SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS, EDGEMONT COMMUNITY COUNCIL, DR. KATHERINE GALARZA, DR. LENORE S. KATKIN, JENNIFER YOUNG, DR. MARC RICHMOND, SUNIL K. SHUKLA, DR. ARTHUR BERMAN, and AMBU PATEL,

Index No.: 62208/2017

IAS PART Justice Susan Cacace

Petitioners,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF GREENBURGH; FORMATION-SHELBOURNE SENIOR LIVING SERVICES, LLC., and ALFRED H. KRAUTTER,

Respondents.

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PETITIONER'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF ITS VERIFIED PETITION

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Petitioners Council of Greenburgh Civic Associations, Edgemont Community Council, Dr. Katherine Galarza, Dr. Lenore S. Katkin, Jennifer Young, Dr. Marc Richmond, Sunil K. Shukla, Dr. Arthur Berman, and Ambu Patel (together, "Petitioners") by and through their attorneys, Bernstein & Associates, PLLC, respectfully submit the following Memorandum of Law in support of their Petition pursuant to Article 78 of the Civil Practice Law and Rules, Town Law § 267-c and Greenburgh Town Code § 285-10(A)(2)(4)(f).

PRELIMINARY STATEMENT

Only the municipal legislature has the power to amend its zoning ordinances. A Zoning Board of Appeals ("ZBA") is an administrative body that has no legislative powers at all, and thus no authority to amend the zoning ordinances. It is also well-established that a ZBA cannot grant variances from the zoning ordinances that would have the same effect as an amendment, as that would similarly intrude upon the legislative process. As the Court of Appeals made clear long ago, a ZBA cannot "amend the ordinances under the guise of a variance." But that is exactly what the ZBA for the Town of Greenburgh did in this case.

The Greenburgh Town Board enacted a zoning ordinance that imposes strict limitations on the location of any assisted living facility. Among other things, any such facility "must" be within 200 feet of a state or county right of way, and "must" have "direct access" to such road, which access "shall not" be via a "circuitous route." One of the express purposes of these requirements was to ensure that emergency vehicles would have safe and efficient access to any such facility, and to minimize other disruption of vehicle and pedestrian traffic. When it enacted the ordinance, the Town Board studied the entire map of the unincorporated area of Greenburgh,

and identified every parcel that would satisfy these requirements. Assisted living facilities are not a permitted use in parcels that fail to meet these legislative mandates, absent a specific legislative finding by the Town Board — not the ZBA — that such use is "appropriate and harmonious with the surrounding area."

Despite these express requirements, Greenburgh's ZBA — by a razor-thin 4-3 vote — granted an "area variance" allowing the construction of an assisted living facility at a location that is over *6,000 feet* away from a state or county right of way. Indeed, the site is *as far as it is physically possible to be* from a state or county right of way within the Fire District that would be responsible for responding to emergency calls at the facility. To make matters worse, the facility can only access that state or county right of way by first traversing a steep, double-hairpin turn and then negotiating a mile-long, winding road that goes up and down one of the tallest hills in the Fire District — a route that no one could deny is "circuitous." Indeed, the ZBA itself described its twists and turns as "severe."

In short, the ZBA could not have more perfectly or more completely violated the express requirements of the ordinance. This purported "variance" was no such thing: it affects not only the parcel belonging to the applicant, but *every single property* in the vicinity of the mile-long, winding road from the parcel in question to the nearest state or county road — an area comprising *hundreds* of homes that would now be burdened by emergency vehicle traffic contrary to the legislative mandate. It would also set a precedent for any subsequent property owner who wishes to operate such a facility in contravention of the ordinance; any such property would necessarily involve a lesser deviation from the statute than was permitted here, because no greater deviation is physically possible. The ZBA's action amounts to either an improper, *de*

facto amendment to the zoning ordinance, or an outright waiver of its requirements — neither of which is within the ZBA's power, and thus is beyond the scope of its jurisdiction. Its action is therefore void as a matter of law.

Even if it could be deemed a "variance" at all (which it cannot), the ZBA's action was in reality a *use* variance, not an "area variance." This is significant because while a ZBA is empowered to grant *area* variances when considering a special use permit, a ZBA has *no* authority to grant a *use* variance in that context. Here, the Town Board has expressly limited the parcels in which a special permit may be granted to allow an assisted living facility — indeed, when it enacted the requirements the Town Board had every such parcel identified on a map. By waiving the legislatively enacted restrictions, the ZBA has effectively allowed a use of the parcel at a location where the ordinance forbids it. That is the very definition of a use variance, and the ZBA had no power to grant it in connection with a special permit application. The decision should be annulled for that reason as well.

Moreover, the ZBA approved this use without any legislative finding by the Town Board that such use beyond the legislatively mandated 200-foot perimeter is "appropriate and harmonious with the surrounding area." The ZBA also did so knowing that (1) in the past seven years there had been at least eight reported accidents near the proposed site; (2) there would be an estimated 100-115 emergency medical calls (or more) there per year if the facility is permitted; (3) all such calls would in the first instance be responded to by the Greenville Fire District; and (4) Fire District personnel would only be able to get to the facility by traveling at high rates of speed along the "severe" S-curves and hairpin turns in full-sized firetrucks, using sirens and flashing lights through a residential neighborhood with hundreds of private homes.

The Fire District — which is the only "interested" agency that would be directly impacted by an assisted living facility at that location — was so concerned about safety that it

asked the ZBA to require the applicant to conduct an independent study to assess the financial and operational impacts of having an assisted living facility at that particular location. But just as the ZBA thumbed its nose at the legislatively enacted safety requirements, it thumbed its nose at the Fire District's concerns: the ZBA refused to require any such independent study, and effectively waived the very restriction enacted to protect safe passage for emergency vehicles, without any finding at all that emergency vehicles would have "safe access" to and from the proposed facility at that location. Adding insult to injury, the ZBA faulted the Fire District for not conducting its own study, at its own expense — a rationale that turns the variance process on its head, because the *applicant* is supposed to bear such costs.

Even if this "area" variance were not void on its face (which it is), the ZBA's determination would still fail because its decision is not supported by the record. The ZBA's written decision *does not even address* the requirement that the facility "shall not" have access to a State or County road by a "circuitous route," let alone make findings that would justify ignoring that express requirement. Nor did the ZBA address the sheer magnitude of the variance — nearly *3,000 percent* — perhaps because the ZBA realized it could not possibly justify such an extraordinary departure from the statutory requirements. Instead, the ZBA simply acknowledged that the variance was "substantial" (a gross understatement), with no analysis of its actual magnitude. Either of these failures by itself warrants rejection of the ZBA's decision as arbitrary and capricious.

In short, the ZBA's actions in granting these variances violated state law in numerous material respects. The ZBA is an administrative body which as a matter of law cannot grant variances that disregard legislative mandates and effectively amend the ordinance. Nor can the ZBA, when presented with an application for a special use permit, grant variances permitting a

use on a parcel where that use is otherwise not permitted. And even if such variances here were "area variances," and they are not, the ZBA's granting of a 3,000% variance is so substantial and precedent-setting that it would eliminate the legislative mandates altogether, and allow assisted living facilities in all parts of all single family residential zoning districts without regard to the Town Board's legislative mandate limiting the location of such facilities to limited areas within such single family zoning districts that it believed would provide safe access for emergency vehicles, while at the same time not otherwise burdening residential neighborhoods with additional or excess traffic.

For all of these reasons, the ZBA's decision should be annulled.

THE PARTIES

Petitioner Council of Greenburgh Civic Associations ("CGCA") is a nonpartisan umbrella organization consisting of residents representing civic associations throughout the unincorporated areas of the Town of Greenburgh. The CGCA was founded in 1955 to provide information and to advance the common interests of member civic groups in important Town affairs. The CGCA meets regularly once a month to address matters pertaining to the Town, its meetings are open to the public, minutes of its meetings are published and publicly available and its duly-elected officers regularly speak on behalf of the CGCA at meetings of the Town Board, as well as the Planning Board and the ZBA.

Petitioner Edgemont Community Council ("ECC") is a civic association consisting of residents of the Edgemont section of the unincorporated area of Greenburgh. The Edgemont section consists of a two and a half square mile area in the southern most portion of the Town; included within its borders is the Edgemont School District and the Greenville Fire District, both of which are local municipal entities. The ECC was organized in 1947 to "determine community

opinion on civic matters, coordinate community action thereon, and to plan and promote the general welfare of the Edgemont Community." The ECC meets once a month, its meetings are open to the public, minutes of its meetings are published and publicly available, and its duly-elected officers regularly speak on behalf of the ECC at meetings of the Town Board, as well as its planning and zoning boards.

Petitioner Dr. Katherine Galarza is a citizen of the State of New York and the Town of Greenburgh, having a residence at 99 New Sprain Road, Scarsdale, New York 10583, which is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr, Galarza is a medical doctor.

Petitioner Dr. Lenore S. Katkin is a citizen of the State of New York and the Town of Greenburgh, having a resident at 15 Deer Hill Lane, Scarsdale, New York 10583, which is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr. Katkin is a medical doctor.

Petitioner Jennifer Young is a citizen of the State of New York and the Town of Greenburgh, having a residence at 72 Underhill Road, Scarsdale, New York 10583, which is in the vicinity of the proposed project along Underhill Road, and is situated in the Edgemont School District and Greenville Fire District.

Petitioner Dr. Marc Richmond is a citizen of the State of New York and the Town of Greenburgh, having a residence at 16 Paradise Drive, Scarsdale, New York 10583, which is in the vicinity of the proposed project along Underhill Road, and is situated in the Edgemont School District and Greenville Fire District. Dr. Richmond is a medical doctor.

Petitioner Sunil K. Shukla is a resident of the State of New York and the Town of Greenburgh, having a residence at 109 New Sprain Road, Scarsdale, New York 10583, which

property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District.

Petitioner Dr. Arthur Berman is a citizen of the State of New York and the Town of Greenburgh, having a residence at 10 Deer Hill Lane, Scarsdale, New York 10583, which property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr. Berman is a medical doctor.

Petitioner Ambu Patel is a citizen of the State of New York and the Town of Greenburgh, having a residence at 61 Sprain Road, Scarsdale, New York, which property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District.

Respondent ZBA is the Zoning Board of Appeals of the Town of Greenburgh, a municipality in the State of New York. The ZBA is comprised of Acting Chairperson Eve Bunting Smith, and members Louis J. Crichlow, Kristi Knecht, William Losapio, Daniel Martin, Lawrence Doyle, Rohan Harrison, and William Bland (alternate).

Respondent Formation-Shelbourne Senior Living Services, Inc. ("Shelbourne") is a limited liability company duly formed under the laws of the State of Delaware. Shelbourne has entered into a contract to purchase real property located at 448 Underhill Road, Scarsdale, New York 10583, in the Town of Greenburgh, which is designated on the Tax Map of the Town as Parcel ID: 8:330-242-9. (the "Property"). And Respondent Alfred H. Krautter is the contract vendor of the Property.

JURISDICTION AND VENUE

This proceeding is commenced pursuant to CPLR Article 78, as provided by New York State Town Law § 267-c, and Respondent Shelbourne is a necessary party hereto. This Court has subject matter jurisdiction, and may exercise personal jurisdiction over the respondents in this matter. The decision at issue was rendered by resolution of the ZBA at a meeting held on

June 22, 2017. The written certificate of decision, containing a copy of the ZBA's resolution and its findings, was filed with the Office of the Town Clerk, on July 13, 2017. A copy of the decision is attached to the Petition as Exhibit A. This proceeding was commenced within 30 days of the date that the Certificate of Decision was filed in the Office of the Town Clerk and is, therefore, timely. Pursuant to CPLR Section 504(2) and 506(b), venue is proper in this Court. The Town is situated, the determination complained of was made, and any material events took place, in the County of Westchester, which is situated within the Ninth Judicial District.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Town Enacts The Assisted Living Facility Zoning Ordinance And Imposes Specific Restrictions On The Location Of Any Such Facilities.

