

Note.—This resolution is final but subject to formal revision before publication in the Bulletin. Please notify the General Counsel of any typographical or other formal errors so that corrections may be made before the Bulletin is published.

BOARD OF STANDARDS AND APPEALS

MEETING OF: February 25, 2020
CALENDAR NO.: 2016-4302-A through 2016-4326-A; 2016-4355-A through 2016-4462-A; 2017-107-A through 2017-129-A; and 2019-51-A through 2019-57-A
PREMISES: 92-120 Cupidity Drive, 201-225 Avidita Place; 301-465 Fourberie Lane, 201-275 Avidita Place, 76-120 Cupidity Drive; 301-477 Fourberie Lane, 201-275 Avidita Place, 76-120 Cupidity Drive; and 301-477 Fourberie Lane, 201-275 Avidita Place, 76-120 Cupidity Drive; Staten Island
Block 3019, Lot 120 (Tentative Lots 99-119, 401-411, 203-247, 252-269, 412-460, and 307-325)

ACTION OF BOARD — Application denied.

THE VOTE —
Affirmative:.....0
Negative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta, and Commissioner Scibetta.....5

THE RESOLUTION —

The decisions of the Department of Buildings (“DOB”), dated October 11, 2016, December 6, 2016, April 12, 2017, and March 4, 2019, acting on New Building Application Nos. 520266337, 520266346, 520266355, 520266364, 520266373, 520266382, 520266391, 520266408, 520266417, 520266426, 520266435, 520266444, 520266453, 520266462, 520267069, 520267078, 520267087, 520267096, 520267103, 520267112, 520267121, 520267130, 520267149, 520267158, 520267167, 520266471, 520266480, 520266499, 520266505, 520266514, 520266523, 520266532, 520266541, 520266550, 520266569, 520266578, 520266587, 520266496, 520266603, 520266612, 520266621, 520266630, 520266649, 520266658, 520266667, 520266676, 520266685, 520266694, 520266701, 520266710, 520266729, 520266738, 520266747, 520266756, 520266765, 520266774, 520266783,

2016-4302-A et seq.

520266792, 520266809, 520266818, 520266827, 520266836,
520266845, 520266854, 520266863, 520266872, 520266881,
520266890, 520266907, 520266916, 520266925, 520266934,
520266943, 520266952, 520266961, 520266970, 520266989,
520266998, 520267005, 520267014, 520267023, 520267032,
520267041, 520267050, 520267176, 520267185, 520267194,
520267201, 520267210, 520267229, 520267238, 520267247,
520267256, 520267265, 520267274, 520267283, 520267292,
520267309, 520267318, 520267327, 520267336, 520267345,
520267354, 520267363, 520267372, 520267381, 520267390,
520267407, 520267416, 520267425, 520267434, 520267443,
520267452, 520267461, 520267470, 520267489, 520267498,
520267504, 520267513, 520267522, 520267531, 520267540,
520267559, 520267568, 520267577, 520267586, 520267595,
520267602, 520267611, 520267620, 520267639, 520267648,
520267657, 520267979, 520267960, 520267951, 520267942,
520267933, 520267924, 520267915, 520267906, 520267899,
520267880, 520267871, 520267862, 520267853, 520267844,
520267835, 520267826, 520267817, 520267808, 520267791,
520267773, 520267764, 520267755, and 520267746, read in pertinent
part: “The street giving access to proposed building is not duly placed
on the official map of the City of New York therefore: A) No Certificate
of Occupancy can be issued pursuant to Article 3, Section 36 of the
General City Law. B) Proposed construction does not have at least 8%
of the total perimeter of building(s) fronting directly upon a legally
mapped street or frontage space contrary to section 502.1 of the 2014
NYC Building Code.”

This is an application requesting waiver of the requirement pursuant to General City Law § 36(2) that the subject development of 163 new residential buildings be accessed from a legally mapped street and to instead allow the 163 new buildings to be accessed from a network of 34-foot-wide unmapped private streets.

As discussed herein, the Board has considered all of the evidence in the record and testimony presented but ultimately finds that approving an application for the proposed development would not be appropriate or consistent with the intent of the General City Law and that the applicant has not substantiated a basis to warrant the exercise of discretion.

I.

A public hearing was held on this application on September 10, 2019, after due notice by publication in *The City Record*, with continued hearings on November 19, 2019, and February 25, 2020, and then to decision on that date.

Vice-Chair Chanda, Commissioner Ottley-Brown and Commissioner Sheta performed inspections of the site and surrounding neighborhood.

