



Village of Harriman

1 Church Street
Harriman, New York 10926
Phone (845) 783-4421

ZONING BOARD OF APPEALS

NOVEMBER 6, 2024

MEETING AGENDA

- 1. PLEDGE OF ALLEGIANCE**
- 2. ROLL CALL**
- 3. ACCEPTANCE OF MINUTES**
 - a. FEBRUARY 1, 2024**
- 4. 101-2-1.12 – RIGHT CHOICE BUILDERS, VARIANCES REQUESTED**

**NEXT MEETING FOR ZONING BOARD OF APPEALS
IS SCHEDULED FOR
WEDNESDAY DECEMBER 4, 2024 @ 7:30PM**

**SUBMISSION DEADLINE FOR THE
ZONING BOARD OF APPEALS MEETING IS
WEDNESDAY NOVEMBER 15, 2024, BY NOON.**

VILLAGE OF HARRIMAN ZONING BOARD OF APPEALS
NOVEMBER 6, 2024, 7:30 PM
Page 1

Chairman Pettiford opened the Village of Harriman’s November 6, 2024, Zoning Board of Appeals regular meeting at 7:30pm. He welcomed everyone followed by the Pledge of Allegiance and roll call.

Present: Chairman Pettiford, Member LaMarch, Member Paez, Member Torres, Attorney DeJoy, and Secretary Hunter.

Absent: none

Member LaMarch made a MOTION to accept the minutes from February 1, 2024.

Second by Member Paez, ALL IN FAVOR.

101-2-1.12 – Right Choice Builders, variances requested: Attorney Aaron Warner, Attorney Daniel Richmond, and Engineer John Loch present for the applicant this evening.

Attorney Warner stated this is a 2 story with a mezzanine level mixed use office and storage space, located at 200 Route 17M in the Village’s B-2 Zone. Construction is essentially complete; however, the applicant appears before this board in connections with a denial from the Building Inspector for a Certificate of Occupancy. (Letter dated October 22, 2024, from the Law Office of Zarin & Steinmetz and denial letter dated October 18, 2024, attached to the minutes).

The applicant is requesting 2 area variances, code interpretation and parking spaces of additional 7 spaces. Height requirement is 35 feet, requesting an additional 1.33 foot which is not a significant difference due to the topography and tree line of the property.

Mr. Loch handed out paperwork with diagrams to the ZBA members, which he will send digitally to the Secretary. The 6 corners of the building were used for the average grade. Per code usually only use 4 corners to determine the height. Stories of the building should be excluded due to the loading dock to determine the height. The site plans don’t show any peaks with the slope. Discussion between Mr. Loch and Attorney DeJoy about the height of the building. Agreed to the height of 36.52, excess of 1.52.

Mr. Loch noted the loading docks are at the lower level with storage space in the middle. Office spaces are located at the outer perimeters of the building. The second floor above it is a mezzanine level which is different than a 3-story building. The NYS Building Code states that a mezzanine is not a story. Added a little bit more office space than was anticipated from site plan approval, concerned was this another story. It didn’t build any higher for the mezzanine level. The site plan showed an elevator to be installed to the mezzanine level but didn’t account for parking.

Attorney DeJoy per the Building Inspector in his referral stated the third floor is considered a floor area of occupancy per the NYS Building Code. Apparently, there is a difference between his and your interpretation. Additional information is needed for explanation of the code for the board members to determine if a variance or interpretation is needed.

Mr. Loch approved parking for the site needs to be addressed. Currently, there are 78 parking spaces on site. After discussions with the Village’s representative of Lanc & Tully there is an additional black-topped area to place 5 parking spaces that won’t interfere with truck movement. The Building Inspector and Lanc & Tully’s office deem that a total of 90 parking spaces is required. We are seeking a variance in the requirement.

Attorney Warner stated that plans were submitted regularly to the Building Inspector for his review.

The following questions on the *AREA Variance* requested are answered on October 22, 2024, Attorney letter and were reviewed this evening by Attorney Warner:

VILLAGE OF HARRIMAN ZONING BOARD OF APPEALS
NOVEMBER 6, 2024, 7:30 PM
Page 2

Question #1 Will the granting of this variance produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties?

