SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ATERES BAIS YAAKOV ACADEMY OF ROCKLAND

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

– against –

THE TOWN OF CLARKSTOWN, THE TOWN OF CLARKSTOWN ZONING BOARD OF APPEALS, and THE TOWN OF CLARKSTOWN BUILDING DEPARTMENT

Respondents,

Index No.
Date Filed: August 8, 2019

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED ARTICLE 78 PETITION & DECLARATORY JUDGMENT COMPLAINT

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Petitioner Ateres Bais Yaakov Academy of Rockland ("Petitioner" or "ABY") respectfully submits this Memorandum of Law in support of its Verified Article 78 Petition and Declaratory Judgment Complaint ("Petition" or "Pet.") under Articles 78 and 30 of the New York Civil Practice Law and Rules ("CPLR"), filed on August 8, 2019.

INTRODUCTION

This action seeks redress from the abject refusal of The Town of Clarkstown (the "Town"), through its Zoning Board of Appeals (the "ZBA"), to accommodate the religious freedom of ABY, a Jewish school that has sought to buy a property owned by Grace Baptist Church of Nanuet ("GBC"), which has been used since the 19th century for religious and educational purposes (the "Property"). As detailed below and in ABY's Petition, the Town, its Building Department, and its ZBA have thrown up every roadblock possible to derail ABY's purchase. First, on the heels of raucous town hall meetings and amid noxious local rhetoric calling ABY's purchase a "hostile invasion," the Town's Building Inspector erroneously denied ABY's application for a building permit to make certain needed improvements to the Grace Baptist Church. That determination rested on an arbitrary and capricious interpretation of Local Law No. 5 of 2016. As further explained below, the Building Inspector grossly misapplied that law in at least two respects, including by misinterpreting it as a use requirement when it is in fact a bulk requirement, and by misapplying it to schools in the R- 10 Zoning District when, in fact, it only applies to two-family homes in that District. In the alternative, the Building Inspector should have granted ABY an area variance as a proper and lawful accommodation of religion.

Making matters worse, the ZBA outright refused to hear ABY's properly filed appeal. This refusal, too, was arbitrary and capricious. Both the First Amendment of the Constitution of the United States and Article I, Section 3 of the New York State Constitution require the Town to reasonably accommodate religion. Indeed, New York courts have been particularly vigilant in

enforcing local zoning boards' affirmative obligations in this regard. Yet not only has the Town wholly failed to accommodate religion, it has, unconscionably, *refused to even hear* ABY's claims, silencing the school instead of accommodating it. This refusal not only violates controlling New York state law, it ignores the Town's own code, which *requires* that the ZBA hear any correctly filed appeal.

The ZBA bases its refusal to entertain ABY's appeal on purported jurisdictional grounds, as it seizes on the uncontested fact that ABY is no longer under contract to purchase the Property. It is true: as a result of the Town's actions and unlawful conduct, ABY's financing was revoked, and GBC cancelled its contract to purchase the Property. For purposes of this action, however, that is of no moment: the ZBA was and is still *required* to hear ABY's appeal, since ABY filed it before the contract for the Property was cancelled. If anything, the cancellation of the contract only strengthened ABY's appeal, as the cancellation was a direct result of Clarkstown's actions in violation of New York State and federal law. Moreover, since the ZBA's judgment will bind future interests in the Property, and the nature of this action is capable of repetition yet evades review, the appeal is live and the ZBA is required to hear it.

Finally, in its latest unlawful act targeting ABY, the Town has not responded within ten (10) days to ABY's Freedom of Information Law ("FOIL") Appeal filed on July 22, 2019. *See* Ex. T to Pet. A response within 10 days is required by New York's FOIL, § 89(4)(a)-(b), and the Town's failure to comply entitles ABY to attorneys' fees and other litigation costs.

STATEMENT OF FACTS

ABY is a New York State chartered education corporation providing both secular and Jewish religious instruction to girls in grades pre-K through 12. ABY was founded in 2000 by Rabbi Aaron Fink and has been located in Rockland County since its inception. ABY currently

occupies temporary quarters in the Village of New Hempstead which are made up of two modular buildings comprised of pre-manufactured modules, similar to office trailers. Pet. ¶¶ 3.

GBC has been occupying the Property since 1860. During the ensuing 159 years, GBC built sanctuaries, offices, and a large school building containing nine large classrooms with forty smaller classrooms, along with offices, storage, and bathrooms. Pet ¶¶ 20-22 . GBC and its tenants have continuously conducted worship services of various Christian faiths and have provided religious education consistent with their Christian beliefs. *Id.* Both religious and educational uses continue to this day. *Id.*

The Property is located in an R-10 residential zoning district within the Nanuet Hamlet Overlay District. There are no specific regulations governing schools in this district. According to Table 1 of Chapter 290 of the Clarkstown Zoning Code, "schools of general instruction" are permitted uses as of right in the R-10 district. There is no dispute that a school use was permitted at its inception and for many decades thereafter: indeed, the certificate of occupancy, dated June 4, 1965, expressly references the following uses: "Church[es], Office[s], and Bible School[s]." Pet. ¶¶ 13-23 (citing Affidavit of William French, Pastor of GBC) (the "French Affidavit").

