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May 20, 2016

William Moore, Chair
Saratoga Springs Zoning Board of Appeals
474 Broadway
Saratoga Springs, New York 12866

Re: <u>ANW Holdings, Inc. – Area Variance Renewal Application</u>
27 Jumel Place – UR-3

Dear Chairman Moore:

We represent the interests of ANW Holdings, Inc. ("ANW") with respect to its application for the renewal of area variances granted by the Saratoga Springs Zoning Board of Appeals ("Board") in 2013 and 2014 related to 27 Jumel Place ("Property"). The area variances lapsed due to delays related to the death of the current owner and the inability of ANW to close on the purchase of the Property due to estate and probate issues. However, all issues related to the sale have now been resolved and we respectfully request that the Zoning Board of Appeals adhere to its prior precedent and findings related to this project and renew the relief previously granted.

A. <u>Background and History</u>

The Property has been before the Board on several occasions prior to the instant application and dating back as far as 1957. The site was home to a manufacturing operation in what was, then and now, a largely residential area. The pre-existing, non-conforming building is a large concrete structure covering approximately 49.5% of the lot. At the front and rear of the lot, there is currently under one foot of setback as the building is located directly on the property lines. Over time, the use on the site evolved from manufacturing to a ballet school and apartment building; and, even at one time, a non-conforming karate studio.

In 2013, John Witt, ANW's representative, came before the Board to present a new use on the site which had the potential to reduce the overall lot coverage and density in the form of seven residential single family condominium units. The 2013 application (formerly known as "Magnolia Lane" and now referred to as "Downton Walk") set forth plans to demolish the existing non-conforming structure and requested several area variances to construct the project, to wit: maximum building coverage, maximum principal building on one lot, minimum front yard setback for two units on Jumel Place, and minimum rear yard setback for two units at the rear. The Board requested an advisory opinion from the Planning Board which was issued in favor of the project, specifically finding that the "site can adequately accommodate development of this scale, and that the overall density proposed is compatible with the surrounding neighborhood." (See 11/18/13 Resolution of the ZBA) Moreover, the Board requested alternatives to the proposed project from ANW which Mr. Witt provided in the form of an itemized list of land development costs and scenarios involved in erecting fewer than the seven lots shown. Following a public hearing on the matter, the Board voted to approve the area variances as requested and made several specific factual findings related to the relief granted. Below is a summary of the relief and those findings:

Type of Relief	Required	Existing	Proposed	Total Relief
Maximum Principal Building Coverage	30%	49.4%	43.58%	13.58% (45%)
Maximum Principal Buildings	1	1	7	6 (600%)
Minimum Front Yard Setback for 2 units on Jumel Place	10 ft	1 ft	5 ft	5 ft (50%)
Minimum Rear Yard Setback for 2 units located at the rear	25 ft	.7	6	19 ft (76%)

Factual Findings and Legal Precedent pursuant to New York State City Law §81-b(4); Saratoga Springs City Zoning Ordinance §8.0, et seq:

1. Feasible Alternatives (Whether the benefit cannot be achieved by other feasible means): The Board reiterated that several prior applications had been made prior to ANW's application in 2013 for redevelopment of the Property which were unsuccessful. The current use of the Property was described as "mixed commercial and residential purposes with a large cement structure, formerly a manufacturing facility" which uses are "not conducive to a residential neighborhood" with noise and traffic that is disturbing to neighbors. The Board found that the Property presented unique non-conforming concerns

and evidence of previous economically infeasible redevelopment proposals. Specifically, the Board determined that "[n]ot only has the Applicant explored alternate means to achieve the requested benefit *including a smaller number of units* which were evaluated and found to be economically unfeasible, but *prior applications* have also attempted to use the structure for varied uses, all of which demonstrates that other alternatives have not been shown to be practical or economically feasible. In short, the ANW proposal "is the best economically feasible use as shown on the proposed site plan for this property." [emphasis supplied]

2. Undesirable Change (Whether the variance will create an undesirable change in the neighborhood character or a detriment to nearby properties): First, the Board noted that the application involves the complete removal of a non-conforming commercial structure from a UR-3 residential zone with a project that "substantially conforms to the residential homes in the neighborhood." The Board specifically articulated the *beneficial* impacts of the project including the removal of a varied use, as well as an illegal use, and replaced with a residential use in keeping with the zone. Second, the Board pointed to the favorable advisory opinion from the Saratoga Springs Planning Board which specifically opined that the "site can adequately accommodate development of this scale and that the overall density is compatible with the surrounding neighborhood." In sum, the Board concluded that (i) the project would improve the appearance of the Property and (ii) the project would not create an undesirable change in the character or impact on nearby properties.

