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February 20, 2018

Hon. James Madison, Chairman, Planning Board
Village of Plandome Heights
37 Orchard Street
Manhasset, New York 11030

Re: Village of Plandome Heights Planning Board:
Reviewing Psyllos Subdivision Application for 109 Summit Drive

Dear Chairman Madison:

This letter provides a general roadmap for the Village of Plandome Heights Planning Board ("VPHPB") with respect to subdivision review, and provides specific direction for the Psyllos application.

This letter will address:

(a) time frames for VPHPB action with respect to subdivisions;
(b) legally relevant considerations in VPHPB subdivision review;
(c) shared jurisdiction rules for proposed subdivisions in close proximity to other municipalities
(d) satisfying VPHPB obligations under SEQRA; and
(e) ensuring that Nassau County records reflect "minor" subdivisions for real property tax purposes.

At the outset, I will briefly summarize key points to bear in mind while reviewing subdivision applications.

Substantive law and regulations. Under New York State Village Law (the "Statute"), § 7-728 (1), the Village Board of Trustees may create a Planning Board to review and approve subdivisions. Village Code Section 140-14 authorizes VPHPB to do so. The Village has adopted local regulations (the "VPH-PB Rules"), which, with the Statute, govern VPHPB review of subdivisions.

Under the Statute, "subdivision" includes the division of a parcel of land into one or more lots, and any alteration of a lot line or lot dimension.

Statute § 7-730.7. and the VPH-PB Rules allow VPHPB to waive certain requirements for subdivision review, if reasonable to do so under applicable circumstances.

With much of the Village developed, any subdivision applications to VPHPB will likely be of one plot into not more than four plots. I will refer to these as "minor subdivisions." The proposed subdivision of 109 Summit is a minor subdivision.

Shared jurisdiction subdivisions. As I explain in more detail below, if the property is more than 300 feet from any Village boundary, and no zoning variances are required, then VPHPB will be the only land-use body with jurisdiction with respect to the subdivision. However, 109 Summit is within 300' of a Village boundary, and so there is shared jurisdiction with the Nassau County Planning Commission (the "NCPC").

SEQRA. A proposed subdivision is an "action" subject to the New York State Environmental Quality Review Act ("SEQRA") and its implementing regulations (the "SEQRA Regulations"). The Statute requires VREPB to coordinate subdivision review with SEQRA review obligations under.

A "minor subdivision" is an "unlisted action" under SEQRA. Therefore, the Board must determine whether it should (i) assume lead agency status, and (ii) make a "negative" (no significant environmental impact) or "positive" (potential for significant environmental impact) declaration.

Lead agency status. Ordinarily, if the property is more than 300 feet from any Village boundary, and no zoning variances are required, then there will be no other "interested agencies" under SEQRA; so, VPHPB will the "lead agency." However, the 109 Summit subdivision must be approved by NCPC, and so it is an "interested agency." Nevertheless, as I explain below in Section C, addressing "shared jurisdiction applications," I recommend that VPHPB proceed unilaterally as lead agency under SEQRA, without involving any other government agencies.

Negative or positive declaration. The analysis to render a negative or positive declaration, required for an "unlisted" action, can be more involved. However, absent some unusual or extraordinary circumstance that may appear on the record, I will ordinarily recommend a "negative" declaration for a minor residential subdivision. That ends analysis under SEQRA, as it means there is no significant environmental impact. While that typical recommendation is based upon my experience and review of relevant case law, it is strengthened by proposed SEQRA Regulation amendments that would classify minor residential subdivisions as "Type II" actions (which require no review or action under SEQRA), rather than "unlisted" actions. However, until that amendment is enacted, VPHPB must treat 109 Summit as "unlisted."

Process for subdivision review. The Statute requires that VPHPB first review and approve a *preliminary* plat. Then, VPHPB must review and approve a *final* plat. The *preliminary* plat approval process is set forth at Statute §7-728(5)(d); the *final* plat approval process (assuming final plat is in substantial agreement with approved preliminary plat) is set forth at §7-728(6)(b). However, as I explain below, VPHPB is authorized to waive the requirement for the two phases pursuant to §12 of the VPH-PB Rules.

The balance of this letter addresses in more detail the points summarized above.

