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September 15, 2017

By e-mail and by hand

Chairman John Dunne
and Members of the Zoning Board of Appeals
City of Beacon
1 Municipal Plaza
Beacon, New York 12508

Re: Second Supplemental Submission for 226 Main Street
226 Main Street, Beacon, New York 12508 (SBL: 5954-27-860918)

Dear Chairman Dunne and Members of the Zoning Board of Appeals:

We respectfully submit this letter to provide the Board with supplemental information to aid in its consideration of the requested variances, and to respond to the concerns raised by the public at the July 18, 2017 public hearing.

The project seeks to improve an underutilized corner property located on Central Main Street, presently occupied by an automotive repair facility, by constructing a 4-story mixed-use retail and multifamily residential building containing ground-floor retail space and 8 apartment units on the second through fourth floors (the "Project").

The two requested area variances are summarized as follows:

A. Rear Yard Setback:

The Applicant requests relief from Zoning Code Section 223-41.18(D)(5), which requires a rear yard setback of 25 ft. The Applicant requests a variance of 15 ft., to permit a rear yard setback of 10 ft. (The existing building on the site, which would be replaced by the proposed new building, has a rear yard setback of less than one foot.)

B. Residential Parking Spaces:

The Applicant requests relief from Zoning Code Section 223-41.18(F)(2)(a), which requires 1 parking space per 1 residential unit, and thus 8 residential parking spaces, to allow zero spaces on the Premises.

C&F: 3530488.4

GENERAL COMMENTS BY THE PUBLIC:

The Zoning Board is obligated to consider each variance separately. However, there were certain comments made by the public which were intended to apply to both variances, and those comments are addressed first.

The Right of an Applicant to Seek Variance Relief:

There were numerous comments from the public that the ZBA should never grant a variance for any application. This clearly reflects a misunderstanding of the law.

Landowners have a constitutional due process right to request variance relief. Granting the ability to apply for variances is an essential element in preserving the constitutionality of zoning laws. Thus, the right to apply for variances is codified in New York State statutes, General City Law 81-b, and in the Beacon City Code, section 223-55 (C) (2).

General opposition to the project, or to development in general:

Many of the comments at the public hearing were general statements of opposition to the project, or to development in general, unsubstantiated by any data or objective facts. Many commenters expressed clear animus for all new development and growth in the City, even projects such as this one, which substantially complies with the requirements and intent of the recently updated City Code and Comp Plan. Multiple commenters requested that the City oppose all development and push back on developers who do not reside in Beacon – by enacting a moratorium on all new applications.

It is well settled law that such general opposition does not provide a valid ground to deny a variance.

THE LEGAL TEST FOR AREA VARIANCES:

New York law clearly states the applicable test for an area variance: weighing the *benefit* of the variance to the applicant, as against the actual *detriment*, if any, to the neighborhood from the granting of the variance.[1] If the benefit to the applicant outweighs the actual harm to the community, the applicant is entitled to receive the area variance.

[1] *See* GEN. CITY LAW § 81-b; CITY OF BEACON ZONING CODE § 223-55(C)(2).

The law does not require an applicant for an area variance to establish any "hardship." The hardship standard applies only to use variances.

The Zoning Board is obligated to consider each variance separately. Accordingly, this submission addresses the two separate variance requests in turn.

EASEMENT 1 - REAR SETBACK VARIANCE:

Precedent:

Zoning Boards are obligated to treat similar cases in a similar way. They cannot grant variances to some applicants, but not to other applicants in similar circumstances. A critical factor with respect to the rear setback variance is the precedent of this Board's having granted similar, and even greater, rear setback variances to other properties in similar circumstances.

Specifically, the Board granted variances to:

- **344 Main Street** (SBL: 5954-36-987833), CMS District – O'Donnell Construction Corp.: The Zoning Board of Appeals approved a 0 ft. rear yard setback where 25 ft. was required. The long, narrow site did not allow the applicant to optimize the setup of interior units in the building. The granting of this variance allowed the applicant to build a 4-story mixed use building and lay out 18 apartments and 6 retail units. Further, as a corner lot, the applicant did not want to create the appearance of a "gaping hole" at the rear of the property. The Zero rear setback variance was approved on September 15, 2015. The variance requested by 226 Main Street is less extensive than this variance. The factual circumstances are very similar, since this is also a corner lot with a unique configuration.