3. Substantiality (Whether the relief requested in substantial): The Board found that the variances were substantial but that the substantiality was mitigated by (i) the existence of a structure that is non-conforming; (ii) the fact that the lot would support either 5 subdivided lots with single family homes or four duplex homes (8 units) while the project only calls for 7 units (which is one less than the maximum allowed under current zoning; (iii) the need of access behind the units for parking and service vehicles to access the rear; and (iv) the current building has less setbacks than are currently requested in the front and rear. In sum, the Board found that the substantiality is mitigated by the project's beneficial improvement to the current status of the Property.

4. Physical or Environmental Impact (Whether the relief requested will have an adverse impact on the physical or environmental impact on the neighborhood): The Board found that the project will reduce traffic and noise from the existing use which would return quietude to the residential neighborhood. Furthermore, the Board determined that the

project would be a substantial improvement to the overall neighborhood and its impact positive rather than adverse; specifically including an increase in permeability of more than 10%.

5. Self-Created Hardship (Is the requested relief self-created): Yes but not fatal to the application because it is outweighed by the installation of a use and structures more in conformance with the neighborhood than currently exists.

6. Additional Findings: All prior variances (including a use variance) were removed and replaced with the Resolution on ANW's application.

In 2014, ANW had to once again come before the Board in order to expand upon the relief requested in the 2013 application. First, ANW requested the ability to increase the fence height from 6 feet to 8 feet in order to provide additional screening to neighbors. Second, the front stoops on the units closest to Jumel Place required additional relief from the front yard setback. Third, the maximum building coverage request increased from 43.5% to 46%; representing a 2.5% change. Attached is a copy of the Resolution of the Board dated May 1, 2014. Following a public hearing on the matter, the Board voted to approve the area variances as requested and made several specific factual findings related to the relief granted. Below is a summary of the 2014 relief and findings:

	Required	**1st Approval (10/28/13)**	**2nd Approval (5/1/14)**	**Total Relief granted by prior approvals**
Maximum Building Coverage	30%	43.5%	46%	53%
Minimum Front Yard (2 units on Jumel for front stoops only)	10 ft	5 ft	1 ft	90%
Maximum Fence Height	6 ft	n/a	8 ft	2 ft (33%)
Minimum Principle Building	1	7	n/a	6 (600%)
Minimum Rear Yard	25 ft	6 ft	n/a	19 ft (76%)

Factual Findings and Legal Precedent pursuant to New York State City Law §81-b(4); Saratoga Springs City Zoning Ordinance §8.0, et seq:

1. Feasible Alternatives: Citing to its prior precedent of 2013, the Board determined that the additional relief requested from the minimum front yard setback and maximum building coverage did not alter the rational and findings from the 2013 decision. Furthermore, the Board found that the fence height was necessary to provide additional privacy which could not be achieved by an alternative means on the property limited by size.

2. Undesirable Change: Citing to its prior precedent of 2013, the Board reiterated that the project created a desirable change for the neighborhood and that the finding was in no way altered by the additional relief requested by ANW. Furthermore, it found that the fence would increase the character of the neighborhood.

3. Substantiality: While the relief may be considered substantial, the Board concluded that this was offset by the benefit of privacy fencing.

4. Physical and Environmental Impact: Citing to the prior precedent of 2013, the Board reaffirmed that the project would have a beneficial physical impact on the neighborhood and nothing about the additional relief changed the Board's original findings. Furthermore, the fence relief would not have an adverse impact on the neighborhood.

5. Self-Created Hardship: Yes but not fatal to the application.

6. Additional Findings: Minimum front yard setback of 5 feet to 1 foot modified to permit front stoops and stairways on the two Jumel Place residences; no eight (8) foot fence shall be constructed along Jumel Place or extend beyond the front foundation line along Jumel Place.

