 843 N.Y.S.2d 744 (2007) (holding that "[s]ubstantiality cannot be judged in the abstract; rather, the totality of relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one.").

Notwithstanding the fact that the area variance is inherently not substantial, the following factors mitigate any perceived substantiality:

- The Project is surrounded by similar warehouse and commercial uses with few residences, which are located in the Interchange Business zoning district.
- As seen in the renderings supplied by Scannell, dense screening has been proposed to mitigate to the greatest extent practical noise or visual impacts this project might have on

a few surrounding residences, which are located in an industrial/commercial zoning district.

- Only 20% of the building (approximately 25,440 SF) is within the 500-foot setback, which portion of the building is 381 feet from Route 17K. Healy Kia, a nearby commercial building (31,073 SF), is closer to Route 17K. Big Shine LED commercial building, which use is classified as “storage” (approximately 20,522 SF) is located approximately 334 feet from Route 17K.
- Directly across the street from the Project Site is the Industrial “I” zoning district and the Stewart International Airport runway. Warehouse Uses are permitted 50-feet from Route 17K in the I zoning district. Commercial/industrial buildings along this portion of Route 17K in the I zoning district are built even closer than this 50-foot requirement (US Global Airways, 40-foot setback). As a result, the built environment surrounding the Project Site is commercial/industrial with similar uses closer than 500 feet from Route 17K.
- According to the Interchange Business zoning district regulations, the building could be approximately 113,816 SF larger (90% increase), 50-feet from Route 17K, and fully permitted without the Warehouse Uses. Such a building would be permitted to hold industrial uses such as manufacturing, fabrication, and processing materials, which would likely have greater impacts.

With the above noted considerations, which represent a totality of the circumstances, the ZBA should find that the area variance is **not** substantial. *See Easy Home Program v. Trotta*, 276 A.D.2d 553, 553 (2d Dep’t 2000) (in overturning the denial of an area variance, the Court held that “the requested variance was, arguably, substantial. However, there was no evidence that granting the variance would have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a “detriment to the health, safety and welfare of the neighborhood or community”).

The Requested Area Variance Will Not Create Precedent for Future Applications

The ZBA will not set a precedent by granting Scannell’s requested area variance. This concern is eliminated by the unique characteristics of this site, which can distinguish it from other future applications. In addition, our office has reviewed all vacant properties in the IB zoning district along Route 17k to further assess the potential for any precedent. *See* Enclosed. All but one vacant property would not be suitable for warehouse development due to size and configuration constraints. The only property that may be available for warehouse development appears to include enough land to meet the 500-foot setback without impacting the potential viability of development. That said, the ZBA must evaluate each application on a case-by-case basis under the applicable area variance balancing test and may distinguish future applications to avoid precedent.

Related to future applications, the ZBA would merely have to “indicate its reason for reaching a different result” if faced with a similar application. *See Monte Carlo I, LLC v. Weiss*, 142 A.D.3d 1173, 1176, 38 N.Y.S.3d 228, 231 (2016) (holding that “[w]here, however, a zoning

board provides a rational explanation for reaching a different result on similar facts, the determination will not be viewed as either arbitrary or capricious”); *see also Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 76, (2d Dep’t 2009) (holding that “[t]he ZBA adequately distinguished other cases in the Town of Greenburgh where area variances had been granted.”)

The Property and the Project are distinguishable from other future applications for the following reasons:

- The lot depth of the Project Site is 1,069 feet. Therefore, if the Route 17K setback is applied, combined with the 60-foot rear yard setback, approximately only 500 feet of depth is developable (not accounting for fire access). This makes the Property undevelopable from a financial standpoint.
- Due to the irregular shape and lack of sufficient depth and width of the Property, no feasible alternatives exist which do not require an area variance for the Project.
- The Project Site is directly adjacent the Northeast Business Center, which is developed with larger warehouses, unlike other areas along Route 17K in the IB zoning district.
- The Project Site is directly across from the Stewart International Airport runway and the I zoning district, which allows for Warehouse Uses 50-feet from Route 17K. Commercial/industrial buildings along this portion of Route 17K in the I zoning district are built even closer than this 50-foot requirement (US Global Airways, 40-foot setback). As a result, the built environment surrounding the Project Site is commercial/industrial with similar uses closer than 500 feet from Route 17K.
- The Project Site is physically less than a mile from I-87 and approximately 1,835 feet from I-84. Further, the Project Site is approximately 1.8 miles to the closest I-84 interchange.