- **249 Main Street** (SBL: 5954-27-852906), CMS District – 249 Main Street, LLC: The Zoning Board of Appeals on the same date (September 15, 2015) approved a 10 ft. rear yard setback where 25 ft. was required, to construct a new 4-story residential/retail building.

  In light of this precedent, and the similarity of the circumstances, the Board is bound by its prior precedent to make a similar determination.[2] The circumstances are similar, and there is no justification for a different treatment for this project.[3]

[2] *See* Knight v. Amelkin, 68 N.Y.2d 975 (1986); Dil-Hill Realty Co. v. Schultz, 53 A.D.2d 263 (2d Dept. 1976).
[3] *See* Frisenda v. ZBA of Town of Islip, 215 A.D.2d 479 (2d Dept. 1995); Callahan Indus. Inc. v. Rourke, 187 A.D.2d 781 (3d Dept. 1992).

5 Factor Analysis of the Rear Yard Setback Variance:

The grant of the variance is also supported by a consideration of the 5 area variance factors, even independent of the precedent of prior decisions.

1. **Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the area variance.**

   The existing building on the subject property sits less than 1 foot from the rear property line. The proposed variance will actually increase this significantly, reducing the nonconformity. The proposed project, including the requested setback variance will also have a positive effect on the character of the neighborhood, as documented by the Dutchess County Planning Department comments on the proposal:

   > The proposed redevelopment of this prominent corner on Main Street to a 4-story mixed use building with retail on the ground floor will result in a vast improvement in the appearance of this site and will add value to the parcel, and the City as a whole. The proposed site plan is in keeping with the City's regulations for the Central Main Street (CMS) district and we commend the applicant in proposing a building that upholds these standards.[4]

   The express purpose of the CMS District is to "increase the vitality, attractiveness, and marketability of Main Street and the Central Business District by providing more flexibility of land use while maintaining and enhancing urban form as recommended by the City's Comprehensive Plan."[5] Furthermore, the CMS District regulations contemplate that the most ideal location to site taller buildings in the district are on corner lots.[6]

   The City's 2007 Comprehensive Plan and 2017 Comprehensive Plan Update "encourage housing development at relatively greater densities within and adjacent to the central

[4] The County's Letter, dated May 31, 2017 t the City of Beacon Planning Board is on file with the Planning Board and is enclosed herein as **Exhibit A** for the ZBA's ease of reference.
[5] CITY OF BEACON ZONING CODE § 223-41.16.
[6] CITY OF BEACON ZONING CODE § 223-41.18(B)(1)(b) (5-story buildings, which are even taller than the 4-story building currently proposed as-of-right, are permissible with special use permit: "Corner locations are deemed most appropriate for such buildings").

business district."[7] Referencing the 2007 Comprehensive Plan, the 2017 Comprehensive Plan Update recognized and affirmed that:

> While Main Street is viewed as an important asset of the City, many residents expressed the need to improve the 'transition area' between Teller and Digger Phelps Street. This area lacks the density and architectural features of the more historic sections of Main Street to the east and west. The 2007 Plan stated that many residents felt the City should encourage the development of more residences on Main Street, particularly in the transition area, which would help provide a larger local market for businesses.
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> … The Main Street business district needs an increased residential population in the area near Main Street in order to support a larger market necessary for long-term economic viability.[8]

There is no adverse impact on the neighborhood which justifies the denial of the setback variance. The generalized claims of so-called "shadow" impacts have been investigated, and the applicant submits herewith a Shadow Study (Exhibit C) which shows that there is no perceptible difference in the nature of the shadows created by the proposed building under the 10 foot setback as compared to the 25 foot as-of-right setback. These claims are discussed in detail below under factor 4, pages 7-9.

2. Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance.

The applicant cannot achieve the benefit he seeks---the construction of a viable building—without a setback variance, because of the shape and shallow nature of the Premises, and its character as a corner lot.

The facts demonstrate that the Premises and proposed development are actually comparable in lot size (in terms of overall acreage/SF) to the other lots on its block, but the Premises is distinguishable from most of the other properties because it is a corner lot. *See* **Exhibit B**.

