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November 28, 2022

**VIA EMAIL**

Daniel Patrick, Esq.  
Cuddy & Feder LLP  
445 Hamilton Ave, 14th Floor  
White Plains, NY 10601

Re: Yeshivah Yeshivath Viznitz Dkhal Torath Chaim (the “Yeshiva”)  
Special Permit Application (the “Application”)  
235 Elm Road, Briarcliff Manor, NY 10510 Parcel ID 98.19-2-11 (the “Property”)

Mr. Patrick:

The Briarcliff Manor Village Board (the “Village Board”) is committed to acting within the law in the review of the Application. Respectfully, we write in part to address certain statements made in your recent correspondence to the Village, most notably in your November 15, 2022, letter submitted in connection with the Application. We also write to confirm the timeline of the Application’s review to date, whether the Village Board can waive special permit requirements, the requirements of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), and the accommodations that have been put in place by the Village in connection with the foregoing.

**TIMELINE / FACTUAL BACKGROUND**

As you may be aware, toward the end of 2018, several members of the Village Board, including its current executive members, campaigned for office on platforms which included proposed reforms on how the Village would treat its large parcels. This included, as a principal element, reforms revisiting the special permit criteria for parcels of land abutting residential zoning districts. These proposed and later enacted amendments to the Village Code apply to multiple properties in the Village, and were in no way targeted or focused exclusively on 235 Elm Road or this applicant. Indeed, the amendments to Chapter 220-6 Special Use Permits were enacted in December of 2020 before the applicant purchased 235 Elm, and subsequent public hearings to further amend the chapter commenced in April of 2021, months before the applicant’s submission of the initial, and incomplete, application for its specific intended use. Consequently, the characterizations in your letter of November 15, 2022, that somehow the Yeshiva and/or its religious practices has been

singled out by the Code revisions, are not consistent with the documented history of discussions of those revisions or the subsequent Application for use of the Property.

Along these lines, we submit the following timeline which addresses factually the matters raised in your said letter:

- June 2019 - Amendments to special permit law first discussed by Village Board, including a June 7, 2019 Moratorium focusing on commercial properties abutting residential districts.
- May 19, 2020 - Amendments to §220-6 are back on the agenda - relating back to the June 7, 2019 Moratorium.
- December 15, 2020 - Village Board formally adopts local law amending special permit law.
- April 20, 2021 - First public hearing to further amend special permit law (Village Code §220-6J(a)).
- June 15, 2021 - Close of public hearings (after five meetings) and enactment of Village Code §220-6J(a) by Board of Trustees
- June 18, 2021 - Village receives initial incomplete application from the Yeshiva as subsequently supplemented by the Yeshiva from time to time.
- May 3, 2022 - Complete application in the instant matter submitted to Village Board.
- June, 3 2022 - Village Board opens public hearing on the application and refers this matter to the Planning Board per Village Code.
- June 9, 2022 - Planning Board discussed the matter and returned same to Village Board to commence formal review.
- September 14, 2022 - Village Planning Consultant BFJ issues review memo, raising the issue of compliance with Village Code §220-6J(a). At no time prior was this issue raised by the Yeshiva in its normative zoning / permit compliance analysis.
- October 12, 2022 - After an intervening phone call by Special Counsel for the Village, the Yeshiva responds via letter to BFJ's comments and references Village Code §220-6J(a).<sup>1</sup>
- October 26, 2022 - Telephone conference held during which Village Special Counsel and Village Attorney encourage the Yeshiva's attorney to present a more robust showing in

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<sup>1</sup> It is of note that applicant indicated they were aware of the requirements of Village Code §220-6J(a) but had as of yet not responded.

response to BFJ's comments relating to Village Code §220-6J(a) frontage requirements and law relating to waiver of special permit conditions.

- October 31, 2022 - Yeshiva responds but does not satisfactorily address the frontage requirements and law relating to waiver of special permit conditions.
- November 4, 2022 - Village Traffic consultant DTS Provident issues review memo indicating, among other things, that compliance with Village Code §220-6J(a) by the Yeshiva is not possible.
- November 4, 2022 - Contemporaneous with the DTS Provident memo, a formal denial of the Application is issued by the Building Department.
- November 4, 2022 - Letter from Village Counsel is sent outlining Yeshiva's procedural options given said denial and extending courtesies to the Yeshiva if they choose to appeal this matter to the Zoning Board of Appeals ("ZBA").<sup>2</sup>
- November 7, 2022 - Village Special Counsel and Village Attorney, in another conference with Yeshiva attorney suggests the Yeshiva bring this matter before the ZBA and present any case law it might consider determinative.
- November 15, 2022 - Yeshiva sends a letter demanding the Village Board waive the special permit frontage requirement.
- November 16, 2022 - Village Special Counsel and Village Attorney, in another telephone conference with Yeshiva attorney suggest that while the next regularly scheduled ZBA meeting would be in February 2023, we would expedite the matter for an earlier review by the ZBA if the Yeshiva would apply to the ZBA promptly.
- November 21, 2022 - Yeshiva submits its appeal documents to the ZBA, with the understanding that it must complete its ZBA record by November 30, 2022, with a possible date for an expedited ZBA special meeting in December 2022.

