

January 12, 2022

[Via Email]

Supervisor Michael Schiliro and the
Honorable Members of the North Castle Town Board
15 Bedford Road
Armonk, NY 10504

**Re: Mariani Gardens
Application for Special Permit Extension
45 Bedford Road, Section 108.03, Block 1, Lot 65**

Honorable Supervisor and Members of the Town Board:

Our firm was recently retained to represent 45 Bedford Road, LLC (“45 Bedford”) and NCD Acquisitions, LLC (“NCD”)(collectively “Client”) in connection with the property located at 45 Bedford Road (“Property”). As you know, the Property was re-zoned to the R-MF-DA zoning district on June 12, 2019. Subsequently, on October 16, 2019 your Board granted Special Use Permit Approval for the construction of 43 residential units containing 76 bedrooms in 4 buildings. Pursuant to the Resolution of Approval, the Special Use Permit was to expire on October 16, 2020. On October 14, 2020, your Board granted a one-year extension of the Special Use Permit Approval. More recently, on October 27, 2021 your Board granted a 90-day extension through January 14, 2022.

As your Board has been previously advised, 50% of the membership interest in 45 Bedford has been acquired by NCD. As you also are aware, the remaining 50% interest in 45 Bedford owned by Mark Mariani (“Mariani”) was placed in Bankruptcy. In order for NCD to acquire the remaining 50% interest in 45 Bedford, the United States Bankruptcy Court had to consent to the transfer. On November 19, 2021, the Bankruptcy Court approved the sale terms and on December 19th Federal Judge Drain signed an Order approving the transfer of Mariani’s 50% interest to NCD. While the transfer of Mariani’s interest in 45 Bedford to NCD has not yet been finalized, we anticipate that those interests will be transferred pursuant to Court Order in the next few weeks.

Upon receipt of Mariani's interest, our Client intends to improve the current condition of the Property and move forward to develop the Property under the existing Special Use Permit. NCD has been in discussions with a joint venture partner to develop the Property. The JV partner has reviewed the existing Special Use Permit, Community Benefits Agreement executed by the Town, and associated plans. Additionally, they have discussed the plans with the projects engineers and planners and are likewise eager to move forward with the current approvals. No changes to the terms of the Special Use Permit or the plans associated therewith are being contemplated. Accordingly, we are requesting a one-year extension of the currently valid and subsisting Special Use Permit.

For the reasons set forth below, we urge you to grant the pending extension request based upon: (i) well established principles of New York law, (ii) the fact that our Client cannot presently proceed until the Court Order is effectuated, and (iii) the fact that there has been no change in circumstance with respect to the nature of the project or the surrounding environs.

It has been consistently held by New York State courts that when a party applies in a timely fashion for an extension of a zoning approval from a municipal board or agency, "the applicant 'must be afforded an opportunity to show that circumstances have not changed, and a denial of extension will only be sustained if proof of such circumstances is lacking.'" Allegany Wind LLC v. Planning Board of the Town of Allegany, 982 N.Y.S.2d 278, 279 (4th Dep't 2014) (citing Patricia E. Salkin, 2 N.Y. Zoning Law & Practice § 29:34). Consequently, when the circumstances related to a project have not changed, a municipality has no valid reason to deny an extension request. This is because "[t]he purpose for imposing a time limitation . . . is to insure that in the event conditions have changed at the expiration of the period prescribed[,] the board will have the opportunity to reappraise the proposal" Dil-Hill Realty Corp. v. Schultz, 385 N.Y.S.2d 324, 327 (2d Dep't 1976) (quoting Matter of Goodwin (Town of Greenburgh) (N.Y.L.J., July 5, 1962, p. 10, col. 1)). Any such change must be material and based on the criteria analyzed in the original approval, and may include changes to the nature of the project, surrounding environs, and the relationship between the two. Allegany Wind LLC, 982 N.Y.S.2d at 280; Dil-Hill Realty Corp., 385 N.Y.S.2d at 327. In regards to surrounding environs, it should be noted that it has been found that an extension is justified when the nature of the surrounding neighborhood, which was analyzed as part of the original approval criteria, has not changed. William Borea Contracting Co. v. Murdock, 294 N.Y.S. 19, 20–21 (1st Dep't 1937). The analysis of said changed circumstances must relate to land "use" issues, not the land "user." It matters not that Mariani is no longer the developer.

In this case, the circumstances related to the land development project have not changed. The plans remain identical and there have been no significant changes in the surrounding environs. Further, in connection with the approved Special Use Permit, your Board found, among other things, that:

1. "[T]he proposed project would accomplish many of the goals of the Comprehensive Plan, including, minimizing traffic and parking impacts by permitting multifamily residential adjacent to the Armonk Hamlet and by strengthening the Armonk Hamlet commercial core by prohibiting additional commercial uses on the subject site."

2. All the general special use permit standards contained in Section 355-37 of the Town Code have been met.
3. All the specific special use permit standards contained in Section 355-40(X) have been met.
4. The proposed use is compatible with surrounding uses.
5. The proposed use will not have a negative impact on the environment.

Since the circumstances related to our Client's project and the nature of the immediate environs have not changed, the Town Board has no legal or factual justification to deny the pending extension request.

Furthermore, if the Town Board were to deny our Client's pending extension request, our Client could theoretically simply resubmit its previously filed application for Special Use Permit Approval. It is well settled under New York law that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious." Nicolai v. McLaughlin, 81 N.Y.S.3d 89, 90 (2d Dep't 2018); Amdurer v. Village of New Hempstead Zoning Board of Appeals, 45 N.Y.S.3d 186, 187 (2d Dep't 2017); Lucas v. Board of Appeals of the Village of Mamaroneck, 870 N.Y.S.2d 78, 80 (2d Dep't 2008) (internal citations omitted). As occurred in the above-cited cases, a municipality cannot provide a conflicting decision on a zoning application that it previously had approved or disapproved without providing reasoning for why its now conflicting decision is justified by a change in the nature of the proposed action. Since our Client's resubmitted application would not represent any material difference from its previously submitted application, any denial of its resubmitted application would be considered arbitrary and capricious.

We understand and acknowledge the Town Board's frustration that this project, though approved, has not proceeded with construction to date. To ignore an unprecedented world-wide pandemic that has dominated economic offers since these approvals would be arbitrary, capricious, and callous. We further understand the Town Board's displeasure with the current state of Property in terms of ongoing maintenance and repair. Once the remaining 50% in 45 Bedford is transferred to NCD, our Client intends to clean up and maintain the site. Further, the extension of the Special Use Permit will allow our Client to finalize its deal with the joint venture partner and begin processing the necessary site plan application to allow this development to come to fruition. While the delay in moving this project forward has been disappointing for our Client, the Town Board, and the community it is certainly not the only approved land development project that has yet to proceed and had no choice but to request extensions.

Based on the above, it is our belief that the Town Board has the legal obligation to approve our Client's pending extension request, and we respectfully request that the Town Board do so. This approval would be in the best interest of the Town and our Client, as it would not require the Town to undergo a full review of a newly submitted special use permit application that would,

under the legal principles articulated above, result in an approval already provided to our Client. Consequently, this would represent a significant savings in terms of time and money for both the Town and our Client.

We genuinely hope that your Board will seek to work cooperatively with our Firm and Client. If you have any questions or concerns, please do not hesitate to contact us.

Respectfully submitted,

ZARIN & STEINMETZ

By: *David Steinmetz* /s/
David S. Steinmetz
Kory Salomone

Cc: Roland Baroni, Esq.
Kevin Hay, Town Administrator
NCD Acquisitions, LLC
45 Bedford Road, LLC