B. Current Application

In 2016, ANW was finally able to move forward with the process of purchasing the Property following the resolution of issues related to the estate probate process involving the current owner. However, ANW's variances from 2014 had lapsed pursuant to the Saratoga Springs Zoning Ordinance eighteen months after the approval (November 1, 2015). As a result, ANW must renew its application for the requested area variance relief in order to proceed with the project. On January 19, 2016, ANW filed an application for the reconsideration of the area variances and the application was first heard on February 22, 2016 by the Board. At the meeting,

ANW presented the application and reiterated several times on the record that none of the project elements has changed since the 2013 and 2014 approvals. Mr. Witt, as representative for ANW, confirmed that the pricing of the units has increased in direct proportion to the increase in the land development and build costs brought about in the market place in the preceding three years. As a result, the original economic premise justifying seven units as opposed to an alternative (or lesser) number remains valid. A summary and analysis of land acquisition and development costs from 2013 to 2016 is provided in the table below:

Land Acquisition & Development Costs – 2013 to 2016

Cost Item	2013	2016	Difference
Land Purchase	$370,000	$37,000	n/a
Professional Fees	23,000	60,000	$37,000
Interest	42,000	45,000	3,000
Taxes	20,000	20,800	800
Soil Testing	11,700	112,500	800
Construction (water line)	60,000	212,000	152,000
Dirt (Fill)	21,000	22,000	1,000
Demo and Asbestos Removal	155,000	165,850	10,850
Lot Clearing	10,000	10,700	700
Silt Fencing	6,000	6,500	500
Electric Lines (x2)	24,000	48,000	24,000
Trees	12,000	12,800	800
Administrative Cost	Unreported	$100,000	$100,000
Sub-total	$754,700	$1,086,150	$331,450
Reasonable Return for Risk	20%	20%	
TOTAL ACQUISITION AND LAND DEVELOPMENT COSTS	**$905,640**	**$1,303,380**	↑44.%

The table above outlines the increase in costs of acquisition and development of the site from 2013 to 2016 and provides an overall cost increase of $331,450 or 44%. In order to address the cost increases, the price of each unit must also increase in proportion in order to have the project remain economically viable. The table below indicates the Minimum Average Price per home in 2013 and 2016 according to the number of units in the project which utilizes the industry standard of a land to home price ratio of 20%.

Number of Units	% of Land to Home Cost	Land Cost per Unit - 2013	Min Average Home Price -2013	Land Cost Per Unit -2016	Min Average Home Price -2016
7 units	20%	$129,377	$646,885	$186,197	$930,000
5 units	20%	$181,128	$905,640	$260,676	$1.3M
3 units	20%	$301,880	$1.5M	$434,460	$2.18M
2 units	20%	$452,820	$2.2M	$651,690	$3.25M

The results indicate that the average home cost of $640,000 for 7 units reported in the 2013 application process was accurate at that time, but the rising cost development costs has increased the average home price to $930,000 in 2016. In order to address the varied market, ANW is proposing several price points ranging from $587,045 to $1.255M for a median price of $921,022 (See Exhibit C of Application). These price points indicate that: (1) two of the units will experience a loss related to the development costs; (2) two units will likely provide a net neutral return; and (3) three units will provide the economic benefit of a return. ANW intentionally varied the pricing of the units to provide a stratum of available home prices in keeping with the UR-3 and the East Avenue/Jumel Place neighborhood in general. As evidenced by the above table, ANW's position is that an average minimum home price of $1.3M is not consistent with the market for the neighborhood and it would not move forward with the project at 5 units.

Additionally, it was noted in the 2013 approval specifically that the project would increase the permeability of the site which remains true to the current application. In 2013 and 2014, the ANW applications indicate an estimated permeability of 35.1% on the site which is 40% more permeability than required by the City Code at 25%. The 2013 permeability calculation was 40.6% based upon the concept plan and, in 2014, had been revised to 38.7%. However, in each plan submitted to the Board, the permeability calculation has remained above both the applicant estimate of 35.1% and well above the City minimum of 25%. The final configuration of the project, including owner-optional pools, porches, and overhangs is not expected to exceed the 35.1% permeability and will provide a net permeability increase to the existing site conditions. Copies of the 2013 and 2014 concept plans are attached to this letter with the 2014 version representing the current concept plan.

