

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS,
EDGEMONT COMMUNITY COUNCIL, DR.
KATHERINE GALARZA, DR. LENORE S. KATKIN,
JENNIFER YOUNG, DR. MARC RICHMOND, SUNIL
K. SHUKLA, DR. ARTHUR BERMAN, and AMBU
PATEL

Petitioners,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF
GREENBURGH; FORMATION-SHELBOURNE SENIOR
LIVING SERVICES, LLC., and ALFRED H. KRAUTTER

Respondents.

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Petitioners Council of Greenburgh Civic Associations, Edgemont Community Council,
Dr. Katherine Galarza, Dr. Lenore S. Katkin, Jennifer Young, Dr. Marc Richmond, Sunil K.
Shukla, Dr. Arthur Berman, and Ambu Patel (together, "Petitioners") by and through their
attorneys, Bernstein & Associates, PLLC, as and for their Verified Petition, allege as follows:

NATURE OF THE PROCEEDING

1. This petition, brought under Article 78 of the Civil Practice Law and Rules, Town Law § 267-c and Greenburgh Town Code § 285-10(A)(2)(4)(f), seeks an order vacating and reversing the erroneous and unlawful 4-3 decision by respondent Zoning Board of Appeals of the Town of Greenburgh (the "ZBA") to grant a 3,000% variance to allow an assisted living facility to be built on a site that (1) is more than a mile from where such use was legislatively mandated under the Town's Zoning Ordinance, and

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IAS PART

Justice Susan Cacace

**AMENDED VERIFIED
PETITION**

(2) does not have direct and non-circuitous access to state or county roads that the Zoning Ordinance requires. The ZBA's actions amount to an improper amendment to the Zoning Ordinance or a waiver of its requirements, neither of which is within the ZBA's authority.

2. Under the Zoning Ordinance, assisted living facilities were not permitted in the Town's one family residential zoning districts at all, except by special use permit and subject to certain specific requirements. First and foremost, to allow safe access by emergency vehicles to and from such facilities, that use was to be permitted (1) only for parcels that are no more than 200 feet from access to a state or county right-of-way, excluding parkways and interstates, and (2) only where such access to a state or county right-of-way was also by means of a direct and non-circuitous route. When it enacted these requirements, the Town stated that such facilities would not be permitted on any parcels beyond that 200-foot perimeter, and without the appropriate access to state or county rights-of-way, without a specific legislative finding by the Town Board that such use is "appropriate and harmonious with the surrounding area." And before it enacted these restrictions, the Town Board studied the map of the entire unincorporated area of the Town to ensure that even with them, there would still be a sufficient number of parcels that would satisfy these requirements.
3. Despite those express legislative mandates, the ZBA has granted a purported "variance" that would allow an assisted living facility on a parcel that is as far away from a state or county right-of-way as it is physically possible to be within the fire district that has exclusive responsibility for responding to medical emergencies at that site — a distance of over 6000 feet. To make matters worse, the site can only access

that state or county right of way through a long, steep, winding road with multiple hairpin turns and S-curves that the ZBA itself described as “severe” – a route that is “circuitous” beyond question.

4. Although styled as a “variance,” the ZBA’s action affects not just the parcel in question, but every parcel in the vicinity of the mile-long road that would now be burdened by emergency vehicle traffic in violation of the ordinance. It also sets a precedent that would allow assisted living facilities to be located anywhere in any one family residential zoning district in the 19-square mile area of unincorporated Greenburgh, without regard to the legislatively mandated location restrictions that were specifically imposed to allow safe access to and from such facilities by emergency vehicles, and to prevent additional or excessive traffic everywhere else in such residential zoning districts. The “variance” thus granted by the ZBA constitutes either a waiver or a de facto amendment to the ordinance, neither of which the ZBA has the power to enact and which therefore must fail as a matter of law.
5. The ZBA approved such use without any legislative finding by the Town Board that such use beyond the legislatively mandated 200-foot perimeter is “appropriate and harmonious with the surrounding area,” and did so knowing that (1) in the past seven years there had been at least eight reported accidents near the proposed site, (2) there would be an estimated 100-115 emergency medical calls there per year, (3) all such calls would in the first instance be responded to by the Greenville Fire District, which would be using firetrucks to respond to all medical emergencies at that location; (4) Fire District personnel responding to medical emergencies at that site would only be able to get there by traveling at high rates of speed using sirens and flashing lights

through a residential neighborhood with hundreds of private homes, and (5) the Fire District, which is the only “interested” agency that would be directly impacted by an assisted living facility at that location was so concerned about safety that it asked the ZBA to require the applicant to conduct an independent study to assess the financial and operational impacts of having an assisted living facility at that particular location, which the ZBA refused to do.

6. Even though the stated purpose of the use restriction was to ensure safe access by emergency vehicles to and from such facilities, the ZBA waived the very restriction enacted to protect that safe passage, without any finding at all that emergency vehicles would have “safe access” to and from the proposed facility at that location. What is more, in granting these variances, the ZBA faulted the Fire District for not conducting a study of its own in that regard -- a rationale that turns the variance process on its head by requiring a public safety agency to bear the costs of a private developer’s request for special relief.
7. In short, the ZBA’s actions in granting these variances violated state law in numerous material respects. The ZBA is an administrative body which as a matter of law cannot grant variances that disregard legislative mandates and effectively amend the ordinance. Nor can the ZBA, when presented with an application for a special use permit, grant variances permitting a use on a parcel where that use is otherwise not permitted. And even if such variances here were “area variances,” and they are not, the ZBA failed to satisfy the relevant legal requirements for granting such variances. The ZBA did not properly take into account the detriment to the health, safety, and welfare of the neighborhood or community that might result from granting variances

from legislative requirements that were imposed to protect the safety of emergency vehicles getting to and from assisted living facilities. The ZBA did not even address the requirement of a direct and non-circuitous route to a state or county right of way. Nor did the ZBA recognize that granting a 3,000% variance would be so substantial and precedent-setting that it would eliminate these legislative mandates altogether, and allow assisted living facilities in all parts of all single family residential zoning districts without regard to the Town Board's legislative mandate limiting the location of such facilities to limited areas within such zoning districts that it believed would provide safe access for emergency vehicles, while at the same time not otherwise burdening residential neighborhoods with additional or excess traffic. Accordingly, the ZBA's action cannot stand.

THE PARTIES

8. Petitioner Council of Greenburgh Civic Associations ("CGCA") is a nonpartisan umbrella organization consisting of residents representing civic associations throughout the unincorporated areas of the Town of Greenburgh. The CGCA was founded in 1955 to provide information and to advance the common interests of member civic groups in important Town affairs. The CGCA meets regularly once a month to address matters pertaining to the Town, its meetings are open to the public, minutes of its meetings are published and publicly available and its duly-elected officers regularly speak on behalf of the CGCA at meetings of the Town Board, as well as the Planning Board and the ZBA.
9. Petitioner Edgemont Community Council ("ECC") is a nonpartisan civic association consisting of residents of the Edgemont section of the unincorporated area of

Greenburgh. The Edgemont section consists of a two and a half square mile area in the southern most portion of the Town; included within its borders is the Edgemont School District and the Greenville Fire District, both of which are local municipal entities. The ECC was organized in 1947 to “determine community opinion on civic matters, coordinate community action thereon, and to plan and promote the general welfare of the Edgemont Community.” The ECC meets once a month, its meetings are open to the public, minutes of its meetings are published and publicly available, and its duly-elected officers regularly speak on behalf of the ECC at meetings of the Town Board, as well as the Planning Board and the ZBA.

10. Petitioner Dr. Katherine Galarza is a citizen of the State of New York and the town of Greenburgh, having a residence at 99 New Sprain Road, Scarsdale, New York 10583, which is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr. Galarza is a medical doctor.
11. Petitioner Dr. Lenore S. Katkin is a citizen of the State of New York and the Town of Greenburgh, having a residence at 15 Deer Hill Lane, Scarsdale, New York 10583, which is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr. Katkin is a medical doctor.
12. Petitioner Jennifer Young is a citizen of the State of New York and the Town of Greenburgh, having a residence at 72 Underhill Road, Scarsdale, New York 10583, which is in the vicinity of the proposed project along Underhill Road, and is situated in the Edgemont School District and Greenville Fire District.
13. Petitioner Dr. Marc Richmond is a citizen of the State of New York and the Town of Greenburgh, having a residence at 16 Paradise Drive, Scarsdale, New York 10583,

- which is in the vicinity of the proposed project along Underhill Road, and is situated in the Edgemont School District and Greenville Fire District. Dr. Richmond is a medical doctor.
14. Petitioner Sunil K. Shukla is a citizen of the State of New York and the Town of Greenburgh, having a residence at 109 New Sprain Road, Scarsdale, New York 10583, which property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District.
15. Petitioner Dr. Arthur Berman is a citizen of the State of New York and the Town of Greenburgh, having a residence at 10 Deer Hill Lane, Scarsdale, New York 10583, which property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District. Dr. Berman is a medical doctor.
16. Petitioner Ambu Patel is a citizen of the State of New York and the Town of Greenburgh, having a residence at 61 Sprain Road, Scarsdale, New York, which property is in the vicinity of the proposed project, and is situated in the Ardsley School District and Hartsdale Fire District.
17. Upon information and belief, Respondent ZBA is the duly appointed Zoning Board of Appeals of the Town of Greenburgh, a municipality in the State of New York, and is duly authorized to hear and determine applications for variances pursuant to the applicable provisions of the Town Law of the State of New York and Chapter 285, Zoning, of the Town Code of the Town of Greenburgh, New York (the “Zoning Code”). The ZBA is comprised of Acting Chairperson Eve Bunting Smith, and members Louis J. Crichlow, Kristi Knecht, William Losapio, Daniel Martin, Lawrence Doyle, Rohan Harrison, and William Bland (alternate).

