



# THE NEW ROCHELLE BAR ASSOCIATION

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## **VARIAN on VARIANCES**

### **"IONA & NEW ROCHELLE"**

Land Use Restrictions - Past, Present & Future

Presented by

**Gregory T. Varian, Esq.**

### **VARIAN LAW FIRM**

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**Where:** The New Rochelle Public Library, Ossie Davis Theatre  
**When:** Thursday, May 31st, 2018  
**Time:** Registration and Lite Dinner at 5:30 pm; CLE 6-8 pm  
**RSVP:** Email your response to Hon. Jeffrey L. Levin, at  
[jeffrey.levin.law@gmail.com](mailto:jeffrey.levin.law@gmail.com)



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## ***Program Description***

### **VARIAN on VARIANCES: IONA & NEW ROCHELLE – Land Use Restrictions Past, Present & Future**

- New Rochelle's development - "City of Neighborhoods"
- The Christian Brothers purchase property on North Avenue
- Private Land-use Restrictions - Covenants Running with the Land
- Governmental Land Use Restrictions - Zoning Law
- Special Permits, SEQRA, Segmentation, RILUPA, FAR & Variances
- Merging residentially restricted tax lots - Iona College v The City of New Rochelle
- The Future - litigation or cooperation?

## ***Presenter***

**Greg Varian** of the **Varian Law Firm** has a diverse civil practice for 36 years including the areas of land use and residential and commercial real estate transactions. Greg came to his unique focus on Land Use from both his professional experience representing a major development through various Council and Board approvals, and then, three (3) Article 78 proceedings, as well as his civic education in New Rochelle, as president of the Halcyon Park Association & advocate for an improved North Avenue corridor. In 2016, the Varian Law Firm represented the Lombardi, a five (5) story luxury residential (with retail at ground level) development on North Avenue thru the municipal approval process (City Council- special permit, Planning Board- site plan and B.A.Z.- area variance) in record time.

In addition, Greg is a long-time faculty member with the Hudson Gateway School of Real Estate. He was admitted to the New York State Bar and U.S. Federal Court, Southern and Eastern Districts, in 1982. He received his J.D. from Pace Law School in 1981 and his B.A. from Providence College in 1976. Greg has also served on the New Rochelle Bar Association Board of Directors and as N.R.B.A. president (2003-2005).

Greg also served as an elected trustee of the New Rochelle Public Library (2006-2018): the main Library is located in the center of the downtown and has been the focus of re-development as a result of New Rochelle's creation of "Form Based" zoning overlay district(s).

## INTRODUCTION

A Man's home is his castle. All title to land derives from the sovereign. When we discuss land use regulations, we start with the age-old conflict between the rights of the property owner to use his/her property as he/she sees fit... and the public good. Although many land use regulations are relatively recent innovations, the concepts are not.

## NEW ROCHELLE'S DEVELOPMENT "CITY OF NEIGHBORHOODS"

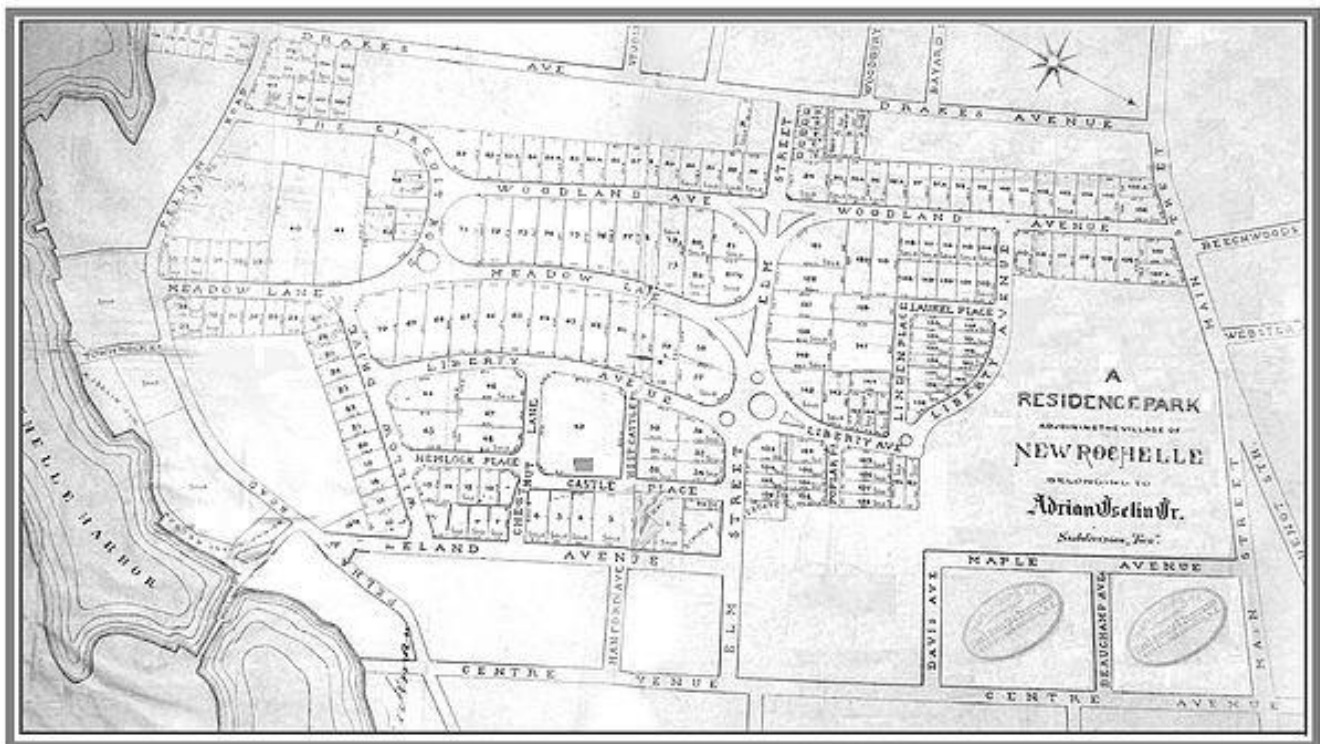
We are fortunate to work and live in a city so rich in history. We're going to skip over New Netherlands, the Huguenots, the revolution & the 1<sup>st</sup> 200 years as a quiet farm town; and that period from the creation of the Village of New Rochelle within the Town of New Rochelle in 1857 to the 1880's.

[See Attachment #1.](#) *"A Vision for New Rochelle, Plan for Revitalizing the City Park Neighborhood".*  
Graduate School of Architecture, Planning and Preservation, Columbia University, May 2001.