Assisted living facilities offer a housing alternative for older adults who may need help with dressing, bathing, eating, and toileting, but do not require the intensive medical and nursing care provided in nursing homes. However, their residents frequently require emergency medical attention and, unless such facilities maintain a staff of paramedics with access to a fleet of private ambulances, and most do not, they must rely instead on local municipalities to respond to medical emergencies at local taxpayer expense.

On February 13, 2013, the Town of Greenburgh amended its zoning code to allow for the construction of assisted living facilities by special permit. However, to allow emergency vehicles to get safely to and from such facilities, and to prevent additional or excess traffic in residential neighborhoods, the Town Board required that any such facilities "must" be located within 200 feet of access to a state or county right-of-way (other than parkways and interstates); that such access "must" be direct, or via a side street; and that such access "shall not" be via a "circuitous route." A copy of the Town's Zoning Ordinance as it pertains to assisted living facilities is attached to the Petition as Exhibit B.

Specifically, the Town Board made SEQRA findings stating that "[t]he inclusion of the proximity of potential sites to State or County Roads other than Parkways and Interstate Highways, into the criteria, *seeks to limit additional or excessive traffic within established residential neighborhoods, while insuring safe emergency and other vehicular and pedestrian access*." (Emphasis added). Mindful of the Town's concern for the health, safety and welfare of the aging population that would be living in such facilities, the Town Board further stated that a requirement of this type will "increase the efficiency for access to and from the facility by public and private transportation, as well as emergency services." A copy of the Town's SEQRA findings referred to herein is attached to the Petition as Exhibit C.

As part of its SEQRA findings, Town staff produced a map identifying all properties with a minimum area of four (4) acres[1] "that are within 200 ft. of and have access to (direct or via side street) a State or County Road (other than Parkways and Interstate Highways) that have the potential to allow for assisted living facilities in the unincorporated portion of the Town of Greenburgh." The findings further state that "[t]his map was used by Town Board to identify where other assisted living facilities might be entertained in the future and was analyzed and discussed at length by the Town Board in its decision on the special permit legislation." The map showed no potential assisted living facilities in any areas of the Town beyond 200 feet of access to any state or county right-of-way, not including parkways or interstates. Hence, the map showed that no applications for potential assisted living facilities were to be "entertained in the

[1] The ordinance separately requires that any assisted living facility be on a lot that is at least four acres in size. The site at issue here is slightly less than four acres (3.79 acres to be precise), but the ZBA granted an area variance with respect to that requirement. The ZBA's grant of this 5.25% variance with respect to this single parcel is a classic example of a permissible "area variance," in that it provides a minor deviation from an area requirement for a specific parcel, and that grant is not challenged here. The 5.25% area variance the ZBA granted with respect to the lot size requirement, which affects only that parcel, stands in marked contrast to the nearly *3000.00%* variance the ZBA granted from the requirement that assisted living facilities be within 200 feet of a state or county road, and its wholesale *waiver* of the requirement that the facility have "direct" access to such a road that "shall not" be via a "circuitous route" — an action that affects *hundreds* of parcels.

future" if they were located more than 200 feet from access to such state or county rights-of-way. A copy of the map adopted as part of the Town's SEQRA findings is attached to the Petition as Exhibit D.

In making the representation that under its Zoning Ordinance, no potential assisted living facilities would be "entertained in the future" in any location where such access was beyond 200 feet, the Town Board acknowledged the possibility that developers might assemble different parcels totaling 4 acres of or more. But the Town Board stated in its SEQRA findings that any such potential assisted living facilities would still be limited to the 200-foot perimeter, because that was the only area in such districts that the board was expressly zoning for that use. Thus, the Town Board stated that any area beyond that perimeter would require a finding *by the Town Board*, after compliance with the SEQRA process, that "such use of such parcel is appropriate and harmonious with the surrounding area." Accordingly, the Town Board found that "no assisted living facility could be developed under these proposed amendments without: i) satisfying the applicable zoning bulk criteria; ii) review and recommendation by the Planning Board; and iii) issuance of a Special Permit *by the Town Board* only after compliance with the SEQRA process "*and finding that such use of such parcel(s) is appropriate and harmonious with the surrounding area*." (Exhibit C, p. 5, emphasis added).

In allowing assisted living facilities as a permitted use within the Town, the Town Board specifically amended Section 285-10(A)(4) of its Zoning Ordinance, which lists for its single family residential zoning districts six other "uses under special permit by the Town Board," such as "agency group homes," "convalescent homes, rest homes, nursing homes, and other state-licensed residential health care facilities," "hospitals" and "day care centers," by adding a new subsection (f), entitled, "assisted living facilities." That subsection then listed 15 individual

requirements. Most of these requirements pertain to lot and bulk specifications, including minimum lot size, number of beds per acre, distances from street and lot lines, maximum building height and length, lot widths, floor area ratios, and maximum coverages for principal buildings, accessory buildings, and impervious surfaces. However, subsection 14 therein restricts *where* in the Town's residential zoning districts assisted living facilities may be located — a restriction that is not found in *any* of the other uses for which a special permit is required.

Specifically, subsection 14 states that "[t]he site must be within 200 feet of, and have access to, a state or county right-of-way, other than parkways and interstate highways. Such access must be direct or via a side street and shall not be accessed by a circuitous route." In other words, if the site is not with 200 feet of access to a state or county right-of-way — or even if it, but such access is not direct or is accessed by a circuitous route — then its use for an assisted living facility is prohibited.

2. The ZBA Is Authorized To Grant Area Variances, But Not Use Variances, In Connection With A Special Permit Application.

There are no provisions in the Zoning Ordinance, as amended, that would allow the Town Board to waive or otherwise modify any of the requirements for assisted living facilities; nor are there any provisions authorizing the ZBA to waive or otherwise modify any of these requirements. However, Town Law § 274-b, entitled "Approval of special use permits," states that "where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals *for an area variance* pursuant to section two hundred sixty-seven-b of this article." (Emphasis added). Under Town Law § 267-b, zoning boards are generally authorized to grant two types of variances, i.e., "use" variances and "area" variances. Hence, the legislative authorization granted to zoning boards under Town Law § 274-b to issue only "area variances" for special use permits

was specifically intended to prohibit such boards from issuing "use variances" in the context of special use permits, and allowing instead only variances that meet the statutory definition of an "area variance."

Under Town Law § 267(1), a "use variance" is defined to 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," while an "area variance" involves authorization "for the use of land in a manner which is not allowed by the dimensional or physical requirements of the application zoning regulations." Use of land in a manner "not allowed by the dimensional or physical requirements of the applicable zoning regulations" generally refers to dimensional or physical "lot" and "bulk" requirements, such as minimum lot size, minimum setbacks, maximum building height and length, maximum floor area ratios, parking requirements, as well as provisions mandating distances between similar uses and in the case of certain commercial uses, their distance from residential zoning districts.

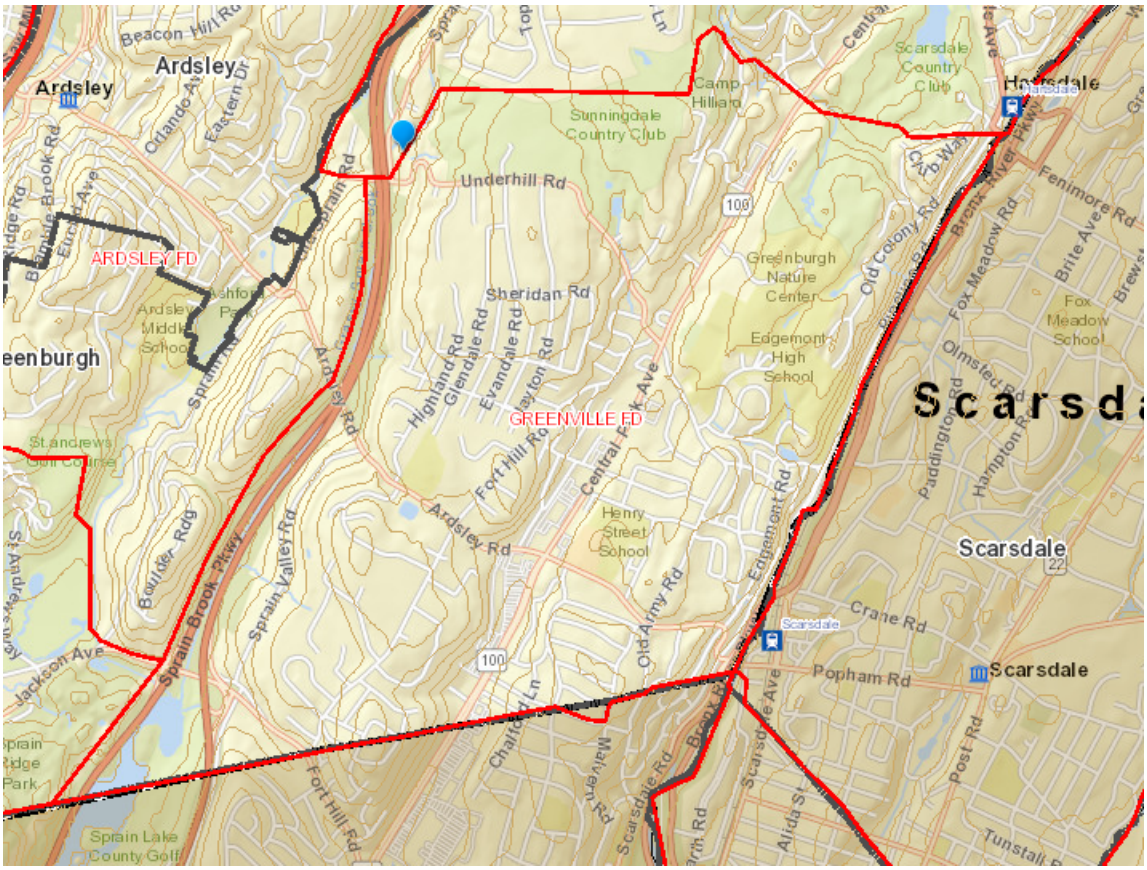
Here, however, to permit safe access by emergency vehicles to and from an assisted living facility, the Town Board prohibited the use of land for an assisted living facility at a site that is not within 200 feet of access to a state or county road, or that lacks "direct" access to a state or county road that is "not circuitous." Indeed, when the Town adopted the Zoning Ordinance permitting assisted living facilities in residential zoning districts, it expressly stated that any use of land for an assisted living facility that is not within 200 feet of access to a state or county road, and where such access is not direct or via a circuitous route, would not be permitted without a separate finding by the Town Board that such use of such parcels is "appropriate and harmonious with the surrounding area." Accordingly, a use variance to permit that use of such parcels may not legally be granted by the ZBA. *See Dost v. Chamberlain-Hellman,* 236 A.D.2d

471, 472 (2d Dep't 1997) (denying special permit where "petitioners' plans for their proposed use of the premises violated provisions of the applicable zoning ordinances").

3. Shelbourne Applies For A Special Permit To Develop An Assisted Living Facility At A Site Where The Zoning Ordinance Prohibits Such Use.

On or around February 19, 2015, Formation-Shelbourne Senior Living Services, LLC ("Shelbourne") filed an application with the Town Board of the Town of Greenburgh (the "Town Board") for a special permit under Town Code Section 285-10(A) to develop an 80-unit, four story, assisted living facility at a 3.79 acre site in the Greenville Fire District at the intersection of two town roads, Underhill Road and Sprain Road, which are more than 6,000 feet from the nearest state or county right-of-way. The property at issue is located in an R-30 One Family Residence District and is designated on the Town Tax Map as Parcel ID: 8.330-242-9. A copy of that application is attached to the Petition as Exhibit E.

The Parcel in question is in the northeast corner of the Greenville Fire District. The only state or county rights-of-way within the Greenville Fire District are Central Avenue and the portion of Ardsley Road east of Central Avenue. As shown in the map below, the parcel is therefore *as far away from a state or county right of way as it is physically possible to be* within the Greenville Fire District.



(Source: Town of Greenburgh GIS website, available at https://goo.gl/qVwuEw.)