18. The ZBA is named herein in its official capacity only and pursuant to CPLR § 1023, is designated only by its official title.
19. Upon information and belief, Respondent Formation-Shelbourne Senior Living Services, Inc. (“Shelbourne”) is and was, at all times relevant hereto, a limited liability company duly formed under the laws of the State of Delaware. Shelbourne has entered into a contract to purchase real property located at 448 Underhill Road, Scarsdale, New York 10583, in the Town of Greenburgh, which is designated on the Tax Map of the Town as Parcel ID: 8.330-242-9 (the “Property”).
20. Upon information and belief, Respondent Alfred H. Krautter is and was, at all times relevant hereto, an individual residing in the County of Westchester, State of New York, and the owner and contract vendor of the Property.

JURISDICTION AND VENUE

21. This proceeding is commenced pursuant to CPLR Article 78, as provided by New York State Town Law § 267-c, and Respondent Shelbourne is a necessary party hereto.
22. This Court has subject matter jurisdiction, and may exercise personal jurisdiction over the respondents in this matter.
23. The decision at issue was rendered by resolution of the ZBA at a meeting held on June 22, 2017. The written certificate of decision, containing a copy of the ZBA’s resolution and its findings, was filed with the Office of the Town Clerk, on July 13, 2017. A copy of the decision is attached hereto as Exhibit A.
24. This proceeding was commenced within 30 days of the date that the Certificate of Decision was filed in the Office of the Town Clerk and is, therefore, timely.

25. Pursuant to CPLR Section 504(2) and 506(b), venue is proper in this Court. The Town is situated, the determination complained of was made, and any material events took place, in the County of Westchester, which is situated within the Ninth Judicial District.

FACTUAL AND PROCEDURAL BACKGROUND

The Assisted Living Facility Zoning Ordinance

26. Assisted living facilities offer a housing alternative for older adults who may need help with dressing, bathing, eating, and toileting, but do not require the intensive medical and nursing care provided in nursing homes. However, their residents frequently require emergency medical attention and, unless such facilities maintain a staff of paramedics with access to a fleet of private ambulances, and most do not, they must rely instead on local municipalities to respond to medical emergencies at local taxpayer expense.
27. On February 13, 2013, the Town of Greenburgh amended its Zoning Ordinance to allow for the construction of assisted living facilities. Such facilities were to be a permitted use in the Town's one family residential zoning districts, but to allow emergency vehicles to get safely to and from such facilities, and to prevent additional or excess traffic in residential neighborhoods, these facilities were to be located only within 200 feet of access to a state or county right-of-way, other than parkways and interstates, and only if such access was direct, or via a side street, and not by a circuitous route. A copy of the Town's Zoning Ordinance as it pertains to assisted living facilities is attached hereto as Exhibit B.

28. Specifically, in SEQRA findings adopted by the Town Board on January 9, 2013, the Town stated that “[t]he inclusion of the proximity of potential sites to State or County Roads other than Parkways and Interstate Highways, into the criteria, *seeks to limit additional or excessive traffic within established residential neighborhoods, while insuring safe emergency and other vehicular and pedestrian access.*” (Emphasis added).
29. Mindful of the Town’s concern for the health, safety and welfare of the aging population that would be living in such facilities, the Town further stated that a requirement of this type will “increase the efficiency for access to and from the facility by public and private transportation, as well as emergency services.” A copy of the Town’s SEQRA findings referred to herein is attached hereto as Exhibit C.
30. As part of its SEQRA findings, Town staff produced a map that showed all properties with a minimum four (4) acres “that are within 200 ft. of and have access to (direct or via side street) a State or County Road (other than Parkways and Interstate Highways) that have the potential to allow for assisted living facilities in the unincorporated portion of the Town of Greenburgh.” The findings further state that “[t]his map was used by the Town Board to identify where other assisted living facilities might be entertained in the future and was analyzed and discussed at length by the Town Board in its decision on the special permit legislation.” The map showed no potential assisted living facilities in any areas of the Town beyond 200 feet of access to any state or county right-of-way, not including parkways or interstates. Hence, the map showed that no applications for potential assisted living facilities were to be “entertained in the future” if they were located more than 200 feet from access to

such state or county rights-of-way. A copy of the map adopted as part of the Town's SEQRA findings is attached hereto as Exhibit D.

31. In making the representation that under its Zoning Ordinance, no potential assisted living facilities would be “entertained in the future” in any location where such access was beyond 200 feet, the Town Board acknowledged the possibility that developers might assemble different parcels totaling 4 acres or more. But the Town Board stated in its SEQRA findings that the potential for assisted living facilities would still be limited to the 200-foot perimeter because that was the only area in such districts that the board was expressly zoning for that use. Thus, the Town Board stated that any area beyond that perimeter would require a finding *by the Town Board*, after compliance with the SEQRA process, that “such use of such parcel is appropriate and harmonious with the surrounding area.” Accordingly, the Town Board found that “no assisted living facility could be developed under these proposed amendments without: i) satisfying the applicable zoning bulk criteria; ii) review and recommendation by the Planning Board; and iii) issuance of a Special Permit *by the Town Board* only after compliance with the SEQRA process *and finding that such use of such parcel(s) is appropriate and harmonious with the surrounding area.*” (Emphasis added).
32. In allowing assisted living facilities as a permitted use within the Town, the Town Board specifically amended Section 285-10(A)(4) of its Zoning Ordinance, which lists for its residential zoning districts six other “uses under special permit by the Town Board,” such as “agency group homes,” “utility structures,” “convalescent homes, rest homes, nursing homes, and other state-licensed residential health care facilities,” “hospitals” and “day care centers,” and “continuing care retirement

communities,” by adding a new subsection (f), entitled, “assisted living facilities.”

That subsection then listed 15 individual requirements. Most of these requirements pertain to lot and bulk specifications, including minimum lot size, number of beds per acre, distances from street and lot lines, maximum building height and length, lot widths, floor area ratios, and maximum coverages for principal buildings, accessory buildings, and impervious surfaces. However, subsection 14 therein restricts where in the Town’s one family residential zoning districts assisted living facilities may be located. Specifically, subsection 14 states that, “[t]he site must be within 200 feet of, and have access to, a state or county right-of-way, other than parkways and interstate highways. Such access must be direct or via a side street and shall not be accessed by a circuitous route.” In other words, if the site is not with 200 feet of access to a state or county right-of-way or even if it is, but such access is not direct or is accessed by a circuitous route, its use as an assisted living facility is prohibited. The Town’s special use permit for assisted living facilities is the only special use permit in the Town’s entire Zoning Ordinance with respect to any of its commercial or residential zoning districts to include this sort of requirement.

33. There are no provisions in the Zoning Ordinance, as amended, that would allow the Town Board to waive or otherwise modify any of these requirements for assisted living facilities; nor are there any provisions authorizing the ZBA to waive or otherwise modify any of these requirements.

34. However, Town Law § 274-b, entitled “Approval of special use permits,” states that “where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of

appeals *for an area variance* pursuant to section to two hundred sixty-seven-b of this article.” (emphasis added).

35. Under Town Law § 267-b, zoning boards are authorized to grant two types of variances, i.e., “use” variances and “area” variances. Hence, the legislative authorization granted to zoning boards under Town Law § 274-b to issue only “area variances” for special use permits was specifically intended to bar such boards from issuing “use variances” for special use permits, and allowing instead only variances that meet the statutory definition of an “area variance.”
36. Under Town Law § 267(1), a “use variance” is defined to mean “the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations,” while an “area variance” involves authorization “for the use of land in a manner which is not allowed by the dimensional or physical requirements of the application zoning regulations.” Use of land in a manner “not allowed by the dimensional or physical requirements of the applicable zoning regulations,” generally refers to dimensional or physical “lot” and “bulk” requirements, such as minimum lot size, minimum setbacks, maximum building height and length, maximum floor area ratios, parking requirements, as well as provisions mandating distances between similar uses and in the case of certain commercial uses, their distance from residential zoning districts.
37. Here, however, to permit safe access by emergency vehicles to and from an assisted living facility, any use of land for an assisted living facility where the site is not within 200 feet of access to a state or county right-of-way, excluding parkways and interstates, is not a use that is allowed under the Town’s Zoning Ordinance. Indeed,

when the Town adopted the Zoning Ordinance amendment permitting assisted living facilities in residential zoning districts, it expressly stated that any use of land for an assisted living facility which is not within 200 feet of access to a state or county road, and where such access is not direct or via a circuitous route, would not be permitted without a separate finding by the Town Board that such use of such parcels is “appropriate and harmonious with the surrounding area.” Accordingly, a use variance to permit such use of such parcels may not legally be granted by the ZBA. *See Dost v. Chamberlain-Hellman*, 236 A.D.2d 471, 472 (2d Dep’t 1997) (denying special permit where “petitioners’ plans for their proposed use of the premises violated provisions of the applicable zoning ordinances”).

