Planning Board
Village of Tarrytown
Regular Meeting
October 23, 2017 7:00 pm

PRESENT: Chairman Friedlander, Members Tedesco, Aukland, Raiselis, and Birgy; Counsel Zalantis; Village Engineer Pennella; Village Planner Galvin; Secretary Meszaros

Chairman Friedlander called the meeting to order at 7:00 pm.

APPROVAL OF MINUTES – September 25, 2017

Mr. Tedesco moved, seconded by Mr. Aukland, that the minutes of September 25, 2017 be approved as submitted. All in favor. Motion carried.

Mr. Tedesco moved, seconded by Mr. Aukland, that the Board go into executive session to discuss a litigation matter. All in favor. Motion carried.

The Board left the meeting room at 7:02 p.m.

The Board returned to the meeting room at 7:15 p.m. Mr. Tedesco moved, seconded by Mr. Aukland, to come out of executive session. All in favor. Motion carried.

CONTINUATION OF PUBLIC HEARING - Peter Bartolacci – 67 Miller Avenue

Paul Berté, P.E., of Fusion Engineering, representing Peter and Suzanne Bartolacci, also present, appeared before the Board. Mr. Berté presented the most recent plan of a 2 tiered wall design which was granted a height variance at the 9-11-17 Zoning Board meeting. Mr. Berté said the first wall will be set back 7.5 feet and the top will be 8.2 feet from the property line. The second wall will be 13.2 feet back from the property line and with camper, the top of the wall will be 14.2 feet from the westerly property line. The lowest elevation is 177.5 feet going to 198 feet. There will be plantings between the 2 tiers and at the base of the first wall for screening. The construction will be done in two phases. The first phase will install northerly sections of the 2 tiers and a ramp will be constructed for access to the lowest elevation. Half of the first wall will be constructed with the grids going back between 8.5 feet and 10 feet. Once the corner is constructed the southerly sections will take place. The material will be stored on site and moved off temporarily to install the grid for the 2 tiers. 417 cubic yards of fill will be brought in. The final elevation of the wall will be in the same location as the existing railroad tie wall. The finished product will leave the backyard where it was back in the 1950's.

Mr. Aukland asked what the maximum height of the wall would be. Mr. Berté said 9.5 feet will be the maximum height and the grade comes up as you are travelling south.

The height of the first wall will be a little bit more than 6 feet and a little bit less than 8 feet for the second tier as it goes from north to south.

Dr. Friedlander asked how much space between the 2 walls for plantings.
Mr. Berté said there is 6 feet between the walls for planting. They stepped the first tier back to provide enough space for the plantings.

Dr. Friedlander asked about any setback issues. Mr. Pennella confirmed that Lucille Munz had the most recent set of plans.

Dr. Friedlander asked Mr. Pennella to give his report on the plans.

Mr. Pennella said the current plan has a number of outstanding items. Soil sample results are needed to determine capacity. The design of the geogrid wall and length of geogrid is also needed. Mr. Pennella advised the Board that he has provided his comments to the applicant and his engineer for their review and attention. Mr. Berté said that this information should be coming to him soon and he will forward.

Mr. Tedesco asked Mr. Pennella to confirm if ARB approval is not required for this project. Mr. Pennella said that the Building Inspector has determined that approval is not required.

Mr. Tedesco read the recommendation from Lucille Munz's revised landscape report into the record.

- Provide an arborist's report on the existing condition of the trees on adjacent properties and how the proposed construction will impact these trees along with mitigation measures.
- Provide tree protection plans and details.
- Provide drip irrigation system.
- Provide additional plant material to soften the commercial look of the wall and provide a more diverse plant palette.
- Provide a 3 year maintenance bond. This is to ensure plants are maintained during the critical growing period.

Dr. Friedlander also showed material and color samples of the wall which were submitted at the work session.

Mr. Berté referred to the 2 trees mentioned in the Landscape Report. With regard to the Black Cherry on the property to the west, they will certainly look at tree protection detail but the roots should not be impacted because of the elevation change.

Mr. Pennella advised the Board that he has spoken with Ms. Munz and discussed the tree adjacent to the south side of property which is the tree of concern. This is the tree she would like to have an arborist's report on. With regard to the other Cherry tree between the 2 walls to the west, this tree is on the adjacent property and not on the Bartolacci property. By virtue of protecting the wall on the property line, they will also be

protecting the tree. Suzanne Bartolacci confirmed with Mr. Pennella that they will need to get the arborist report on the tree located on the south side of the property.

Mrs. Bartolacci introduced their landscape architect, Dan Sherman. Mr. Sherman came up and said that there are 2 narrow terraces and he is recommending an evergreen screen planting such as Green Giant Arborvitae be planted - 14 trees on the lower tier at 9 to 10 feet tall and 21 trees on the upper tier at 6 or 7 feet tall. He said that these plantings will definitely cover the walls and within a year or two they will thicken up and fill in. Mr. Sherman agrees with providing a drip irrigation which is necessary.

Ms. Raiselis suggested Wood Vine be planted. Mr. Sherman said it is not easy to maintain them. Ms. Raiselis asked if the Green Giant is deer resistant. Mr. Sherman said they are, and agreed that the deer like to eat the Emerald Green Arborvitae.

Mr. Birgy asked if it was difficult to access the terraces. Mr. Sherman said landscapers can and they will be accessible on the south side where there are steps. Mr. Bartolacci would like to be able to see the condition of wall and would rather not have it vined.

Mr. Aukland asked about the size of the blocks. Mr. Berté said they come in 8 x 16 blocks. He said you will see horizontal and vertical lines between each block and it will be a brick pattern.

Mr. Friedlander asked if anyone in the public had any comments.

Geraldine Baldwin of 66 Riverview Avenue came up to the podium. Her presentation was distributed to the Board Members. Mrs. Baldwin read her statement in its entirety is attached with appendices as part of these minutes as "Exhibit A".

She began by saying she is not against a wall being repaired or reconstructed on the applicant's property but is should be replaced or repaired with a wall in the same location as the original, or either timber, stone or concrete, at the same height as the original wall. In her presentation, she went through the applicant's criteria for the justification for a waiver of steep slope; the applicant's failure to consider the neighbors downslope; and previous statements that were submitted by the applicant without factual support. It is the Planning Board's role to apply standard set forth in current code. She referenced two cases where walls have failed in the Village of Ossining and City of Peekskill and expressed concern about a wall failure and applicant's failure to give no consideration to safety.

Member Birgy excused himself from the meeting at 8:15 pm.

In summary, Mrs. Baldwin stated that the applicant only seeks to enlarge his backyard by constructing 2 walls and removing the entire steep slope with no regard to the neighbor's downslope. She feels that no waiver is justified because the applicant seeks not minimization of the disturbance of the steep slope but rather the minimization or elimination of the slope. The code and comprehensive plan mandate that the Planning

Board and Building Inspector enforce the code to protect these specific landscape features. If this Board does not agree that this is worth enforcing then they should go to the Board of Trustees and change it, but until such time, it should be enforced. With regard to the Cherry tree on her property, she feels it will be impacted by the lower wall, since it has a huge drip line. Mrs. Baldwin introduced her attorney, Kristen Wilson, Partner of Blanchard and Wilson, who distributed a letter to the Board and Counsel Zalantis as part of her presentation, attached as "Exhibit B". She submitted information to Counsel Zalantis referencing case law.

Ms. Wilson advised the Planning Board that there is an active Article 78 challenging the Zoning Board of Appeals decision for granting a height variance. She said the criteria for looking at area variances is similar to the waiver of steep slope protection in the code. She is asking that the Board deny the requested waiver of steep slope. It is her opinion that the purpose of the steep slope law is to protect it and it is not a mechanism for an applicant to enlarge a backyard. The question is what is necessary to protect the steep slope. She cited three cases in her letter that environmental laws trump property rights. She asked the Board what the purpose is of having these codes if they are not enforced. The applicant never came back with a plan that replaces what was there before. She asked the Board to please uphold the purpose of steep slope law to determine if this application is worthy of a waiver and to consider the environmental laws and deny this waiver based upon them. In reference to the Munz Landscape Report, Ms. Wilson urges the Board to ask for conditions as part of the site plan approval rather than making them a requirement of the building permit application. She is requesting a tree protection plan and, as her client is a down gradient property owner, they would request to see this information before the Board considers any waiver.

Dr. Friedlander asked if anyone else had any comment.

Mrs. Bartolacci came back to the podium and gave the ZBA transcripts to the Secretary to forward to the Board members. She refuted Mrs. Baldwin's statements about the age of Mr. Tompkins who remembers the wall when he was 25 years old. She said that Mrs. Baldwin has stated before that she is opposed to the building of this wall and has cherry-picked the facts. In addition, she stated that the wall failures Ms. Baldwin spoke about were addressed at the Zoning Board. Mrs. Bartolacci thinks that a rationale neighbor would be concerned about the safety of the existing wall. With regard to steep slope section of the village code, Mrs. Bartolacci said it was changed from restrict to prohibit at some point, but the current code says restrict. She would like a clarification since if there is a prohibition then there is also a prohibition of high ground. She would appreciate this being put into the record. Again, she said that all statements made by Mrs. Baldwin were refuted at Zoning.

Mrs. Bartolacci submitted additional information to the Board for the record as follows which she said may be helpful to the Board:

Exhibit C - Pictures of the Cherry Tree on Geraldine Baldwin's property
Exhibit D - Renderings of Proposed Retaining Walls at 67 Miller Avenue

Exhibit E - Screening of other large retaining walls in Tarrytown.
Exhibit F - 4-24-17 Presentation to the Planning Board.

Mr. Tedesco moved, seconded by Mr. Aukland, to continue the public hearing. All in favor. Motion carried.

CONTINUATION OF PUBLIC HEARING
New Cingular Wireless (AT&T) – 120 White Plains Road

Mike Musso, PE, of HDR, retained by the village to perform a technical review of the application for the placement of 3 sectors of 4 antennas each on the rooftop of 120 White Plains Road appeared to give a brief summary of his findings in his report. He explained that the key part of these facilities are the aesthetics and visual impacts of the antenna. He advised the Board that the applicant still has to submit additional information with regard to sliding back antenna systems on roof to see if they will work. In addition, a new plan was just introduced which may be a viable alternative which the Board may wish to consider.

Mr. Musso showed the current layout of the 3 sectors facing east and west with and without the screening. He explained that antennas work on line of sight and need to be visible and the current proposal allows for this. HDR feels that the west and east facing sectors could be moved back toward the penthouse and raised in height. The southern sector which services Rt. 287 is more difficult since for every distance you move back you have to go up to account for shadowing. Mr. Musso went through coverage maps and locations and determined that there is a need for this facility in this area due to a gap in coverage.

Ms. Raiselis asked Mr. Musso to comment about masking the antenna. Mr. Musso spoke about his visual analysis and showed simulations of the antenna with and without screening. If the Board goes with the original plan, he recommends placement without a screening wall. Ms. Raiselis asked if there are any other screening alternatives.

Mr. Pennella asked Mr. Musso to bring the Board up to speed on the new alternative.

Mr. Musso showed the antenna again and said they could move them back but applicant has to still weigh in on that. With regard to the new plan, he presented a photo looking at the east side of the building and pointed to the parapet on the penthouse which is sloped and angled. He explained that the antenna can be put on the parapet and they could notch out the parapet wall and replace it with a RF screening wall to match the color. This is the 3rd option in addition to the other 2 which are:

1. Antennas as proposed without the screening
2. Antennas as proposed on the main roof with 2 of the sectors moved back and up against the penthouse.

Mr. Musso stated that all of the other items, i.e., health, safety, future co-location, structural, radio frequency, need for site, are all addressed in his tech memo.

Dr. Friedlander asked when they can expect a response on the feasibility about the parapet installation. (newest plan). Mr. Musso deferred this question to the applicant.

Mr. Pennella advised the Board that this picture was taken from Summit Street. He has spoken to Ray McDonald, the Building manager of 120 White Plains Road, and it was their idea to put the antenna behind the parapet wall. This will yield greater coverage since it is 10 feet above the proposed height of the antenna and the applicant will not need a variance from the Zoning Board since the penthouse is permitted.

Kristen Motel, Attorney, representing AT & T, said they just received word late Thursday evening about the new proposal from the landlord. They have asked their RF and structural engineers to assess the feasibility of this new proposal and would like to continue the Public Hearing in November. Ms. Motel confirmed with Mr. Pennella that there will not be a need for a variance should they proceed with this new plan.

Dr. Friedlander asked if anyone in the public would like to speak. No one appeared.

Mr. Tedesco moved, seconded by Mr. Aukland, to continue the public hearing. All in favor. Motion carried.

CONTINUATION OF PUBLIC HEARING
202 Lexington Group LLC – 29 S. Depot Plaza

Mark Constantine, Attorney, representing the applicant, appeared and explained to the Board that since they were last here an application for subdivision has been made by the owner of the property and, unless the Board has any questions, he will defer to Ms. Whitehead, Attorney, representing the owner, American Independent Paper Mill Co., Inc.

Ms. Whitehead informed the Board that she represents the owner of the 3 tax lots (37,38, and 39). The site plan Application was for Lots 37 and 38. The village has treated them as 3 separate tax lots over the years. However, the Building Inspector said that three lots were not formally created, so they have submitted an application to separate them with one building on each lot. They were proposing to subdivide Lots 38 and 39 along the existing lines, but will modify slightly to include the front part of the access way. This will eliminate the non-conformity of the existing building.

Dr. Friedlander recused himself and went to sit in the meeting room.

Ms. Raiselis asked about access to the property at the end of Depot Plaza in the back. Ms. Whitehead said access will be provided through easements. Mr. Pennella said there is an access and utility easement and the county and metro north also have easements which are shown on the plan.

Ms. Whitehead said there is no construction proposed, they simply want to subdivide and put each building on its own lot. She is requesting that the Board authorize the circulation of the notice of intent for subdivision and be placed on the agenda for a new public hearing for the November 27, 2017 meeting.

Mr. Tedesco asked Mr. Constantine to come up and asked if he no longer wishes to demolish the building on Lot 37. Counsel Zalantis asked if he will only be proposing Lot 38. If so, the Board will need a revised plan. Mr. Constantine said both options are open and his client has not formally made the application.

Mr. Galvin asked if they are going to amend their site plan to reflect lot 38 once subdivision is in place.

Mr. Constantine said as part of this process, the last section of code allows for variance and waivers and wanted to inform the Board. They are prepared to apply to the Zoning Board with regard to Lot 38.

With regard to the subdivision application necessary in order for this application to go forward, Mr. Tedesco moved, to designate this as an Unlisted Action, and that the Board declares its intent to be lead agency with proper notification to all involved and interested agencies, seconded by Mr. Aukland. All in favor. Motion carried.

Mr. Tedesco moved, seconded by Mr. Aukland, to set a Public Hearing for the subdivision application for November 27, 2017.

Mr. Tedesco moved, seconded by Mr. Aukland, to continue the public hearing for the site plan application for 29 South Depot Plaza. All in favor. Motion carried.

Dr. Friedlander returned to the meeting.

NEW PUBLIC HEARING – Sisters of the Sacred Heart of Mary – 32 Warren Avenue

Chairman Friedlander read the Public Hearing notice:

PLEASE TAKE NOTICE that the Planning Board of the Village of Tarrytown will hold a public hearing on Monday, October 23, 2017, at **7:00 p.m**. at the Municipal Building, One Depot Plaza, Tarrytown, New York, to hear and consider an application by:

Sisters of the Sacred Heart of Mary
50 Wilson Park Drive
Tarrytown, NY 10591

For site plan approval for the expansion of a driveway, construction of retaining walls and the addition of a garden.

The property is located at 32 Warren Avenue, Tarrytown, NY and is shown on the tax maps as Sheet 1.50, Block 20, Lot 70 and is in the R 40 Zoning District.

Documents are available for inspection in the Planning and Zoning Office. All interested parties are invited to attend and be heard. Access to the meeting room is available to the elderly and the handicapped. Signing is available for the hearing-impaired; request must be made to the Village Clerk at least one week in advance of the meeting.

By Order of the Planning Board

Lizabeth Meszaros
Secretary

DATED: October 13, 2017

The mailing receipts were received and the signs were posted.

John Folchetti, P.E., of JR Folchetti and Associates LLC, appeared on behalf of the applicant. As discussed at the September Preliminary Hearing, they will be widening the driveway to 26 feet to allow for emergency fire access, which will require demolition of the existing retaining wall. They are proposing alternatives such as green wall or 2 walls. Mr. Folchetti presented photographs of the mechanically structured earthen wall that allows for plantings in each cavity. He showed photographs of the walls after construction to indicate how it would look with landscaping over time.

Ms. Raiselis said this would require a lot of planting since they are essentially individual planter blocks. Mr. Pennella said it looks great but there is limited sun in this area. Ms. Raiselis said they will have to propose plants that do not require as much sun. Mr. Folchetti said for maintenance purposes, it is hard to access, which is his chief concern for maintenance over time. Ms. Raiselis said the village has a plan to support native plants, which would require less maintenance.

Mr. Pennella advised the Board that the single green wall proposed would require a substantial height variance from the Zoning Board.

Dr. Friedlander asked to see the other options.

Mr. Folchetti showed a plan for 2 walls, which allows for better maintenance. He will work with the village landscape architect to screen the lower wall.

Ms. Raiselis would like to visit the site. Mr. Pennella said you can see it from the trail.

Mr. Tedesco advised Mr. Folchetti that he will need to indicate the nature, size and type of the trees on the plan and any trees that are proposed to be removed.

Dr. Friedlander was concerned about the look of the single wall if the plantings die.

Mr. Pennella suggested that the Board look at the site within the next two weeks so that the applicant can have time to prepare a plan. Counsel Zalantis said that public notice of a site visit will be necessary if 3 or more members will be attending. Mr. Folchetti advised the Board that the site needs to be marked out and he would notify the secretary when this was done in order to schedule the site visit.

Mr. Tedesco moved, seconded by Mr. Aukland, to continue the public hearing. All in favor. Motion Carried.

NEW PUBLIC HEARING – Broadway on Hudson Estates, LLC – 11 Carriage Trail

Chairman Friedlander read the Public Hearing notice:
PLEASE TAKE NOTICE that the Planning Board of the Village of Tarrytown will hold a public hearing on Monday, October 23, 2017, at **7:00 p.m**. at the Municipal Building, One Depot Plaza, Tarrytown, New York, to hear and consider an application by:

Broadway on Hudson Estates LLC
229 Main Street
Huntington, NY 11743

For subdivision approval to subdivide of 9.96 acre parcel of land into 3 zoning compliant lots. (2 additional lots in addition to the existing Coppola residence)

The property is located at 11 Carriage Trail, Tarrytown, NY and is shown on the tax maps as Sheet 1.271, Block 138, Lot 1.23 and is in the R 60 Zoning District.

Documents are available for inspection in the Planning and Zoning Office. All interested parties are invited to attend and be heard. Access to the meeting room is available to the elderly and the handicapped. Signing is available for the hearing-impaired; request must be made to the Village Clerk at least one week in advance of the meeting.

By Order of the Planning Board

Lizabeth Meszaros
Secretary

DATED: October 13, 2017
The mailing receipts were received and the signs were posted.

Mr. Aukland recused himself and went to sit in the meeting room.

Andy Todd, representing Broadway on Hudson Estates, LLC, is the contract vendee for property located at 11 Carriage Trail, which is the existing Coppola residence. They are proposing to subdivide this 9.96 acre property into 3 parcels. The Coppola residence will be 5.56 acres; the 2 remaining parcels will be 2.02 acres and 2.4 acres. The lots will all be in the R60 zone and are zoning compliant with no adverse impacts to the environment. The lot is mostly located on a flat meadow, there are no wetlands and there will be no slope

disturbance nor traffic impacts. Mr. Todd added that these are expensive homes and will bring tax revenue to the Village. The 2 new lots border the Town of Greenburgh.

Mr. Todd presented a plan of the entire subdivision with respect to the location of this lot and then the lot itself.

Mr. Tedesco asked Mr. Todd if the homes have been sited yet and asked about the long driveway on the plan. Mr. Todd said no consideration has been taken as to how long the driveway will be. It will depend upon how the homes are sited.

Dr. Friedlander confirmed with Mr. Todd that each of the lots were zoning compliant.

Mr. Galvin referred to the Zoning Compliant Chart submitted and Mr. Todd confirmed that the 3 lots will all be zoning compliant.

Mr. Pennella said he has met with the applicant and it was discussed that the water and sewer utilities will come from Greenburgh. He has reviewed the plans and they have indicated stormwater details. The only question he had was about the long driveway. But again, this is not a site plan approval, it is just subdivision. Again, Mr. Todd said the driveway as proposed on the plan will not be as long as indicated.

Ms. Raiselis confirmed with Mr. Todd that the existing Coppola residence will remain.

Dr. Friedlander asked if anyone in the public had any questions. No one appeared.

Mr. Tedesco moved, seconded by Ms. Raiselis, to continue the public hearing, scheduled for November 27, 2017. All in favor. Motion carried.

Mr. Aukland returned to the meeting.

NEW PUBLIC HEARING – Mark Morganelli – 1 Dixon Lane

Chairman Friedlander read the Public Hearing notice:

PLEASE TAKE NOTICE that the Planning Board of the Village of Tarrytown will hold a public hearing on Monday, October 23, 2017, at **7:00 p.m**. at the Municipal Building, One Depot Plaza, Tarrytown, New York, to hear and consider an application by:

Mark Morganelli
1 Dixon Lane
Tarrytown, NY 10591

to consider an application to amend the July 25, 2016 Site Plan Approval in order to extend the hours and periods of operation at the Jazz Forum.

The property is located at 1 Dixon Lane, Tarrytown, NY and is shown on the tax maps as Sheet 1.40, Block 14, Lot 22 and is in the RR District.

Documents are available for inspection in the Planning and Zoning Office. All interested parties are invited to attend and be heard. Access to the meeting room is available to the elderly and the handicapped. Signing is available for the hearing-impaired; request must be made to the Village Clerk at least one week in advance of the meeting.

By Order of the Planning Board

Lizabeth Meszaros
Secretary to the Planning Board

DATED: October 13, 2017

The mailing receipts were received and the signs were posted.

Ellen Prior appeared with Mark Morganelli, owners of the Jazz Forum, to request an amendment to their 7-25-16 site plan approval to extend the hours and months of operation at the Jazz Club. She explained that they originally asked for a limited schedule since they didn't expect that there would be a need to open during the months of January and February. She gave a petition to the secretary, for the record, listing 280 supporters who are in favor of having the club open all year round. In addition to the months of operation, they are also asking to have the hours extended at the club on Fridays and Saturdays (one hour earlier) starting at 6:00 pm until 1:00 am and on Sundays from 3:00 pm to 12:00 pm, in order to accommodate educational programs and jam sessions for local professional and student musicians. Ms. Prior noted that the neighbors are supportive and there have been no complaints from police since the opening. They feel that it is critical to add this schedule to keep continuity and momentum going for their business and also to retain their staff who relies on the income.

Mr. Tedesco asked about snow removal during the months of January and February. Ms. Prior said the street is private and is not plowed by the village. When it is necessary, the neighbors pay for plowing and salting and they will protect the street as much as possible.

Ms. Raiselis asked about parking situation since they have opened. Ms. Prior said they have had no problems. Mr. Morganelli came up and explained that, in addition to the parking already in place, they have recently entered into a 24/7 lease agreement for additional parking spaces from the NYS Office of Parks, Recreation and Historic Preservation. All parking information is on their tickets, the website, and at the front entrance of the club. Ms. Raiselis was pleased to hear that there have been no parking problems.

Dr. Friedlander asked if anyone in the public had any comment.

Michelle Casarella, of 36 N. Washington Street, said that the Jazz Club is directly behind her. The lane is not perfect and she is concerned that it can be dangerous and she does not want to be sued. If the village would like to plow, they would be more than happy to have them do this. She said patrons come through, they drop people off and there are deliveries on the street and there have been some times when people have parked in homeowners parking spots. She thinks the winter months may be a problem.

Linda Juliano, of 9 Hanford Place, who has lived in town for 25 years, said the new Jazz Forum is a gem in our community. There are no other jazz venues in this area. It is a great benefit to our community and draws people to the village. She walks to the club and commutes to the train station. She has no issues walking to the club and feels that the applicants will make it safe for their residents during the winter. She supports extending the hours since continuity is very important for a business and it is important to support the workers.

Mr. Aukland asked if the audience is loud after the concert. Ms. Juliano said that people trickle out at different times. She thinks it varies but she cannot speak for the direct area since she lives on Hanford Place.

Hollis Glaser, of 28 Dixon Street, said it is a mellow crowd, no mosh pit by any means. The noise is not an issue for her and she lives right down the lane.

Mrs. Casarella came back up and said the noise is not an issue. She has a problem with cars coming through and dropping off. It is also dark and the end of the lane and it may be dangerous getting up to Key Bank in the winter months. They do have motion detectors on their property.

Ms. Raiselis asked Ms. Prior to respond. Ms. Prior said she will ask the neighbor across the lane about adding a motion sensor. They have been talking about adding motion sensor lighting which will help just lighting up the ground. They were going to put one up by Hollis's house. Ms. Raiselis suggested lighting only a foot off the ground to protect people walking to the venue. Mr. Morganelli said he has installed a light by the awning and sign and midway down the block there is also another motion detector.

Mr. Morganelli said with regard to sound, Dean Gallea, who lives in the village, soundproofed the stage area with rugs, stage drape, and acoustic panels. There is no noise. They have a $25 to $30 cover charge so it is not a typical bar crowd who can be loud.

Mr. Aukland asked again about the snow removal. Mr. Morganelli said they will pay their share for plowing the area and salting. He will do it himself if need be.

Mr. Pennella advised the Board that the Chief of Police said there is no record of any incidents at the Jazz Club. He also said that the applicant still has to go to Zoning to amend Condition # 3 with regard to hours and months of operation.

Dean Gallea, of 20 Wildey Street, has lived in town since 1990. He is pleased that the club is open. He said it is a joy to be able to walk to see a jazz concert and have some drinks and eats and nothing would brighten up a January and February winter day than being able to go to the jazz club. With regard to the hours extension, the early concert ends at 7:30 p.m. so the extra time between shows will help with the crowd control.

Patricia Pinckney, of 18 N. Broadway, a 27 year resident of Tarrytown, said you can have bad weather beginning in December and lasting until March, so a lot has to do with maintenance. She frequents the club and it has become a wonderful addition to town. She is pleased that the neighbors are happy. She feels that 85 to 90 people is not really a large amount of people when compared to the Music Hall crowd.

Ms. Sarah Hoss, of Sleepy Hollow, came up and said she works at the Jazz Club. She said it would be nice to have the club open from an employment perspective. With regard to the weather conditions, the club would most likely not even open if the weather was that terrible.

Mr. Tedesco moved, seconded by Mr. Aukland, that the applicant go to the Zoning Board to amend the resolution for the change of hours and months of operation and continue this public hearing in November. All in favor. Motion carried.

ADJOURNMENT

Ms. Raiselis moved, seconded by Mr. Aukland, to adjourn at 10: 40 pm. All in favor. Motion carried.

Liz Meszaros
Secretary

EXHIBIT A

OCT 23 2017
BUILDING DEPARTMENT

Statement of Geraldine F. Baldwin to the Tarrytown Planning Board October 23, 2017

My name is Geraldine F Baldwin; I live at 66 Riverview Avenue, Tarrytown, NY. Before I begin my Statement, I would like to assure this Board that I am not against a wall being repaired or reconstructed on Applicant's property. I do believe that the existing wall should either be repaired or replaced with a wall in the same location as the original, of either timber, stone or concrete, at the same height as the original. For reasons detailed, below, I submit that the proposed precedent setting Mesa® block walls, most suited to industrial or commercial properties, are NOT suited and should not be constructed on a steep slope in a single family residential neighborhood.

Initially, I would like to address the failure of Applicant's Letter of October 11, 2017 to justify a waiver of the Village Code's protection of steep slopes. Then, I will address Applicant's failure to give any consideration at all to the safety of the downslope neighbors. Finally, I would like to clear up and correct the record by reviewing some of Applicant's previous statements to this Board.

Part I. APPLCANT'S FAILURE TO JUSTIFY A WAIVER OF THE STEEP SLOPE PROTECTION

Since the 1990's, the Village Code Section 305-67 ("Steep Slope Protection") has sought to preserve certain environmental and sensitive features of the environment that identify the Village landscape including steep slopes. Such preservation must be particularly important for the Village because in 2005, the original text of the Steep Slope Protection was changed from the milder term "restrict" to the more emphatic term "prohibit" disturbance. This raised the bar for any waiver of the protection.

In relevant part, the Steep Slope Protection mandates that this Planning Board shall prohibit disturbance of the steep slopes and removal of vegetation on such slopes.

Under sub-Section F (b) of the Steep Slope Protection, the Planning Board MAY grant a waiver if the applicant establishes that the benefit to the applicant outweighs the detriment to the neighborhood or community. In order to make such determination, the Planning Board takes into consideration four factors:

Factor 1. Whether it will produce an undesirable change in the character of the neighborhood

The proposed Mesa® block walls of Applicant's Plan will result in a significant undesirable change to the neighborhood.

Attention is directed to Appendix A attached to this Statement which presents two (2) pictures taken on October 20, 2017 illustrating the view from the grass sidewalk in front of 66 Riverview

RECEIVED
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Avenue. Appendix A1 shows the view between 64 Riverview and 66 Riverview; Appendix A2 shows the view between 66 Riverview and 80 Riverview. The current walls, the slope and even the house at 67 Miller Avenue are clearly visible in these pictures. Moreover, in the late fall, winter and spring, the walls, slope, etc. will be much more visible since the deciduous vegetation partially blocking the present view will not be Thus, for three seasons of the year, there will be no vegetation even partially blocking the view from the sidewalk. Additionally, the residents of 64, 66 and 80 Riverview Avenue will have unobstructed views of the massive walls 12 months of the year from their rear windows and backyards.

Attention is further directed to Appendix B attached to this Statement which presents several recent pictures of walls taken in early 2017 from the view walking along Riverview Avenue facing the rear yards along Miller Ave. These pictures demonstrate that, if constructed, the proposed walls will be clearly visible from the street level along Riverview Avenue.

Additionally, the pictures of Appendix B illustrate the character of the neighborhood along Riverview and Miller avenues. Most significantly these pictures clearly demonstrate that none of the current walls in the relevant neighborhood look like the proposed massive industrial Mesa® block walls.

Attention is next directed to a Statement signed by ten (10) neighbors of Riverview Avenue, (the Residents' Statement submitted to this Board at the end of March 2017 (already of record in this file), a copy of which is attached (for convenience) as Appendix C. Two pictures were/are attached to the Residents' Statement--- the first is an actual photograph of the slope viewed from my yard in the summer of 2015; the second is an Architect's Rendition of the Mesa® block walls essentially the same as proposed in Applicant's Plan.[FN1] The Architect used an actual picture of my yard to superimpose the proposed walls according to the Plan.

As is evident from the addresses of the Riverview Residents, these are the downslope people whose residential neighborhood will be most affected by construction of the proposed walls. The Riverview Residents affirm that construction of such massive walls is not consistent with the Village's objective to preserve and protect our habitats and landscapes. The Riverview Residents conclude: that the proposed walls will result in a significant undesirable change to the neighborhood and will set a bad precedent, likely encouraging others to demand similar walls.