I. ENACTMENT OF LOCAL LAW NO. 5

In 2016, the Town adopted Local Law No. 5 of 2016 ("LL5"), which added Section 290-20.I(7) to the Zoning Code. This new section provides that in residential districts, "[a]ll uses other than single-family residences shall have minimum frontage of 100 feet and access to either a state or county major or secondary road as classified on the Town Official Map." LL5 also added the following Note 48 to the Bulk Table: "These uses shall have minimum frontage of 100 feet and access to either a state or county major or secondary road as classified on the Town Official Map." The uses to which Note 48 refers are, generally, all uses other than single-family dwellings in residential districts. Pet. ¶¶ 24-25. Critically, in the subject R-10 district, Note 48

applies ***only to two-family dwellings***, but not to any other allowed uses. The Town maintains that this provision now renders GBC's century and a half of continued use at the Property illegal. Pet. ¶¶ 26.

II. ABY ENTERS INTO CONTRACT TO PURCHASE THE GBC CAMPUS, BUT FACES FIERCE LOCAL OPPOSITION AND DISCRIMINATION

The enactment of LL5 came at a particularly inopportune time for GBC. Its membership was declining and it was having difficulty generating sufficient revenue to maintain its campus. GBC thus decided to sell. On October 17, 2018, ABY entered into a contract to purchase the GBC Campus. News of ABY's interest in the Property did not sit well with many vocal Town residents and political figures: at public meetings and on social media, ABY has been told – in no uncertain terms – "***we don't want you***" and "go away, we don't want you, go back to Ramapo." A prominent community political group called ABY's move to Nanuet a "***hostile invasion***." The local opposition formed a new citizens' group called "Citizens United to Protect Our Neighborhood," or "CUPON" of Greater Nanuet, for the express purpose of preventing ABY from operating its school. GBC's Pastor French has been derided publicly simply for selling the Property to an Orthodox Jewish institution. Pet. ¶¶ 33-45.

Representatives from ABY and GBC appeared at a Town Board meeting on November 26, 2018, to try to assuage the community's concerns. ABY's Founder and Dean, Rabbi Aaron Fink, explained that its curriculum was virtually identical to the curricula of other local religious schools, and he introduced three ABY graduates: the owner of a small business in the fashion industry, a pre-med student, and an MBA candidate. While some residents were careful to couch their objections in terms of "increased traffic" (when in reality, ABY would use a total of eight buses, twice daily, plus some staff), others could barely contain their hostility, shouting "***go away, we don't want you, go back to Ramapo***." (emphasis added). *See* Pet. ¶¶ 36.

The following night, Town Supervisor George Hoehmann noted at a Town Board Regular Meeting that the sale between ABY and GBC is a "private sale" and that it would be "illegal and inappropriate" for the Town to interfere, but that "there is definitely an interest in this property for Town usage and the school district is interested in the parking located there." Supervisor Hoehmann noted that the "Town will strongly enforce our zoning laws and our building code within the entire Town of Clarkstown." The audience roared in approval. *See* Pet. ¶¶ 37, 41-42.

III. ABY SUBMITS AN APPLICATION, WHICH IS DENIED

Despite this hostile climate, ABY persisted. On December 26, 2018, ABY submitted an application to the Building Department for minor improvements to the buildings (the "Permit Application"). The Permit Application was accompanied by a description of ABY's proposed use of the Property, the French Affidavit describing the history of the Property, and an opinion letter from ABY's land use counsel regarding the applicable law. ABY's application conformed with all procedures required by the Town's Building Department, including an updated Use Permit / Certificate of Occupancy, which is required any time a non-residential building changes hands. *See* Pet. ¶ 46.

Disregarding or ignoring these voluminous materials, the Building Inspector denied the building permit on January 11, 2019. *See* Ex. 2 to Ex. A to Pet. The Building Inspector summarily concluded that GBC's school use at the Property had "ceased" merely because the Building Department had no records of a recent New York State Fire Inspection on the Property. And, because the Building Inspector misinterpreted Clarkstown Town Code section 290-20.I(7) as creating new "use requirements," he erroneously concluded that ABY would require a variance. *See* Pet. ¶ 47.

IV. ABY SUBMITS APPEAL AND APPLICATION FOR A VARIANCE TO THE ZBA, AND FACES ADDITIONAL DISCRIMINATORY BACKLASH

On March 8, 2019, ABY timely appealed to the ZBA, and alternatively sought an area variance that would permit ABY's intended use. Declining to even schedule a hearing, the ZBA demanded that ABY submit a survey of the Property, even though neither the Town Code nor the ZBA's own rules require one. Regardless, and at great expense, ABY commissioned and submitted a survey to the ZBA. *See* Pet. ¶¶ 60-62.

The mere filing of ABY's appeal prompted yet more discriminatory local sentiment on social media, including as follows:

- "***They are nothing but parasites***! They don't want to follow the rules, they are disgusting! . . . . They will hire lawyers for the cult and tirelessly drag it through the courts until they get the desired results! #monseycowboys #parasites #hopetheyallgetmeasles."
- "You better before the[y] ***infest*** Pearl River! Good luck!"
- "I was waiting for this. What Rockland County needs is an awesome lawyer to argue before the Supreme Court that RLUIPA is unconstitutional. And we need that lawyer now."