The parcel's access to the nearest state or county right of way (Central Avenue) is via Underhill Road. As shown in the above map, Underhill Road is a long, winding route with multiple S-curves and hairpin turns leading to the parcel. The route also happens to go up and down one of the tallest hills in the Greenville Fire District. Thus, the parcel at issue violates every part of the legislative mandates for the location of an assisted living facility, and does so to the maximum possible extent.

Rather than reject the application outright as an impermissible use, on or about March 23, 2015, the Building Inspector sent a memorandum to the Town's Commissioner of Community Development and Conservation stating that Shelbourne's "special permit request requires a variance from § 285-10(A)(4)(f)(14) which restricts the site to be within 200 feet of, and have

access to a state or county right-of-way, other than parkways and interstate highways." The building inspector further stated that "[s]uch access must be direct or via a side street and shall not be accessed by a circuitous route." A copy of that memorandum is attached as Exhibit F.

The Town Board likewise should have rejected the application as an impermissible use, but did not do so. Instead, on or about May 13, 2015, pursuant to Section 617.6(a)(1) of the regulations of the New York State Environmental Quality Review Act ("SEQRA"), the Greenburgh Town Board declared its intent to be "lead agency" for the review of Shelbourne's special permit application and all related actions under SEQRA.

4. Shelbourne Requests An "Area Variance" To Allow An Assisted Living Facility At A Site That Is 6,000 Feet From The Nearest State Or County Road, And Can Only Access It Via A Long, Winding Route With "Severe" S-Curves And Hairpin Turns.

On May 20, 2015, Shelbourne submitted an application for a variance from Section 285-10(A)4(f)14 of the Zoning Ordinance to establish an assisted living facility at the parcel.

On or about June 11, 2015, the ZBA placed on its agenda for June 18, 2015 a request by Shelbourne for a variance from Section 285-10(A)(4)(f)(14) of the Zoning Ordinance to "allow a structure to be more than 200 ft. from a state or county right-of-way, in order to obtain a Special Permit from the Town Board to permit an assisted living facility." The statement in the agenda that Shelbourne's request was to "allow a structure to be more than 200 ft. from a state or county right-of-way" misleadingly suggested that Shelbourne was merely seeking an area variance. In fact, the Zoning Ordinance expressly prohibited the use of any parcel of land in a residential zoning district unless it was within 200 feet of access to a state or county right-of-way. The Agenda did not mention the separate requirement under the ordinance that the site have access to a state or county road that is "direct" and that is not by a "circuitous route."

5. Shelbourne Attempts To Avoid The Need For A Variance By Claiming That An Adjoining 0.21-Acre Sliver Of Land Was A "State Or County Right-of-Way."

On or about June 16, 2015, Shelbourne asked the Town's building inspector to reconsider whether a variance was required. Shelbourne's request was based on a claim that a 0.21 acre sliver of land bordering the applicant's property along Underhill Road, a town road, was a "state owned right of way" because it had been acquired in 1967 by a division of the New York State Department of Transportation then known as the "Bureau of Rights of Way." The property was acquired in connection with construction of the Sprain Brook Parkway. The sliver of state-owned property along Underhill Road was never used as a state right-of-way for vehicular traffic. In other words, Shelbourne argued that the site was in compliance with the Zoning Ordinance's requirements — which were meant to ensure safe emergency vehicle traffic — because it was within 200 feet of a 0.21-acre sliver of land, even though that sliver of land was *also* 6,000 feet away from the nearest *actual* state or county right-of-way (Central Avenue), where the Greenville Fire District is located.

On or about June 17, 2015, while Shelbourne's request to the building inspector for a ruling that no variance was required was pending, but before anyone other than Shelbourne and the building inspector knew that any such request had been made, the Edgemont Community Council ("ECC") notified the ZBA that the Shelbourne site is "not within the area of a residential district where an assisted living facility is a permitted use" and that, accordingly, "[a]pplicant is seeking a 'use variance'" within the meaning of Town Law § 267 and not an "area variance." The ECC stated that the "crucial distinction between an area variance and a use variance is that an area variance permits deviation from strict compliance with the zoning ordinance's requirements for, as an example, the physical characteristics of premises, so long as the purpose for which the premises are intended to be used is permitted by the ordinance," citing *Matter of*

Overhill Bldg. Co. v. Delaney, 28 N.Y. 2d 449, 453-54 (1971) and *Croissant v Zoning Board of Appeals of the Town of Woodstock, Ulster County*, 83 A.D.2d 673, 674 (3d Dep't 1981).

At its meeting on June 18, 2015, the ZBA noted the applicant's request to the building inspector and took no action on the application.

On or about July 13, 2015, the Building Inspector determined that Shelbourne "needs no variance as the applicant and the NYSDOT provided sufficient documentation that the site is within 200 feet of a NY State right-of-way." At its meeting on July 16, 2015, the ZBA reported that Shelbourne's application had been withdrawn because the Building Inspector had determined it was no longer needed.

On or about August 12, 2015, the ECC, the Council of Greenburgh Civic Associations, and 17 nearby homeowners filed an appeal with the Zoning Board of the Building Inspector's determination that no variance was required. A copy of that appeal is attached to the Petition as Exhibit G.

On or about October 9, 2015, Shelbourne submitted a written response to the appeal.

On October 10, 2015, November 18, 2015, December 17, 2015, and January 28, 2016, the ZBA heard testimony in respect of the appeal of the building inspector's decision.

On March 17, 2016, the ZBA closed the appeal for decision only and directed that a decision be drafted reversing the Building Inspector's determination that no variance was required.

Without waiting for a final ruling from the ZBA, on April 5, 2016, and without public disclosure, Shelbourne reapplied for the variances from the 200 feet and minimum acreage requirements. In its application, Shelbourne conceded that "[f]rom a pure numerical analysis, the closest state road is Central Park Avenue (NYS Rt. 100)" and that "Central Park Avenue is

approximately ± 4,500 feet away in a straight line from the site (± 6,025 feet if driving)." In other words, the variance requested is nearly 3,000%. A copy of Shelbourne's renewed application for variances is attached to the Petition as Exhibit H.

On April 8, 2016, three days after renewing its request for variances from the ZBA, Shelbourne requested that the Town Board, as lead agency, complete the SEQRA review process for Shelbourne's application and issue a negative declaration for the project. Shelbourne intended to use the Town Board's "negative declaration" to support its request to the ZBA for variances it was seeking.

On April 18, 2016, the Town's Building Inspector confirmed that the "site does not meet the distance requirements" under the Town's zoning ordinance because "Central Avenue is 6,025 linear feet from the site via Underhill Road." A copy of the building inspector's memo to that effect is attached to the Petition as Exhibit H.

On April 21, 2016, the ZBA voted to reverse the Building Inspector's decision that no variance was required. The vote was unanimous. The board's decision was filed with the Town Clerk on May 12, 2016. A copy of that decision is attached to the Petition as Exhibit I.

6. Despite Serious Concerns Raised By Representatives Of The Affected Fire District, The Town Board Issues A "Negative Declaration" Under SEQRA.

On May 11, 2016, the Town Board, as lead agency, held a public hearing to "consider the SEQRA process" in respect of Shelbourne's request for a negative declaration for the project. Several residents raised concerns at that hearing about the impact the project would have on the Greenville Fire District, both in terms of fire safety and its ability to respond to medical emergencies. Under the terms of an inter-municipal agreement between the Greenville Fire District and the Town's police department, the Greenville Fire District is the first responder to all medical emergencies within the Greenville Fire District. Concerns were raised about the number

of emergency calls and the ability of fire district personnel responding to those calls to reach the site in a safe and timely manner given the downward sloping hairpin curves on Underhill Road. Concerns were also raised concerning the burden that responding to medical emergencies at the site would place on homeowners residing along the one-mile long Underhill Road corridor. A video of the hearing may be viewed at http://greenburghny.swagit.com/play/05112016-1022/#11

On May 25, 2016, the Town Board was scheduled to vote to approve a negative declaration for the project, but the Town Board agreed to hold the matter over after two board members said they had unanswered questions. A video of the board action may be viewed at http://greenburghny.swagit.com/play/05252016-1014/#29

On June 7, 2016, the Town Board held a work session to discuss the Shelbourne application with representatives of the Greenville Fire District and the district's fire chief. At the meeting, the fire district representatives expressed concern about "increasing calls," an inability to "quantify" the impact on the fire district without knowing what the actual number of emergency medical calls is likely to be, noting that the applicant may be estimating 100 additional calls per year, but the number could turn out to be four times as many, and the dangers that the fire trucks the District uses to respond to these emergency medical calls would have in navigating the downward sloping curves on Underhill Road approaching the site. The fire chief referred to one of the curves as a "sharp hairpin turn." He noted that on an icy day, if one of the trucks were to slip off the road, it could hit the New York City aqueduct, which supplies water to the city, and risk puncturing it.

As one fire trustee who has driven the District's ladder truck said, "The curves there are a problem. The descending sloping road with multiple curves going into a hairpin turn. The firetrucks probably have absolutely no way to yield on the side, there is no shoulder, there is no

place for anybody to go . . .It's an extremely narrow road." The fire district's chair said it was a "terrible turn." The applicant's engineering consultant explained that while certain mitigation measures such as an improved guardrail and a widening of the shoulder could be implemented, nothing could be done about the hairpin turn because it was built to accommodate the New York City aqueduct and could not be changed. The fire district also expressed concern that the Town was minimizing without any analysis the issue of noise in the Underhill Road corridor from the District's having to use emergency sirens and airhorns over at least 100 times a year in order to reach the facility just for medical emergencies. A video of the meeting between the town board and representatives from the Greenville Fire District is available online at http://greenburghny.swagit.com/play/06072016-538.

Despite the concerns raised by these Fire District personnel, on June 8, 2016, the Town Board granted Shelbourne's request by unanimously adopting a negative declaration that the Shelbourne project would have only "small impacts" with respect to the factors required to be considered under SEQRA. The resolution stated that the Town Board had coordinated its review with the ZBA, but the ZBA had not yet had any opportunity to do anything to comply with SEQRA. The resolution made no mention of any of the comments received from the Fire District on June 7, 2016. In its negative declaration, the Town Board dismissed concerns raised about the downward sloping curves and sharp hairpin turn on Underhill Road as a "preexisting condition" that could be mitigated by an improved guardrail and shoulder widening. The Town also dismissed concerns from the Greenville Fire District regarding the impact on emergency medical calls by concluding that the "applicable responder" here was not the Greenville Fire District, but the Greenburgh Police Department. The Town Board thus saw no reason to study whether the Fire District's responding along Underhill Road to an estimated 100 or more medical

emergency calls to the facility per year would create safety risks for emergency vehicles required to get to and from the facility.

The Town Board was apparently unaware when it adopted its negative declaration that pursuant to an intra-municipal agreement between the fire district and the police department, the fire district was, by agreement, the designated first responder to all emergency medical calls within the fire district's borders. Thus, the Town Board's conclusion that the police department was the "applicable responder" on emergency medical calls was demonstrably wrong.

Finally, even though it did no study of the matter, the Town Board concluded that the 100 or more estimated emergency medical trips to the facility per year would not have a "significant effect on local noise quality." A copy of the Town's negative declaration is attached to the Petition as Exhibit I.

7. Shelbourne Sues The ZBA In An Effort To Avoid The Need For A Variance, But Then Withdraws The Lawsuit.

On June 9, 2016, Shelbourne commenced an Article 78 proceeding against the ZBA for the purpose of challenging its finding that variances were required. The case bore Index No. 2159-16. Also named as respondents in the lawsuit were the Edgemont Community Council, the Council of Greenburgh Civic Associations; and the 17 individual homeowners who had joined in the appeal of the Building Inspector's July 2015 determination that no variances were required.

Town Attorney Timothy W. Lewis said Shelbourne had alerted town officials well in advance that they intended to file suit against the civic groups and residents, but town officials provided no advance notice to any of the parties to warn them that they were being sued.

On July 6, 2016, Shelbourne filed a notice of voluntary discontinuance of that proceeding pursuant to CPLR 3217(a)(1). [As discussed below, this was apparently part of a back-room deal between Shelbourne and town officials.]

