

Memo

To: Chester Zoning Board of Appeals

From: Robert J. Dickover

Date: 1/31/2023

Re: Summerville Way Subdivision / Rachel Mandel / Interpretation-Variance / Sec. 6, Block 1, Lot(s) 36.11, 36.12 and 37.1

This second memorandum will address the application for an Interpretation (actually, Review of Determination made by Planning Board) or, in the alternative, variance dated on or about October 24, 2022.

1. The Application.

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 “have no direct access to a state, county or local road” and appear to require “access through an easement”.

The letter further provides that “accordingly, pursuant to NYS Town Code Section 280-a, the applicant has been referred to your Board for an interpretation and/or a variance as to whether:

1. The applicant needs a standard 280-a variance to be issued by the ZBA
2. The applicant needs a 280-a section F variance for access to a state, county, local road by easement which requires a Town Board Action to declare an open data area on the above properties.

The letter then ends by stating that “this matter is thus referred to your board for consideration of a variance from this requirement . . . “

Following the letter from the Planning Board, the Applicant filed an appeal with the ZBA. The appeal is not dated but from the supporting documents appears to have been made on or about October 24, 2022 and is therefore presumed to be timely filed.

The Appeal states it seeks an area variance “if necessary” and an Interpretation.

In support of the application the Applicant submits as her factual terms the exact manner in which she seeks from the ZBA: “Interpretation of Planning Board Determination that all lots meet frontage and lot width requirements of the Town of Chester Code regardless of where lot access is provided-See attached letter”

There was no “attached letter” to the application but, from the Applicant’s introductory meeting with the ZBA on January 19, 2023 we are now given to understand that the “attached letter”, in fact, refers to the Letter from the Planning Board to the ZBA. That letter makes no reference to frontage or lot width requirements.

The Application goes on to summarize the practical difficulty because of the existing zoning regulations as follows: “Failure to grant relief would limit development of two lots that conform with all aspects of zoning”; and

Describes the circumstances supporting the application as: “NYSDOT has granted concept approval for the new driveway location as it is the only safe access (see attached)”

From the information provided by the Applicant’s representative at the ZBA meeting of January 19th, we now are given to understand that the applicant’s appeal consists of the following requests and the Board will consider the application amended as follows:

The Appeal seeks a review of the two Determinations made by the 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, 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 now, in addition to the foregoing, has verbally supplemented their appeal and asks that if the Board determines that a 280-a variance or an open development area formation is required that the ZBA consider their application as one seeking a 280-a variance.

2. Jurisdiction

NYS Town Law § 267-b provides for the permitted actions of a board of appeals. At subparagraph 1 therein the provision provides that as to

Orders, requirements, decisions, interpretations, determinations - The board of

appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

I do not find in the application materials any determination by the “administrative official” i.e. the Town Building Inspector, from which the appeal is taken. Rather, I do see the “referral” letter from the Town Planning Board.

Is a referral from the Planning Board a “sufficient” determination made by “the administrative official charged with the enforcement of such ordinance” to give the ZBA jurisdiction over the appeal?

The question of whether - the access for the subdivision lots as proposed by the subdivider is sufficient for subdivision purposes - is a distinct inquiry to be made by the planning board and involves a determination to be considered by the planning board in deciding whether to approve the proposed subdivision (see, Town Law § 277).

The Supreme Court of New York, Appellate Division, Third Department in the matter of *Wiederspiel v. Leifeld*, (197 A.D.2d 781 *; 602 N.Y.S.2d 712; 1993 N.Y. App. Div. LEXIS 9850) stated that

While, concededly, in situations such as this where access for the proposed subdivision is via a right-of-way, consideration of whether the proposed subdivision lots would be buildable under Town Law § 280-a (4) is a necessary inquiry *{for the Planning Board}* for there is little use to having an approved subdivision when the lots themselves are not buildable, . . .

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 or open development area is required is the type of a determination that the ZBA has jurisdiction to hear. See, *Wiederspiel v. Leifeld*, *supra*.

From the foregoing, it is recommended to the ZBA that the request for an “*Interpretation*” be treated as aforementioned, to wit: an appeal seeking a review of the two determinations made by the Planning Board with respect to the (1) the requirement for a 280-a variance, and (2) for the need of an open area development; and, alternatively (3) as one seeking a 280-a variance.

On each of the foregoing, the ZBA has jurisdiction to hear the appeals.

3. The Property.

The property has been previously identified in my first memorandum and has now been fully presented to the ZBA at the introductory meeting.

4. SEQRA.

This application is subject to compliance with the provisions of SEQRA and the procedures therefore must be followed. The applicant has submitted a short form EAF. The Zoning Board must make a preliminary classification of the project.

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 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 treated as a Type II action.

Further, the provisional relief requested - for a 280-a variance - is an “area” variance for single family homes and therefore by definition that portion of the application is also a Type II action. See, 6 CRR-NY 617.5 for Type II actions.

At the next meeting of the Board, the ZBA should adopt a motion declaring itself lead agency, resolve to conduct and uncoordinated review, and then type the appeal as a Type II action. Upon adoption of such a motion no further environmental review will be required of the ZBA. It is noted that any subsequent action before the Planning Board will require a full environmental review and determination from that Board.

5. GML 239-m:

The application is subject to and must be referred to the Orange County Planning Department, Village of Chester, and Orange County Department of Public Works. No public hearing should be concluded until each have had at least 30 days from the date of referral to respond to the Sec. 239-m,n referrals.

6. Public Hearing:

A Public Hearing on this application is required and has been scheduled for February 16, 2023. Because the 239 referrals will not be made more than 30 days before February 16th, that Public Hearing should not be closed on February 16 but rather held open until at least the 30 day comment period has expired.

Once scheduled the applicant must produce proof of mailing the required public notice to all property owners within 300’ of the project property boundaries. Proof of that mailing should be placed in the Zoning Board file on this application.

Publication of the Public Notice is also required. The affidavit of publication of the Public Notice must also be secured and placed in the Zoning Board file on this application. In addition, the requirements for public place and web-site posting must

be followed.

7. The Applicable Law

I have prepared and submitted herewith a **third** memorandum on the provisions of Town Law 280-a and reference is made thereto in connection with the applicable law that is involved in this application.

Respectfully,

Robert J. Dickover, Esq.
Counsel to the Zoning Board