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[7] CITY OF BEACON, 2007 COMPREHENSIVE PLAN at 7 (Population and Residential Development), 106 (Land Use, Objective C);

[8] *See* CITY OF BEACON, 2017 COMPREHENSIVE PLAN UPDATE at 61-62 (Section 4.2, Goals and Recommendations)

Despite its comparable square footage to other lots located on its block within the CMS District, 226 Main Street is quite shallow, being only about 57 ft. deep. The requested 10 ft. setback would allow a building depth of approximately 47 ft., with an interior dimension of about 45 ft. This is the minimum feasible depth to create a layout that permits apartments to be located on either side of a central 5-foot wide corridor, and creates apartments of a viable size, each 20 ft. wide. It is infeasible to lay out an apartment unit that is less than 20 ft. deep, and still maintaining a configuration that features adequate living space and facilities. To meet Building Code requirements for a 3+ story multifamily building, the double-loaded corridor must be at least 5 ft. wide, and there must be two means of ingress/egress access to the building. Applying the 25 ft. setback requirement would make the double-loaded corridor impossible, as there would simply not be enough space within the building footprint to support the amount of square footage required by the corridor and ingress/egress access ways, and maintain reasonably sized apartment units on each floor.

Allowing the Applicant to build on the Premises and receive an economic return from its property is a legitimate "benefit" to be sought by an area variance, and cannot be rejected by a ZBA as an "unworthy" motive. This consideration is particularly applicable to the present case, where the Applicant seeks to develop this corner lot in accordance with the broader objectives of the CMS District regulations and Comprehensive Plan. It is improper for a ZBA to deny a variance and attempt to relegate an applicant to an alternative design that is a "profound departure" from, or at causing a substantial loss compared to what the applicant is seeking through the variance request.[9] Similarly, where an applicant seeks the benefit of a variance a ZBA may not reject a variance on the ground or allegation that the applicant doesn't "need" it.[10]

3. Whether the requested area variance is substantial.

The variance is not substantial in its effect. The substantiality of a variance cannot be judged solely by a comparison of the percentage deviation from the mandated requirements of the Zoning Code. In considering whether a variance is substantial, the ZBA shall examine the totality of the circumstances within an application.[11] Thus, the

[9] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Zoning Bd. of Appeals of Town/Village of Harrison, 296 A.D.2d 460, 461-62, 745 N.Y.S.2d 76, 78, 2002 N.Y. Slip Op. 05773 (2d Dept. 2002) (Court reversed ZBA's denial of variance where the ZBA attempted to force the applicant to a profound departure from its own proposal, and would cost applicant an additional $1 million).

[10] *See* Baker v. Brownlie, 248 A.D.2d 527 (2 Dept. 1998) (Board may not reject a variance on the ground that the applicant doesn't "need" the variance to have a patio not facing the water).

[11] *See* Aydelott v. Town of Bedford Zoning Bd. of Appeals, N.Y.L.J. June 25, 2003, p. 21, col. 4 (Sup. Ct. Westchester Co. 2003) ("consideration of the percentage [of lot coverage] alone, taken in a vacuum, is not an adequate indicator of the substantiality....[A] large deviation can have little or no impact depending on the circumstances of the variance application."); Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals, Misc.3d 1120(A), 873 N.Y.S.2d 512 (Table), 2007 WL 56495232007 N.Y. Slip. Op. 52571(U) ("Substantiality cannot be judged in the abstract; rather, the totality of

overall effect of granting the relief is the appropriate inquiry. The ZBA must consider the surrounding neighborhood and nearby lots when determining whether the application is substantial.[12]

Here, the requested variance is not substantial in its effect, because a 10 ft. rear yard setback is greater than the Premises' existing rear yard setback (less than 1 ft.), and is consistent with other existing properties in the CMS District. The existing building on the property is set back less than one foot from the rear property line, and other properties in the area feature rear yard setbacks of 10 feet or less, including several that were granted variances for reduced rear yard setbacks.

Moreover, even if a variance is deemed "substantial," this factor alone does not preclude the granting of a variance, since the applicant meets the overall balancing test.[13]

4. **Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district**.

The proposed variance will have no adverse impacts on the physical or environmental conditions in the neighborhood or district. There will be no adverse effects of noise, vibrations, odor, traffic, or impact on public services, caused by a mere 15-foot reduction in rear yard setback. As the County Planning Board establishes in its letter, there will in fact be a positive visual/aesthetic effect on the neighborhood and district - as the proposed Project employs a pleasing architectural design in character with the goals of the CMS District. The increased residential density in the CMS District will revitalize Main Street's economy and contribute to a vibrant and walkable streetscape.