Height variance will not have undesirable effect. The building is tucked away in a bowl with a dense tree line in the rear of the building which blocks the view from the Heritage Trail. To the west of the site there are more trees and vegetation screening the property from Loyal Auto Tire Center. Front of the site is screened from Frankie's Car Wash with their vivid colors.

Regarding the height variance for a third story, the applicant did not intend to build a third story and does not believe they have built a third story. Applicant believes the mezzanine level is within the 2nd floor.

The Planning Board previously approved 78 parking spots. With the mezzanine floor area added, your consultants have indicated 90 parking spaces are required for the site. Furthermore, the applicant is amenable to using the adjacent property to provide for additional 26 parking spaces should that be needed.

Question #2 Can the benefit you seek be achieved by some feasible method area variance?

The building is already constructed, requiring the applicant to reduce the project now would be serious economic hardship. If this board has any other ideas or reasonable changes to mitigate the non-conforming are welcomed to the applicant.

Question #3 How substantial is the variance that you are requesting?

These variances are not substantial, negative impact on the neighborhood character.

Question #4 Will the granting of the variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?

The parking variance being requested will not have an adverse effect.

Question #5 Is the alleged difficulty self-created?

The applicant relied upon the Building Inspector regularly submitting building plans, which he reviewed. In this case the building is complete, and the applicant was not aware of any deformities. These variances will not create any precedence.

Member Paez asked how many times submissions were given to the Building Inspector, Mr. Loch acknowledged at least 3 times. Member Paez asked if any communications from the Building Inspector were sent. She would like to see the communications between the applicant and the Village.

Attorney Warner noted for the record, when we started originally in 2017 to where we are at now what the original ZBA plan was. Chairman Pettiford read from the 2017 ZBA decision, page 11. ..." The ZBA determines that the alleged difficulty asserted by the Applicant to justify its area variance requests was definitely self-created. Specifically, the Applicant has asserted that the three area variances are needed because of the flagpole shape of the lot and the loss of 33% of usable land due to FEMA demarcation line. The ZBA finds that the Applicant was aware of these limitations on developing the property when it purchased the property. The "need" for the three variances arises solely from the Applicant's desire to maximize its profits by building a structure with the largest possible square footage. The ZBA finds that the Applicant could simply build a smaller structure that is more suitable for the size of the usable portion of the lot and does conflict with the zoning requirement for the B-2 district."

Mr. Loch noted the building was predominantly to be offices, storage was not talked about. The layout was somewhat different, later on they had the wetland reevaluated. It was determined there were not wetlands on this site and this issue disappeared. This site does have some differences from before. Attorney Richmond noted that this request is much less substantial than when requested to the ZBA in 2017.

VILLAGE OF HARRIMAN ZONING BOARD OF APPEALS
NOVEMBER 6, 2024, 7:30 PM
Page 3

Chairman Pettiford pointed out the leniency of the Village ever since the beginning of this application, allowing all of this up to the point we are at C of O being denied again for reasons being stated. We are narrowing the issues down.

Per Mr. Loch the applicant has currently acquired a parcel, his intentions are to subdivide the property. Unable to do this at this time due to the current technical issues with SWPPP. Have looked at a preliminary plan.

Member Paez asked to explain SWPPP. Mr. Loch noted that SWPPP stands for the Storm Water Pollution Prevention Plan. Harriman Community is in what is called MS4, regulations to be followed that are very strict.

Member LaMarch asked if there is any SWPPP documentation available to review. On the site is a mailbox with the SWPPP paperwork. Best practices are to be used to contain water on site.

Attorney DeJoy noted procedurally could schedule a public hearing next month if you feel application is complete and substantially enough information to decide on this matter. You still ask for more information at the next meeting as needed. GML submission needs to be done, needs to wait 30 days to offer a decision.

Chairman Pettiford made a MOTION to go into an attorney client meeting.
Second by Member Paez, ALL IN FAVOR.

Members of the ZBA Board and Attorney DeJoy left the meeting room at 8:32pm.
Members of the ZBA Board and Attorney DeJoy returned to the meeting at 8:43pm.

Chairman Pettiford made a MOTION to schedule a public hearing for January 8, 2025.
Second by Member Torres, ALL IN FAVOR.

