

James R. Loeb
Richard J. Drake, *retired*
Glen L. Heller*
Marianna R. Kennedy
Gary J. Gogerty
Stephen J. Gaba
Adam L. Rodd
Dominic Cordisco
Ralph L. Puglielle, Jr.
Alana R. Bartley**
Aaron C. Fitch

Judith A. Waye
Sarah N. Wilson
Michael J. Barfield **

Jennifer L. Schneider
Managing Attorney

*L.L.M. in Taxation
**Member NY & NJ Bar

September 27, 2023

ATTN: MICHAEL NEWHARD, Mayor
Village Board of Village of Warwick
Village Hall
77 Main Street - PO Box 369
Warwick, New York 10990

Re: Warwick LLC Request for Special Use Permit
8 Forester Avenue : Section 207, Block 3, Lot 3
Our File No.: 14562-73000

Dear Mayor Newhard:

The application of Warwick LLC for a special use permit to convert existing office space on the first floor of the building at 8 Forester Avenue into three one-bedroom apartments and to add a second floor with three additional one-bedroom apartments has been referred to this office for review and comment.

Applicable Zoning:

The subject property is located in a Central Business District ("CB"). The proposed project is essentially conversion of existing office space into a six-unit apartment building (i.e., a "Multiple Residence" under the Village Zoning Code). The Table of Use Requirements in the Village Zoning Code lists Multiple Residence as a use permitted in the CB District subject to grant of a special use permit from the Village Board in accordance with Article XVI as well as grant of site plan approval by the Planning Board.

SEQRA Review:

Under the SEQRA Regulations (6 NYCRR §617.5) construction of a one-, two- or three-family residence on an approved lot constitutes a Type II (i.e., exempt) Action. However, here, the applicant proposes construction of a six-unit apartment building. According, this project is an "Unlisted" Action under SEQRA, and must be subjected to SEQRA review prior to consideration of grant of any land use approvals.

I suggest that the Village Planning Board would be the most appropriate involved agency to act as Lead Agency in SEQRA review. If the Planning Board has not already circulated for Lead Agency status, the Village Board may wish to consider adopting a resolution requesting the Planning Board to do so.

I note that there is an alternative possible approach to SEQRA review in this matter. Because the project is an Unlisted Action, the Village Board could elect to conduct an "Uncoordinated Review" on this application; which would mean that the Village Board and the Planning Board would conduct their own separate SEQRA reviews. While there are sometimes practical reasons for taking such an approach, I don't believe that such circumstances exist in this case, and so I cannot recommend that the Village Board undertake an Uncoordinated SEQRA review.

General Municipal Law §239-m:

Pursuant to General Municipal Law §239-m, notice of certain land use applications, including special use permits, must be referred to the County Planning Department for consideration if they meet certain criteria. Among the criteria is location of the subject property within five hundred feet (500') of any boundary of the village or of any county or state roadway.

While Forester Avenue is a Village Street, to the west of the subject property is Main Street which is NYS Route 94. The Village Board will need to ascertain whether the subject property is within 500' from Main Street or any other state or county road. If it is, a referral to the County Planning Department under General Municipal Law §239-m will be necessary.

Special Use Permit Procedure & Criteria:

The procedure for processing an application for grant of a special use permit is set forth in Village Code §145-161. Under the Village Code, an applicant for a Special Use Permit must simultaneously submit the application for a special use permit to the Village Board and the application for site plan approval to the Planning Board. Before the Village Board considers or reviews the special use permit application, the Village Planning Board must refer the site plan application to the Village's Architectural and Historic District Review Board (AHDRB).

Here, the AHDRB has reviewed the application and it issued a report on September 21, 2023. Under the Village Code, upon receipt of the report of the AHDRB, the Village Board is supposed to schedule a public hearing on the application. However, until the issue of whether the Village Board or the Planning Board is going to act as lead agency in SEQRA review, the Village Board would be within its rights in delaying scheduling a public hearing.

If it wishes to do so, the Village Board could schedule the public hearing now simply to complete it with the understanding that the Village Board cannot take action on the application until SEQRA review is complete. But, I cannot recommend this approach because, although it expedites review of the application, it often leads to a disjointed and confused review process.