SUBDIVISION MAP OF ROCHELLE PARK

Our story begins before the incorporation of the City of New Rochelle. In 1886, the Manhattan Life Insurance Company filed a subdivision plat with the Westchester County Registrar for the farm it had acquired through foreclosure in 1881. Rochelle Park was the 1<sup>st</sup> residential park to be laid out in New Rochelle and among the earliest planned neighborhoods in America. Designed by a landscape architect, the 75 acre site was carved out with an aesthetic balance of naturalistic rambles, cultivated open spaces, clear viewsheds, asymmetrical with winding streets (unlike the grid-system of Manhattan, Mount Vernon & New Rochelle's West End), generous set-backs and proximity to the railroad, was a great success and ignited a development boom that led to dozens of attractive residential parks in the southern half of New Rochelle before the start of World War 1 led to many residential park subdivisions starting with the Residence Park subdivision created by Adrian Islen Jr.<sup>1</sup>



RESIDENCE PARK

<sup>1</sup> "New Rochelle's Residential Parks" from New Rochelle Public Library Local History Collection, with gratitude to City Historian Barbara Davis. [See Attachment #2](#)

Also developed between 1888 and 1910 were the Soundview subdivision (Sutton Manor), Rochelle Heights, the much larger subdivision abutting Rochelle Park, Sycamore Park, Beechmont and the Halcyon Park neighborhoods to name just a few.

NEW ROCHELLE PIONEER

# Halcyon Park

## for Halcyon Days

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### GREAT SCOTT MAN!

Why don't you pick up one or two of our \$800, forty-foot lots in the new section before the other fellows get them? Look at them (our new Hubert Street entrance is wide open now), and think a moment—**TWENTY DOLLARS A FRONT FOOT** in the great North Street boomland (the coming center of the City) in a beautiful, restricted park, with perfect streets and drains, 60 high class houses, and with A REPUTATION, 6 years old, for good management, thorough caretaking, and steadily rising prices!

**GOOD GRACIONS! SHAKE A LEG! GET A MOVE ON!  
HUSTLE! AND GET IN THE GAME!**

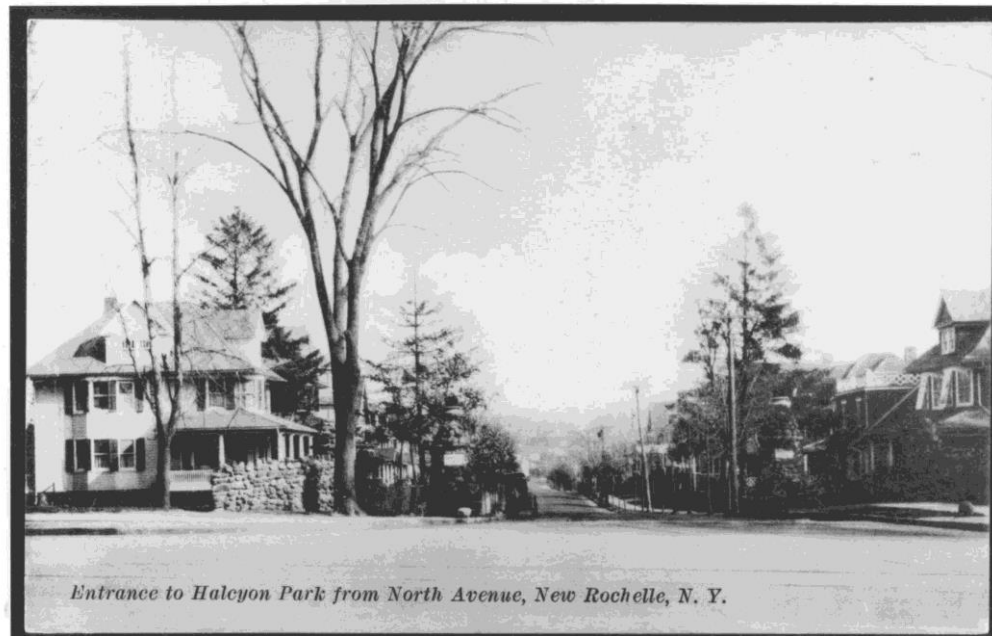
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## Halcyon Park Company

HOWARD S. MEIGHAN, President.

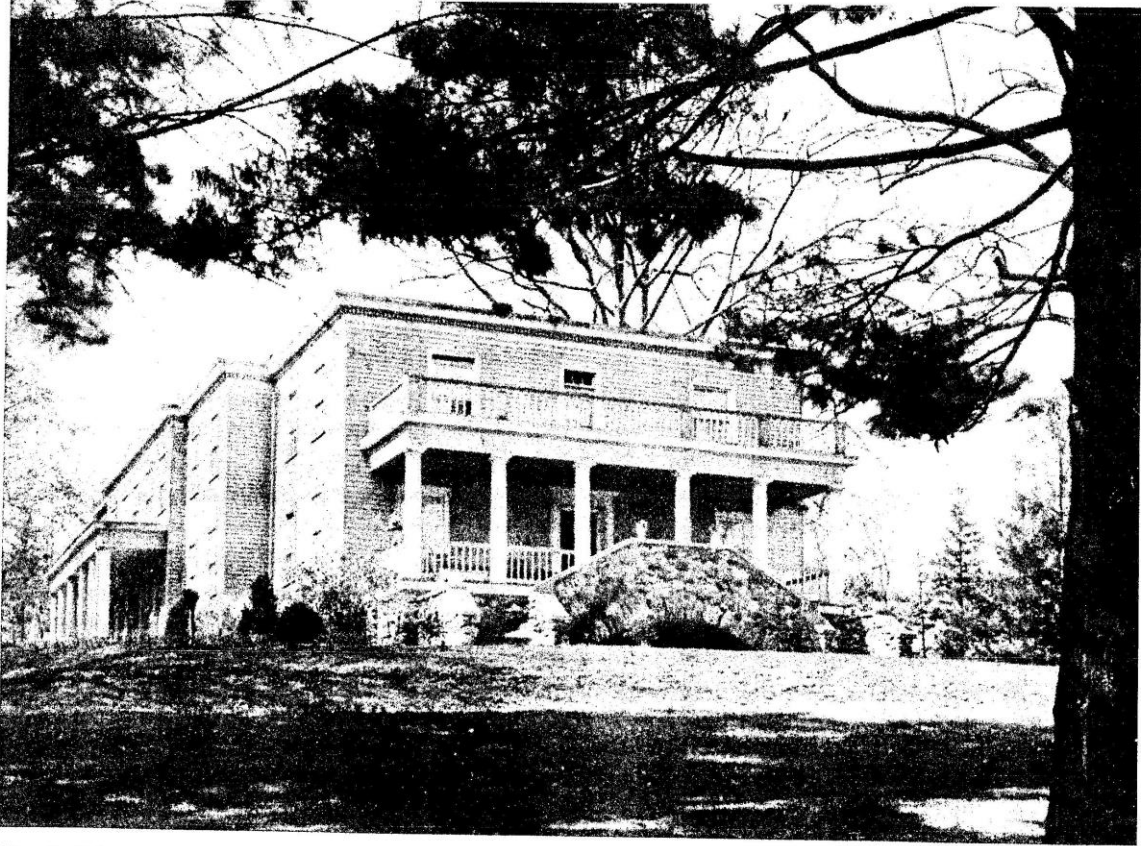
230 MAIN STREET NEW ROCHELLE, N. Y.

HALCYON PARK NEWSPAPER AD



HALCYON PARK

Incorporated in 1899, the population of the City of New Rochelle grew from 14,720 in 1900 to 54,000 in 1930.