The foregoing timeline confirms that the Village has not delayed review of the Yeshiva's application. Noncompliance with the Special Permit requirement was raised by the Village a few months after receiving a full application and having its consultants undertake formal review. It was only recently, when the noncompliance with the Special Permit condition was documented by the Village's traffic consultant, and the Village Building Inspector issued his formal denial in reliance on same, that the Yeshiva provided any substantive submission relative to Village Code §220-

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<sup>2</sup> Enclosed please find a copy of our November 4, 2022 letter as well as the denial of the Building Department with its expert memorandum annexed thereto.

6J(a). Throughout this process, the Village was direct, transparent and gave the Yeshiva multiple opportunities to address and expedite matters, so as not delay the review. What also is very clear is that Village Code §220-6J(a) was in no way adopted to target any applicant, including the Yeshiva.

With the foregoing background in mind, we turn to the legal issues raised in the Yeshiva's letter of November 15, 2022.

### **WAIVER AND MODIFICATION OF SPECIAL PERMITS**

As you know, the Village's Building Department has denied the application and expressly found that it "does not comply" with the special permit requirement of Village Code §220-6J(a), that mandates an eligible property to have "no less than 200 feet along, a state, county arterial or collector road, as defined by the NYS Department of Transportation." As confirmed by the Village's traffic consultant, the Yeshiva's property abuts only a "local road" as designated by NYSDOT, and accordingly does not meet this requirement.

It is long settled law in New York that "[a]n applicant for a special use permit must establish that the proposed use complies in all other respects with the zoning ordinance." *Dost v. Chamberlain-Hellman*, 236 A.D.2d 471 (2d Dep't 1997). *Dost* further holds that a Board "does not have authority to waive or modify any conditions set forth in ordinance" and that "failure to meet any one of conditions set forth in ordinance warrants denial of special permit application." *Id.* *Dost* has been cited in the Second Department for this very proposition as recently as March of 2021. *See, Muller v. Zoning Bd. of Appeals Town of Lewisboro*, 192 A.D.3d 805, 807 (2d Dep't 2021); *See also Navaretta v. Town of Oyster Bay*, 72 A.D.3d 823, 825 (2d Dep't 2010).

Further, the law you posit in support of waiver,<sup>3</sup> indicates in juxtaposition to your argument, that absent express authorization in the relevant local law, the Board of Trustees is unable to waive conditions of a special permit:

The village board of trustees **may** further **empower** the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits submitted for approval. **Any such waiver, which shall be subject to appropriate conditions set forth in the local law** adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular special use permit.

N.Y. Village Law § 7-725-b, subd. 5 (emphasis added).

The operative provisions of the Village Code do not grant the Village Board the authority to allow any board (including itself) to waive the road frontage and access special permit criterion. Indeed, the Practice Commentaries to NYS Village [law] state that, "in the absence of express

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<sup>3</sup> See pp. 4-5 of your November 15, 2022 letter and pp. 7-9 of your October 12, 2022 letter.

authorization from a board of trustees to a board reviewing a special permit application, an applicant must comply with all of the specific conditions.” N.Y. Village Law § 7-725-b (McKinney).

To support your contention that the Village Board retains unilateral authority to waive special permit criteria without any authority granted in the Village’s zoning law you cite *Cummings v. Town Board of North Castle* (“*Cummings*”), 62 N.Y.2d 833 (1984). However, *Cummings* does not support your proposition. The following is the operative text from *Cummings* setting forth the holdings of the Court of Appeals:

When the legislative body reserves to itself the granting of special exceptions it need set forth no standards for the exercise of its discretion . . . , and even if the ordinance sets forth standards, it has not divested itself of **the power of further regulation . . . , unless the standards expressed purport to be so complete or exclusive as to preclude the Board from considering other factors without amendment of the zoning ordinance.** . . . Except in the latter situation, grant or denial of the permit is left to the “untrammelled, but of course not capricious discretion” of the Board with which the courts may interfere only when it is clear that the Board has acted “solely upon grounds which as matter of law may not control the discretion” of the Board . . .

*Id.* at 834 - 35 (emphasis added; citations omitted).

The emphasized text makes clear that the Court of Appeals was addressing the circumstances under which a municipal governing body that had reserved to itself the power to grant a special permit could further regulate in the course of reviewing a special permit application. There is no mention in *Cummings* of the power of a municipal governing body to unilaterally waive special permit requirements. Even if *Cummings* is read to apply to waiver of special permit requirements, the mandatory language of the Village Code regarding frontage and access is definite and complete. The Village Zoning Law would need to be amended to authorize the Village Board to waive the requirement, or a variance must be sought.