Shelbourne Seeks a “Variance” to Allow an Assisted Living Facility Where That Use is Prohibited

38. On or around February 19, 2015, Formation-Shelbourne Senior Living Services, LLC (“Shelbourne”) filed an application with the Town Board of the Town of Greenburgh (the “Town Board”) for a special permit under Town Code Section 285-10(A) to develop an 80-unit, four story, assisted living facility at a 3.79 acre site in the Greenville Fire District at the intersection of two town roads, Underhill Road and Sprain Road, which are more than 6,000 feet from the nearest state or county right-of-way – thirty times the maximum distance permitted under the ordinance. A copy of that application is attached hereto as Exhibit E.
39. The property at issue is in an R-30 One Family Residence District and is designated on the Town Tax Map as Parcel ID: 8.330-242-9.

40. Rather than reject the application outright as an impermissible use, on or about March 23, 2015, the Building Inspector sent a memorandum to the Town's Commissioner of Community Development and Conservation stating that Shelbourne's "special permit request requires a variance from § 285-10(A)(4)(f)[14] which restricts the site to be within 200 feet of, and have access to a state or county right-of-way, other than parkways and interstate highways." The Building Inspector further stated that "[s]uch access must be direct or via a side street and shall not be accessed by a circuitous route." A copy of that memorandum is attached as Exhibit F.
41. The Town Board likewise should have rejected the application as an impermissible use, but did not do so. Instead, on or about May 13, 2015, pursuant to Section 617.6(a)(1) of the regulations of the New York State Environmental Quality Review Act ("SEQRA"), the Greenburgh Town Board declared its intent to be "lead agency" for the review of Shelbourne's special permit application and all related actions under SEQRA.
42. On May 20, 2015, Shelbourne submitted an application for a variance from Section 285-10(A)(4)(f)[14] of the Zoning Ordinance to establish an assisted living facility at 448 Underhill Road, on a 3.79 acre property, more than 200 feet from a state or county right-of-way.
43. On or about June 11, 2015, the ZBA placed on its agenda for June 18, 2015 a request by Shelbourne for a variance from Section 285-10(A)(4)(f)[14] of the Zoning Ordinance to "allow a structure to be more than 200 ft. from a state or county right-of-way, in order to obtain a Special Permit from the Town Board to permit an assisted living facility." The statement in the agenda that Shelbourne's request was to "allow

a structure to be more than 200 ft. from a state or county right-of-way” was intended to convey the false and misleading impression that Shelbourne was merely seeking an area variance. In fact, the Zoning Ordinance expressly prohibited the use of any parcel of land in a residential zoning district for an assisted living facility unless it was within 200 feet of access to a state or county right-of-way.

44. On or about June 16, 2015, Shelbourne asked the Town’s Building Inspector to reconsider whether a variance was required. Reconsideration was based on a claim that a 0.21 acre sliver of land bordering the applicant’s property along Underhill Road, a town road, was a “state owned right of way” because it had been acquired in 1967 by a division of the New York State Department of Transportation then known as the “Bureau of Rights of Way.” The property was acquired in connection with the nearby construction of the Sprain Brook Parkway. The sliver of state-owned property along Underhill Road was never used as a state right-of-way for vehicular traffic.
45. On or about June 17, 2015, while Shelbourne’s request to the Building Inspector for a ruling that no variance was required was pending, but before anyone other than Shelbourne and the Building Inspector knew any such request had been made, the Edgemont Community Council (“ECC”) notified the ZBA that the Shelbourne site is “not within the area of a residential district where an assisted living facility is a permitted use” and that, accordingly, “[a]pplicant is seeking a ‘use variance’” within the meaning of Town Law § 267 and not an “area variance.” The ECC stated that the “crucial distinction between an area variance and a use variance is that an area variance permits deviation from strict compliance with the zoning ordinance’s requirements for, as an example, the physical characteristics of premises, so long as

- the purpose for which the premises are intended to be used is permitted by the ordinance,” citing *Matter of Overhill Bldg. Co. v. Delaney*, 28 N.Y. 2d 449, 453-54 (1971) and *Croissant v Zoning Board of Appeals of the Town of Woodstock, Ulster County*, 83 A.D.2d 673, 674 (3d Dep’t 1981).
46. At its meeting on June 18, 2015, the ZBA noted the applicant’s request to the Building Inspector and took no action on the application.
47. On or about July 13, 2015, the Building Inspector determined that Shelbourne “needs no variance as the applicant and the NYSDOT provided sufficient documentation that the site is within 200 feet of a NY State right-of-way.”
48. At its meeting on July 16, 2015, the ZBA reported that Shelbourne’s application had been withdrawn because the Building Inspector had determined it was no longer needed.
49. On or about August 12, 2015, the ECC, the Council of Greenburgh Civic Associations, and 17 nearby homeowners filed an appeal with the ZBA of the Building Inspector’s determination that no variance was required. A copy of that appeal is attached hereto as Exhibit G.
50. On or about October 9, 2015, Shelbourne submitted a written response to the appeal.
51. On October 10, 2015, November 18, 2015, December 17, 2015, and January 28, 2016, the ZBA heard testimony in respect of the appeal of the Building Inspector’s decision.
52. On March 17, 2016, the ZBA closed the appeal for decision only and directed that a decision be drafted reversing the Building Inspector’s determination that no variance was required.

53. Without waiting for a final ruling from the ZBA, on April 5, 2016, and without public disclosure, Shelbourne reapplied for the variance from the 200 foot requirement as well as a variance from the minimum acreage requirement. In its application, Shelbourne conceded that “[f]rom a pure numerical analysis, the closest state road is Central Park Avenue (NYS Rt. 100)” and that “Central Park Avenue is approximately \pm 4,500 feet away in a straight line from the site (\pm 6,025 feet if driving).” In other words, the variance requested is nearly 3,000%. A copy of Shelbourne’s renewed application for variances is attached as Exhibit H.

The Town Board Issues, and then Rescinds, a “Negative Declaration” under SEQRA

54. On April 8, 2016, three days after renewing its request for variances from the ZBA, Shelbourne requested that the Town Board, as lead agency, complete the SEQRA review process for Shelbourne’s application and issue a negative declaration for the project. Shelbourne intended to use the Town Board’s “negative declaration” to support its request to the ZBA for variances it was seeking.

55. On April 18, 2016, the Town’s Building Inspector confirmed that the “site does not meet the distance requirements” under Town’s zoning ordinance because “Central Avenue is 6,025 linear feet from the site via Underhill Road.” A copy of the building inspector’s memo to that effect is attached as Exhibit I.

56. On April 21, 2016, the ZBA voted to reverse the Building Inspector’s decision that no variance was required. The vote was unanimous. The board’s decision was filed with the Town Clerk on May 12, 2016. A copy of that decision is attached as Exhibit J.

57. On May 11, 2016, the Town Board, as lead agency, held a public hearing to “consider the SEQRA process” in respect of Shelbourne’s request for a negative declaration for the project. Several residents raised concerns at that hearing about the impact the project would have on the Greenville Fire District, both in terms of fire safety and its ability to respond to medical emergencies. Under the terms of an inter-municipal agreement between the Greenville Fire District and the Town’s Police Department, the Greenville Fire District is the first responder to all medical emergencies within the Greenville Fire District. Concerns were raised about the number of emergency calls and the ability of fire district personnel responding to those calls to reach the site in a safe and timely manner given the downward sloping hairpin curves on Underhill Road. Concerns were also raised concerning the burden that responding to medical emergencies at the site would place on homeowners residing along the one-mile long Underhill Road corridor.
58. On May 25, 2016, the Town Board was scheduled to vote to approve a negative declaration for the project, but the Town Board agreed to hold the matter over after two board members said they had unanswered questions.
59. On June 7, 2016, the Town Board held a work session to discuss the Shelbourne application with representatives of the Greenville Fire District and the district’s Fire Chief. At the meeting, the fire district representatives expressed concern about “increasing calls,” an inability to “quantify” the impact on the fire district without knowing what the actual number of emergency medical calls is likely to be, noting that the applicant may be estimating 100 additional calls per year, but the number could turn out to be four times as many, and the dangers that the fire trucks the

District uses to respond to these emergency medical calls would have in navigating the downward sloping curves on Underhill Road approaching the site. The Fire Chief referred to one of the curves as a “sharp hairpin turn.” He noted that on an icy day, if one of the trucks were to slip off the road, it could hit the New York City aqueduct, which supplies water to the city, and risk puncturing it. As one fire trustee who has driven the District’s ladder truck said, “The curves there are a problem. The descending sloping road with multiple curves going into a hairpin turn. The firetrucks probably have absolutely no way to yield on the side, there is no shoulder, there is no place for anybody to go . . . It’s an extremely narrow road.” The fire district’s chair said it was a “terrible turn.” The applicant’s engineering consultant explained that while certain mitigation measures such as an improved guardrail and a widening of the shoulder could be implemented, nothing could be done about the hairpin turn because it was built to accommodate the New York City aqueduct and could not be changed. The Fire District also expressed concern that the Town was minimizing without any analysis the issue of noise in the Underhill Road corridor from the District’s having to use emergency sirens and airhorns over at least 100 times a year in order to reach the facility just for medical emergencies. A video of the meeting between the Town Board and representatives from the Greenville Fire District is available online at <http://greenburghny.swagit.com/play/06072016-538>.

