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VIA EMAIL [PZCLERK@TOWNOFNEWLEBANON.COM]

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Zoning Board of Appeals
Town of New Lebanon
14755 Route 22
New Lebanon, New York 12125

Re: Tilden Project LLC (TM# 19.2-1-69)
Case No. PB 2025
Area Variance Application

Dear Members of the Zoning Board of Appeals:

Keane & Beane, P.C. has been engaged by the New Lebanon Central School District ("New Lebanon CSD") in connection with the Tilden Commons development proposal. Tilden Project LLC (the "Applicant") seeks to construct and operate a mixed-use project comprised of a grocery store and forty-one (41) dwelling units upon premises located at 538 Route 20, designated on the Town Tax Map as Parcel ID No. 19.2-1-69 (the "Project"). The Project's residential component poses impacts upon New Lebanon CSD through an increase in student population with attendant school resource demands. The prospect of a tax exemption and accompanying Payment in Lieu of Taxes/PILOT Agreement for this aspect of the Project casts additional real property tax and fiscal impacts affecting New Lebanon CSD's finances.

Consequently, we submit this letter to the Zoning Board of Appeals ("ZBA"), on New Lebanon CSD's behalf, in advance of its September 2, 2025 continued public hearing on the Applicant's request for an area variance. The Applicant seeks a variance from the minimum lot size per dwelling unit standards imposed § 205-13E(10)(a) of the New Lebanon Town Code. Specifically, it seeks a variance that will result in a forty-seven (47%) percent departure from these Town Code requirements (the "Requested Variance").

At the outset, we recognize the ZBA cannot act on the Requested Variance until the Town of New Lebanon Planning Board ("Planning Board"), in its capacity as Lead Agency under the State Environmental Quality Review Act ("SEQRA"), has completed SEQRA review of the Project. And, in that regard, New Lebanon CSD anticipates the Planning Board will undertake a robust examination of the Project's

affect upon public education, including fiscal, school facility and program impacts with consideration afforded to the overall financial burdens borne by New Lebanon CSD.

In the meantime, we offer the following comments concerning the ZBA's consideration of the Requested Variance.

As the ZBA is aware, in determining whether to grant an area variance, the Board is to evaluate "the benefit to the application if the variance is granted as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant." N.Y. Town Law § 267-b(3)(b).[1] Five (5) factors are to be considered in undertaking this balancing of "the benefit to the applicant" as against "the detriment to the health, safety and welfare of the neighborhood or community."

Although this letter addresses two (2) of these factors, the ZBA must carefully examine all five (5) factors and undertake the overarching balancing analysis. Here, again, this examination and analysis cannot be fully discharged until SEQRA processes have been adequately completed.

I. Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

One of the factors the ZBA is to apply in evaluating the Requested Variance is "whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance." N.Y. Town Law § 267-b(3)(b)(2). Thus, this factor focuses upon whether an applicant can achieve a development objective in compliance with zoning standards or by way of a project that reduces the degree of the area variance sought.

In a July 1, 2025 letter to the ZBA from the Applicant's counsel, the following rationale is advanced concerning this factor:

> "[T]he Building must have 41 apartments in order to be viable. With fewer apartments, the Project will not receive the necessary funding from the State, which is critical to how the Project will be financed. … it cannot be made smaller with fewer units."

In other words, the Applicant has stated that, in the absence of the Requested Variance, a project consisting of 41 units made available through state financing cannot proceed.

[1] The New Lebanon Town Code contains an identical test for consideration of an area variance. Town Code §205-12C(b).

This suggests that only a project of this size, with such financing, is the only feasible means of viably developing this site. The Applicant has not specified why it is infeasible to build a zoning compliant project with a different type of financing. The Applicant's development objective has been to construct a grocery store with an accompanying residential component. The only reason proffered by the Applicant as to why this cannot be achieved in a zoning compliant manner relates to state financing demands. Yet, other, non-state funded alternatives are certainly available to develop a commercial/residential project on this site.

Smelyansky v. Zoning Bd. of Appeals of Town of Bethlehem, 83 A.D.3d 1267, 1269-70 (3d Dept' 2011), involved an area variance application to convert a two-family dwelling into a three-unit dwelling. An area variance from the minimum lot size requirement to support the requested third unit was denied. In upholding this denial, the Appellate Division, Third Department aptly noted:

> "Although there is no feasible method for petitioners to make the conversion without a[n] [area] variance, respondent noted that petitioners already have a two-family dwelling and can receive a benefit from this investment property by renting out at least one, if not both, of the two units in the duplex."

