**Dickover, Donnelly & Donovan, LLP**
**By: Robert J. Dickover, Esq.**

# 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

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This **third** memorandum will address NYS Town Law § 280-a as it relates to the Appeal presented by the Applicant – Mandel.

1. The Facts:

   Proposed lots 1, 2 and 3 each have frontage in excess of 15 feet upon NYS Route 94 - locally known as Summerville Way. (Herein sometimes referred to as "SR 94")

   Access to lots 1 and 3 from SR 94 is proposed to be by way of an easement over adjoining lots. Access to Lot 1 is proposed to remain unchanged via an existing driveway that circumscribes and will cross over proposed lots 2 and 3 which are being created out of Lot 1 as the parent parcel. That driveway will become an easement over Lots 2 and 3 and will enter SR 94 at a location on Lot 3. Access to lot 2 will be directly onto SR 94. Access to lot 3 will be via an easement over lot 2 and will use the same driveway as lot 2 and the same access point onto SR 94 as that used by lot 2.

   Access from the lots 1 and 3 to SR 94 is not *direct* access onto SR 94 because the topography along the frontage of the lots with SR 94 is too steep to afford direct access and the location of any direct access does not otherwise afford sufficient sight distance for entering traffic onto SR 94. The proposed location of the easement area accessway onto SR 94 does provide sufficient sight distance and has been deemed by the NYS DOT as acceptable for the two single family homes that are proposed as part of the subdivision.

2. The Issue(s):

   In the appeal of Mandel/Summerville Way, the issues presented are:

   Whether the "access" from proposed lots 1 & 3 to SR 94 by way of an easement over adjoining lands is permissible in the absence of a NYS Town Law § 280-a variance?

   The applicant contends that access by way of an easement is permissible and no 280-a variance is necessary. The applicant's position is that access from the lots to SR 94 does not need to be directly from the lot onto SR 94 but rather can be by way of an easement across adjoining lands and then onto SR 94.

And

Whether the project can be developed as proposed with access via easement in the absence of the Town Board creating an open development area?

The applicant contends that an open development area is not necessary for the approval of its project as is proposed to the Planning Board.

And

Alternatively, if the ZBA determines that a 280-a variance or open development area creation are required then the applicant seeks a 280-a variance?

3. The Law.

The pertinent sections of statutory law are: [underlining added by the author]

§ 280-a(1) of New York Town Law which in pertinent part requires that

*(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 §s 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) further requires that

*(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) further provides that

*(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 further provides that

*(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.*

§ 280-a(5) further 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.*

4. As to the First Issue of Whether the proposed Project can be approved with access to the proposed structures being via Easement to SR 94.

The Applicant contends that access to the lots by way of easement is permissible without benefit of either a 280-a variance or creation by the Town Board of an open development area. Is the applicant correct?

As noted, § 280-a of New York Town Law requires, in part, that "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 section 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. (See, 280-a(1))

As to this first component, the applicant contends that the highway giving "access" to the lots is SR 94 - albeit by easement – and is sufficient to meet the requirements of 280-a. There is no contention that SR 94 meets the formal status required in that the highway giving access – SR 94 - is certainly "an existing state highway."

As such, the issue of whether the highway has the formal status required is not an issue. It does.

Equally certain is that the proposed easement providing the access to the structures from SR 94 is not a street or highway enjoying the qualifying formal status required by 280-a(1).

Further, the second component of 280-a (2) – that the road giving access is suitably improved - is also met in that SR 94 is adequately improved.

Equally certain, at this time, however is that the easement area is not "suitably improved to the satisfaction of the town board or planning board". Although it may, if the project continues before the Planning Board, be required by the Planning Board to be so improved, it is not at this time.

***As to "Direct Access"***

The applicant contends that "direct" access to the highway from the lots (i.e. that the access provided is along the frontage of the lots which abut SR 94) is not required by Section 280-a and that access by way of easement over adjoining lands is permissible. Is the Applicant correct?

Section 280-a does not use the words "direct access." It simply says "access" What type of access is required?

§ 280-a(4)) gives guidance on this issue wherein it provides that "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, . . . "

Further, 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."*

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 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?

