

Section 6, Block 1, Lot(s) 36.11, 36.12 and 37.1

TOWN OF CHESTER: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

-----X
In the Matter of the Appeal of

RACHEL MANDEL

DECISION

*Seeking a Review of two Determinations made
by the Town Planning board, to wit:*

(Granting § 280-a variance)

1. *That a NYS Town Law § 280-a variance
is required. The Applicant appeals that
determination and asks that the ZBA replace
that determination with a finding that no § 280-
a variance is required; and*

2. *That for the project to proceed as
presented that an open area development
approval from the Town Board is required. The
Applicant appeals that determination and asks
the ZBA to replace that determination with a
finding that an open area development is not
required;*

and

*That if the Board determines that a § 280-a
variance or Open Area Development is required
that the Zoning Board consider her application
as one seeking a NYS Town Law Sec. § 280-a
variance.*

-----X
**DUE TO CONCERNS OF THE ZONING BOARD OF APPEALS IN RELATION TO GRANTING
VARIANCES TO BUILD HOMES ON PRIVATE ROADS, ANY PROSPECTIVE PURCHASER OF
THE PROPERTY AFFECTED BY THIS VARIANCE IS CAUTIONED TO DETERMINE WHAT
AGREEMENTS, IF ANY, EXIST FOR ROAD MAINTENANCE. THE BUILDING INSPECTOR IS
DIRECTED TO FILE THIS DECISION IN HIS/HER FILE.**

Introduction

The applicant seeks a review of two determinations made by the Town of Chester Planning board, to wit that:

1. A § 280-a variance is required. The Applicant appeals that determination and asks that the ZBA replace that determination with a Finding that no § 280-a variance is required; and
2. That for the project to proceed as presented to the Planning Board that an open area development approval from the Town Board is required. The Applicant appeals that determination and asks the ZBA to replace that determination with a finding that an open area development is not required.

The Applicant, in addition to the foregoing, has supplemented their appeal and asks that if the Board determines that a § 280-a variance or Open Area Development by the Town Board is required that the ZBA consider their application as one seeking such a variance.

The Project

The property presently consists of three (3) parcels each with an address and located at 3966 Summerville Way (NYS Rte. 94 and/or SR 94) in the SR-6 Zoning District. The properties are identified on the Town of Chester tax maps as Section 6, Block 1, Lot(s) 36.11, 36.12 and 37.1.

The Applicant has sought a three-lot subdivision from the Town Planning Board which would re-locate the lot lines between the three parcels and proposes the construction thereon of two (2) new single family residences. An existing

residence will remain on what is shown as Lot 1 on the proposed subdivision plat. The new construction would be on lots 2 and 3.

The Planning Board upon its review of the subdivision application determined that the project required either a NYS Town Law § 280-a variance or an Open Area Development to be created by the Town Board because the proposed access to the lots was by easement rather than by direct access to the municipal road serving the lots – NYS Rte. 94 aka Summerville Way. The applicant has sought from the Zoning Board a review of those two determinations and a request that the Zoning Board replace those determinations with a Finding that no § 280-a variance nor open area development is required. Alternatively, if the Zoning Board upholds the Planning Board determinations then, in that event, the Applicant requests that the ZBA consider their application as one seeking such a variance.

A public hearing was convened on February 16, 2023, notice of which was published in the Times Herald Record and mailed to adjoining property owners as required by Code. The public hearing was held over to March 16, 2023, and thereupon closed.

At the public hearing several persons spoke to their concerns that further development would cause a reduction in the flow from wells servicing their property and generalized concerns about traffic safety in the area of the project.

Jurisdiction

Prior to the instant application the Town Planning Board by letter dated October 12, 2022 advised the Town of Chester Zoning Board of Appeals ("ZBA") that the applicant (Mandel) had appeared before the Planning Board seeking a

three-lot subdivision whereby two of the proposed lots would "have no direct access to a state, county or local road" and appear to require "access through an easement".

Because a Planning Board cannot/should not approve a subdivision if it requires a 280- a variance, the "determination" made by the Planning Board that a variance is required is the type of a determination that the ZBA has jurisdiction to hear. (See, *Wiederspiel v. Leifeld*, (197 A.D.2d 781 *; 602 N.Y.S.2d 712; 1993 N.Y. App. Div. LEXIS 9850)

Law

§ 280-a(1) of New York Town Law provides:

(1) no permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan, or if there be no official map or plan, unless such street or highway is (a) an existing state, county or town highway, or (b) a street shown upon a plat approved by the planning board as provided in §§ two hundred seventy-six and two hundred seventy-seven of this article, as in effect at the time such plat was approved, or (c) a street on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats.