A. TIME FRAMES:

1. Ability of Applicant and Planning Board to Consent to Extend Time Frames.

SEQRA and the Statute establish time frames for action by the planning board, and provide that the failure to adhere to certain deadlines can lead to a default approval of a subdivision application under unique provisions of the Statute.

However, all time periods mandated under SEQRA and under the Statute are expressly made subject to extensions by mutual agreement between the Planning Board and the applicant. See Title 6 NYCRR, Part 617, § 617.3(i) for the SEQRA provision, and Village Law § 7-728(8).

With respect to the application for 109 Summit, the applicant has agreed in writing to extend applicable deadlines, so that your board may proceed without concern about a default approval. For your information, the required documentation for a subdivision application to VPHPB includes a signed letter from the applicant consenting to extension of time periods. So, while you should be aware of the statutory and SEQRA deadlines, which I set forth below, and the threat of a default approval under the Statute, you need not dwell on those deadlines as the process in the Village for these applications adequately addresses and manages those time frames and that risk.

2. Pre-application Procedure:

STEP 1: **Applicant submits Sketch Plan** to Village Building Department and to the VPHPB Chair before filing an actual application, or paying any fees.

STEP 2: **Informational Discussion with Board's representative.** Building Inspector, as VPHPB representative, meets applicant to discuss sketch plan. Chairman may select one or two (but not more than two) VPHPB members to join. Purpose: to let applicant obtain informal feed-back before incurring expense of full preliminary layout, formal application, and fees.

3. Preliminary Plat Approval:

STEP 1: **Applicant Submits Preliminary Plat Application,** as initial attempt at a complete formal application; includes short Environmental Assessment Form ("EAF"), filing fees and deposits.

STEP 2: **SEQRA Determination.** Preliminary plat not deemed "complete" until VPHPB either (i) makes negative declaration, or (ii) makes positive declaration and files notice of completion of draft environmental impact statement ("DEIS"); only then do deadlines for VPHPB action on the subdivision application commence. *Within twenty (20) days* after VPHPB receives application and EAF, it must either (i) make negative or positive declaration, or (ii) request "additional information reasonably necessary to" enable VPHPB to make SEQRA determination. See SEQRA's implementing regulations, at Title 6, NYCRR, Part 617, Section 617.6(b)(1)(ii).

If VPHPB requests such additional information, then within twenty (20) days after VPHPB receives such "additional information," the VPHPB must make its SEQRA determination.

Observations**.** (a) Application must be complete before it triggers the 20 day time period. To avoid risk of noncompliance by VPHPB, VPH subdivision application forms include applicant's signed consent to extend time period.

(b) VPHPB will want input from Building Inspector and Village Engineer for both SEQRA and general subdivision review, either written or oral; although SEQRA process does not itself require a public hearing, we recommend that all SEQRA and subdivision review be done in a public hearing (which in any event is required for the subdivision application itself); this provides a record to support all decisions made by VPHPB, in case any decision is challenged.

(c) The SEQRA determination will include (ordinarily) (i) a declaration that VPHPB is "lead agency" and (ii) either (A) a negative declaration (no significant adverse environmental impact) or (B) a positive declaration, with a finding that a DEIS is required to continue consideration of possible environmental impacts.

STEP 3: **Public Hearing.** Alternative A: if VPHPB makes a "negative declaration" with respect to preliminary plat, and determines that application otherwise is complete, then, VPHPB must (if it hasn't already) open the public hearing for the application *within sixty two (62) days* after the "negative declaration" has been filed by VPHPB in accordance with the provisions of SEQRA (and at least five (5) days' after publication of legal notice of hearing). (Under SEQRA Regulations, a negative declaration on an unlisted action is deemed "filed" merely upon its filing with VPHPB.)

Observation: this timeframe is not likely to be an issue, because VPHPB commences public hearing before addressing SEQRA; so, hearing already is opened when SEQRA determination is made.

Alternative B: if VPHPB makes positive declaration, and so DEIS *is required*, then VPHPB must open public hearing addressing both the DEIS and the preliminary plat approval application, *within sixty-two (62) days* after filing of notice of completion of DEIS (and at least fourteen (14) days after publication of legal notice of hearing). (Under SEQRA Regulations, notice of completion of DEIS must be filed with various other agencies. See Title 6 NYCRR, Part 617, § 617.12(b).)