**The Hall Manor House on North Avenue.**

## **HALL MANOR HOUSE ON NORTH AVENUE**

### **THE CHRISTIAN BROTHERS PURCHASE PROPERTY ON NORTH AVENUE**

On Dec 22, 1919, the Irish Edmund Rice Christian Brothers North American Province, known as Irish Christian Brothers, purchased an 18-acre parcel facing North Avenue situated between the Beechmont and Halcyon Park neighborhoods to relocate the Iona Grammar School which had been



operating out of rented space on the 7-acre Benjamin Stearn Estate on Webster Avenue near Lockwood Avenue. Upon completion of minor alterations of the residence, a former estate of the Reverend Thomas G. Hall, a retired Presbyterian minister, The Iona Grammar school opened its new site to students in September 1920.

A high school, Iona Prep, was added to the site in 1925 with the completion of Doorley Hall. In 1928 & 1929, the area to rear of Doorley Hall was leveled to be used by the baseball, football and track teams, and named Haag Field (Mazzella Field). A gymnasium was next. The Harris Gymnasium (Amend Hall) built in 1930 “was one of the finest gymnasiums built during that period” At that time Iona’s school population had increased to 301 students.<sup>2</sup>

**Iona College started** with a building constructed to be the Science building for Iona Prep. In September of **1940** the newly completed Cornelia Hall received Iona College’s 1<sup>st</sup> class of 92 students. Two wings were added to Cornelia Hall in 1955. Ryan Library built in 1948 has been expanded twice, in 1960 and 2007. **Hagan Hall** built in 1950 was the home of Iona Prep until the Prep was relocated to a new building on a 27-acre site at 255 Wilmot Road and Hagan became the home of the Iona College School of Business. In 1954, the College acquired property in the Beechmont subdivision adjacent to Beechmont Oval (now “Rice Oval”) for the purpose of erecting a Residence Hall for student Christian Brothers. The building opened in 1958, originally named Edmund Hall (Rice Hall), contained 107 private rooms, a spacious dining room, recreation areas, kitchen facilities and a chapel seating 150. In 1960, McSpedon Hall was opened, providing offices for administration and faculty.

<sup>2</sup> *"The Three Iona Schools in New Rochelle, New York"* by Harry M. Dunkak, Ph.D., C.F.C, Quarterly of the Westchester County Historical Society, Vol. 92.Number 1, Winter 2016.



IONA CAMPUS CIRCA 1960



CURRENT CAMPUS ILLUSTRATION



In 1973 a parking garage accommodating 715 cars was built behind Hagan Hall close to the Sunset View Park & Halcyon Park neighborhoods. In 1974, a new gymnasium (replacing homes on President Street in the Halcyon Park subdivision) replaced the Harris Gymnasium which was remodeled into classroom space and renamed Amend Hall.

[See Attachment #3](https://www.iona.edu/about/history-mission/buildings-memorials-statues.aspx) Complete history of Iona's buildings "*Buildings, Memorials & Statues*" Iona College Website [https://www.iona.edu/about/history-mission/buildings-memorials-statues.aspx]

See Attachments regarding Iona College's Master Plans:

[See Attachment #4](#) Newspaper article "Iona abandons master plan, leaving city, neighbors wary", dated August 23, 1998.

[See Attachment #5](#) Notice: "Iona College to Host Master Plan Meeting, dated May 21, 2013

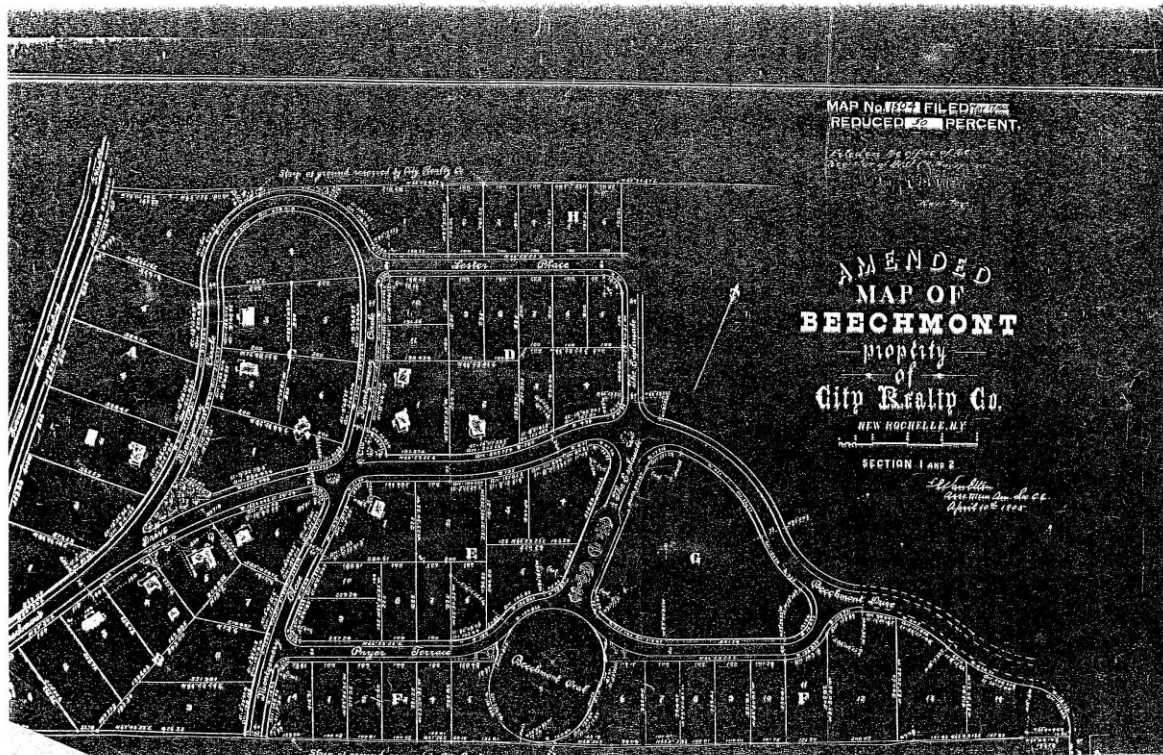
[See Attachment #6](#) Iona Web page; College Announces Major Campus Plan Projects February 23, 2017.

## **PRIVATE LAND USE RESTRICTIONS COVENANTS RUNNING WITH THE LAND**

Covenants running with the land are private restrictions on land use and one of the oldest rights in that bundle of rights comprising real estate ownership; the right to exclude. Covenants were and are a mechanism for property owners to implement a common plan or scheme of development - that by excluding certain uses when subdividing a property, the value of each subdivided parcel is increased. Restrictive Covenants are most commonly found in connection with the subdivision of land into housing subdivisions.

Many of us have come across restrictive covenants in a title report when representing a buyer, seller or lender. If the home being purchased is in an older neighborhood, a review of the restrictive covenant will illustrate what the land use concerns were 60 or 120 years ago. It is not uncommon

to find restrictive covenants prohibiting chicken coops, pig sties, glue factories, bar rooms & ale houses, noxious fumes, tanneries or unsightly erections.