Community Board 1, Staten Island, recommends disapproval of this application, citing concerns that the proposed creation of a homeowners association to manage the development implicates many foreseeable issues (including failure to collect adequate maintenance funds, failure to afford necessary infrastructure maintenance and repairs, failure to enforce parking regulations for safe and proper access for service delivery and emergency vehicles, and failure to provide adequate trash and snow removal); that the proposed private streets would not be built to the same Department of Transportation standards as roadways placed on the City Map; and that the size of the proposed development, with 169¹ dwelling units, would alter and negatively affect the surrounding area because of concerns with traffic, storm-water runoff, sanitary sewers, and school seats.

The Borough President of Staten Island recommends disapproval of this application, citing concerns that the proposed development would adversely affect the quality of life for adjoining homeowners and the potential for devastating consequences with respect to public health, safety, and the general welfare.

The Board also received testimony opposing this application from a New York State senator, New York State Assembly member, and a New York City Council member, citing concerns over potential traffic issues caused by the proposed development, adverse effects to the public health, safety, and general welfare, and failure of the Applicant to demonstrate unnecessary hardship, respectively.

The Board received one letter supporting this application and approximately 59 letters from individuals and 4 letters from community advocacy groups opposing this application.

II.

The Premises are located on the west side of Fingerboard Road, north of Narrows Road North, in an R3-2 zoning district, on Staten Island. They have approximately 565 feet of frontage along Fingerboard Road, 85 feet of frontage along Merle Place, 24 feet of frontage along Hope Avenue, 356 feet of frontage along Narrows Road North, 683,381 square feet of lot area, and are vacant.

¹ The community board's reference to 169 dwelling units included review of 6 dwelling units that are proposed to be constructed as of right and are not included in this application nor subject to the Board's review.

III.

The General City Law provides that municipalities “may establish an official map of the city” that is “deemed to be final and conclusive with respect to the location and width of streets, highways, drainage systems and the location of parks shown thereon” in order “to conserve and promote the public health, safety and general welfare.” General City Law § 26. Under Section 198 of the New York City Charter, the City Map serves this purpose within the City of New York.

The General City Law also establishes a planning board with the power to review and approve, among other things, plats, subdivisions, and new streets as part of the official city map. General City Law §§ 32–34. Further, the New York City Charter prohibits the filing and recording of subdivisions or platting of land into streets, avenues, or public places and blocks unless and until the map showing such has been reviewed and approved under the Uniform Land Use Review Procedure (“ULURP”) and the City Planning Commission has filed its decision with the City Council and borough president for approval. New York City Charter §§ 197-c, 197-d, and 202.

By law, “streets” “shall be located and laid out on the city map,” and “[t]he width and grades of all streets so located and laid out shall be indicated thereon.” Admin. Code § 25-102. The Administrative Code defines a street as “[a]ny public street, avenue, road, alley, lane, highway, boulevard, concourse, parkway, driveway, culvert, sidewalk, crosswalk, boardwalk, viaduct, square or place, except marginal streets.” Admin. Code § 1-112.

Consistent with this framework, Section 36(2) of the General City Law (emphasis added) provides, in pertinent part:

No certificate of occupancy shall be issued in such city for any building unless a street or highway giving access to such structure has been duly placed on the official map or plan, which street or highway, and any other mapped street or highway abutting such building or structure shall have been suitably improved to the satisfaction of the department of transportation of the city in accordance with standards and specifications approved by such department as adequate in respect to the public health, safety and general welfare for the special circumstances of the particular street or highway *Where the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship, and where the circumstances of the case do not require the structure to be related to existing or proposed streets or highways, the applicant for such a certificate of occupancy may appeal from the decision of the administrative officer having charge of the issuance of certificates of occupancy to the board of standards and appeals or other similar board of such city having power to make variances or exceptions in zoning regulations, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations.* The board may in passing on such appeal make any reasonable exception and issue the certificate of

2016-4302-A et seq.

occupancy subject to conditions that will protect any future street or highway layout. Any such decision shall be subject to review under the provisions of article seventy-eight of the civil practice law and rules.

This provision vests the Board with the authority, under certain circumstances, to “make any reasonable exception” to the requirement that “any building” issued a certificate of occupancy have “access” to “a street or highway . . . duly placed on the official map or plan.” *Id.*

The Board had taken an expansive view of this authority, making exceptions for developments of all sizes, which permitted the buildings on them to be accessed by unmapped streets, while imposing few if any safeguards as conditions of the Board’s grants. In the cases where such safeguards were imposed, they relied on the representation of the developers that a Homeowners Association Agreement (“HOA”) would oblige homeowners to maintain the private streets and enforce no-parking regulations on narrow unmapped private streets to allow emergency vehicle access.

