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Via E-Mail droemer@dobbsferry.com; scollins@dobbsferry.com

Honorable Chairperson and Members of the Board of Appeals
112 Main Street
Privileged
Dobbs Ferry, NY 10522

Re: 0 North Mountain Drive, Dobbs Ferry, New York 10522

Dear Honorable Members of the Dobbs Ferry Board of Appeals,

My firm has been retained by Tanya Giglio, the owner of 0 North Mountain Drive (the "Property") to appeal the building inspector's determination dated July 27, 2022 (the "Determination"). In the alternative, if the Zoning Board of Appeals (the "Board" or "ZBA") does not overturn the Determination, we are seeking an area variance of approximately 23% for the Property to qualify as a building lot (the "Variance Request"). Ms. Giglio is seeking to construct a new single-family home with a three-car garage and swimming pool. The Property is located in the OF-2 zoning district which requires a net site area of 20,000 square feet. The OF-2 district permits single family homes and other accessory uses. The Property consists of 23,337 square feet but, due to steep slope calculations recently performed, the square footage is reduced to 15,241 square feet. The proposed home and swimming pool is otherwise compliant with the other bulk regulations in the OF-2 district.

The threshold interpretation that we are appealing before this Board is whether the Property is a building lot. The Determination states that the Property is deficient in square footage by 4,759.1 s.f. as a result of the application of Village Code § 300-34.A.(2) "Reductions for steep slope areas." This Determination is premised on the finding that the steep slope deductions apply to this Property and render it a non-buildable lot due to the size. For the following reasons, the Zoning Board of Appeals should overturn this Determination and find that the Property is a building lot.

THE PROPERTY IS PART OF AN APPROVED AND FILED SUBDIVISION PLAT

The timeline of events clearly establish that the Village's intention was to create this Property as a buildable lot. By way of background, the Property is part of the Hempleman Subdivision that was filed with Westchester County Clerk's office on December 20, 1989. The Hempleman Subdivision was being reviewed and considered simultaneously by the Village with the steep slope law. The steep slope law was adopted approximately three weeks prior to the Hempleman Subdivision. Thereafter, the Planning Board purposefully approved the Hempleman Subdivision, creating two building lots, with the steep slope law in effect. Furthermore, the Planning Board's intentions to create two building lots is supported by the minutes. *See* Exhibit D2 to the Application submission. The Planning Board withheld its approval and reviewed a revised subdivision plan after the steep slopes law was effective for no other reason but to confirm that the proposed subdivision would comply. It is illogical that the Planning Board purposefully approved a two-lot subdivision, after asking for a revised plan, that did not result in legal building lots. Importantly, the steep slopes law has not been amended since the subdivision was approved.

THE BUILDING ENVELOPE WILL NOT IMPACT THE STEEP SLOPES

As the Board will see from the proposed site plan (Exhibit L to the Application), the proposed building envelope allows the steep slopes to be protected. It avoids the most steeply sloped areas of the Property and allows for an environmentally sensitive development. Not only did the Planning Board specifically contemplate and approve the Property to be improved with a single-family home, the proposed site plan is taking into account the sensitive features and is furthering the intent of the steep slopes law.

THE PROPERTY HAS BEEN ASSESSED AS A BUILDING LOT

Since 1989, the Village has assessed and treated the Property as a building lot. As you can see on the assessment card, the Village assesses the undeveloped parcel at $549,800. *See* Exhibit I to Application. The property owners have paid, and the Village has received the benefits of tax payments, as if the Property were a building lot for decades. If the Village did not consider the Property a building lot back in 1989, it would have reduced the assessment to a value reflecting a deminimus value. Instead, the Village itself has treated the Property as a building lot.

Based on the history of the steep slope legislation, the timeline of events, the filing of a subdivision plat, and all the other reasons outlined above, it is clear that the Property was approved as a building lot and that was the Village's clear intention at such time.

IN THE ALTERNATIVE, THE ZONING BOARD OF APPEALS SHOULD GRANT THE NECESSARY VARIANCES TO ALLOW FOR THE PROPOSED SINGLE-FAMILY HOME TO BE BUILT

If the ZBA does not overturn the Determination, the ZBA should grant the necessary variance to allow the Property to be a building lot. The role of the ZBA is to provide a safety valve and flexibility from the rigid enforcement of the zoning ordinance. Salkin, New York Zoning Law and Practice §§ 27:08 & 27:09 [4th ed. 2022]. As I know this board is well-aware, the New York Court of Appeals has held the standard for granting an area variance is a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. *Sasso v. Osgood*, 86 N.Y.2d 374 [Ct Ap 995]; *Monroe Beach, Inc. v. Zoning Bd. Of Appeals of Long Beach*, 898 N.Y.S.2d 194, 195 [2d Dept. 2010]. The basic inquiry for zoning boards at all times is whether the strict application of the ordinance in a given case will serve a valid public purpose which outweighs the injury to the property owner. *See Grace v. Palmero, 182 A.D.2d 820, 582 N.Y.S.2d 284 (*2d Dep't 1992*)*.