Member LaMarch made a MOTION to close the regular meeting of November 6, 2024, at 8:46pm.
Second by Member Paez, ALL IN FAVOR.

Minutes respectively submitted,

Maria C. Hunter, Secretary

**VILLAGE OF HARRIMAN
ZONING BOARD OF APPEALS**

NOTICE OF PUBLIC HEARING

NOTICE IS HEREBY GIVEN, that a public hearing will be held by the Zoning Board of Appeals of the Village of Harriman, New York on Wednesday, January 8, 2025 at 7:30 p.m., or as soon thereafter as may be hear, at the Village Hall, located at 1 Church Street, Harriman, New York, 10926 regarding an application submitted by MYL Investors, LLC for area variances from §140-7 of the Zoning Code to legalize an existing structure with a height of 36.52 ft., when the Code limits building height to 35 ft., and to allow for 83 off-street parking spaces when the Code requires a minimum of 90 off-street parking spaces. In addition, the Applicant is seeking an interpretation that a second floor “mezzanine” structure is not a “third story,” within the meaning of the §140-4 of the Code. Alternatively, the Applicant is seeking a variance for a third story in the event that the mezzanine level is determined to be a third story. The property is identified on the Orange County tax map as Section 101, Block 2, Lot 1.12, said lot being known as 200 State Route 17M, in the Village of Harriman.

The Zoning Board of Appeals will hear all persons interested in the proposed area variance application at the above time and place. Copies of said application, and any other information submitted in support of the application are available for review at Village Hall at the address stated above.

The Village of Harriman will make every effort to ensure that the hearing is accessible to persons with disabilities. Anyone requiring special assistance and/or reasonable accommodations should contact the Village Clerk.

BY ORDER OF
THE ZONING BOARD OF APPEALS
VILLAGE OF HARRIMAN
MICHAEL PETTIFORD, CHAIRMAN

**VILLAGE OF HARRIMAN
BUILDING DEPARTMENT**

1 CHURCH STREET
HARRIMAN, NY 10926
Ph. (845) 782-6892

RECEIVED

OCT 22 2024

Date: October 18, 2024

Address: 194/ 200 Route 17M SBL: 101-2-1.12

Village of Harriman

**Owner: Rite Choice Builders
Yoel Leifer MYL Investors**

Inspector: Stephen Giacco

Re: Denial of issuance of a Certificate of Occupancy

This letter is to advise you that a Certificate of Occupancy cannot be issued for the purpose of occupying and use of the building due to the following issues found during the final inspection of the building plans.

- **The final building height has exceeded the approved height of 35 feet. The finished building height has been determined to be 36.52 feet as per Lanc and Tully Engineering. AFR Engineering has determined the height as 38.55 to 41.425 feet. These heights are in violation of the Village of Harriman building codes.**
- **There is a third floor mezzanine that has been built as per the plans, but the amount of office spaces has exceeded the approved amount of parking spaces allocated for the property. The third floor is considered a floor area of occupancy as per the New York State Building Code. The approved number of parking spaces is 73 and the amount of parking required is 90 spaces. This has exceeded the approved site plan for the project. There will need to be additional parking spaces created for the additional floor space on the third floor.**

The issues will require the owner to be referred to the Village of Harriman Zoning Board for the issuance of a variance(s) for the non-compliant conditions for the project.

Any questions please contact me. Thank you.

**Stephen R Giacco
Building Inspector**



Daniel M. Richmond
dmrichmond@zarin-steinmetz.com

October 22, 2024

Michael Pettiford, Chairperson
Village of Harriman Zoning Board of Appeals
Village Hall
1 Church Street
Harriman, New York 10926

**Re: 200 Route 17M;
Tax Map Designation: 101-2-1.12**

Dear Chairperson Pettiford and Members of the ZBA:

This Firm represents MYL Investors, LLC (the "Applicant"), in connection with the enclosed application for variances from the Village of Harriman Zoning Law Schedule of District Regulations for its already built, two-story building with mezzanine level consisting of professional offices and private storage facilities (the "Project") on the above-referenced property (the "Site"). The Site, which is located on 200 Route 17M in the Village of Harriman ("Village") is within the Village's B-2 Zoning District. The Applicant appears before your Board seeking relief in the form of area variances from certain bulk requirements of the Village's B-2 General Commercial Zoning District on appeal of the Village Building Inspector letter, dated October 18, 2024, which denied the Applicant's request for a Certificate of Occupancy (the "Denial Letter"). We respectfully request that this Application be added to your Board's next available meeting agenda and scheduled for a Public Hearing.