60. On June 8, 2016, the Town Board granted Shelbourne’s request by unanimously adopting a negative declaration that the Shelbourne project would have only “small impacts” with respect to the factors required to be considered under SEQRA. The resolution stated that the Town Board had coordinated its review with the ZBA, but

the ZBA had not yet had any opportunity to do anything to comply with SEQRA. The resolution made no mention of any of the comments received from the Fire District on June 7, 2016. In its negative declaration, the Town dismissed concerns raised about the downward sloping curves and sharp hairpin turn on Underhill Road as a “preexisting condition” which could be mitigated by an improved guardrail and shoulder widening. The Town also dismissed concerns from the Greenville Fire District regarding the impact on emergency medical calls by concluding that the “applicable responder” here was not the Greenville Fire District, but the Greenburgh Police Department. The Town Board thus saw no reason to study whether the Fire District’s responding along Underhill Road to an estimated 100 or more medical emergency calls to the facility per year would create safety risks for emergency vehicles required to get to and from the facility.

61. The Town was apparently unaware when it adopted its negative declaration that pursuant to an intra-municipal agreement between the Fire District and the Police Department, it was agreed that the Fire District would be the first responder on all emergency medical calls within the Fire District’s borders. Thus, its conclusion that the Police Department was the “applicable responder” on emergency medical calls was wrong. Finally, even though it did no study of the matter, the Town concluded that the 100 or more estimated emergency medical trips to the facility per year would not have a “significant effect on local noise quality.” A copy of the Town’s negative declaration is attached hereto as Exhibit K.
62. On June 9, 2016, Shelbourne commenced an Article 78 proceeding against the ZBA for the purpose of challenging its finding that variances were required. The case bore

- Index No. 2159/2016. Also named as respondents in the lawsuit were the Edgemont Community Council, the Council of Greenburgh Civic Associations, and the 17 individual homeowners who had joined in the appeal of the Building Inspector's July 2015 determination that no variances were required.
63. Town Attorney Timothy W. Lewis said Shelbourne had alerted Town officials well in advance that they intended to file suit against the civic groups and residents, but Town officials provided no advance notice to any of the parties to warn them that they were being sued.
64. On July 6, 2016, Shelbourne filed a notice of voluntary discontinuance of that proceeding pursuant to CPLR 3217(a)(1).
65. On July 19, 2016, the Town Board held a special meeting to rescind its June 8, 2016 negative declaration on the Shelbourne project. The Town Board stated that its rescission was not because of its factual errors, but because the ZBA "has recently determined that a variance is needed by the Applicant related to a requirement that Assisted Living Facilities not be located more than 200 feet from a State or County right-of-way, in addition to a variance related to a requirement that Assisted Living Facilities must be located on sites of four acres or greater," that "the Town Board believes it no longer has the most significant approval required for this project," and "the Town Board does not want to interfere in any way with the Zoning Board of Appeals' consideration of the project and the variances requested." A copy of the resolution is attached as Exhibit L.

Shelbourne Sues the Town for Rescinding the Negative Declaration

66. On August 4, 2016, at a meeting of the Town Board, James Kane, a Shelbourne executive, accused Town officials of reneging on a promise they allegedly made years before to grant Shelbourne its land use approvals – an agreement Kane said had been recently reaffirmed when Shelbourne agreed at the Town Supervisor’s request to withdraw its lawsuit against civic groups and residents. Kane said, however, that “within 72 hours of our withdrawal of this filing, the Supervisor notified me that the Town Board would no longer be supporting the project.” Kane’s videotaped remarks to the Town Board that night may be viewed at <https://www.youtube.com/watch?v=6my18of5ok8&feature=youtu.be>.
67. On August 18, 2016, Shelbourne filed suit against the Town Board in New York State Supreme Court, Westchester County, claiming that its rescission of the “negative declaration” was unlawful. The Index Number of that case is 002654/2016.
68. In the meantime, the ZBA commenced public hearings on Shelbourne’s application for variances. There were two sets of public hearings held. One set was before the ZBA announced its intent to be lead agency for purposes of SEQRA in connection with the Shelbourne application, and the other set was after. The first set of hearings was held May 19, 2016; June 16, 2016; August 11, 2016; September 14, 2016; and November 17, 2016, respectively. Residents and community leaders argued during these hearings that the variances requested were not legally permissible either because they were use variances, or because, even if deemed an “area variance,” it would be so large – nearly 3000% -- that it would create a precedent potentially allowing assisted living facilities on parcels of land in residential zoning districts throughout the entire 19-square mile area of unincorporated Greenburgh. In

response, the applicant conceded there were at least 15 other sites that would qualify if the variances sought were granted. A copy of the applicant's written submission to that effect is attached as Exhibit M.

69. On December 15, 2016, the ZBA declared its intent to be lead agency for purposes of SEQRA in connection with the Shelbourne application.

70. Under SEQRA, an "interested agency" means an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action. See 6 CRR-NY 617.2(t).

71. The Greenville Fire District is an independent municipal agency under the laws of the State of New York providing emergency services to the Edgemont community in the Town of Greenburgh. The district is governed by a Board of Fire Commissioners consisting of five members who are elected by the general public for five year terms. The Fire District operates as a combination fire department with 30 career firefighters and 17 active volunteers. In addition to responding to fire and other emergencies, the Fire District responds to medical emergencies and, pursuant to an inter-municipal agreement with the Greenburgh Police Department, the Fire District responds in the first instance to all medical emergencies within its borders, which includes the area of the proposed assisted living facility. Medically-trained Fire District personnel provide "basic life support" services and will determine in each instance whether medical transport to a hospital is required. If such medical transport is required, through advanced life support services provided by the Town, an ambulance and a team of paramedics will then be dispatched by Greenburgh police. The Fire District operates

with an annual budget in excess of \$9 million, which is fully funded by taxpayers who own property within its borders.

72. Because the Fire District would in the first instance be responding to all medical emergency calls at the proposed assisted living facility, but lacks any authority to authorize or approve the project, it is an “interested agency” under SEQRA.

73. On December 16, 2016, the Greenville Fire District put the ZBA on written notice that it was requesting a “full SEQRA study be performed relating to the proposed assisted living facility (Formation Shelbourne Senior Living) on Underhill Road.”

The Fire District’s letter stated that “[t]his analysis should be executed by an external professional resource, and should consider all of the impacts, both operational and financial, this facility will have on the Greenville Fire District, including without limitation: (1) the number, and nature of, additional alarms anticipated by the facility; (2) traffic considerations, and roadway conditions, in particular for accessibility of emergency vehicles; and (3) other safety considerations.” And, referring back to its meeting with the Town Board on June 7, 2016, the Fire District’s letter further stated that the district had “previously requested this information from the Town.” A copy of this letter is attached as Exhibit N.

74. On January 26, 2017, the ZBA declared itself lead agency and issued a proposed Conditioned Negative Declaration (“CND”) and gave notice of the declaration to involved and interested agencies, including the Fire District.

75. On February 10, 2017, the Fire District wrote again to the ZBA, declared itself an “Interested Agency” as defined by SEQRA that will be “directly impacted on a daily basis by the Project” and the proposed CND, and further stated, “we are compelled to

request that the ZBA rescind the CND and issue a Positive Declaration.” The Fire District stated that the ZBA did not respond to the District’s letter dated December 16, 2016, did not discuss potential Project impacts and concerns with the District, and that, as a result, “[t]he CND includes materially incorrect assumptions which, in turn, results in proposed mitigation measures that are inherently unreliable.” By contrast, the District stated, “[a] Positive Declaration, and the resulting independent analysis, will ensure that impacts that the Project may have are accurately identified and quantified, and that appropriate mitigation measures are advanced.” A copy of this letter is attached hereto as Exhibit O.

76. The Fire District said that the ZBA’s proposed CND showed that the ZBA did not understand that, by agreement with the Police Department, the Fire District was the first responder within the Greenville area to all emergency medical calls and that the “ZBA’s fundamental misunderstanding of our role necessarily means that the CND does not correctly identify the impacts the Project may have on the District, or the effect of the proposed mitigation measures.”