Observation: There are various provisions triggered under SEQRA by a positive declaration, including "scoping," and determining whether DEIS and final EIS ("FEIS") provided by applicant are ready for public comment. As I expect a negative declaration for

109 Summit, I do not anticipate this becoming relevant. Of course, I will go over those details with the Board, if and when the need arises.

STEP 4: **Closing of Public Hearing.** *Within 120 days after opening* public hearing on preliminary plat (and, if applicable, DEIS), the hearing must be closed "upon motion of the Planning Board." (Statute expressly requires motion, rather than simple determination of chairperson to close the public hearing. See § 7-728(5)(d)(ii).)

STEP 5: **Planning Board's Decision on Preliminary Plat.** Alternative A: following negative declaration, VPHPB must make decision on Preliminary plat *within sixty-two (62) days* after *close* of public hearing.

Alternative B: if EIS was required, Applicant must file FEIS *within forty-five (45) days* after c*lose* of public hearing. (Under SEQRA Regulations, FEIS must be filed with various other agencies. See Title 6 NYCRR, Part 617, § 617.12(b).) *Within thirty (30) days* after filing of FEIS, VPHPB must (i) issue findings on FEIS, and (ii) make decision on preliminary plat.

STEP 6: **Filing of Board Decision on Preliminary Plat.** *Within five (5) days* of VPHPB's decision, Chairman shall cause copy of decision to be filed with Clerk to Planning Board. If decision approves preliminary plat, VPHPB Clerk, *within the same five (5) day period*, must certify and file approved plat in VPHPB Clerk's office. Then, VPHPB Clerk mails copy to applicant (and counsel, if represented by counsel).

4. Final Plat Approval:

Typically, applicant presents VPHPB with *final* plat which is in "substantial agreement" with previously approved *preliminary* plat. Procedures mandated by Statute and/or VPH-PB Rules for final plat approvals are:

STEP 1: **Submission of Final Plat.** Applicant must submit to Village Clerk its final plat *within six months* after approval of preliminary plat. §7-728(5) (h) of Statute authorizes VPHPB to revoke approval if applicant fails to meet this 6 month period. (This provision establishes an outside time frame, not a minimum; so,

theoretically, applicant can present final plat immediately after approval of preliminary plat.)

STEP 2: **Public Hearing (Optional).** Statute does not require public hearing on final plat in substantial agreement with approved preliminary plat. VPHPB essentially is confirming with its Engineer and counsel that final plat substantially agrees with approved preliminary plat, incorporating any conditions to preliminary approval imposed by VPHPB, which presumably reflects public input at preliminary approval stage. So, there is nothing new that would warrant additional public input.

STEP 3: **Decision on Final Plat.** VPHPB must render decision on final plat *within sixty-two (62) days* after final plat, in form deemed by VPHPB to be in substantial agreement with approved preliminary plat, is received by VPHPB clerk. Approval of a final plat is an action by VREPB, which must occur at public meeting.

B. LEGALLY RELEVANT CRITERIA FOR SUBDIVISION REVIEW.

Statute §7-730(1) describes what VPHPB may consider in evaluating a subdivision application, and the findings that it must make before approving one. VPHPB must find that (i) the subject land can be used safely for building purposes, (ii) without danger to health, and (iii) without peril through fire, flood, drainage or other menace to neighboring properties or the public health, safety and welfare. The VPH-PB Rules repeat the Statute's general parameters for what the board should consider, and also provide, at §13 thereof, that a subdivision should: (i) not aggravate a flood hazard; (ii) conform to the Village's official map and comprehensive plan; (iii) have street frontage that satisfies the Village Code; (iv) be improved in reasonable conformity with existing topography, minimizing grading, cut and filling to retain natural contours to the extent possible; (iv) limit storm water runoff; and (vi) conserve natural ground cover and soil. Efforts should be made to enhance the aesthetic value of the site by preserving existing natural features such as trees, water courses, ponds and similar assets.

While those parameters may seem broad, the courts narrowly construe the bases upon which a planning board can deny a subdivision application.