§ § 280-a(2) provides

(2) before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the town board or planning board, if empowered by the town board in accordance with standards and specifications approved by the town board, as adequate in respect to the public health, safety and general welfare for the special circumstances of the particular street or highway.

Alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board shall be furnished to the town by the owner. Such performance bond shall be issued by a bonding or surety company approved by the town board or by the owner with security acceptable to the town board, and shall also

be approved by such town board as to form, sufficiency and manner of execution. The term, manner of modification and method of enforcement of such bond shall be determined by the appropriate board in substantial conformity with section two hundred seventy-seven of this article.

§ § 280-a(3) provides

(3) the applicant for such a permit may appeal from the decision of the administrative officer having charge of the issue of permits to the board of appeals or other similar board, in any town which has established a board having the power to make variances or exceptions in zoning regulations for: (a) an exception if the circumstances of the case do not require the structure to be related to existing or proposed streets or highways, and/or (b) an § 280-a Variance pursuant to section two hundred sixty-seven-b of this chapter, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations. The board may in passing on such appeal make any reasonable exception and issue the permit subject to conditions that will protect any future street or highway layout. Any such decision shall be subject to review by certiorari order issued out of a special term of the supreme court in the same manner and pursuant to the same provisions as in appeals from the decisions of such board upon zoning regulations.

§ 280(4)-a provides

(4) The town board may, by resolution, establish an open development area or areas within the town, wherein permits may be issued for the erection of structures to which access is given by right of way or easement, upon such conditions and subject to such limitations as may be prescribed by general or special rule of the planning board, if one exists, or of the town board if a planning board does not exist. If a planning board exists in such town, the town board, before establishing any such open development area or areas, shall refer the matter to such planning board for its advice and shall allow such planning board a reasonable time to report.

and

§ § 280-a(5) provides that

(5) For the purposes of this section the word "access" shall mean that the plot on which such structure is proposed to be erected directly abuts on such street or highway and has sufficient frontage thereon to allow the ingress and egress of fire trucks, ambulances, police cars and other

emergency vehicles, and, a frontage of fifteen feet shall presumptively be sufficient for that purpose.

Findings of Fact

After receiving all the materials presented by the applicant, the comments from members of the public who appeared and gave testimony, the testimony of and comments of Neil Frishberg, Esq. and Keith Woodruff, Senior Project Engineer each on behalf of RACHEL MANDEL, at the public hearings, and upon the letter dated February 10, 2023 from Philip Dropkin, Esq. submitted on behalf of the applicant, all as held before the Zoning Board of Appeals, the Board makes the following findings of fact:

1. The applicant is the owner of the above described parcels.
2. The Planning Board referred the application to the Zoning Board.
3. SEQRA: By definition "Interpretations" by the ZBA are Type II actions. Though this application is not a request to "interpret" the local zoning code and is therefore not "technically" an "interpretation" it is one requesting the ZBA to determine the applicability of the NYS Town Law Sec. § 280-a to their subdivision application and that request is closely aligned with the interpretation of local zoning codes. Therefore, this application for a review of the determinations made by the Planning should be and is to be treated as a Type II action.

Further, the provisional relief requested for a § 280-a variance is an "area" variance for a single-family, two-family or three-family residence [6 NYCRR §617.5(c)(13)]. As such, the request for alternative relief is also a Type II action and the project is not subject to further review under the State Environmental Quality Review Act.

4. GML 239 Referral: This application was required to be referred to the Orange County Planning Department for review. In a letter dated 2/24/2023, the Orange County Planning Department reported that the application was a matter for local determination.

5. The applicants' proposal is set forth on a six (6) sheet set of plans entitled "Summerville Way Holdings LLC" last revised 8/23/2022 drawn by Engineering & Surveying Properties. Those plans are hereby incorporated into this decision and a set shall remain in the zoning board's file in this matter.

6. Several members of the public offered to be heard during the hearing whose comments are referred to above.

7. Inquiry was made of the applicant as to the suggestion made by the Board that a private maintenance agreement be recorded that would set forth the rights and obligation of the property owners with respect to a common driveway should the application be granted. The applicant informed the Board that such an Agreement would be a condition to any approval that might be forthcoming.