AMENDED MAP OF BEECHMONT  
DATED, APRIL 10, 1905

Beechmont is a residential subdivision planned by the City Realty Company, a corporation formed in 1901 by a prominent local family; Eugene Lambert, an attorney and president of the company and its successor, the Beechmont Association, and his brother, John, a local banker. To create the upscale residential park of Beechmont, the City Realty Company purchased the Pugsley and Montgomery farms comprising approximately 160 acres extending from North Avenue to Highland

(now Mountain) Avenue in the Town of Mamaroneck. As the neighborhood's centerpiece, the Pine Brook was damned to create Beechmont Lake.

The first house lots were sold in 1904. Inserted into the deeds of conveyance was a restrictive covenant utilized in all subsequent lot sales which states that the Buyer (party of the second part):

***“covenants and agrees to and with the party of the first part its successors and assigns, that she shall not or will not at any time hereafter erect or cause, procure or suffer to be erected upon the hereby granted premises any building other than one dwelling house on frontage of less than one hundred feet of .....AND it is expressly understood and agreed that the several covenants on the part of the said part(y) of the second part above specified shall attach to and run with the land and it shall be lawful not only for the City Realty Company of New Rochelle, N.Y. , its successors or assigns but also for the owner or owners of any lot or lots adjoining or in the neighborhood of the premises above described deriving title from or through the said City Realty Company of New Rochelle, N.Y. to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same....”.***

Deed of Conveyance from City Realty Company, to Lucy G. Adams, dated March 8<sup>th</sup>, 1906, conveying lot 2, Block B, on the Amended Subdivision Map of Beechmont, dated April 10<sup>th</sup>, 1905.

[See Attachment #7](#) Deed of Conveyance.

The right to exclude and restrict will be upheld by the courts if the covenant continues to benefit the parties burdened and it does not violate our constitutional right to equal protection under the law. In short, you can exclude uses, but not people.

In addition to restricting the use of land to residential, or single-family houses, restrictive covenants often restrict the type of structure to be built (old covenants - at a minimum cost of \$5,000.00 dollars) - materials to be used, maximum square footage (McMansions), height and front yard setbacks.

To say that a covenant runs with the land means that a piece of property will remain burdened and/or benefited by that covenant even though it is no longer owned by the person who made or received the promise.

But when do they end? When are covenants no longer enforceable? Essentially covenants are no longer enforceable when they become irrelevant; when the scheme of development for which the covenant was implemented is no longer viable; when there is no longer a benefit to be derived; when a significant number of burdened properties are in violation.

See New York Real Property Law §1951(1) &

NEW ROCHELLE CONGREGATION OF JEHOVAH'S WITNESSES, INC. v. THE ROCHELLE PARK ASSOCIATION. Index No.:15818/99

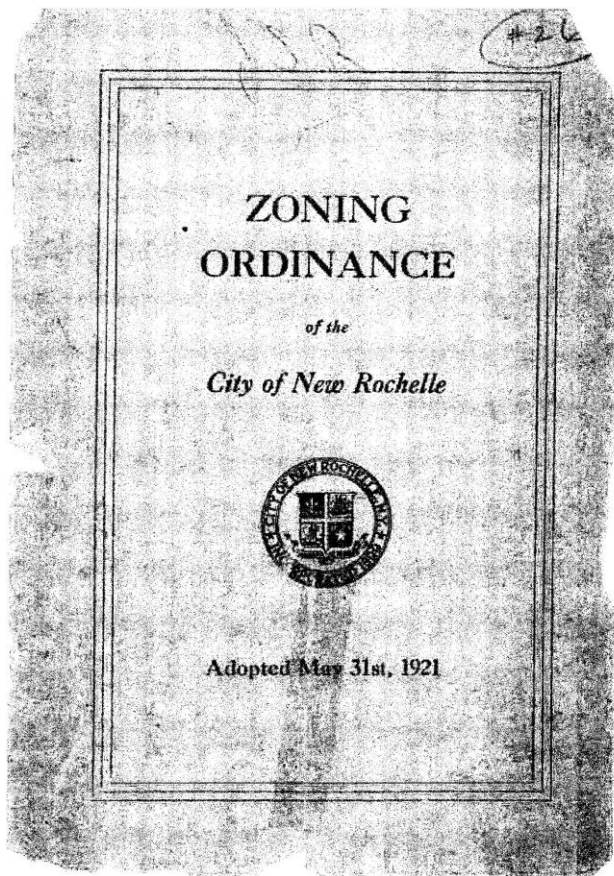


Rochelle Park/Rochelle Heights

- Proposed Church Property
- Existing Nonconformance to Restrictive Covenant

ROCHELLE PARK/ROCHELLE HEIGHTS MAP EXHIBIT FROM PLAINTIFF'S  
MEMORANDUM OF LAW

## GOVERNMENTAL LAND USE RESTRICTIONS – ZONING LAW



### *Zoning Ordinance*



AN ORDINANCE REGULATING AND RESTRICTING THE LOCATION OF TRADES AND INDUSTRIES AND THE LOCATION OF BUILDINGS DESIGNED FOR SPECIAL USES, AND REGULATING AND LIMITING THE HEIGHT AND BULK OF BUILDINGS HEREAFTER ERECTED, AND REGULATING AND DETERMINING THE AREA OF YARDS, COURTS AND OTHER OPEN SPACES SURROUNDING BUILDINGS, AND ESTABLISHING THE BOUNDARIES OF DISTRICTS FOR THE SAID PURPOSES AND PROVIDING PENALTIES FOR THE VIOLATION OF ITS PROVISIONS.

The government at all levels, federal, state, county, local and even by regional agencies, regulates the use of real property. The most direct governmental regulation, however, is at the local level. The power to regulate land derives from the police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Albany v. Anthony, 262 A.D. 401 (3<sup>rd</sup> Dept. 1941); Lawton v. Steele, 152 U.S. 133 (1894).

This power is vested within the states. However, states have generally delegated this power with respect to land to their local governments- cities, towns, villages. Delegation occurs through



enactment of a zoning enabling act, a subdivision enabling act, or similar form of statutory authorization.

Constitution Article IX §2; Municipal Home Rule Law §10(1)(ii)(a)(11,12,14), §10(2), Statute of Local Government §10(6,7); General City Law §20(24,25) and 81-83-a; Town Law §261-281; Village Law §7-700 to 7-742.

Zoning ordinances attempt to control the use of land and structures within designated districts or zones. Zoning regulates such things as use of land, lot sizes, types of structures permitted, building heights and setbacks (minimum distance from the back, front or side property line that a structure may be built) and density (number of units that can be built in an area).

Zoning ordinances generally divide land use in a community geographically into residential, commercial and industrial classifications with many sub-classifications.

In addition to regulating the use, zoning ordinances establish dimensional regulations for each use district:

*Minimum lot size*- before a lot will be permitted to accommodate any building or activity. This is done to reduce density. Lot size minimums run from lows of 2,000 sq. ft. in dense urban areas, to 4 acres up-county and up to 20 or more acres in farm communities.

*Minimum frontage*- minimum width fronting a street- i.e. may need 100 feet frontage or at the building line (setback).

*Height*- i.e. 35 ft. or 2<sup>1/2</sup> stories

*Bulk*- generally regulated as a function of lot size- front, back, side yard requirements.