VPHPB should consider objective factors relevant to planning considerations, including: (i) vehicular and pedestrian traffic, from congestion and safety perspectives; (ii) streets, sidewalks and lighting, as they relate to congestion and safety; (iii) the containment of storm water on the subject property; (iv) the availability of utilities, including water, sewer and waste disposal services; (v) slopes and grading of the properties and their impact on neighboring properties; (vi) preserving trees and natural growth to the extent same impact the community and

neighbors; and (vii) the quality of the soil at the subject premises and its ability to support the proposed construction.

Not that those factors are not considered in the abstract, but in the context of actual conditions in the Village and the surrounding community. In other words, these factors should not be applied such as to hold the proposed lots to higher, more restrictive standards than other similarly situated lots.

If a subdivision application proposes parcels that will satisfy applicable zoning rules ("Conforming Parcels"), either because the property as improved and proposed complies with zoning, or because all required variances have been granted, then the Planning Board cannot deny the subdivision on grounds properly the subject of zoning. For example, a proposed subdivision into Conforming Parcels cannot be denied because the subdivision will create too great a density of population; that is a zoning issue.

While traffic safety and congestion are legitimate subdivision considerations, general complaints from neighbors about projected increases in traffic are not a sufficient basis for a denial. Such complaints should be substantiated by expert testimony or other sufficient evidence (e.g., eyewitness accounts, even if from laypersons) that establish traffic safety problems that cannot be mitigated, to support denial of a proposed subdivision on that basis.

Existing or proposed streets and highways must be of sufficient width, grade and location to accommodate traffic, afford adequate light and air, and allow fire and emergency services access to the proposed buildings. If sufficient evidence demonstrates that proposed property configuration would prevent or impair access by firefighting equipment, then that could be a basis to reject an application.

Legitimate grounds to deny, or impose conditions when approving, a subdivision application (assuming the grounds are applied consistently in the context of existing parcels in the Village), include an inability to install sanitary sewers or facilities to satisfy Village standards and specifications, or an inability of a property to handle storm water run-off in a manner that adequately addresses the health and safety.

Of course, new subdivisions can be conditioned upon the installation of dry-wells and other engineering solutions to drainage problems which frequently *improve* existing drainage and storm water retention capabilities on a property.

Architectural and aesthetic considerations ordinarily are not factors for a planning board to consider. Such issues are properly before the Village's Architectural Review Board. For example, if a Planning Board's concerns about the location of proposed structures are really aesthetic, then the Planning Board cannot condition subdivision approval on locating the structures in areas that satisfy the Planning Board's purely aesthetic preferences.

Outdoor lighting for a proposed subdivision is properly within the contemplation of the Planning Board. The Board might reasonably require an applicant to contain light from spilling onto neighboring properties or adjacent sites.

C. SHARED JURISDICTION APPLICATIONS.

While General Municipal Law ("GML") Section 239-n requires that villages refer to their county planning commission all subdivision applications for property within 500 feet of a village boundary, it applies only to counties in which the county legislative body has affirmatively granted its county planning commission jurisdiction over subdivisions within villages in the county. In Nassau County, villages retain subdivision jurisdictions with respect to properties within the village. Therefore, subdivision applications in Plandome Heights are subject only to the application referral rules contained in the County Government Law of Nassau County (also known as the "County Charter"), at Part 16.

Under the County Charter, a proposed subdivision in a village but within 300 feet of a village boundary line (a "shared jurisdiction" application), must be approved by the village in which the property is located, and that neighboring municipality and the NCPC, before the property owner may file its subdivision map with the Nassau County Clerk. The burden to obtain those approvals or consents (or waivers therefrom) is on the applicant, and not the Village. The 109 Summit subdivision is within 300 feet of the Town of North Hempstead. So, the owner must obtain consent or waiver from the NCPC. (While villages have Village planning boards, the NCPC serves as the planning board for all unincorporated areas in all these towns in Nassau County.) The VPH-PB Rules require that the subdivision plat reflect whether the property is within 300 feet of another village or jurisdiction.

GML § 239-nn requires that VPHPB provide at least ten (10) days' prior written notice of its public hearing to all municipalities within 500' of the subject parcel. VPHPB must comply with this statewide notice requirement.

D. SEQRA.

Lead agency status. A "shared jurisdiction" application involves more than one "involved agency" for purposes of SEQRA. As I note above, a subdivision application is an "unlisted action" for SEQRA purposes, at least until such time as the proposed SEQRA regulation changing the classification of minor subdivisions to Type II status is enacted.