8. The Board inquired as to suitability of the proposed accessway to accommodate emergency vehicles inclusive of fire apparatus, ambulance, police and maintenance vehicles. The applicant produced a letter from the Chester Fire Department indicating no objection to the relief in as much as their equipment could navigate the road. The Engineer for the project testified that the accessway would be suitably improved such that adequate access would exist for emergency vehicles to access the premises including access for police, ambulance, and firefighting equipment and vehicles. The engineer also testified that the design and construction of the accessway would take into account such factors as the curves of the accessway, width of the access-way, any steep grades of the accessway,

the sufficiency of the drainage improvements, and the ability of the accessway to handle the anticipated current and future traffic loads.

9. Also presented was a letter dated February 8, 2023 from Ross Winglovitz, P.E. addressed to Mr. Dropkin wherein is recited the results of a traffic and speed analysis on NYS Rte. 94. The letter recites that site distance for the proposed accessway and the speed study show that NYS DOT have accepted the proposed location for the accessway.

10. After hearing the testimony at the public hearing and considering the materials received by the Board, the Board undertook a review of two determinations made by the Planning Board, to wit: that a § 280-a variance or Open Area Development is required for the project to proceed wherein access to the lots is proposed to be by easement. On this question the Board finds that the provisions of § 280-a(5) give clear guidance on the type of access that is required wherein it states that "(5) For the purposes of this section the word "access" shall mean that the plot on which such structure is proposed to be erected directly abuts on such street or highway and has sufficient frontage thereon to allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles, and, a frontage of fifteen feet shall presumptively be sufficient for that purpose." The Board finds that though Lot 2 will have access that directly abuts upon SR 94, Lot 1 and Lot 3 will not. From this provision the Board finds that the proposed access to lots 1 and 3 by way of easement is not allowed.

11. Also from the foregoing comes the statutory basis for concluding that if access is to be gotten by right of way or easement that an open development area is required. This conclusion naturally follows from the provisions of subsection 4 of § 280-a because if access by right of way or easement were allowed what

reason would there be for the State Legislature to specifically create a mechanism for access by right of way or easement through the mechanics of the Town Board creating an open development area to address that very issue?

12. Accordingly, The Board finds that the two determinations made by the Planning Board are correct and decides to uphold them.

13. As to the alternative and third issue of whether a § 280-a variance can and should be granted to allow access to SR 94 by way of easement the Board has taken into consideration the provisions of § 280-a(3) and finds that the applicant can request a variance from the requirements of 280-a(1).

14. In making its determination the Board has considered the five standards for determining whether the applicant has sustained its burden of proof as required by Town Law Section 267-b(3). Each factor was considered relevant to the decision of the board of appeals, but no single one is viewed as precluding the granting of the variance. On the Five Factors the Board has considered the contents of the letter from Mr. Dropkin and the comments from the applicant and neighbors and makes the following Findings:

(1) As to whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the § 280-a area variance the Board has heard and knows to the personal knowledge of its members that the adjacent lands to the north are comprised of multi-family dwellings in a densely populated development known as Chester Greens. The lands across the State highway and adjoining to the west are a mixed use of commercial and residential parcels and based upon the proposal to create only two (2) new single family residential dwellings that the grant of the

variance will not produce an undesirable change in the character of the neighborhood or a detriment to nearby properties.

(2) As to whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than a § 280-a area variance.

Notably, the alternative to granting the variance would be the creation of an open area development however the Town has created code provisions that dictate bulk area requirements for an open development area and the project acreage and proposed lot sizes do not meet the Town Code requirements and because those provisions are not within the zoning code, the ZBA has no jurisdiction to vary them. Accordingly there is no other available relief other than the grant of a variance.

(3) As to whether the requested § 280-a variance is substantial. This factor can be considered numerically and with respect to the impact upon the neighborhood. A numerical analysis results from a consideration by the ZBA of what impact the creation of two additional single family residential lots resulting from the grant of the variance would have upon the neighborhood and whether the Board considers that increase to be "substantial" when compared to the existing neighborhood. On this point the Board finds that the variance if granted is not substantial.

(4) As to whether the proposed § 280-a variance if granted will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

This review is not dissimilar from the aforementioned factor of "undesirable change etc." except that this review focuses upon any adverse effects or impacts

on the physical and environmental conditions in the neighborhood or district. The Applicants engineer has testified that the accessway will be suitably improved so as to avoid any stormwater damage from water drainage; noise; odors; aesthetic impacts; water quality; sewage treatment; waste water treatment; traffic; impacts on fauna and flora; and any others. Further the potential impact on the well across the street is deemed to be minimal resulting from the creation of two single family homes.