In response to the Denial Letter, the Applicant respectfully seeks variances for the following district regulations:

District Regulation	Requirement	Proposed
Maximum Building Height	35 Feet	36.33 Feet ¹
Maximum Building Height	2-Stories	2-Stories with Mezzanine Level ²

¹ The Denial Letter references 36.52 as the building height per Lanc & Tully, and could be construed to be 38.55 to 41.425 feet as the building height as per the Applicant's consultant, AFR Engineering. As explained below, these calculations lead to an extremely conservative interpretation, which is not consistent with a reasonable interpretation of the code. The Denial Letter states that "[t]hese heights are in violation of the Village of Harriman buildings codes." Accordingly, the Applicant appeals to your Board in connection with all of these heights.

² Although the Denial Letter does not state that the building has a noncompliant third floor, it does reference the building has a "third floor mezzanine." While, as explained herein, the Applicant does not believe that the mezzanine constitutes a third floor (but is rather included as part of the second floor), in an

Parking	90	83
---------	----	----

In addition, the Applicant would like to raise with your Board issues of Village Code interpretation related to Site Plan Notes, prior to discussion with the Planning Board, as it relates to permitted uses in the B-2 Zoning District and is relevant to the parking requirements.

Accordingly, enclosed is a Zoning Board Application, the as-built plans for the Project and other relevant documentation.

Executive Summary

The Applicant respectfully requests relief from the Village Building Inspector’s Denial Letter, which indicates that it will not issue a Certificate of Occupancy (“CO”) for its building on the Site because of nonconforming building height and parking. In fact, the Project was built pursuant to plans that were approved and regularly reviewed by the Building Inspector. Construction is now finished, and the Applicant is in need of relief.

The Applicant respectfully submits that the requested variances should be granted because they are not substantial, will not cause an adverse impact on the physical or environmental conditions in the neighborhood or Zoning District, and will neither create harmful precedent nor an undesirable change in the character of the neighborhood or a detriment to nearby properties. As per Lanc & Tully, the Village’s Engineering Consultant, the requested height variance is only 1.52 feet, and even using the Applicant’s consultant’s worst case, the building at one point is at most 6.425 feet above the Village Code requirement. This worst-case calculation method is extremely conservative and is not consistent with a reasonable interpretation of the Village Code because it uses only four foundational corners when there are six, per Village Code, and it fails to use the average grade elevations and instead relies upon the lowest point of grade. When the Applicant’s consultant used a reasonable and code consistent methodology, using all six foundational corners and average grade, the building height resulted in a variance of 1.33 feet, as shown on the enclosed AFR ZBA Plans, essentially the same as Lanc & Tully’s calculation, which we understand also used a six foundational corner method. To the extent a variance is required for the mezzanine level (i.e., to the extent the Denial Letter characterizes the mezzanine as a third floor) such variance similarly is minimal. Moreover, the Applicant is only seeking a 7-spot parking variance and the Applicant would be willing to build those 7 spaces on adjacent property that it owns.

Notably, the Applicant was previously before your Board for more substantial variances, including a height variance of 9 feet; a variance to have a third floor; and a 100-space parking variance. On that application, your Board found the height variance and third floor variance would not create an undesirable change in the character of the neighborhood due to the unique topography of the site and were also found to be, individually, not substantial. However, when viewed in connection with the “excessively large” 100-space parking, your Board determined the variances were unacceptable and denied them.

excess of caution the Applicant appeals from so much of the Denial Letter as would withhold a Certificate of Occupancy because the building has a third floor.

