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LEGAL REVIEW MEMORANDUM

To: West Windsor Township Zoning Board of Adjustment

From: Trishka Waterbury Cecil, Esq.



Date: May 20, 2026

Re: **Application ZB26-02: Afm Haque c (bulk) variances for fence in front yard
3 Dey Farm Road, Block 20.11, Lot 2
R-1/C Residential Zoning District**

The West Windsor Township Zoning Board of Adjustment will consider the above-referenced variance application at its meeting on June 4, 2026.

I. Description of property and applicant’s proposal

Afm Haque (“applicant”) is the owner of improved property located at 3 Dey Farm Road and designated as Block 20.11, Lot 2 on the West Windsor Township Tax Maps (“Property” or “Subject Property”), which is a ±6-acre, D-shaped parcel with landscaping beds and berms throughout the property, along with a variety of shrubs and mature trees. The applicant seeks approval to install a six-foot-high aluminum fence approximately twenty-five to thirty feet from the front property line.¹ As described in the application, the fence is needed for the security of the applicant’s son, who has autism and is prone to “elopement behaviors” when agitated or overstimulated.

¹ The proposed fence will tie into a black chain link fence that is being installed along the side and rear property lines. The chain link fence does not require any relief from the Zoning Board and is therefore not the subject of the within application.

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II. Relief needed

Section 200-227C of West Windsor’s Land Use Ordinance (“LUO”) states that “[n]o fence or wall forward of the front setback line shall exceed four feet in height.” Pursuant to LUO §200-159E(1), the minimum front yard requirement in the R-1/C zoning district in which the Property is located is forty feet. The applicant therefore requires “c” variance relief to construct the proposed six-foot-high fence less than forty feet from the front property line.

As with all variances, the applicant has the burden of demonstrating to the Board that the proposal satisfies the applicable “positive” and “negative” criteria for the type of variance being sought, as described in more detail below.

A. Positive criteria: The “positive” criteria (the affirmative reasons for granting a variance) vary depending on the nature of the variance in question.

There are two types of “c” variances: the c(1) “hardship” variance and the c(2) “flexible” or “public purpose” variance.

(1) *Hardship variance*: The Municipal Land Use Law (“MLUL”) at N.J.S.A. 40:55D-70c(1) gives zoning boards of adjustment the power to grant so-called “hardship” relief from the bulk zoning regulations (*i.e.*, lot area, lot width, setbacks, impervious or improvement coverage, lot frontage, etc.) where:

(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon, the strict application of any regulations...would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property.

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Note that the hardship must arise from physical conditions specific to the property, such as the size of the property, the size of the permissible building envelope, the location of existing structures or other improvements, the presence of trees or boulders, or the property's topography. Further note that the hardship that the applicant must prove is not inutility – that without the variance the property could not be used. Rather, the Board may grant a variance where the hardship at issue may inhibit “the extent” to which the property can be used. *See, Lang v. North Caldwell Board of Adjustment*, 160 N.J. 41, 54-55 (1999).

Here, the applicant has identified hardships stemming from the topography and plantings on the property. To install a conforming fence, the applicant has two options: build a six-foot-high fence at least forty feet from the property line, or build a four-foot fence less than forty feet from the property line. The applicant states in his application that installing the fence at forty feet would disturb the existing berms and landscaping and require the removal of mature trees. The applicant further states in his application that a four-foot fence (which per the zoning regulations would not have to meet the forty-foot setback requirement) could be easily scaled and therefore would not serve its intended purpose, which is to provide for the safety and security of his autistic son.

(2) “*Flexible*” or “*public benefits*” variance:

The MLUL at N.J.S.A. 40:55D-70c(2) gives zoning boards of adjustment the power to grant so-called “flexible” or “public benefits” variances from zoning regulations where:

in an application or appeal relating to a specific piece of property the purposes of [the MLUL] would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment.

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The zoning benefits resulting from allowing the deviation(s) must be for the community (“improved zoning and planning that will benefit the community”) and not solely for the private purposes of the owner. *Kaufmann v. Warren Township Planning Board*, 110 N.J. 551, 563 (1988). The Appellate Division has held that the zoning benefits resulting from permitting the deviation(s) are not restricted to those directly obtained from permitting the deviation(s) at issue; the benefits of permitting the deviation can be considered in light of benefits resulting from the entire development proposed. While “c(1)” or so-called hardship variances are not available for self-created situations and/or for mistakes, our courts have not held that an intentionally created situation or a mistake serves to bar a “c(2)” variance because the focus of a “c(2)” variance is not on hardship but, rather, on advancing the purposes of zoning. *Ketcherick v. Mountain Lakes Board of Adj.*, 256 N.J. Super. 647, 656-657 (App. Div. 1992); *Green Meadows v. Montville Planning Board*, 329 N.J. Super. 12, 22 (App. Div. 2000).

Here, the applicant asserts in his application that placing the fence thirty feet from the property line would allow him to maintain the current topography of the property, sustain the landscape of the development, and would be in line with the fencing and setbacks on the neighboring properties, which would allow consistency in the topography of Dey Farm Road.

B. Negative criteria. As with all variances, the Board may not exercise its power to grant either a c(1) or a c(2) variance otherwise warranted unless the applicant satisfies the so-called “negative criteria.” This refers to the last unlettered paragraph of N.J.S.A. 40:55D-70, which states that “[n]o variance or other relief may be granted ... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.”

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The first prong of the negative criteria—substantial² detriment to the public good—focuses on the negative impacts of the deviation on the abutting property owners, the general neighborhood, and the traveling public. Considerations here would be the visual impact of having a six-foot-high fence located twenty-five or thirty feet from the front property line instead of forty feet.

The second prong of the negative criteria—substantial³ impairment of the master plan and zoning ordinance—focuses on the extent to which the deviation would undermine the goals of the Master Plan or do “violence” to the underlying intent and purpose of the regulation in question, which here is the requirement that fences higher than four feet must meet the minimum front yard setback requirement. Put differently, can the requested relief be reconciled with the goals of the master plan and the reasons for limiting to four feet the height of fences that are situated in a front yard?

Last, the Board should consider whether the negative impacts (if any) stemming from the grant of the variance could be alleviated through the imposition of reasonable conditions.

III. Voting requirements:

Unlike with “d” variances, which require five affirmative votes, “c” variances can be approved by a simple majority of those Board members who are present at the meeting and eligible to vote.

cc:(*via email*):

Aaron Kardon, Manager, Division of Land Use
Kerielie Solecito, Administrative Secretary
David Novak, PP, AICP, Board Planning Consultant, Burgis Associates, Inc.
Afm Haque, applicant

² The key word here is “substantial.”

³ See footnote 2.