C. Legal Support for the Approval of the 2016 Application

It is ANW's position that the state of the law in New York is clear as it relates to the renewal of variances following their expiration by time. In American Red Cross, Thompkins County Chapter v. Board of Zoning Appeals of the City of Ithaca, the applicant's variance expired three years after the initial approval and, upon rehearing, the Board of Zoning Appeals denied the

variances while none of the project elements had changed. 161 A.D.2d 878 (3d Dep't 1990) In reversing the Zoning Board's denial, the Appellate Division, Third Department found, "Absent such material changes, the [Board of Zoning Appeals] is bound to its earlier decision and may not refuse a variance previously granted . . . In our view, the record contains insufficient evidence evincing a change in circumstances sufficient to support [the Board of Zoning Appeal's] reversal of its previous position. Id. (internal citations and quotations omitted). This requirement is grounded in the principles of res judicata and collateral estoppel which give conclusive effect to the quasi-judicial determinations made by a Zoning Board of Appeals. See Jensen v Zoning Bd. of Appeals of the Village of Old Westbury, 130 AD2d 549, 550 (2nd Dept. 1987) (citing Ryan v NY Tel. Co., 62 NY2d 494, 499 (1984)). This proposition includes reapplications for the same variance after a time condition has expired. American Red Cross, supra; Center Square Ass'n v. City of Albany Zoning Bd. of Appeals, 19 A.D.3d 968, 972 (3d Dep't 2005); Cohen v. Vil. of Irvington Zoning Bd. of Appeals, 29 Misc.3d 1231[A] (Sup Ct, Westchester County 2010) (a frontage variance 24 years expired must be renewed when there is no material change in the project).

Facing these overriding principles, we submit that the Board is bound by its original findings in its October 30, 2013 resolution - and the subsequent May 1, 2014 resolution - granting the area variances because the facts and justifications have not changed in any material manner. There has been no empirical evidence presented before the Board to demonstrate that a material change in the project or the surrounding neighborhood has occurred since the variances were issued in 2013 and 2014. Moreover, ANW is not seeking any additional or different relief which would change the previously considered impacts to the neighborhood.

As a result of the foregoing, we respectfully request that the Board observe the legal and factual precedent of its prior findings, especially in light of the testimony of Mr. Witt before the Board on February 22, 2016 that none of the project elements has changed since the original relief was granted in 2013 and 2014, as well as the information provided within the written submissions. Absent empirical evidence in the record contradicting the testimony of Mr. Witt concerning a lack of material changes to the project, we believe there is insufficient basis on which the Board may alter its prior determinations.

C. Purpose of Zoning Board and Generalized Community Objection

As part of this renewal application, there have been several neighbors who have written or spoken out against the project. There has even been a region-wide online petition circulated articulating the position that the project should be denied because it is contrary to zoning and has

the potential to set a negative precedent. It is ANW's position that these generalized community objections are (1) insufficient to demonstrate a material change in the project components or the neighborhood composition since the original precedential decisions were made; (2) unsupported by empirical evidence sufficient to raise an issue of fact related to the findings made during the deliberation of the original approvals; and (3) mischaracterizations of the character of the neighborhood composition. ANW has twice satisfied the area variance standard and its entitled by law to rely upon the precedent of the prior findings.

Leaving aside momentarily the legal precedent provided by American Red Cross, supra, a review of the written objections, as well as the vast majority of comments from the neighbors who oppose the project, reveals that there is one overarching objection raised continuously, to wit: the project is not zoning compliant and therefore flies in the face of the land use plan for the City of Saratoga Springs. As such, it is incumbent upon the applicant to note the Zoning Board of Appeals exists for the primary purpose of varying the zoning requirements for appropriate projects when they are not zoning compliant if the applicant has met the statutory test – which has been twice found met in this case. Therefore, it follows that *any* relief granted by the Board will, to some extent, be out of compliance with the City's land use code and we submit that this is the very purpose of the Board. Opposition to the project based upon its alleged inconsistency with zoning or the Comprehensive Plan[1] would obviate the statutory purpose and scope of the Board itself. Back in 1925, the Supreme Court of Oneida County noted, "The creation of a board of appeals, with discretionary powers to meet specific cases of hardship or specific instances of improper classification, is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment." People v. Kerner, 125 Misc. 526 (Sup. Ct. Oneida Co, 1925). It is a zoning board's duty to act as a "safety valve" to provide relief from rigid and inflexible zoning laws. Salkin, New York Zoning Law and Practice, 4th Ed., §27.08.