Given that the requested parking variance is now far less substantial, the Applicant respectfully submits that your Board should grant the requested variances. Because of the unique topography of the Site, and the fact that Frankie's Auto Center and Car Wash and other building obstruct views of the building from Route 17M, the building is virtually undetectable to the public. In addition, the majority of the Site is screened by natural vegetation, which, in conjunction with the building's earthen tones, make the building blend in well with the area. Moreover, the Site's drastic slope results in the first floor being entirely underground in the front. From the front, the most important vantage point, the building appears as a two-story building, while it appears as a three-story building from the back, which is the side with the most vegetative screening.

As a result of these unique factors, granting the variances would not set precedent. Accordingly, and as will be discussed in more detail below, we respectfully request that your Board grant the requested variances.

Factual Overview

The Applicant was previously before your Board seeking more substantial variances: a height variance of 9 feet; a variance to have a third floor; and a 100-space parking variance. In reviewing the request, your Board recognized that the height and story variance essentially posed the same impacts, and found that these variances "would not cause an undesirable change in the neighborhood because of the topography of the project location," and "because both [variances] would result in the structure being significantly *taller only in the back due to the topography of the property*," and that a tree line blocked the view of the Project from that angle. *See* Village of Harriman Zoning Board of Appeals October 18, 2017, Findings of Fact & Decision ("ZBA Decision" or the "Decision").³ The Board nevertheless denied these variances, apparently due to parking considerations. Notably, the Applicant is now seeking a far less substantial parking variance than it did previously.

The Applicant intended to build a zoning compliant project, and regularly submitted plans to the Building Inspector during the building process. Unfortunately, while the Applicant, in good faith, intended to rely upon statements and guidance from its Architect and the Village Building Inspector regarding the height, number of stories, and parking in constructing the Project, it appears there may have been some missed communication.

³ The Board found, for example, that:

The ZBA's findings with regard to this factor are essentially *the same for the height variance request as for the third story variance request* because both would result in the structure being significantly *taller only in the back due to the topography of the property*. The key consideration for the ZBA was how visible the structure would be from neighboring properties. If the tree line were not blocking the view of the 19 feet height exceedance in the back of the structure, the ZBA would find it to be an undesirable change in the neighborhood.

See ZBA Decision at 9 (emphasis added).

The Applicant, for example, did not intend to build a third story and does not believe that it has constructed one. The Applicant relied upon information provided by its Architect to determine that pursuant to New York State Building Code a mezzanine level did not constitute a third story. Per New York State Building Code, a mezzanine “shall be considered a portion of the story below.” *See* New York State Building Code Section 505.2. A mezzanine is defined by the Building Code as “an intermediate level or levels between the floor and ceiling of any story.” *See* New York State Building Code Chapter 2. Based upon the information provided by the Applicant’s Architect, our client built a level within the second floor (i.e., a mezzanine level), with stairs and an elevator leading to the mezzanine level, which is enclosed but does not entirely cover the second floor. As the Denial Letter recognizes, plans showing the mezzanine were presented to the Building Inspector. To the extent that the Building Inspector now deems the mezzanine level to be a third floor, relief is requested to allow the built building to be occupied.

In any event, it is clear from the prior ZBA Decision that the biggest issue your Board had with the previous variance requests was with the Applicant’s previous request for a 100-space parking variance, as opposed to the 7 space variance it now seeks. Your Board determined that all three variances were, when viewed together, substantial, primarily due to the “excessively large number of parking spaces” requested by the parking variance. *See* ZBA Decision at 10. The far less substantial parking variance now sought should enable your Board to easily grant the requested variances.

ZBA Should Grant the Requested Variances

The ZBA should grant the requested variances based on the 5-factor balancing test under N.Y. Town Law Section 267-b because the benefit to the Applicant outweighs the absence of any detriment to the community and does not create harmful precedent.

First, granting the requested variances would not result in an undesirable change in the character of the neighborhood or a detriment to nearby properties. The professional office use is a principal permitted use in the B-2 zone and the private storage accessory use is also a permitted accessory use in the B-2 zone. *See* ZBA Decision. As the maximum building height variances (feet and number of stories) are interrelated, the Applicant will address them both together. (*See* Village of Harriman Zoning Law Schedule of District Regulations Part 1). The B-2 Zoning District is the Village’s general commercial zoning district, and the Site is, topographically, at the center of a bowl, surrounded by large commercial ventures or vegetative screening on all sides. To the North, or towards the back, of the Site is a dense layer of vegetation and trees that act as natural screening from Heritage Trail/Erie Main Line. In addition, more vegetative screening and trees are found to the West of the Site screening the property from the Loyal Tire & Auto Center and parking lot in that direction. In addition, the building’s earthen tones neatly camouflage the building within the surrounding trees. The building’s earthen tones are in stark contrast to the bright blue and red coloration of Frankie’s Full Service Car Wash and Auto Center, which draws attention away from and screens the building from view from the front and from passerby’s on Route 17M.