[FN1]When the Riverview Residents signed the Statement, Applicant's Plan proposed 2 Mesa block walls, one 8 feet and one 10 feet in height. The current plan is substantially identical except that the impact of the current plan will be of a combined 19 feet rather than 18 feet in height.

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When shown the second picture in Appendix C in particular, some of the residents living along Riverview Avenue reacted with exclamations such as:" I certainly would not want that in my backyard" and "That is going to set a really bad precedent for our neighborhood and Village". Thus, it is clear that the neighbors appreciate the significant negative impact of the proposed walls.

Applicant's allegation that he has shown this Board numerous examples of similar-sized walls in the relevant neighborhood is absolutely false. No concrete block walls with geogrids of any size have been shown in any residential neighborhood of the Village, much less in any single family residential neighborhood. Additionally, Applicant has introduced **no** evidence that any wall of comparable height has been built under the current Village Code in any single family residential neighborhood.

Factor 2. Whether the benefit to applicant can be achieved without a waiver

Applicant's Letter of October 11, 2017 requesting a waiver states very clearly that Applicant is submitting a plan for "the repair/replacement" of the railroad tie retaining wall.

The benefit sought by Applicant can surely be achieved by the simple expedient of installing a code-compliant fence at the top of the steep slope and restoring or reconstructing a single code compliant wall similar in kind to the railroad tie wall at the original height and the original location of the wall. Such action would provide the benefit of a safe backyard without the necessity of a waiver.

In fact, replacement of the railroad tie wall with a single block wall without geogrids, a single concrete wall with stone facing or a single timber wall at the original height and the original location of the railroad tie wall would provide the benefit sought without need for a waiver. Such replacement would ensure the safety of the slope and the downslope neighbors without the need for more than 40 truck-loads of fill and stones required by Applicant's plan.

The original railroad tie wall was installed when the 67 Miller Avenue property was developed more than 50 years ago. Even a replacement pressure- treated timber retaining wall would secure the slope for the next 40 years (See "All About Retaining Walls" by Sal Vaglica in This Old House Magazine, 2013).

Factor 3. Whether the waiver is inconsistent with the Objectives of the Steep Slope Protection

The purpose of the Steep Slope Protection is to safeguard and preserve specific characteristic features of the Village landscapes. Included in the objectives of the Steep Slope Protection are

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preventing habitat disturbance, minimizing storm water runoff as well as preserving the Villages' aesthetic character and property values. Steep slopes are one of the characteristic features of the Village landscapes.

The waiver required by Applicant will result in the complete obliteration of the steep slope and removal of the remaining vegetation on the slope. Applicant has in fact, admitted this in the Application. Elimination of the one of the characteristic features of the Village landscapes is completely contrary to and in no way consistent with the Objectives of the Village Code.

Applicant alleges that the steep slope was only created by erosion induced by years of neglect of the original retaining wall. This is not only absolutely false--- the property at 67 Miller Avenue is higher than the properties on the either side of it, slopes severely to the adjourning property to the west and the retaining wall was erected to stabilize the steep slope when the house was built--- but also this is not relevant to any issue before this Board. Even assuming arguendo that the slope partially developed due to neglect---Applicant has done nothing in the eight years he has owned the property to repair the retaining wall. He cannot now complain of his own neglect.

Finally, Applicant's allegation that how the steep slope developed is relevant to this Board is in error. How the steep slope developed DOES NOT MATTER AT ALL. As clarified by the then Village Attorney at the meeting of the Village Board of Trustees, in explaining amendments to the Steep Slope Protection:

> "It has become obvious since 2003 that when you have man-made steep slopes, they usually are adjacent a natural steep slope. . . . Whether it is a man-made steep slope or a naturally occurring steep slope, the law will hold." (Minutes of the Board of Trustees meeting, July 26, 2006).

In sum, new construction of 2 walls (or even a single wall) with geogrids that require complete removal of the steep slope is completely contrary to the objectives of the Steep Slope Protection of the Village Code.

Factor 4. Whether the waiver is the minimum necessary to relieve extraordinary hardship

Applicant has established no hardship. The only reason ever alleged for the required waiver, is to safeguard his back yard which can be accomplished by the simple expedient of installing a code compliant fence at the top of the steep slope. In actual fact, the waiver is only required to enlarge the backyard.

Based on the current plan, it is obvious that there are at least 20 feet of backyard between Applicant's house and the hedge at the top of the steep slope. Applicant purchased the property with the hedge in its current location and was aware of the steep slope.

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Grant of the required waiver to construct the 2 Mesa® block walls is certainly not the minimum necessary. Construction of the Mesa block walls requires significant excavation, in fact, complete excavation of the steep slope and significant backfill in order to secure the walls. Keep in mind that construction of the walls in Applicant's current plan requires 417 cubic yards or more than 41 truckloads of fill. Nothing of the steep slope would remain. Applicant's yard would be substantially enlarged at the expense of the natural habitat of the steep slope.

Throughout all the proceedings, Applicant has persisted in seeking not to minimize disturbance of the steep slope --- rather Applicant has sought and continues to seek to completely obliterate the slope.

In complete contrast, construction of timber or stone walls or even a code compliant concrete wall with stone facing would not require such significant excavation and in fact the steep slope would remain. The steep slope would recover from the disturbance needed for such construction. This would constitute the minimum necessary to provide Applicant with the ability to safe guard his property and family and friends.

The present situation is analogous to that in *Anello v. Zoning Board of Appeals of Dobbs Ferry , et al.*, 89 N.Y. 2d 535, 656 N.Y. S. 2d 184 (1997) in which the Petitioner purchased property after a steep slope law was adopted. Application of the steep slope law limited the amount of buildable land to an amount below what was required for building a house. The Dobbs Ferry Zoning Board of Appeals found that Anello bought the property two years after the steep slope law was adopted and, thus, bought with full knowledge that the lot was non-conforming and unbuildable. The lower court upheld the denial of a waiver of the steep slope law and the Court of Appeals affirmed.

In the present situation, Applicant purchased the property with full knowledge that there was a steep slope on the property and that the steep slope law would prevent building on the steep slope. Applicant cannot now argue that the steep slope creates an extraordinary hardship for him.

Part II. APPLICANT'S FAILURE TO CONSIDER THE DOWNSLOPE NEIGHBORS

A. Applicant Does Not Seek Any Reconstruction or Repair

The pending Application states: The project is to "reconstruct an existing failed railroad tie wall". Despite the stated objective, throughout all the proceedings Applicant has sought not to repair or reconstruct the original wall, but rather new construction of a much higher wall(s) which will remove the steep slope. The objective is to extend and flatten the Westward portion of the rear yard. Such extension is the sole reason Applicant seeks two 9.5 –foot-high walls (or a single 20 foot-high wall). Indeed, the "need" for two walls 9.5 feet high (or a 20 foot-high wall) is only to satisfy Applicant's desire for a larger backyard, NOT to stabilize the steep slope.

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Significantly, in prior proceedings regarding Applicant's Application, when Applicant brought an Article 78 Proceeding against the Zoning Board of Appeals and appealed to the courts, two Judges of the State of New York found that: "there is insufficient evidence Petitioner intends to repair the pre-existing wall." Rather these Courts found that:" There is ample indication that Petitioner intends to wholly replace what is left of the existing structure with a three-sided retaining wall constructed of Mesa® concrete blocks" (*Matter of Bartolacci v. Village of Tarrytown Zoning Board of Appeals*, Decision and Order Index No. 1326-14 June 5, 2014, *aff'd* 41 N.Y.S.3d 116 (2016).

As found by the Judge in the Article 78 Proceeding: "there is a more than minimal distinction between the railroad ties and concrete" *Id*. In addition to the "obvious differences in aesthetics" the Judge noted "equally apparent distinctions in the materials, respective weight and absorbency and in the methods of installation required" (*Id.*)

B. Applicant Does Not Seek a Wall the Same Size as the Original

The most recent plan proposes 2 walls, each of 9.5 feet -----which when viewed from the downslope properties will still appear as a 19-foot high wall. The impact to the downslope properties will be no less detrimental than the single 20–foot high wall.

After much discussion, deemed only "speculation" by Planning Board member Ms. Raiselis, regarding the original height of the retaining wall, the Chairman directed the then Village Engineer, Michael Mc Garvey, to revisit the rear yard and determine the height of the original wall. Chairman Friedlander stated:" the Planning Board will take a wall that replaces the wall according to Mr. McGarvey's opinion of height". (Village of Tarrytown Planning Board Minutes, August 26, 2013).

As instructed, the Village Engineer visited the site. He noted that if the wall were 20 feet high as alleged by Applicant's Engineer, there should be evidence on the neighbor's property below. **He found no such evidence**. In conclusion, Mr. McGarvey stated: "As a professional engineer, I do not believe that a railroad tie wall 20' high was ever constructed on the site; instead, I believe there were three walls approximately 7' (+) high." (Mc Garvey Letter to the Planning Board dated September 26, 2013.)[FN2]

FN2 **Applicant has alleged that Mr. McGarvey was mistaken in indicating a three tier wall system. This has no basis in fact. Indeed, as noted above, in the prior Article 78 Proceeding, after having reviewed the entire record, the Judge found the Applicant intended to replace "what is left of the existing structure with a three-sided retaining wall . . ." (*Matter of Bartolacci. v. Village of Tarrytown Zoning Board of Appeals*, Decision and Order Index No. 1326-14 June 5, 2014, *aff'd 41* NYS. 3d 115 (2016) (emphasis added). Thus, it is clear that any reasonable person having viewed Applicant's property or his Plans would surely understand that there is a three-sided wall system, i.e., a wall on the North side, a wall across the West side and a wall on the South side-- --Mr. McGarvey never suggested there was a three –tiered wall system across the West side.**

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In fact, Mr. McGarvey's statement was further corroborated by the Judge in the proceeding under Article 78 of the New York State CPLR, who found that the record was "devoid of evidence" that the proposed 20-foot high retaining wall would be of "equivalent dimension to the prior wall". In contrast, the Judge found that the "proposed retaining wall is also intended to be taller that the pre-existing structure". (*Id.*) (The Judge stated: "The pre-existing wall is estimated to have been between seven and ten feet (Certified Record, pp. 178-79)". (*Id.*)

C. Applicant Does Not seek to Stabilize the Steep Slope

Most importantly, every proposed wall is to be constructed of Mesa® blocks. For stability, Mesa® block walls minimally require 2 things: 1. extensive excavation for installation of lengthy geogrids and 2. an extremely large amount of fill to stabilize the geogrids.

The most recently proposed 2-tier walls of 9.5 feet high require excavation of at the very least 10 feet in length to install geogrids and at least 417 cubic yards or 41.5 truckloads of stones and fill. Such excavation and fill will eliminate the steep slope and extend the yard about 15 feet.

The only object of all the proposed Plans is enlarging the rear yard ----**not stabilization of the steep slope**. According to Applicant's current plan, as a back yard there are about 20 feet between Applicant's house and the hedge at the top of the steep slope. How could such a distant slope endanger the distant house which has been standing there since the 1950s?

Moreover, as recognized by the Village Engineer Don Pennella at the August 14, 2017 meeting of the Zoning Board of Appeals, the steep slope itself is stable. The Engineer stated: "that as it stands now, the slope is stabilized". (Transcript of the ZBA meeting of Aug.14, 2107 at p. 330).

D. Applicant Does Not Meet Manufacturer's Minimum Safety Requirements

There has been no study conducted to demonstrate whether any remainder of the steep slope or the subsurface will be able to withstand the additional fill and the Mesa® block walls. The Manufacturer's literature, however, clearly states that: "A qualified professional **geotechnical engineer** should evaluate the site, surface and subsurface conditions, other environmental factors and the intended use and location of the wall **in advance of final wall design and installation**". (Mesa® Retaining Wall Systems: System Overview, p. 16 (emphasis added). See attached Appendix D pp. 15-16, available at www.tensarcorp.com)

Mesa® blocks, connectors and geogrids are shown in Applicant's Plan for the 2 9.5-foot high walls. The literature by Tensar, manufacturer of Mesa® block walls, however, indicates that more components are required. It clearly states: "**drainage composite, piping and geotextile materials may also be required**". (*Id.* p.16). Further and most significantly, the Tensar

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literature **warns** that: "Surface or subsurface water should never be allowed to saturate the backfilled reinforcement zone. **Adequate drainage measures . . . are the responsibility of the owner or owner representatives** (not Tensar)" (*Id.*).

At page 6, The Tensar brochure entitled Mesa® Retaining Wall Systems: Installation and Special Considerations Manual states that: "**The contractor is also responsible for . . . surface water drainage and control**". See attached Appendix D for pages 6-7, available at www.tensarcorp.com). The brochure further warns:" **Surface water drainage must be addressed during and after construction**". (Emphasis added) See attached Appendix D p.7.

Attention is further directed to Appendix E attached, a copy of an illustration of a concrete block wall system with geogrids manufactured by Libertystone™ Hardscape Systems. As demonstrated by this manufacturer, block retaining wall systems with geogrids **require water management**—see the illustration which states: "**perforated drain pipe surrounded by clear crushed drain rock wrapped with filter fabric"** (Corner Stone 100™ & Mira Stone™ Installation Guide from Libertystone™ Hardscape Systems, p. 24 emphasis added).

It is extremely important to note that Applicant's Plan does not address the issue of drainage or surface water. In fact, Applicant has repeatedly alleged that since the steep slope is being flattened that there is no need for control of drainage or run off from the property. Applicant's Engineer has repeatedly claimed that there will be no impact of water to the downslope properties because the flatter slope will permit water to percolate behind the wall. This is completely **contradicted** by the instructions of the Mesa® Block Manufacturer. Due to compaction of the required fill, no percolation of surface water can occur. Water management and containment on Applicant's property is critically needed. The Manufacturer's literature notes specifically that the NCMA Segmental Retaining Wall Drainage Manual, published in 2002, "should be consulted prior to final design and construction ". See attached Appendix D, Mesa® Retaining Wall Systems: System Overview. p. 16, emphasis added).

Additionally, Applicant's Plan proposing two-tier walls **fails to meet the minimum requirement for space between the two walls required by the Manufacturer for stability.** With respect to tiered or terraced walls, the Manufacturer states: "For each wall to be considered an independent structure, typical design guidelines require enough 'green space' between the walls equal to or greater than two times the height of the lower wall" (*Id.* at p.15). Thus, **for a lower wall of 9.5 feet, a space of at least 19 feet would be needed between it and the upper wall to meet the minimum requirement of the Mesa® Block Manufacturer**.

There is not enough space between the proposed walls. On the current Plan there are only about 6 feet between the walls. According to the Manufacturer's requirements, there need to be at least 19 feet. Attention is directed to Appendix F attached to this Statement. Appendix F is a copy of page 1 of Applicant's current plan, reduced 50% for convenience, with a red dotted

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line introduced part way up the steep slope. The red dotted line, to the best approximation possible, indicates the location on the slope where the upper wall would need to be to satisfy the Manufacturer's minimum requirement. It is obvious that constructing the wall in that location would not allow Applicant to enlarge his yard.

Applicant's Plan provides absolutely no provision for protection or security of the downslope properties should the Mesa® Block walls fail. Based on the evidence presented below and substantiated by attached Appendices G-K, **failure of a Mesa® Block wall is a very real possibility**.

Although there are no Mesa® Block walls in the Village, I was informed recently about two Mesa® block walls built in other fairly close towns. One was built at the Peekskill High School and the other at the Library in Ossining. Both Mesa® Block walls have failed.

The experience at the Library is informative. The Mesa® block retaining wall, about 20 feet high, was erected on a slope below the new Ossining Public Library (OPL). The new OPL opened on March 25, 2007. Thus, the Mesa® block retaining wall is about 10 years old; it has been failing since it was only about 7 years old.

Attached Appendices G-J are photographs of the Mesa® block wall at the Ossining Public Library (OPL) taken in August 2017. The Mesa® block retaining wall is on a steep slope; above the wall is a Library parking lot. Appendices G and H show the wall from the downslope property. As seen in Appendix G, the Mesa® blocks on the face of the wall do not appear aligned and the wall has a "bumpy" appearance. As seen in Appendix H, obvious cracks are visible in the blocks on the face of the wall.

Appendix I shows the wall from the south side of the parking lot. Appendix I shows two images of devices mounted by the engineers to monitor movement or slippage of the blocks. The first image of Appendix I shows the monitoring devices spaced along the wall. The second image is a close up of a monitoring device—the devices are checked on a monthly basis.

Appendix J shows 12 parking spaces above the Mesa® block retaining wall which have been cordoned off to avoid danger from the failing wall below.

The publicly available Minutes of the Meetings of the Board of Trustees of OPL demonstrate that, beginning as early as October 14, 2014; the Library has an ongoing problem with the Mesa® block retaining Wall. Appendix J contains copies of relevant pages of the Minutes of the Meetings of the Board of Trustees for the Library available at www.Ossining Library.org.

As illustrated in Appendix K, beginning in October 2014, water presented an issue for the Mesa® block wall which became "an Emergency" issue by December of that year. Throughout 2015, various engineers were consulted and by November of 2015, the OPL had spent tens of thousands of dollars monitoring the wall. As of October 25, 2016, the emergency has persisted and monitoring has continued. From Jan-July 2017, the Board has discussed the Retaining wall

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at most meetings, continued monitoring the Wall, had a Peer Review of the Wall, consulted a geologist, and hired at least one other Engineer for a second opinion. At a meeting on July 31, 2017 the Board approved and authorized more tens of thousands of dollars for continued monitoring the failing wall. Although the Board recognizes it need to "be shovel ready" to deal with the failing wall, no one seems to be able to come up with a solution for fixing the failing wall. (See Appendix J, Minutes of the Board of Trustees of OPL dated July 10, 2017).

Given the apparent inability of many engineers and other experts to find a solution to a failing Mesa® Block wall at a public institution what kind of protection would there be for the downslope properties if such walls were to be installed on a residential property with a steep slope? Approval of Applicant's two massive Mesa® Block walls on the steep slope solely to enlarge his backyard will be at the expense of the downslope properties. Should the proposed walls fail, all the excessive stone fill and concrete blocks will surely cascade down slope onto my property and that of my adjacent neighbors on the North and South.

PART III. STATEMENTS WITHOUT FACTUAL SUPPORT

A. Statements Re: Aerial Photographs Having No Basis in Fact

In April 2017, before this Planning Board, Applicant presented several images of aerial photographs of 67 Miller Avenue obtained originally from Mapping Westchester County. Applicant marked the images with various notations. At great length, Applicant argued that comparison of aerial photographs of the property from 1976 and 2013 show that: 1. the rear yard of the property was much larger in 1976 and 2. the retaining wall was much higher in 1976. In fact, Applicant argued that the retaining wall was 16 feet high—most recently Applicant alleges the wall was 18 feet high.

Applicant has presented no evidence that he has familiarity, much less, expertise in reading and interpreting aerial photographs. Perhaps, given his overwhelming desire to enlarge the rear yard of 67 Miller, Applicant has convinced himself and has tried to convince others of what he wishes were so.

In fact, however, as indicated in the Minutes of the Village Zoning Board of Appeals (ZBA), Chairperson Lawrence clearly stated that, in her profession, she has years of experience viewing and interpreting aerial photographs. Chairperson Lawrence further stated that "the aerial photos were unclear to her". (Minutes of the ZBA Meeting of June 10, 2017, p.14). Mr. Maloney remarked the "it is hard to tell in the photos if the backyard was larger" (Id.)

With respect to determining the size of the original wall from the aerial photographs, Chairperson Lawrence stated that: "she could not ascertain the size of the wall from aerial

photographs". Moreover, Chairperson Lawrence remarked:" there is no proof of what the wall looked like" (Id. p.13).

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Attention is directed to Appendix L, attached. Appendix L is a Letter from Andrew J. Allison, AIA with Exhibits A and B. Exhibits A and B are, respectively, copies of aerial photographs submitted by Applicant of the 67 Miller property labelled 1976 and 2013.

Mr. Allison is a licensed, practicing Architect. Although Mr. Allison does not have expertise in interpreting aerial photographs, in his letter, he explains that as an Architect, he has over 20 years' experience with minute details of site plans, schematics and other types of plans and drawings. Thus, he is experienced in ascertaining details from numerus types of images. After carefully examining the attached Exhibits A and B, Mr. Allison has concluded the following:

1. "The 1976 photograph is so blurry that it is impossible to determine whether the size of the backyard was larger in 1976 compared to that in 2013; and
2. It is impossible to determine the size of the wall from the aerial photographs,"

Thus, Mr. Allison confirms and corroborates the findings of the Board Members that Applicant's statements regarding the aerial photographs have no basis in fact.

B. No Basis in Fact in Childhood Recollections from 40 to 50 Years Ago

Applicant has presented testimony of several neighbors or ex-neighbors who allege that they played on the railroad tie retaining wall as children of somewhere between 8 and 11 years old. The recollections are from adults recalling events at least 40 and 50 years ago. They have alleged that the wall was much higher than currently —one even going so far as to allege the wall was a story high.

Although it is often pleasant to walk down memory lane, memories and recollections from decades ago in childhood are not reliable for factual events, much less for accurate determinations of physical parameters such as height. Consider your own memories of sleigh riding down the highest hill in your neighborhood as an 8-10-year-old. The hill was really high and scary. It looked to be the steepest hill around and may even have been given a nick name such as "dead man's hill" or "suicide hill". If you were to re-visit that same hill as an adult, I am sure you would be very surprised to find that it is only a small bump on the landscape. You might even feel "cheated" that the hill has shrunk since you last saw it. That is how unreliable such childhood recollections really are.

Moreover and most importantly, it is NOT RELEVANT what size of yard may have existed decades ago on Applicant's property. The role of the Planning Board is not to establish what might have existed in the 1950's, 60's 70's or even in 2009. The Planning Board's role is to apply the standards set forth under Tarrytown's current Code---not the law that may have existed decades ago when the childhood recollections were made.

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C. No Basis in Fact That the Yard Has Changed in Size Since 1987

Testimony of another neighbor has been presented to allege that the yard was larger and that the previous owner had to move the hedge at the top of the hill closer to the house.

I have owned the property at 66 Riverview Avenue immediately adjacent to the West property line of 67 Miller Avenue since the end of 1986. In 1987, the hedge at the top of the slope was mature and old. In all the time from 1987 to the present, the hedge has not been moved. **Thus, the extent of the yard between the house and the hedge is no smaller or larger than in 1987.** Based on Applicant's current plan, I estimate that there are about 20 feet of yard between the hedge and the house.

SUMMARY

Applicant persists in seeking no repair or reconstruction of the original railroad tie wall. Applicant seeks only to enlarge the back yard.

Applicant does not seek a wall even comparable in size to the original wall. Applicant seeks new construction of two massive 9.5-foot high walls requiring geogrids that remove the entire steep slope. The impact of the two Mesa® block walls of total 19- feet high will be the same on the downslope properties as Applicant's proposed 20-feet-high wall. The steep slope will be eliminated.

Applicant does not seek to stabilize the steep slope. In fact, the Village Engineer admitted at the Zoning Board of Appeals meeting on August 14, 2017 that the slope is currently stable. The only thing that needs repair or stabilization is the retaining wall.

Applicant's only goal is to eliminate the steep slope so he can enlarge the rear yard.

Applicant has no regard for the safety of the downslope properties. Applicant cares only to remake the property to suit himself, regardless of the safety of the downslope neighbors. None of Applicant's plans or sketches addresses any of the significant adverse impacts to the neighbors inherent in his plans.

Applicant seeks to enhance the value of his property to the detriment of his neighbors' safety and property values.

In view of the above clarification and the attached evidence, it is clear that the Application should be denied in its entirety by this Board. No waiver is justified because Applicant seeks not minimization of disturbance of the steep slope but rather minimization or elimination of the slope.

As I stated at the very beginning of this Statement, I would like to assure the Board that I am not against a wall being repaired or reconstructed on Applicant's property. I do believe that the existing long neglected wall should either be repaired or replaced with a wall in the same

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location as the original. The replacement wall should be of either timber, stone or concrete, at the same height as the original as determined by the Village Engineer, i.e., at 7± feet high. Unlike the proposed Mesa® block walls, such repaired or replaced wall would be compatible with the existing character of the neighborhood along Miller/Riverview Avenues. The steep slope would be disturbed during the repair or reconstruction but with a timber, stone or even concrete wall, the slope would recover. This would afford preservation of the steep slope and would be in accord with the Village's objectives to preserve our pretty Village and its unique landscape features.

I would like to add one additional comment. The Village of Tarrytown currently has a Village Code and a Comprehensive Plan which both envisage protecting certain features of the landscapes, including steep slopes. The Code mandates that this Board and the Zoning Board of Appeals as well as the Building Inspector protect those specific landscape features. A waiver of the steep slope protection is only justified when there is minimum disturbance of the steep slope and adequate protection of the character and safety of the neighborhood.

If there were no Steep Slope Protection, I would not be here today. I would have saved myself a lot of time, money and aggravation.

If this Board does not agree that the Code's protection of steep slopes is worth enforcing, I would ask that you go to the Village Trustees and have the Code changed. Until such time, this Board has an obligation to enforce and honor the Code as written.

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LIST: APPENDICES TO STATEMENT OF GERALDINE F. BALDWIN TO PLANNING BD. OCT 23, 2017

1. **Appendix A: Photos of 67 Miller Ave property as seen from 66 Riverview Ave, North & South sides, A1 view between 64 and 66 Riverview Ave; A2 view between 66 and 80 Riverview Ave**

2. **Appendix B: B1-B3 Photos of Walls of rear yards of Miller Ave , seen from Riverview Ave**

3. **Appendix C: Statement of Riverview Residents with attached Exhibits A and B**

4. **Appendix D: : Mesa Retaining Wall Systems Overview, pp. 15-16 &Mesa Retaining Wall Systems: Installation and Special Considerations, pp. 6-7, www.tensarcorp.com**

5. **Appendix E. CornerStone 100™ & MiraStone™ Installation Guide, p. 24, Libertystone™ Hardscaping Systems, www.LibertyStone.com**

6. **Appendix F: Illustration of Location of Upper 9.5- foot high wall to meet the Minimum Requirements of the Manufacturer**

7. **Appendix G: Photograph of the Mesa Block Retaining Wall at the Ossining Public Library (OPL) taken from the downslope property**

8. **Appendix H: Photograph of the Mesa block at the OPL showing cracks in the blocks**

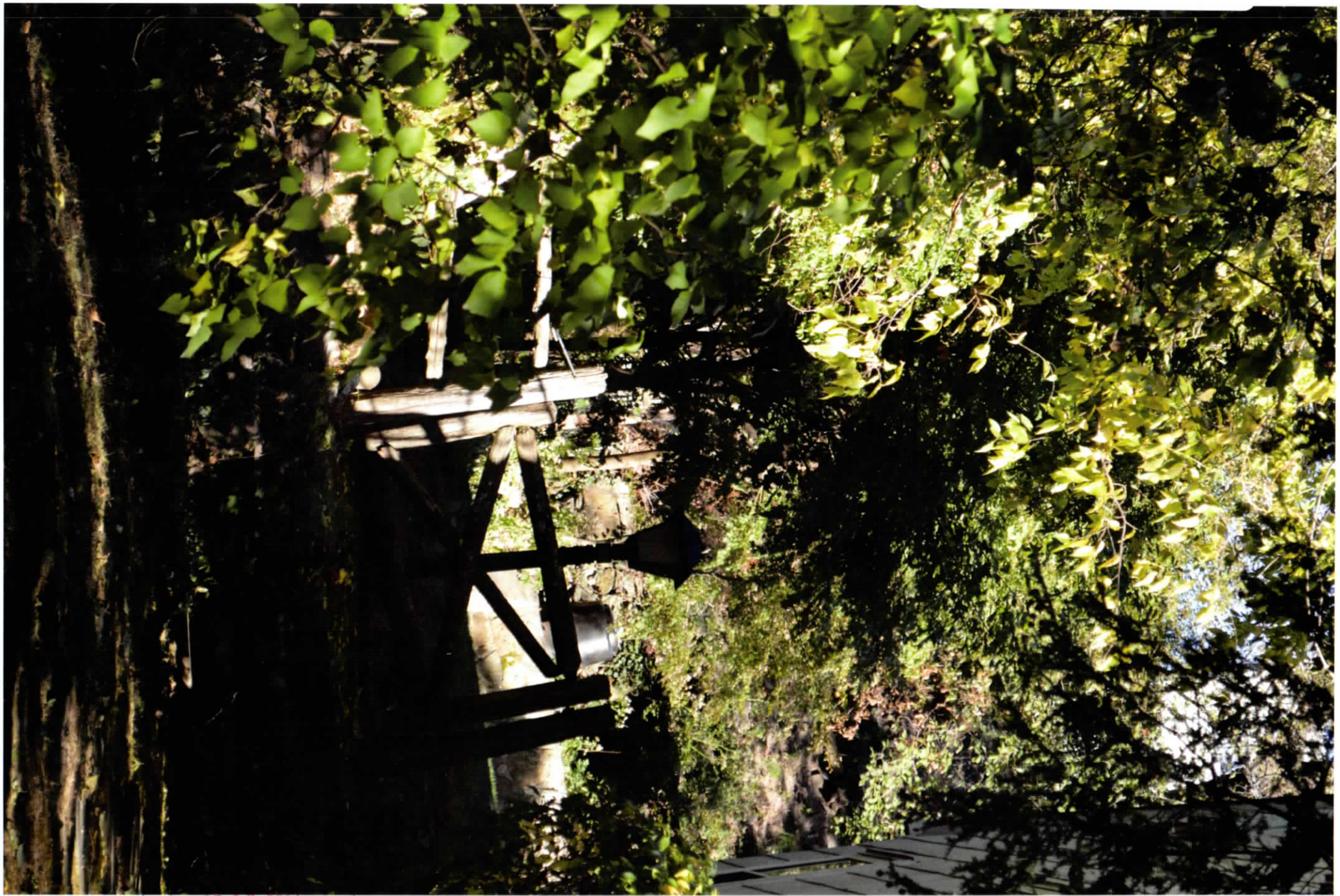
9. **Appendix I: I1: Photograph of the Mesa Block Wall at the OPL showing an engineer's monitoring device on the wall.I2: Close-up photograph of the engineer's monitoring device on the wall.**

10. **Appendix J: Photograph of the 12 parking spaces cordoned off and unavailable above the Mesa block wall at the OPL.**

11. **Appendix K: Minutes of Various Meetings of the Board of Trustees of the OPL relevant to issues about the Mesa Block wall.**

12. **Appendix L: : Letter of Andrew J. Allison, AIA dated July 27, 2017 with attached Exhibits A & B**