*Open space-* prohibiting building from occupying more than a certain percentage of the lot. Such open space requirement generally co exist with the yard requirements above, so as to control the placement of the building on the lot.

*Minimum Floor-* Suburban zoning ordinances may reflect a policy of prohibiting residential structures from being too small, rather than too large, and require that residential structures be of a certain minimum size, i.e. 1,000 sq. ft. of floor space. If the requirements are judicially perceived as designed to exclude the poor rather than to prevent overcrowding, it may be held invalid, especially if it is combined with an unjustifiably large minimum lot size. Home Builders League of South Jersey, Inc v. Township of Berlin, 81 N.J.127, 405A.2d 381(N.J. 1979) 416.

*PUD or Cluster Development-* are a more recent innovation to permit more variation while retaining the same planning goals.

Zoning is best known for its creation of use districts; zones where certain activities are prohibited, although identical activities are permitted in other zones elsewhere in the community.

An original premise behind zoning was that some uses of land are incompatible and must be kept separated for the protection of one (or both) uses. In particular, residential areas are deemed to need protection from commercial and industrial intrusion.

In addition to the text of the ordinance there also will be a zoning map showing the location of district boundaries.



Residential uses are commonly subdivided according to intensity. Categories may include single-family, two-family, and multiple family residences (apartments). Other categories may include or exclude different kinds of residential use: hotels, motels, apartment complexes, garden apartments, mobile home parks, boarding houses, fraternity and sorority houses, dormitories and various forms of institutional housing (asylums, orphanages, halfway houses). The exclusions of apartment buildings in single family residential zones has been upheld ever since the United States Supreme Court validated zoning in Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), 420, 466. However, the exclusion of housing which best accommodates low-income persons may be held invalid as exclusionary. See Home Builders League of South Jersey, Inc v. Township of Berlin above at page 7. The controversy surrounding implementation of Westchester County's Settlement with H.U.D. again raised the issue as to whether some of our local zoning ordinances are exclusionary in a manner violating federal law. Meanwhile, the courts continue to uphold classifications of residential zoning based on definition of "family". See Village of Belle Terre v Boraas, 416 U.S. 1, 9, 94 S Ct 1536, 39 L Ed 2d 797 (1974), a case which upheld, as constitutional, a zoning definition of family against a challenge that it violated the equal protection clause.

Is Rice Hall a single family dwelling?

[See Attachment #8](#) "When Zoning and Covenants Conflict" NYTimes May 27, 1984

## **SPECIAL PERMITS, SEQRA, SEGMENTATION, RILUPA, FAR & VARIANCES**

**SPECIAL PERMIT** - Under zoning a use is either permitted as of right, if the Ordinance included it as an allowable activity, or else is absolutely banned. However, not all activities or improvements

are so readily subject to a simple yes/no classification. The Special Permit Use is permitted only after a discretionary decision has been made by the appropriate zoning agency.

The state enabling statutes defined a special use permit as follows:

*“[A]n authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or Local Law and will not adversely effect the neighborhood if such requirements are met.” General City Law §27-b(1); Town Law §274-b(1); Village Law §7-725(b)(1).*

The practitioner must determine through review of the Zoning Ordinance, which Municipal Board has the authority to grant the specific special permit in question. Within the same ordinance, certain special permits may be granted by the Town Board, the Zoning Board or the Planning Board. Where the legislative Board (i.e., City Council or Town Board) retains the authority to grant a particular special permit it need only meet the standards set forth in the state statute. Where the legislative Board has delegated the authority to grant a particular special permit to another Board, such as the Zoning Board of Appeals or Planning Board, the Legislative Board must provide standards of review, which must appear in the ordinance, in order to guide that Board’s decision-making process. The failure to provide suitable standards of review to a non-legislative Board renders the ordinance unconstitutional. Tandem Holding Corp. v. Board of Zoning Appeals Town of Hempstead, 43 N.Y. 2<sup>nd</sup> 801 (1997).

New Rochelle Zoning Ordinance § 331-86 **General Provisions.**

*Special permit uses for which conformance with additional requirements is mandated by this chapter shall be deemed to be permitted uses in their respective districts, subject to the satisfaction of the conditions and standards set forth in this section, in addition to all other requirements of this chapter. All such uses are declared to possess characteristic of such unique and special form that each specific use must be considered as an individual case.*

[See Attachment #9](#) New Rochelle Zoning Ordinance §331-87 **Approving Agencies.**



New Rochelle Zoning Ordinance § 331-89 **General standards.**

[Amended 6-14-2005 by L.L. No. 2-2005]

*All special permit uses shall comply with the following standards in addition to all other requirements of this chapter. The approving agency shall attach such additional conditions and safeguards to any special permit as are, in its opinion, necessary to insure initial and continual conformance to all applicable standards and requirements of this or other applicable codes.*

*A. The location and size of the special permit use, the nature and intensity of the operations involved in or conducted in connection with it, the size of the site in relation to it and the location of the site with respect to streets giving access to it are such that it will be in harmony with the appropriate and orderly development of the area in which it is located.*

*B. The location, nature and height of buildings, walls and fences and the nature and extent of existing or proposed plantings on the site are such that the special permit use will not hinder or discourage the appropriate development and use of adjacent land and buildings.*

*C. Operations in connection with any special permit use will not be more objectionable to nearby properties by reason of noise, traffic, fumes, vibration or other such characteristics than would be the operations of permitted uses not requiring a special permit.*

*D. The Department of Development shall render an advisory opinion to the approving agency, on the request of such agency, with respect to traffic, planning and other factors relating to an application for a use allowed by special permit in this zoned district or any less restrictive zoned district.*

**SEQRA** - The New York State **E**nvironmental **Q**uality **R**evue **A**ct – NYS ECL Article 8 is both a law and process that requires the consideration of environmental factors early in the planning stages of actions that, inter alia, require approval of City Council, Planning or Zoning Appeal Boards.

Type II is an action that requires no further review because it is deemed to not have a significant impact on the environment such as a “set-back” variance, construction of most accessory structures, a two(2)-lot subdivision or site-plan approval for one(1) or two(2)-family house.

All other actions require processing per SEQRA.

When two or more Boards or Departments are involved in a project, designation of lead agency is necessary.

After receipt of a complete application and designation of Lead Agency, the Lead Agency must make a “determination of significance” which can be either a “Negative Declaration” or a “Positive Declaration”.

A “Negative Declaration” means that an action will not have a significant adverse impact on the environment. A “Positive Declaration” means that the proposed action has potential for significant adverse impact on the environment. Once a “Positive Declaration” is made, an application cannot be further processed until an Environmental Impact Statement is prepared.

What is the standard of review by a Court of a SEQRA dispute? SEQRA doesn’t specify, so general administrative law standards apply. Thus, the courts will be very deferential “unless something smells really bad”. P. Daniel Hollis, 111, Esq., Zoning Update: Zoning Board of Appeals and Planning Board Cases. CLE for the Mamaroneck/Harrison/Larchmont Bar Association, March 4<sup>th</sup>, 2016.