8. The Town Board Rescinds Its Negative Declaration Under SEQRA, And Shelbourne Accuses The Town Board Of Reneging On A Promise Of Approval.

On July 19, 2016, the Town Board held a special meeting to rescind its June 8, 2016 negative declaration regarding the Shelbourne project. The Town Board stated that its rescission was not because of its factual errors, but because the ZBA "has recently determined that a variance is needed by the Applicant related to a requirement that Assisted Living Facilities not be located more than 200 feet from a State or County right-of-way, in addition to a variance related to a requirement that Assisted Living Facilities must be located on sites of four acres or greater," that "the Town Board believes it no longer has the most significant approval required for this project," and "the Town Board does not want to interfere in any way with the Zoning Board of Appeals' consideration of the project and the variances requested." A copy of the resolution is attached as Exhibit J.

On August 4, 2016, at a meeting of the Town Board, James Kane, a Shelbourne executive, accused town officials of reneging on a promise they allegedly made years before to grant Shelbourne its land use approvals — an agreement Kane said had been recently reaffirmed when Shelbourne agreed at the Town Supervisor's request to withdraw its lawsuit against civic groups and residents. Kane said, however, that "within 72 hours of our withdrawal of this filing, the Supervisor notified me that the Town Board would no longer be supporting the project." Kane's videotaped remarks to the Town Board that night may be viewed at https://www.youtube.com/watch?v=6my18of5ok8&feature=youtu.be.

On August 18, 2016, Shelbourne filed suit against the Town Board claiming that its rescission of the "negative declaration" was unlawful. The Index Number of that case is 002654/2016.

9. The ZBA Commences Its Own SEQRA Process And The Affected Fire District Again Raises Serious Concerns.

In the meantime, the ZBA commenced public hearings on Shelbourne's application for variances. There were two sets of public hearings held. One set was before the ZBA announced its intent to be lead agency for purposes of SEQRA in connection with the Shelbourne application, and the other set was after.

The first set of hearings was held May 19, 2016; June 16, 2016; August 11, 2016; September 14, 2016; and November 17, 2016, respectively. Residents and community leaders argued during these hearings that the variance requested was not legally permissible either because the relief sought was actually a use variance (which the ZBA had no authority to grant in connection with a special permit application), or because, even if deemed an "area variance," it would be so large – nearly 3000% -- that it would create a precedent potentially allowing assisted living facilities on parcels of land in residential zoning districts throughout the entire 19-square mile area of unincorporated Greenburgh. In response, the applicant conceded there were at least 15 other sites that would qualify if the variances sought were granted. A copy of the applicant's written submission to that effect is attached to the Petition as Exhibit K.

On December 15, 2016, the ZBA declared its intent to be lead agency for purposes of SEQRA in connection with the Shelbourne application. Under SEQRA, an "interested agency" means an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action. See 6 CRR-NY 617.2(t).

The Greenville Fire District is an independent municipal agency under the laws of the State of New York providing emergency services to the Edgemont Community in the Town of Greenburgh. The district is governed by a Board of Fire Commissioners consisting of five

members who are elected by the general public for five year terms. The Fire District operates as a combination fire department with 30 career firefighters and 17 active volunteers. In addition to responding to fire and other emergencies, the Fire District responds to medical emergencies and, pursuant to an inter-municipal agreement with the Greenburgh Police Department, the Fire District responds in the first instance to all medical emergencies within its borders, which includes the area of the proposed assisted living facility. Medically-trained Fire District personnel provide "basic life support" services and will determine in each instance whether medical transport to a hospital is required. If such medical transport is required, through advanced life support services provided by the Town, an ambulance and a team of paramedics will then be dispatched by Greenburgh police. The Fire District operates with an annual budget in excess of $9 million which is fully funded by taxpayers who own property within its borders. See http://fdgreenville.com.

Because the Fire District would in the first instance be responding to all medical emergency calls at the proposed assisted living facility, but lacks any authority to authorize or approve the project, it is an "interested agency" under SEQRA.

On December 16, 2016, the Greenville Fire District put the ZBA on written notice that it was requesting a "full SEQRA study be performed relating to the proposed assisted living facility (Formation Shelbourne Senior Living) on Underhill Road." The Fire District's letter stated that "[t]his analysis should be executed by an external professional resource, and should consider all of the impacts, both operational and financial, this facility will have on the Greenville Fie District, including without limitation: (1) the number, and nature of, additional alarms anticipated by the facility; (2) traffic considerations, and roadway conditions, in particular for accessibility of emergency vehicles; and (3) other safety considerations." And, referring

back to its meeting with the Town Board on June 7, 2016, the Fire District's letter further stated that the district had "previously requested this information from the Town." A copy of this letter is attached to the Petition as Exhibit L.

On January 26, 2017, the ZBA declared itself lead agency and issued a proposed Conditioned Negative Declaration ("CND") and gave notice of the declaration to involved and interested agencies, including the Fire District.

On February 10, 2017, the Fire District wrote again to the Zoning Board, declared itself an "Interested Agency" as defined by SEQRA that will be "directly impacted on a daily basis by the Project" and the proposed CND, and further stated, "we are compelled to request that the ZBA rescind the CND and issue a Positive Declaration." The Fire District stated that the ZBA did not respond to the District's letter dated December 16, 2016, did not discuss potential Project impacts and concerns with the District, and that, as a result, "[t]he CND includes materially incorrect assumptions which, in turn, results in proposed mitigation measures that are inherently unreliable." By contrast, the District stated, "[a] Positive Declaration, and the resulting independent analysis, will ensure that impacts that the Project may have are accurately identified and quantified, and that appropriate mitigation measures are advanced." A copy of this letter is attached to the Petition as Exhibit M.

The Fire District said that the ZBA's proposed CND showed that the ZBA did not understand that, by agreement with the police department, the Fire District was the first responder within the Greenville area to all emergency medical calls and that the "ZBA's fundamental misunderstanding of our role necessarily means that the CND does not correctly identify the impacts the Project may have on the District, or the effect of the proposed mitigation measures."

The Fire District also questioned the CND's assumptions with respect to the projected number of annual emergency medical calls because the data came from the applicant and had not been verified independently. Accordingly, the Fire District called for a "proper and independent study of this issue" using pre-existing industry data where available.

Finally, the Fire District noted that the ZBA had correctly noted the "curvilinear and sloping portion of Underhill Road" but called for an independent study to "assess the danger present and the extent to which the proposed alterations will impact on the safety risks for District employees and other motorists." "The CND simply assumes that the conditional improvements proposed would materially reduce the safety risks of running a substantial increase of emergency traffic along the identified dangerous road segments," adding that "[a]n independent study must be completed which: (a) measures both the risks of the road condition and the utility of improvements (whether proposed or other available options); (b) analyzes existing road conditions against the benchmark for road conditions expected for a facility like the Project."

The Fire District did not take a position on the overall merits of the application or its propriety for the community, but said "we are compelled to take issue with the CND insofar as it lacks adequate analysis, is based on erroneous assumptions, and proposes solutions based on unsound footing."

On February 16, 2017, the ZBA heard testimony on its proposed CND during which time residents identified a series of potentially significant adverse impacts related to the proposed action that warranted the issuance instead of a "positive declaration." http://greenburghny.swagit.com/play/02162017-976. Under SEQRA, a "positive declaration" means a written statement prepared by the lead agency, here, the ZBA, indicating that

implementation of the action as proposed may have a significant adverse impact on the environment and that an environmental impact statement ("EIS") will be required. An EIS provides a means for agencies, project sponsors, and the public to systematically consider significant environmental impacts, alternatives and mitigation, and "facilitate the weighing of social, economic and environmental factors early in the planning and decision-making process." 6 CRR-NY 617.2(n).

A draft EIS ("DEIS") is the "initial statement prepared by either the project sponsor or the lead agency and circulated for review and comment." Id. If the DEIS involves a developer's project, the cost of preparing and reviewing the DEIS can be charged to the project sponsor; a municipal agency should not have to pay anything. Costs chargeable to the project sponsor include the use of independent technical and legal consultants. SEQRA authorizes the lead agency to charge the project sponsor up to 2% of the cost of land acquisition and site improvements; however, the only government agency that may lawfully be reimbursed for any costs associated with the preparation of the DEIS is the lead agency itself. http://www.dec.ny.gov/permits/56837.html ."Interested" agencies are not authorized to recover any such costs and must therefore bear them entirely on their own.

On February 27, 2017, Justice Barbara Zambelli denied the Town's motion to dismiss Shelbourne's Article 78 lawsuit challenging the Town Board's July 16, 2016 decision under SEQRA to rescind its June 8, 2016 "negative declaration" in respect of the Shelbourne application. Without ruling whether the rescission was proper or improper, the Court held that if it ultimately determined the rescission to have been improper, and Shelbourne had in the interim been required by the ZBA to conduct an independent study as part of the preparation of a DEIS,

the costs of such DEIS, which would normally be borne by the applicant, would in this instance be borne by the Town. A copy of that ruling is attached to the Petition as Exhibit N.

10. After Learning That The Town Might Be Ordered To Bear The Cost Of An EIS Rather Than Shelbourne, The ZBA Rejects The Fire District's Request For An Independent Study Of The Safety Risks.

Even though Shelbourne, the Town, and the Office of the Town Attorney which employs ZBA counsel all knew about it, Justice Zambelli's ruling was never made part of the public record before the ZBA.

On March 16, 2017, the ZBA held a second public hearing on its proposed CND, during which time several ZBA members — who would have known from their counsel about Justice Zambelli's decision — asked residents requesting that the ZBA issue a positive declaration who they expected to pay for the independent study needed to create the DEIS. Because covering the cost of such study is mandated by statute, the only purpose in such questioning by the ZBA was to ascertain whether members of the public were aware of the decision — and they were not. There was also no public mention of it by Shelbourne, the Town, or by any ZBA member, except that Shelbourne's counsel mentioned in passing at the close of the public portion of the hearing that there had been a recent ruling in the case with "interesting language." The ZBA then voted to close the public hearing on the SEQRA matter as of April 18, 2017. http://greenburghny.swagit.com/play/03162017-938/#2

On April 20, 2017, the ZBA voted to approve the proposed CND and, in so doing, rejected arguments raised by the Greenville Fire District and members of the public for a positive declaration and an independent study. The ZBA then voted to reopen the public hearing on Shelbourne's requests for variances. The vote in favor of the CND was unanimous. A copy of the CND is attached to the Petition as Exhibit O.

Even though the ZBA itself did not issue a positive declaration, as the Fire District and members of the public had asked, its CND made findings consistent with the issuance of a positive declaration, which requires a written statement prepared by the lead agency indicating that implementation of the action as proposed "may have a significant adverse impact on the environment." Thus, while the CND identified several small impacts it said that will result from the proposed project, it expressly found two "*potentially moderate to large impacts* that could result from the proposed project with respect to . . . Impact on Transportation; and . . . Consistency with Community Plans." (Emphasis added).

In its section on transportation, the CND reported that the portion of Underhill Road closest to the site "has *severe* vertical and horizontal curves." (Emphasis added). Then, based on an estimate that the Shelbourne facility would generate a total of 1.8 medical emergency calls per week, the Zoning Board found that "due to the increased potential for emergency vehicles traversing the curvilinear and sloping portion of Underhill Road (providing access to the site form the Greenville Fire District station and providing access from Central Park Avenue South), the proposed action *will potentially have a moderate to large impact on existing transportation systems from a safety perspective*." (Emphasis added).

The CND further stated that if the ZBA granted the variances, it would incorporate certain conditions which it said "will mitigate such impacts." The ZBA then called for a "minor widening of Underhill Road on the approach to the first 's' curve, which will repair a swale and enhance drainage," "widen the southern, interior radius of Underhill Road near the Con Edison access gates," "[p]rovide a maximum of five (5) feet extra width with a four (4) foot shoulder," "[r]egrade and super-elevate the outer radius of this area to provide positive pitch and stability for turning vehicles," and "[e]xtend guiderail on outer radius to define Con Edison gate."