[1]The Comprehensive Plan is a planning tool used to assist the City Council in its rezoning or updated zoning efforts, as opposed to the statutory evaluation charged to the Zoning Board. Even assuming for the moment that the Comprehensive Plan was relevant to this application, it notes the following goals: (i) Efforts to strengthen and enhance this area through Infill Development and reuse are integral to the overall success of the city." pp 51. Housing 3.4-50; (ii) Encourage a range of residential opportunities that will be available to all residents to promote the social and economic diversity vital to a balanced community." 3.4-51; (iii) Promote diversity of housing types in close proximity to employment centers such as downtown, the hospital, Skidmore College, the Racetrack; and (iv) Encourage the development of higher density residential alternatives within the urban core including the conversion to residential use of upper floors in commercial districts.

Along with the statutory test, the zoning law also permits the opportunity for members of the public to be heard concerning applications which directly affect them. Neighbors may come to voice concerns with an application, but in order to raise an issue of fact with the evidence presented by the applicant, they must present more than mere objection – it must be empirical evidence which is contrary to that of the applicant. As with any land use determination, zoning boards of appeals may not base a decision to deny an area variance on what has come to be termed 'generalized community objections.'" Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 240 (2005) (citing Constantino v. Moline, 4 A.D.3d 820, 821 (4th Dep't 2004)). Where a zoning board of appeals fails to engage in the statutory balancing and instead bases its decision on general community opposition to a project, its decision to deny an application for an area variance is arbitrary and capricious. See e.g., Matter of Marro v Libert, 40 A.D.3d 1100, 1102 (2nd Dept. 2007); Matter of Lessings, Inc. v Scheyer, 16 A.D.3d 418, 419 (2nd Dept. 2005).

In this particular case, it is ANW's position that the Board must only consider whether there is evidence in the record of a material change in circumstances upon which to deviate from its twice prior precedent, as opposed to generalized neighborhood objection to the project. Furthermore, ANW is prepared to submit a number of neighbor letters in support of the project to the Board for consideration at its May 23rd meeting – thereby only further supporting the fact that neither neighbor opposition nor support acts as a referendum on entitlement to variance relief.

For all of the reasons set forth above, we respectfully request that the Board adhere to its prior precedent concerning this application, given that no evidence has been provided on the record of any material changes in the project which would affect the original approvals of 2013 and 2014 and the facts indicate that the project continues to demonstrate entitlement to the relief under the standard of review for the area variances. Thank you for your time and attention to this matter.

Respectfully submitted,

M. Elizabeth Coreno
MEC/ccm
Enclosures

Cc: Members of the Zoning Board of Appeals
Tony Izzo, Esq.
Susan Barden
ANW Holdings, LLC

MAP OF the Neighborhood of MAGNOLIA LANE in SARATOGA SPRINGS

by Witt Construction

2013

Lot Coverage			
Residence	Footprint	Roof OH	Coverage
#1	2,313	284	2,597
#2	1,277	159	1,436
#3	1,332	160	1,492
#4	1,884	189	2,073
#5	2,606	228	2,834
#6	2,340	223	2,563
#7	1,906	220	2,126
	13,658	1,463	15,121
			34,766
			43.5%

Permeability Statistics	
Size of Development (Sq. Ft.)	34,766

Non-Permeable Areas (Sq. Ft)		
Road	3506	
Driveways	1944	
Pavers	1546	
Living	8,665	
Porches	818	
Garages	4,175	
Total Non-Permeable	20654	59.4%

Permeable Areas (Sq. Ft.)		
Turf Paved	1222	
Landscaped	12,890	
Total Permeable	14112	40.6%

Scale of Feet

1 5 10 25 50 100

MAP OF the Neighborhood of MAGNOLIA LANE in SARATOGA SPRINGS

by Witt Construction

2014

Lot Coverage			
Residence	Footprint	Roof OH	Coverage
#1	2,449	284	2,733
#2	1,357	159	1,516
#3	1,472	160	1,632
#4	2,079	189	2,268
#5	2,759	228	2,987
#6	2,340	223	2,563
#7	2,070	220	2,290
	14,526	1,463	15,989
			34,766
			46.0%

Permeability Statistics		
Size of Development (Sq. Ft.)	34,766	
Non-Permeable Areas (Sq. Ft)		
Road	3,506	
Driveways	1,536	
Pavers	1,740	
Living	8,665	
Porches	1,686	
Garages	4,175	
Total Non-Permeable	21308	61.3%
Permeable Areas (Sq. Ft.)		
Turf Paved	1,588	
Landscaped	11,870	
Total Permeable	13458	38.7%

Scale of Feet

1 5 10 25 50 100