[See Attachment #10](#) New Rochelle Planning Board’s “Positive Declaration”, Resolution No.150-2017 adopted 11/28/2017.

**SEGMENTATION** – The division of the environmental review of an action such that various activities or stages are addressed [for purposes of environmental quality review] as though they were independent, unrelated activities, needing individual determinations of significance. 6 N.Y.C.R.R. §617.2. Segmentation “is impermissible when the environmental review of an action is divided into smaller stages in order to avoid the detailed review called for under SEQRA.” Friends of Stanford Home v. Town of Niskayuna, 50 A.D.3d 1289, 857 N.Y.S.2d 249, 251 (3<sup>rd</sup> Dept. 2008).

“The regulations generally prohibiting segmentation are designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full blown review.”

Long Island Pine Barrens Soc., Inc. v. Planning Bd of Town of Brookhaven, 204 A.D.2d 548, 611 N.Y.S.2d917, 919 (2d Dept. 1964).<sup>3</sup>

**RLUIPA**- Congress adopted the Religious Land Use and Institutionalized Persons Act in 2000 (42 U.S.C.2000cc, Pub. L. 106-274, September 22, 2000, 114 Stat. 803) after the U.S. Supreme Court struck down the Religious Freedom Restoration Act of 2000. City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed 2d 624(1997). The federal statute protects the practices of religious institutions from land use regulations that impose a “substantial burden” on religious exercise.

One of the most significant aspects of RLUIPA is that once a religious institution carries its burden of establishing that a regulation substantially burdens the exercise of religion, the burden shifts to the government to defend the regulation.

RLUIPA, therefore, applies to a broad range of activities regulated by various levels of government which have jurisdiction over land use. Zoning variances, site plan approval and special permits are among the areas of regulation that most frequently create a forum for a claim of RLUIPA violations. Zoning ordinances must be drafted in a manner that does not discriminate against religious exercise. Municipalities must, among other things, be certain that permitting requirements do not single out religious institutions and practices and that such permitting requirements are related in some way to potential impacts of the use. The boards and commissions which implement and interpret zoning ordinances and other land use regulations must also be sensitive to the potential for a claim that the zoning ordinance has been implemented in a manner that discriminates against religious exercise.

<sup>3</sup> Memo From: David Steinmetz, Esq. and Kate Roberts, Esq. to Darius Chafizadeh, Esq., dated June 28, 2017.

**FAR** - Floor Are Ratio - regulates the overall bulk of a building according to the size of the lot, without determining its precise shape. Namely, a ratio of 2:1 permits the lot owner to erect a building containing 2 sq. ft. of floor space for every 1 sq. ft. of lot area- So a 2-story building could cover the entire parcel, an 8-story building could only cover 25% of the lot, etc.

**VARIANCES** - An application to vary the law. A zoning ordinance must provide that a property owner may be entitled to a variance if he/she would unnecessarily suffer hardship from strict enforcement of the ordinance. The granting of a variance(s) will permit the property owner to deviate (to vary) from the law in respect to some aspect of lot or building dimensions or activity/use requirements;

or

An authorization for construction or maintenance of a building or structure, or for the establishment or maintenance of a use/activity which is prohibited by the Zoning Ordinance. New York Zoning Law Practice, 4<sup>th</sup> Edition, Vol. 2 §29.02.

Zoning is characterized by pre-set regulations that are applicable uniformly within each district; it is precisely this general applicability that creates a need for variances. Variances are a safety valve designed to assure the constitutionality of zoning. The power to grant variances is limited to cases where a literal application of the ordinance would result in unnecessary hardship and where it is determined that the requested relief will observe the spirit of the ordinance (comprehensive plan), secure the public health, safety and welfare, and preserve and protect the character of the neighborhood. Town Law §267(5); Village Law §7-712; General City Law §81(4): See also, Gregory v. Town of Cambria, 115 A.D. 2<sup>nd</sup> 288 (4<sup>th</sup> Dept. 1985), appeal granted, 67 N.Y. 2<sup>nd</sup> 607 (1986), and order affirmed 69 N.Y. 2<sup>nd</sup> 655 (1986).

It is important to note that the circumstances giving rise to this hardship must be unique to the parcel- not the applicant- namely, the variance runs with the land and can not be made personal to the applicant.

Where development proceeded zoning law there are frequently more variance applications.

There are two (2) types of variances:

**Use Variance** - A “use” variance is defined in the statute as “the authorization by the Zoning Board of Appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.” Town Law §267: Village Land §7-712; General City Law §81-b.

The enabling statutes (Town Law §267-b (2); Village Law §7-712-b(2)(b); General City Law §81-b(3)(b)) set forth the following as the standard for the consideration and granting of use variances:

*“No such use variance shall be granted by a Board of Appeals without a showing by the applicant that applicable zoning regulations have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the Board of Appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located (I) **the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;** (ii) **the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;** (iii) **the requested use variance, if granted, will not alter the essential character of the neighborhood;** and, (iv) **the alleged hardship has not been self-created.**” See also, Friends of Lake Mahopac v. ZBA of the Town of Carmel, 2005 WL 301073(2<sup>nd</sup> Dept, February 7, 2005).*

The Zoning Board of Appeals is also mandated to “grant the minimum variance it deems necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.”



**Dimensional (Area Variance)** - An “area” variance is described as the authorization by the Zoning Board of Appeals for the use of the land in a manner which is not allowable by the dimensional or physical requirements of the applicable zoning regulations.

Until the adoption of 1992 amendments to the state enabling statutes, common law interpretations by various Courts created a rule that area variances could be granted upon a showing, by substantial evidence, that literal application of the zoning regulations would result in “practical difficulties.” Wilson v. Town of Mohawk, 246 A.D. 2<sup>nd</sup> 762(3<sup>rd</sup> Dept. 1998); Village of Bronxville v. Francis, 1 A.D. 2<sup>nd</sup> 236(2<sup>nd</sup> Dept. 1956). This rule was affirmed by the Court of Appeals at 1 N.Y. 2<sup>nd</sup> 839(1956) and again in Pondfield Road Co. v. Village of Bronxville, 1 N.Y. 2<sup>nd</sup> 841(1956).