- Appendix A(1+2) -



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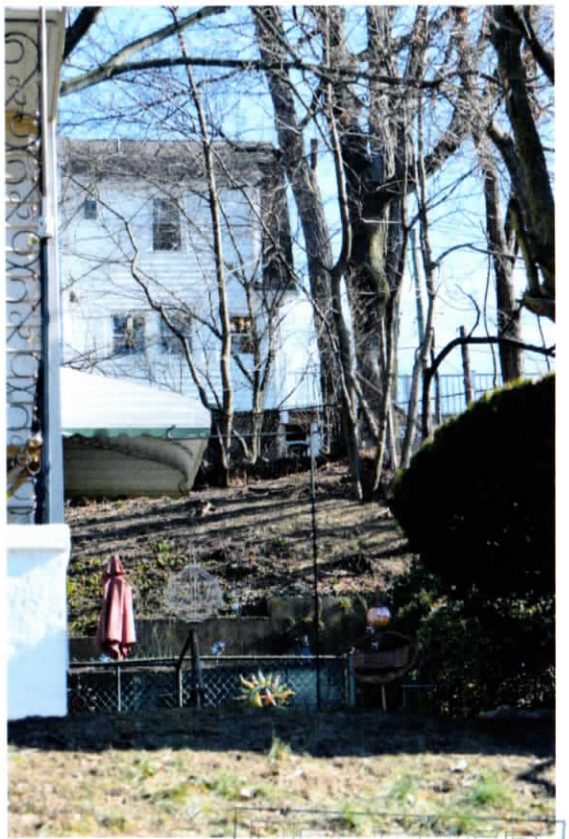
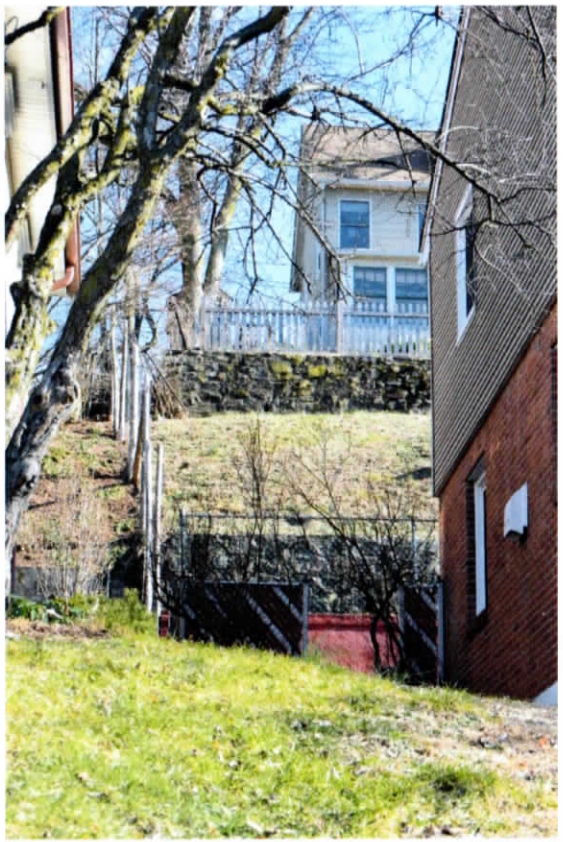
APPENDIX B

RECENT PICTURES:REAR PROPERTES OF MILLER AVE VIEWED FROM RIVERVIEW AVE





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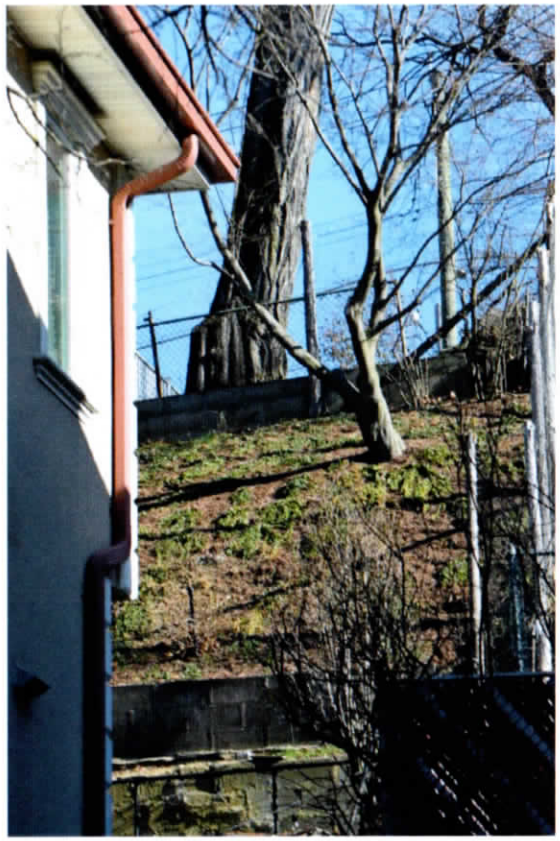
APPENDIX B2



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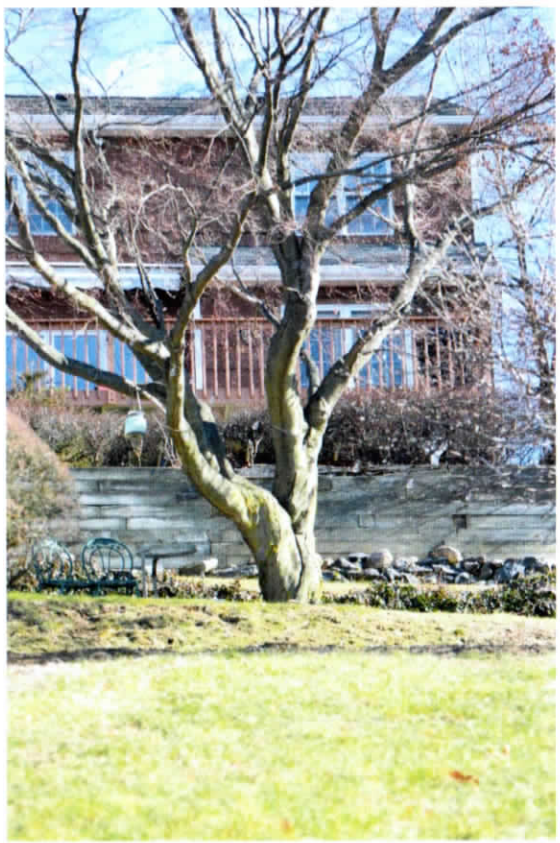

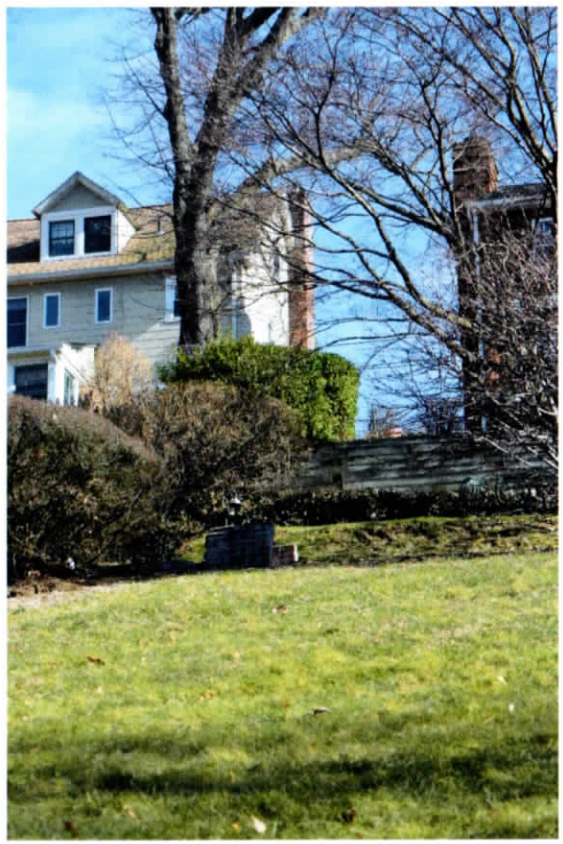

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Appendix C

To: The Tarrytown Building Dept.
Planning Board and
Zoning and Board of Appeals

Re: Application of 67 Miller Ave to construct two Mesa Block Walls on the Steep Slope at the Rear of the Property based on a Plan to replace a retaining wall dated February 23, 2017

I have been informed and understand that the Plan requires two Mesa Block walls, one 10 feet in height and one 8 feet in height, extending 75 feet in length across the entire rear of the property and extending on the North and South sides of the property—for a total length of 157 feet.

I understand further that construction of the planned walls will require excavation of the entire steep slope and 332 cubic yards or 33 truckloads of fill in order to stabilize the walls.

I have been informed that the Tarrytown Village Code seeks to protect our natural habitats and landscapes including the hills and steep slopes of our neighborhoods.

I have seen a picture of the current slope as viewed from the rear of the property and an artist's rendition of the planned walls (both attached). I am informed that the planned walls will be visible from the street on Riverview Avenue.

Based on my understanding, it is my conclusion and opinion that:

1. The proposed walls will result in a significant undesirable change in the neighborhood. None of the walls visible from Riverview Avenue appear as massive as the planned walls which are more suited to industrial or commercial property--- not our residential neighborhood.

2. Permitting construction of the planned walls will not be consistent with the Village's objectives to preserve and protect our natural habitats and landscapes.

3. The neighborhood is hilly and many yards are not level. Construction of the planned walls will set a bad precedent and may well encourage others to demand similar walls.

4. Filling in a slope with 33 truckloads of soil to erect the planned walls is not the minimum necessary to replace a 7 foot high retaining wall.

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Name: Gerald F Bach Address: 66 Riverview Ave. Tarrytown NY

Name: Trina Taylor Address: 73 Riverview Ave. Tarrytown NY

Name: Kim Lagmanen Address: 80 Riverview Ave Tarrytown NY

Name: Bruce M Fulton Address: 67 Riverview Ave, Tarrytown NY

To: The Tarrytown Building Dept.
Planning Board and
Zoning and Board of Appeals

Name: Dan Petrelli Address: 67 Riverview Dr Tarrytown NY

Name: _____ Address: _____

Name: _____ Address: _____

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To: The Tarrytown Building Dept.
Planning Board and
Zoning and Board of Appeals

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Name: [illegible] Address: 64 Riverview

Name: [illegible] Address: 64 Riverview Ave.

Name: _____ Address: _____

Name: _____ Address: _____

To: The Tarrytown Building Dept.
Planning Board and
Zoning and Board of Appeals

Re: Application of 67 Miller Ave to construct two Mesa Block Walls on the Steep Slope at the Rear of the Property based on a Plan to replace a retaining wall dated February 23, 2017

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Name: [illegible] Address: 62 RIVERVIEW AVE TARRYTOWN NY 10591

Name: Bryna Majidi Address: 62 Riverview Ave Tarrytown NY 10591

Name: [illegible] Address: 62 Riverview Ave Tarrytown NY 10591

Name: _____ Address: _____

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Exhibit A

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Exhibit B

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Appendix D

DESIGNING FOR SPECIAL CONSIDERATIONS

Serpentine walls blend with naturally curving contours, while inside and outside corners complement the traditional angular look of existing structures. With the Mesa® Systems, your design options have no bounds.

- **Curves and Corners** – Designing for inside, outside and serpentine curves as well as 90° inside and outside corners is easy since the unique locking connector makes alignment and installation quick and simple.
- **Steps** – Whether you require steps inside or in front of your wall, the Mesa Systems are up to the challenge. By offering different size and style units to aid in your project requirements, virtually any design can be achieved.
- **Tiered and Terraced Walls** – A less obtrusive alternative than conventional wall solutions, tiered and terraced walls can be built in areas with sufficient land space. For each wall to be considered an independent structure, typical design guidelines require enough "green space" between the walls equal to or greater than two times the height of the lower wall.
- **Facing Combinations** – The blend of hardscape and softscape (vegetated face) is often preferred on projects that require an aesthetically green look.

For more information on design and construction of these or other special considerations, please refer to the *Mesa Systems Installation and Special Considerations Manual*. Other requirements and limitations based on actual site conditions may also apply.

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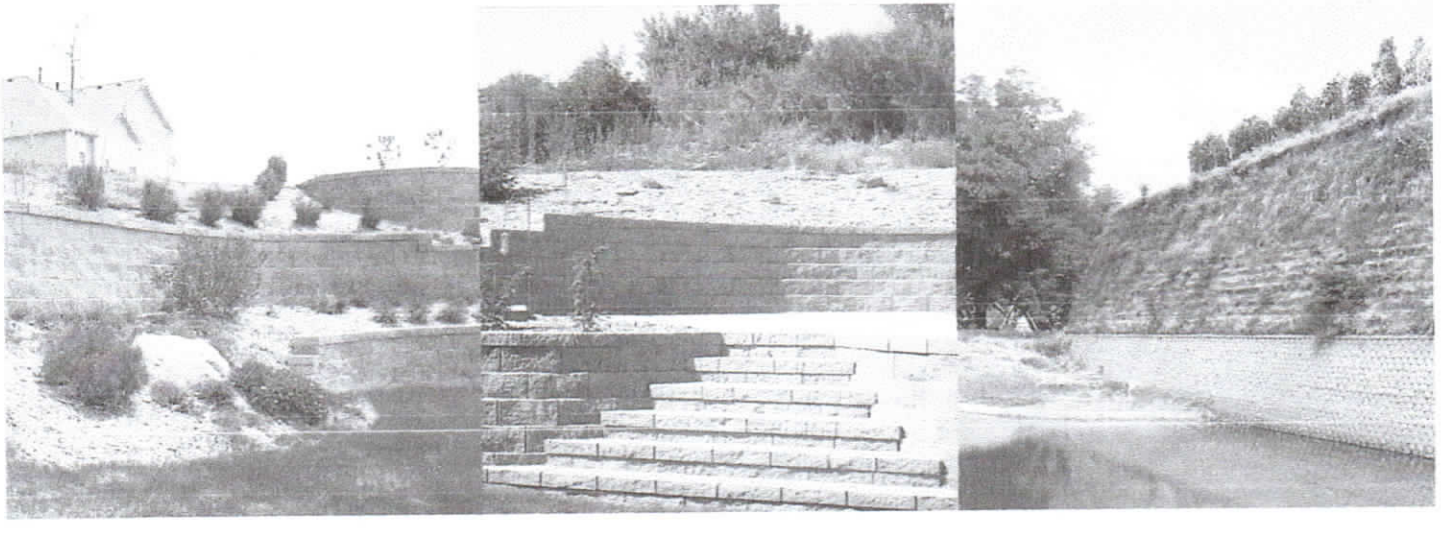

Standard Installation Procedures

The following steps provide a generalized guideline for installing a Mesa® Retaining Wall System with the Mesa Standard Unit. These steps will take you through a typical installation from start to finish.

Additional information is contained within the *Mesa Systems Installation and Special Considerations Manual* available at **www.tensarcorp.com**

NOTE: *Specific requirements and installation steps for your project are governed by the final drawings sealed by a registered professional engineer and the project specifications. Another useful document which should be consulted prior to final design and construction is the* NCMA Segmental Retaining Wall Drainage Manual (2002).

Step 1:
PRECONSTRUCTION PREPARATION

It's important to be familiar with the components of the Mesa® Systems prior to the start of construction. Below is a list of these components and the tools needed to aid you in the construction of a standard Mesa Wall. Mesa Corner Units, drainage composite, piping and geotextile materials may also be required.

MESA COMPONENTS:

- Mesa Block
- Mesa Connector
- Tensar® Geogrid
- Mesa Cap Unit (if applicable)
- Concrete adhesive (if applicable)

SUGGESTED TOOLS FOR INSTALLATION:

- Dead blow hammer
- 2- to 4-ft level
- Utility saw and/or grinder
- Masonry string and chalk line
- Pitchfork (used to help remove slack from geogrid)
- Shovels
- Compaction equipment

Step 2:
PREPARE THE LEVELING PAD

Prepare the subgrade by excavating or filling vertically to plan elevation and horizontally to design geogrid lengths. If the excavated material can meet the reinforced fill requirement, then it can be stockpiled with surface vegetation and debris removed prior to backfill. Start the leveling pad at the lowest elevation of the wall. Level the prepared base with 6 in. of unreinforced concrete or well-compacted granular fill (gravel, road base or ¾ in. minus crushed stone). The leveling pad is typically 12 in. wider than the Mesa Unit, extending 6 in. in front of and 6 in. behind the unit. Compact the well-graded stone in accordance with project plans and specifications. Aggregate leveling pads are generally overbuilt and should be carefully trimmed down to meet the proper elevation.

Steps in the leveling pad are required to change elevation. It is important that the height of the step is equal to the height of the number of unit courses. If a concrete leveling pad is used, it is important to have the step-up heights match the Mesa Unit's height exactly. If not, grinding and/or shimming may be required.

NOTE: *The leveling pad requirements and the suitability of the foundation soil for your project should be determined by a qualified professional engineer engaged by the installer on the project.*

Step 3:
INSTALL THE BASE COURSE

Once the pad is in place, begin by making a wall line where the units will be positioned. Chalk works well for concrete, while string works well for aggregate. Place the first course of Mesa Units tightly together, with the sides touching and the textured face outward. The first course must be accurately placed to align with the string line, carefully spaced and leveled to facilitate construction and enhance the appearance of the wall. The tail of the unit should always be used to align the wall face. Occasionally, a unit will have a slight difference in height. If this occurs, the rib or fingers of the geogrid may be used to shim the face or tail back to level.

NOTE: *Surface or subsurface water should never be allowed to saturate the backfilled reinforcement zone. Adequate drainage measures, the testing of site soils and backfill compaction, and overall construction quality control are responsibilities of the owner or owner representatives (not Tensar).*

NOTE: *A qualified professional geotechnical engineer should evaluate the site, surface and subsurface conditions, other environmental factors and the intended use and location of the wall in advance of final wall design and installation.*

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FIGURE 1: [illegible]

Construction and Quality Control

1.1 CONSTRUCTION RESPONSIBILITIES

This installation section of the manual provides general guidelines for construction and quality control of the installation. This section should be provided to the owner's engineer, the construction quality assurance inspector and the contractor. Specific construction details and procedures depend on individual site conditions and other considerations, which are the responsibility of the owner and engineer.

***NOTE:** All installation instructions apply to the Mesa® Standard Unit except where otherwise stated.*

The contractor must provide construction in accordance with the contract documents, plans and specifications. The contractor is also responsible for the verification of line, grade and other physical features as well as surface water drainage control.

1.2 MATERIALS AND HANDLING

Materials Supplied

- Mesa Units and Connectors
- Mesa Cap Units (where required)
- Tensar® Uniaxial (UX) and/or Biaxial (BX) Geogrids
- Drainage composite and piping (where required)
- Geotextile filter materials (where required)

Handling Wall Materials

- The concrete facing units are delivered on pallets and off-loaded by the contractor. Transporting equipment must have firm ground and a stable, level area to off-load. A forklift is normally used to handle pallets. If pallets are the property of the block manufacturer, they must be stored by the contractor for pick up. The contractor must provide protection from staining or discoloration of the units by using wood dunnage and polyethylene sheet film, or similar.
- The Mesa Connectors are shipped in cartons and should be stored in a secure and dry location.
- Tensar Geogrids are shipped in roll form; the contractor is responsible for off-loading.
- Geogrid rolls should be stored in a secure area. Each roll will be labeled by type, lot number and roll number.

- Standard Tensar UX Geogrid roll sizes are 4.36 ft wide x 200 or 250 ft long (1.33 m x 61 m or 76 m). Rolls weigh between 87 and 170 lbs (40 and 77 kg) depending on type. Before labels have been removed, rolls should be color-coded with spray paint to help identify geogrid type (Figure 1).

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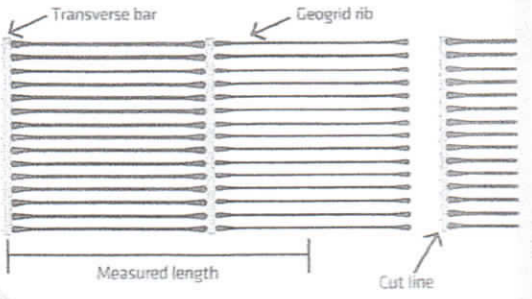

FIGURE 2: Cut Tensar Geogrid to Tensar Geogrid to measured length

FIGURE 3: Typical Mesa Unit leveling pad

- It is the contractor's responsibility to verify the quantities shipped and condition of the materials. The contractor will inventory materials supplied to assure sufficient quantities have been delivered.
- The contractor will be allowed a limited amount of time to off-load materials.
- If certifications are required, the contractor must provide a written request prior to shipment of the material. The contractor will ensure that all information, including product type, roll/lot number, etc. is furnished to the engineer.

Contractor Supplied Materials

- Dead blow hammer
- 2- or 4-ft (.61 or 1.22 m) levels
- Utility saw and/or grinder
- Masonry string and chalk line
- All cast-in-place concrete and structural components
- Stone filter medium
- Reinforced or select fill
- Pitchfork, stakes and/or rods used to remove slack from geogrid
- All labor, equipment and supervision necessary to perform the total Mesa® Wall construction

1.3 WALL CONSTRUCTION PREPARATORY WORK

- Verify approval of Mesa Units, Tensar® Geogrids and the specified reinforced fill.
- Review drawings to plan geogrid layout. Review drawings and site plans to consider surface water drainage control both during and after construction.
- Prepare subgrade by excavating vertically to plan elevation and horizontally to design geogrid lengths. If a rock face is shown, it is the responsibility of the Engineer to determine the competency of the rock at the limits of excavation shown on those plans.

NOTE: *Any deviation in the location of the rock face with respect to the face of the retaining wall may require an adjustment to the Tensar Geogrid design and the Engineer of Record must be notified by the contractor prior to proceeding with the wall construction.*

- The subgrade shall be approved before proceeding with wall construction. Any foundation soils found unsuitable by the engineer shall be treated in a manner approved by the engineer.
- To speed up construction on larger projects, we suggest cutting the Tensar Geogrids in advance. Cut geogrid at the nearest transverse bar beyond the measured length (illustrated in Figure 2) or several inches in front of the transverse bar to provide "finger shims" (Figure 8 on page 9).

LEVELING PAD CONSTRUCTION

- The leveling pad must be flat and level to assure the first course of Mesa Units will provide uniform support to the courses above it. Non-uniform support will induce tensile stresses and shear stresses in the Mesa Units above the first course that can result in cracking.
- The leveling pad (Figure 3) may be constructed with unreinforced concrete or compacted ¾ in. (1.9 cm) minus, well-graded aggregate. It is typically 12 in. (30 cm) wider than the Mesa Units, providing 6 in. (15 cm) in front of and behind the Mesa Unit allowing for wall curvature and minor alignment adjustments. It is generally 6 in. (15 cm) deep. For unreinforced concrete leveling pads, steel or wood forms are generally required to assure that the top of the leveling pad is flat and level. For aggregate leveling

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Estimating Charts

Appendix E

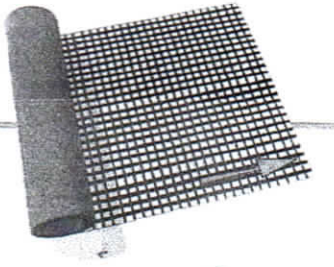
The soil friction angle in these charts is used to calculate the pressure soil will have on CornerStone 100™ and MiraStone™ Geogrid reinforced walls. This guide outlines 26, 30 & 34 degree friction angle soil types. Additionally, three different top-of-wall load conditions are used in each of the soil types i.e. no surcharge load, 100 psf load and a 3 to 1 slope.

The assumed weight for the three soil types is approximately 120 lb/ft³. A well graded gravel leveling pad with a minimum of 1 (8") unit of burial is assumed for base sliding resistance. All sub base, leveling pad and backfill materials should be compacted to a minimum of 95% Standard Proctor.

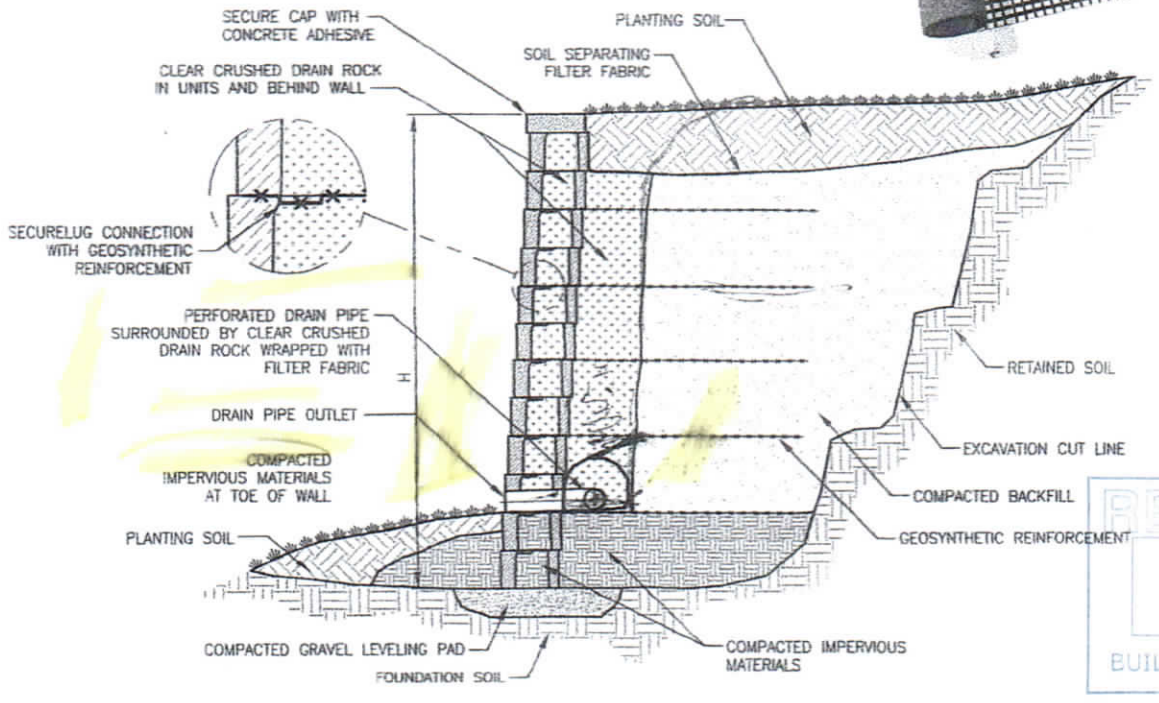
The SecureLug built into CornerStone 100™ and MiraStone™ has a batter or setback of 4.5 degrees (1"/vertical foot). For more specific soil analysis refer to our website, or consult a qualified engineer. These preliminary design charts are used by owner, designer, architect and installer to calculate construction cost only and are not for construction purposes. A qualified engineer should be consulted for a final construction design.

Geogrids

Geogrids are meshes typically made of a regular pattern of tensile elements usually made of a fairly rigid type of plastic. These are used to strengthen fill materials in geotechnical applications. **They provide increased shear strength between soil strata interfaces.** Their tensile strength can prevent or decrease the degree of differential settlement in some applications such as beneath structures or roads by transmitting **the load over a broader area of soil, thereby diminishing the** vertical stress — and subsequent compression — in the soil.



Geogrid Reinforced Cross Section



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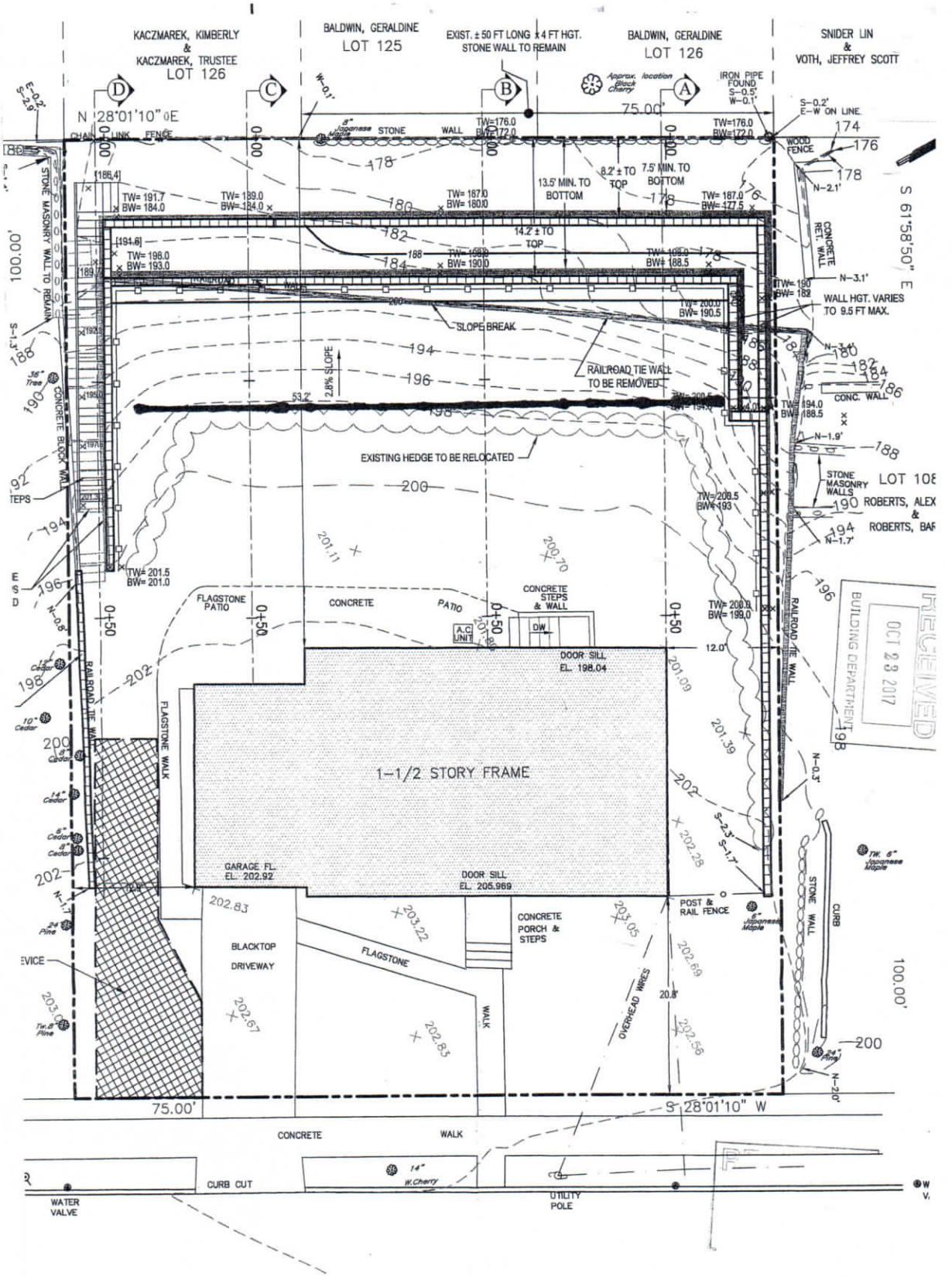
KACZMAREK, KIMBERLY
&
KACZMAREK, TRUSTEE
LOT 126
BALDWIN, GERALDINE
LOT 125
EXIST. ± 50 FT LONG x 4 FT HGT.
STONE WALL TO REMAIN
BALDWIN, GERALDINE
LOT 126
SNIDER LIN
&
VOTH, JEFFREY SCOTT
N 28°01'10" E
75.00'
S 28°01'10" W
S 61°58'50" E
100.00'
CHAIN LINK FENCE
STONE WALL
WOOD FENCE
IRON PIPE FOUND
S-0.5'
W-0.1'
E-W ON LINE
13.5' MIN. TO BOTTOM
8.2' ± TO TOP
7.5' MIN. TO BOTTOM
14.2' ± TO TOP
SLOPE BREAK
2.8% SLOPE
RAILROAD TIE WALL TO BE REMOVED
WALL HGT. VARIES TO 9.5 FT MAX.
CONCRETE RET. WALL
CONC. WALL
STONE MASONRY WALL TO REMAIN
CONCRETE BLOCK WALL
EXISTING HEDGE TO BE RELOCATED
STONE MASONRY WALLS
LOT 108
ROBERTS, ALEX
&
ROBERTS, BAR
FLAGSTONE PATIO
CONCRETE PATIO
CONCRETE STEPS & WALL
A.C. UNIT
DW
DOOR SILL EL. 198.04
1-1/2 STORY FRAME
FLAGSTONE WALK
RAILROAD TIE WALL
GARAGE FL. EL. 202.92
DOOR SILL EL. 205.969
BLACKTOP DRIVEWAY
FLAGSTONE
WALK
CONCRETE PORCH & STEPS
OVERHEAD WIRES
POST & RAIL FENCE
STONE WALL
CURB
CONCRETE WALK
CURB CUT
WATER VALVE
UTILITY POLE
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Appendix G

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Appendix H

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Appendix I(1+2)

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Appendix U'

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Appendix K

Building and Grounds Committee

- The Board asked that Randy Martin and John Tortoso attend the next Board meeting.
- Retaining Wall – problem with water. John Crawford and Matthew Weiss will take pictures of wall. Board needs to get someone in to inspect it.
- Revisit roof clips – have letter sent by attorney to manufacturer asking manufacturer to honor his warranty
- Paint chipping from prior water leakage – 2nd floor
- Need for prioritizing building items
- Bids on window cleaning
- Next Board Meeting on November 10 is a Work Session. Topics to discuss:
    - HVAC
    - Roof letter
    - Look into retaining wall inspector
    - Windows and painting
    - Randy Martin and John Tortoso
    - Lower circle/curbing

Safety Planning Committee – they are working on the Disaster Plan.