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relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one."); Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner, 56 A.D.3d 883, 886, 867 N.Y.S.2d 238, 241 (3d Dept. 2008)(although variances were substantial the ZBA properly determined area variances will not have a substantial impact on the community); *see also* Schaller v. New Paltz Zoning Bd. of Appeals, 108 A.D.3d 821, 824, 968 N.Y.S.2d 702, 705 (3d Dept. 2013) (upholding ZBA determination that an area variance).

[12] *See* Crystal Pond Homes, Inc. v. Prior, 305 A.D.2d 595 (2d Dept. 2003) (Court overturned lot area application for 12,750 square foot lot where 21,780 was required where there were a substantial amount of substandard lots in area); Gonzalez v. ZBA of Putnam Valley, 3 A.D.3d 496 (2d Dept. 2004) (denial overturned where record showed substandard lots next to subject lot and other nearby nonconforming structures similar to that sought by applicant); Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Zoning Bd. of Appeals of Town/Village of Harrison, 296 A.D.2d 460, 461-62, 745 N.Y.S.2d 76, 78, 2002 N.Y. Slip Op. 05773 (2d Dept. 2002) (even though a variance seeking a 77% increase over the permitted height was substantial, this "does not relieve [the ZBA] from engaging in the balancing test" and the application can still be granted.").

[13] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Zoning Bd. of Appeals of Town/Village of Harrison, 296 A.D.2d 460, 461-62, 745 N.Y.S.2d 76, 78, 2002 N.Y. Slip Op. 05773 (2d Dept. 2002) (even though a variance seeking a 77% increase over the permitted height was substantial, this "does not relieve [the ZBA] from engaging in the balancing test" and the application can still be granted.").

The only public comments that had any specific connection to the proposed project included unsupported claims that a 4-story building in this location is inappropriate because it will create "shadows" on neighboring properties and it block the flow of "light and air" in the neighborhood.

These comments reflect generalized opposition to the project itself and the proposed building height, not the requested setback variance. Height is not an issue before this Board, nor is it an issue for debate, since it is zoning compliant. The Beacon Zoning Code § 223-41.18(D)(7) expressly permits 4-story buildings in the CMS District. The Zoning Code also notes that the most appropriate location for a taller building is on a corner lot.[14]

Moreover, under New York State law, a neighboring property owner has no natural or inherent right to light or air, and may not complain that either has been cut off by the erection of buildings on adjoining land.[15] Nor does such owner possess an implied visual easement over property he does not own.[16] It is well-settled law in New York that no easement for light or air will ever be implied in favor of one city lot over another, and that doctrine of implied easements of that kind does not exist in this state; further, no such rights may be acquired by prescription, even where the existing neighboring parcel has been in place for many decades.[17]

Therefore, arguments by neighbors that the proposed Project will cut off light and air access to existing buildings located on adjacent or nearby properties are without legal merit. The adjacent and neighboring property owners have no inherent right to light or air; these lots, like any other lot in a city, do not enjoy a perpetual right to undeveloped surroundings merely by virtue of having been there first. The only means by which a property owner may acquire a right to right and air is by an express easement. No such easement exists.

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[14] *See* CITY OF BEACON ZONING CODE § 223-41.18(B)(1)(b) ("Corner locations are deemed most appropriate for such buildings…").

[15] *See* Myers v. Gemmel, 10 Barb 537, 542-543 (New York Gen. Term 1851); De Baun v. Moore, 6 N.Y. Ann. Cas. 132, 32 A.D. 397, 52 N.Y.S. 1092 (2d Dept. 1898), *aff'd* 167 N.Y. 598, 60 N.E. 1110; Kingsway Realty & Mortgage Corp. v. Kingsway Repair Corp., 228 N.Y.S. 265, 223 A.D. 281 (2d Dept. 1928); 1 N.Y. Jur.2d Adjoining Landowners § 57; Pica v. Cross County Construction Corp., 259 App.Div. 128, 18 N.Y.S.2d 470 (1st Dept. 1940); Blair v. 305-313 East 4th Street Assocs., 123 Misc.2d 612 (New York Co. 1983). The English doctrine of "ancient lights" (providing that a landowner had a legal right to light and air based on an extended period of uninterrupted use and enjoyment) has been rejected in New York State and almost universally in every United States jurisdiction. *See* Myers v. Gemmel, 10 Barb 537, 542-543 (New York Gen. Term 1851).