Having rejected the request from the Fire District and members of the public for an independent study of the safety risks associated with the Fire District having to travel a mile along Underhill Road, which is a narrow two-lane town road with upward and downward sloping curves and a dangerous downward sloping hairpin turn approaching the facility, in order to respond to an estimated hundred annual emergency medical emergencies or more at the proposed facility, the CND cited *no* study, documentation or testimony purporting to demonstrate how incorporating these specific conditions would in fact mitigate the potentially "moderate to large impact" the Shelbourne facility would have from a safety perspective.

The ZBA also addressed the issue of potential noise from emergency medical vehicles using their sirens along the Underhill Road corridor. Specifically, the ZBA noted that "noise due to sirens of emergency service vehicles traveling to/from the site is not a noise produced by the proposed action itself, but rather, a consequence of the proposed action, and that emergency service vehicles will be moving in and out of the facility." Based on an estimated 8-10 calls per month, or two per week, and assuming such calls will be "distributed at different times of day," the Zoning Board concluded that "there is not anticipated to be any large negative impacts from a noise perspective, due to the proposed use."

The ZBA's conclusions with respect to noise from emergency vehicle sirens were not supported by any study, documentation or testimony showing the effect of such noise of the hundreds of homes situated along the Underhill Road corridor. Testimony adduced at the hearing showed that for every individual emergency medical call, as many as four emergency medical vehicles may respond, and each such vehicle would almost certainly be using its sirens, both because state law requires use of sirens and because it would be extremely unsafe for

emergency vehicles traveling at high rates of speed along the Underhill Road corridor to do otherwise.

With respect to consistency with community plans, the ZBA's CND stated that the Zoning Ordinance restricts assisted living facilities to sites within 200 feet of, and that have access to, a state or county right-of-way other than parkways and interstate highways, that such access must be direct or via a side street and shall not be accessed by a circuitous route, and that "[t]he purpose of this requirement is to limit additional or excessive traffic within established residential neighborhoods, while insuring safe emergency and other vehicular and pedestrian access." It acknowledged that the site does not meet these requirements because "Central Park Avenue, the closest county or state road, is 6,025 linear feet from the site via Underhill Road."

With respect to "consistency with community character," the ZBA found that "the potential increase in the demand for emergency *medical* services is the most relevant factor pertaining to community service needs." (Emphasis added.) Here, the ZBA recognized that the proliferation of assisted living facilities that depend on municipalities to provide emergency medical services would require the hiring of additional full-time paramedic personnel, that the Greenville Fire District responds to "all fire and EMS-related calls within its jurisdiction," and that "[t]he addition of 104 estimated annual calls generated from the Shelbourne Facility would increase the GFD's total call volume, and the percentage of calls that are for medical-related emergencies, by approximately 7.8%."

However, the Zoning Board offered nothing to mitigate the potential financial and logistical impact of such increase in the Fire District's call volume. Instead, it said the applicant would employ a full-time nurse on site, use an "internal emergency call system to intervene on calls from residents that might otherwise go to 911, and use "private ambulance/ambulette

services got [should this be "for"] non-emergency transport." The ZBA cited no study, documentation or testimony that any of the things Shelbourne was offering to do would in any way mitigate any impact on the Fire District's projected 7.8% increase in medical-related emergency calls resulting from the project. Indeed, testimony at the hearing was that the use of a full-time nurse and an internal emergency call system were things Shelbourne was already using *at the facilities upon which Shelbourne's estimate of 100-115 annual emergency medical calls was based*. Accordingly, there was nothing in the record to show that such measures would mitigate the increased burden on the Fire District at all.

11. The ZBA Grants An "Area Variance" Permitting An Assisted Living Facility At A Site That Is As Far From A State Or County Road As Is Physically Possible Within The Fire District, And That Can Only Access That Road By A Circuitous Route.

On May 18, 2017, the ZBA closed the public hearing on Shelbourne's application for variances and directed its counsel to prepare a decision granting the variances. http://greenburghny.swagit.com/play/05182017-1244/#2

On June 22, 2017, the ZBA voted 4-3 to approve the decision granting the variances. The three dissenters were the acting chair of the board, Eve Bunting-Smith, Kristi Knecht, and Lawrence Doyle. Bunting-Smith said she was concerned as acting chair that the ZBA's decision was creating a dangerous and unlawful precedent. She was quoted in a local newspaper stating, "There wasn't much of a discussion of precedents. While it's not mentioned in cases, it's something we have to be concerned about in making these decisions." See *Scarsdale Inquirer*, June 30, 2017, "Zoning Board Approves Shelbourne Variances." A copy of the article is attached to the Petition as Exhibit P.

Ms. Knecht voiced a similar concern, stating, "It's bad public policy for something that's been in place three years to completely negate the 200 feet. It's almost waiving it, and it sets a

bad precedent for the Town." In fact, the applicant itself conceded during the public hearing that dispensing with the 200-foot requirement would allow for potential assisted living facilities in at least *15 other locations* that were not on the original map of potential assisted living facilities the Town Board had prepared in its SEQRA process in early 2013. See Exhibit M to the Petition.

The ZBA's decision purported to apply the criteria for granting area variances, stating that it had "weighed the benefit to the applicant from the requested variances against any detriment to the health, safety and welfare of the neighborhood or community that might result from the granting of the variances." Specifically, the ZBA found that allowing use of the land there for assisted living would "not cause an undesirable change in the character of the neighborhood or detriment to nearby properties" because it would replace a large commercial nursery that had been damaged on two recent occasions by fire, and the proposed assisted living facility is "more consistent with the character of the neighborhood than the commercial nursery use," and that the applicant submitted a study showing an assisted living facility "does not result in a significant impact upon the values of the adjacent residential properties."

The ZBA also found that "because the size and location of the site makes compliance with the requirements of the Zoning Ordinance impossible," the benefit sought by the applicant could not be achieved by some method feasible for the applicant to pursue "other than an area variance." The one obvious method for the applicant to have pursued "other than an area variance," was an amendment to the Zoning Ordinance to delete the requirements that, for the safety of emergency vehicles getting to and from the site, such facilities not be located more than 200 feet from access to a state or county right-of-way, and that such access not be via a circuitous route. By finding that such alternative was not "feasible for the applicant to pursue,"

the ZBA thus recognized that having the applicant ask the Town Board to repeal a measure it imposed in its Zoning Ordinance for safety purposes would be an obvious futility.

With respect to the 3,000% variance from the requirement that the site be within 200 feet of a state or county right-of-way, the ZBA found that "[a]lthough the variance to increase the distance of the proposed facility from the nearest state or county right of way is undoubtedly substantial in relation to the requirement, the variances, as we have conditioned them, will not cause substantial adverse impacts on the neighborhood or district for the reasons stated elsewhere herein and in the Conditioned Negative Declaration adopted by this Board on April 20, 2017." The Zoning Board thus concluded that the projected 7.8% increase in annual emergency medical calls that the Greenville Fire District would have to bear — coupled with the increased risk to public safety in having its emergency vehicles travel at a high rate of speed along a relatively curved road with a dangerous hairpin turn — would not, because of certain improvements to the road, cause a substantial adverse impact on either the district or the neighborhood.[2]

Even though, as the CND states, the purpose of the 200 foot perimeter in the Zoning Ordinance was to "limit additional or excessive traffic within established residential neighborhoods, *while insuring safe emergency and other vehicular and pedestrian access,*" (emphasis added), the ZBA not only allowed use more than a mile beyond the legislatively mandated perimeter, it did so while minimizing concerns about safe emergency and other vehicular and pedestrian access, stating that "[a]s it approaches the site, Underhill Road curves *sharply*, resulting in a so-called 'S-curve,' which opponents *claim to be unsafe*." (emphasis

[2] The 7.8% figure is based on *Shelbourne*'s estimate of the amount of emergency calls that would be required. The Fire District specifically disputed this estimate on the ground that it was inadequately supported. Thus, the actual burden imposed on the Fire District could be substantially higher.

added). The ZBA discounted the safety concern, stating that "[w]ith respect to the allegedly dangerous road conditions in the area, we initially note that the Town of Greenburgh Highway and Sanitation garage facility is located on Sprain Road, less than ¼ mile away from the site, and that large sanitation trucks have used these same streets every day, without a significant history of accidents." The ZBA did not explain how "sanitation trucks" conducting routine trash collection on an established schedule were comparable to fire trucks responding to medical calls on an emergency basis.

And even though it knew allowing such use more than a mile away from where legislatively permitted would result in fire trucks having to make more than 100 emergency medical calls a year along a narrow two-lane road with downward sloping curves and a hairpin turn that was never intended for that purpose, the ZBA similarly discounted the accident history approaching the site: "[w]e further examined the accident history on the roads approaching the site. Since 2010 there have been eight (8) accidents at or near the intersection of Sprain and Underhill Roads. Of those accidents, six (6) were caused by driver error or non-road-related conditions, such as sun glare, sudden stops, taking a turn too wide, etc. The two road-related accidents — both of which occurred more than four years ago — involved the rear of tractor-trailers veering over a traffic lane on the "S-curve," striking cars going in the opposite direction on Underhill Road."[3]

The ZBA dispensed with the legislatively mandated restrictions on assisted living facilities beyond the 200-foot perimeter by relying on certain modifications to Underhill Road that had been recommended by a traffic consultant. However, the traffic consultant merely

[3] The ZBA's argument on this point is curious, because "the rear of tractor-trailers veering over a traffic lane on the 'S-curve,' striking cars going in the opposite direction on Underhill Road" is exactly what could happen if full-sized fire trucks are required to traverse that S-curve when responding to emergency calls over a hundred times a year.

addressed what he thought were the "conditions that caused the accidents," and did not address, much less study, what improvements would be needed for the Fire District's firetrucks to be able to respond at high rates of speed to more than 100 medical emergency calls annually.

Finally, even though the ZBA knew that the Greenville Fire District — which, because it responds to all medical emergencies within its borders, would be the only government agency directly impacted by the ZBA's decision — the ZBA blamed the Greenville Fire District for not conducting its own study of the financial and operational impacts that an assisted living facility at that location would present. Even though the Fire District *twice* wrote to the ZBA calling for an independent study of such impacts, the ZBA stated that it had reached out to the District "on at least two occasions for it to advise us of any impacts it expects the project to cause," and "[t]he District failed to provide us with any information with respect to any adverse financial or any other impact on its operations or budget, *other than to request that this Board engage an independent agency or individual to investigate same.*" (Emphasis added). And even though the Zoning Board had the legal authority as lead agency under SEQRA to call for an independent study and, as lead agency, it alone had the legal authority to require the applicant to pay for it, the ZBA added that, "[i]t is the opinion of this Board that the only party capable assessing the impact of the proposed project on the Fire District's budget and operations is the Fire District itself. Its failure to do so undermines the otherwise unsupported allegations of such impacts raised by the opponents herein." The ZBA's description of the Fire District's concerns as "otherwise unsupported" ignored the testimony by Fire District officials, including the Fire Chief, about the dangers associated with the proposal.

The ZBA also accused the Fire District of not being forthcoming with the Town Board when the Town Board was lead agency: "Moreover, we note in this regard that the GFD was

consulted and involved in the review of the proposed facility conducted by the Town staff and the Town Board, when that Board was Lead Agency. In its communications, the only concern expressed by GFD was as to water supply, which is dependent on main design as well as water volume and pressure adequate to meet fire protection and domestic demands for the proposed project." In fact, however, the Fire District — through two members of its board and the fire chief himself — had raised *safety* concerns about the narrow two-lane downward sloping curves and sharp hairpin turn approaching the site on Underhill Road over the course of a two-hour televised meeting of the Town Board at its work session on June 7, 2016, which the ZBA in its decision nowhere mentions. The ZBA instead quoted out of context a statement made at that same June 7 meeting by the Fire District chairman, made in her personal capacity as a private citizen, that Underhill Road was "no less safe" than certain other roads in Edgemont — an observation which was both irrelevant and beside the point, because an assisted living facility expected to generate at least 100 medical emergency calls per year was not being proposed for those other roads.