In 1992, the enabling statutes were amended, and at this time the statutes set forth a five prong test for the consideration of area variances. General City Law §81-b; Town Law §267-b; Village Law §7-712-b. The adoption of this statutory framework was not primarily intended to raise or lower the bar with respect to the approval of area variances. Rather, it was enacted in order to codify and clarify inconsistent rules which had been adopted by the various Courts of the state. The requirement that an applicant show practical difficulties or significant economic injury *no longer exists* and is replaced by the following 5 factor balancing test:

- **Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;** See, Cassano v. ZBA of the Incorporated Village of Bayville, 263 A.D.2d 506, 693 N.Y.S.2d 621 (2d Dept. 1999); Sorby v. ZBA Town of Mount Pleasant, 289 A.D.2d 410, 734 N.Y.S.2d 888 (2d Dept. 2001); Heitzman v. Town of Lake George ZBA, 309 A.D.2d 1126, 766

N.Y.S.2d 452 (3d Dept. 2003). Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002); Buckley v. Amityville Village Clerk, 264 A.D.2d 732, 694 N.Y.S.2d 739 (2d Dept. 1999); Korean Evangelical Church of Long Island v. Board of Appeals of the Village of Westbury, N.Y.L.J. Feb. 28,1996, p. 31, col. 2 (Sup. Ct. Nassau Co, 1996); SoHo Alliance v. NYC Board of Standards and Appeals, 264 A.D.2d 59, 703 N.Y.S.2d 150(1<sup>st</sup> Dept. 2000) Tall Trees Construction Corp. v. ZBA Town of Huntington, 97 N.Y.2d 86,735 N.Y.S.2d 873 (2001); and,

- **Whether the benefits sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance;** See, Tanglewood Shopping Center v. Cianciulli, 224 A.D.2d 432, 637 N.Y.S.2d 756 (2d Dept. 1996); Witzl v. Zoning Board of Appeals of Town of Berne, 256 A.D.2d 775, 681 N.Y.S.2d 634 (3d Dept. 1998); Weisman v. ZBA Village of Kensington, 260 A.D.2d 487, 688 N. Y .S.2d 215 (2d Dept. 1999); Robbins v. Seife, 215 A.D.2d 665, 628 N.Y.S.2d 311 (2d Dept. 1995); Baker v. Brownlie, 248 A.D.2d 527,670 N. Y.S.2d 216 (2d Dept. 1998) Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. ZBA of Town/Village of Harrison, 296 A.D.2d 460, 745 N.Y.S.2d 76 (2d Dept. 2002); and,

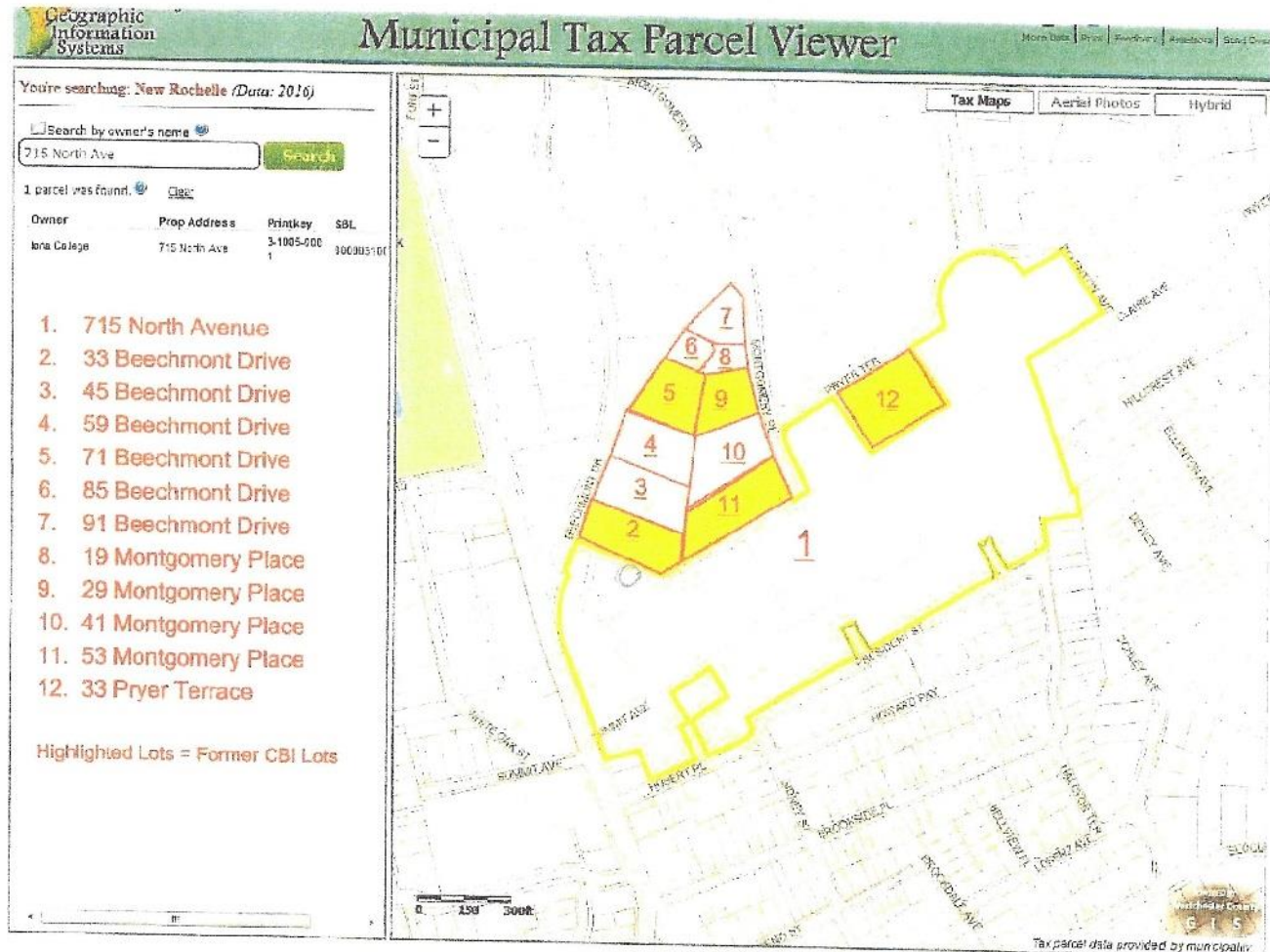
- **Whether the requested area variance is substantial;** See, Biscardi III v. ZBA of the Town of Hype Park, 288 A.D.2d 215,733 N.Y.S.2d 105(2d Dept. 2001); Sautner v. Amster, 284 A.D.2d 540,728 N.Y.S.2d 54 (2d Dep't 2001); Kelinhaus v. Zoning Board of Appeals of the Town of Cortlandt, N.Y.L.J March 26, 1996, p. 37, col 7 (Sup. Ct. Westchester Co. 1996); Raubvogel v. Board of Zoning Appeals of the Village of Brookville, N.Y.L.J. Dec. 27,1995, p. 33, col. 2(Sup. Ct. Nassau Co. 1995); Becvar v. Scheyer, 250A.D.2d 842, 673 N.Y.S.2d 210(2d Dept. 1998); Tetra Builders, Inc. v. Scheyer, 251 A.D.2d 589, 674 N.Y.S.2d 764 (2d Dept. 1998); Sexton v. ZBA of the Town of Oyster Bay, 300 A.D.2d 494,751 N.Y.S.2d 595 (2d Dept. 2002); and,

- **Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district;** See. Gregory v. ZBA of

the Town of Somers, 270 A.D.2d 419, 704 N.Y.S.2d 638 (2d Dept. 2000) (obstruction of access for emergency vehicles); Rogers v. Baum, 234 A.D.2d 685, 650 N.Y.S.2d 452 (3d Dept. 1996) (grading, erosion, runoff, stability of fill); Hampshire Mgmt. Co. v. Nadel, 241 A.D.2d 496, 660 N.Y.S.2d 64 (2d Dept. 1997)(traffic); Icahn v. ZBA of the Village of East Hampton, 12/31/98 N.Y.L.J. 30:1(Sup. CT. Suffolk Co.)(erosion); Westervelt v. ZBA of the Town of Woodbury, 7 A.D.3d 964, 776 N. Y.S.2d 487 (2d Dept. 2004); Frank v. Scheyer , 227 A.D.2d 558,642 N.Y.S.2d 956 (2d Dept. 1996); and,