This requirement for *direct access* has been reviewed by and upheld by several courts that have been called upon to address the question and has been commented upon by other writers.

Citing from NYS McKinney's Practice Commentaries by Terry Rice within Town Law § 280-a, he writes:

> Section 280-a(5) defines "access" to "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, police cars and other emergency vehicles...." Pursuant to the statute, street frontage of fifteen feet is presumptively sufficient for such purpose.
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> Despite the statutory definition of "access," considerable litigation has resulted regarding what form of access is sufficient to satisfy the requirements of the statute. Although regulations adopted by a town may prescribe particulars, no particular form of access is required by the statute. See Robinson v. Jagger, 57 Misc.2d 507, 293 N.Y.S.2d 258 (Sup. Ct. Suffolk Co. 1968); New York State Electric & Gas Corp. v. McCabe, 32 Misc.2d 898, 224 N.Y.S.2d 527 (Sup. Ct. Westchester Co. 1961); McGlasson Builders, Inc. v. Tompkins, 203 N.Y.S.2d 633 (Sup. Ct. Westchester Co. 1960). However, it is clear that actual access is required, not merely frontage on a qualifying road. See Novak v. Planning Board of the Town of LaGrange, 136 A.D.2d 610, 523 N.Y.S.2d 590 (2d Dept. 1988). In order to suffice, access may not merely be provided to a portion of a lot; improved access must be provided to the proposed structure itself. See

Annandale, Inc. v. Brienza, 1 A.D.2d 785, 148 N.Y.S.2d 17 (2d Dept. 1956); Robinson, supra; New York State Electric & Gas Corp. v. McCabe, supra; Turner v. Calgi, 12 Misc.2d 1026, 174 N.Y.S.2d 520 (Sup. Ct. Westchester Co. 1958). Access must be unobstructed. See Robinson, supra; Joseph v. Romano, 208 A.D.2d 926, 617 N.Y.S.2d 868 (2d Dept. 1994). However, the means of ingress and egress need not be exclusive. See Robinson, supra; McGlasson Builders, supra; 85 Op.Atty.Gen. 61 (1985). Most significantly, in order to satisfy the requirements of Town Law § 7-736(1), the property furnishing access must be owned in fee. An easement or right-of-way providing access does not satisfy the statute. See Wiederspiel v. Leifeld, 197 A.D.2d 781, 602 N.Y.S.2d 712 (3d Dept. 1993); New York State Electric & Gas Corp. v. McCabe, supra. The Attorney General has concluded that the requirements of Town Law § 280-a impose a continuing obligation on the owner to maintain such access roads. 82 Op.Atty.Gen. 281 (1982).

The denial of subdivision approval was sustained as a consequence of the requirements of Town Law § 280-a where the property in question fronted on the Taconic State Parkway, but did not have access thereto. See Novak v. Planning Board of the Town of LaGrange, 136 A.D.2d 610, 523 N.Y.S.2d 590 (2d Dept. 1988). A building inspector may not condition issuance of a building permit for property adjoining an improved mapped road on the installation of sidewalks and curbs. See Catalfamo v. Zirk, 22 A.D.2d 802, 254 N.Y.S.2d 186 (2d Dept. 1964), reversing, 42 Misc.2d 429, 248 N.Y.S.2d 315 (Sup. Ct. Suffolk Co. 1964).

***Conclusion***:

From all of the foregoing, the conclusion should be that access by way of easement is not allowed.

But, there may be alternate relief.

5. As to the Second Issue of Whether the proposed Project can be approved with access to SR 94 by way of Easement without an Open Development Area being Created by the Town Board?

This question has been answered by the determination made by the foregoing issue that access by way of easement is not allowed and therefore the answer is "no." The proposed access by easement is not allowed in the absence of an open area development. See, Town Law § 280-a(4).

Notably, The Town of Chester has codified its subdivision regulations wherein it describes various requriements for an open area development in the Town. Notably, the project area must be a minimum of 50 acres and the lots created must be at least 5 acres in size. The proposed project cannot meet those requirements and therefore would not qualify under the current Town Code for approval as an open area development.