Resolutions

RESOLUTION #22

RESOLVED, that the Board of Trustees approves the personnel changes so noted.

Name	Title	Department	Projected Hrs.	Salary	Effect. Date
NEW HIRES					
Carleen Ince	Lib. Clerk	Circ. Dept.	Up to 17 hrs/wk	$17.77/hr.	10/7/14 ($302.09/wk)
Marco Llano	Lib. Clerk	Circ. Dept.	Up to 17 hrs/wk	$17.77/hr.	10/17/14 ($302.09/wk)
Marcie McMahon	Page	Children's	12 hrs/wk	$8.00/hr.	10/16/14 ($96.00/wk)
Thao Nguyen	Librarian I	Children's	On call	$28.96/hr.	10/4/14

RESOLUTION #23

RESOLVED, that the Board of Trustees accepts, with thanks, the following:

1. A 90% appropriation of the 2014 LLSA in the amount of $8,095.50. The LLSA-NYS Grant line (2760000) of the Revenue Report will be increased by $8,095.50.
2. A grant in the amount of $700 for the Learning Ambassador Program. The Miscellaneous Grants line (2760003) of the Revenue Report will be increased by $700.
3. A donation in the amount of $10 from Alfred Goyburu. The Gifts and Donations line (2705000) of the Revenue Report will be increased by $10.

RESOLUTION #24

RESOLVED, that the Board of Trustees approves the fees for legal services for 2015 (January 1-December 31) as outlined in the October 14, 2014 letter from Thomas, Drohan, Waxman, Petigrow & Mayle, LLP.

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- "Emergency" Issues:
  * Retaining Wall - Warranty has expired. Need structural engineer to inspect. If there is a fee John Tortoso will let Board know.

  * Development of Up-to-Date Evacuation/Disaster Plan
    Review what we already have - Police, EMS. Show plan to Scott Craven or J.T. Camp (Fire Dept.)
    Emergency Procedures for Personnel - People part/Material part
    Disaster Recovery Plan Company?

RESOLUTION #28
RESOLVED, that the Board of Trustees accepts, with regret, the resignation of John Crawford in accordance with his email dated November 20, 2014.
Debbie Goddard moved and Stephanie Unger seconded the motion to approve Resolution #28. Motion passed unanimously.

Executive Session
At 7:06 p.m. Madeline Zachacz moved and Debbie Goddard seconded the motion to enter into Executive Session to discuss personnel matters. Motion passed.

At 7:35 p.m. Stephanie Unger moved and Debbie Goddard seconded the motion to leave Executive Session. Motion passed.

Adjournment
At 8:09 p.m. Matthew Weiss moved and Debbie Goddard seconded the motion to adjourn the December 3, 2014 Special Meeting of the Board of Trustees.

Respectfully submitted,
Kathy Beirne, Secretary to Director

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BOARD OF TRUSTEES
OSSINING PUBLIC LIBRARY
Special Meeting/Work Session
November 2, 2015, 8:00 p.m.

DRAFT MEETING MINUTES

In Attendance: Alice Joselow, *President*; Madeline Zachacz, *Vice President*; Matthew Weiss, *Secretary*, Debbie Goddard, Lucinda Manning, Cecilia Quintero, Stephanie Unger

Staff: Karen LaRocca-Fels, *Director*; Molly W. Robbins, *Assistant Director*; John Tortoso, Building Consultant

Call to Order
At 7:58 p.m. President Alice Joselow called the November 2, 2015 Special Meeting of the Board to order.

Pledge of Allegiance
All those present stood for the Pledge.

Work Session

- Building and Grounds Presentation – Molly Robbins, Assistant Director
  Work responsibilities re-evaluated by Molly, Karen and John Tortoso. Two page handout distributed – Tracking and Maintenance.
  Critical Projects: Heating System
  Facilities Committee – meet with staff monthly to stay up to date with Board
  John Tortoso – large projects – equipment is priority
  Molly Robbins – maintenance
  Heating Grant – NYS $50,000 is forthcoming
  Wall consultant $20,000 spent to date for monitoring
  Roof – attorney review underway
  Deteriorating cement at traffic circle waiting for ConEd to complete work before repair

  $3,400.78 owed to Maureen Sullivan for consulting.

- Fringe Benefits Policy for Non-Union Employees
  Nearing completion for review and approval.

- Finance Committee – Set Date to Meet With Auditor to Review Audit
  Will set up date to meet with Auditor.

Executive Session
At 9:03 p.m. Madeline Zachacz moved and Stephanie Unger seconded the motion to enter into Executive Session for the purpose of discussing personnel matters. Motion passed unanimously.

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the February 22, 2016 Regular Meeting of the Board. Motion passed.

Vote	D Goddard	A Joselow	L Manning	C Quintero	S Unger	M Weiss	M Zachacz
Yes	X	X	X	X		X	X
No							
Abstain					X		

Motion to Accept the Minutes of the March 14, 2016 Special Meeting of the Board of Trustees.

Stephanie Unger moved and Madeline Zachacz seconded the motion to approve the Minutes of the March 14, 2016 Special Meeting. Motion passed.

Vote	D Goddard	A Joselow	L Manning	C Quintero	S Unger	M Weiss	M Zachacz
Yes		X	X	X	X	X	X
No							
Abstain	X						

Director's Report

- The Board asked questions about Linda Puskar's sudden resignation. We are temporarily piecing together hours with other staff members. Replacement search has begun.

Committee Reports

Policy and Bylaws, Personnel – *First Reading: Revised Nook Policy*

- Nooks not circulating
- Reduce fines for losing Nooks from $200 to $100
- Extend lending time to 3 months

Board decided to table approval until next meeting/Policy Committee review. Also, add review of Procurement Policy.

Building and Grounds

- Bids for repairs to HVAC system put out
- Clean Air on hold
- Wall: set up for dye test - results from test will tell us what we're dealing with
- Safety trainings being scheduled. Active Shooter tabletop/AED training
- Vending machines will be brought in – due 5/1/16 – per Stephanie Unger
- Hire new lawyers to investigate roof

Resolutions

RESOLUTION #40

RESOLVED, that the Board of Trustees approves the following personnel change:

RESIGNATION:

Name	Title	Department	Hrly. Rate	Hrs Wrk	Effective Date
Linda Puskar	Librarian I	Children's	$31.37	17 hrs/wk	03/07/16

Lucinda Manning moved and Madeline Zachacz seconded the motion to approve Resolution #40. Motion passed.

Old Business

- Long Range Plan – on track – focus group meetings scheduled – still waiting for survey

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BOARD OF TRUSTEES
OSSINING PUBLIC LIBRARY
Special Meeting
October 25, 2016, 7:00 p.m.

MEETING MINUTES

In Attendance: Alice Joselow, *President*, Matthew Weiss, *Vice President*, Stephanie Unger, *Secretary*, Debbie Goddard, Lucinda Manning

By Phone: Madeline Zachacz (until 7:25 p.m.)

Absent: Peter Capek

Staff: Karen LaRocca-Fels, Director; John Tortoso, Consultant

Call to Order
At 7:12 p.m. President Alice Joselow called the October 25, 2016 Special Meeting of the Board of Trustees to order.

Pledge of Allegiance
All those present stood for the Pledge of Allegiance.

Retaining Wall
The Board of Trustees discussed possible problems with the retaining wall and approved the following resolutions:

RESOLUTION #23 – EMERGENCY AUTHORIZATION TO KAREN LAROCCA-FELS
RESOLVED, that the Board of Trustees designates that the condition of the Retaining Wall is an emergency situation and authorizes Karen LaRocca-Fels, Director, to take action after conferring with the Ossining Public Library Board of Trustees Building Committee. The full Board of Trustees authorization and consensus is not required.

Stephanie Unger moved and Matthew Weiss seconded the motion to approve Resolution #23. Motion passed. Lucinda Manning abstained.

RESOLUTION #24 – STRUCTURAL MONTIORING SERVICES
RESOLVED, that the Board of Trustees accepts the proposal from Contractors' Line & Grade South, LLC for weekly monitoring & utility survey of the Retaining Wall for a period of one month. The Board will re-evaluate the situation at the end of the month and will determine further service requirements at that time.

Stephanie Unger moved and Matthew Weiss seconded the motion to approve Resolution #24. Motion passed. Lucinda Manning abstained.

Adjournment
At 8:22 p.m. Stephanie Unger moved and Matthew Weiss seconded the motion to adjourn the October 25, 2016 Special Meeting of the Board of Trustees. Motion passed unanimously.

Respectfully submitted,
Stephanie Unger, Secretary

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BOARD OF TRUSTEES
OSSINING PUBLIC LIBRARY
Special Meeting/Work Session
February 13, 2017, 7:00 p.m.

MEETING MINUTES

In Attendance: Alice Joselow, *President*, Matthew Weiss, *Vice President*, Stephanie Unger, *Secretary*, Peter Capek, Debbie Goddard, Lucinda Manning, Madeline Zachacz

Staff: Karen LaRocca-Fels, Director; Kathy Beirne, Secretary to Director

Other: Jim Dolan, OLA Consulting Engineers (via phone)

Call to Order
At 7:03 p.m. President Alice Joselow called the February 13, 2017 Special Meeting of the Board of Trustees to order.

Pledge of Allegiance
All those present stood for the Pledge of Allegiance.

Work Session

- Wall Discussion
  Discussion points:
  - Need for wall planning process
  - Further information required
  - Obtain second opinion
  - Protecting the integrity of the wells
  - Go back to Antonucci
  - Ask Village Engineer to make recommendation

- HVAC Discussion
  The Board discussed the HVAC (and the state of the wall) via phone call with Jim Dolan of OLA.

- Hudson Steppe PILOT
  Karen and Peter attended a Village Board Meeting for overview of the PILOT. Karen will meet with representatives from Hudson Steppe.

- Rescheduling 2/27/17 Regular Meeting of the Board
  The regular meeting was rescheduled to begin at 6:30 (changed later to 6:45 PM), meeting minutes approved, resolutions and then Long Range Planning.

Adjournment
At 8:43 p.m. Madeline Zachacz moved and Matthew Weiss seconded the motion to adjourn the February 13, 2017 Special Meeting of the Board of Trustees. Motion passed unanimously.

Respectfully submitted,
Kathy Beirne, Secretary to Director

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BOARD OF TRUSTEES
OSSINING PUBLIC LIBRARY
Special Meeting/Work Session
May 8, 2017, 7:00 p.m.

DRAFT MEETING MINUTES

In Attendance: Alice Joselow, *President*, Matthew Weiss, *Vice President*, ~~Stephanie Unger~~, *Secretary*, Peter Capek, Debbie Goddard, Lucinda Manning, Madeline Zachacz

Staff: Karen LaRocca-Fels, Director; Kathy Beirne, Secretary to Director

Call to Order
At 7:11 p.m. President Alice Joselow called the May 8, 2017 Special Meeting of the Board of Trustees to order.

Pledge of Allegiance
All those present stood for the Pledge.

RESOLUTION #45
RESOLVED, that the Board of Trustees approves the payments represented by the unpaid bills report of May 8, 2017 reviewed by the Board.

Debbie Goddard moved and Matthew Weiss seconded the motion to approve Resolution #45. Motion passed unanimously.

Work Session

- Emergency Procedures Manual draft version – Board to continue to submit suggestions.
- *Library In-Charge Person* (LICP) had first meeting – Karen reviewed procedures and gave tour of building to review Emergency Exits.
- PESH – no report yet but we have been attending to the issues.
- Budget Promotion – put out yard signs. Postcard mailed – next year add sentence in Spanish to refer to Website and Absentee Ballot information.
- Wall – Engineers have additional questions of peer review. Information sent last Friday to SGH. Conference call requested for Thursday or Friday of next week – no confirmation yet.
- Agenda for Annual Meeting, June 12, 2017 – invite LRP focus group participants
- Karen, Alice and Suzy working on Frog Rock $20,000 Grant. Outreach for Summer Reading – creative programming alternate summer camp at OPL for middle schoolers transitioning to high school.
- Add Jaime Aguirre, Treasurer, to Website

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- Patron Privacy and Law Enforcement policies need review.

Ad Hoc: 125th Committee

- Fundraising meeting July 11

Revisit LRP focus group community leaders – resource or center of influence for financing. Present strategies plan. Draft overview – email to contacts. Draft of goals on LRP. We still have two $50,000 awards from PILOTs.

Resolutions

RESOLUTION 14 – Personnel Changes

RESOLVED, that the Board of Trustees approves the following personnel change:

Name	Position	Department	FT/PT	Pay Rate	Effective Date
Resignation:					
Myles Robert	Lib. I	Children's	PT	$28.96	6/28/17

Alice Joselow moved and Madeline Zachacz seconded the motion to approve Resolution 14. Motion passed unanimously.

RESOLUTION 15 – Window Cleaning Contract Approval

RESOLVED, that the Board of Trustees approves the window cleaning contract for Clean View Window Cleaning in the amount of $6,435 for the fiscal year July 1, 2017 through June 30, 2018.

Alice Joselow moved and Matthew Weiss seconded the motion to approve Resolutions 15. Motion passed unanimously.

RESOLUTION 16 – Unpaid Bills Report and Approval

RESOLVED, that the Board of Trustees approves the payments dated July 10, 2017 represented by the unpaid bills report of July 7, 2017 reviewed by the Board.

Debbie Goddard moved and Alice Joselow seconded the motion to approve Resolution 16. Motion passed unanimously.

Old Business

- Wall
  Per conference call with geologist wall needs to be monitored – it is vulnerable to fail.
  We need to be ready with shovel-ready project and the funds to move ahead.
  Board asked for alternatives besides digging.
  Karen did not receive wall report for meeting. We need strategies for remediation.
  Kathleen Dunne (the wall designer) will locate original plans to build the wall.

- HVAC Recommendations
  We still have the two NYS $50,000 grants.

New Business

- Open Trustee Term Ending June 30, 2018 due to Stephanie Unger's Resignation

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BOARD OF TRUSTEES
OSSINING PUBLIC LIBRARY
Special Meeting/Work Session
July 31, 2017, 7:00 p.m.

AGENDA draft

Call to Order

Pledge of Allegiance

Work Session

- Unpaid bills
- HVAC Discussion – Jim Dolan
- Wall Update and Estimate
- Security Upgrade and Sidewalk Project
  - Possible Construction Grant Project
- Boat Donation Offer

Resolutions

RESOLUTION #17
RESOLVED, that the Board of Trustees approves the Unpaid Bills Payment Schedule dated July 28, 2017 that was reviewed by the Board.

RESOLUTION #18
RESOLVED, that the Board of Trustees approves the July 17, 2017 Retaining Wall and Associated Work Proposal from Antonucci & Associates in the amount of $22,500.

RESOLUTION #19
RESOLVED, that the Board of Trustees approves the preliminary grant application for security and access upgrades.

Executive Session

Adjournment

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Appendix L

AJA Architecture
Three Broad Street
Glens Falls, NY 12801

Geraldine F. Baldwin
66 Riverview Avenue
Tarrytown, NY 10591

July 27, 2017

Dear Ms. Baldwin:

In response to your request, I provide the following information. I am a practicing Architect, licensed in the State of New York. Although I do not have expertise in interpreting aerial photographs, I am trained and have over 20 years' experience dealing with minute details of site plans, schematics and plans/drawings for buildings and other structures.

Per your request, I have examined two aerial photographs labelled "Mapping Westchester County" and "1976 67 Miller" and "Mapping Westchester County" 2013 67 Miller", attached to this letter, marked A and B. I understand that photographs A and B, taken respectively in 1976 and 2013, of a house at 67 Miller Avenue have been alleged to show:

1.) The backyard of the house at 67 Miller Avenue was substantially larger in 1976 when compared to that in 2013; and

2.) The presence of a 20-foot-high railroad tie retaining wall in the rear of that yard in 1976.

I have carefully reviewed and compared the two aerial photographs and, based on my experience and expertise as an Architect, I have concluded the following:

1). The 1976 photograph is so blurry that it is impossible to determine whether the size of the backyard was larger in 1976 compared to that in 2013; and

2.) It is impossible to determine the size of the wall from the aerial photographs.

Sincerely,

Andrew J. Allison, AIA

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A

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B

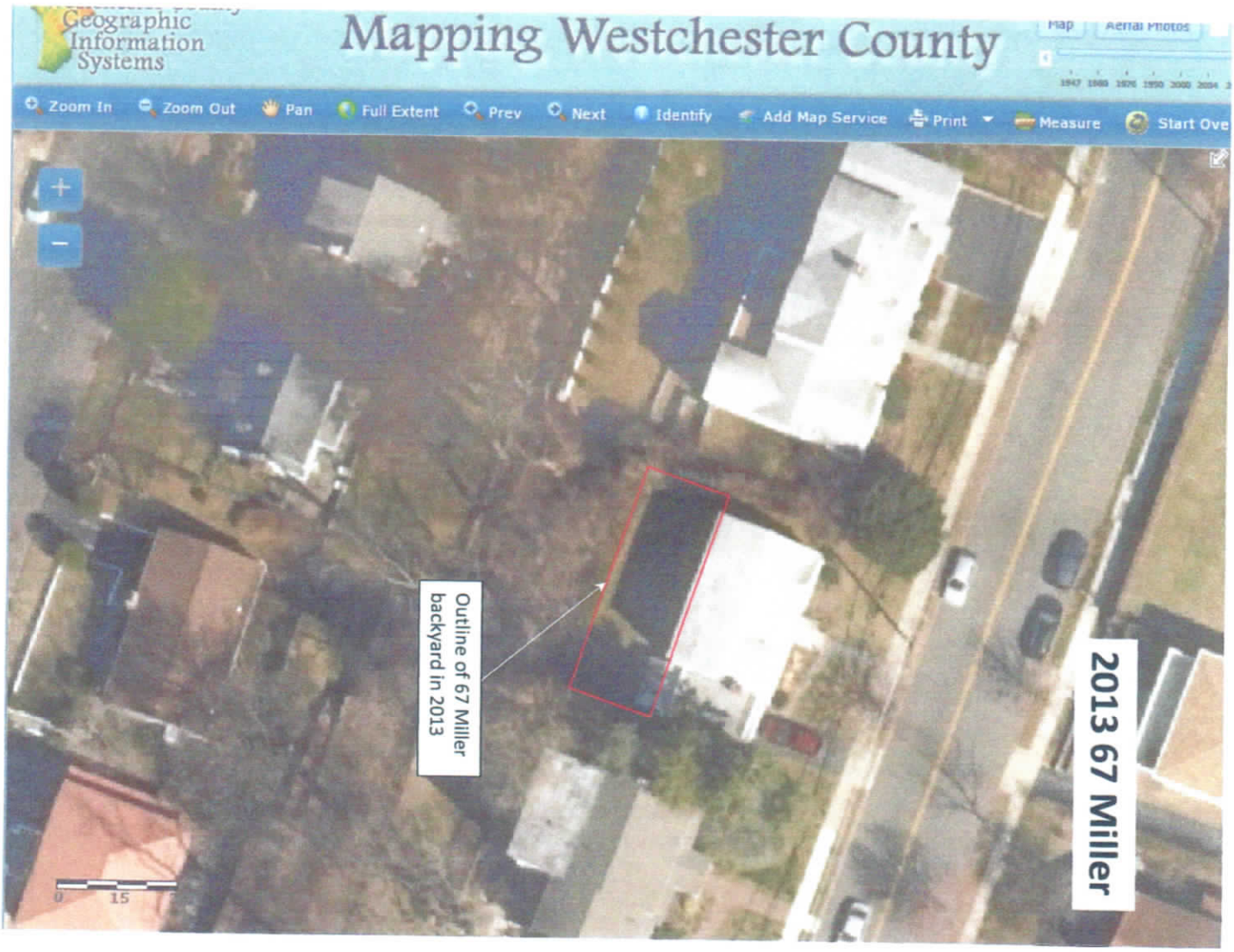

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EXHIBIT B

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October 23, 2017

Via Hand Delivery

Honorable Chairman Stanley Friedlander and Members of the Planning Board
Village of Tarrytown
One Depot Plaza
Tarrytown, NY 10591

Re: 67 Miller Avenue
Parcel ID # 1.70-40-4

Dear Honorable Members of the Tarrytown Planning Board:

I represent Ms. Geraldine Baldwin who resides immediately downgradient of 67 Miller Avenue and is the back yard neighbor to Mr. Bartolacci. I am before you tonight to ask you to deny the requested waiver. As proposed, the applicant is requesting a waiver to remove the entire slope and bring in additional fill (approximately 470 cubic yards) to create a larger back yard (the "Application"). Although the Planning Board has heard from Mr. and Mrs. Bartolacci (the "Applicants") over the course of numerous meetings and several months, it is clear that the Application must be denied. In reality, the Application

As this Boardmay not be aware, the Zoning Board of Appeals' (the "ZBA") grant of the two variances to allow for two 9.5-foot walls is currently being challeged in an Article 78 proceeding. Although this Board is not a party to that lawsuit, I wanted to make you aware that we believe there are significant issues that the ZBA failed to properly consider. As set forth below, the Applicant's fail to meet the criteria that this Board must apply in order to grant the Application.

Courts have routinely upheld denials of approvals and variances from municipal boards when environmental features that are intended to be protected would have been harmed if such approval or permit were granted. In *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry, Gazza v. New York State Department of Environmental Conservation*, and *Basile v. Town of Southampton,* the Court of Appeals found that denying applications based on environmental considerations (steep slopes, wetlands, etc.) is rational and not arbitrary and capricious. Copies of these decisions are annexed hereto for your consideration. As you will see, the highest New York state court has found on muliple occassions that taking ownership of property when there are laws in place that may diminish the value of one's property due to environmental considerations does not constitute a taking of property.

The Applicants have made it clear that their main purpose is to create a significantly larger backyard on a severly sloped parcel of property. However, there is no "permit" or even approval process set forth in the Village Code that allows for the creation of a back yard on a steeply sloped parcel.

I. APPLICANTS' PROPOSAL MUST BE DENIED AS IT FAILS TO SATISFY ANY OF THE CRITERIA IN THE VILLAGE LAW FOR A STEEP SLOPE WAIVER

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Although the Planning Board's jurisdiction for considering a waiver to the steep slope prohibition is not the same as the ZBA's jurisdiction in granting area variances, the basic inquiries are strickingly similar for zoning boards at all times is whether the strict application of the ordinance in a given case will serve a valid public purpose which outweighs the injury to the property owner. *See Grace v. Palmero, 182 A.D.2d 820, 582 N.Y.S.2d 284 (*2d Dep't 1992*)*. In *Palmero*, the property owner was seeking substanial side yard variances and a height variance for an existing garage. The Court found that the property owner conceded his ability to situate the garage on his property in such a way as to conform to the setback requirements and, ultimately, the zoning board denied the variances. The Court also noted that the financial hardship incurred to the property owner to remove the existing garage did not give rise to any entitlement to the area variances.

II. Whether it will produce an undesirable change in the character of the neighborhood

As evidenced by the petition previously submitted by numerous neighbors, there would be a significant and undesireable change to the neighborhood if this Board granted variances for either the 20' wall plan or for the two wall plan. This Board has numerous pictures of what the impact would be to my client and the downhill properties. Constructing two walls that amount to the same height as the original 20' proposal has not mitigated the undesireable change. Moroever, despite seeing numerous walls located in other areas of the Village, the vast majority of those walls are not in a similar location to the one proposed here (i.e., in a residential backyard). This type and size of structure is not meant to be placed in residential backyards – indeed, the Village Code does not permit it. As a result, this Board must deny the Application. *See Fowlkes v. Board of Zoning Appeals of the Town of North Hempstead*, 52 A.D.3d 711 (2d Dep't 2008) where the zoning board denied an area variance for an existing two family home where the certificate of occupany was for a single family home. The board based its decision on the detrimental effect to the neighborhood that primarily consisted of single family homes. The Town of North Hempstead zoning board found that the overal detriment to the surrounding properties outweighed the benefit to the property owner. *See also Kraut v. Board of Appeals of the Village of Scarsdale*, 841 N.Y.S.2d 369 (2d Dep't 2007) where an area variance for a front yard setback was denied because of the detrimental effect on the neighborhood.

III. Whether the benefit sought by the applicant can be achieved through some other feasible method

The answer to this question is simply "yes" – the need to stablize the slope can be achieved by other feasible methods. Similar to *Palmero*, *supra*, there are other much less intrusive and code-complaint options that could possibly stablize the slope. In *Merlotto v. Town of Patterson Zoning Board of Appeals*, 43 A.D.3d 926, 841 N.Y.S.2d 650 (2d Dep't 2007), the applicant was seeking a variance for more than 3 times the permitted size to legalize the existing construction of their home. The Second Department found that the Patterson Zoning Board of Appeals acted rationally when it found, among other reasons, that the applicant could have easily constructed a

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smaller home in compliance with the code, it was not the minimum variance necessary, and that this need for a variance was entirely self created.

The facts in front of this Board are remarkably similar. The Applicants are seeking a waiver to eliminate the slope when they can easily construct a much smaller wall. As a result, this Board must deny the waiver.

IV. Whether the waiver will result in a change that will be materially detrimental or injurious…or result in substantial impairment of a slope area

In *DeCillis v. Grannis*, 69 A.D.3d 851 (2d Dep't 2010), the petitioner owned property in the Nissequogue Recreation River Corridor and wanted to subdivide. The property did not meet the minimum lot size to subdivide and the New York State Department of Environmental Conservation Commissioner denied the requested area variance stating that such a variance would result in adverse impacts to the area. The Second Department upheld this determination and found that reliance on the potential impact to the environmental conditions of the areas was supported by the record. So, it is clear that although this particular case concerned an area variance, a municipal board's decision to deny an application for relief, in any form, based on the impact to environmental conditions is rational and has been upheld by the court.

V. Whether the waiver is inconsistent with the purpose, objectives and general spirit and intent of the chapter.

Again, the answer is simply no. This law was written to protect steep slopes and, in certain very specific instances, grant waivers to allow for some development – not the complete destruction of a slope. The very issue raised in front of this Board is to uphold the intent of the law and not permit the Applicants to render it meaningless. The regulations protecting the steep slopes were not intended to permit a property owner to subsequently request a waiver to increase the size of his backyard.

VI. LANDSCAPING PLAN, ARBORIST STUDY, and CONSTRUCTION AND MAINTENANCE PLAN

Upon information and belief, the Planning Board received an updated comment letter from Munz Associates recommending additional information and studies be performed by Mr. Bartolacci as part of the Planning Board's review process. Significantly, the report recommends that a certified arborist provide a report identifying and assessing the trees on neighboring properties. Although the Munz Report recommends this being a condition to a building permit, it should be a pre-condition to any Board approval.

VII. CONCLUSION

Over the past several years, the Planning Board has dedicated numerous hours to addressing the Bartolocci's application but it is clear that the proposal is simply too extrordinary,

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has signficant adverse and direct impacts to the downhill neighbors, and sets a dangerous precedent for the Village. In looking at the criteria that the Village Board of Trustees adopted to protect steep slopes, the Bartolocci's have failed to meet *any* of the criteria to support the granting of this waiver. In addition, the courts have upheld decisions by municipal boards to deny applications to safeguard the enviornmental features the laws were intented to protect.

As a result, we respectfully request that this Board deny the requested waiver. The ability to seek a waiver from a prohibition of building on slopes greater than 25% does not equate to the ability to remove the slope entirely.

Respectfully submitted,

Kristen Kwilson

Kristen K. Wilson

cc: Geraldine Baldwin

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Richard Roeser Professional Builder, Inc. v. Anne Arundel County, Md., March 7, 2002

89 N.Y.2d 535
Court of Appeals of New York.

In the Matter of Rose E. ANELLO, Appellant,
v.
ZONING BOARD OF APPEALS OF THE VILLAGE OF DOBBS FERRY et al., Respondents,
Briary Woods Neighborhood Association, Intervenor–Respondent.

Feb. 18, 1997.

Property owner brought action challenging decision by village zoning board of appeals denying variance from "steep slope" ordinance, which prevented owner from building single-family dwelling on her lot. The Supreme Court, Westchester County, Leavitt, J., annulled board's decision, and board appealed. The Supreme Court, Appellate Division, 226 A.D.2d 458, 641 N.Y.S.2d 52, reversed, and property owner sought further review. The Court of Appeals, Ciparick, J., held that, since owner acquired her property after enactment of ordinance, its enforcement did not deprive her of any property interest for which she was entitled just compensation.

Affirmed.

Wesley, J., dissented and filed opinion.

West Headnotes (1)

[1] **Eminent Domain**
Particular Cases

Where property owner purchased property two years after village's enactment of "steep slope" ordinance, enforcement of ordinance to deny variance, which prevented owner from building single-family dwelling, did not constitute governmental taking of any property interest for which compensation was due. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

10 Cases that cite this headnote

Attorneys and Law Firms

*****184 *536 **870** Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York City (Catherine M. Foti, of counsel), for appellant.

***537** Plunkett & Jaffe, P.C., White Plains (Kevin J. Plunkett and Elizabeth S. Torkelsen, of counsel), for respondents.

***538** Morgan, Lewis & Bockius LLP, New York City (David Stoelting, of counsel), for intervenor-respondent.

OPINION OF THE COURT

CIPARICK, Judge.

Petitioner contends that the denial of a variance from Dobbs ***539** Ferry's "steep slope" ordinance, which prevents her from building a one-family dwelling on a parcel, constitutes a taking of property for which she is entitled to just compensation (*see*, U.S. Const. 5th Amend; N.Y. Const., art. I, § 7). We disagree and conclude that because petitioner acquired her property after the enactment of the steep-slope ordinance, its enforcement does not deprive her of any property interest.