The natural and planned screening qualities underly the fact that the building's current average height is just 36.33 feet tall, only 1.33 feet higher than the required 35 feet. To reach our calculated average height of 36.33 feet tall, we used reasonable ground elevations and accounted for depressed loading docks and used the average height of all six corners of the building. The six-corner average is the required calculation under the Village Code. Village Code provides that "height" is "[t]he vertical distance measured from the average finished grade at *all* foundation corners of the building or structure [...]" (emphasis added). As the building has six foundational corners, we used that method of calculation to reach a total average height of 36.33 feet tall, which is 1.33 feet higher than the required 35 feet. Please note that 1.33 feet is far less than the original height variance of 9 feet sought by the Applicant.

The building height, including the mezzanine level, is comparable to the surrounding height level of surrounding buildings, including being just slightly higher than Frankie's Auto Center, which is between the building and Route 17M. Due to the unique topography of the Site and the fact that the building is built into the slope of the terrain, its height is comparable to the level of the surrounding buildings at the top of the hill adjacent to Route 17M. In addition, the sightlines from Route 17M causes the buildings along Route 17M to substantially block the view of our building from drivers and pedestrians travelling along Route 17M. This means that even though our building is slightly taller than Frankie's Auto Center, it still cannot be seen from Route 17M. Furthermore, the unique topography, the terrain sloping downward toward the rear of the Site, and the fact that the first floor is entirely underground in the front, causes the second floor and mezzanine level to be at ground level making the building appear from the front as if it were only two stories. Although the building appears as a three-story building from the back, the fact that the Site has its vegetative screening predominantly on the sides and rear mitigates this point especially considering that the majority of visibility does not occur at the back of the Site but occurs at the front of the building due to Route 17M passerby's. Furthermore, the Applicant would agree to condition the granting of these variances on leaving the woods intact on the sides and rear of the property in order to maintain the vegetative screening. Accordingly, and as the ZBA correctly determined in its October 18, 2017, Decision, granting the height and third-story variances will not create an undesirable change in the neighborhood.

For similar reasons to the height variance, granting the third-story variance for the mezzanine level would not create harmful precedent due to the unique topography of the site. In the ZBA's October 18, 2017, Decision, the ZBA indicated that it has strong concerns about setting a precedent allowing three story buildings in the Village, which would result in more of a city look that conflicts with the Village's quaint rural character. We do not believe harmful precedent will be set should your Board grant the third-story variance.

Granting the third-story variance, to the extent it is required, will not set harmful precedent due to the unique topography of the site. As explained previously, the Site is tucked away in the side of the slope and surrounded by trees and vegetative screening as well as other commercial ventures making it virtually imperceptible. In addition, the building is not a true three-story building no matter from which direction it is viewed. From the front, it appears as a two-story, from the back, although there are three levels of windows, which gives the appearance of a three-story building, the grading and loading bay/parking overhang, engulfs both the sides, and rear, of

the building at the nexus between the first and second level, which gives the appearance of a basement level rather than a first story because half of it is subterranean and the other half is obscured by the loading dock overhang. Importantly, the outcome achieved by granting this third-story variance will not create harmful precedent because under Village Code, one cannot simply change the grade to avoid compliance with the district regulation requiring two-stories without a permit and specifications. Said another way, one cannot regrade to create a subterranean or partially subterranean first floor to avoid the two-story requirement in the B-2 Zoning District without first obtaining a permit. Therefore, your Board would be in control of granting any regrading permits and therefore in control of avoiding this issue through thoughtful permitting. Despite the permitting control, assuming that your Board's concern is borne from the fact that others may endeavor to create three-story buildings in the B-2 zone, respectfully, the concern is unwarranted. Considering the unique nature including the natural slope of this Site, granting this variance would not create harmful precedent because this could not happen elsewhere. It is purely due to the unique nature of the natural slope of the site. Again, the unique nature of the Site due to slope and with the fact that the first floor is hidden due to the design of the building and natural screening, granting this variance will not create harmful precedent as it is extremely unlikely it would be able to occur elsewhere in the B-2 Zoning District. The effect is the same, that the first story is hidden, like those other three-story buildings in the B-2 Zoning District that have their first floor entirely underground. Accordingly, granting the third-story variance will not create harmful precedent in other parts of the Village's B-2 Zoning District.