See Pet. ¶¶ 63-64 (emphases added).

V. ABY IS UNABLE TO OBTAIN FINANCING AS A RESULT OF CLARKSTOWN'S DISCRIMINATORY CONDUCT; GBC CANCELS CONTRACT

Prior to the Town's denial of the Permit Application, ABY had arrangements with a lender to finance ABY's purchase of the Property. Upon that denial, however, the lender pulled out. The ZBA's undue delay in even scheduling a hearing made matters worse, such that ABY was unable to obtain alternative means of financing its purchase of the Property. On May 16,

2019, GBC terminated the contract, and promptly wrote to the ZBA "revok[ing] any consent to land use applications" relating to the Property. *See* Pet. ¶¶ 65-66.

On June 6, 2019, ABY objected to the GBC's consent withdrawal, and urged the ZBA to schedule a hearing expeditiously. ABY also submitted a memorandum of law concerning the application of land use laws to religious institutions under federal and state law. Undeterred, ZBA Secretary Cirrone informed ABY's counsel that the ZBA had taken no action on ABY's appeal. *Id.* ¶¶ 67-74.

On June 24, 2019, ABY's counsel submitted another letter addressing the ZBA's inordinate delay, which appeared calculated to allow a government entity to purchase the Property at a discount. ABY's letter to the ZBA reminded the ZBA of its obligations to reasonably accommodate the free exercise of religion and that undue delay, in and of itself, can evince invidious discrimination. Counsel urged the ZBA to cease its delay and entertain ABY's appeal as soon as possible. *Id.* ¶ 75.

VI. ZBA REFUSES TO HEAR ABY'S APPEAL AND APPLICATION; TOWN BELATEDLY TRIES TO "FIX" GLARING DEFECTS IN ITS ZONING POSITION WITH INVIDOUS INTENT

On July 9, 2019, ABY received a letter from counsel to the Town stating that the ZBA "will not entertain any appeal by [ABY] with respect to the [Property]." The Town has thus taken the legally unsupportable position that ABY's appeal will ***not even be heard***. *See* Pet. ¶ 76.

The Town's efforts to quash ABY's purchase of the Property continue unabated. On July 25, 2019, the Town published a proposed amendment to section 290-20.I(7). *See* Ex. Q to Pet. This latest proposed amendment is a transparent and discriminatory attempt to belatedly "fix" its zoning laws to address issues raised by ABY in its initial application. Specifically, the proposed amendment would, among other things, add Note 48 to the R-10 O use group and require a *use* variance – not an *area* variance – for all uses other than single family homes unless they are

located on a State or County major or secondary road. This amendment would make it exceedingly difficult, if not impossible, to locate a school or house of worship on the Property, and it would also severely restrict GBC's ability to sell the Property. *See* Pet. ¶¶ 77-83.

VII. THE TOWN RENEWS ITS INTEREST IN PURCHASING THE GBC CAMPUS

Following GBC's cancellation of its contract with ABY, the Town renewed its interest in purchasing the Property. In multiple statements to the press, Town Supervisor Hoehmann expressly stated that the Town "has interest in the property," that he is personally "excited about the prospects for the acquisition of [GBC]," and that "all options are on the table." *Id.* ¶¶ 85-86. Despite these public statements, the Town Clerk responded to ABY's recent FOIL request by making the remarkable assertion that no records exist concerning the Town's interest in the Property. On July 22, 2016, ABY submitted an appeal challenging that determination, but has received no response. *Id.* ¶ 87.

ARGUMENT

I. GOVERNING LEGAL STANDARD

Article 78 of the CPLR provides that a party is entitled to relief from a local zoning decision that is, *inter alia*, "affected by an error of law" or "arbitrary and capricious," and where the zoning body "failed to perform a duty enjoined upon it by law." CPLR § 7803(1) and (3). In evaluating whether a decision was affected by an error of law, a court's decision will turn on the substantive law governing the determination. *See Classic Realty LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 2 N.Y.3d 142, 146 (2004); *Pace Univ. v. N.Y.C. Comm'n on Human Rights*, 85 N.Y.2d 125, 128-29 (1995). If the determination is a question of "pure statutory reading and analysis," the court owes little deference to the agency interpretation because "there is little basis to rely on any special competence or expertise" of the zoning board. *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003).

To determine whether a zoning board's decision was arbitrary and capricious, courts review whether the determination has a rational basis. *See Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1,* 34 N.Y.2d 222, 231 (1974). A determination will lack a rational basis if it is made "without sound basis in reason and . . . without regard to the facts." *Id.* Any determination not supported by "substantial evidence" will be set aside. *450 Sunrise Highway, LLC v. Town of Oyster Bay*, 287 A.D.2d 714, 714 (2d Dep't 2001). Additionally, New York state courts may hear a "hybrid CPLR article 78 proceeding and declaratory judgment action . . . ." *24 Franklin Ave. R.E. Corp. v. Heaship*, 74 A.D.3d 980, 901 (2d Dep't 2010).