In order to maximize village control over a proposed subdivision project, I ordinarily recommend that for all applications to subdivide property located inside the Village,

whether or not within the 300 feet shared jurisdiction threshold, the village planning board elect lead agency status under SEQRA. I expect to do so with respect to the 109 Summit application.

"Coordinated" or "Uncoordinated" Review. As lead agency, VPHPB must elect whether to proceed under SEQRA with "coordinated review" or with "uncoordinated review" of the shared jurisdiction application.

When a subdivision application does not involve shared planning jurisdiction or zoning variances, there is no need to choose between "coordinated" or "uncoordinated" review, because there is no other involved agency with which to co-ordinate. The choice becomes relevant only when there are other involved agencies, such as a "shared jurisdiction" application.

"Uncoordinated" review permits VPHPB to proceed as if it were the only involved agency, with no obligation under SEQRA to provide notice to other involved agencies *unless* VPHPB were to make a positive declaration under SEQRA, concluding that the proposed action would have a significant adverse impact upon the environment. In such a case, VPHPB must provide to the other involved agencies written notice, giving those agencies an opportunity to contest VPHPB's lead agency status.

With "uncoordinated" review, at any time before VPHPB makes its final decision on the application, any other involved agency may make a positive declaration as to the project, superseding VPHPB's negative declaration. That possibility poses a risk primarily to the applicant, whose project could be stalled.

In contrast, "coordinated" review would require VPHPB to provide written notice of its "lead agency" election to each other involved agency, commencing a thirty day period during which those other involved agencies may contest VPHPB's status as lead agency. If during that thirty day period the other involved agencies fail to contest or otherwise consent to that status, then VPHPB may make its SEQRA declaration, be it positive or negative, and the applicant need not worry about a superseding declaration from another agency.

Note that a Type I action (the type more likely than not to warrant an environmental impact statement) can *only* proceed with a *coordinated* review, to maximize the input from all involved agencies. The option of "*uncoordinated*" review, relevant only when more than one agency is involved, is legally permitted only for "unlisted actions," which include a minor subdivision like 109 Summit.

In my experience, applicants usually prefer "uncoordinated" review, thereby accepting the possibility of a late challenge by another agency to VPHPB's SEQRA declaration, because the alternative, "coordinated" review, surely slows down VPHPB's processing of the application.

I ordinarily recommend that a village planning board proceed with "uncoordinated" review when addressing minor subdivision applications, like 109 Summit.

"Negative" or "positive" declaration. I explained above the various reasons why I expect to recommend to VPHPB that a "negative" declaration (no significant adverse environmental impact) is appropriate with respect to the 109 Summit application.

E. REQUIRING SUBDIVISION APPLICANTS TO FILE DEEDS.

After a minor subdivision is approved by a Village, the subdivision map need not be filed with the Nassau County Clerk because the Real Property Tax Law provides an exception for the filing requirement for "minor subdivisions." Therefore, Nassau County will not automatically reflect the subdivision lots as separate tax lots, unless the applicant takes steps to have the County effect apportionment (effecting and recognizing the creation of new tax lots). Until that happens, tax assessment and collection will not be consistent with the subdivided lots.

I understand that, where filed maps are not involved, Nassau County does not apportion and assess the new tax lots until a deed has been recorded with respect to the new lots. Even then, the process proceeds slowly. The deed is recorded, the tax lots are reflected in the County's tax lot maps, but the assessment office does not recognize the change until the first tax year that begins after the first County tax recognition date that occurs after the deed is recorded.

Therefore, I recommend that VPHPB condition subdivision approval upon the applicant (or its successor) recording deeds for the new lots created within six (6) months of the date of final subdivision approval. This will not eliminate, but should reduce, delays between subdivision recognition by the Village and tax lot apportionment by the County, even if an actual sale to a third party of a newly subdivided lot does not occur soon after subdivision.

I hope that the foregoing is helpful. Please call me if you have any comments or questions.

Sincerely,

Christopher J. Prior

Enclosures

cc: Members of the Planning Board
Arlene Drucker, Clerk to the Planning Board
Edward Butt, Building Official