When the Village Board decided to schedule the public hearing, the applicant is required to mail notice of the public hearing via certified mail at least ten (10) days before the hearing and to all property owners within three hundred feet (300') of the property line of the applicant's property. Additionally, notice of the public hearing must be published in the Village's newspaper of record at least five (5) days prior to the hearing.

Further, the Code provides that at least 10 days prior to the public hearing, the notice of the hearing must Village Board shall mail notice thereof to the Orange County Planning Board "as required by section 239M of the General Municipal Law." It is unclear to me whether this notice is to be mailed only in cases where a referral is required by General Municipal Law §239-m, or if it must be made even if referral under GML §239-m is not legally required. But my recommendation is to mail the notice even if referral under GML §239-m is not legally required.

For properties lying within 500 feet from a municipal boundary of the Village and the Town of Warwick, notice of the public hearing must be mailed to the Town Planning Board at least ten (10) days prior to the public hearing. But the subject property in this matter is not near any boundary of the Village, so there is no need to send a notice to the Town.

Article XVI does not set forth any criteria for consideration by the Village Board at the public hearing. However, as is discussed below, Article XII of the Village Code sets forth a general criterion for grant of special use permits.

After the public hearing has been held and closed, the Village Board is to render a decision within sixty-two (62) days. However, there is no penalty or default approval if the Village Board fails to act within the prescribed time period. At most, the applicant would be entitled to commence an Article 78 proceeding for a court order directing the Village Board to issue a decision.

Under Village Code §145-20, in considering whether to grant or deny an application for a special use permit, the Village Board needs to make a finding as to whether each of the following criteria has been met:

- A. Whether the location, size and character of the proposed use will be in harmony with the appropriate and orderly development of the district in which it is proposed to be situated and not be detrimental to the site or adjacent properties in accordance with the zoning classification of such properties.
- B. Whether the location and size of the proposed use, the nature and intensity of operations involved in or conducted in connection therewith, its site layout and its relation to access streets shall be such that both pedestrian and vehicular traffic to and from the use and the assembly of persons in connection therewith will not be hazardous.

- C. Whether the location and height of buildings, the location, nature and height of walls and fences and the nature and extent of landscaping on the site shall be such that the use will not hinder or discourage the development and use of adjacent land and buildings; and
- D. Whether the proposed use will not require such additional public facilities or services, or create such fiscal burdens upon the Village greater than those which characterize uses permitted by right.

The Village Board is authorized to impose reasonable conditions to ensure that the above-listed criteria will be met and/or if it deems such conditions necessary or appropriate to promote the public health, safety and welfare and to otherwise implement the intent of the Village Code.

After the Village Board renders its decision on the application, a copy of the decision must be filed with the Village Clerk, the Planning Board Secretary, and the Code Enforcement Officer, with a copy being mailed to the applicant within five (5) business days.

Status of the Current Application:

It appears from the report of the Village's Engineering Consultant that Warwick LLC has submitted at least a site plan application form to the Planning Board in addition to submitting his application to the Village Board for a special use permit. With the AHDRB having rendered a report, the next step in processing this application is addressing SEQRA review. The Village Board may either defer scheduling a public hearing on the special use permit application until after SEQRA review has been completed, or it may hold the public hearing before SEQRA review is completed. But the Village Board cannot take action on (i.e., make a decision on) the special use permit application until SEQRA review has been completed.

It appears from the report of the Village's Engineering Consultant there is a substantial amount of important information which still needs to be supplied regarding this project. Particularly, additional information is required in regard to the compliance with the Village Zoning Code's bulk requirements and parking requirements. The Village Board may wish to require the applicant to submit the information referenced in the report of the Village's Engineering Consultant before scheduling a public hearing.

When the application is ready for a public hearing upon it, the considerations at the public hearing, aside from the issue of providing adequate notice, will not be legal but, rather, will be substantive (i.e., whether the above-listed criteria has been met or not). Once the public hearing has been closed, the Village Board can act on the application.

ATTN: MICHAEL NEWHARD, Mayor
September 27, 2023
Page 5

If you have any questions or comments just let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Gaba", with a long horizontal flourish extending to the right.

STEPHEN J. GABA

SJG/ev/1201966

cc: David A. Getz PE