Under Village Law, the following standards/criteria must be considered and balanced by the ZBA in considering whether to grant the requested variance. For the following reasons, the requested variance should be granted.

a. Whether an undesireable change will be produced in the character of the neighborhood.

The OF-2 zone is a single family zone that only permits residential homes and normal and customary accessory uses. The application proposes a single family home of a similar size to the homes immediately surrounding the Propety. The variance would not have any undesireable change in the character of the neighborhood and would be a complement to the existing homes. The size of the Property is larger than required so there is sufficinet area to comply with all necessary setbacks and other bulk regulations. In addition, as the minutes reflect during the subdivision process, the Planning Board looked at the potential impacts to the surrounding neighborhood and concluded that the subidivision complied with the Village's requirements.

b. Whether the benefit sought can be achieved by some other feasible method

The answer to this question is simply "no" – the need for the variance is essential to allow for the Property to be used for any permitted use. This is not a situation where the applicant is seeking a variance for an oversized home or to build something that is not otherwise permitted.

c. Whether the requested variance is substantial

The request is not substantial in the context in which it is being sought. Here, the gross area is more than what is required but the calculations of the steep slopes are such that a 23% variance is required. Here, again, the original subdivision was created immediately after the steep slopes law was adopted. The topography of the Property has not changed in the intervening time period but the calculations today result in a net area that is less than what is required.

d. Whether the variance will have an adverse effect or impact on the physical or environmental conditions

There will be no adverse impact on the physical or environmental conditions. The Planning Board thoroughly reviewed the potential impacts when it approved the subidivision. In addition, the proposed single family home's building envelope reflects the environmentally sensitive nature of the property.

e. Whether the need for the variance is self created

The hardship was not self created. The Village adopted the Steep Slopes Law and has removed all reasonable use of the property. In this Board's decision, this factor tips undoubtably in favor of the Owner.

IF A VARIANCE IS NOT GRANTED, THERE IS NO ECONOMIC USE OF THE PROPERTY AND A REGULATORY TAKING WILL HAVE BEEN ESTABLISHED

Here, if the ZBA does not overturn the Decision and does not grant the Variance Request, the ZBA will have effectively taken all use of the Property and will be subject to a regulatory takings proceeding. The test to help determine a regulatory taking when a per se taking is not demonstrated (Factors from *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978)) consists of: 1) The economic impact of the regulation – "mere diminution in the value of the property, however serious, is insufficient to demonstrate a taking" *Gazza v. New York State Dep't of Env't Conservation;* 2) The extent to which the regulation has interfered with reasonable investment-backed expectations – reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need. *Gazza v. New York State Dep't of Env't Conservation*; and 3) The character of the governmental action – "its effects are so complete as to deprive the owner of all or most of his interest in the subject matter to amount to a taking" *Gazza v. New York State Dep't of Env't Conservation.*

A taking may be established, "[o]nly when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed." *Spears v. Berle*, 48 N.Y.2d 254 (2d Dep't 1979). Moreover, "it is clear that the mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Id.* Thus, "a taking may be found only if an onerous burden forces property owners alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960). In order to prove that the denial of a permit constitutes a regulatory taking, the petitioner must demonstrate that his property has "but bare residue of its value" due to the denial of the building permit application. *Gazza v. New York State Dep't of Env't Conservation*, 89 N.Y.2d 603, 610 (1997). That being said, the court must find that the permit denial is supported by substantial evidence and whether the restriction constitutes an unconstitutional taking requiring compensation. *Id.* Further, the fact that a regulation deprives a property of its most beneficial use does not render it unconstitutional. *Id.* And, the value of the property after regulation depends on what remaining uses are available to the property owners. *Friedenburg v. New York State Dep't of Env't Conservation*, 767 N.Y.S.2d 451 (2003). Here, the only way the owner can use the Property is if the Variance Request is granted. Without a determination that the Property is buildable or the granting of the variance, nothing can be built on the Property and there is no economical use.

Conclusion

All outward indices demonstrate clearly that the Property is a buildable lot. Considering the historical context, the filed Village documents, the treatment by the assessor's office, and the timing of the Planning Board's actions, the Property was created and intended to be a building lot. As such, this Board should overturn the Determination. In the alternative, the applicant has clearly met the requirements set forth for an area variance. The Variance Request will not result in an undesirable change, is necessary to allow any development of the Property, is not significant, will not harm the environment and the need was not self-created. All of the factors tip in favor of the Variance Request being granted.

Respectfully submitted,

/s/

Kristen K. Wilson