Regarding the requested parking variance, the Zoning Board used the Planning Board's calculation of 150 required parking spaces, however, based on the As-Built plans, the Applicant and the Building Inspector calculate that there are only 90 required parking spaces for the Project. Like the Planning Board calculated, the parking requirements should be determined by first calculating the required parking spaces for the office space portion of the Project and then calculating the parking required for the private storage portion of the Project and adding the two together. Per the As-Built plans, there is 14,841 square feet of office space, required parking for which is calculated by dividing the office space by 200 square feet, resulting in 74 parking spaces. *See As-Built Plans.* Two additional spaces are needed for each of the eight storage areas equaling sixteen more parking spaces. Thus, the total parking spaces required for the Project is 90 parking spaces. Currently, the Site provides 83 parking spaces, meaning our requested parking variance is for only 7 parking spaces, which is far less than the 100 parking spaces requested in the original variance.

Accordingly, using the As-Built plans gives a more accurate calculation of the required number of parking spaces than were calculated based on previous plans. Knowing now the correct number of parking spaces required for the Project, the seven space parking variance will not cause an undesirable change in the characteristics of the neighborhood or have a detrimental impact on nearby properties. The Applicant is also amenable to using its adjacent property to provide additional parking, estimated to provide an additional 26 parking spaces, should that be needed. Accordingly, we submit that granting the requested parking variance will not create an undesirable change in the characteristics of the neighborhood or have a detrimental impact on nearby properties.

Second, there is no feasible alternative to achieve the benefit sought by the Applicant because the Applicant cannot avoid waste and maximize its use of the property without these variances. Despite the Applicant's regular communication with its Architect and the Building Inspector, and that that the building was built in conformance to plans reviewed and approved by the Building Inspector, the Applicant is now left with a Site that is nonconforming as to height, number of stories, and parking spaces. The Applicant understands the predicament it is in and, notwithstanding its current request for relief, is willing to make reasonable changes to mitigate or correct the current nonconformities to the satisfaction of your Board and welcomes discussion to do so.

Third, the requested variances are not substantial. As explained above, we seek a parking variance for seven parking spaces, which is ninety-three spaces less than previously requested. The Applicant submits that a seven-space variance is not substantial, and the Applicant will be providing eighty-three parking spaces. Regarding the requested 1.33-foot height variance, your Board, in its October 18, 2017, Decision determined that a 9-foot variance was not substantial. Our current requested variance is less than previously determined to be not substantial. Therefore, the Applicant also submits that the 1.33-foot height variance requested here is also not substantial. Finally, regarding the requested variance for a third story, we submit that this too is also not substantial. Your Board, in its October 18, 2017, Decision reasoned that the requested variance for a third story was substantial because it is equivalent to more than one third of the building. New York courts, however, have held that simply relying upon the percentage deviation alone does not suffice in evaluating a variance application.

Furthermore, even if the requested variances were deemed substantial, it is settled law that "[s]ubstantiality cannot be judged in the abstract; rather, the totality of the relevant circumstances must be evaluated in determining whether the variance sought is, in actuality a substantial one." *See Lodge Hotel, Inc. v. Town of Erwin Z.B.A.*, 21 Misc. 3d 1120(A), 5 (Sup. Ct. Steuben Cnty. 2007), *aff'd*, 43 A.D.3d 1447, (4th Dept. 2007). The totality of the circumstances and the actual impact a requested variance would have on the surrounding community is critical to the overall analysis.⁴ Accordingly, the question of whether a substantial variance should be granted is whether it has an impact on the neighborhood community character. The third-story variance will not have a negative impact on the community character of the neighborhood as the building does not appear to be a three-story building due to the first floor being entirely below ground level in the front. As a result, the granting of this variance will have no greater of an impact than those other three-story buildings in the B-2 Zoning District, as, even though some of those buildings have the first floor entirely subterranean, the effect is the same, the appearance of a two-story building. Accordingly, these variances are not substantial, and, even if they were they should still be granted because they do not have a negative impact on community character.