II. THE ZBA'S REFUSAL TO HEAR ABY'S APPEAL WAS AFFECTED BY ERRORS OF LAW AND WAS ARBITRARY AND CAPRICIOUS

A. The ZBA Was Required To Reasonably Accommodate Petitioner's Free Exercise Rights.

The ZBA's refusal to hear ABY's appeal was legally erroneous and arbitrary and capricious, because it contravenes controlling precedent – including from within this Department – that requires the ZBA to reasonably accommodate zoning petitioners' free exercise rights, as guaranteed by the First Amendment of the Constitution of the United States and Article I, Section 3 of the New York State Constitution. The U.S. Constitution, applicable to the States via the Fourteenth Amendment, requires state and local governments to make reasonable accommodations for religious practice. As the U.S. Supreme Court has held, the Constitution does not "require complete separation of church and state; *it affirmatively mandates accommodation*, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (emphasis added).

New York courts have, likewise, long recognized the principle of accommodation:

> [T]he free practice of one's religion is a right deeply cherished by the citizens of our State and Nation, and one that is zealously protected by the free exercise clause of the First Amendment. New York courts have repeatedly held that by their very nature religious

> institutions are beneficial to the public welfare and consequently proposed religious uses should be accommodated.

Smith v. Cmty. Bd. No. 14, 128 Misc. 2d 944, 949 (Sup. Ct. Queens Cnty. 1985) (emphasis added) (internal quotation marks and citation omitted).

Applying these fundamental principles, the Second Department has repeatedly recognized that zoning board decisions are arbitrary and capricious where they have failed to accommodate religious practice. For example, in *St. Thomas Malankara Orthodox Church, Inc. v. Board of Appeals*, 23 A.D.3d 666 (2d Dep't 2005), the Town of Hempstead Board of Appeals denied a church's application to waive certain off-street parking requirements. The Second Department affirmed the Supreme Court's holding that the Zoning Board's determination was "arbitrary, capricious, and an abuse of discretion," *id.* at 667, since a local zoning board was "required to 'suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible.'" *Id*. As the Court explained, "[i]t is well settled that '. . . greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.'" *Id*. at 666.

Similarly, the Second Department held in *Harrison Orthodox Minyan, Inc. v. Town Board of Harrison*, 159 A.D.2d 572 (2d Dep't 1990) that the town board's denial of a permit was "arbitrary, capricious, and an abuse of discretion" where the board failed to make any attempts to accommodate a special use exception permit in connection with Petitioner's use of a private residence for religious services. *Id*. at 572. The Court noted that "more flexibility is required and efforts must be made to accommodate the religious use, if possible" and that "[e]very effort must be made to accommodate the religious use subject to conditions reasonably related to land use." *Id*. at 573. Because the town board failed to "suggest measures to accommodate the planned

religious use," the Second Department set aside its unconditional findings denying the application. *Id*.

In *East End Eruv Ass'n, Inc. v. Town of Southampton*, No. 14-21124, 2015 WL 4160461 (N.Y. Sup. Ct. Suffolk Cnty. June 30, 2015), the Court explicitly stated:

> It is well-settled that, while religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use and every effort to accommodate the religious use must be made. Thus, a zoning board of appeals may not merely deny an application for a religious use unless the use is dangerous or contrary to the public welfare of the community. Instead, ***when a variance is denied, the board has "an affirmative duty … to suggest measures to accommodate the planned religious use***, without causing the religious institution to incur excessive additional costs, while mitigating the detrimental effects to the health, safety and welfare of the surrounding community."

Id. at *6 (emphasis added) (citations omitted). The Court held that the ZBA's failure to suggest measures to accommodate the planned religious use "was improper and constituted an abuse of the ZBA's discretion as it ignored its affirmative duty to suggest measures to accommodate the EEEA's variance applications." *Id.*

Numerous additional New York and Second Department cases reaffirm the ZBA's obligation to accommodate religion. *See, e.g.*, *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 493-97 (1968) (reversing the Planning Commission's rejection of synagogue's expansion plan, concluding that "under the guise of reasonable regulation, [the Planning Commission] has unconstitutionally abridged religious freedom"); *Richmond v. City of New Rochelle Bd. of Appeals on Zoning*, 24 A.D.3d 782, 782-83 (2d Dep't 2005) (affirming grant of area variance as rational and not arbitrary and capricious because the Board "did not improperly elevate the religious concerns of the applicant over the public health, safety, and welfare" of the community, and the board instead rightly made an effort to accommodate the religious use, as required by the law); *N. Shore Hebrew Acad. v. Wegman* 105 A.D.2d 702, 705 (2d Dep't 1984) (holding that board of

trustees unconstitutionally applied zoning ordinances to prohibit religious institution from expanding its programs, and finding that "stricter scrutiny" applies to such zoning restrictions).

