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**MEMORANDUM
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

To: Town of North Castle Planning Board

From: Linda B. Whitehead, Esq.

Date: September 22, 2023

Re: 11 Whippoorwill Lane

I have been retained as special counsel to the Planning Board to review the legal issues relating to the legality of the lot at 11 Whippoorwill Lane (the "Lot") and rights of access thereto. Based on the analysis set forth below, it is my opinion the Lot is a legal non-conforming lot with a legal frontage on a mapped road and a right of access over Whippoorwill Lane and the strip of land adjacent to the Lot which is a part of the property at 9 Stone Hollow Way (the "Stone Hollow Strip"), and that the owner has the right to improve the portion of the 9 Stone Hollow Strip as shown on the proposed plans. I am attaching a separate document with the various maps and documents referenced below.

In undertaking this review, I have reviewed the applicant's plans submitted as well as correspondence submitted by and on behalf of various neighbors, the Town's consultants' memoranda, and the relevant law and recorded documents.

The Lot and all of the surrounding area, including what is now Whippoorwill Lane, was owned by Whippoorwill Corporation ("Whippoorwill") in the 1930's. The Lot was created by Whippoorwill by file map #3585 filed in 1930 after approval by the North Castle Planning Commission. The Lot is shown as lot K-4 thereon (map and an enlarged portion showing the lot is attached). The adjacent property at 9 Whippoorwill Lane is shown as Lot K-5. The area which is now the Stone Hollow Strip (and more) is shown on this map as Road K, and runs along the easterly side of the Lot and the adjacent lot K-5 (9 Whippoorwill Lane). Other lots on this map no longer exist in the same configuration as shown on the 1930 map. Road E on map #3585, which ran to the west of the Lot, is now in part Stone Hollow Way, but ends in a cul-de-sac before reaching the Lot. See map #19840 attached.

NY Town Law Section 279 titled Subdivision Review; record of plats, subsection 3 provides as follows:

3. Effect of filing. After such plat is approved and filed, the streets, highways and parks shown on such plat shall be and become a part of the official map or plan of the town.

Therefore the Stone Hollow Strip, by virtue of being a road (Road K) on a filed subdivision map, became a street on the official map of the town, and the Lot therefore has frontage on a mapped street shown on a filed subdivision plat. To this end, the Town Tax maps as shown on the Westchester County GIS maps show Stone Hollow Way as a road extending from the terminus of the Stone Hollow Way cul-de-sac past 11 and 9 Whippoorwill Lane, all the way through to Whippoorwill Lane and out to Whippoorwill Road.

Town Law Section 280-a, subsection 1, states that no permit shall be issued for any building unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan, or if there is no official map or plan, a street shown on a duly filed plat. This requirement is clearly satisfied by virtue of the Stone Hollow Strip, then known as Road K, being shown on the filed plat and the Lot fronting on such mapped road. Subsection 2 of Section 280-a goes on to say that before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the planning board, in accordance with standards and specifications approved by the town board, as adequate in respect to the public health, safety and general welfare for the special circumstances. The Kellard Sessions August 4, 2023 memorandum states that the portion of the Stone Hollow Strip to be improved is proposed to be 18 feet in width, greater than the 14 feet required by the Town standards for private roads. The Planning Board is authorized to require a bond to ensure the completion of this work.

The correspondence submitted on behalf of the neighbors indicates a variance under Section 280-a from the Zoning Board is required here. Such an application is only required when the property does not front on a mapped street and has access only by way of an easement. As set forth, that is not the case here.

Based on the above, the Lot has frontage on a street on a filed map, and the requirements of Town Law Section 280-a are satisfied, provided the Planning Board finds the Stone Hollow Strip to be suitably improved.