77. The Fire District also questioned the CND’s assumptions with respect to the projected number of annual emergency medical calls because the data came from the applicant and had not been verified independently. Accordingly, the Fire District called for a “proper and independent study of this issue” using pre-existing industry data where available.

78. Finally, the Fire District noted that the ZBA had correctly noted the “curvilinear and sloping portion of Underhill Road” but called for an independent study to “assess the danger present and the extent to which the proposed alterations will impact on the

safety risks for District employees and other motorists.” “The CND simply assumes that the conditional improvements proposed would materially reduce the safety risks of running a substantial increase of emergency traffic along the identified dangerous road segments” adding that “[a]n independent study must be completed which: (a) measures both the risks of the road condition and the utility of improvements (whether proposed or other available options); (b) analyzes existing road conditions against the benchmark for road conditions expected for a facility like the Project.”

The ZBA Rejects the Fire District’s Concerns and Issues a Conditioned Negative Declaration Without Conducting Any Study

79. The Fire District did not take a position on the overall merits of the application or its propriety for the community, but said “we are compelled to take issue with the CND insofar as it lacks adequate analysis, is based on erroneous assumptions, and proposes solutions based on unsound footing.”
80. On February 16, 2017, the ZBA heard testimony on its proposed CND during which time residents identified a series of potentially significant adverse impacts related to the proposed action that warranted the issuance instead of a “positive declaration.” Under SEQRA, a “positive declaration” means a written statement prepared by the lead agency, here, the ZBA, indicating that implementation of the action as proposed may have a significant adverse impact on the environment and that an environmental impact statement (“EIS”) will be required. An EIS provides a means for agencies, project sponsors, and the public to systematically consider significant environmental impacts, alternatives and mitigation, and “facilitate the weighing of social, economic

and environmental factors early in the planning and decision-making process.” 6
CRR-NY 617.2(n).

81. A draft EIS (“DEIS”) is the “initial statement prepared by either the project sponsor or the lead agency and circulated for review and comment.” *Id.* If the DEIS involves a developer’s project, the cost of preparing and reviewing the DEIS can be charged to the project sponsor; a municipal agency should not have to pay anything. Costs chargeable to the project sponsor include the use of independent technical and legal consultants. SEQRA authorizes the lead agency to charge the project sponsor up to 2% of the cost of land acquisition and site improvements; however, the only government agency that may lawfully be reimbursed for any costs associated with the preparation of the DEIS is the lead agency itself. “Interested” agencies are not authorized to recover any such costs and must therefore bear them entirely on their own.
82. On February 27, 2017, Justice Barbara Zambelli denied the Town’s motion to dismiss Shelbourne’s Article 78 lawsuit challenging the Town Board’s July 16, 2016 decision under SEQRA to rescind its June 8, 2016 “negative declaration” in respect of the Shelbourne application. Without ruling whether the rescission was proper or improper, the Court held that if it ultimately determined the rescission to have been improper, and Shelbourne had in the interim been required by the ZBA to conduct an independent study as part of the preparation of a DEIS, the costs of such DEIS, which would normally be borne by the applicant, would in this instance be borne by the Town. A copy of that ruling is attached as Exhibit P.

83. Even though Shelbourne, the Town, and the Office of the Town Attorney which employs ZBA counsel all knew about it, Justice Zambelli's ruling was never made part of the public record before the ZBA.
84. On March 16, 2017, the ZBA held a second public hearing on its proposed CND, during which time several ZBA members who would have known from their counsel about Justice Zambelli's decision, asked residents requesting that the ZBA issue a positive declaration who they expected to pay for the independent study needed to create the DEIS. Since covering the cost of such study is mandated by statute, the only purpose in such questioning by the ZBA was to ascertain whether members of the public knew of the decision – and they had not. There was also no public mention of it by the Town, or by any ZBA member. However, after all residents had spoken, Shelbourne's attorney made a brief reference at the end of the hearing to "interesting language" in a recent ruling of the court. The ZBA then voted to close the public hearing on the SEQRA matter as of April 18, 2017.
85. On April 20, 2017, the ZBA voted to approve the proposed CND and, in so doing, rejected arguments raised by the Greenville Fire District and members of the public for a positive declaration and an independent study. The ZBA then voted to continue reopen the public hearing on Shelbourne's requests for variances. The vote in favor of the CND was unanimous. A copy of the CND is attached as Exhibit Q.
86. Even though the ZBA itself did not issue a positive declaration, as the Fire District and members of the public had asked, its CND made findings consistent with the issuance of a positive declaration which requires a written statement prepared by the lead agency indicating that implementation of the action as proposed may have a

significant adverse impact on the environment.” Thus, while the CND identified several small impacts that it said will result from the proposed project, it expressly found two “*potentially moderate to large impacts* that could result from the proposed project with respect to . . . Impact on Transportation; and . . . Consistency with Community Plans.” (Emphasis added). In its section on transportation, the CND reported that the portion of Underhill Road closest to the site “has *severe* vertical and horizontal curves.” (Emphasis added). Then, based on an estimate that the Shelbourne facility would generate a total of 1.8 medical emergency calls per week, the Zoning Board found that “due to the increased potential for emergency vehicles traversing the curvilinear and sloping portion of Underhill Road (providing access to the site from the Greenville Fire District station and providing access from Central Park Avenue South), the proposed action *will potentially have a moderate to large impact on existing transportation systems from a safety perspective.*” (Emphasis added).

87. The CND further stated that if the ZBA granted the variances, it would incorporate certain conditions which it said “will mitigate such impacts.” The ZBA then called for a “minor widening of Underhill Road on the approach to the first ‘s’ curve, which will repair a swale and enhance drainage,” “widen the southern, interior radius of Underhill Road near the Con Edison access gates,” “[p]rovide a maximum of five (5) feet extra width with a four (4) foot shoulder,” “[r]egrade and super-elevate the outer radius of this area to provide positive pitch and stability for turning vehicles,” and “[e]xtend guiderail on outer radius to define Con Edison gate.”
88. Having rejected the request from the Fire District and members of the public for an independent study of the safety risks associated with the Fire District having to travel

a mile along Underhill Road, which is a narrow two-lane town road with upward and downward sloping curves and a dangerous downward sloping hairpin turn approaching the facility, in order to respond to more than an estimated hundred annual emergency medical emergencies at the proposed facility, the CND cited no study, documentation or testimony purporting to demonstrate that incorporating these conditions would in fact mitigate the potentially “moderate to large impact” the Shelbourne facility would have from a safety perspective.

89. The ZBA also addressed the issue of potential noise from emergency medical vehicles using their sirens along the Underhill Road corridor. Specifically, the ZBA noted that “noise due to sirens of emergency service vehicles traveling to/from the site is not a noise produced by the proposed action itself, but rather, a consequence of the proposed action, and that emergency service vehicles will be moving in and out of the facility.” Based on an estimated 8-10 calls per month, or two per week, and assuming such calls will be “distributed at different times of day,” the ZBA concluded that “there is not anticipated to be any large negative impacts from a noise perspective, due to the proposed use.”
90. The ZBA’s conclusions with respect to noise from emergency vehicle sirens were not supported by any study, documentation or testimony showing the effect of such noise on the hundreds of homes situated along the Underhill Road corridor. Testimony adduced at the hearing showed that for every individual emergency medical call, as many as four emergency medical vehicles may respond, and each such vehicle would almost certainly be using its sirens, both because state law requires use of sirens and

because it would be extremely unsafe for emergency vehicles traveling at high rates of speed along the Underhill Road corridor to do otherwise.

91. With respect to consistency with community plans, the ZBA's CND stated that the Zoning Ordinance restricts assisted living facilities to sites within 200 feet of, and that have access to, a state or county right-of-way other than parkways and interstate highways, that such access must be direct or via a side street and shall not be accessed by a circuitous route, that "[t]he purpose of this requirement is to limit additional or excessive traffic within established residential neighborhoods, while insuring safe emergency and other vehicular and pedestrian access," and that the site does not meet the distance requirements because "Central Park Avenue, the closest county or state road, is 6,025 linear feet from the site via Underhill Road."
92. With respect to "consistency with community character," the ZBA found that "the potential increase in the demand for emergency *medical* services is the most relevant factor pertaining to community service needs." Here, the ZBA recognized that the proliferation of assisted living facilities that depend on municipalities to provide emergency medical services would require the hiring of additional full-time paramedic personnel, that the Greenville Fire District responds to "all fire and EMS-related calls within its jurisdiction," and that "[t]he addition of 104 estimated annual calls generated from the Shelbourne Facility would increase the GFD's total call volume, and the percentage of calls that are for medical-related emergencies, by approximately 7.8%."
93. However, the ZBA offered nothing to mitigate the potential financial and logistical impact of such increase in the Fire District's call volume. Instead, it said the

applicant would employ a full-time nurse on site, use an “internal emergency call system to intervene on calls from residents that might otherwise go to 911, and use “private ambulance/ambulette services for non-emergency transport.”