In light of this voluminous case law, this is an easy case for Article 78 relief: the ZBA was required to make a meaningful effort to accommodate ABY's religious exercise through its intended operation of a Jewish day school on the Property. It wholly failed to do so. Not only did the ZBA fail to take *any* actions to accommodate ABY, it even took the highly unusual step of unlawfully denying ABY's right to a hearing *altogether* – an indication that the Town was more interested in manufacturing delay tactics and burdensome obstacles rather than accommodating constitutionally protected religious practice. Statement of Facts § VI. The ZBA had numerous alternative paths for accommodating and authorizing ABY's acquisition of the Property. Instead, it opted to completely sidestep its statutory obligation to hear the appeal in the first place. *Id*. This is the exact opposite of accommodation. The ZBA's refusal to hold a hearing must be annulled and set aside for this reason alone.

B. The ZBA Was Required By Law To Hear ABY's Appeal.

Setting aside the ZBA's blatant failure to follow controlling precedent and reasonably accommodate ABY, the ZBA's refusal to hear ABY's appeal was flatly contrary to law, as well as arbitrary and capricious.

1. The ZBA Is Required By State And Local Law To Hear ABY's Appeal.

The ZBA's refusal to hear ABY's appeal also flies in the face of clear and straightforward New York and Clarkstown municipal law that *expressly mandates* that the ZBA hold a hearing for all properly filed appeals. New York's Town Law clearly states:

> The board of appeals ***shall fix*** a reasonable time for the hearing of the appeal or other matter referred to it and give public notice of such hearing by publication in a paper of general circulation in the town at least five days prior to the date thereof.

Town Law § 267-a (emphasis added). Furthermore, the Town's municipal code plainly states that "[t]he Board of Appeals **will hold a hearing of the appeal** provided notice of such appeal has been filed in the proper form[,]" *see* Clarkstown Code § A295-14 (emphasis added), and further provides that "[t]he Board of Appeals **shall decide** upon the appeal within 62 days **after the conduct of said hearing**." Clarkstown Code § A295-15 (emphasis added).

As described previously, ABY's appeal was both timely and met all procedural requirements set forth by the Town's municipal code. Statement of Facts § IV. Nothing in the Clarkstown code or New York Town Law grants the ZBA with any discretion to deny to hear a properly filed zoning appeal. In fact, nothing in the Clarkstown code or New York Town Law grants the ZBA with any unilateral discretion to alter its appeals procedure *in any manner whatsoever*. By refusing to even entertain ABY's appeal and reducing its Determination to a perfunctory letter from its outside counsel, *see* Ex. P to Pet, the ZBA arbitrarily acted in complete contradiction to its statutorily prescribed procedures, rendering a decision on ABY's appeal without even attempting to hold a hearing. Statement of Facts § IV. The ZBA's refusal to hold a hearing is so blatantly erroneous that decades of New York case law reviewing ZBA determinations rest on the basic notion that a zoning board will hold a hearing in the normal course, and then issue a determination.

It is of no consequence that, in the ZBA's view, "[ABY's] right to *make any application to the Town concerning [GBC's] property has been revoked."* Ex. P to Pet. Even if this jurisdictional conclusion was correct – and it is not – the ZBA was required to at least hold a hearing before making any such determination. *See Haldand v. Zoning Bd. of Appeals of Town of Southampton*, 94 A.D.3d 1001, 1001-02 (2d Dep't 2012) (holding that the ZBA, "after a hearing . . . properly determined that the petitioner was not an aggrieved person" and therefore could not

bring an appeal). By refusing to decide the merits of ABY's appeal due to a purported lack of standing, the ZBA betrayed its willingness to do anything to prevent ABY from establishing itself in the Clarkstown community. Accordingly, it was both an error of law and arbitrary and capricious for the ZBA to refuse to hold a hearing on ABY's appeal.

2. The ZBA Erroneously Determined That ABY Lacked Jurisdiction.

Contrary to the ZBA's blunt pre-hearing assessment, ABY's appeal is still alive, and the ZBA was required to consider its application. Under Clarkstown municipal law, "**Any** appeal may be taken by **any** person aggrieved or by an officer, department, board or bureau of the Town of Clarkstown." Clarkstown Code, § A295-10 (emphasis added). Standing to bring an appeal before the ZBA is broader than standing to bring an Article 78 action appealing a ZBA's determination in court. *See Bayport Civic Ass'n v. Koehler*, 138 N.Y.S.2d 524, 531 (Sup. Ct. Suffolk Cnty. 1954) (determining that "the broadest possible interpretation should be given" to persons aggrieved as defined in the New York Town Law); *see also* 3 Arden H. Rathkopf et al., The Law of Zoning and Planning § 57:24 & n.2, Westlaw (4th ed. updated June 2019) (noting that "[t]he standard for determining whether a person is an aggrieved person" by a determination of a ZBA is "stricter" than determining whether a person is a "person aggrieved by a decision of an administrative officer, and thereby entitled to appeal to a board of appeals[.]"). ABY's appeal is still ripe under either analysis.

The ZBA should have considered ABY's appeal and application for an area variance, irrespective of GBC's termination of its contract with ABY, because the ZBA's judgment will necessarily bind future property interests in this Property. Generally, the loss of a complete property interest during the appeals process does not render a party's claims moot because "[t]he issues are not academic since the judgment is binding on the new owners." *Froehlich v. Town of Huntington*, 159 A.D.2d 606, 607 (2d Dep't 1990). Here, declaratory relief on the misapplication

of a Clarkstown zoning ordinance, as well as an area variance determination, will affect future permit applicants for the Property and other similarly situated properties, including ABY's own interest in rekindling its purchase of the Property following the grant of a permit or variance.