In 1989, the Village enacted the steep-slope ordinance in an effort to "protect environmentally sensitive lands, preserve the Village's natural resources and promote the orderly development of land * * * with excessively steep slope areas" (Dobbs Ferry Village Code § 300–35.D). To determine whether a lot is large enough to be developed, the ordinance requires a percentage reduction of the property's gross area depending upon the degree of the property's slope, which yields the buildable area. Applying the steep-slope ordinance to petitioner's property, the buildable area is less than 4,200 square feet, well below the Zoning Code's minimum buildable area of 5,000 square feet.

Petitioner sought to construct a one-family dwelling on the property and applied for a variance from the steep-slope ordinance. The Zoning Board of Appeals denied the variance, reasoning that petitioner "acquired the

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property over two years after the steep slope law came into effect and therefore had full knowledge that the lot was unbuildable and non-conforming." The Board also found that granting a "variance would have a substantial detrimental impact upon the surrounding area and constitute a detriment to the health, safety and welfare of the neighborhood." *****185 **871** On petitioner's subsequent CPLR article 78 proceeding, Supreme Court annulled the Board's decision, holding that petitioner was entitled to a variance under the "single and separate ownership" theory. While the Board's appeal was pending before the Appellate Division, this Court rendered its decision in *Matter of Khan v. Zoning Bd. of Appeals*, 87 N.Y.2d 344, 639 N.Y.S.2d 302, 662 N.E.2d 782, rejecting the "single and separate ownership" doctrine. The Appellate Division thereafter reversed the order of Supreme Court based solely on *Khan* and dismissed the petition, concluding that the Board's denial of a variance was not arbitrary or capricious and was supported by substantial evidence.

On appeal to this Court, petitioner's main argument is that the denial of a variance from the steep-slope ordinance works a taking of her property. Petitioner's takings claim must fail because she never acquired an unfettered right to build on the ***540** property free from the steep-slope ordinance. Petitioner purchased the property in 1991, two years *after* the steep-slope ordinance was enacted. This statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her (*accord, Soon Duck Kim v. City of New York*, 89 N.Y.2d 1, ——, 659 N.Y.S.2d 145, 681N.E.2d 312 [decided today] [enforcement of preexisting statutory lateral-support obligation not a taking of a property interest]; *Matter of Gazza v. New York State Dept. of Envtl. Conservation*, 89 N.Y.2d 603, ——, 657 N.Y.S.2d 555, 679 N.E.2d 1035 [decided today] [enforcement of preexisting statutory wetlands restriction not a taking of a property interest]).

For the reasons fully elaborated in *Kim, supra*, at 659, 145 N.Y.S.2d ——, 681 N.E.2d 312 and *Gazza, supra*, at 657, 555 N.Y.S.2d ——, 679 N.E.2d 1035, we are unpersuaded by the arguments in the dissenting opinion. Importantly, petitioner does not seek to invalidate the steep-slope ordinance as an improper exercise of the Village's police power, but only challenges the ordinance as applied to her property (*see, Gazza, supra*, at ——, —— N.Y.S.2d 679, 679 N.E.2d ——; *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 500–501, 121 N.E.2d 517).

Moreover, we disagree with the dissent's assertion that our holdings in these cases will impede the alienability of property. The rule that preexisting regulations inhere in a property owner's title will affect the *value* of property, but this should furnish ample incentive to the prior owner—the party whose title has been redefined by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.

Furthermore, if property owners were permitted to assert compensatory takings claims based on enforcement of preexisting541 regulations, the traditional takings analysis articulated in *Penn Cent.*, and its inquiry into "the extent to which the regulation has interfered with distinct investment-backed expectations," would be rendered hopelessly circular (*see, Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631).[1] To illustrate based on the *****186 **872** facts of this case: If petitioner's title was defined without regard to the steep-slope restriction, then her investment-backed expectations would include the possibility of winning a compensatory takings lawsuit as a result of the Village's enforcement of the ordinance. However, the success of her compensatory takings lawsuit would depend largely on the extent to which the ordinance interferes with her investment-backed expectations, which would in turn depend on the possible success of the

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compensatory takings claim, and so on. This inevitable circularity points up the analytical flaw in permitting a subsequent purchaser to assert a compensatory takings claim based on a property interest that has already been defined out of the owner's title. [2]

Petitioner's other arguments are unpreserved or without merit. Accordingly, the order of the Appellate Division should be affirmed, with costs.

WESLEY, Judge, dissenting.

I disagree that the enforcement of the steep-slope ordinance does not constitute a taking of petitioner's property merely because the ordinance was enacted prior to petitioner's acquisition of the property. I, therefore, respectfully dissent.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798, the United States Supreme Court held that a confiscatory ***542** regulation, i.e., one that prohibits all economically beneficial use of land, "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." If the Village ordinance in this case prohibits all economically beneficial use of Mrs. Anello's property, then Mrs. Anello must be compensated for the property unless she had already been restricted from developing it by the very nature and location of the lot or by another principle of the law of property of New York.

The majority holds that Mrs. Anello had already been restricted from developing the property by the ordinance itself, because the ordinance had been in effect for two years before she acquired the property. If so, then for any parcel of property that is completely deprived of its value by the ordinance, the Village has, " 'by *ipse dixit*, * * * transform[ed] private property into public property without compensation' " once the parcel is transferred to another (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S., at 1031, 112 S.Ct., at 2901, quoting *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452, 66 L.Ed.2d 358).

The fact that a parcel is transferred should not make a once-compensable taking become noncompensable. As we reaffirm today, "a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power" (*Matter of Gazza v. New York State Dept. of Envtl. Conservation*, 89 N.Y.2d 603, ——, 657 N.Y.S.2d 555, 679 N.E.2d 1035, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322; and *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 500–501, 121 N.E.2d 517).

The majority reaffirms this rule only in the context of a challenge to the validity of a regulation itself, and not in the context of a claim that an otherwise valid regulation has worked a taking of all the economic value of *****187 **873** a particular piece of property. I see no reason to draw such a distinction; to the contrary, I believe that there are compelling reasons why no such distinction should be drawn.

> "A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. ***543** Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability" (*Lopes v. City of Peabody*, 417 Mass. 299, 303, 629 N.E.2d 1312, 1315).

Although the court in *Lopes* noted that "the rights of a subsequent purchaser to takings damages might well stand in a posture significantly different from that of one seeking to have a zoning provision invalidated" (*Lopes, supra*, at n. 8), I believe that each of the considerations applies in this case. For all of these reasons, I would hold that, as long as the Village could not have deprived the prior owners of the parcel of all economically beneficial use of the property without compensation, "the prior owners must be understood to have transferred their full property rights in conveying the lot" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 833–834, n. 2, 107 S.Ct. 3141, 3147, n. 2, 97 L.Ed.2d 677; *see also, K & K Constr. v. Department of Natural Resources*, 217 Mich.App. 56, 64, 551 N.W.2d 413, 417–418).

If a prior owner cannot transfer a potential taking claim to a subsequent purchaser, then the property's value is destroyed by the transfer without the government having to pay compensation for it. As suggested by the court in

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Lopes, and as noted in my concurring opinion in *Gazza*, the majority's reasoning effectively forces New York property owners to keep abreast of regulatory enactments and, if an enactment appears to deprive a parcel of its economic value, to seek compensation for the taking. Any property owner who overlooks or misinterprets a regulatory enactment, or who lacks the resources to commence a taking action, cannot transfer the property to someone else without destroying the property's value. Instead, he or she will find that the property has, without compensation, been dedicated to whatever governmental purpose formed the basis for the regulatory enactment.

The majority's opinion also has the potential to work an interesting alchemy on the estate of a decedent who, through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death. The majority's view also creates the prospect of adjacent landowners with similar lots and similar land use regulations who sue to challenge a regulation as confiscatory, but receive totally different results, dependent upon the date of ownership and the date of the regulation's enactment. I do not believe that such a restriction on alienability comports with the intent of those who drafted the Constitution (*see generally, Kmiec, The Original Under standing* ***544** *of the Taking Clause is Neither Weak nor Obtuse*, 88 Colum L Rev 1630 [1988]).

I recognize that "[t]here is an inherent tendency towards circularity" if a taking is defined by the reasonable expectations of the owner, but "[s]ome circularity must be tolerated in these matters" (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S., at 1034, 112 S.Ct., at 2903 [Kennedy, J., concurring]). More importantly, as Justice Kennedy points out, the definition is not entirely circular as long as "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved" (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S., at 1035, 112 S.Ct., at 2903). Thus, for example, in *Gazza* the taking issue was not determined by Mr. Gazza's expectation that the property would be worth $396,000 as a single-family residential lot. That expectation was not reasonable because, as Supreme Court determined, the property had value as a result of other uses permitted under the Tidal Wetlands Act and the local zoning ordinance.

In this case, by contrast, we have no basis for determining whether Mrs. Anello's expectations were reasonable at this point. I am aware of no principle of New York common law, and the majority cites none, that would have prohibited all economically beneficial *****188 **874** use of Mrs. Anello's property because its over-all slope is approximately 21%. There is, however, no need for us to conduct such a "logically antecedent inquiry into the nature of the owner's estate" (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S., at 1027, 112 S.Ct., at 2899), because no court has yet determined that the denial of the variance from the ordinance deprived the property of all economic use (*Spears v. Berle*, 48 N.Y.2d 254, 263–264, 422 N.Y.S.2d 636, 397 N.E.2d 1304). As the majority notes, Supreme Court relied upon the now-discredited principle of "single and separate ownership" in granting the petition without an evidentiary hearing, and neither Supreme Court nor the Appellate Division addressed Mrs. Anello's claim of a taking. I agree with the majority that Mrs. Anello's other arguments are unpreserved or without merit. I would, however, modify by deleting so much of the order of the Appellate Division that dismisses the petition, and remit the case to Supreme Court for a hearing on petitioner's taking claim (*Spears v. Berle, supra*).

***545** KAYE, C.J., and BELLACOSA, SMITH and LEVINE, JJ., concur.

WESLEY, J., dissents and votes to modify in a separate opinion.

TITONE, J., took no part.
Order affirmed, with costs.

All Citations

89 N.Y.2d 535, 678 N.E.2d 870, 656 N.Y.S.2d 184, 1997 N.Y. Slip Op. 01499

Footnotes

1 As the dissent notes, Justice Kennedy opined in *Lucas* that "[s]ome circularity must be tolerated in these matters," but Justice Kennedy was discussing the impact of *newly enacted* regulations on a property owner's investment-backed expectations, and not the separate issue of *preexisting* restrictions inhering in title (*see, Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003, 1034–1035, 112 S.Ct. 2886, 2903, 120 L.Ed.2d 798 [Kennedy, J., concurring]). In this connection, Justice Kennedy observed that "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. * * * The State should not be prevented from enacting new regulatory initiatives in response to changing conditions * * *. The Takings Clause does not require a static body of state property law" (*id.,* at 1035, 112 S.Ct., at 2903 [citation omitted]).

2 The dissent's arguments concerning the ability of an owner to separately transfer a compensatory takings claim to a successor-in-interest and the right of a decedent's estate to assert such a claim are directed to issues not before us. As noted in *Gazza,* 89 N.Y.2d, at ——, 657 N.Y.S.2d 555, 679 N.E.2d 1035, we leave for another day the issues of transferability left open by these cases.

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Richard Roeser Professional Builder, Inc. v. Anne Arundel County, Md., March 7, 2002

89 N.Y.2d 974
Court of Appeals of New York.

Dorothy A. BASILE, Appellant,
v.
TOWN OF SOUTHAMPTON, Respondent.

Feb. 18, 1997.

In condemnation proceeding, the Supreme Court, Suffolk County, Werner, J., valued subject property as restricted by wetlands regulation, and claimant appealed. The Supreme Court, Appellate Division, 222 A.D.2d 638, 636 N.Y.S.2d 97, affirmed, and appeal was taken. The Court of Appeals held that valuation of property acquired by town in condemnation proceeding was required to reflect applicable wetlands restrictions.

Affirmed.

Wesley, J., filed opinion concurring in result.

West Headnotes (3)

[1] Eminent Domain
Value for Special Use

Generally, upon condemnation, property value should be calculated with due consideration paid to applicable restrictions upon use.

1 Cases that cite this headnote

[2] Eminent Domain
Value for Special Use

Valuation of property acquired by town in condemnation proceeding was required to reflect applicable wetlands restrictions, rather than its preregulatory property value; claimant took title to her property subject to wetlands regulations and encumbrances of covenants entered into by former owner in exchange for right to subdivide and develop. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

4 Cases that cite this headnote

[3] Eminent Domain
Wetlands and Coastal Protection

Enactments which are legitimate exercises of police power, such as wetlands regulations, do not effect taking when purchaser acquires property subject to such regulations. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

Cases that cite this headnote

Attorneys and Law Firms

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***975** Wayne D. Bruyn, Deputy Town Attorney, Southampton, for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs.

In 1980, claimant's family acquired 12 acres of property situated near Moriches Bay in the Town of Southampton. At that time, the land was zoned for residential development and subject to further regulation because of its location within the Tidal Wetlands and Ocean Beach Overlay District and the Tidal Floodplain Overlay District. In fact, over 95% of the parcel consists of tidal wetlands as inventoried pursuant to the Tidal Wetlands Act (ECL 25–0201).

The 1980 purchase was made subject to certain covenants which had been filed by the former owner in the Suffolk County Clerk's office. These covenants stated that the parcel "may consist of wetlands and may not be suitable for erection of a dwelling thereon." The covenants further

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stated that "no building or structure shall be erected on [the parcel] unless and until said [parcel] is approved as a building lot by the Planning Board of the Town of Southampton."

In 1990, respondent Town of Southampton acquired from claimant Basile, by condemnation, the fee title ownership to the parcel. The Town's appraiser initially valued the land at $128,000 and an advance payment was made in that amount to claimant (EDPL 304). The Town later revised its appraisal to $117,500 and claimant submitted a counter appraisal listing the property value at $960,000. The wide disparity between the valuations submitted by the parties stems primarily from the fact that only the respondent's estimate reflects the property value as restricted under the wetlands regulations. Supreme Court awarded claimant $117,500. *

Claimant argues that the wetlands regulations which decreased the market value of her property effect an unconstitutional taking (U.S. Const. 5th Amend.; N.Y. Const., art. I, § 7), and the formal condemnation proceeding requires just compensation of the preregulatory property value. Respondent counters that it is the property value, as restricted, which must dictate the amount of compensation in a condemnation proceeding.

[1] [2] ***976** Generally, upon condemnation, property value should be calculated with due consideration paid to the applicable restrictions upon use (*cf., Matter of Town of Islip [Mascioli],* 49 N.Y.2d 354, 360, 426 N.Y.S.2d 220, 402 N.E.2d 1123 ["Ordinarily the potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking"]). Here, the valuation of claimant's property should reflect the applicable environmental restrictions. Whatever taking claim the prior landowner may have had *****879 **491** against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests. Moreover, as the concurrence notes, "[t]he wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered" by virtue of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel.

[3] Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations. "The relevant property interests owned by [a purchaser] are defined by those State laws enacted and in effect at the time [title is taken] and they are not dependent on the timing of State action pursuant to such laws" (*Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 89 N.Y.2d 603, 616, 657 N.Y.S.2d 555, 560, 679 N.E.2d 1035, 1041 [decided today]). Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions.

WESLEY, Judge, concurring.

For the reasons set forth in my dissenting opinion in *Matter of Anello v. Zoning Bd. of Appeals,* 89 N.Y.2d 535, 656 N.Y.S.2d 184, 678 N.E.2d 870 [decided today], I cannot agree that claimant is prevented from claiming the value of her property without the wetlands regulations solely because she took title after the enactment of those regulations. Nevertheless, I concur in the result reached by the majority, because claimant took title subject to the covenants filed by the former owner of the property, which substantially restrict the value and use of the property.

Even if we were to accept claimant's argument that the property must be valued as if it could be developed for one or more single-family residences because the alternative use for ***977** recreational or aesthetic purposes is not an economic use (*cf., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1044, 112 S.Ct. 2886, 2908, 120 L.Ed.2d 798 [Blackmun, J., dissenting]), that is a consequence of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel. The wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered by the former owner by virtue of the covenants. As such, an unrestricted right to develop the parcel no longer remained in the "bundle" of rights that claimant acquired through the former owner, and Supreme Court properly determined that the Town need not compensate claimant as if she retained that right.

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KAYE, C.J., and BELLACOSA, SMITH, LEVINE and CIPARICK, JJ., concur.

WESLEY, J., concurs in result in an opinion.

TITONE, J., taking no part.

Order affirmed, with costs, in a memorandum.

All Citations

89 N.Y.2d 974, 678 N.E.2d 489, 655 N.Y.S.2d 877, 1997 N.Y. Slip Op. 01496

Footnotes

* Respondent has not sought the difference between the advance payment and the award by Supreme Court. Claimant retains those funds.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Friedenburg v. New York State Dept. of Environmental Conservation, N.Y.A.D. 2 Dept., November 24, 2003

89 N.Y.2d 603
Court of Appeals of New York.

In the Matter of Joseph F. GAZZA, Appellant,
v.
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Respondent.

Feb. 18, 1997.

Landowner brought proceeding to review determination by Department of Environmental Conservation (DEC) that denied his application for tidal wetlands permit to build single-family home. The Supreme Court, Suffolk County, Michael F. Mullen, J., 159 Misc.2d 591, 605 N.Y.S.2d 642, dismissed. Landowner appealed. The Supreme Court, Appellate Division, Second Judicial Department, 217 A.D.2d 202, 634 N.Y.S.2d 740, affirmed. Landowner sought permission to appeal. The Court of Appeals, Smith, J., held that denial of setback variances did not constitute a taking.

Affirmed.

Wesley, J., concurred in result and filed opinion.

West Headnotes (10)

[1] **Eminent Domain**
Nature and Grounds in General

If court finds that substantial evidence supports denial of permit for landowner to conduct regulated activities in and around inventoried wetlands, then second determination is made in same proceeding to determine whether restriction constitutes an unconstitutional taking requiring compensation. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7; McKinney's ECL §§ 25–0402, 25–0403, 25–0404; N.Y.Comp. Codes R. & Regs. title 6, § 661.6.

6 Cases that cite this headnote

[2] **Environmental Law**
Wetlands

Denial of setback variances by Department of Environmental Conservation (DEC) was supported by evidence that proposed project would have eliminated or diminished several tidal wetland benefits, that proposed construction of sanitary system threatened both marine life and humans, that other contaminants threatened area, and that flooding problems would be increased. McKinney's ECL §§ 25–0402, 25–0403; N.Y.Comp. Codes R. & Regs. title 6, § 661.6.

1 Cases that cite this headnote

[3] **Eminent Domain**
Property and Rights Subject of Compensation

Property interest must exist before it may be "taken." U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

3 Cases that cite this headnote

[4] **Eminent Domain**
Property and Rights Subject of Compensation

Taking claim may not be based upon property rights that have already been taken away from landowner in favor of public. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

5 Cases that cite this headnote

[5] **Eminent Domain**
Estate and Rights Remaining in Owner

Once taken, property interests are no longer owned by private landowner and may not be sold by such party, and purchaser's title is necessarily limited to and by remaining property interests alone. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

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2 Cases that cite this headnote

[6] **Eminent Domain**
Public Use

State may exercise its police power of eminent domain only upon showing of valid legislative purpose. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

Cases that cite this headnote

[7] **Eminent Domain**
Wetlands and Coastal Protection

Denial of setback variances that would have enabled landowner to construct single-family home on parcel did not constitute a taking of landowner's property, where landowner was aware at time of purchase that wetland regulations existed regarding property. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7; McKinney's ECL 25–0402, 25–0403; N.Y.Comp. Codes R. & Regs. title 6, § 661.6.

10 Cases that cite this headnote

[8] **Eminent Domain**
What Constitutes a Taking:Police and Other Powers Distinguished

Primary inquiry in determining whether taking has occurred must always focus upon question of severity of impact of law on landowner's parcel. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

1 Cases that cite this headnote

[9] **Eminent Domain**
What Constitutes a Taking:Police and Other Powers Distinguished

Taking may be found only if onerous burden forces property owners alone to bear public burdens which, in all fairness and justice, should be borne by public as a whole. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

1 Cases that cite this headnote

[10] **Eminent Domain**
Particular Cases

Denial of setback variances that would have enabled landowner to construct single-family home on parcel did not constitute a taking, where parcel could still be used for recreational purposes. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7.

5 Cases that cite this headnote

Attorneys and Law Firms

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Wilmer, Cutler & Pickering (William A. Butler, David A. Westbrook and James F. O'Reilly, of the District of Columbia Bar, admitted pro hac vice, of counsel), and James T.B. Tripp, New York City, for Environmental Defense Fund, amicus curiae.

*608 OPINION OF THE COURT

**1036 SMITH, Judge.

The primary issue in this case is whether the denial of a building variance pursuant to environmental regulation effects an unconstitutional taking (U.S. Const. Fifth Amend.; N.Y. Const., art. I, § 7) for which the landowner

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must be justly compensated. Petitioner argues that the denial of a variance due to legislation enacted to preserve wetlands is a taking despite the fact that the legislation was fully enacted and in force when he purchased the property. We disagree and affirm the dismissal of the petition.

Petitioner purchased property located in a residentially zoned district in the Village of Quogue, Town of Southampton, Suffolk County, for $100,000. Approximately 65% of the 43,500-square-foot parcel had previously been inventoried as tidal wetlands by the New York State Department of Environmental Conservation (DEC). As Supreme Court found, the purchase price reflected the fact that a variance would be required to build a residence on the property due to its incorporating tidal wetlands. Petitioner estimates that, assuming a variance were granted and a residence could be constructed on the property, the parcel would be worth $396,000.

Petitioner applied to the DEC for two setback variances from the requirements of 6 NYCRR 661.6 to enable him to construct a single-family home on the parcel. The first variance request was from the minimum 75–foot setback required between the tidal wetlands boundary and the dwelling. The second variance ***609** request was from the 100–foot setback required between the wetlands boundary and the planned septic system.

The matter was heard by an Administrative Law Judge (ALJ) who recommended that the application be denied. Nevertheless, the ALJ suggested the construction of a dock, catwalk, and/or a small parking lot as possible uses for the property. The Hearing Report of the ALJ was adopted as the decision in the matter by the DEC Commissioner.

In concluding that the petitioner had not sustained his burden of showing that the variances would have no adverse impact on the tidal wetlands contained on the property, the DEC concluded:

> "The proposed project and all of the many alternatives that were considered require a variance from the development restrictions of 6 NYCRR 661.6. To receive the variance, the Applicant has the burden to show that, among other things, the granting of a variance would not have an undue adverse impact on the present or potential value of the tidal wetland [6 NYCRR 661.11(a)].[1] The record clearly demonstrates that the *****557 **1037** Applicant has not sustained this burden. The proposed project and any of the alternatives would eliminate or diminish several tidal wetland benefits, in particular, values related to flood control, wildlife habitat, marine food production and silt/organic material absorption. Exacerbating these impacts is the fact that losses would occur in one of the few functioning wetlands remaining in an otherwise developed area."

Moreover, the DEC made findings of fact that the proposed construction of a sanitary system threatened both marine life and humans, that other contaminants threatened the area and that flooding problems would be increased.

Because the property was located in a residentially zoned area, none of the uses suggested by the ALJ and adopted by the DEC were allowable without a variance from the Town's Zoning Board. Rather than apply for such a variance, petitioner filed this action pursuant to ECL 25–0404 and CPLR article 78.

In Supreme Court, petitioner did not contend that the DEC's determination was not supported by substantial evidence. ***610** Rather, petitioner argued that the decision of respondent, the DEC, constituted a taking without just compensation of petitioner's real property.[2] A hearing was held to determine petitioner's claim.

At the hearing, petitioner's appraiser testified that the value of the property without the wetlands restriction would be $396,000. Respondent's appraiser testified that under the wetlands restrictions, the property was still worth $80,000. There was also testimony from a local resident that in 1991 he offered petitioner $50,000 for the property, an offer that had not been withdrawn.

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Supreme Court found that no taking had occurred and dismissed the proceeding. In so holding, the court found that petitioner had failed to demonstrate that his property had "but a bare residue of [its] value" due to the denial of a building permit and the application of the wetlands regulation. (*Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 159 Misc.2d 591, 593, 605 N.Y.S.2d 642.) The court held:

> "The issue is whether petitioner offered sufficient proof to sustain his heavy burden of showing that the property, as restricted, has lost its economic value, or all but a bare residue of it. The answer is no. The whole focus of the testimony of his own real estate expert was that the property was not as valuable as it would be without the regulations. That is not enough, particularly when there was testimony from a real estate expert called by respondent to show the property, as restricted, had a value of approximately $80,000, which was not too much less than what petitioner 'paid' for it ($100,000)." (*Id.,* at 594, 605 N.Y.S.2d 642.)

Supreme Court went on to explicate an alternative basis to deny petitioner relief. Citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. Supreme Court concluded that because petitioner knew at the time he purchased the property that ***611** there were wetlands limitations, petitioner did not own an interest in the property which could be "taken" by the denial of the setback variances. The court noted that because his title was limited by the wetlands regulations, petitioner had no reasonable investment-backed expectation that he could build a residence there.

The Appellate Division affirmed the dismissal of the petition and noted that "[c]entral to this appeal is the fact that at the time he purchased the property, the petitioner knew of the wetland regulations that 'burdened' it" (*****558** ****1038** *Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 217 A.D.2d 202, 209, 634 N.Y.S.2d 740). Petitioner argued that he was not bound by such knowledge since it was not until the variance was denied that he was made to suffer a regulatory taking. The Appellate Division disagreed and concluded:

> "that where, as here, a landowner does not have a reasonable investment-backed expectation that he would be able to build a residence on his parcel, he cannot claim a regulatory taking when his application for a permit to allow the construction of a building is denied" (217 A.D.2d 202, 203, 634 N.Y.S.2d 740, *supra*).

In other words, the Appellate Division, citing *Lucas v. South Carolina Coastal Council, supra,* stated that at the time petitioner purchased this property, he did so knowing that wetlands restrictions were in place. He thus knew that he was purchasing property with limitations on its use. It followed that he took title to the property with restrictions and no compensation was warranted.

Petitioner appeals the determination of his claim that his property has been taken without compensation. He also argues that this Court should review its decision in *de St. Aubin v. Flacke,* 68 N.Y.2d 66, 76, 505 N.Y.S.2d 859, 496 N.E.2d 879 which stated that a "landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt." He claims that this burden is so onerous that it denies him the equal protection of the law. [3]

In 1973, the Legislature concluded that "tidal wetlands constitute one of the most vital and productive areas of our natural ***612** world, and that their protection and preservation are essential." (L. 1973, ch. 790, § 1.) The Legislature also noted its concern that much of the State's tidal wetlands had already been irreparably destroyed or despoiled and the remaining wetlands were in imminent danger of the same fate (*id.*). Pursuant to these findings, the Legislature enacted the Tidal Wetlands Act and struck a balance between ecological and economic considerations by preserving and protecting tidal wetlands while permitting reasonable economic use and development (L. 1973, ch. 790; *cf., Spears v. Berle,* 48 N.Y.2d 254, 260, 422 N.Y.S.2d 636, 397 N.E.2d 1304 [discussing policy of Freshwater Wetlands Act enacted in 1975]).

To implement this policy, the Legislature directed the Commissioner of Environmental Conservation to inventory all tidal wetlands in the State of New York (ECL 25–0201). The Commissioner was also empowered to regulate the use of inventoried wetlands as well as the areas immediately adjacent thereto (ECL 25–0202, 25–0301, 25–0302; *de St. Aubin v. Flacke,* 68 N.Y.2d 66, 70, 505 N.Y.S.2d 859, 496 N.E.2d 879, *supra* [tidal wetlands are "subject to 'rigorous regulation' "] [quoting *Spears v.*

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Berle, 48 N.Y.2d, at 260, 422 N.Y.S.2d 636, 397 N.E.2d 1304]).

The Legislature also enacted strict guidelines for the application and granting of permits to landowners desiring to conduct regulated activities in and around inventoried wetlands (ECL 25–0402, 25–0403). The applicant has the "burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions" of the Tidal Wetlands Act (ECL 25–0402[1]). Judicial review pursuant to CPLR article 78 is available to "[a]ny person aggrieved by the issuance, denial, suspension, or revocation of a permit" (ECL 25–0404). Here, the petitioner initiated an article 78 proceeding challenging the denial of his permit by the DEC.

As provided under section 25–0404:

> "In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them *****559** ****1039** as have been taken, proceeding under the power of eminent domain" (ECL 25–0404).

[1] Judicial review is a two-step process. As noted in *de St. Aubin,* "If the court finds that the permit denial is supported ***613** by substantial evidence, then a second determination is made in the same proceeding to determine whether the restriction constitutes an unconstitutional taking requiring compensation" (68 N.Y.2d, at 70, 505 N.Y.S.2d 859, 496 N.E.2d 879; *see also, Spears v. Berle,* 48 N.Y.2d, at 261, 422 N.Y.S.2d 636, 397 N.E.2d 1304).

[2] Turning to the first step in the process, the DEC's denial of the setback variances in this case is supported by substantial evidence. We have previously noted the findings and conclusions of the DEC which petitioner does not dispute.

It must next be "determined whether the wetlands act, coupled with the denial of the * * * permit, has placed such an onerous burden on the property that a taking must be deemed to have occurred" (*Spears v. Berle,* 48 N.Y.2d, at 261, 422 N.Y.S.2d 636, 397 N.E.2d 1304).

In *Lucas,* the Supreme Court stated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property" (505 U.S., at 1027, 112 S.Ct., at 2899).

[3] **[4]** Our courts have long recognized that a property interest must exist before it may be "taken" (*United States v. Willow Riv. Power Co.,* 324 U.S. 499, 502–503, 65 S.Ct. 761, 763–764, 89 L.Ed. 1101; *Bennett v. Long Is. R.R. Co.,* 181 N.Y. 431, 435, 74 N.E. 418). Neither may a taking claim be based upon property rights that have already been taken away from a landowner in favor of the public. For example, government may "assert a permanent easement that was a pre-existing limitation upon the landowner's title" (*Lucas v. South Carolina Coastal Council,* 505 U.S., at 1028–1029, 112 S.Ct., at 2900). Similarly, regulatory limitations that "inhere in the title itself" will bind a purchaser (*id.,* at 1029, 112 S.Ct., at 2900). To paraphrase Supreme Court's ruling, the purchase of a "bundle of rights" necessarily includes the acquisition of a bundle of limitations.

Under a State's power of eminent domain, the legitimate exercise of police power to advance the general welfare may result in the redefinition of property interests in favor of the public. It is that redefinition of a landowner's title that can ***614** serve as the basis of a takings claim. Indeed, the United States and New York State Constitutions both provide that a private party must be compensated when such interests are "taken" away so a landowner may look to the government for just compensation upon the destruction of a formerly owned property interest.

[5] However, once taken, those property interests are no longer owned by the private landowner and may not be sold by such party. Rather, a promulgated regulation forms part of the title to property as a preexisting rule of

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State law. While the remaining property interests may still be freely transferred by the landowner, a purchaser's title is necessarily limited to and by those property interests alone. [4]

[6] Of course, the State may exercise its police power of eminent domain only upon a showing of a valid legislative purpose. Thus, it has been recognized that a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power (*see, e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 ["it always is open to interested parties to contend that the legislature has ***560 **1040 gone beyond its constitutional power"]). In *Vernon Park Realty v. City of Mount Vernon,* 307 N.Y. 493, 121 N.E.2d 517, this Court held:

> "Purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance since the zoning ordinance in the very nature of things has reference to land rather than to owner [citation omitted]. Knowledge of the owner cannot validate an otherwise invalid ordinance" (307 N.Y., at 500–501, 121 N.E.2d 517).