94. The ZBA cited no study, documentation or testimony that any of the things Shelbourne was offering to do would in any way mitigate any impact on the Fire District’s projected 7.8% increase in medical-related emergency calls resulting from the project. Indeed, testimony at the hearing was that the use of a full-time nurse and an internal emergency call system were things Shelbourne was already using at the facilities upon which Shelbourne’s estimates of 100-115 annual emergency medical calls was based.

The ZBA Grants the Requested “Variances” by a Narrow 4-3 Decision

95. On May 18, 2017, the ZBA closed the public hearing on Shelbourne’s application for variances and directed its counsel to prepare a decision granting the variances.
96. On June 22, 2017, the ZBA voted 4-3 to approve the decision granting the variances. The three dissenters were the acting chair of the board, Eve Bunting-Smith, Kristi Knecht, and Lawrence Doyle. Bunting said she was concerned as acting chair that the ZBA’s decision was creating a dangerous and unlawful precedent. She was quoted in a local newspaper stating, “There wasn’t much of a discussion of precedents. While it’s not mentioned in cases, it’s something we have to be concerned about in making these decisions.” See Scarsdale Inquirer, June 30, 2017, “Zoning Board Approves Shelbourne Variances.” A copy of the article is attached as Exhibit R.

97. Ms. Knecht voiced a similar concern, stating, “It’s bad public policy for something that’s been in place three years to completely negate the 200 feet. It’s almost waiving it, and it sets a bad precedent for the Town.” In fact, the applicant itself conceded during the public hearing that dispensing with the 200-foot requirement would allow for potential assisted living facilities in at least 15 other locations that were not on the original map of potential assisted living facilities the Town Board had prepared in its SEQRA process in early 2013.
98. By allowing an assisted living facility to be located more than a mile from where permitted under the Town’s Zoning Ordinance, the ZBA applied the criteria for granting area variances, stating that it had “weighed the benefit to the applicant from the requested variances against any detriment to the health, safety and welfare of the neighborhood or community that might result from the granting of the variances.”
99. Specifically, the ZBA found that allowing use of the land there for assisted living would “not cause an undesirable change in the character of the neighborhood or detriment to nearby properties” because it would replace a large commercial nursery that had been damaged on two recent occasions by fire, and the proposed assisted living facility is “more consistent with the character of the neighborhood than the commercial nursery use,” and that the applicant submitted a study showing an assisted living facility “does not result in a significant impact upon the values of the adjacent residential properties.”
100. The ZBA also found that “because the size and location of the site makes compliance with the requirements of the Zoning Ordinance impossible,” the benefit sought by the applicant could not be achieved by some method feasible for the

applicant to pursue “other than an area variance.” The one obvious method for the applicant to have pursued “other than an area variance,” was an amendment to the Zoning Ordinance to delete the requirement that, for the safety of emergency vehicles getting to and from the site, such facilities not be located more than 200 feet from access to a state or county right-of-way. By finding that such alternative was “feasible for the applicant to pursue,” the ZBA thus recognized that having the applicant ask the Town Board to repeal a measure it imposed in its Zoning Ordinance for safety purposes would be an obvious futility.

101. With respect to the 3,000% variance from the requirement that the site be within 200 feet of a state or county right-of-way, the ZBA found that “[a]lthough the variance to increase the distance of the proposed facility from the nearest state or county right of way is undoubtedly substantial in relation to the requirement, the variances, as we have conditioned them, will not cause substantial adverse impacts on the neighborhood or district for the reasons stated elsewhere herein and in the Conditioned Negative Declaration adopted by this Board on April 20, 2017.” The ZBA thus concluded that the projected 7.8% increase in annual emergency medical calls that the Greenville Fire District would have to bear – coupled with the increased risk to public safety in having its emergency vehicles travel at a high rate of speed along a relatively curved road with a dangerous hairpin turn would not, because of certain improvements to the road, cause a substantial adverse impact on either the district or the neighborhood.

102. Even though, as the CND states, the purpose of the 200 foot perimeter in the Zoning Ordinance was to “limit additional or excessive traffic within established

residential neighborhoods, *while insuring safe emergency and other vehicular and pedestrian access,*” (emphasis added), the ZBA not only allowed use more than a mile beyond the legislatively mandated perimeter, it did so while minimizing concerns about safe emergency and other vehicular and pedestrian access, stating that “[a]s it approaches the site, Underhill Road curves *sharply*, resulting in a so-called ‘S-curve,’ which opponents *claim to be unsafe.*” (emphasis added). The ZBA discounted the safety concern, stating that “[w]ith respect to the allegedly dangerous road conditions in the area, we initially note that the Town of Greenburgh Highway and Sanitation garage facility is located on Sprain Road, less than ¼ mile away from the site, and that large sanitation trucks have used these same streets every day, without a significant history of accidents.” The ZBA did not explain how “sanitation trucks” conducting routine trash collection on an established schedule were comparable to fire trucks responding to medical calls on an emergency basis.

103. And even though it knew allowing such use more than a mile away from where legislatively permitted would result in fire apparatus having to make more than 100 emergency medical calls annually along a narrow two-lane road with downward sloping curves and a hairpin turn that was never intended for that purpose, the ZBA similarly discounted the accident history approaching the site: “[w]e further examined the accident history on the roads approaching the site. Since 2010 there have been eight (8) accidents at or near the intersection of Sprain and Underhill Roads. Of those accidents, six (6) were caused by driver error or non-road-related conditions, such as sun glare, sudden stops, taking a turn too wide, etc. The two road-related accidents – both of which occurred more than four years ago – involved the rear of tractor-trailers

veering over a traffic lane on the “S-curve,” striking cars going in the opposite direction on Underhill Road.”

104. The ZBA dispensed with the legislatively mandated restrictions on assisted living facilities beyond the 200-foot perimeter by relying on certain modifications to Underhill Road that had been recommended by a traffic consultant. However, the traffic consultant merely addressed what he thought were the “conditions that caused the accidents,” and did not address, much less study, what improvements would be needed for the Fire District’s firetrucks to be able to respond at high rates of speed to more than 100 medical emergency calls annually.

105. The ZBA did not address *at all* the Zoning Ordinance’s requirement that the facility have “direct” access to a state or county road, which access “shall not” be by a “circuitous route.” These legislative mandates are in addition to the requirement that the facility be within 200 feet of access to state or county right-of-way. Thus, even if the ZBA’s 3000% “variance” was appropriate with respect to the proximity requirement (which it is not), such a “variance” would not absolve the independent requirement of “direct” access that is “not circuitous.” The ZBA’s actions essentially waived this legislatively mandated requirement, which was enacted for public safety reasons.

106. Moreover, even though the ZBA knew that the Greenville Fire District -- which, because it responds to all medical emergencies within its borders, would be the only government agency directly impacted by the decision -- the ZBA blamed the Greenville Fire District for not conducting its own study of the financial and operational impacts that an assisted living facility at that location would present.

Even though the Fire District twice wrote to the ZBA calling for an independent study of such impacts, the ZBA stated that it had reached out to the District “on at least two occasions for it to advise us of any impacts it expects the project to cause,” and “[t]he District failed to provide us with any information with respect to any adverse financial or any other impact on its operations or budget, *other than to request that this Board engage an independent agency or individual to investigate same.*” (emphasis added). And even though the ZBA had the legal authority as lead agency under SEQRA to call for an independent study and, as lead agency, it alone had the legal authority to require the applicant to pay for it, the ZBA added that, “[i]t is the opinion of this Board that the only party capable assessing the impact of the proposed project on the Fire District’s budget and operations is the Fire District itself. Its failure to do so undermines the otherwise unsupported allegations of such impacts raised by the opponents herein.”

107. The ZBA also accused the Fire District for not being forthcoming with the Town Board when the Town Board was lead agency: “Moreover, we note in this regard that the GFD was consulted and involved in the review of the proposed facility conducted by the Town staff and the Town Board, when that Board was Lead Agency. In its communications, the only concern expressed by GFD was as to water supply, which is dependent on main design as well as water volume and pressure adequate to meet fire protection and domestic demands for the proposed project.” In fact, the Fire District, through two members of its board and the fire chief himself, raised safety concerns about the narrow two-lane downward sloping curves and sharp hairpin turn approaching the site on Underhill Road over the course of a two-hour televised

meeting of the Town Board at its work session on June 7, 2016, which the ZBA in its decision nowhere mentions. The ZBA instead quoted out of context a statement made at that same June 7 meeting by the Fire District chairman, made in her personal capacity as a private citizen, that Underhill Road was “no less safe” than certain other roads in Edgemont – an observation which was both irrelevant and beside the point since an assisted living facility expected to generate at least 100 medical emergency calls per year was not being proposed for those other roads.