Finally, the ZBA conceded that by purchasing property which it knew was more than a mile from the nearest state or county right-of-way, the applicant's need for a variance to build an assisted living facility that was supposed to be within 200 feet of the nearest such right-of-way was "self-created." The ZBA next found that the applicant's need for a variance to reduce the size of the site from the required 4 acres to 3.79 acres, was "not self-created" because the site was originally 4.01 acres, but "was reduced to its present size when New York State condemned some of the property in connection with the construction of the Sprain Brook Parkway." However, the ZBA omitted to mention that the condemnation to construct the Sprain Brook Parkway took place more than 50 years ago, the zoning ordinance allowing assisted living

facilities on minimum four acre lots was adopted in 2013, and the applicant acquired an interest in the property subsequent to that date. Thus, the applicant knew when it acquired the property that it did not satisfy the minimum acreage requirement, and that problem was as much "self-created" that its acquiring property more than a mile from where such use was permitted was "self-created."

THE ZBA'S ACTION SHOULD BE OVERTURNED

Article 78 of the CPLR prohibits the ZBA from acting "without or in excess of jurisdiction" and making a determination "in violation of lawful procedure," "in error of law" or where such determination was "arbitrary and capricious or an abuse of discretion." In this case, the ZBA exceeded its jurisdiction, and acted in violation of lawful procedure and in error of law, by amending the Zoning Ordinance in the guise of an "area variance" and thus intruding upon the legislative function. Its action should be overturned on that basis alone.

Second, even if the ZBA's action could be considered a "variance" at all, it was a use variance — which the ZBA had no authority to grant in the context of a special permit application. By essentially waiving the legislatively mandated location restrictions, the ZBA allowed a use that the Zoning Ordinance does not permit at that parcel. Because the ZBA had no power to grant a use variance, its action was outside its jurisdiction, in violation of lawful procedure, and in error of law.

Finally, even if the ZBA's action was within its authority (it was not), its actions were arbitrary and capricious. There is no dispute that the mile-long, winding route from the parcel to the nearest state or county road — with its "severe" S-curves and hairpin turns — is "circuitous," in violation of the Zoning Ordinance. Even assuming for the sake of argument that the ZBA had the power to waive that express requirement, the ZBA did not even *mention* it in its decision —

let alone conduct the analysis necessary to support such an action. Nor did the ZBA address the magnitude of the departure from the legislative requirements — nearly 3,000 percent — or explain how that mind-boggling disparity was justified. Its conclusions were not supported by substantial evidence, and ignored uncontradicted testimony regarding the negative safety and other impacts of the proposed action. The ZBA's decision was therefore arbitrary and capricious, and an abuse of discretion.

1. The Zoning Board Exceeded Its Authority By Amending The Zoning Code In The Guise Of An "Area Variance."

A. The Statutory Framework for Zoning

Under New York law, the Town Board is responsible for enacting the Town's zoning ordinances. Town Law § 261. The Town Board "has the sole final authority to enact or amend zoning regulations." 2-16 N.Y. Practice Guide, Real Estate § 16.03. The Town Board for the Town of Greenburgh consists of the elected Town Supervisor and the four elected members of the Town Council. The Town Board may also enact regulations permitting a zoning board of appeals to vary the application of the ordinances, "in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained." Town Law § 261.

The Town Board also appoints the members of two administrative bodies to carry out the provisions of the Zoning ordinances: the Planning Board and the Zoning Board of Appeals. Town Law §§ 261, 267, 271. The Planning Board reviews and makes recommendations for the Comprehensive Plan for the Town, which is subject to the approval of the Town Board. Town Law § 271, 272-a. The Zoning Board of Appeals, among other things, considers appeals from decisions by town officials (such as building inspectors) who are charged with enforcing the Zoning ordinances. Town Law § 267-b.

The statutes thus set forth a careful balance of powers with respect to zoning. One court summarized it as follows:

> In broad terms, the legislative body (here the Town Board) enacts the ordinance defining the uses of property in districts in locations referable to the zoning map; an administrative body (here the [ZBA]) tempers the effect of the ordinance when occasion warrants under prescribed standards; and a second administrative body (here the Planning Board) supervises the development of land by subdivision controls, again under prescribed standards.

Van Deusen v. Jackson, 35 A.D.2d 58, 60 (2d Dep't) (1970). The key to this structure is that only one body — the Town Board — has the power to enact or amend the zoning ordinance, and to set forth the standards by which it is to be applied.

B. **The ZBA's Limited Power To Grant Variances**

The ZBA has authority to grant variances from the Zoning ordinances for particular parcels of land, within prescribed limits. Under New York law, a ZBA may only grant variances that are "in harmony with [the] general purpose and intent" of the zoning ordinances, and "in accordance with general or specific rules therein contained." Town Law § 261.

There are two types of variances: use variances and area variances. A use variance permits a use of the property for a purpose that would otherwise be prohibited by the Zoning ordinances, such as a commercial use in a residential district. Such variances cannot be granted absent a showing of "unnecessary hardship," which requires the applicant to prove that there is no permitted use of the property that allows him to realize a reasonable return; that the hardship relating to the property is "unique, and does not apply to a substantial portion of the district or neighborhood," that the variance "will not alter the essential character of the neighborhood," and that "the alleged hardship has not been self-created." Town Law § 267-b(2)(b). Where the alleged hardship is "general and not confined to plaintiff's property," a use variance is

inappropriate because "the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners." *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 233 (1938).

An area variance is an authorization by the ZBA "for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations." Town Law § 267(1)(b). In determining whether to grant an area variance, the ZBA must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or community if the variance were granted. *See* Town Law § 267(b)((3). The ZBA must consider five specific factors: (1) whether "an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created," (2) whether the benefit sought can be achieved by other means, (3) whether the requested area variance is "substantial," (4) whether there would be an "adverse effect or impact on the physical or environmental conditions" in the neighborhood, and (5) whether the alleged difficulty was "self-created" (a factor that is relevant but not necessarily preclusive).

In determining whether a requested area variance is "substantial," the ZBA must consider "whether the proposed nonconformity is too great, as compared to the lawful dimensions allowed by the zoning law." New York Division of Governmental Services, *"*Zoning Board of Appeals," p. 18 (available at https://www.dos.ny.gov/lg/publications/Zoning_Board_of_Appeals.pdf). For example, in *Heitzman v. Town of Lake George Zoning Board of Appeals*, the Court upheld the denial of a variance where the proposed construction would have exceeded the requirements by 15%. 309 A.D.2d 1126, 1128 (3rd Dept. 2003).

With both use variances and area variances, the ZBA must grant the minimum variance necessary and adequate to address the hardship, while preserving the character of the neighborhood and the health, safety and welfare of the community. Town Law § 267-b(3)(c).

Once granted, and unless expressly temporary, a variance "runs with the land": any subsequent purchaser is entitled to the same variance. *St. Onge v. Donovan*, 71 N.Y.2d 507, 520 (1988). The granting of a variance can also set a precedent that other landowners can rely upon in seeking their own variances. This is because when a ZBA "neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts," its rulings can be challenged as arbitrary and capricious. *Knight v. Amelkin*, 68 N.Y.2d 975, 977-78 (1986).

The ZBA also has the power to grant special use permits, which allow the development of property with a use that is allowed by the zoning ordinance "but only if certain conditions, meant to assure their compatibility with the neighborhood or district, are met." 2-16 N.Y. Practice Guide: Real Estate § 16.05[3][a][i]. The Town Board may delegate to the ZBA the authority to grant special use permits "as set forth in [the] zoning ordinance or local law." Town Law § 274-b(2). Importantly, however, that authority "must be constrained by legislatively imposed standards," to prevent an improper delegation of legislative power to the unelected members of the ZBA. *Id*.; *see Marshall v. Wappingers Falls*, 28 A.D.2d 542 (2nd Dept. 1967) (ordinance authorizing ZBA to issue special use permits "without prescribing any standard or rule by which action by that administrative body is to be governed" was an improper delegation of legislative power). As the Court of Appeals has explained, "[s]tandards governing issuance of special exceptions may not be so general or tautological as to allow unchecked discretion on the

part of the zoning board." *Tandem Holding Corp. v. Board of Zoning Appeals*, 43 N.Y.2d 801, 802 (1977).

An applicant for a special use permit may simultaneously seek an *area* variance from the ZBA if the application contains "one or more features which do not comply with the zoning regulations," even if there has not yet been a determination by an administrative official that such a variance is required. Town Law § 274-b(3); *Real Holding Corp. v. Lehigh*, 2 N.Y.2d 297, 778 N.Y.S.2d 438 (2004) (allowing grant of area variance from requirement that gas station be at least 1,000 feet from residential district and 2,500 feet from any other gas station).[4] However, the statute does not empower the ZBA to grant a *use* variance in the context of an application for a special use permit. *See* Town Law § 274-b(3).

C. **The ZBA Has No Power To Grant A Variance That Effectively Amends The Zoning Ordinance, And Any Such Grant Is Void For Lack Of Jurisdiction**

A ZBA is an administrative body that "completely lacks legislative power." *Knight*, 68 N.Y.2d at 977. The unelected members of the ZBA thus have no authority to amend the provisions of the Zoning ordinances. As the Court of Appeals explained long ago:

> No power has been conferred upon the [ZBA] to review the legislative general rules regulating the use of land. The board does not exercise legislative powers. It may not determine what restrictions should be imposed upon property in a particular district. It may not review the legislative general rules regarding the use of land. It may not amend such general rules or change the boundaries of the districts where they are applicable. Its function is primarily administrative.

[4] While *Real Holding* held that a ZBA has the authority to grant an area variance in the context of a special use permit application, the decision did not address the issues present in this case, namely: (1) whether the "area variance" was so significant that it effectively constituted an amendment to the statute and therefore was beyond the ZBA's jurisdiction, and (2) whether the "area variance" was in reality a disguised *use* variance, which a ZBA has no authority to grant in the context of a special use permit. Notably, the ordinance in *Real Holding* allowed the use of a parcel for a gas station anywhere in the district, provided that it was at least 1,000 feet from a residential district and at least 2,500 feet from any other gas station. In this case, by contrast, the ordinance expressly limited the parcels in the district where an assisted living facility may be located (requiring that they be within 200 feet of a state or county road and that they have direct, non-circuitous access to that road), and even identified those locations on a map.

Levy v. Board of Standards and Appeals, 267 N.Y. 347, 352-53 (1935) (internal citations omitted).

Because the ZBA is "an administrative and not a legislative body," it "may not review or amend the legislatively enacted rules as to use, or amend the ordinances under the guise of a variance." *Clark v. Board of Zoning Appeals of the Town of Hempstead*, 301 N.Y. 86, 90-91 (1950). "If the grant of a variance is destructive of the purposes to be achieved by the ordinance, there is a clear invasion of the legislative process." *Held v. Giuliano*, 46 A.D.2d 558 (3d Dept. 1975) (ZBA exceeded its authority in granting area variance for a 12-acre parcel to allow residential construction on lots of less than one acre, where zoning ordinance required a minimum lot size of one acre for such use). The ZBA "cannot under the semblance of a variance exercise legislative powers," and when the ZBA grants a variance that "violates the general purpose of the ordinance," the ZBA "invades the province of the legislative body, and the grant is invalid for want of authority." *Van Deusen v. Jackson*, 35 A.D.2d 58, 60 (2d Dep't) (1970), *aff'd* 28 N.Y.2d 608 (1971).

"A variance may be regarded as a zoning amendment if it alters in any fundamental and substantial respect the zoning scheme articulated in the ordinance." 2 Salkin, *New York Zoning Law & Practice* § 29.24. Because most variances involve a single lot or a small parcel, the larger the area of land affected by the variance, or the more significant the departure from the applicable standards, the more likely it will be considered an improper amendment. *Id.* At 29:51*; see, e.g., Van Deusen*, 35 A.D.2d at 61 ("The size of the parcel to be benefited by the variance thus becomes a significant factor."); *Colahan v. Schermerhorn*, 77 Misc.2d 23 (Sup. Ct. Suffolk County 1973) ("the variance which most closely resembles an amendment is one which applies to a large or extensive tract of land").