The next issue to be reviewed is the right of the owner of the Lot to improve the Stone Hollow Strip to provide access. When a lot is shown fronting on a street on a filed plat or map, as in this case, the lot is considered to have a right of access over the mapped street, and the right to improve the mapped street to provide access. Therefore, again by virtue of the filed plat the owner has a right to use and improve the mapped street. I have reviewed the Easement and Release Agreement between the owner of 9 Stone Hollow Way and the prior owner of the Lot. While this easement was not necessary to provide the owner of the Lot with the right to use the Stone Hollow Strip for access, it clearly does do so. The more important portion of this Agreement for the owner of 9 Stone Hollow Way is that the owner of the Lot released its rights to use the balance of the Stone Hollow Strip, which could have been utilized for access to the Lot extending from Stone Hollow Way. Therefore, the owner of 9 Stone Hollow Way greatly benefited from this Agreement, granting to the owner of the Lot rights it already had by law, while in exchange having the owner of the Lot give up other rights over their property. While this Easement is not needed to provide a right of access, it clearly gives the Lot a right of ingress and egress, including vehicular ingress and egress. The Agreement also clearly anticipates work being done in the Easement Area in the paragraph referencing indemnification for any work. In addition vehicular ingress and egress could not be accomplished without improving the Easement Area. Therefore there is no basis for the claim that the owner of the Lot does not have the right to improve the Easement Area.

The Lot has a right of access over the Stone Hollow Strip and the right to improve same to provide such access by virtue of the Lot being shown on a filed plat fronting on the mapped street which includes the Stone Hollow Strip.

Finally I will address the right of the owner of the Lot to utilize Whippoorwill Lane to access the Stone Hollow Strip and the Lot. The Lot was conveyed by Whippoorwill to Walter N. Ruth in 1932 by deed recorded at liber 3276 page 76. This deed (attached) includes “an easement for ingress to and egress from the premises above described over and along such private roads as now or may hereafter exist connecting the said premises with the public highways.” The Grantor also reserved for itself the right to change the location of such roads. Whippoorwill owned a substantial portion of the area, including what is now Whippoorwill Lane and the Lot, and a number of roads were built over the land to access the lots created by Whippoorwill.

Clearly in order to access the Stone Hollow Strip, the Lot requires a right of access over Whippoorwill Lane, which connects Whippoorwill Road to the Stone Hollow Strip. The issue then becomes how to get to this strip which lies at the end of what is now known as Whippoorwill Lane.

I have further reviewed the origins of Whippoorwill Lane and the rights of access over same. Provided herewith is filed map #5386 filed in 1941 which shows what is now Whippoorwill Lane extending up to the end of Road K from Whippoorwill Road. Also provided herewith is an Agreement recorded at Liber 3923 page 466 between Whippoorwill Realty Co. Inc. and Reggie Morgan Lulejian. This Agreement refers to the road on map #5386, states that Whippoorwill Realty Co. is the owner of it and is causing the map to be filed. Whippoorwill Realty Co. is a successor to Whippoorwill Corporation, having taken title to all of Whippoorwill Corporation’s property after Whippoorwill Corporation filed bankruptcy in 1934. Therefore, this right of way was clearly part of property owned by Whippoorwill, and would therefore have been one of the “private roads as now or may hereafter exist connecting the said premises with the public highways” which the Lot would have a right of ingress and egress over. There is additional support to indicate various parties as successors to these rights in deeds from Whippoorwill Holdings as successor to Whippoorwill Realty to Edlar Realty Corp., and a reference in an easement from Edlar Realty Corp. (which at one time owned Road K) to Con Edison which refers to Map #5386 and Road K beginning at the end of the road shown on the map. In addition, as set forth above, the Town Tax maps as shown on the Westchester County GIS maps show Stone Hollow Way as a road extending from the terminus of the Stone Hollow Way cul-de-sac past 11 and 9 Whippoorwill Lane, all the way through to Whippoorwill Lane and out to Whippoorwill Road, evidencing that this is a continuous mapped road providing access.

Based upon this analysis it is clear that the Lot has a right of access over Whippoorwill Lane to the Stone Hollow Strip.

Interestingly, there are references in various deed descriptions that indicate Road K actually extended in the area of Whippoorwill Lane, but I have been unable to find that filed map. I would be happy to point out the references.

In further support of the opinions set forth above, I note that 9 Whippoorwill Lane was developed also utilizing a portion of the Stone Hollow Strip, and gaining access over Whippoorwill Lane, both in the same manner as now proposed for 11 Whippoorwill Lane.

I look forward to appearing at your meeting on September 28 and reviewing this matter with you.