Similarly, in the application before the ZBA, the Applicant can build a zoning compliant project by reducing the number of dwelling units. Respectfully, it is not the ZBA's responsibility to ensure that an applicant can receive grant funding or to concern itself with how an applicant finances a project. The relevant consideration is "whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance," not whether a particular variance will make a proposed project more financially *viable* than "feasible." N.Y. Town Law § 267-b(3)(b)(2).

II. Whether the requested area variance is substantial.

The substantiality of an area variance is a critical indication of whether it will have a significant impact on the community. Here, the Applicant seeks a 47% variance, or in other words, it seeks to nearly double the number of units than is permitted under the Town Code. In this regard, the requested variance is properly considered a "density" variance. Although the Applicant may not need a variance for lot coverage, a density variance has entirely different impacts on the neighborhood and community. This is particularly true insofar as public education impacts are concerned, as greater density translates into more students and demands on school resources.

Under Town Code § 205-13E(10)(a), multifamily dwellings must have a lot size of 5,000 square feet per dwelling unit. Thus, the Applicant's 140,000 square foot parcel may contain up to twenty-eight (28) dwelling units without a density variance. Twenty-eight (28) new units, standing alone, is sizeable. Yet, the Applicant seeks to develop forty-one (41) units and thereby have the advantage of a significantly reduced density standard (3,414 square feet versus the required 5,000 square feet).

The ZBA must also be mindful of the precedent it would set in granting the Requested Variance. Specifically, variance denials have been upheld by courts because the degree of variance requested was substantial and would set a dangerous precedent. *See Alfano v. Zoning Bd. of Appeals of Village of Farmington*, 74 A.D.3d 961, 963 (2d Dept' 2010) ("the ZBA rationally concluded that the requested variance would alter the character of the neighborhood and that the request was substantial in light of the potential precedent it would establish."); *see also Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 615 (2004) (the Court of Appeals held that the zoning board was "entitled to consider" the "precedent" that would be established if the variance was granted).

Given the significant number of 2-and-3 bedrooms proposed, the density variance will certainly have a substantial impact on the community and neighborhood. Apart from the school impacts associated with this project, New Lebanon CSD asks that the ZBA to be mindful of the precedent it would set should the Requested Variance be granted.

III. Conflicts of interest.

Finally, New Lebanon CSD voices its concern regarding conflicts associated with the presentation of the Requested Variance and, indeed, the entire project application. Article 18 of the New York General Municipal Law ("GML") provides that municipal officers (including zoning board and planning board members) shall not:

> "[R]eceive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee."

GML § 805-a(1)(c).

This application is being advanced by (1) ZBA Chair Tony Murad, who is a reported investor in the Project and (2) Planning Board Member Josh Young, the Managing Partner of the Applicant. Both have a clear financial interest in the Project. This

interest falls within the ambit of the GML's prohibition. Indeed, members of a land use board should not represent an applicant or perform work for an applicant who seeks land use approvals from such board. In this regard, the New York State Attorney General has opined that an architect who sits upon a land use board should not represent applicants before local land use boards. *See* N.Y. Op. Attorney General No. 94-51. Further, the Attorney General, citing GML § 805-a(1)(c), opined that an engineer who sits on a local planning board cannot be compensated by a client for work that will be presented to the planning board for review. *See* N.Y. Op. Attorney General No. 95-14. Similarly, the New York State Comptroller has set forth that a local professional who sits on a land use board must not only recuse him/herself from hearing applications they have worked on but should refrain from even taking on such work. *See* 1997 N.Y. Op. St. Comp. No. 97-25.

The purpose of these recusal and abstention requirements is that such actions "violate the spirit and intent of these enactments, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety" even if the member is purportedly not compensated for their work. *See e.g.,* 1997 N.Y. Op. St. Comp. No. 97-25. The Town of New Lebanon's Code of Ethics should also be consulted. *See* New Lebanon Town Code §§ 16-6A, E, H, and J(1).

Again, the proponents of the Project are bound to abide by these considerations, which cannot be excused through mere recusal alone. In short, recusal from participation as a board member on a particular application is not enough under the GML's requirements – a conflicted board member must refrain from appearing before the boards on which they sit. Nonetheless, the ZBA Chair and Planning Board Member Young have and continue to actively pursue this application in furtherance of a project in which they have a financial interest.

IV. Conclusion

In summary, New Lebanon CSD urges the ZBA to fully vet and consider all possible adverse impacts to the community and neighborhood as it considers the Requested Variance request and account for the public education impacts arising from this project and the increased density sought by the Applicant. The substantiality of the variance,

its precedential effect and the Applicant's ability to develop the site in a zoning compliant, or less dense fashion, should be carefully considered.

Respectfully submitted,

Judson K. Siebert

JKS/dy
Enclosure
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