In *Van Deusen,* a ZBA granted a variance that allowed the construction of nine 25,000-square foot lots in a district where the ordinance required a minimum of 40,000 square feet. The Second Department held that this exceeded the ZBA's authority because in addition to the "considerable" size of the affected area, what the applicant sought in reality "was the sanction of the development of his land as a subdivision at odds with the ordinance." The court noted that "[n]ot one parcel, but 13 lots" were the subject of the application, and variances were granted for 9 of them. This represented a significant departure from the overall plan established by the Planning Board pursuant to authority delegated by the Town Board, and was not within the ZBA's authority. Allowing the variance "would not only rupture the statutory scheme but also interrupt the enforcement of the policy designed by the Planning Board." *Id*. at 61-62. The Second Department annulled the variance, and the Court of Appeals affirmed. 28 N.Y.2d at 608.

In *Beach Haven Jewish Center v. Foley*, a ZBA granted a variance permitting a one-block long shopping center in a residential district for a 20 year duration. The Second Department upheld the variance over a dissenting opinion by Judge Christ. 18 A.D.2d 917, 918-19. The Court of Appeals reversed the Second Department's ruling and annulled the variance, and unanimously adopted the reasoning of Judge Christ's dissenting opinion. 13 N.Y.2d 973, 974 (1963). In that opinion, Judge Christ ruled that the variance violated two "fundamental principles": first, that "no variance may be granted which defeats or weakens the general purpose and intent of the resolution or the use regulations prescribed thereunder for a particular district," and second, that there must be a reasonable basis in the record to show that the variance "will not do violence to the general zoning plan." 18 A.D.2d at 918. In this case, "[b]y its very size" (one block) and "authorized duration" (20 years), the permitted structure would "necessarily defeat the general design of the Zoning Law." Judge Christ explained that "[s]uch an 'intrusion on the

restricted district' is, 'as a matter of law, so out of harmony with the general purpose of the zoning resolution as to make it impossible to safeguard the character of the more restricted district.'" *Id*. (citations omitted). The Court of Appeals agreed, and therefore invalidated the grant. 13 N.Y.2d at 974.

In *Giuntini v. Aranow*, the Second Department held that a requested area variance affecting approximately 31 acres would have been outside the ZBA's authority because a variance "affecting such a large tract of land …would invade the province of the legislative body." 92 A.D.2d 548 (1983). Similarly, in re *Northampton County* the court found that a variance that would have reclassified a 5 1/2 acre residential lot as commercial would be an improper amendment to the zoning ordinance. 30 Misc.2d 469, 219 N.Y.S. 2d 292, *aff'd* 16 App. Div.2d 830, 230 N.Y.S.2d 668 (2d Dep't 1961).

In *Hess v. Zoning Board of Appeals*, the court found that reclassifying a 40-acre area that was zoned for two-acre residential lots into one-acre building lots was outside the ZBA's authority. 17 Misc.2d 22, 188 N.Y.S.2d 1028 (1955). In *Gardner v. Le Boeuf*, the court found that a variance application that would affect a 19 acre plot would be "futile" because a ZBA "has no power to remake the zoning map under the guise of granting a variance." 24 Misc. 2d 511 (Sup. Ct. Nassau County 1960), *aff'd*, 15 A.D.2d 815 (2nd Dept. 1962).

The principle that emerges from these cases is that "where a variance granted by a zoning board of appeals purports to permit the use of a large tract of land for [a] proscribed purpose, there is a strong possibility that [the] purported variance will be deemed an amendment" and therefore void. 2 Salkin, *New York Zoning Law & Practice* § 29.24; *Clark*, 301 N.Y.2d at 91 (citing cases; "The substance of all these holdings is that no administrative body may destroy the general scheme of a zoning law by granting special exemption from hardships common to all.").

The applicant's proper remedy in that case is to seek an amendment to the ordinance from the Town Board, because "once a variance becomes so substantial that it would effectively be a rezoning of the area, the zoning board of appeals is without authority to grant a variance of that magnitude." 2 Salkin, *New York Zoning Law & Practice* § 29.15.

D. The Zoning Ordinance Imposes Strict Limitations On The Location of Assisted Living Facilities To Ensure Efficient Access for Emergency Vehicles.

Section 285-10(A)(4) of the Greenburgh Zoning Code sets forth various uses of land that require a special permit. Subparagraph (f) allows special permits for "assisted living facilities," subject to fifteen specific requirements. Subdivision 14 requires as follows:

> The site **must** be within 200 feet of, and have access to, a state or county right-of-way, other than parkways and interstate highways. Such access **must** be direct or via a side street and **shall not** be accessed by a circuitous route.

Zoning Code s 285-10(A)(4)(f)(14), emphasis added. This is the only special permit use among those enumerated in this section of the ordinance that is subject to a restriction defining the locations in which the special permit may be granted.

The Town Board imposed these requirements in recognition of, among other things, the need for emergency vehicles to have safe and efficient access to an assisted living facility. When it conducted the legally-required SEQRA review for the proposed statute, the Town Board found that the statute as written would not have a significant impact on the environment; in reaching that determination, the Town Board specifically relied upon the requirements that any such facility would be close to a state or county road, and would have direct access to such a road. The Town Board's Negative Declaration states that:

> The inclusion of the proximity of potential sites to State or County Roads other than Parkways and Interstate Highways, into the criteria, seeks to limit additional or excessive traffic within

> established residential neighborhoods, while insuring safe emergency and other vehicular and pedestrian access.

(SEQR Negative Declaration, s I.A(a).) (Exhibit C to the Petition).

Further, in determining whether there were adequate public facilities, utilities and services to serve the needs of such a facility, the Town Board stated that:

> The proposed special permit criteria requires that potential assisted living facilities are within 200 ft. of and have access to (direct or via a side street) a State or County Road (other than Parkways and Interstate Highways). Generally, a requirement of this type will: (1) increase the efficiency of access to and from the facility by public and private transportation, as well as emergency services; and (2) place facilities within existing areas services by public water and sewer.

(Id.) As noted above, the Town staff also prepared a map identifying all properties that would satisfy these requirements within the unincorporated portion of the Town of Greenburgh, which the Town Board used "to identify where other assisted living facilities might be entertained in the future," and which was "analyzed and discussed at length by the Town Board in its decision" on the statute. (Id.) (Exhibit D to the Petition).

The requirements of both close proximity and direct, non-circuitous access to state or county roads were thus essential to the Town Board's compliance with SEQRA and its adoption of the statute.

E. <u>The "Area Variance" In This Case Would Nullify The Ordinance.</u>

The "area variance" the ZBA purported to grant in this case is no such thing; it is a *de facto* nullification of the zoning ordinance, and an improper usurpation of legislative authority.

After lengthy discussions and public hearings, the Town Board enacted a zoning ordinance that allows assisted living facilities *only* in parcels that are within 200 feet of a State or County road, *and* that have "direct" access to such a road, which access "shall not" be via a

"circuitous route." The Town Board imposed those requirements to, among other things, ensure that emergency vehicles would have quick and efficient access to the facility. The Town Board prepared a map of the unincorporated area identifying each and every parcel therein that would satisfy these requirements. This is exactly the sort of balancing of interests that is properly the function of the elected legislature.

However, four of the seven *unelected* members of the ZBA apparently disagree with the Town Board's judgment.[5] They voted to grant an "area variance" permitting the construction of an assisted living facility at a parcel that violates *every one* of the location restrictions imposed by the ordinance — and does so to the maximum extent possible. The parcel *could not be farther* from a state or county right of way and still remain within the Greenville Fire District. It is *thirty times farther* than the legislative requirements permit. And it cannot access a state or county right of way without traversing a steep, winding road with "severe" turns that is undeniably "circuitous."

The ZBA's action amounts to an improper amendment to the zoning ordinance. Unlike a typical "area variance" that affects only the property in question (such as a setback requirement for a front porch), the ZBA's action will affect *every* property in the vicinity of the mile-long, winding road to the facility, which will now be burdened by emergency vehicle traffic that the legislature deemed inappropriate. It also sets a precedent for any other landowner who wishes to construct such a facility in violation of the ordinance — whose property would necessarily require a less extreme departure from what the ZBA permitted here. It also undoes the very conditions that the Town Board relied upon in determining, under SEQRA, that the ordinance would not have a significant adverse impact upon the environment.

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[5] Effectively, this means that *one* unelected, administrative official cast the deciding vote to overturn the requirements imposed by the duly elected Town Board.

The ZBA's action violates the "fundamental principle" that "no variance may be granted which weakens the general purpose and intent of the resolution or the use regulations prescribed thereunder." *Beach Haven Jewish Center*, 18 A.D.2d at 918. It is "destructive of the purposes to be achieved by the ordinance," and thus represents "a clear invasion of the legislative process. *Held*, 46 A.D.2d at 559.

The sheer magnitude of the ZBA's action by itself demonstrates that it is an improper attempt to "amend the ordinances under the guise of a variance." Clark, 301 N.Y. at 90-91 (1950); *Colahan v. Schermerhorn*, 77 Misc.2d at 25 (Sup. Ct. Suffolk County 1973) ("the variance which most closely resembles an amendment is one which applies to a large or extensive tract of land"). The area affected by this "variance" — the parcels surrounding the mile-long road to the site — can *conservatively* be estimated as 55 acres, based on the 6,000-foot road, and assuming an affected area of only 200 feet on either side of it.[6] That *conservative* estimate is larger than the *combined* areas of the variances at issue in *Giuntini* (31 acres), *Held* (12 acres), *Van Deusen* (nine 25,000 square-foot lots = 5.17 acres), and *Beach Haven Jewish Center* (one block = approximately 5.45 acres) — each of which *by itself* was found so large as to constitute a *de facto* amendment to the zoning ordinance.

The Town Board imposed the location restrictions to ensure safe and efficient access for emergency vehicles — after extensive study and public hearings, and after making specific findings required by state law. The unelected members of the ZBA had no power to override the Town Board's legislative mandate — and doing so was particularly inappropriate with respect to an issue of public safety.

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[6] This results in 2,400,000 square feet. One acre is 43,560 square feet, which translates to 55.1 acres.

The ZBA's action was therefore "invalid for want of authority," and should be vacated on that basis alone. *Van Deusen*, 35 A.D.2d at 60.

2. The Zoning Board Exceeded Its Authority By Granting A Use Variance (In The Guise Of An "Area Variance") To Alter Criteria For A Special Use Permit.

Under Town Law § 274-b, a zoning board's authority on applications for special use permits is limited to granting "area variances." Zoning boards therefore do not have the legal authority to issue use variances in the context of a special permit application.

"In general 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 a use of land which is proscribed." *Overhill Building Co.*, 28 N.Y.2d at 453. An area variance "permits deviation from strict compliance with the zoning ordinance's requirements for, as an example, the physical characteristics of premises, so long as the purposes for which the premises are intended to be used are permitted by the ordinance." *Croissant*, 83 A.D.2d at 674 (citing *Overhill*, *supra*). "However, a use variance often proposes a change in the character of the premises and involves a utilization not permitted by the ordinance." *Id*. (citing *Matter of Village of Bronxville v. Francis*, 1 A.D.2d 236 (2d Dep't), aff'd 1 N.Y.2d 839 (1956)).

In *Overhill*, the zoning ordinance required one off-street parking space per 150 square feet of office space. The applicant sought a variance to convert some of its parking space to office space, which would have put the site out of compliance. The Court of Appeals held that because the use requested (office space) was *already* a permitted use at that site, the application was for an area variance and not a use variance. *Id*. at 453-54. Here, in contrast, the use of the parcel for an assisted living facility is *not* permitted by the ordinance, because it is thirty times farther away from a state or county road than required, and does not have direct and non-circuitous access to such state or county road. By allowing that use in the guise of an "area

variance," the ZBA effectively awarded a use variance in the context of a special permit application, which the statute does not permit it to do.