While any party adversely affected by government action may attack such action as unconstitutional and illegitimate, petitioner does not claim that wetlands regulation is beyond the State's power. Rather, petitioner simply claims that the property interest he had in building a dwelling on his land was taken by the State through the denial of the setback variance.

The determination of whether a property interest exists to support a taking claim is typically the threshold inquiry (*see, Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798, *supra* [addressing the "logically antecedent inquiry into the nature of the owner's estate"]; *Soon Duck Kim v. City of New* *615 *York,* 90 N.Y.2d 1, 6, 659 N.Y.S.2d 145, 681 N.E.2d 312 [decided today]). [5] In this case, the petitioner's claim is based upon the denial of the setback variances. Petitioner had a reasonable expectation that the DEC would consider his request in accordance with the standards and purposes of the wetlands regulations generally and as applied to other landowners. The Legislature has expressly provided for judicial review of DEC action taken pursuant to a permit request (ECL 25–0404). Such action must state the "findings and reasons" upon which it is based (ECL 25–0403[4]). The Commissioner may elect the remedy if a court finds that a DEC determination "constitutes the equivalent of a taking without compensation" (ECL 25–0404).

We have previously noted that the subject regulations were implemented to balance ecological and economic considerations (ECL 25–0102). The regulations of the DEC expressly provide that it must examine a permit request "taking into account the social and economic benefits which may be derived from the proposed activity" (6 NYCRR 661.9[b][1][i]). In connection with its review of a permit request under its regulations, the DEC has the authority to "modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done" (6 NYCRR 661.11[a]).

However, petitioner does not dispute that the DEC's determination is supported by substantial evidence. Thus, whatever claim petitioner may have had that his application was not decided in accordance with DEC regulations, must fail.

[7] Although petitioner's permit application was entitled to due consideration, petitioner's claim that the denial of his variance was a "taking" must fail because he never owned an absolute right to build on his land without a variance. As stated in *Fred F. French Investing Co. v. City of New York,* 39 N.Y.2d 587, 597, 385 N.Y.S.2d 5, 350 N.E.2d 381, "[i]t is recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." Since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner *616 cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on ***561 **1041 the timing of State action pursuant to such laws. [6]

Although an analysis of the petitioner's title is dispositive, it should be noted that petitioner's taking claim would be

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infirm under the alternative analysis found by Supreme Court to which we now turn.

Any takings analysis involves the resolution of whether the government legislation is "supported by a substantial State interest and close nexus" (*Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 399–400, 618 N.Y.S.2d 857, 643 N.E.2d 479; *see also, Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d, at 596, 385 N.Y.S.2d 5, 350 N.E.2d 381). There is no dispute that the protection of the State's tidal wetlands is a legitimate governmental purpose and restrictions regarding the amount of setback from the edge of the wetlands for building are reasonably related to that purpose.

Once it has been established that the regulations at issue are a legitimate exercise of police power, we must next determine whether the regulations result in a taking of petitioner's property by depriving the landowner of his property rights. Oftentimes, this question may be answered by examining the character of the government action (*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631). For example, physical occupations have been ruled takings requiring compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it" (*Lucas v. South Carolina Coastal Council*, 505 U.S., at 1015, 112 S.Ct., at 2893; *see also, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868). A taking has also traditionally been found when the government requires land to be "left substantially in its natural state" (*Lucas v. South Carolina Coastal Council*, 505 U.S., at 1018, 112 S.Ct., at 2895). As stated in *Lucas:* "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking" (*Lucas v. South Carolina Coastal Council*, 505 U.S., at 1019, 112 S.Ct., at 2895 [emphasis in original]; *see also,* ***617** *Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 127–128, 98 S.Ct., at 2660–2661 [discussing cases where a taking was found under regulations that rendered property "wholly useless" or resulted in "complete destruction" of property interest]). Such circumstances have been characterized as a taking per se. The question becomes more complex when the government merely restricts certain uses for property.

The Supreme Court has noted that "government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property" (*Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210). Courts have also recognized that regulatory power has constitutional limits (*see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S., at 1014, 112 S.Ct., at 2892 ["the government's power to redefine the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits"]; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, supra ["while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"]).

However, the outer limit of regulation needed to support a takings determination has not been amenable to firm demarcation (*see, Spears v. Berle*, 48 N.Y.2d, at 262, 422 N.Y.S.2d 636, 397 N.E.2d 1304 ["courts have encountered difficulty in formulating a bright-line standard for differentiating permissible police power measures from overly vigorous and hence unconstitutional impositions"]; *Lucas v. South Carolina Coastal Council*, 505 U.S., at 1015, 112 S.Ct., at 2893 ["we have generally eschewed any ' "set formula' for determining how far is too far"] [citation omitted]). Accordingly, it has been necessary for courts to engage in " 'essentially ad hoc, factual inquiries' " when presented *****562** ****1042** with takings claims (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426, 102 S.Ct., at 3171; *Lucas v. South Carolina Coastal Council*, 505 U.S., at 1015, 112 S.Ct., at 2893; *Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 124, 98 S.Ct., at 2659).

Courts have enunciated several tests to resolve the fact-intensive question of the impact of regulation upon a landowner (*Andrus v. Allard*, 444 U.S., at 65, 100 S.Ct., at 327 ["Formulas and factors have been developed in a variety of settings"]). Where a per se taking is not demonstrated, whether a taking has occurred may be determined by an examination of various factors such as those set forth in the *Penn Central*: the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action (*see, Lucas v. South Carolina Coastal Council*, 505 U.S., at 1019–1020, n. 8, 112 S.Ct., at 2895, n. 8). ***618** For example, an analysis of the regulation's

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economic impact upon the landowner is one way to resolve the issue. Such impact may be reflected by the economic viability (*Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 138, n. 36, 98 S.Ct., at 2666, n. 36) or the "reasonable return" on the property post-regulation (*id.*, at 136, 98 S.Ct., at 2665). Under such an analysis however, it is clear that the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking" (*Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645, 113 S.Ct. 2264, 2291, 124 L.Ed.2d 539; *see also*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 131, 98 S.Ct., at 2663 [cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' "]).

The Supreme Court in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *supra*, also noted that an examination of reasonable "investment-backed expectations" (*id.*, at 124, 98 S.Ct., at 2659) may be particularly relevant. There is no such expectation that a government agency will act in a particular manner when it is not authorized to do so (*see, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006, 104 S.Ct. 2862, 2874–2875, 81 L.Ed.2d 815). Similarly, the mere fact that an agency may take such action does not necessarily give rise to a reasonable expectation when the agency chooses not to so act (*id.*, at 1005, 104 S.Ct., at 2874 [" 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need' "] [citation omitted]). Expectations may also be examined in light of the level of interference with permissible uses of the land by the subject regulation (*Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 136, 98 S.Ct., at 2665).

[8] While such tests may be used as an aid in determining the merits of a takings claim, it has been noted that "[r]esolution of each case * * * ultimately calls as much for the exercise of judgment as for the application of logic" (*Andrus v. Allard*, 444 U.S., at 65, 100 S.Ct., at 327). The primary inquiry must always focus upon "the question of the severity of the impact of the law on appellants' parcel" (*Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 136, 98 S.Ct., at 2665).

[9] Furthermore, whatever the analysis used to determine the impact of regulation on a landowner, the fact that a regulation "deprives the property of its most beneficial use does not render it unconstitutional" (*Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130; *Penn Cent. Transp. Co. v. New York City*, 438 U.S., at 130, 98 S.Ct., at 2662 [no taking shown merely because landowners are denied "the ability to exploit a property interest that they heretofore had believed was available for development"]). " 'Governmental action short of acquisition of title or occupancy has been held, if ***619** its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking' " (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815, *supra* [*quoting United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359–360, 89 L.Ed. 311] [citation omitted]). Thus, a taking may be found only if an onerous burden forces property owners "alone to bear public burdens which, in all fairness and justice, should be borne by the *****563 **1043** public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554).

[10] Supreme Court found, and there is support in the record for the conclusion that the economic value of the property had not been extinguished since it could still be used for recreational purposes and that petitioner's reasonable expectations were reflected by his consideration of the inherent limitations on the property when he made the purchase offer for thousands less than its worth without the restrictions. Thus, his "reasonable" expectations were not affected when the property remained restricted. Petitioner argues that the finding of value does not take into account the fact that the nonresidential uses proposed by DEC that add value to his land may not be undertaken without a variance from the Village.

In such circumstances, we have stated that petitioner has the burden of showing that it is unreasonable to expect relief from a zoning restriction (*de St. Aubin v. Flacke*, *supra*, 68 N.Y.2d, at 76, 78–79, 505 N.Y.S.2d 859, 496 N.E.2d 879). Although petitioner did not have to complete the application process to meet his burden on the issue, his conclusory assertion that the zoning variance would not be granted is insufficient when the record contains "ample and convincing" evidence to the contrary (*Matter of Gazza v. New York State Dept. of Envtl. Conservation*, 217 A.D.2d 202, 212, 634 N.Y.S.2d 740, *supra*). The Village Law provides that a variance may be granted if an applicant cannot realize a reasonable return without it (Village Law § 7–712–b[2][b]). The value of the subject

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property was, at most, diminished as restricted by the regulations.

Here, no per se taking occurred. Moreover, even if petitioner's "bundle of rights" included the "stick" he claims was taken, any burden resulting from the denial of the setback variances would not rise to the level of a taking (*Lucas v. South Carolina Coastal Council*, 505 U.S., at 1030, 112 S.Ct., at 2901). Rather, the alleged diminution of value and limitation of property uses caused by the environmental regulations would fall well within constitutional boundaries.

***620** Accordingly, the order of the Appellate Division should be affirmed, with costs.

WESLEY, Judge (concurring).
I agree that petitioner has not established a taking because the economic value of his property has not been extinguished. For the reasons set forth in my dissenting opinion in *Matter of Anello v. Zoning Bd. of Appeals*, 89 N.Y.2d 535, 656 N.Y.S.2d 184, 678 N.E.2d 870 [decided today], however, I cannot agree that petitioner would otherwise be unable to establish a taking because he acquired the property after the enactment of the Tidal Wetlands Act. (ECL 25–0101 *et seq.*)

If, as the majority reaffirms, "a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power" (majority opn. at 614, at 559 of 657 N.Y.S.2d, at 1039 of 679 N.E.2d), then a subsequent purchaser should also be able to challenge an otherwise valid regulation if it results in a taking without compensation. There are many reasons why a prior owner might not have pursued a taking claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim. Under the reasoning of the majority, the prior owner would nonetheless have had to keep abreast of regulatory enactments and, if an enactment appeared to deprive the property of its economic value, to challenge the statute. Otherwise, the property may have been rendered worthless without the government paying any compensation for the property. By conveying the property to another party who may be willing and able to develop it or to seek compensation for the taking of its value, the prior owner has instead, under the majority's holding, ensured the destruction of the property's economic value.

There is no need to create a rule of law that restricts the alienability of property in New York in this manner, when we all agree that petitioner has no taking claim for a different reason. Supreme Court determined, and the Appellate Division agreed, that petitioner had not met his burden of proving that the economic value of the property had been destroyed by the denial of a *****564 **1044** variance. I would affirm on that ground alone.

KAYE, C.J. and BELLACOSA, LEVINE and CIPARICK, JJ., concur with SMITH, J.

WESLEY, J., concurs in result in a separate opinion.

TITONE, J., taking no part.
Order affirmed, with costs.

All Citations

89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555, 28 Envtl. L. Rep. 20,053, 1997 N.Y. Slip Op. 01495

Footnotes

1 6 NYCRR 661.11(a) provides that "[t]he burden of showing that a variance to such provisions should be granted shall rest entirely on the applicant."

2 The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation." The Takings Clause of the Fifth Amendment applies to State action through the Fourteenth Amendment (*Dolan v. City of Tigard*, 512 U.S. 374, 383–384, 114 S.Ct. 2309, 2315–2316, 129 L.Ed.2d 304 [citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979]). Article I, § 7 of the New York State Constitution provides in part that "[p]rivate property shall not be taken for public use without just compensation."

3 We conclude that whether the petitioner must prove his claim beyond a reasonable doubt or by a lesser standard such as a preponderance of the evidence, there has been no taking and we decline to review the *de St. Aubin* decision.

4 The entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court. Petitioner does not base his claim on such grounds and we decline to reach the question.

5 We note that although the issue must be addressed in every taking claim, the absence of an extended discussion does not indicate an erroneous omission. A court is not required to list every consideration upon which its decision is based. The existence of a protectible property interest may be clear (*see, Lucas v. South Carolina Coastal Council,* 505 U.S., at 1016, n. 7, 112 S.Ct., at 2894, n. 7).

6 We have noted that State law may be examined "whatever its source" (*Soon Duck Kim v. City of New York,* 90 N.Y.2d 1, 8, 659 N.Y.S.2d 145, 681 N.E.2d 312, *supra* [decided today]). Thus, common-law principles and State statutes may be examined to determine the limits and rights of a landowner's title.

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EXHIBIT C

Pictures of Cherry Tree on Geraldine Baldwin's Property

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Picture #1 and #2 taken July 5, 2017
Note the large rotten and broken limb, as well as the significant number of yellowed leaves, which appears unusual for in July.

Picture #3 was taken on October 2, 2017
Note that most of the tree is devoid of vegetation while all other trees surrounding it are still covered in leaves.

Picture Taken July 5, 2017

Picture Taken July 5, 2017 – Close up of fungus damaged leaves

Picture Taken October 2, 2017

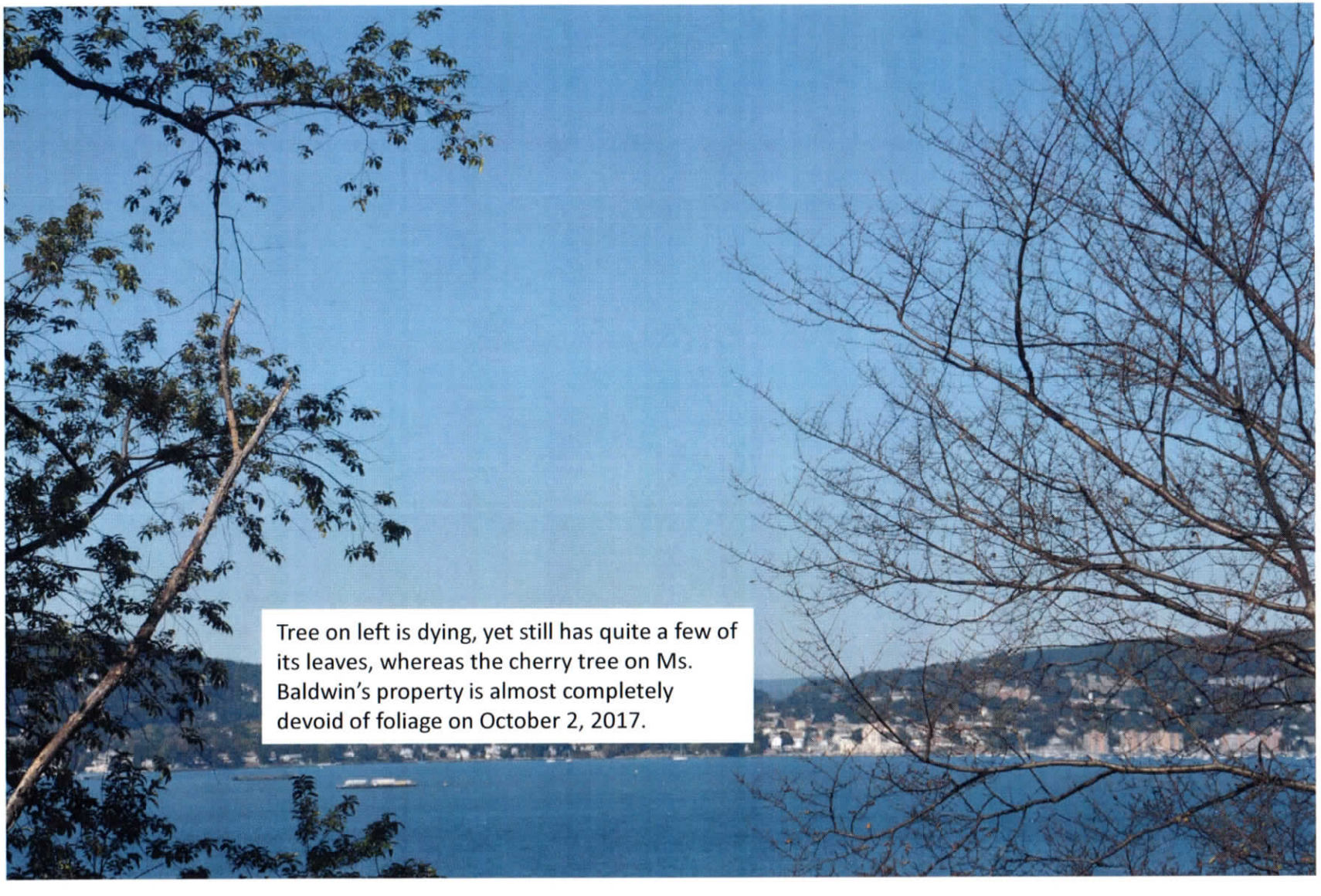

EXHIBIT D

Renderings of Proposed Retaining Walls at 67 Miller Avenue with Landscaping

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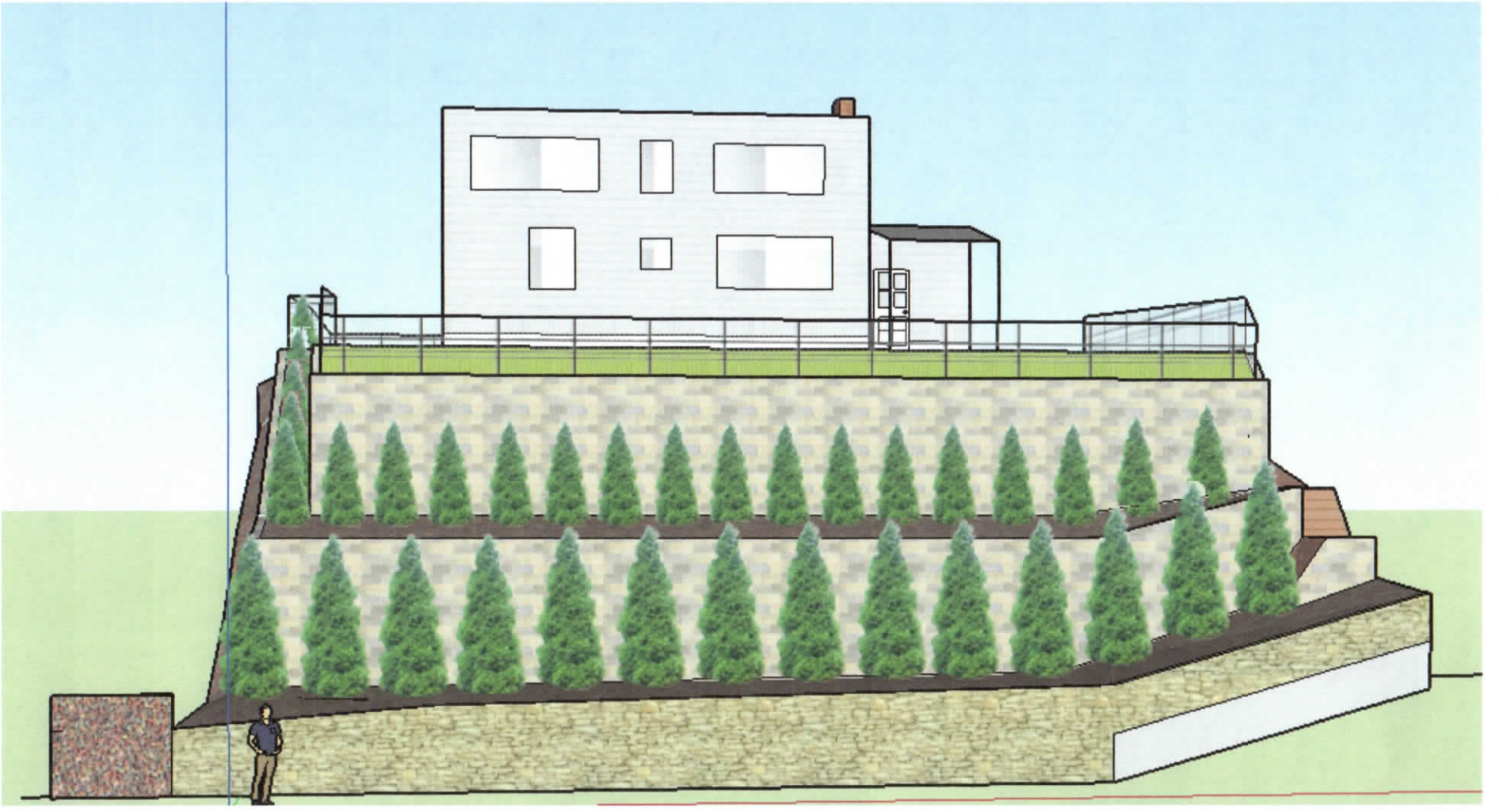
After Construction



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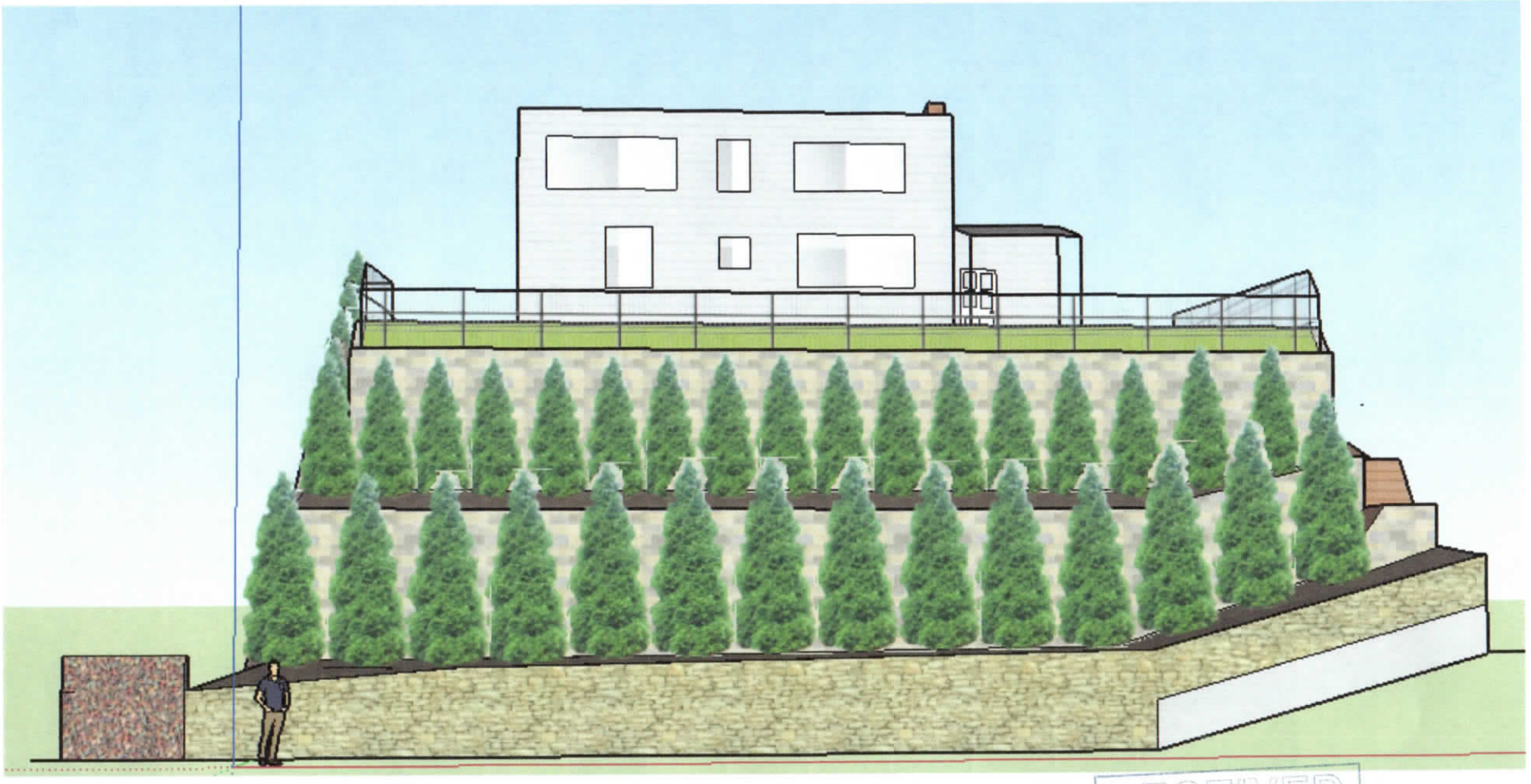
Year 2



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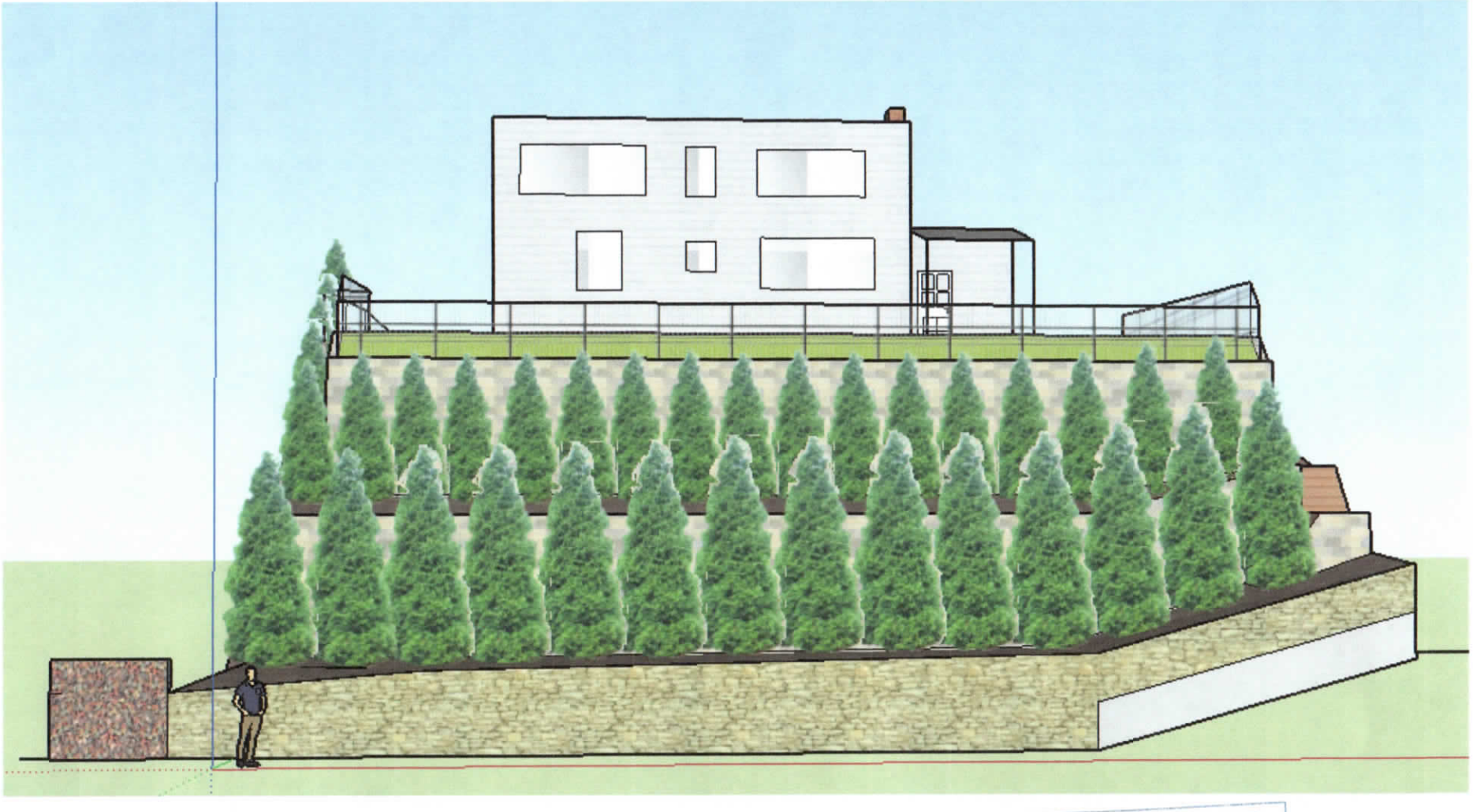
Year 4



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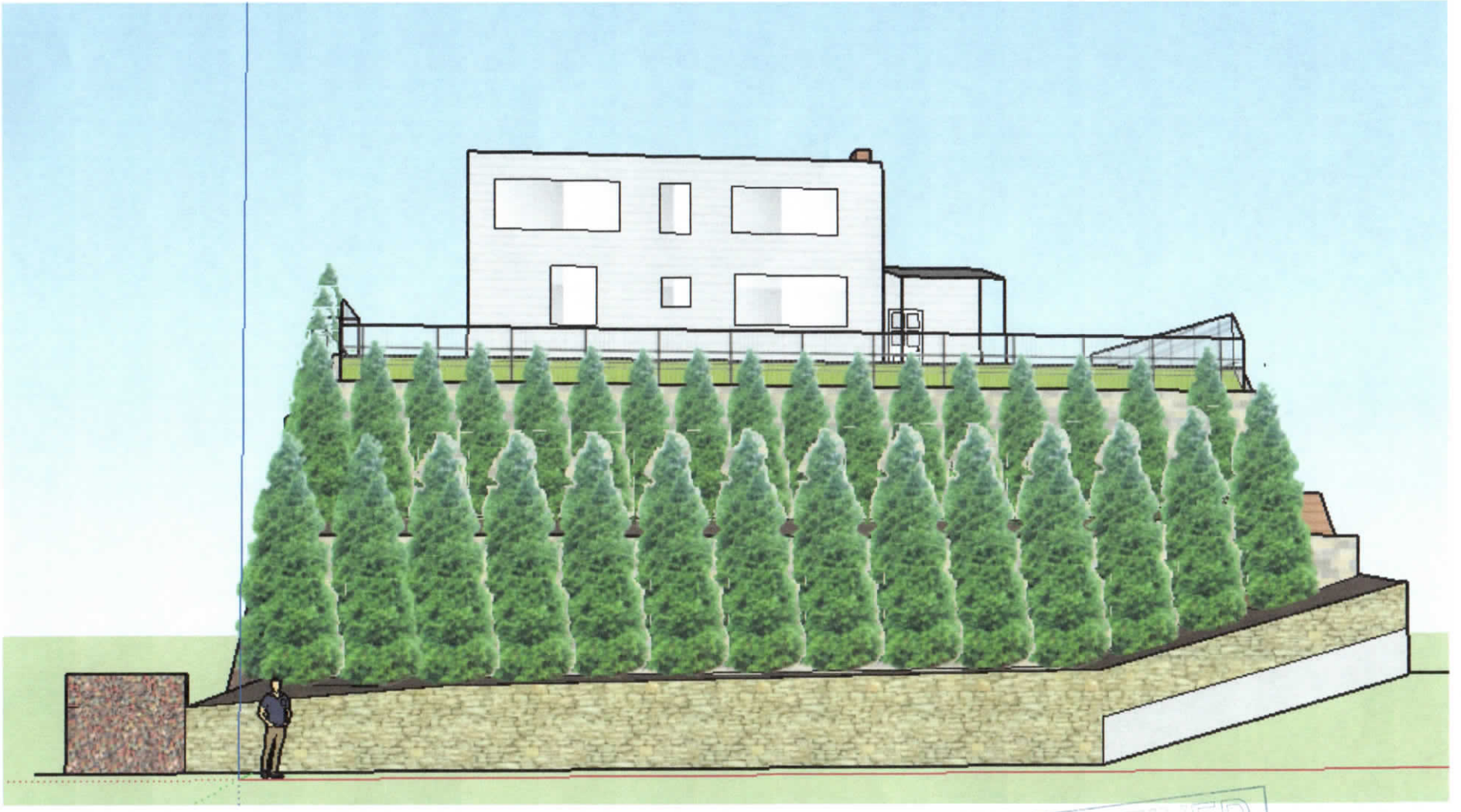

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EXHIBIT E

Screening of other Large Retaining Walls in Tarrytown

Presented in support of 67 Miller landscaping plan 10-23-17

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View from parking lot at 21 Wildey Street (Old Village Hall Site)

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21 Wildey Street - Large retaining walls are visible from at least 4 residential properties, yet no screening appears to have been required?