In recent years, however, the Board conducted site visits to developments constructed pursuant to waivers of General City Law § 36(2) and heard considerable testimony that these safeguards have proven inadequate. The Office of the Staten Island Borough President submitted an extensive amount of testimony highlighting the issues concomitant with these developments, as a myriad of such exist within its borough. Over the last several years, the Board has learned that problems arise because builders frequently abscond after sellout of the development to new homeowners. Homeowners are not properly notified of their obligations under the HOA or aware that their properties are subject to the Board’s restrictions. Homeowners associations have gone unfounded and unfunded. Ownership of the private roadways has gone unrecorded and chain of title has been lost. Access easements have never been granted. Parking restrictions have gone unenforced. Snow has gone unplowed. Trash has gone uncollected. Fire hydrants have gone uninspected. Damaged roadways have gone unrepaired, sidewalks unbuilt, and street lighting never installed. Emergency vehicles have been delayed by inconsistent house numbering, non-continuous and, sometimes, unidentified streets, and double- or triple-parking blocking access. And homeowners and neighborhoods have been left with infrastructure in a state of disrepair, and unplanned, unmapped roads that do not relate to or tie in to existing roadway networks.

The Board has thus revisited its approach towards and analyses of requests for such exceptions to the General City Law, recognizing and refusing to duplicate what is now seen as a previous error, with an eye toward limiting the granting of such “reasonable exceptions” only in rare circumstances. The Board’s authority to modify its approach and, hence, no longer adhere to precedent is permitted where its

reasons for doing so are clearly stated. *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 595 (N.Y. 1977) (“The [board] may refuse to duplicate previous error; it may change its views as to what is for the best interests of the [town] More importantly, the board, after [] reflection, could find that previous awards had been a mistake that should not be again repeated. Certainly, the board was not bound to perpetuate earlier error.”)

Consequently, the Board has over the last several years required applicants to affirmatively demonstrate that it can meet the findings set forth in General City Law § 36(2): that both enforcing the mapped-street access requirement “would entail practical difficulty or unnecessary hardship” and that “the circumstances of the case do not require the structure to be related to existing or proposed streets or highways.” General City Law § 36(2).

Having witnessed the failure of safeguards at other sites, the Board also now takes a critical eye when exercising its discretion and when assessing the credibility of applicants’ assurances that certain safeguards and conditions could—and would—be implemented. These assurances often turn on promises that large numbers of future unidentified and unknown third parties not currently appearing before the Board would coordinate amongst themselves in the applicant’s absence and would take certain steps to maintain the unmapped streets. However, these same sorts of unfulfilled promises have resulted in the current state of disrepair and mismanagement of unmapped streets, and the Board does not generally find them sufficient—especially where entire unplanned neighborhoods are proposed, as in this case.

IV.

The applicant proposes to develop the Premises with 169 new buildings with 473 accessory parking spaces on a single zoning lot, and the applicant represents that the proposed development would be in conformance with applicable zoning regulations.

The Premises have approximately 565 feet of frontage along Fingerboard Road, 85 feet of frontage along Merle Place, 24 feet of frontage along Hope Avenue, 356 feet of frontage along Narrows Road North—all of which are laid out on the City Map.

However, 163 of the proposed buildings would be accessed by Cupidity Drive, Avidita Place, and Fourberie Lane—none of which are laid out on the City Map. Instead, the applicant proposes to pave these unmapped streets to a width of 34 feet.

Accordingly, the applicant requests that exceptions be made to the General City Law and the New York City Building Code.

The Board has considered the applicant’s request but finds it inappropriate to grant because the record does not reflect the presence of the requisite “practical difficulties or unnecessary hardship,”

because the record does not reflect the requisite “circumstances . . . not requir[ing] the structure[s] to be related to existing or proposed streets or highways,” and because the applicant has not substantiated a basis to warrant exercise of discretion, in particular given the absence of adequate assurances that the development of the proposed buildings on the proposed unmapped streets would not succumb to the deficiencies described above.

The Board finds it improper to approve, under a waiver of General City Law § 36(2), in essence, a subdivision, which results in the creation of blocks and lots. The scale of the proposed development triggers a myriad of issues and considerations that are appropriately reviewed by a planning board, not the Board of Standards and Appeals. Unlike a planning board, the Board is not involved in planning the layout of proposed streets to ensure that they comply with comprehensive planning principles and that they will effectively link to existing or future planned street systems, both public and private. Nor does the Board have the jurisdiction to consider a mapping action—requiring full participation of sister agencies including the Department of Environmental Protection, Department of Buildings, Department of Transportation, Fire Department—to ensure the adequate provision of public services for the development such as emergency services, public utilities, and school seats. The City Charter confers such power, decision-making, and expertise to a planning board and not the Board of Standards and Appeals.

The Board cannot satisfy these considerations. The Board observes that the proposed development proposes residential density that may require more public school seats than are potentially available, would create poor urban-planning layouts—with the rear of homes backing to the existing and mapped Fingerboard Road—would, if granted the requested waivers under General City Law § 36(2), lack adequate review by other agencies to ensure provision for its infrastructure and shared open space.