[16] Haber v. Paramount Ice Corp., 239 App.Div. 324, 327, 267 N.Y.S. 329, *aff'd*, 264 N.Y. 98, 190 N.E. 163; Salvin v. Northbracepeth Coal Co., 9 Law R., Ch. Appeals, 705, *cited in* Campbell v. Seaman, 63 N.Y. 568, 577; Blair v. 305-313 East 4th Street Assocs., 123 Misc.2d 612 (New York Co. 1983).

[17] Cohan v. Fleuroma, Inc., 43 A.D.2d 741, 346 N.Y.S.2d 157 (2d Dept. 1973); Wilmurt v. McGrane, 16 App.Div. 412, 418-19, 45 N.Y.S. 32 (1st Dept. 1897); Cutting v. Cutting, 86 N.Y. 41 Sickels 522 (1881); Edgarton v. Foote, 19 Wend 309 (1838); Merriam v. 352 West 42nd Street Corp., 14 A.D.2d 383, 221 N.Y.S.2d 82 (1st Dept. 1961).

Moreover, to respond to these neighbor comments, the applicant hereby submits a "Shadow Impact Study" which establishes that the requested variance, changing the rear setback from 25 feet to 10 feet does not result in any perceptible change in shadow impacts on neighboring properties. Please refer to **Exhibit C.**

The owner of 4 North Elm Street, to the rear of 226 Main Street, objected at the last meeting that this property would suffer adverse effects if the rear setback variance is granted. The Shadow Study refutes these allegations. It is also worthy of note that the owner of 4 North Elm Street has made several offer to purchase 226 Main Street, and his opposition may be motivated by the desire to own the property himself. Moreover, upon information and belief, the owner of 4 North Elm Street, as a partner in O'Donnell Construction Corporation, is the direct beneficiary of this Board's grant of a zero feet rear yard setback at 344 Main Street. It seems inappropriate to object to one's neighbor receiving a variance, after benefitting from the grant of a similar—and even greater—variance oneself.

5. **Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.**

The difficulty is not self-created, but rather arises because of the shallow configuration of a corner lot, as described above. However, even if the hardship *were* self-created, this does not alone justify denial of an area variance under N.Y. GENERAL CITY LAW § 81-b(4)(b)(v).[18]

Conclusion as to Easement 1 - rear setback variance

Based upon a consideration of the 5 factors, the overall balancing test, and the binding nature of the Board's past decisions in similar cases, the applicant has established its entitlement to this variance.

[18] *See* Matter of Daneri v. ZBA Town of Southold, 98 A.D.3d 508 (self-created nature of difficulty is not preclusive of the ability to obtain an area variance).

EASEMENT 2 -THE PARKING VARIANCE:

The applicant has also requested that the Board grant a variance of the 8 required off-street spaces for the 8 new apartments. The applicant has noted that its plan provides at least 2 and possibly 3 new parking spaces along the new frontage created by the new project, and that there are two public parking lots in close proximity to the site.

Precedent:

As noted above, Zoning Boards are obligated to treat similar cases in a similar way. They can't grant variances to some applicants, but not to other applicants in similar circumstances. The ZBA has granted parking variances to a number of Main Street projects featuring a residential component, including:

- **232 Main Street (SBL: 5954-27-867918), Preshrock Corp., Central Business ("CB") District**: On September 16, 2003, the ZBA unanimously voted 7-0 to grant a variance of 29 parking spaces, to permit zero parking spaces where 29 were required, and further to waive the fee-in-lieu of parking requirement. The applicant established that there was no space for parking because the building had been converted from original retail use to seasonal restaurant with retail sales, and the back of the property had been converted to an outdoor dining patio to maximize investment. The applicant relied on parking available in a nearby public parking lot.

- **544 Main Street (SBL: 6054-30-129788), 544 Main Street LLC, CB District:** The ZBA voted unanimously 5-0 to grant a parking variance allowing the applicant to provide 14 off-street parking spaces where 18 spaces were required, for a variance of 4 parking spaces. The applicant intended to renovate an existing building to ground floor retail/commercial and apartments above. Due to topographic (steep slope) conditions of the site, the parking area could not be extended to the rear of the parcel. There was an adjacent municipal parking lot, which was at one time a part of the 544 Main Street property. The applicant showed that it would be impossible to provide parking on its property due to topographic conditions.