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3 Riverview Place – Minimal plantings, no screening required for 12+ foot high retaining wall

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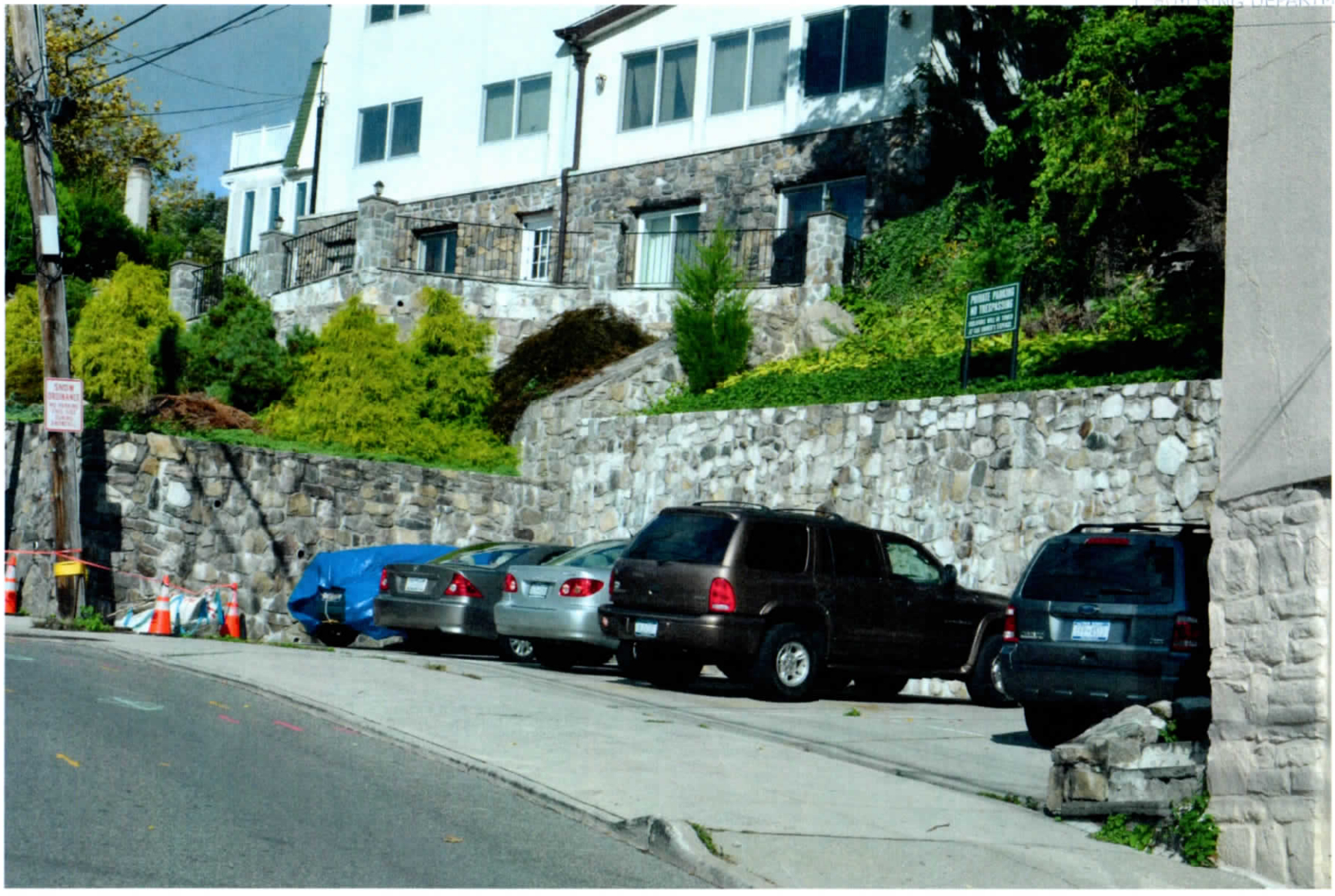
96 Main Street – No screening appears to have been required



116 S. Broadway – No screening appears to have been required for a 12+ foot high poured concrete retaining wall

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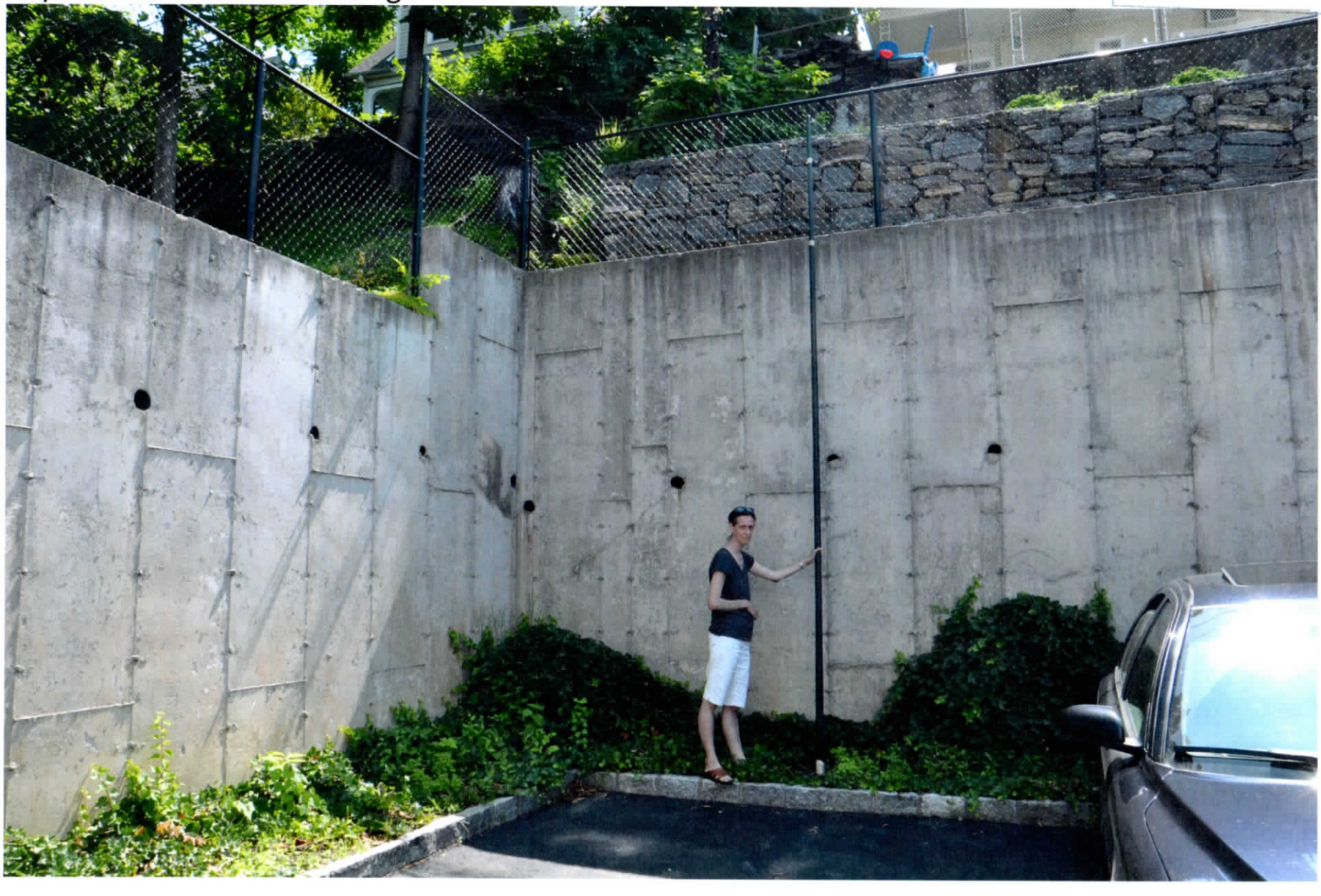

Whisper Hill – No screening appears to have been required for a 12+ foot high poured concrete retaining wall

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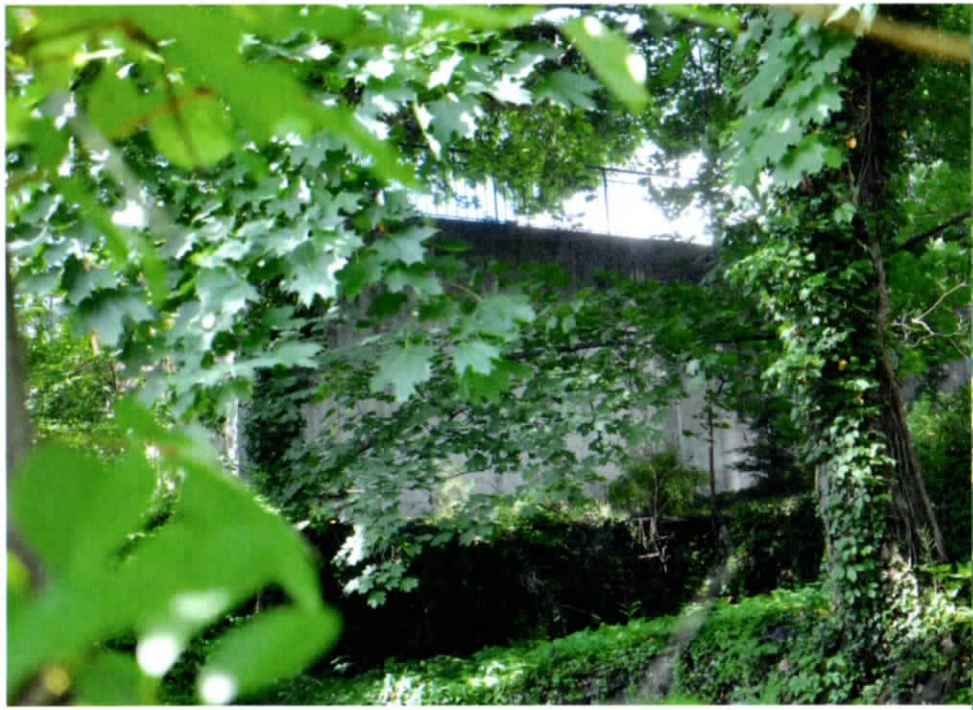

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155 White Plains Road – No screening required for a 11+ foot high retaining wall

45-51 N. Broadway – No screening required for a 78" high retaining wall

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63 Miller Avenue – no screening required for a 90" high "mafia block" retaining wall

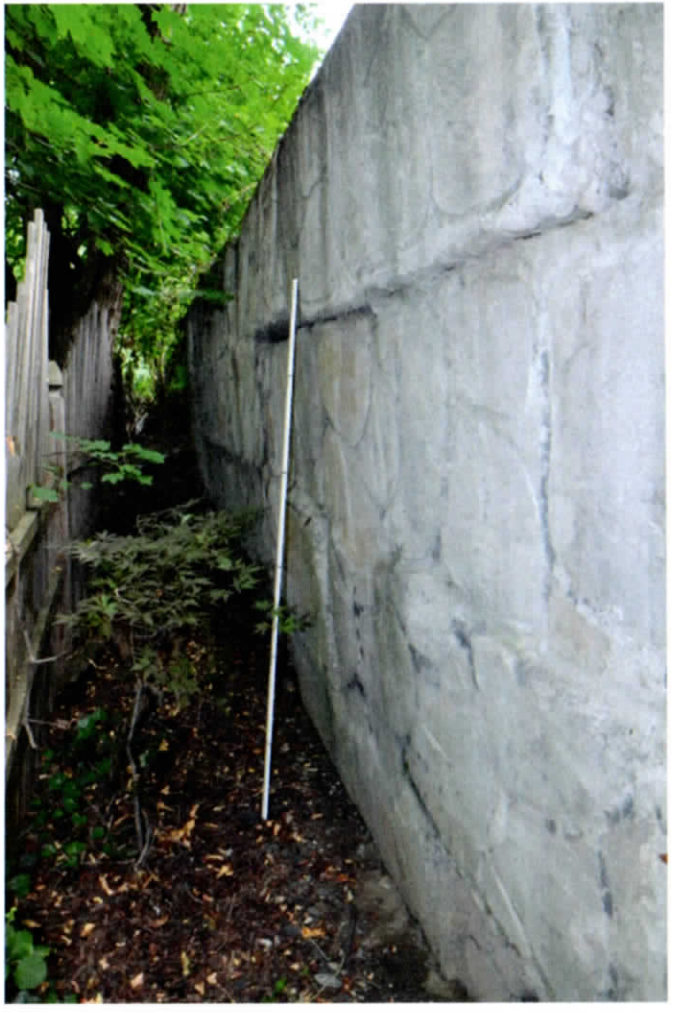

EXHIBIT F

Introduction:

This presentation was presented to the Planning Board on April 24, 2017, in order to prove that when the property at 67 Miller was developed in the 1950s, a very large single retaining wall was installed which provided a significantly bigger flat backyard area behind the house. This "massive" single retaining wall stood for approximately 30 years before it began to deteriorate and partially collapse, resulting in severe erosion and loss of much of this flat backyard area. According to neighbors, the former owner of the property, Mr. Louis Bartoluzzi, initially took steps to repair the retaining wall, but ultimately, due to his advanced age, was no longer able to properly maintain it. The retaining wall fell into a state of disrepair and partially collapsed resulting in the condition that exists on the property today.

The presentation initially provides the direct testimony from 6 current and former neighbors as to what was originally built on the property. Four of these six neighbors have a combined 179 years of living in the neighborhood. All of the testimony is consistent with and corroborates the fact that a very large single retaining wall existed at 67 Miller Avenue prior to its deterioration and partial collapse and that the backyard used to be much bigger than it is today.

Further corroborating evidence is provided in the form of Westchester County aerial photos of the property from 1976 and 2013, and photos of the retaining wall taken in the 1990's from the adjoining property by a former neighbor. A comparison of the aerial photos shows a significantly larger backyard in 1976 than was present in 2013. The photos taken in the 1990s by the former neighbor prove that the flat surface (backyard) behind the house extended well beyond where it ends today, and that severe erosion of the flat backyard surface occurred between then and today. It is also evident from the 1976 aerial photo that a single large retaining wall existed on the property at that time, rather than any kind of tiered structure.

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The presentation concludes with several photos of the property from January 2017. Among other things, these photos highlight that the amount of eroded soil currently sitting at the base of the collapsed retaining wall is consistent with the amount that would have been needed to fill in behind a much higher retaining wall (than exists today). This much larger retaining wall would be necessary to permit a significantly larger backyard area, as the former neighbors have testified to. The photos also show that tie backs protrude from the soil well above the top of the current retaining wall, corroborating the fact that the retaining wall used to be much higher than it is today. Lastly, these photos show multiple railroad ties randomly scattered at the base of the existing retaining wall, which is consistent with a partial collapse of the upper part of the retaining wall. When we presented this to the Planning Board, they indicated that they found the information extremely useful and compelling in determining how our property should be allowed to be restored.

We trust you will find this presentation useful in your consideration of our application and welcome the opportunity to answer any questions you may have relating to this presentation, either at the site visit scheduled for June 11 or at the Zoning Board of Appeals meeting on June 12.

Peter & Suzanne Bartolacci 6/6/17

67 Miller Avenue – Retaining Wall and Property Photos

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In support of Variance for Retaining Wall Design Proposal

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6/24/13 Planning Board Meeting:

John Burkhardt, of 47 Miller Avenue, Tarrytown, NY, stated: "When I got the certified letter a couple of weeks ago I stopped and asked Peter `What's going on? It doesn't look like there's anything out front.' He [Peter] said `No, we're rebuilding the wall.' I said `That's great news.' **I moved into 47 Miller Avenue in 1954. That wall was there then and it hasn't been touched since then. And *half* of it is down on the ground."**

8/26/13 Planning Board Meeting:

Brian Tompkins, of 57 Cedar Lane Ossining, NY, stated: "I lived in the house at 63 Miller Avenue for the first 23 years of my life... He [Peter Bartolacci] asked me if I remembered the retaining wall in the back of Mr. Thompson's or Mr. Brekka's house. And I said "vividly". As a little kid we would constantly climb from the bottom to the top of the railroad ties straight up to the top...**I also asked if I could walk around the backyard of his property and you could see some of the existing railroad ties at the base and that's where it started and it directly went straight up. When I was in his backyard, I was astounded to see how pitched and sloped and tiny his backyard had become. It was significantly smaller. Mr. Brekka had a manicured property and it was completely flat backyard that extended out to the railroad tie wall, and it was just, again, one wall.** That's just coming from someone who spent years climbing and playing on it...I was really shocked to see how much property he has lost." (Mr. Tompkins lived at 63 Miller from 1954 to approximately 1976)

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8/26/13 Planning Board Meeting: (Cont'd)

Despina Katsaris, of 48 Van Wart Avenue, Tarrytown, stated: "Before I lived at 68 Miller Avenue, across the street from Peter's house. I know that house almost 30 years and I went a lot of times in the backyard with the old man [Louis Bartoluzzi, former owner of 67 Miller Avenue]. We have coffee. **It was nice and flat** and after it go down. The guy was always fixing it every summer, you know he fixed the backyard. After, he got old, and he couldn't do anything. But I saw the hedges and it was up here [indicating a spot on the credenza] and once in a while he would take the them from here [original spot on credenza] and put them closer to the house [indicating another spot on the credenza, closer to her to simulate Mr. Bartoluzzi moving the hedges closer to the house] because it [retaining wall] go down. **Now I don't see the backyard but now I know it's down the hill but it was always flat**.. .At the time I was living at 68 Miller Avenue I went to.. .Mr. Louie's house and I had coffee with him and his wife because we were very friendly with them. And now you can't put a table because it will go down the hill." (Ms. Katsaris lived at 68 Miller from 1974 – 2010)

Ms. Katsaris's daughter, Sandy Kostaras, also addressed the Board to help interpret what her mother had said, stating: "I grew up at 68 Miller Avenue. I remember Mr. Louie always fixing the yard, but she was saying, which she wasn't able to say to you, that when she went back there, **there was a retaining wall back there and that is why the land was so flat and each year Mr. Louie would complain that the soil is falling and falling and falling and he would have to move his bushes back from the retaining wall [closer to the house] because of the soil erosion.** So I don't understand how bushes could stay flat like that if there was no retaining wall that high because there was flat ground back there...she remembers there was a wall because there wasn't a wall the ground would have gone, there would be nothing back there right now...Timeframe was 1974 to when he passed away [2003]."

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4/24/17 Planning Board Meeting:

Michael McGuire, 80 Miller Avenue: "During the late 1960s and early 1970s, I was friendly with Steven Thompson who lived across the street at 67 Miller Avenue in what is now Mr. Bartolacci's house, and would frequently play with Steven in his yard. I also attended several birthday parties in Mr. Thompson's backyard from around 1967 to 1971. Mr. Bartolacci asked me to come here tonight to describe the property at 67 Miller Avenue prior to the collapse of the railroad tie retaining wall.

Steven Thompson and I would often take the stairs down to the lower part of the yard and then climb from the base of the retaining wall up to the top. **This single retaining wall was massive – I would estimate the West face of this retaining wall to be 2 stories high, or approximately 20 feet**, angled into the slope due to the slight offset of each railroad tie. This offset is what gave us a toe hold to allow us to climb the retaining wall. Back then there was a post and beam fence at the top of the retaining wall, as well as a hedgerow to protect people from falling from the backyard down the 20 or so feet.

The backyard at 67 Miller Avenue was flat and extended from the house out to the top of the retaining wall. Mr. Bartolacci mentioned to me that **some people have suggested that there was a tiered retaining wall back there. This is absolutely not the case. There was a single massive retaining wall that went from its base straight up to the lawn.**

Mr. Bartolacci invited me into his backyard to see what it looks like now. I can tell you that **Mr. Bartolacci has lost a lot of backyard** due to the collapse of the railroad tie retaining wall. **The sloped area that currently exists between the hedgerow and retaining wall used to be filled in and was flat.** (Continued on next page)

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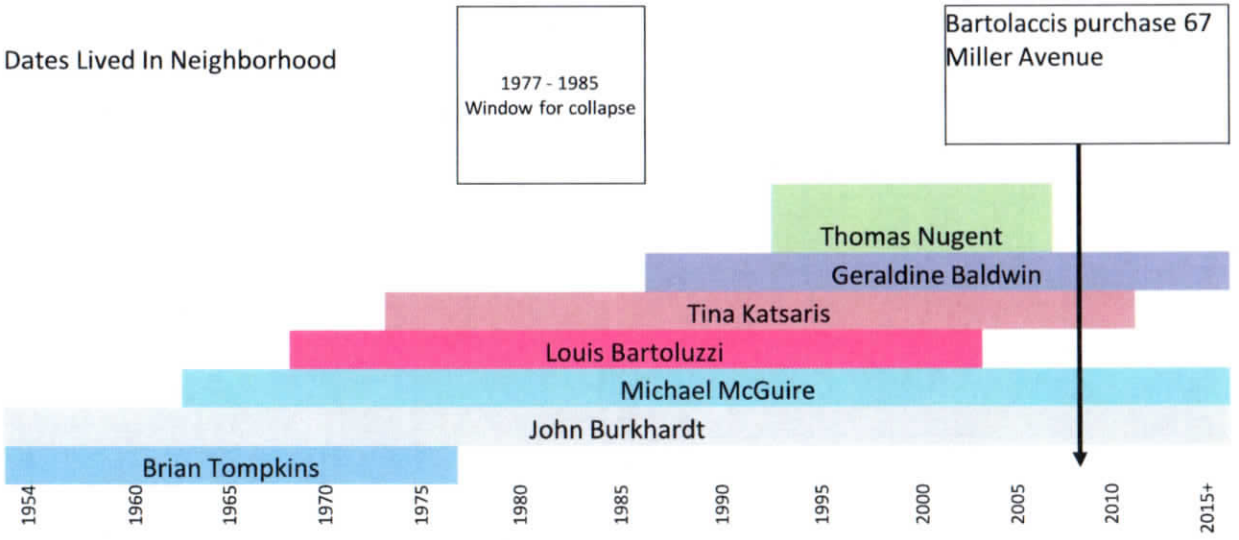
4/24/17 Planning Board Meeting (cont'd):

(Continuation from previous page) Back when Steven Thompson and I would take the stairs down, **there was also a large vertical railroad tie retaining wall going straight up from the side of the stairs to form the Southern border of the lawn. From what I saw during my visit, there is practically nothing left of this retaining wall and most of the dirt in this Southwest corner is gone."**

Thomas Nugent, formerly of 63 Miller from 1993 -2006: "This letter is in reference to the retaining wall between 63 and 67 Miller ave. I attached a picture of what the wall looked like in 1998. A Mr Bartoluzzi was the previous owner of 67 Miller ave. According to him while trimming his hedgerow, a **"stack" or layer of 12 railroad ties fell off the top of the wall. So before 1993 the wall was about 10 feet higher than is is in the picture."**



Per the timeline and testimony from neighbors, and in conjunction with Geraldine Baldwin's statement that the retaining wall has never been higher than 5-8 feet since 1986, then all of the retaining wall collapse had to occur in the 8 years between 1977 and 1985, with little to no further decay to the retaining wall structure or erosion from 1986 to present.

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67 Miller Avenue - 1976 and 2017 Side by Side Photo Comparison

Red lines in 1976 photo show approximate location of top of West retaining wall and North hedgerow delineating boundary of backyard.

This same red line superimposed on the 2017 photo shows a significant amount of backyard has been lost both in the North, NW corner, and Western portions of the lawn, that the hedgerow has been moved closer to the house, and that the higher layers of railroad ties on the retaining wall have disappeared, all of which is consistent with neighbor testimony.

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Magenta lines are identical dimensions, showing scale between both photos is equivalent

67 Miller Avenue – Backyard lost between 1976 and 2017

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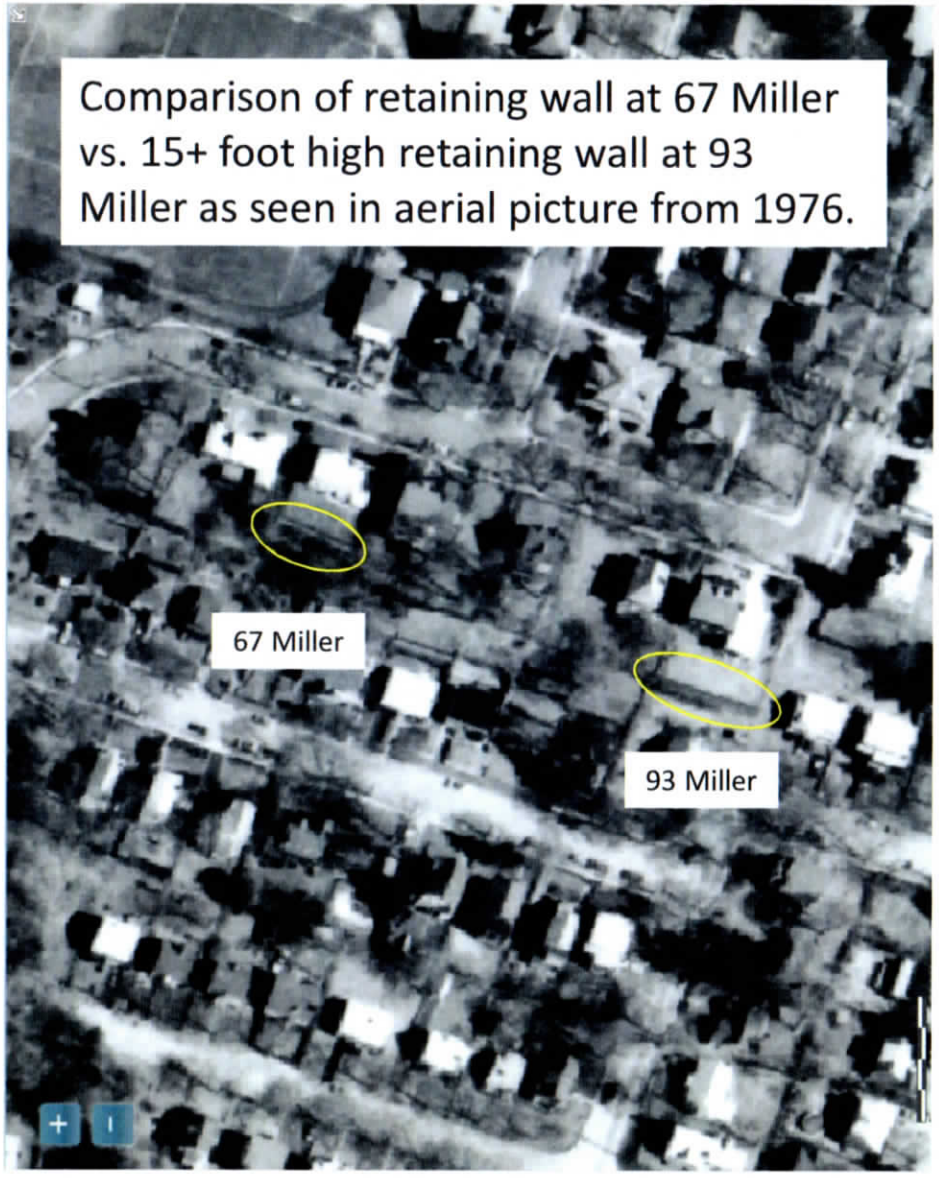
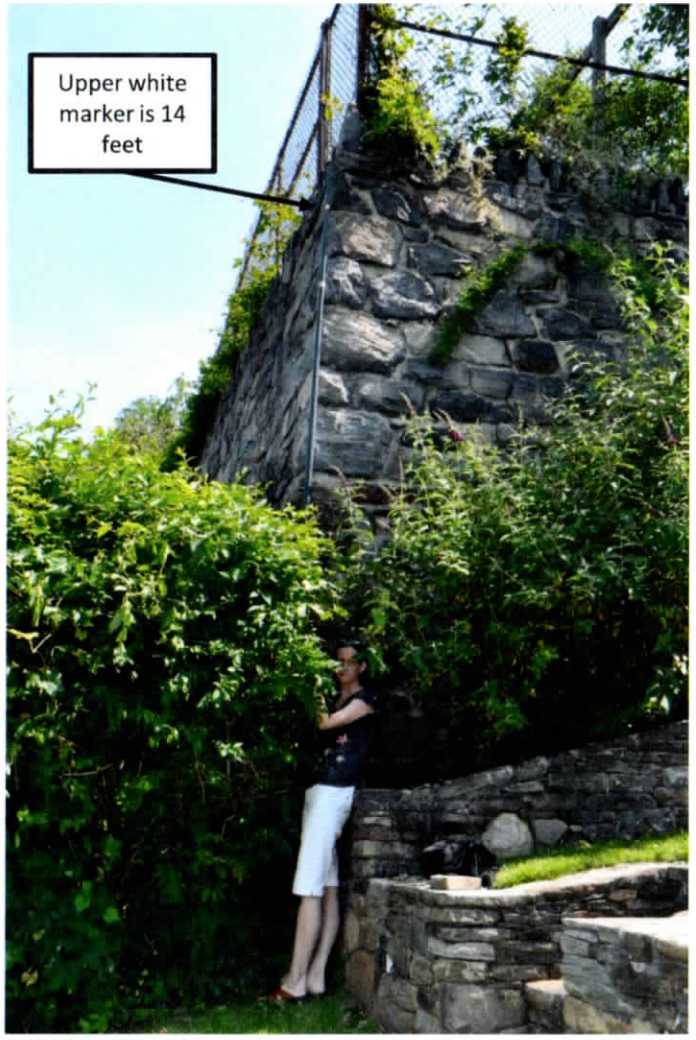


93 Miller as it looks presently



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1998 Picture of NW Corner of Retaining Wall Provided by Thomas Nugent, Owner of 63 Miller Avenue from 1993 to 2006

"My name is Thomas Nugent. I lived at 63 Miller from 1993 -2006. This letter is in reference to the retaining wall between 63 and 67 Miller ave. I attached a picture of what the wall looked like in 1998. A Mr Bartoluzzi was the previous owner of 67 Miller ave. According to him while trimming his hedgerow, a "stack" or layer of 12 railroad ties fell off the top of the wall. So before 1993 the wall was about 10 feet higher than is is in the picture. If you have any questions about the retaining wall from that time , let me know."