Moreover, the ZBA should have heard this appeal because the nature of this action is capable of repetition yet evades review. Claims are not moot where "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Truscott v. City of Albany Bd. of Zoning Appeals*, 152 A.D.3d 1038, 1039 (3d Dep't 2017). Furthermore, claims are not deemed moot where there is:

> (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-15 (1980); *see Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 154 (1994) (applying the *Hearst* factors and preserving plaintiffs' claims concerning subsequently withdrawn FOIL requests for a later scaled down property plan). Here, ABY's rights and interests will be directly impacted by ZBA action, as granting a permit or variance will immediately place ABY in a stronger position to recommence discussions to purchase the Property.

Moreover, all three *Hearst* elements favor ABY. *First*, there is a strong likelihood that ABY *and* other members of the public will revisit the very issues in this appeal for both this Property and future properties facing questions of applicability of Clarkstown's zoning ordinance at issue and accessibility to an area variance. *See, e.g., Shellfish, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 76 A.D.3d 975, 978 (2d Dep't 2010) (applying the *Hearst* factors to plaintiff's fishing permitting challenge concerning an already-completed fishing season, and finding no mootness where "[i]t is also conceivable that a similarly situated permit applicant will face a similar dilemma . . . which will negatively affect future permit requests.").

Second, allowing the ZBA to abdicate its statutorily mandated obligations would create an untenable phenomenon that would typically evade review – that is, zoning authorities could delay proceedings and misapply their zoning ordinances at an early stage, create uncertainty in the marketplace, and cause relevant parties to lose their prospective or current property interests before exhausting their respective zoning appeals.

Finally, this appeal raises the novel issues of whether Local Law No. 5 of 2016 in fact creates new *use* requirements – a determination that is wholly erroneous for all of the reasons ABY stated in its appeal – and whether use of a property is deemed to have ceased merely because the Town Building Department has no records of a New York State Fire Inspection. *See Shellfish*, 76 A.D.3d at 978 (finding "significant and novel questions which should be addressed" where "the contentions raised by the parties regarding the interpretation and implementation of the various statutes and regulations applicable to the issuance of the subject permits" were at issue).

Because ABY meets all three *Hearst* elements, and because public policy dictates that towns should not engage in delay tactics to moot out property interest-related claims, the ZBA should have – and was lawfully required to – continue to consider ABY's appeal and application. At bottom, it was both an error of law and arbitrary and capricious for the ZBA to deny ABY's application on standing grounds.

III. THE BUILDING INSPECTOR ERRED IN DETERMINING THAT A VARIANCE FROM CLARKSTOWN TOWN CODE § 290-20.I(7) IS REQUIRED FOR USE OF A "SCHOOL OF GENERAL INSTRUCTION."

Although ABY's Permit Application included a description of the proposed use of the property and a sworn affidavit describing the history of the property, the Building Inspector erroneously determined that LL5 created new *use* requirements, such that a variance would have to be granted. See Ex. 1 to Ex. A to Pet. The Building Inspector mistakenly denied ABY's Permit Application under the provision of Zoning Code § 290-29.C. Statement of Facts § III.

And, the ZBA erred in failing to hear and overturn the Building Inspector's erroneous determination.

A. The Building Inspector Incorrectly Determined That LL5 Created A Prior Non-Conforming Use.

The Building Inspector denied ABY's Permit Application, mistakenly citing provisions of Zoning Code § 290.29.C. In his Denial Letter, the Building Inspector stated:

> 1. A variance from the Clarkstown Zoning Board of Appeals would be required for the use of the school of general instruction. Our records show the last required NY State Fire Safety inspection for a school of general instruction on this property was conducted on December 11, 1990. Clarkstown Town Code section 290-29C (non-conforming use) "Discontinuance of use. If active and continuous operations are not carried on with respect to a nonconforming use during a continuous period of one year, the building or land where such nonconforming use previously existed shall thereafter be occupied and used only for a conforming use." Clarkstown Town Code section 290-20I(7) additional regulations, All uses other than single family residences shall have minimum frontage of 100 feet and access to either a state or county major or secondary road as classified on the Town Official Map.[1]

ABY contends that the Building Inspector is manifestly wrong for at least two reasons: First, because § 290-20.I(7) is a *bulk* requirement rather than a *use* requirement, the cessation of use provision of § 290.29.C does not apply. Second, § 290-20.I(7) does not apply to schools in the R- 10 Zoning District because the only Use Group to which this requirement applies consists solely of two-family homes.

1. Clarkstown Town Code § 290-20.I(7) Is A *Bulk* Requirement, Not A *Use* Requirement, And Therefore The Building Inspector's Reliance On This Section Of The Code To Deny ABY's Building Permit Was In Error.

The Building Inspector incorrectly referenced § 290-20.I(7) in denying ABY's Building Permit, and contending that a variance would be required. Statement of Facts § III. Section 290-

[1] Ex. 2 to Ex. A to Pet.