### **RLUIPA AND PROCESS GOING FORWARD**

On Monday, November 21, 2022, an application for a variance was finally submitted to the ZBA by the Yeshiva. As you know, approximately four weeks ago we suggested that such a course of action might be the most expeditious path to addressing the road frontage and access criterion.<sup>4</sup> Also we then represented to you that if an application were submitted quickly that the Village would take all steps reasonably possible to expedite the processing of any application to the ZBA so that the process of reviewing the variance application could begin before what would be the normally scheduled ZBA hearing in February of 2023.

The ZBA process, including the courtesy of the Village’s attempt to expedite the process, more than fulfills the Village’s process obligations under RLUIPA. In that regard, we respectfully point out that the Yeshiva did not reference the road frontage and access requirements in its prior

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<sup>4</sup> See, our letter of November 4, 2022.

submissions, even though the Yeshiva was aware of the noncompliance. It is not reasonable or appropriate to state that the Yeshiva's silence and the Village's undertaking of a review of the Application materials submitted constituted some sort of silent acquiescence to the inapplicability of the road frontage and access requirement. RLUIPA does not allow the Yeshiva to unilaterally decide to ignore a local zoning requirement and then to use its own silence as a sword against the Village. And, indeed, *when the Village was informed by its traffic consultant that the Application was deemed not to comply with the road frontage and access requirement, the Yeshiva was informed immediately*. The Village has and will continue to live up to its responsibilities under the law, including under RLUIPA.

Turning to the ZBA application as submitted, we note that it seeks two types of relief: (a) an interpretation of the Village Zoning Law that "no relief is required from Section 220-6(J)(a) of the Village of Briarcliff Manor Zoning Code"; or (b) "in the event that such interpretation is not granted, area variance relief from Section 220-6(J)(a)." In the interest of complying with RLUIPA, please be advised that, as submitted, the ZBA would be unable to grant the application and make the kind of accommodation sought by the Yeshiva.

RLUIPA does not relieve a religious applicant of the obligation of stating the basis for its application. If the Yeshiva believes that the Village Building Inspector misinterpreted the Village Zoning Law, then the Yeshiva needs to state what that interpretative error was. Since the road frontage and access criterion is an objective standard, either the frontage of the project site is on a NYSDOT determined "state, county, arterial or collector road" or it is not. To date, there have been no submissions confirming that the roads along which the project site has frontage meet that standard. If there is such evidence in the Yeshiva's possession, please submit it.

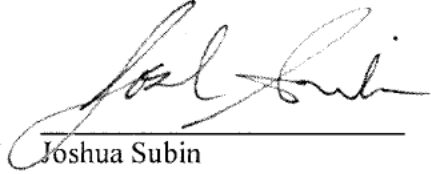
If, however, there is no such evidence, RLUIPA does not relieve the Yeshiva of submitting what the law requires in support of a variance application. As such, we urge you to submit additional materials in support of the variance application as soon as possible. Since it seems that the Yeshiva believes that the grant of a variance is necessary, the Yeshiva now needs to articulate precisely what area variance it is seeking. As submitted, this is not clear from the application materials submitted. Once that specific requested variance is articulated, then the Yeshiva needs to address that the variance sought is the minimum variance necessary. All of the relevant criteria for the grant of an area variance need to be addressed. In addition, the Yeshiva should detail why the grant of the requested variance is needed to make a reasonable accommodation for the Yeshiva's religious use. Put simply, if the Village is to uphold its obligations under RLUIPA, the Yeshiva must articulate the reasons why an accommodation is required, and why the requested accommodation is reasonable under these specific circumstances.

Finally, as the Yeshiva is concerned about the passage of time, we strongly suggest that the Yeshiva concentrate on submitting materials that it would like included in the record before the ZBA. Along those lines, we once again strongly advise that materials be submitted as far in advance of an anticipated ZBA meeting as possible so that these materials can be distributed to and reviewed by ZBA members, and the review process will not be delayed by submissions just prior to board meetings as has occurred repeatedly before the Village Board.

If anything is not clear, or if you want to discuss the Applicant's options in greater detail, please let us know and we will arrange a conference call ASAP.

Very truly yours,

McCarthy Fingar LLP

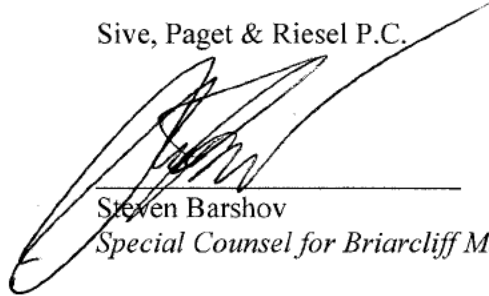
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Joshua Subin

*Village Attorney for Briarcliff Manor*

And

Sive, Paget & Riesel P.C.

A handwritten signature in black ink, appearing to read "Steven Barshov", written over a horizontal line.

Steven Barshov

*Special Counsel for Briarcliff Manor*