Text Source: Email message from Thomas Nugent to the Planning Board 1/22/17

"I spoke to a neighbor who lived in Brian Tomkins's house, the gentleman you heard from earlier, he moved in after they had moved out. His comment to me was that Louis Bartoluzzi, the owner of our property, had said to him one day "I was trimming the hedges and I took a step and a layer of 12 railroad ties came off the top of the wall and down the hill.""

Text Source: Statement made by Peter Bartolacci at the 8/26/13 Planning Board Meeting. See recording of meeting. Meeting Minutes do not accurately reflect Mr. Bartolacci's statement.

NW Corner of 67 Miller Retaining Wall – In 1998 it was at least 10 feet high.

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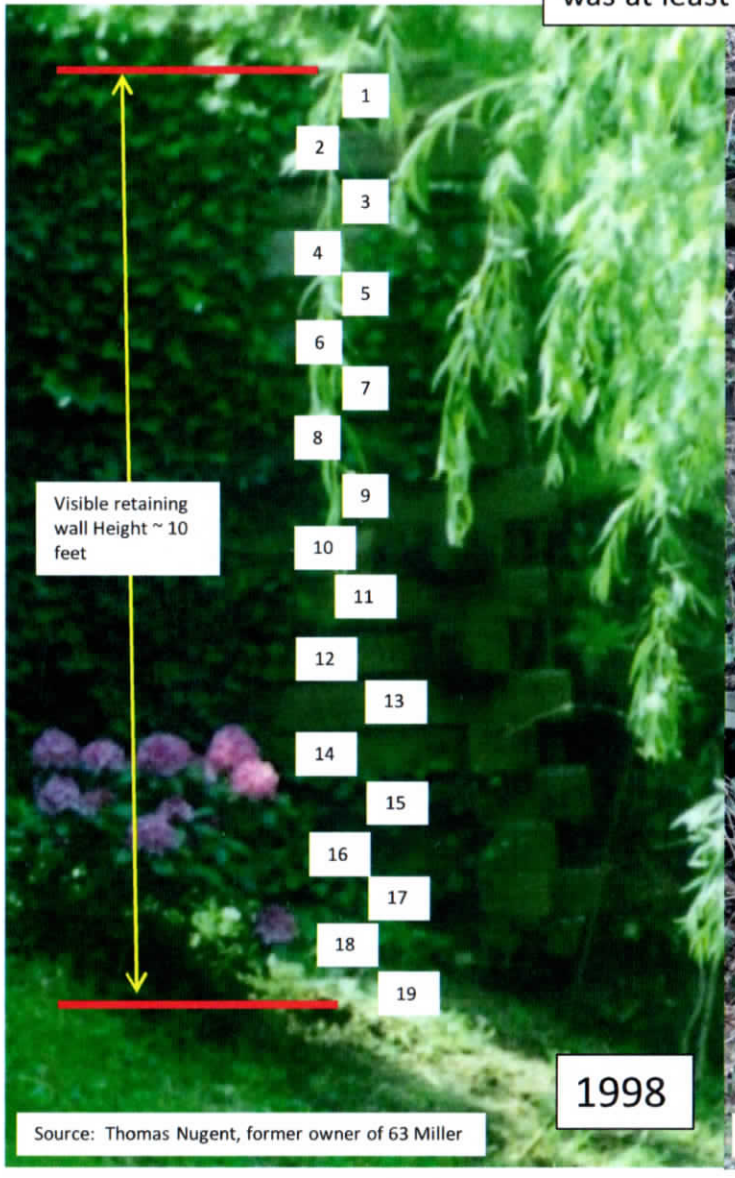
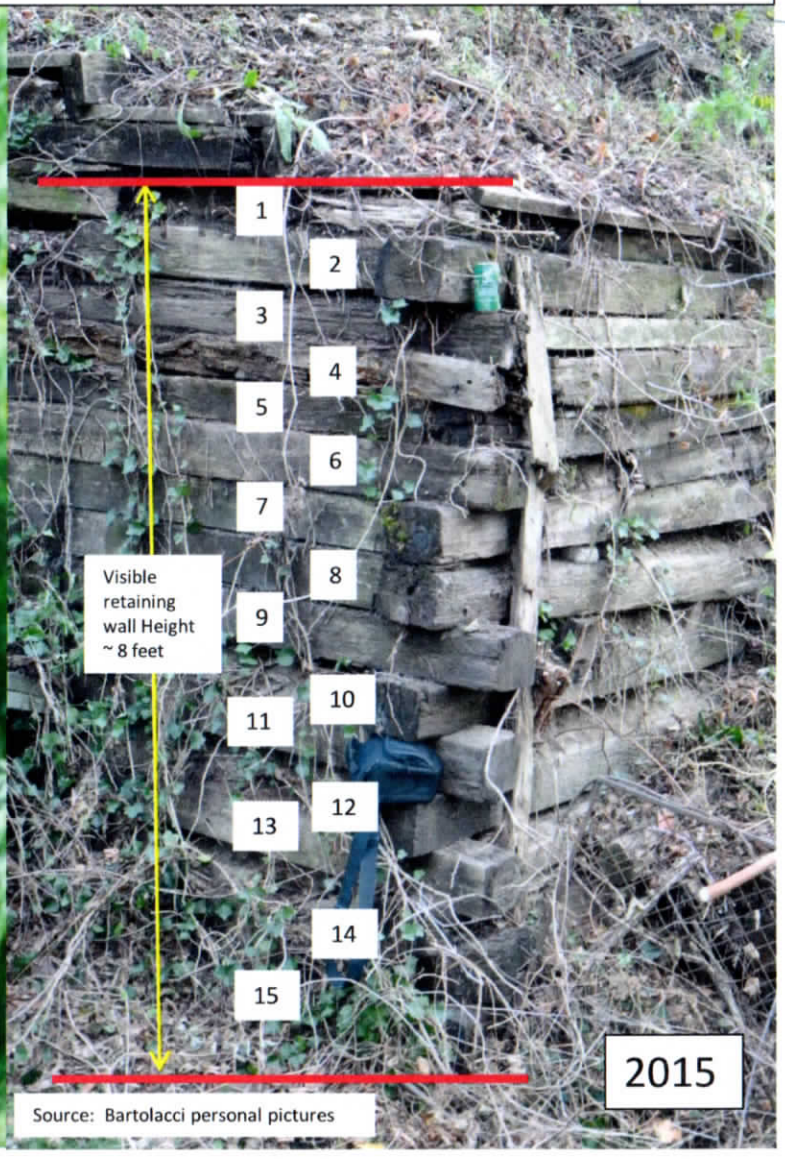


Source: Thomas Nugent, former owner of 63 Miller



Source: Bartolacci personal pictures

Picture provided by Thomas Nugent, resident at 63 Miller from 1993 to 2006

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Picture taken sometime between 1993 and 1998 from backyard of 63 Miller looking South towards North retaining wall at 67 Miller Avenue

Same Thomas Nugent picture zoomed, cropped, and tilted to make horizontal

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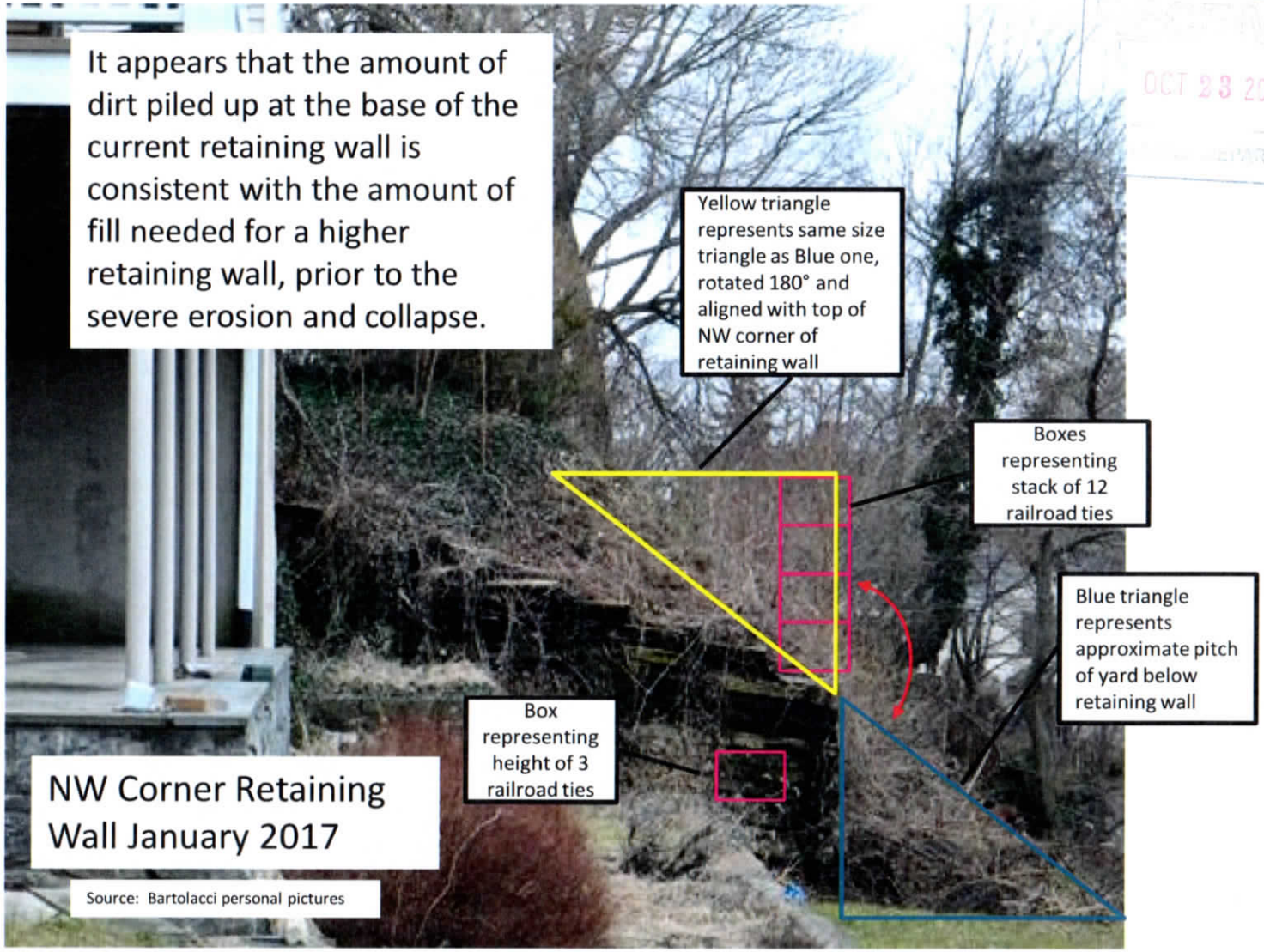
Same blue triangle and hedgerow marker superimposed on recent picture proves that the flat surface extended well beyond the hedgerow and that there has been significant erosion from the 1990s to 2017.

Source: Bartolacci personal pictures

Photo from January 2017



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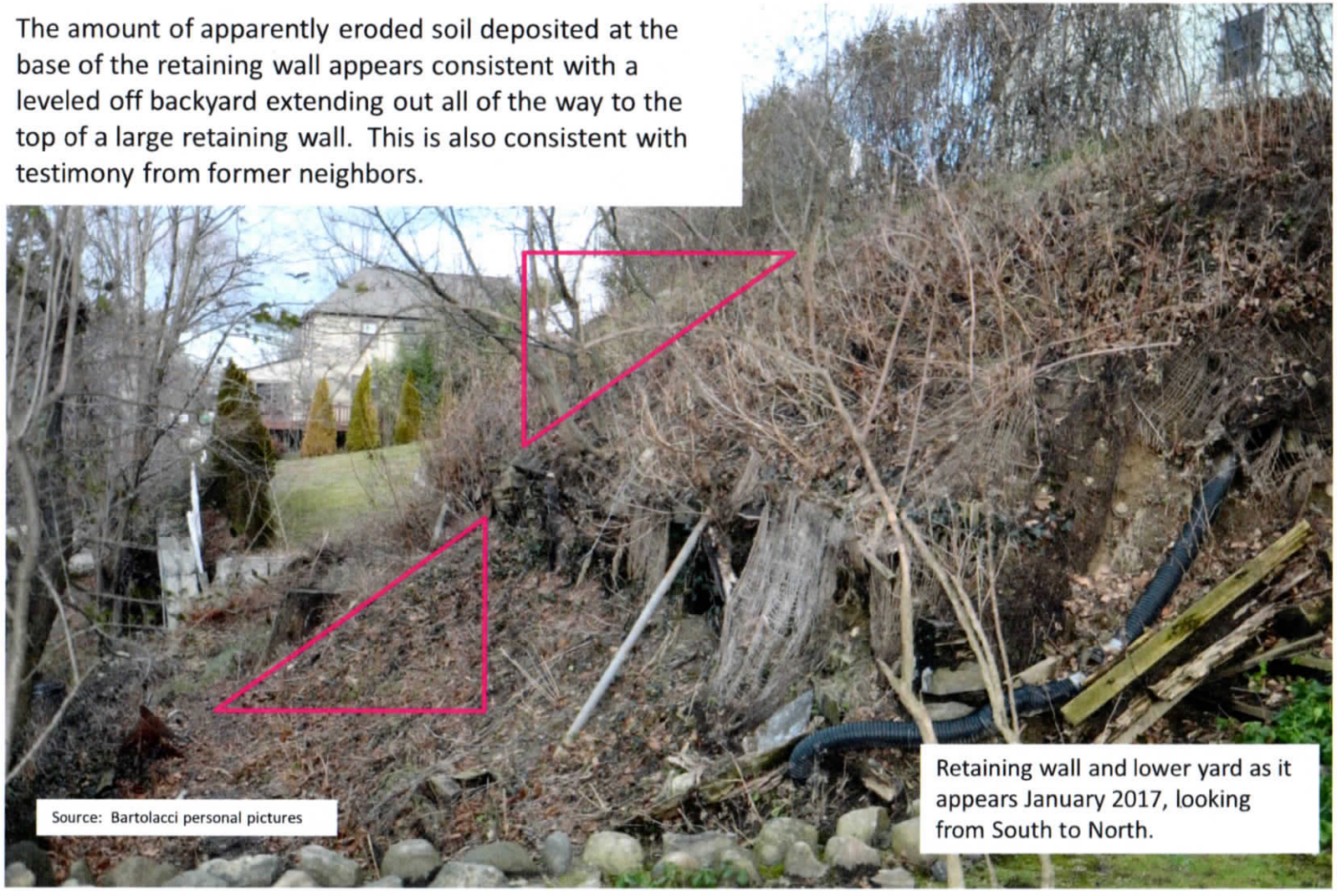
The amount of apparently eroded soil deposited at the base of the retaining wall appears consistent with a leveled off backyard extending out all of the way to the top of a large retaining wall. This is also consistent with testimony from former neighbors.



Source: Bartolacci personal pictures

Retaining wall and lower yard as it appears January 2017, looking from South to North.

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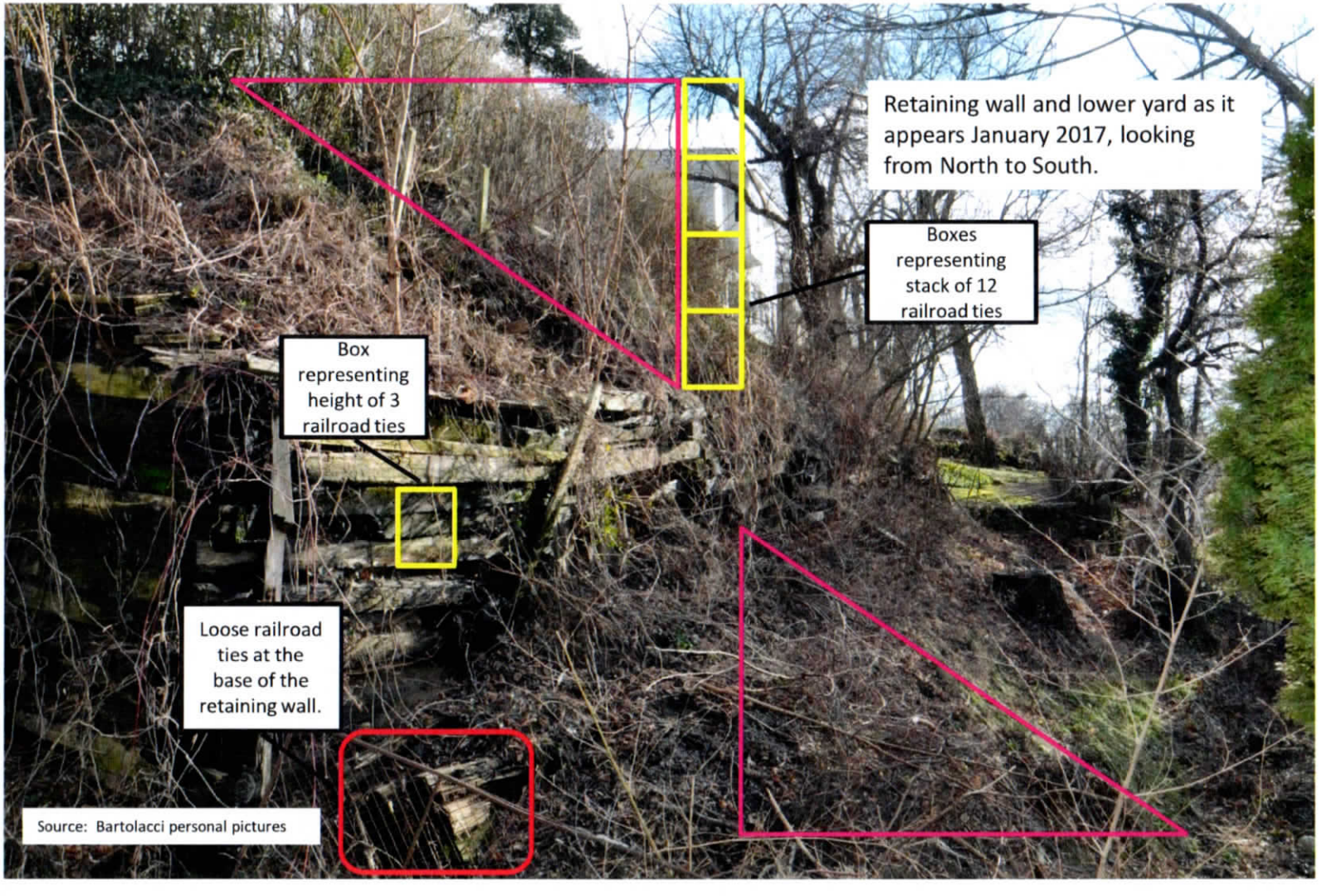

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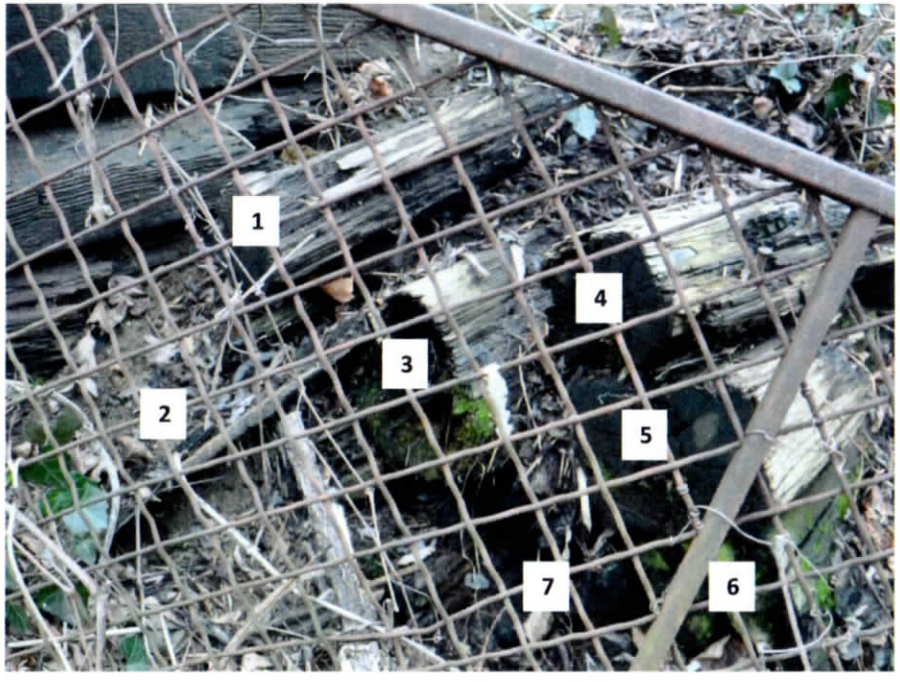
There are currently at least 7 visible railroad ties haphazardly piled at the base of the NW corner of the existing retaining wall which would appear to have fallen off of the top of the retaining wall. There are likely many more buried underneath the pile of dirt at the base of the retaining wall.



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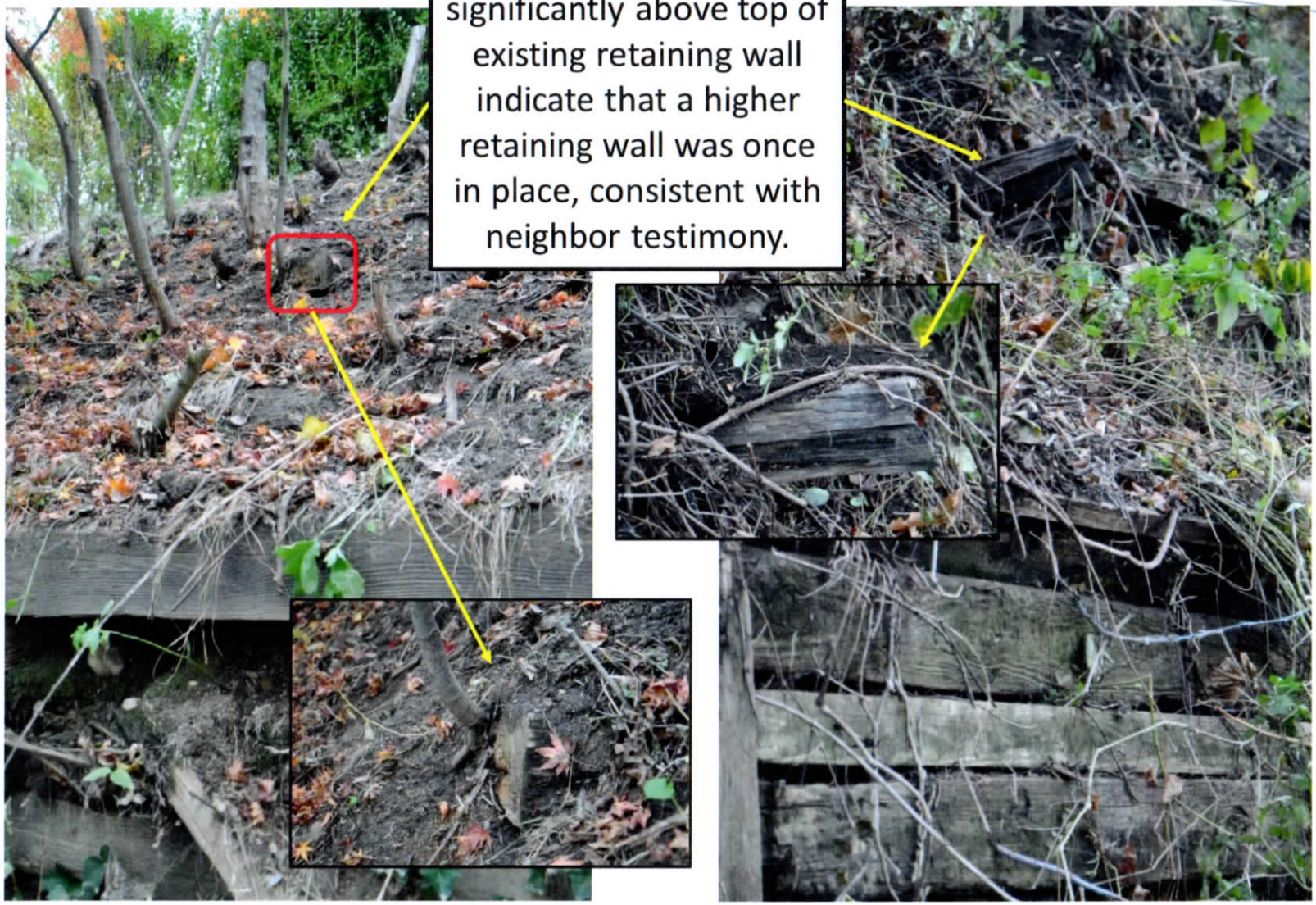
Dilapidated tie backs significantly above top of existing retaining wall indicate that a higher retaining wall was once in place, consistent with neighbor testimony.



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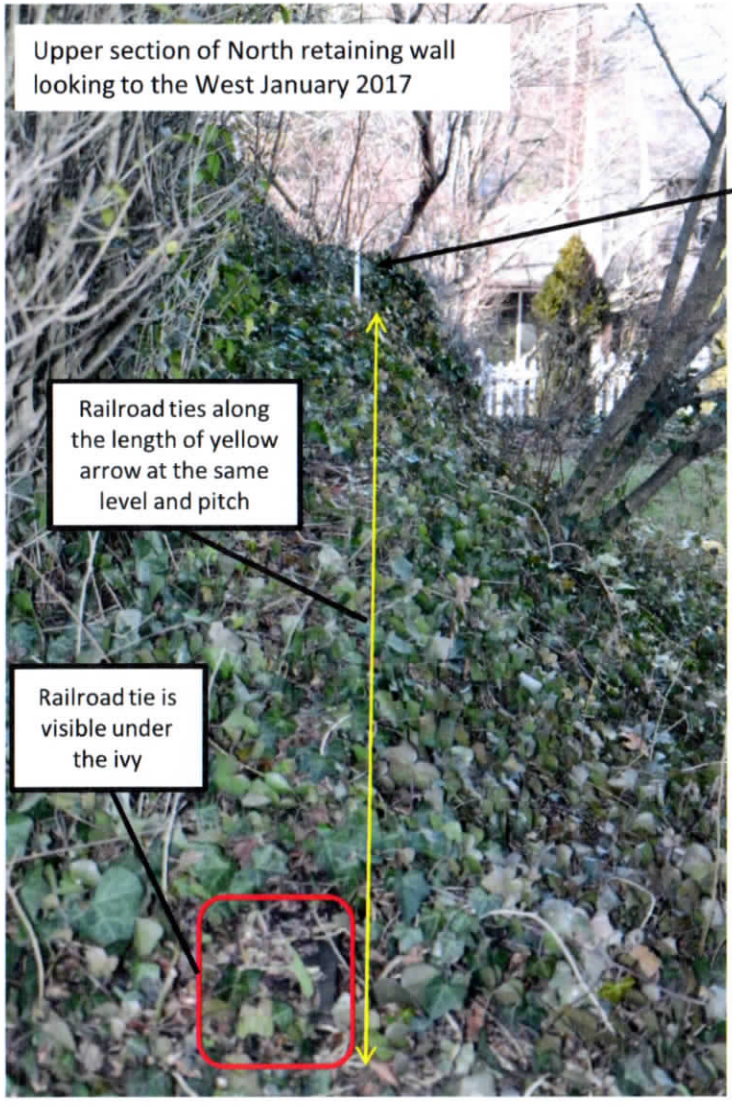
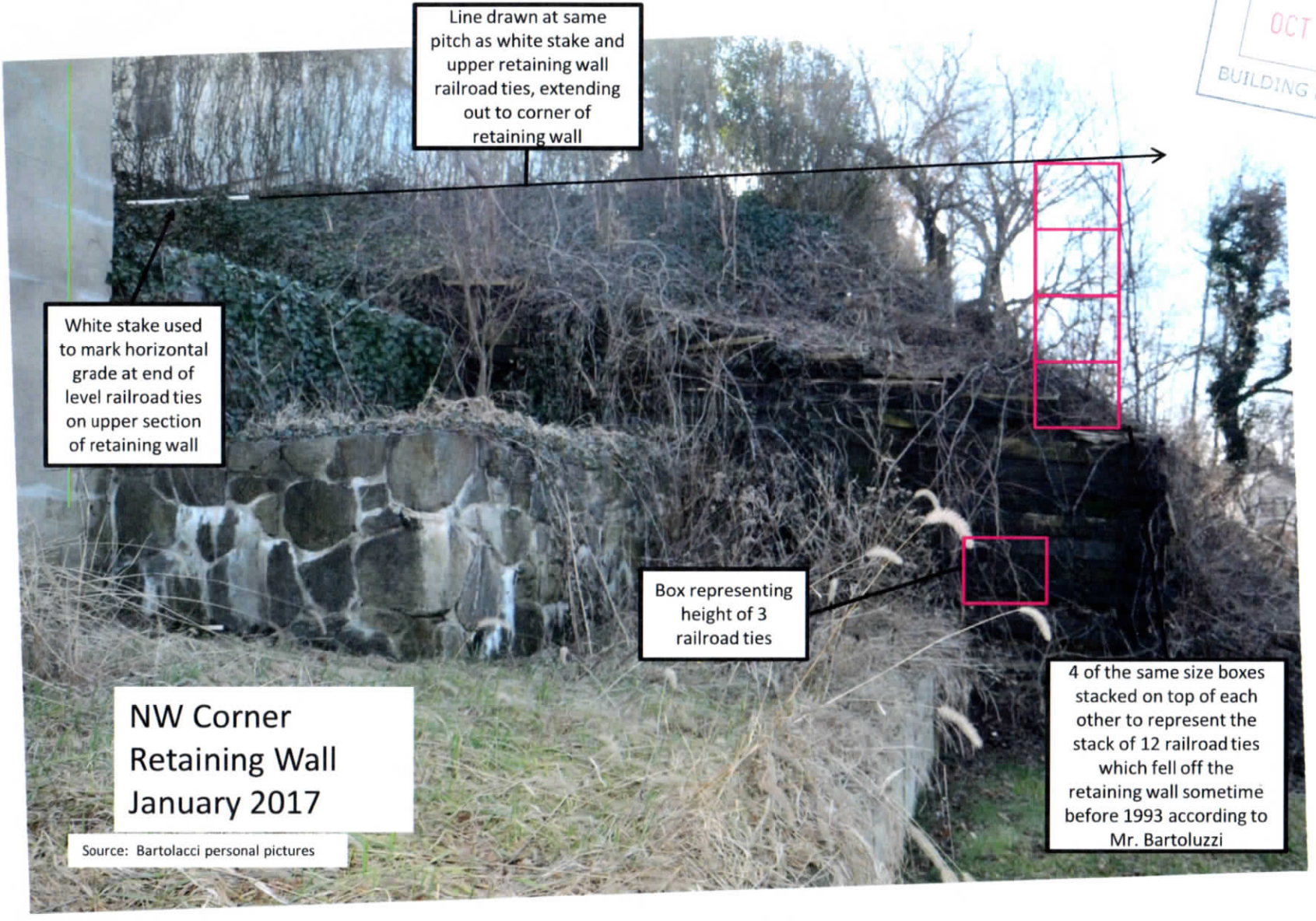


Source: Bartolacci personal pictures

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