The stretch of Route 17k in the Town of Newburgh is comprised of four separate zoning districts: (1) Business “B” district, (2) Industrial “I” district, (3) Residence “R-1” district, and (4) the Interchange Business “IB” district. Of these zoning districts, Warehouse Uses are only permitted in the IB and I zoning districts. Further, only Warehouses Uses within the IB zoning district require the 500-foot setback.

To assess the potential for setting precedent, the enclosed chart identifies all vacant lands that are within the IB zoning district with frontage along Route 17K and evaluates the potential for warehouse development on said properties. A parcel must be a minimum of 12 acres, without environmental constraints (*e.g.* wetlands), for a warehouse developer to consider acquiring. As you will see from the enclosed chart, all but one of the vacant lots are not suitable for warehouse development. The remaining vacant parcels are not suitable for warehouse development due to size and configuration constraints. As such, the ZBA’s concern related to precedent is eliminated.

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The one parcel that may be suitable for development is located at 226 Route 17K (SBL: 89-1-66), which is 19.60 acres in size. A warehouse could be built in the rear of this property because the lot depth is approximately 1,211 feet. The Project Site's lot depth is 1,069 feet. Thus, this vacant property would have an additional approximately 142 feet of lot depth to reach the 500-foot setback requirement. The Project Site does not have this luxury. The remaining 17 vacant parcels are inadequate for warehouse development, eliminating the worry of creating a precedent.

As required by New York State law, in granting an area variance, the ultimate test for the ZBA to consider is whether granting of the benefit to the applicant outweighs any detriment to the neighborhood or community. Based on the above, and notwithstanding all other considerations, because the variance request herein will not result in a precedent for future development, the requested variance will not cause a detriment to the neighborhood or community.

Conclusion

As demonstrated by our initial Application and the information provided above, it is clear that granting the requested variance will benefit the community (e.g. tax revenue generated from currently vacant land) and Scannell by providing an economically viable Project on the Property without any detriment to the neighborhood or the community. Balancing the significant benefits to Scannell and the Town of Newburgh if the variance is granted, as weighed against the detriment to the health, safety, and welfare of the neighborhood or community of granting the variance, we respectfully submit that granting the requested variance is justified.

We look forward to discussing this matter further with you at the November 23, 2021 ZBA meeting. In the meantime, please let me know if you have any questions on the materials submitted.

Very truly yours,



Charles J. Gottlieb

Enclosures

c: Zach Zweifler, Scannell Properties
Mark Willson, Scannell Properties
Chuck Utschig, PE, Langan
John Ewasutyn, Planning Board Chairman

Vacant Parcels Fronting Route 17k in the IB Zoning District

No.	Address	SBL	Acres	Warehouse Use	Comments
1	8 Rock Cut Rd	86-1-34	6.70	NO	Parcel size inadequate
2	Route 17K	86-1-26.1	3.50	NO	Parcel size inadequate
3	Route 17K	86-1-85.1	7.90	NO	Parcel size inadequate and encumbered by USACOE wetlands
4	Route 17K	86-1-35.21	1.40	NO	Parcel size inadequate
5	2 Lakeside Rd.	86-1-39.3	5.60	NO	Parcel size inadequate
6	226 Route 17K	89-1-66	19.60	YES	Warehouse could be built in the rear of the property because the lot depth is appx. 1,211 feet. The Project Site lot depth is 1,069 feet (142 foot difference). The larger lot depth would allow for this lot to comply with the 500-foot setback requirement.
7	Route 17K	94-1-59.2	3.40	NO	Parcel size inadequate
8	100 Corporate Blvd	95-1-66	2.70	NO	Parcel size inadequate
9	Corporate Blvd	95-1-76	6.20	NO	Parcel size inadequate encumbered by regulated wetlands.
10	Route 17K	95-1-64	.895	NO	Parcel size inadequate
11	Route 17K	95-1-54.2	8.60	NO	Narrow strip of land in the front, appx. 770 feet in depth, is inadequate for Warehouse Uses. The lot is also encumbered by a regulated stream.
12	Route 17K	95-1-49.122	6.10	NO	Parcel size inadequate
13	100 Route 17K	95-1-49.2	.79	NO	Parcel size inadequate
14	Route 17K	95-1-80	9	NO	Parcel configuration inadequate
15	Auto Park Place	97-2-46.2	4.8	NO	Parcel size and configuration inadequate
16	Route 17K & Crossroads	95-1-73	2.30	NO	Parcel size inadequate
17	Route 17K	97-2-3	5.40	NO	Parcel size and configuration inadequate
18	Route 17K	100-5-67.2	18.70	NO	Split zoned IB and R2, front yard zoned IB only appx 4+/- acres and not adequate for Warehouse Use.