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PLANNING BOARD AND ZONING BOARD OF APPEALS VILLAGE OF WEST HAVERSTRAW

SUPPLEMENTAL NARRATIVE SUMMARY

November 23, 2020

BRB GARNERVILLE, LLC
170 WEST RAILROAD AVENUE
Tax Lot 20.18-3-48

This narrative supplements the original narrative dated October 26, 2020, submitted herein. The project has changed, and may require an additional variance as a result of the change.

There is an existing fence running generally parallel to the northern lot line of the subject site. At its deepest extent, the fence is approximately 17 feet from the lot line. The original plan removed the fence, and placed the building ten feet from the lot line.

It is not clear who owns the fence, or whether the northerly adjoiner would, or could, claim any right to the land between the fence and the northern lot line (the “encroachment area”, for lack of a better term).

In order to avoid the issue at this time, and without ceding any claims or rights, the applicant has relocated the proposed building so as not to interfere with the existing fence.

The new building has a trapezoidal shape. The northern line of the building is parallel to the northern lot line, and touches the fence at the building’s northeasterly corner. The eastern line of the building runs along the boundary of the Orange and Rockland Utilities, Inc., transmission easement.

Relocating the building will allow the fence to remain, and will also increase the depth of the landscape screening between the proposed use and the northerly adjoiner.

A result of this relocation is to shift the driveway and parking area a little closer to West Railroad Avenue. There will still be 5 to 8.9 feet of planting area along the road, as shown on the updated landscaping plan submitted by the applicant (Sheet C-10, last rev. 11-20-2020).

Pursuant to consultations had with the Village Attorney, the applicant has also amended its application to the Zoning Board of Appeals to add an additional, conditional variance relating to the fence line. If, in the future, the northerly adjoiner makes a successful claim to title to the encroachment area, then the proposed building would be non-complying as to that setback (designated as a side setback). The Zoning Code requires an 8 foot side setback. The proposed site plan shows the building as 17.8 feet from the deed lot line, but 0 feet from the fence.

The applicant believes that this additional variance request meets the balancing test of Village Law § 7-712-b.3(b) for the following reasons:

(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 area variance”:

The variance may never be needed. It is sought only in the event that the northerly adjoiner ever successfully litigates a claim to the encroachment area. Such claims are difficult to prove under New York Real Property Actions and Proceedings Law §§ 501 *et seq.*, especially under these circumstances.

The 2008 amendments to the RPAPL add the requirement that the claimant act under a “claim of right”. A “claim of right” means, “a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be.”¹ No longer may a potential adverse possessor assert squatter’s rights. He or she must have a basis for the claim.

Further, while claims of adverse possession continue to require that possession be hostile, and without the permission of the property owner, the 2008 amendment specifically provides: “Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, *fences*, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse [emphasis supplied].”²

¹ RPAPL § 501.3.

² RPAPL § 543.1.

Thus, as here, the mere maintenance of a fence without permission, even for the requisite period of years, is not sufficient to establish a claim of adverse possession over the area enclosed by the fence.

In the unlikely event that a court of final jurisdiction should find in favor of an adverse possessor for the encroachment area, the impact on the neighborhood would be negligible. The applicant has no plans to remove any of the existing vegetation, and the proposed site plan does not allow such removal. The northern neighbor has thus far shown no inclination to do so, either. If, after obtaining rights, the northern neighbor decides to remove any vegetation, then he or she would be creating his or her own difficulties and impacts.

(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 has already mitigated the impact of the fence location by relocating its proposed building. It could remove the fence and assert its rights to the encroachment area at the present time, but doing so would delay the project and cause unnecessary tension with its neighbor. The proposed conditional variance maintains the current *status quo*.

(3) “whether the requested area variance is substantial”:

The side setback variance, if needed, would still maintain the landscape screening between the two properties. It is not substantial.

(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 maintains the separation distance between the commercial and residential uses.

(5) “whether the alleged difficulty was self-created”:

The difficulty results from the desire of the applicant to avoid creating an issue with respect to an existing fence. The variance will be needed if, and only if, the northerly adjoiner successfully litigates a claim to adverse possession of the encroachment area.

Relief requested

Accordingly, the applicant requests the following relief:

- Site plan approval for a convenience store and gasoline filling station;
- Special permit for a gasoline filling station;
- Variance:

<u>Dimension</u>	<u>Required</u>	<u>Proposed</u>
Distance, intersection to curb cut	100	48.4 (Central Hwy)
Side setback (conditional)	8	0

Dated: November 23, 2020
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