108. Finally, the ZBA conceded that by purchasing property which it knew was more than a mile from the nearest state or county right-of-way, the applicant’s need for a variance to build an assisted living facility that was supposed to be within 200 feet of the nearest such right-of-way was “self-created.” The ZBA next found that the applicant’s need for a variance to reduce the size of the site from the required 4 acres to 3.79 acres, is “not self-created” because the site was originally 4.01 acres, but “was reduced to its present size when New York State condemned some of the property in connection with the construction of the Sprain Brook Parkway.” However, the ZBA omitted to mention that the condemnation to construct the Sprain Brook Parkway took place more than 50 years ago, the Zoning Ordinance allowing assisted living facilities on minimum four acre lots was adopted in 2013, and the applicant acquired an interest in the property subsequent to that date and thus knew when it acquired the property that it did not satisfy the minimum acreage requirement and that its problem was “self-created” in the same way that its acquiring property more than a mile from where such use was permitted was likewise “self-created.”

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST THE ZBA FOR PROCEEDING
IN EXCESS OF ITS JURISDICTION AND IN VIOLATION OF LAWFUL
PROCEDURE**

109. Petitioners repeat and reallege each of the foregoing paragraphs 1 through 108 as if fully set forth herein.
110. Article 78 of the CPLR prohibits the ZBA from acting “without or in excess of jurisdiction” and making a determination “in violation of lawful procedure,” “in error of law” or where such determination was “arbitrary and capricious or an abuse of discretion.”
111. Under New York law, zoning boards of appeal are administrative bodies of unelected municipal appointees, with statutory authority to grant certain limited relief from municipal zoning ordinances.
112. Consistent with such limited authority, zoning boards may not substitute their judgment for that of elected officials that adopt zoning ordinances, and thus zoning boards are without jurisdiction to disregard or otherwise rewrite legislative mandates in such ordinances.
113. The usual indicia of such overreaching by zoning boards is when the variances granted are so large or sweeping in scope that they effectively constitute an amendment to the ordinances or set a legal precedent affecting not just the applicant’s property, but large numbers of other properties as well.
114. Here, the ZBA purported to grant an almost 3000% “area variance” to allow an assisted living facility to be located more than 6,000 feet from the nearest state or county right-of-way. That extraordinary variance is so substantial and sweeping in scope that it effectively eliminates the Town’s legislative mandate that such facilities

115. The Parcel in question here is in the northwest corner of the Greenville Fire District. The only state or county rights-of-way within the Greenville Fire District are Central Avenue and the portion of Ardsley Road east of Central Avenue. As shown in the map below, the parcel is therefore as far away from a state or county right of way as it is physically possible to be within the Greenville Fire District. In other words, the variance in question would violate the statute's requirements to the maximum possible extent.



116. In granting the variance, the ZBA allowed the facility having access to a state or county road via a mile-long narrow two-lane Town road with multiple downward and upward sloping S-curves and a dangerous downward sloping hairpin turn which even the ZBA acknowledged was “severe.” In so doing, the ZBA eliminated the legislative mandate that such access not only had to be within 200 feet of a state or county road, but it *also* had to be direct and non-circuitous.
117. The ZBA’s narrow 4-3 vote meant that effectively *one* of its unelected members decided to substitute his judgment for that of the elected members of the Town Board which enacted these legislative mandates only three years before. These legislative mandates were put in place by elected Town officials in Greenburgh specifically to ensure that emergency vehicles would have safe access getting to and from assisted living facilities which, by their nature, would generate at least 100 medical emergency calls a year – and to keep remaining residential zoning districts from having to deal with excess or additional traffic. The elected Town officials also said when they enacted this amendment to the Zoning Ordinance that there would be no assisted living facilities in any other areas of the Town without a separate finding by the Town Board that such use is both “appropriate” and “harmonious” with the surrounding area. In granting these variances, the unelected members of the ZBA thumbed their nose at this critical element of the Town’s own SEQRA findings.
118. Consequently, when the unelected members of the ZBA approved these variances and substituted their judgment for that of the Town’s elected officials, they disregarded a series of judgments made by those officials specifically to protect public safety and protect the Town’s residential neighborhoods.

119. To make matters even worse, the unelected members of the ZBA approved these variances over the objection of the elected trustees of the Greenville Fire District, the local government agency responsible for responding to all medical emergencies at the proposed facility – of which there were expected to be at least 100 per year -- and thus the most directly impacted by the project. These ZBA members even went so far as to fault the Greenville Fire District for suggesting that the ZBA exercise its legal authority under SEQRA to conduct its own study of the impacts by issuing a “positive declaration” and instead blamed the Fire District for not conducting its own study of the impacts. The ZBA took that action even though in exercising its responsibilities under SEQRA, it found that the assisted living project “*will potentially have a moderate to large impact on existing transportation systems from a safety perspective*” – a finding which would not only have permitted the ZBA to conduct the study that the Fire District was requesting but, under SEQRA rules, would have authorized the ZBA, as lead agency, to require that the applicant pay for it.

120. In sum, for all these reasons, the purported 3000% “area variance” granted by the ZBA to allow construction of an assisted living facility more than a mile from access to the nearest state or county right-of-way, when the Zoning Ordinance mandated that such facilities be located no more than 200 feet from such access – and to allow such variance to be granted even though access was via a mile-long narrow two-lane Town road marked by “severe” S-curves and a dangerous hairpin turn – when the legislation mandated that access be “direct” and “non-circuitous,” was destructive of the purposes to be achieved by the ordinance, effectively rescinded the Zoning

Ordinance's legislative mandates, and was therefore a clear invasion of the legislative process.

121. Accordingly, the ZBA's granting of the variances is void and invalid for want of legal authority and jurisdiction and must therefore be vacated and otherwise set aside.

**AS AND FOR A SECOND CAUSE OF ACTION AGAINST THE ZBA FOR
PROCEEDING IN ERROR OF LAW BY GRANTING A USE VARIANCE TO
ALTER CRITERIA FOR A SPECIAL USE PERMIT**

122. Petitioners repeat and reallege each of the foregoing paragraphs 1 through 121 as if fully set forth herein.

123. Under Town Law § 274-b, a zoning board's authority on applications for special use permits is limited to granting "area variances." Zoning boards do not therefore have the legal authority to issue use variances.

124. Here, the ZBA granted variances from the requirement that assisted living facilities be located no more than 200 feet from access to the nearest state or county right-of-way and from the requirement that access to such state or county right-of-way be "direct," and "not circuitous."

125. These two requirements defined the territory in a zoning district where parcels may be used for assisted living facilities and where they may not be used for that purpose. The Town Board, when it adopted the amendment to the Zoning Ordinance allowing assisted living facilities by special use permit three years before, had drawn up a map of those areas where assisted living facilities could potentially be located under these criteria, and further stated that use of any parcels outside of those areas designated on the map for that potential purpose would require a separate finding by

the Town Board that such use was both “appropriate” and “harmonious” for the surrounding area.

126. While the ZBA was made well aware of these requirements, it nevertheless labeled the variances it granted as “area variances.” However, these were in reality “use variances” within the meaning of Town Law § 267.

127. Because these were “use variances” and not “area variances,” the ZBA had no statutory authority to grant them because Town Law §274-b only allows zoning boards considering special use permits to grant “area variances.”

128. Moreover, even if the ZBA had authority to grant use variances, and it does not, the state law requirements for granting use variances were not met.

129. Accordingly, the ZBA’s decision to grant these variances should be vacated and otherwise declared null and void for the additional reason that these variances were use variances which the ZBA had no legal authority to issue.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST THE ZBA FOR FAILING TO SATISFY THE LEGAL REQUIREMENTS FOR ISSUING AN AREA VARIANCE

130. Petitioners repeat and reallege each of the foregoing paragraphs 1 through 129 as if fully set forth herein.

131. Town Law § 267(1)(b) provides that an area variance is an authorization by a zoning board “for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.”

132. Under Town Law § 267-b(3)(b), in determining whether to grant an area variance, a zoning board must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or

community if the variance were granted. In making this determination, a zoning board must consider five specific factors: (1) whether “an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created,” (2) whether the benefit sought can be achieved by other means, (3) whether the requested variance is “substantial,” (4) whether there would be an “adverse effect or impact on the physical or environmental conditions” in the neighborhood, and (5) whether the alleged difficulty was “self-created” (a factor that is relevant but not necessarily preclusive).

133. When granting either use or area variances, zoning boards must grant the minimum variance necessary and adequate to address the hardship, while preserving the character of the neighborhood and the health, safety and welfare of the community.

134. Assuming *arguendo* that the variances here were in fact area variances, which they were not, the ZBA failed to satisfy the relevant legal requirements for granting such variances. First, although it claimed to have done so, the ZBA did not take into account any “detriment to the health, safety, and welfare of the neighborhood or community that might result from the granting of the variances.” Thus, the ZBA ignored the fact that the purpose of the restrictions was to make it safe for emergency vehicles to get to and from the proposed assisted living facility and granted a variance that would require emergency vehicles to travel more than 100 times per year to and from the facility along a narrow mile-long two-lane town road with “severe” downward-sloping S-curves and a hairpin turn, and a history of motor vehicle accidents, in all weather conditions, including ice, snow and fog. The ZBA did so

without any study at all, much less a study showing that the results would be anywhere near as safe for such vehicles and the neighborhood as a whole if the variances were not granted.