(5) As to whether the alleged difficulty was self-created the Board has determined that the difficulty experienced by the applicant is self-created in that they are charged with knowledge of the law as it existed at the time they purchased the property and notwithstanding have sought to create their proposed subdivision.

In addition to the five factors examination, the Board has addressed the provisions of Town Law § § 280-a which provide that the accessway shall be suitably improved and that adequate access shall exist for emergency vehicles to access the premises including access for police, ambulance, and fire-fighting equipment and vehicles. Also considered have been such factors as the curves of the accessway, width of the accessway, any steep grades of the accessway, the sufficiency of the drainage improvements, and the ability of the accessway to handle the anticipated current and future traffic loads. Finally, the Board has considered the future maintenance and repairs of the accessway if the variance is to be granted.

Decision

After due deliberation and consideration, and upon consideration of the foregoing, the Board hereby determines that the Planning Board was correct in its two determinations that for the project to proceed that a § 280-a variance was

required or the Town Board would have to create an Open Area Development.

Pursuant to the Applicant's request in the alternative that the Board consider its application for a § 280-a variance in rendering the determination made herein, the Board has taken into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant and grants the § 280-a variance as requested subject to satisfaction of the following conditions:

(1) That no further subdivision be allowed of the project property for the reason that any additional subdivision will overload the proposed easement and traffic entering and exiting SR 94.

(2) That only the two (2) new one-family homes as depicted on the project plans be allowed to be constructed on the entire premises proposed for subdivision for the reason that any more homes will overload the proposed easement and traffic entering and exiting SR 94 and will produce both an undesirable change in the character of the neighborhood and cause adverse effects and impacts on the physical or environmental conditions in the neighborhood.


(3) That in the event there be any future proposal for development of the project property other than that as depicted on the project plans that the § 280-a variance hereby granted shall be deemed null and void because the variance is being granted based upon the fact that only two single-family homes are proposed for using the accessway and any different use will have different and significant negative impacts upon the nearby properties and adverse environmental effects upon the neighborhood and district and will not be in keeping with the DOT approval of the proposed entrance onto SR 94.

(4) That the easement accessway shall be "suitably improved" to the

satisfaction of the town planning board prior to the issuance of any building permits for the construction of the proposed single-family structures taking into account such factors including but not limited to: adequate access for emergency vehicles to access the premises including access for police, ambulance, and firefighting equipment and vehicles. Also such factors as the curves of the accessway, width of the accessway, any steep grades of the accessway, the sufficiency of the drainage improvements, and the ability of the accessway to handle the anticipated current and future traffic loads.

(5) The Planning Board shall require the preparation and recording of a common driveway and maintenance agreement for the accessway which shall at first be satisfactory to the review of the Attorney and Engineer of the Planning Board and the provisions of which shall be noted on any Subdivision map that may be ultimately approved by the Planning Board. That agreement is to make provision for the future maintenance and repair of the easement area such as to ensure the continued drainage control and accessibility by emergency vehicles and Town highway personnel in the event the properties benefited fail to do so with the right to charge back the municipal costs thereof to the lot owners by way of tax levy.

Dated: March 16, 2023


Gregg Feigelson, Chairman
Town of Chester, ZBA


By roll call a motion to adopt the decision was voted as follows:

MEMBER	AYE	NAY	ABSTAINS	ABSENT
Gregg Feigelson – Chairman	x			
Julie Bell	x			
Dan Doellinger	x			

Walter Popailo			X	
Tom Atkins	x			
Giuseppe Cassara	x			

STATE OF NEW YORK)
) ss:
 COUNTY OF ORANGE)

I, MELISSA FOOTE, Secretary to the Zoning Board of Appeals of the Town of Chester, do hereby certify that the foregoing is a true and exact copy of a Decision maintained in the office of the Town of Chester Zoning Board of Appeals, said resulting from a vote having been taken by the Zoning Board at a meeting of said Board held on March 16, 2023.


 MELISSA FOOTE, Secretary
 Town of Chester, Zoning Board of Appeals

I, Linda Zappala, Clerk of the Town of Chester, do hereby certify that the foregoing Decision was filed in the Office of the Town Clerk on Apr 5, 2023


 Linda Zappala, Clerk
 TOWN OF CHESTER