20.I(7) was added by LL5 as part of the Bulk Regulation, and contained in the larger section entitled "Additional Bulk Regulations."[2] This section of the Town Code provides that "[a]ll uses other than single-family residences shall have minimum frontage of 100 feet and access to either a state or county major or secondary road as classified on the Town Official Map." Moreover, the Town's Residential Zoning Districts Land Use Table lists places of worship and "schools of general instruction" as "Permitted as of Right." *See supra at* 4. Since ABY's status as a school of general instruction and house of worship fulfills the *use* requirement, the issue would be within the *bulk* requirement category. Admittedly, GBC is not located on a "State or county major or secondary road," and therefore no longer meets the *bulk* requirements imposed by LL5. Pet. ¶ 18. However, this is separate and distinct from the *use* requirements as delineated in the Town Code, and therefore the Building Inspector's reasoning was in error.

New York courts have applied the distinction between use and bulk regulations to locational requirements. For example, in *Real Holding Corp. v. Lehigh*,[3] the Court of Appeals held that relief from the Town Code provisions which mandated 1,000 feet between a gasoline filling station and the boundary line of certain residentially zoned lands and 2,500 feet between gasoline filling stations constituted an area variance, and was not a use variance.

The courts have also distinguished between non-conforming uses and non-complying bulks. In *Amzalak v. Inc. Village of Valley Stream*, for example, the Village sought the

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[2] Section 290-17.BB(8)(b)[1] inserted a special provision applying Note 48 to one specific type of use – loading docks for dormitories – further evidencing the drafters' intent to make § 290-20.I(7) a *bulk* requirement rather than a *use* requirement. For these specific loading docks, "Ingress and egress roads shall be from a state or county major or secondary road. A variance from this provision shall be deemed a *use* variance." (emphasis added).

[3] 2 N.Y.3d 297, 299 (2004).

demolition of a non-complying building that had been vacant for some time. The court held that nothing in the Zoning Code required:

> the demolition [upon] cessation of use of a non-conforming building for its non-use for any period. It is limited solely to the termination of the right to use a building in a particular manner. This ordinance must be strictly construed. . . . Since it is the building and not the use thereof which does not conform to the ordinance, summary judgment is granted to the [property owner, and the building was permitted to remain despite its non-complying bulk].[4]

In *Dawson v. Zoning Board of Appeals*, 12 A.D.3d 444, 445 (2d Dept. 2004), the petitioner owned property on which was located a primary residence and a cottage used as a secondary residence. The Village required her to obtain area variances, which the ZBA conditionally granted. Citing *Amzalak*, the Second Department held that the cottage "constituted a nonconforming building rather than a nonconforming use." Since the ZBA "unreasonably and erroneously determined that the cottage fell into the latter category," it incorrectly focused on the cessation of use. The Appellate Division therefore held that the petitioner was entitled to a certificate of occupancy and annulled the ZBA's determination.

Most recently, and most clearly, the Second Department addressed this issue in *Matter of Route 17K Real Estate, LLC, v. Zoning Board of Appeals*.[5] In that case, a property owner wished to build a hotel. The Town of Newburgh required hotels to have its "principal frontage" on a state or county highway. The subject parcel lacked the required "principal frontage", and therefore sought, and obtained, an area variance from that requirement. A neighboring property owner sued, claiming that the proper remedy was a use variance.

Both the Supreme Court and the Appellate Division dismissed this claim:

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[4] 220 N.Y.S.2d 113, 114 (Sup. Ct. Nassau Cnty. 1961).

[5] 168 A.D.3d 1065 (2d Dep't 2019).

> Contrary to the petitioners' contention, the ZBA properly treated RAM's application as entirely for area variances rather than, in part, for a use variance. Pursuant to Town Law § 267(1)(b), an area variance is defined as the "authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations" (emphasis added). One aspect of RAM's request for a variance related to a provision of the Town's Zoning Law which required that a hotel have its "principal frontage" on a state or county highway (*see* Code of Town of Newburgh § 185-27[C] [1]). We agree with the ZBA and the Supreme Court that the "principal frontage" requirement is a "physical requirement," rather than a use restriction, and that RAM's application is thus properly regarded as one for an area variance.[6]

This line of New York case law illustrates the clear difference between a non-conforming *use* and a non-complying *bulk*. While non-conforming uses may be lost as a result of cessation of use, such cessation has no impact on the *bulk* or dimensional requirements. Because § 290-20.I(7) is a *bulk* requirement, not a *use* requirement, the Building Inspector's reliance on § 290-29.C was incorrect and improper.