135. Second, the ZBA weighed the five factors improperly. Thus, with respect to the first factor, the ZBA found that granting the variances would not cause an undesirable change in the character of the neighborhood or detriment to nearby properties, not by considering the detriment to the health, safety and welfare of the community, as state law requires the ZBA to consider, but rather by noting that because the proposed facility would replace a large commercial nursery that had recently been damaged by two separate fires, it would represent “an aesthetic improvement over existing conditions.”

136. The ZBA never addressed whether placing a four-story, 60,000 square foot commercial building adjacent to 1,400 to 2,500 square foot homes in a neighborhood never planned to have such a development is an “aesthetic improvement” and a desirable change in the neighborhood’s character. The ZBA instead relied upon a “Value Impact Analysis” that the applicant submitted, purporting to show that “the proximity of an assisted living facility does not result in a significant impact upon the values of adjacent residential properties.” In fact, as residents who testified pointed out, the “Value Impact Analysis” looked at 26 different senior housing developments in Westchester and Rockland Counties and found no “assisted living” site to study to determine if there would be a significant impact on property values. Instead, the author chose to study a planned development community (BelleFair) along a state road, consisting of single family homes that were built in conjunction with a luxury

“independent living” facility (Atria at Rye Brook). The ZBA was told there was no apple-to-apple comparison during the hearings, but nevertheless chose to accept the study as valid.

137. The ZBA next concluded that “the benefit sought by the applicant cannot be achieved by some method, feasible for the applicant to pursue, other than an area variance.” Here, however, the ZBA overlooked un-contradicted testimony at the hearing that the applicant was invited to bid and build on the nearby Frank’s Nursery property, a nearly seven-acre site at 715 Dobbs Ferry Road in the Town, but ignored the invitation. Dobbs Ferry Road is a state right-of-way where assisted living facilities may be located without need for any variance, and without creating the safety risks the Zoning Ordinance was intended to avoid. The ZBA likewise overlooked that the applicant also always had the ability to ask for an amendment to the Zoning Ordinance, but chose not to request one.

138. And remarkably, considering that it was granting an unheard of variance of nearly 3,000%, the ZBA virtually ignores the third factor, which is the “substantiality” of the request. Here, the Decision mentions the distance from the state right of way “is undoubtedly substantial” but fails to provide any dimensional information on the 200 feet (required) or 6,025 feet (requested) or how substantial the request is – a 2,912.5% variance. The omission is significant because “the greater the variance in area restrictions, the more severe the likely impact upon the community.” *See Biscardi v. Zoning Board of Appeals*, 288 A.D.2d 215, 216 (2d Dep’t 2001), *citing Matter of National Merritt v. Weist*, 41 N.Y.2d 438, 441 (1977) (also noting that substantiality

only comes into play when the variance sought “does not involve a use prohibited” by the zoning ordinance and does not seek a change in the “essential use of the land”).

139. Here, of course, the variance proposed is so substantial it would impact not just residents whose properties abut that of the applicant, but also residents of the entire mile-long Underhill Road corridor, which is the route that emergency vehicles responding to medical calls at the site would have to take. Indeed, because the proposed location is about as far away from any state or county road that any residential neighborhood in the entire 19-square mile area of unincorporated Greenburgh is likely to be, it would also impact virtually every residential neighborhood where a developer is able to put together parcels of at least 3.79 acres in size.

140. The ZBA dismissed concerns neighbors might have about having emergency vehicles traveling at high rates of speed with sirens and lights at all hours of the day and night.

141. Instead, the ZBA concluded that, despite “two potentially moderate-to-large adverse impacts on the physical or environmental conditions in the neighborhood or district,” because of the conditions it was imposing upon granting the variances, neither the neighborhood nor the district would experience “substantial adverse impacts.”

142. However, the ZBA never determined, much less studied, whether the recommendations it made for improving Underhill Road -- the mile-long narrow two-lane Town road marked by “severe” downward sloping S-curves and a dangerous hairpin turn would actually make it as safe for a hundred or more emergency vehicles

each year to get to and from the proposed site as if it were located within 200 feet of access to a state or county right-of-way, where such access is both “direct” and “non-circuitous.” Accordingly, the ZBA’s conclusion that granting the variances would therefore “not cause substantial adverse impacts” on either the neighborhood or the Fire District was not supported by substantial evidence and was thus arbitrary and capricious.

143. In sum, even assuming the variances the ZBA granted here were “area variances” rather than “use variances,” they would still not satisfy the statutory requirements for granting such variances in New York and must therefore be declared void and unenforceable.

No prior application for this or any similar relief has been made in any court.

WHEREFORE, Petitioners respectfully request that an order and judgment be made and entered:

1. reversing, annulling, and setting aside the July 13, 2017 decision of the ZBA granting the variances identified therein, specifically, variances setting aside compliance with the requirement that an assisted living facility be located within 200 feet of access to a state or county right-of-way, and the requirement that such access be direct, or via a side street, and not a circuitous route;
2. declaring that no such variances can be issued at all by the ZBA in respect of the Shelbourne application because to do so would be beyond its administrative jurisdiction; and
3. granting such other and further relief as the Court may deem just and proper.

Dated: Scarsdale, New York
September 3, 2017

BERNSTEIN & ASSOCIATES, PLLC


By: 

Robert B. Bernstein
2 Overhill Road, Suite 400
Scarsdale, New York 10583
(914) 529-6500
rbernstein@rbblegal.com
Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Ella Preiser, being duly sworn, states that she is secretary of the Council of Greenburgh Civic Associations, one of the petitioners in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, she believes them to be true.



Ella Preiser

Sworn to before me this
28 day of August 2017



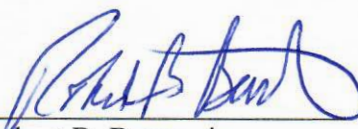
Notary Public
ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/20 19

VERIFICATION

Robert B. Bernstein, an attorney duly admitted to practice before the Courts of this State, hereby affirms, pursuant to CPLR 2106, that the following is true and correct:


I am an attorney admitted to practice before this Court, and a partner in the law firm of Bernstein & Associates, PLLC. I am also president of the Edgemont Community Council, one of the petitioners in this proceeding, and have read the foregoing Amended Verified Petition and know the contents thereof; that the same is true to my own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, I believe them to be true.

Dated: September 3, 2017
Scarsdale, New York


Robert B. Bernstein

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)


Dr. Katherine Galarza


Notary Public

ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/2018

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Dr. Lenore S. Katkin, being duly sworn, states that she is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, she believes them to be true.



Dr. Lenore S. Katkin

Sworn to before me this
28th day of August 2017



Notary Public

ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 028E6220307
Qualified in Westchester County
Commission Expires 04/12/2019

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Dr. Arthur Berman, being duly sworn, states that he is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, he believes them to be true.

Dr. Arthur Berman

Sworn to before me this
28 day of August 2017



Notary Public

ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/2019

VERIFICATION

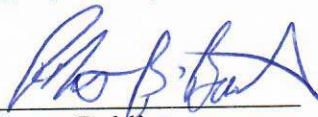
STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Sunil K. Shukla, being duly sworn, states that he is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, he believes them to be true.



Sunil K. Shukla

Sworn to before me this
25th day of August 2017




Notary Public
ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/2018

VERIFICATION

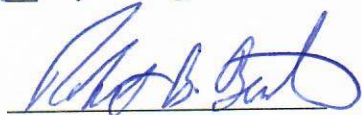
STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Ambu Patel, being duly sworn, states that he is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, he believes them to be true.



Ambu Patel

Sworn to before me this
28 day of August 2017



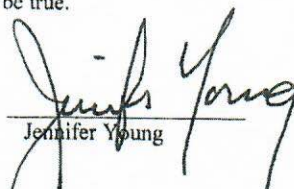
Notary Public

ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/2019

VERIFICATION

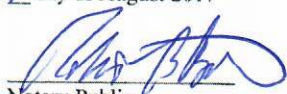
STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Jennifer Young, being duly sworn, states that she is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, she believes them to be true.



Jennifer Young

Sworn to before me this
31st day of August 2017



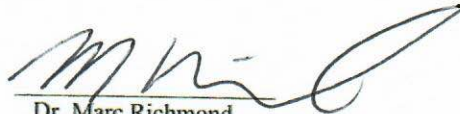
Notary Public

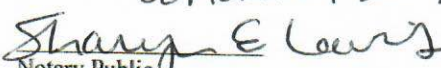
ROBERT B. BERNSTEIN
Notary Public, State of New York
No. 02BE6220307
Qualified in Westchester County
Commission Expires 04/12/2018

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Dr. Marc Richmond, being duly sworn, states that he is a Petitioner in this proceeding, and has read the foregoing Amended Verified Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, he believes them to be true.


Dr. Marc Richmond

Sworn to before me this
3 day of ~~August 2017~~ September, 2017

Notary Public