- **536 Main Street (SBL: 6054-30-132779), Grzegorz Stachnik, CB District**: The ZBA unanimously voted 5-0 on February 21, 2006 to grant a variance of 3 parking spaces, to provide 5 off-street parking spaces where 8 were required. The applicant proposed to construct a new three-story building with artist live/work space on the ground floor and apartment units on the upper floors on a vacant parcel of land.

Naturally, the consideration of a parking variance is dependent on the relevant facts. The key relevant facts in this situation are that: (1) the applicant is creating 2-3 additional parking spaces by closing in open curbs on its property; (2) the proposed property is located within 800 feet of

two public parking lots, and (3) that studies have established available on-street parking in the neighborhood.

5 Factor Analysis of Requested Parking Variance:

1. **Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the area variance.**

   No undesirable change will be produced in the character of the neighborhood and no detriment to nearby properties will be created by granting the area variance, for three separate reasons. First, there is adequate street parking surrounding the Premises; the City's 2017 Comprehensive Plan Update noted that "The City of Beacon is well-served by current public and private parking facilities."[19] A 2014 parking analysis of Center City parking availability by the Dutchess County Planning Department also "suggests there is still ample parking capacity in the downtown area for future growth."[20]

   Second, the existing street parking will be supplemented by the closing of multiple curb cuts on the Premises' frontage, thereby allowing for the addition of 2 to 3 new on-street parking spaces.

   Third, there are also 2 public parking lots located within 800 feet of the property: the Pleasant Ridge Pizza lot (parking for 13 cars) and the Dutchess County Motor Vehicles lot (parking for 92 cars).[21] The existing and new street parking, coupled with the nearby public parking lots, are sufficient to meet the residential parking needs for the proposed use, and therefore no change in character to the neighborhood or detriment to nearby properties will be caused by the parking needs of the proposed Project. Moreover, the complaints by neighbors of crowded parking by tourists and shopper, as well as church attendees, are inapplicable to the proposed request, since demand for residential parking generally occurs at different hours than the commercial parking.[22]

2. **Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance.**

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[19] CITY OF BEACON, 2017 COMPREHENSIVE PLAN UPDATE at 84 (Section 6: Transportation, Parking).
[20] *Id.*; *see also* Dutchess County Department of Planning and Development, *Beacon Center City Parking Analysis* at 6 (2014).
[21] *See* CITY OF BEACON ZONING CODE § 223-41.18(F)(3), which lists criteria that the Planning Board may consider in choosing to modify the residential parking requirement of ZONING CODE § 223-41.18(F)(2). "That there is sufficient public parking available within 800 feet of the site and within the CMS or PB Districts to meet foreseeable parking needs of the proposed use and surrounding uses for the duration of the proposed use." *Id.* at § 223-41.18 (F)(3)(d).
[22] *See* Dutchess County Department of Planning and Development, *Beacon Center City Parking Analysis* at 7, 15 (2014).

There are no other viable means for the Applicant to achieve the benefit sought by the area variance. There is insufficient space on the site to construct off-street parking, while still maintaining the minimum feasible depth of the building to support a multifamily residential layout. The difficulty in providing off-street parking on this corner lot is exacerbated by the City's Zoning Code prohibition on parking within a front yard.[23] Because the Premises is a corner lot, it is treated as having two front yards.[24] Further, the CMS Zoning District regulations require that buildings within the CMS District be sited right at the streetscape, to improve the pedestrian experience.[25] Therefore, the only permitted location for off-street parking on this lot would be at the rear of the lot.[26]

But the shallow nature of the lot does not create the possibility to provide such parking. A minimum 42 ft. setback from the rear property line would be required to provide any parking at the rear of the Premises, considering that the required width/length of a parking space is 9 ft./18 ft.[27], and the required width of a drive aisle is 24 ft.[28] This would leave only approximately 23 ft. in depth for a building sited on the lot. As detailed in the analysis for the rear setback variance, the Premises is only about 57 ft. in depth. Requiring off-street parking to be sited on the lot, leaving only 23 ft. in which to construct a building, would make not only a double-loaded corridor setup impossible, [see discussion of building requirements in analysis of setback variance above, pages 5-6] but would render *any* possible building configuration unworkable and the lot effectively undevelopable.