But, there may be alternate relief.

6. 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 provisions of 280-a(3) provide that

*(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 high-way 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.*

From the foregoing comes the conclusion that the applicant can request a variance from the requirements of 280-a. *See*, Mastromonaco v. Bartels, 16 A.D.2d 676, 227 N.Y.S.2d 74 (2d Dept. 1962); DeLoe v. Payne, 49 A.D.2d 572, 371 N.Y.S.2d 22 (2d Dept.), appeal dismissed, 38 N.Y.2d 822, 382 N.Y.S.2d 44, 345 N.E.2d 587 (1975). Based upon these and other decisions granting variances from local zoning regulations permitting various methods of access, the Attorney General has opined that "[a] number of courts have construed this provision liberally." 82 Op.Atty.Gen. 281 (1982); see also Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 386 N.Y.S.2d 681, 353 N.E.2d 594 (1976); Spano v. Baldwin, 214 N.Y.S.2d 780 (Sup. Ct. Nassau Co. 1961).

Quoting again from Rice, he has written that

> On the other hand, if a road is clearly inadequate to ensure safe access to a structure, the denial of a variance will be sustained. For example, in Lund v. Town Board of the Town of Philipstown, 162 A.D.2d 798, 557 N.Y.S.2d 712 (3d Dept. 1990), the denial of a variance for a private road which did not comply with the town's regulations for access roads was sustained. The proposed private road was only partially paved, possessed sharp curves, steep grades and insufficient drainage facilities and was too narrow. The court applied the area variance criteria of Friendly Ice Cream v. Barrett, 106 A.D.2d 748, 483 N.Y.S.2d 782 (3d Dept. 1984), an analysis which is similar to the subsequently adopted statutory considerations for area variances, and concluded that the deficiencies were substantial, that granting relief would exacerbate the provision of emergency services and existing drainage problems and that the applicant had failed to demonstrate the lack of feasible alternatives, such as the posting of a bond

In this case the variance being requested is that access be (1) allowed by easement. In the review and determination of that request it is incumbent upon the ZBA to determine the extent to which such an easement area shall be "suitably Improved."

An application for a 280-a variance is considered as and is to be reviewed by the ZBA under the criteria for area variances.

In order to receive an approval for a 280-a variance, the criteria that the zoning board of appeals shall take into consideration is the benefit to the applicant if the requested variances are granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall consider and the applicant must demonstrate that the proposal meets the criteria set forth in the five factor test.

<u>The Law for Area Variances – The *Five (5) Factors Test*.</u>

In making its determination the Board must determine:

(1) 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.

In order to make this analysis the Board should hear from the applicant as to what is the character of the existing neighborhood and nearby properties in particular and what, if any, detriment might be imposed upon that neighborhood or nearby properties if the variance is granted. A mere conclusion that "none" will not suffice. Testimony and proof should be presented as to what the current neighborhood is like and the same for the nearby properties.

(2) 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, there is an alternative to the grant of a variance which is that of requesting from the Town Board the creation of an open development area. However, as earlier noted 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. The Town Board may however.

(3) 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.

(4) 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. Again, a mere conclusory statement that there will be "none" is not sufficient. The applicant should present proof/testimony as to what effects a granted variance will have on the physical and environmental conditions in the neighborhood. Appropriate proof would consist of comment on water drainage; noise; odors; aesthetic impacts; water quality; sewage treatment; waste water treatment; traffic; impacts on fauna and flora; and any others. Reference to the short form EAF may be helpful in this part of the review.

(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.

As to this factor, it is respectfully submitted 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 must address the provisions of Town Law § 280-a which provide that the accessway shall be suitably improved and that adequate access exists for emergency vehicles to access the premises including access for police, ambulance, and firefighting equipment and vehicles. Also to be considered are 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 proposal for the future maintenance and repairs of the accessway should be considered.

If the board of appeals decides to grant the variance it shall grant the minimum variance that it deems necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Imposition of conditions. The board of appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the zoning local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

In connection with this project it is suggested that if a 280-a variance is to be granted, that the Board consider the following conditions to the grant:

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) 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 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.

Respectfully,

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