In *Croissant*, the applicant sought a variance to expand its car wash and add a mechanical car wash station. The ZBA allowed the expansion but denied the addition of a mechanical car wash station, which was prohibited by the zoning ordinance. The petitioner claimed that this request was for an area variance, and thus subject to a lower burden of proof. The Appellate Division rejected the argument, noting that an area variance is only appropriate where the intended use is permitted by the ordinance, and stated: "[i]t is clear that the construction of an addition to the service station to house an automatic car wash requires a use variance, not an area variance," and that the petitioner had failed to meet the higher showing required for a use variance. *Croissant*, 83 A.D.2d at 674.

As in *Croissant*, the "purposes for which the premises are intended to be used" by the applicant are not permitted under the Zoning Ordinance, which allows such use only in specifically designated locations. Here, the ZBA granted variances from the requirement that assisted living facilities be located no more than 200 feet from access to the nearest state or county right-of-way and from the requirement that access to such state or county right-of-way be direct, and not circuitous. These two requirements defined the territory in a zoning district where the ordinance permits parcels to be used for assisted living facilities, and where they may not be used for that purpose. When it adopted the Zoning Ordinance that allowed assisted living facilities by special use permit just three years earlier, the Town Board had drawn up a map of the parcels where assisted living facilities could potentially be located under these requirements, and further stated that use of any parcels outside of those areas designated on the map for that

potential purpose would require a separate finding by the Town Board that such use was both "appropriate" and "harmonious" for the surrounding area.

While the ZBA was made well aware of these requirements, and that assisted living facilities were not a permitted use in any other locations, it nevertheless labeled the variances it granted as "area variances." However, these were in reality "use variances" within the meaning of Town Law § 267, because they permit a use at a location where the ordinance expressly prohibits such use. Because these were "use variances" and not "area variances," the ZBA had no statutory authority to grant them because Town Law §274-b only allows zoning boards considering special use permits to grant "area variances."

Before the ZBA, Shelbourne argued that the requested use *is* "permitted" under the Zoning Ordinance, because "assisted living facilities" are allowed within the single family residential district *subject to obtaining a special use permit*. But Shelbourne's argument ignores that (1) under the Zoning Ordinance, the special use permit is only allowed for parcels that meet the Zoning Ordinance's express location restrictions, and (2) under state law, the ZBA cannot alter the *use* limitations on a parcel when considering a special permit application. Town Law Law §274-b. If accepted, Shelbourne's argument would effectively nullify that important statutory limitation on the ZBA's authority. Indeed, the relief the ZBA granted in this case is *exactly* what a use variance would look like if that were permitted — which demonstrates why the ZBA's action cannot stand.

State law further provides that the Town Board may only delegate to the ZBA the authority to grant special use permits "as set forth in [the] zoning ordinance or local law." Town Law § 274-b(2). That is an important restriction, because a delegation of such power without "legislatively imposed standards" and "without prescribing any standard or rule by which action

by that administrative body is to be governed" would be an improper delegation of legislative authority. *See Marshall*, 28 A.D.2d at 542-43; *Tandem Holding Corp.*, 43 N.Y.2d at 802 (zoning ordinance cannot allow "unchecked discretion" on the part of the ZBA). Here, the Town Board did enact "legislatively imposed standards" by restricting where assisted living facilities could be located — but the ZBA ignored them, granting a special use permit that violated those standards as much as was physically possible. That was an improper intrusion upon the legislative authority.

Moreover, even if the ZBA had the power to grant use variances in connection with a special use permit, and it does not, the state law requirements for granting use variances were not met here. First, the ZBA itself recognized that the alleged hardship was "self-created" because the applicant bought the property knowing that it was located outside of the legislatively mandated location restrictions. That by itself automatically precludes any grant of a use variance. Town Law § 267-b(2)(b) (to be granted a use variance, applicant must prove that "the alleged hardship has not been self-created"). Although nothing more is required, the grant would also "alter the essential character of the neighborhood" by turning the mile-long, winding road that goes through it into an expressway for dangerous emergency vehicle traffic at all hours of the day and night. *Id*. Finally, the grant fails because the alleged "hardship" is not "unique, and applies to "a substantial portion of the district or neighborhood" – namely, every other parcel that does not meet the ordinance's location restrictions. *Id*. Because the alleged hardship is "general and not confined to plaintiff's property," it should be remedied – if at all – "by revision of the general regulation, not by granting the special privilege of a variation to single owners." *Arverne Bay Construction Co.*, 278 N.Y. 222, 233.

Accordingly, the ZBA's decision to grant these variances should be vacated and otherwise declared null and void for the additional reason that these variances were use variances which the ZBA had no legal authority to issue.

3. Even If The Zoning Board Had The Authority To Grant The Variance (Which It Did Not), Its Decision Was Arbitrary And Capricious.

A ZBA's determination to grant a variance may be overturned as arbitrary and capricious where the ZBA's decision is not supported by substantial evidence, or constituted an abuse of discretion. *See Park Hill Residents' Ass'n v. Cianciulli*, 234 A.D.2d 464 (2nd Dep't 1996) (annulling grant of use variance under Article 78 where there was no evidence to support one of the elements for such a variance); *Dawson v. Zoning Bd. of Appeals*, 12 A.D.3d 444 (2nd Dep't. 2004) (ZBA's decision to grant conditional area variance rather than certificate of occupancy for residential cottage was arbitrary, capricious, and not supported by substantial evidence where residential cottage situated on same lot as residential building was a nonconforming building, but ZBA "unreasonably and erroneously" found it was a nonconforming use). In this case, the ZBA's decision failed to properly address the statutory factors that must be considered in granting an area variance, and its decision is not supported by the record.

Town Law § 267(1)(b) provides that an area variance is an authorization by a zoning board "for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations." Under Town Law § 267-b(3)(b), in determining whether to grant an area variance, a zoning board must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or community if the variance were granted. In making this determination, a zoning board must consider five specific factors: (1) whether "an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be

created," (2) whether the benefit sought can be achieved by other means, (3) whether the requested variance is "substantial," (4) whether there would be an "adverse effect or impact on the physical or environmental conditions" in the neighborhood, and (5) whether the alleged difficulty was "self-created" (a factor that is relevant but not necessarily preclusive). When granting either use or area variances, zoning boards must grant the minimum variance necessary and adequate to address the hardship, while preserving the character of the neighborhood and the health, safety and welfare of the community.

Assuming *arguendo* that the variances here were in fact area variances, which they were not, the ZBA failed to satisfy the relevant legal requirements for granting such variances. First, although it claimed to have done so, the ZBA did not take into account any "detriment to the health, safety, and welfare of the neighborhood or community that might result from the granting of the variances." The ZBA ignored the fact that the purpose of the restrictions was to make it safe for emergency vehicles to get to and from the proposed assisted living facility, and granted a variance that would require emergency vehicles to travel more than 100 times per year to and from the facility along a narrow mile-long two-lane town road with "severe" downward-sloping S-curves and a hairpin turn, and a history of motor vehicle accidents, in all weather conditions, including ice, snow and fog. The ZBA ignored testimony that multiple emergency vehicles responding to calls would be required under state law to use sirens along the winding, mile-long road to the site, creating noise issues for all surrounding homeowners. The ZBA reached these conclusions without any study at all, much less a study showing that the results would be anywhere near as safe for such vehicles and the neighborhood as a whole if the variances were not granted.

Second, the ZBA weighed the five factors improperly. With respect to the first factor, the ZBA found that granting the variances would not cause an undesirable change in the character of the neighborhood or detriment to nearby properties, not by considering the detriment to the health, safety and welfare of the community (as state law requires the ZBA to consider) but rather by noting that because the proposed facility would replace a large commercial nursery that had recently been damaged by two separate fires, it would represent "an aesthetic improvement over existing conditions." The ZBA never addressed whether placing a four-story, 60,000 square foot commercial building adjacent to 1,400 to 2,500 square foot homes in a neighborhood never planned to have such a development is an "aesthetic improvement" and a desirable change in the neighborhood's character. The ZBA instead relied upon a "Value Impact Analysis" that the applicant submitted, purporting to show that "the proximity of an assisted living facility does not result in a significant impact upon the values of adjacent residential properties." In fact, as residents who testified pointed out, the "Value Impact Analysis" looked at 26 different senior housing developments in Westchester and Rockland Counties and found *no* "assisted living" site to study to determine if there would be a significant impact on property values. Instead, the author chose to study a planned development community (BelleFair) along a state road, consisting of single family homes that were built in conjunction with a luxury "independent living" facility (Atria at Rye Brook). The ZBA was told there was no apple-to-apple comparison during the hearings, but nevertheless chose to accept the study as valid.

The ZBA next concluded that "the benefit sought by the applicant cannot be achieved by some method, feasible for the applicant to pursue, other than an area variance." Here, however, the ZBA overlooked un-contradicted testimony at the hearing that the applicant was invited in writing to bid and build on the nearby Frank's Nursery property, a nearly seven-acre site at 715

Dobbs Ferry Road in the Town, but ignored the invitation. Dobbs Ferry Road is a state right-of-way where, according to the map produced by the Town when it approved the assisted living ordinance (Exhibit D to the Petition), assisted living facilities may be located without need for any variance, and without creating the safety risks the Zoning Ordinance was intended to avoid. The ZBA likewise overlooked that the applicant also always had the ability to ask for an amendment to the Zoning Ordinance, but chose not to request one.

And remarkably, considering that it was granting an unheard-of variance of nearly 3,000%, the ZBA virtually ignores the third factor, which is the "substantiality" of the request. Here, the Decision mentions the distance from the state right of way "is undoubtedly substantial" but fails to provide any dimensional information on the 200 feet (required) or 6,025 feet (requested) or how substantial the request is – a 2,912.5% variance. The omission is significant because "the greater the variance in area restrictions, the more severe the likely impact upon the community." *See Biscardi v. Zoning Board of Appeals,* 288 A.D.2d 215, 216 (2d Dep't 2001), citing *Matter of National Merritt v. Weist*, 41 N.Y.2d 438, 441 (1977) (also noting that substantiality only comes into play when the variance sought "does not involve a use prohibited" by the zoning ordinance and does not seek a change in the "essential use of the land").

Here, of course, the variance proposed is so substantial it would impact not just residents whose properties abut that of the applicant, but also residents of the entire mile-long Underhill Road corridor, which is the route that emergency vehicles responding to medical calls at the site would have to take. Indeed, because the proposed location is about as far away from any state or county road that any residential neighborhood in the entire 19-square mile area of unincorporated Greenburgh is likely to be, it would also impact virtually every residential neighborhood where a developer is able to put together parcels of at least 3.79 acres in size.

The ZBA also provided no analysis whatsoever of the independent requirement under the Zoning Ordinance that the parcel have "direct" access to a state or county road that "shall not" be via a "circuitous route." The ZBA cited no study, no testimony, and no evidence to support its (unauthorized) waiver of those legislated requirements.

Finally, in a staggering display of arrogance, the unelected members of the ZBA completely dismissed the concerns raised by the Fire District — the elected officials who, unlike the ZBA, are charged with responsibility for public safety in the affected area. Rather than cite a study to support its conclusion, the ZBA cited the *absence* of a study by the Fire District itself. But it is the "lead agency" — here, the ZBA — that has the power to require such studies, and to require the applicant to pay for them. By effectively placing that (unfunded) burden on the Fire District, the ZBA turned the process on its head. More fundamentally, *the absence of a study proving the contrary* does not constitute "substantial evidence" supporting the ZBA's decision. The ZBA also ignored uncontradicted testimony by Fire District officials regarding the dangerous nature of Underhill Road, and the risks attendant to increasing emergency vehicle traffic in the manner that the ZBA permitted.

For all of the foregoing reasons, the ZBA's decision was arbitrary and capricious, and should be overturned.

CONCLUSION

For the reasons set forth herein, and in the accompanying Verified Petition, and exhibits annexed thereto, Petitioners respectfully request that the Decision of the ZBA to grant the variances herein be vacated in all respects.

Dated: Scarsdale, New York
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