⁴ *See, e.g., Wambold v. Southampton Zoning Bd. of Appeals*, 140 A.D.3d 891, 893 (2d Dep't 2016) ("While we agree with the petitioner that the proposed variance was substantial, there was no evidence that the granting of the variance would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community.").

Fourth, there would not be an adverse impact on the environment. In its October 18, 2017, Decision, the ZBA was concerned that the 100-space parking variance would have an adverse impact on the physical and environmental condition of the neighborhood because the lack of parking spaces may cause vehicles to park on the grass in the wetland, Route 17M and in other roadways or parking lots. The Applicant reiterates that it is seeking only a 7 space parking variance, which will not adversely impact the environment or the surrounding roads or roadways. In addition, the Applicant has constructed an underground stormwater drainage system, which is environmentally beneficial. Furthermore, the Applicant is amenable to placing natural wood barricades to prevent individuals from parking on the grass in the wetland, should your Board so desire.

Fifth, to the extent that the alleged hardship is deemed self-created, such a determination does not preclude the granting of the requested variances under N.Y. State Town Law. This is especially true considering that the building is complete and the reasonable reliance of the Applicant upon its architect and Building Inspector.

In conclusion, we respectfully request that your Board grant the variances requested as the majority of the factors weigh in favor of granting the variances, which will not create harmful precedent.

Notes On Approved Site Plan

Finally, the Applicant seeks a code interpretation from your Board regarding a perceived misinterpretation by the Planning Board of the ZBA's October 18, 2017, Decision. In particular, Note #3 on the approved site plan appears to improperly require that each primary office use in the building must have a corresponding accessory storage use, reading "Each office area shall be rented only with a corresponding storage area. No tenant space shall be rented solely as office space. Or solely as storage space. Each storage area shall be rented only with a corresponding office area. Any tenant renting multiple units shall also rent the corresponding accessory storage area(s)." In fact, business and professional offices use is a use permitted by right in the B-2 Zoning District. (See Village of Harriman Zoning Law Schedule of District Regulations Part 1). Therefore, we request a determination that professional offices used within the B-2 Zoning District do not require a corresponding accessory use.

Similarly, Note #2 in the approved site plan appears to prohibit the occupancy of office uses year-round, even if they do not have an associated accessory storage use, reading: "Office areas shall be occupied year-round and utilized by the tenants for conducting of their business. A lack of occupancy of office area shall render associated storage area 'unlawful' due to no longer being an accessory use." Again, however, business and professional offices use is a use permitted by right in the B-2 Zoning District, without any temporal requirement. (See Village of Harriman Zoning Law Schedule of District Regulations Part 1).

Moreover, Note #4 on the approved site plan, for reasons that are unclear, but which do not appear based on Code considerations, prohibits the subleasing of office space, reading: "No office areas or storage areas shall be sublet or otherwise offered to occupants besides the main tenant(s)."

Again, however, business and professional offices use is a use permitted by right in the B-2 Zoning District, without any restrictions on subleasing. (See Village of Harriman Zoning Law Schedule of District Regulations Part 1).

CONCLUSION

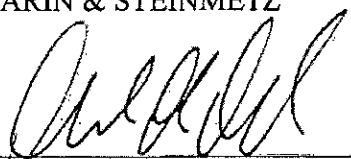
Based on the foregoing, the Applicant respectfully requests that the ZBA place this matter on its November 15, 2024, meeting agenda for a public hearing, and that the Board vote to approve the requested variances.

Please let us know if your Board has any questions or would like to discuss any aspect of this Application before then.

Respectfully submitted,

ZARIN & STEINMETZ

By:



Daniel M. Richmond, Esq.
Aaron N. Warner, Esq.

encs.

cc: Yoel Leifer
John A. Loch, P.E., P.L.S.