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[23] CITY OF BEACON ZONING CODE § 223-41.18(D)(1) ("Front setback on Main Street: minimum zero, maximum 10 feet, except that a larger maximum may be allowed if the **area in front of a building has no parking spaces** and is landscaped and used in a manner that enhances the street life on Main Street by such means as pocket parks or plazas, fountains, outdoor dining areas, public art and outdoor display of items for sale on the premises. Such outdoor space shall be landscaped with plant materials as appropriate to the use, in a configuration approved by the Planning Board." [bold emphasis added]); CITY OF BEACON ZONING CODE § 223-41.18(D)(2) ("Front setback on other streets: minimum zero, maximum 25 feet. If surrounding buildings have a larger setback, the setback line may be placed in a location that harmonizes with the prevailing setbacks, **provided that there is no parking in the front yard** other than on a driveway accessing a rear garage." [bold emphasis added]); CITY OF BEACON ZONING CODE § 223-41.18(F)(1) ("All off-street parking for buildings that have Main Street frontage **shall be located behind, underneath, or to the side** of a building. If on the side, the parking area shall be located at least 40 feet from the Main Street property line…" [bold emphasis added]); *see also* CITY OF BEACON ZONING CODE § 223-41.18(D)(13).

[24] CITY OF BEACON ZONING CODE § 223-41.18(D)(3) ("Corner buildings: Corner buildings **shall be treated as having frontage on both streets and front setbacks shall apply to both**, as appropriate to the street. Corner buildings with **frontage on Main Street** shall **wrap around corners** and **maintain a consistent setback line** along the side." [bold emphasis added]).

[25] CITY OF BEACON ZONING CODE § 223-41.18(D)(1), (2); *see also* CITY OF BEACON ZONING CODE § 223-41.18(D)(13).

[26] Indeed, this is the parking scheme envisioned by the Comprehensive Plan for the CMS District. *See* City of Beacon Comprehensive Plan at 106 (2007) ("The properties between Digger Phelps Street and Teller Avenue should be encouraged to be redeveloped at greater density, with incentives (such as increased floor area ratio) for new housing construction above the first floor and **parking included behind the building**." [bold emphasis added]).

[27] CITY OF BEACON ZONING CODE § 223-26(C)(2)(a).

[28] CITY OF BEACON ZONING CODE § 223-26(C)(2)(c).

Because a building that shallow in depth is completely unworkable, parking cannot be provided on the site.

As noted in the earlier portion of this letter (see page 6), allowing the Applicant to build on the Premises and receive an economic return from its property is a legitimate "benefit" to be sought by an area variance. It is impossible to provide the required number of off-street parking spaces and still preserve the benefit sought by the Applicant; therefore, a variance from the required number of off-street parking spaces is the only means by which the Applicant can achieve the benefit sought.

3. Whether the requested area variance is substantial.

The requested variance to permit zero parking spaces where 8 spaces are required is not substantial in its effect. The substantiality of a variance cannot be judged solely by a comparison of the percentage deviation from the mandated requirements of the Zoning Code. In considering whether a variance is substantial, the ZBA shall examine the totality of the circumstances within an application.[29] Thus, the overall effect of granting the relief is the appropriate inquiry. The ZBA must consider the surrounding neighborhood and nearby lots, including the availability of on-street and off-street parking, when determining whether the application is substantial.[30]

Here, the proposed Project is not substantial in its effect. The Board must consider the Applicant's parking variance request individually on its own merits, and should not be distracted by discussions of other sections of Main Street which don't have nearby public parking lots for residential parking, by complaints about tourist parking or Sunday church parking which are irrelevant to the demand for residential parking since the demands

[29] *See* Aydelott v. Town of Bedford Zoning Bd. of Appeals, N.Y.L.J. June 25, 2003, p. 21, col. 4 (Sup. Ct. Westchester Co. 2003) ("consideration of the percentage [of lot coverage] alone, taken in a vacuum, is not an adequate indicator of the substantiality....[A] large deviation can have little or no impact depending on the circumstances of the variance application."; Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals, Misc.3d 1120(A), 873 N.Y.S.2d 512 (Table), 2007 WL 56495232007 N.Y. Slip. Op. 52571(U) ("Substantiality cannot be judged in the abstract; rather, the totality of relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one."); Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner, 56 A.D.3d 883, 886, 867 N.Y.S.2d 238, 241 (3d Dept. 2008)(although variances were substantial the ZBA properly determined area variances will not have a substantial impact on the community); *see also* Schaller v. New Paltz Zoning Bd. of Appeals, 108 A.D.3d 821, 824, 968 N.Y.S.2d 702, 705 (3d Dept. 2013) (upholding ZBA determination that an area variance).