2. The Building Inspector's Application Of Clarkstown Town Code § 290-20.I(7) Was Further Flawed Because The Section Does Not Apply To Schools

Section 290-20.I(7)'s location requirements – embodied in Note 48 to the Bulk Table excerpted below – clearly state that R-10 is the sole District that has the "minimum frontage of 100 feet and access to either a state or county major or secondary road" requirement *only* for two family residences. Pet. ¶ 25. All other Districts mandate compliance for "all uses other than single-family residences." The drafters of LL5 therefore intentionally distinguished R-10 from the other District requirements. However, the wording of § 290-20.I(7) mandates "*All uses other than single-family residences* shall have minimum frontage of 100 feet and access to either a

[6] *Id.,* at 1066.

state or county major or secondary road as classified on the Town Official Map," which is in direct contradiction with Note 48:

1	2	3
District	Group	For Uses Listed Below (Uses herein refer in abbreviated form to the uses listed in detail in Use Table Cols. 2 and 3)
R-160	A	Single-family residences
	C	All other uses for which standards are not otherwise specified (See Note No. 48)
R-80	A	Single-family residences
	C	All other uses for which standards are not otherwise specified (See Note No. 48)
R-40	D	Single-family residences
	F	Same as Group C (See Note No. 48)
R-22	G	Single-family residences
	I	Same as Group C (See Note No. 48)
R-15	J	Single-family residences
	L	Same as Group C (See Note No. 48)
R-10	M	Single-family residences
	N	Two-family residence (See Note No. 48)
	O	All other uses for which standards are not otherwise specified

It is a well-established principle of law that, where there is an ambiguity in a Zoning Code, the ambiguity is to be resolved against the municipality and in favor of the property owner, as zoning codes are "in derogation of common law property rights" of owners. *See, e.g., C. DeMasco Scrap Iron & Metal Corp. v. Zirk*, 62 A.D.2d 92, 98 (2d Dep't 1978), *aff'd*, 46 N.Y.2d 864 (1979). Therefore, since a school clearly would not fall into the category of a two-family residence, the Building Inspector's application of Section 290-10.I(7) and Note 48 to ABY was wholly improper, and the ambiguity should be resolved in favor of ABY. This Court

should thus compel the ZBA under Article 78 to find, after holding a hearing, that a variance from Clarkstown Town Code § 290.20.I(7) is not required for use of a "school of general instruction."[7]

IV. ALTERNATIVELY, THE ZBA SHOULD HAVE GRANTED ABY'S APPEAL FOR AN AREA VARIANCE.

Had the ZBA properly heard ABY's appeal, it would have determined that ABY was entitled to an area variance. In the case of an application for an "area variance," a zoning board of appeals must evaluate five criteria[8] to weigh the "benefit to the applicant if the variance is granted. . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant." Town Law § 267-b(3)(b). Of particular importance here, New York courts have repeatedly recognized that "a proposed religious use should be accommodated, even when it would be inconvenient for the community." *Holy Spirit Assn. for the Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 197 (2d Dep't 1983), *superseded by statute,* Town Law § 267–b(3); *Jewish Reconstructionist Synagogue v. Levitan,* 41 A.D.2d 537, 538 (2d

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[7] Alternatively, ABY will be able to demonstrate that it is entitled to declaratory relief, under CPLR 3001, annulling and setting aside the Building Department's determination as contrary to law, arbitrary and capricious, invalid as applied to ABY, and in violation of ABY's constitutional right to the free exercise of their religion.

[8] Town Law § 267-b(3)(b) - "In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

Dep't 1973) (explaining that "facilities for religious or educational uses are, by their very nature, clearly in furtherance of the public morals and general welfare; that different considerations apply to them; and that considerations which might properly control commercial structures may not control or even apply to religious structures") (citations and internal quotation marks omitted));[9] *see also*, *e.g.*, *Tabernacle of Victory Pentecostal Church v. Weiss*, 101 A.D.3d 738, 740 (2d Dep't 2012) (reversing denial of area variance to church, and noting that "greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made") Far from accommodating ABY's proposed religious use, the ZBA did not even *attempt* to analyze ABY's application under the five-pronged test for an area variance. Statement of Facts § VI. Because the ZBA has not even engaged with the five-factor test for an area variance required by law, the Determination should be set aside as legally erroneous and arbitrary and capricious.

V. THE TOWN IS REQUIRED BY LAW TO RESPOND TO ABY'S FOIL APPEAL, AND ABY IS ENTITLED TO ASSOCIATED ATTORNEY'S FEES.

As its most recent delay tactic, the Town failed to timely respond to ABY's Freedom of Information Law ("FOIL") appeal, filed with the Town on July 22, 2019. *See* Ex. T to Pet.; Statement of Facts § VII. Under New York's FOIL § 89(4)(a)-(b), the Town was required to respond in writing to ABY's appeal "within ten business days of the receipt of such appeal[,]" failure to timely respond constitutes a denial of ABY's appeal, and "a person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial pursuant to article seventy-eight of the [CPLR]." Furthermore, under FOIL § 89(4)(c)(ii), ABY is entitled

[9] As the court further explained, "[a] religious use may not be prohibited merely because of potential traffic congestion, an adverse effect upon property values, the loss of potential tax revenue, or failure to demonstrate that a more suitable location could not be found." *Holy Spirit Assn.*, 91 A.D.2d at 197-98.

to "attorney's fees and other litigation costs reasonably incurred" since the Town "had no reasonable basis for denying access." In fact, it provided no basis at all. Accordingly, the Town erred as a matter of law in failing to timely respond to ABY's FOIL appeal, and it should be required under APLR Article 7803 to fulfill its statutory obligations.

CONCLUSION

For the foregoing reasons, ABY respectfully requests that this Court grant the relief requested in the Verified Petition.

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Respectfully submitted,

/s/ Yehudah L. Buchweitz

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