- **Whether alleged difficulty was self created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance;** See. Mobil Oil Corp. v. Village of Mamaroneck Board of Appeals, 293 A.D.2d 679,740 N.Y.S.2d 456 ((2d Dep’t 2002); Ron Rose Group, Inc. v. Baum, 275 A.D.2d 373, 712 N.Y.S.2d 174 (2d Dep’t 2000); Weisman v. ZBA of the Village of Kensington, 260 A.D.2d 487,688 N.Y.S.2d215 (2d Dep’t 1999); McGlasson Realty, Inc. v Town of Patterson Board of Appeals, 234 A.D.2d 462, 651 N.Y.S.2d 131 (2d Dep’t 1996); Monte v. Edwards III, 256 A.D.2d 695, 685 N.Y.S.2d 479 (2d Dep’t 1999); Carlucci v. Board of Zoning Appeals of the Town of Philipstown, 205 A.D.2d 688, 613 N.Y.S.2d 665 (2d Dep’t 1994).

## MERGING RESIDENTIALLY RESTRICTED TAX LOTS IONA COLLEGE V THE CITY OF NEW ROCHELLE



MAP OF 11 BEECHMONT LOTS AND CAMPUS LOT

Customarily when litigation is commenced against a municipality involving Land Use Restrictions, it's because of an unfavorable decision by a City Council, Planning Board, or most typically, a BAZ, not because of a Tax Assessor's refusal to merge 12 tax lots.



### HAGAN EXPANSION

715 North Avenue, the property purchased by the Christian Brothers, is situated between two (2) residential subdivisions, Beechmont & Halcyon Park, both of which were fully developed by the time Iona College opened in 1940. From New Rochelle's 1<sup>st</sup> Zoning Ordinance in 1921 through today, the property owned by the Christian Brothers or Iona College at or abutting 715 North Avenue has been situated in residential zoning districts split between the current R1-15 (Beechmont) and R2-7 (Halcyon Park). Over the years, the Christian Brothers or College have purchased a total of 43 houses abutting the main campus; 21 in Beechmont and 22 on Hubert and President Streets

When the Christian Brothers or Iona purchased these houses in Halcyon Park and Beechmont, the purchase and subsequent ownership was and is made subject to the applicable restrictive covenants and zoning law.

The expansion of Hagan & Spellman exceeds the FAR and height limitations of the existing zoning.

On November 9, 2016, the College petitioned City Council to amend the Zoning Ordinance allowing additional FAR and height for the Hagan & Spellman expansions via a newly created special permit process, but was unable to obtain the support of a single Council member required for an amendment to the Ordinance.



When the Tax Assessor refused to accept the College's tax lot merger application, Iona College commenced litigation against the City of New Rochelle in State Supreme Court.

**New Rochelle Zoning Ordinance § 331-91 Establishment of new or expansion of existing universities, colleges and private school campuses in residential districts.**

*B. A special permit shall be required for a new or the expansion of an existing university, college and private school campus in residential districts. Expansion shall include the merger of lots adjacent to the existing campus.*

*[Amended 11-15-2016 by Ord. No. 233-2016; 4-19-2017 by Ord. No. 80-2017]*

*(1) A campus site plan shall be required that includes a facility-wide site plan, and related narrative at a suitable level of detail to describe specific land uses within the campus that are existing and a schedule for development for those uses that are proposed. The site plan shall include the graphic illustration of major buildings, internal roadways (including circulation pattern), parking areas, open spaces, recreational fields, dormitories, classrooms that includes a tabular calculation of building square footage, number of parking spaces, and percent of open space.*

*(2) The institution shall be chartered by the Board of Regents of the State of New York and shall be operated in accordance with the requirements of the New York State Education Department.*

*(3) The minimum site area shall be in no case less than the minimum site area standards as recommended for public schools by the New York State Department of Education.*

*(4) The total building coverage of all principal and accessory buildings shall not exceed 25% of the total campus area.*

*(5) Outdoor playing fields shall be set back from neighboring streets and property lines by at least 50 feet and shall be screened from public view with fencing and/or buffer landscaping, all in accordance with § 331-119B of this chapter.*

*(6) The minimum number of off-street parking and loading spaces shall be provided in accordance with the requirements of Article XIV of this chapter.*

*(7) Exterior lighting shall be so placed and shielded as to reflect the source of light away from residential property and be limited to illuminating the subject property without spilling over across property boundaries.*

*(8) If the proposed use is an expansion of the educational use, then the applicant must show the need to expand into a residential area rather than into a less restrictive business area. No special permit shall be granted by the City Council unless the applicant can demonstrate that there is no reasonable alternative to location or expansion on the site proposed.*

*C. The City Council, in considering the request for a special permit, may impose conditions it deems necessary to protect the health, safety and public welfare of the neighboring residents and the City.*

[See Attachment #11](#) Application Denial from the Bureau of Buildings, dated August 10, 2017

**CITY OF NEW ROCHELLE  
DEPARTMENT OF DEVELOPMENT  
BOARD OF APPEALS ON ZONING AGENDA**

**NOTICE IS HEREBY GIVEN** pursuant to Chapter 331, Article XV, Section 134, of the Zoning Chapter of the New Rochelle Code, that a Regular Meeting will be held by the Board of Appeals on Zoning, in Meeting Room, B-1, City Hall, 90 Beaufort Place, New Rochelle, New York on **Tuesday evening, June 5, 2018 at 7:00pm** for the adjourned cases and new cases regarding the applications listed below. The BAZ welcomes all written comments from the public on applications to be heard by the Board. Time Permitting, we will welcome comments to the Board delivered orally at the hearing. The Chair reserves the right to limit the time and number of speakers on any matter before the Board:

**ADJOURNED CASES**

**CASE #41-2017 IONA COLLEGE (KATHLEEN MCELROY)**, for permission to construct a 32,840 sq. ft. addition to the existing Hagan Hall business school and completely renovate Hagan Hall; whereas the proposed FAR of .397 is greater than the .376 maximum allowed; whereas the proposed 4 story addition to building is greater than the maximum 3 stories that are permitted; whereas proposed building height of 52' ± is greater than the maximum allowable height of 35' in an R1-15/R2-7.0 Zoned District, at the premises **715 North Avenue, Block 1005, Lot 1 [area variance]**

[See Attachment #12](#) Settlement Agreement, dated April \_\_, 2018, by and between the City of New Rochelle and Iona College.

[See Attachment #13](#) "Notice" of Application by Iona College for Site Plan approval from the New Rochelle Planning Board, dated May 7, 2018.

[See Attachment #14](#) Letter from Gregory T. Varian to the New Rochelle Planning Board, dated May 22, 2018.



**CURRENT PICTURE OF IONA / HUBERT AND PRESIDENT STREETS**

**THE FUTURE - LITIGATION OR COOPERATION?**