[30] *See* Crystal Pond Homes, Inc. v. Prior, 305 A.D.2d 595 (2d Dept. 2003) (Court overturned lot area application for 12,750 square foot lot where 21,780 was required where there were a substantial amount of substandard lots in area); Gonzalez v. ZBA of Putnam Valley, 3 A.D.3d 496 (2d Dept. 2004) (denial overturned where record showed substandard lots next to subject lot and other nearby nonconforming structures similar to that sought by applicant); *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Zoning Bd. of Appeals of Town/Village of Harrison, 296 A.D.2d 460, 461-62, 745 N.Y.S.2d 76, 78, 2002 N.Y. Slip Op. 05773 (2d Dept. 2002) (even though a variance seeking a 77% increase over the permitted height was substantial, this "does not relieve [the ZBA] from engaging in the balancing test" and the application can still be granted.").

occur at different hours, or speculation about future development and future circumstances. The comments at the public hearing conflate this specific parking variance request with other issues, and other speculative future developments on Main Street. Whether future projects, on other properties, may have a substantial effect on existing parking is not an issue now before this Board. Likewise, this Board is not the forum in which to debate legislative issues concerning the CMS District's preference for increased residential density.

An essential part of the context of this application is the availability of two nearby municipal parking lots (with space for 13 cars and 92 cars, respectively) in the immediate vicinity. These lots supplement the available on-street parking. Additionally, the applicant will be creating 2-3 additional parking spaces immediately adjacent to this building. These existing parking resources are more than sufficient to serve central Main Street's parking needs.

4. **Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district**.

The proposed variance will have no adverse impacts on the physical or environmental conditions in the neighborhood or district.

The data discussed in the previous sections establishes that the proposed Project will have no adverse effect or impact on the physical or environmental conditions of the neighborhood or district. The proposed Project encourages walkability and access to public transportation, and will have a beneficial impact on the aesthetics, walkability, and economy of the neighborhood and district. It will also result in closing multiple curb cuts, allowing for the addition of 2 to 3 on-street parking spaces and thereby only truly generating a need for 5-6 off-site parking spaces.

5. **Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.**

The difficulty is not self-created, but results from the lot's shape and character as a corner lot. As discussed above, placement of the 8 required off-street parking spaces on the Premises would result in an unworkably narrow 23 ft. building envelope, rendering *any* development of the Premises infeasible. The proposed Project is in conformance with the other aspects and intent of the CMS Zoning District, and with the goals of the Comprehensive Plan, but will be impossible to achieve without obtaining the requested

parking variance. Finally, even if the hardship *were* self-created, this does not alone justify denial of an area variance under N.Y. GENERAL CITY LAW § 81-b(4)(b)(v).[31]

Conclusion with respect to Easement 2 - parking variance:

The facts clearly show that there is ample available public parking in the neighborhood of the proposed building to provide 8 residential spaces. The proposed project itself will provide 2 or 3 new spaces immediately in front of the building. Considering the overall balancing test, the 5 factors, and the precedent of past parking variances, there is no harm to the community sufficient to outweigh the benefit to the applicant from the grant of the parking variance.

Summary:

The Applicant looks forward to appearing at the Zoning Board of Appeals meeting on September 19, 2017. Should you have any questions, please call me at the office. My direct line is 914-872-1941.

The following exhibits are attached to this letter:

Exhibit A: 293-m Referral Response Letter from Dutchess County Department of Planning & Development to City of Beacon Planning Board, dated May 31, 2017;

Exhibit B: Chart, Map, and Property Cards Illustrating Comparable Lot Sizes to the Premises located within the same Block in the CMS District; and

Exhibit C: "226 Main Street Shadow Impact Study," prepared by Patrick Cleary, AICP, dated September 15, 2017.

Very truly yours,

Jennifer L. Van Tuyl

cc: Edward J. Phillips, Esq.
Eric L. Gordon, Esq.

[31] *See* Matter of Daneri v. ZBA Town of Southold, 98 A.D.3d 508 (self-created nature of difficulty is not preclusive of the ability to obtain an area variance).

Jennifer L. Gray, Esq.
Aryeh J. Siegel, AIA
Brendan McAlpine