First, the Board finds that in the subject case, enforcing the General City Law’s requirement that “any building” issued a certificate of occupancy have “access” to “a street or highway . . . duly placed on the official map or plan” would not “entail practical difficulty or unnecessary hardship.” General City Law § 36(2). The applicant asserts: “The requirement . . . results in practical difficulty in the development of the subject lots that each meet all pertinent code requirements for area and lot width. The subject site has limited frontage at its perimeter on mapped streets (Fingerboard Road, Narrows Road East, Merle Place), and alternate access to the interior of the site via a mapped street is impossible, resulting in practical difficulty in conforming and compliant development of the subject site.”

The applicant alleges a practical difficulty in complying with General City Law § 36(2) because access to the interior of the proposed development from a mapped street would be impossible. The applicant

states that the proposed private roads would be developed and paved in accordance with Fire Code and zoning standards and equivalent in dimension to nearby private roads.

Additionally, the applicant states that a development complying with both General City Law § 36(2) and with applicable bulk regulations, which would permit as-of-right development of multiple dwellings, would be out of character with the surrounding area; would result in more, but smaller, dwelling units; require six, instead of two, curb cuts; and would represent a loss of return to the developer.

However, the record reflects that the Premises are situated such that they could be developed as of right with four multiple dwellings. Notably, one of these multiple dwellings is in the same location and position as the multiple dwelling on the proposed site plan, undercutting the applicant's hardship claim that developing the others would prove impractical.

Further, the applicant failed to explore whether access to each of the buildings on the site, whatever their number and configuration, could be achieved from existing mapped streets, or whether access to such buildings could be accomplished by obtaining street mapping-approval from the Department of City Planning and City Planning Commission.

The applicant's decision to pursue an exception with this application does not reflect the presence of "practical difficulty or unnecessary hardship." The applicant asserts that, unlike a waiver of General City Law § 36(2), mapping-approval is a legislative act that is both onerous and political, and represents that the Department of City Planning rarely undertakes mapping-approvals for private development. The Board, however, notes that many mapping-approvals have taken place in recent years for sites destined for private development as indicated on the Department of City Planning's website (*see* City Planning Reports C 150359 MMR (September 6, 2017), C 120323 MMX (February 18, 2015), C 130384 MMQ (September 29, 2014), M 090107 (C) MMK (February 22, 2017); *see also* C 150359 MMR (September 6, 2017), C 130229 MMR (September 11, 2013), and C 810161 MMR (December 8, 1982)). Rather, the applicant is seeking to develop the highest and best use of its property without restriction. This the Board cannot abide.

Second, "the circumstances of the case do . . . require the structure[s] to be related to existing or proposed streets or highways." General City Law § 36(2). The applicant asserts: "Development of the lot does not require any of the proposed structures to be related to any existing mapped streets or highways since the proposed roads Cupidity Drive, Avidita Place and Fourberie Lane will be paved and improved pursuant to all pertinent code requirements, providing safe access to each of the proposed single-family homes. The proposed private roads will be equivalent to existing private roads immediately west of the subject site (North Drive, Wagner Street, Schubert Street, Strauss

Street and Mendelsohn Street) that currently provide access to more residential buildings (166) and dwelling units (180) than are proposed as part of the subject development (163 and 163).”

However, the record reflects that this would not be the case. For instance, the applicant has received no determination from the Department of Transportation confirming that the proposed unmapped streets would be equivalent to mapped streets in design, construction, or maintenance. Instead, the Department of Transportation, by letter dated April 4, 2017, states that the applicant should “map and build the streets depicted in the proposed site plan according to City standards and transfer title of those streets to the City.” The applicant merely concludes that, in providing access to the proposed development through the proposed unmapped streets, the development becomes related to existing mapped streets and highways, or that this requirement is somehow satisfied.

Furthermore, it is the Board’s understanding, based on its consideration of legislative materials preceding the creation of and amendments to General City Law § 36, that the phrase in General City Law § 36(2) “*and where the circumstances of the case do not require the structure to be related to existing or proposed streets or highways*” is meant to refer to buildings that are incidental to a principle use or building that does need adequate access to a mapped street, such as a garage or storage building, pool house or cabana, artist studio, or farm structure (see Edward M. Bassett, *Planning of Unbuilt Areas in the New York Region*, REGIONAL PLAN OF NEW YORK AND ITS ENVIRONS, 1925, at 9, fn. 1, “This provision is for occasional structures like farm buildings certain kinds of industrial buildings, public utility structures, etc., that may not have any necessary relation to streets and highways.”).

Nor has the applicant provided any determination from the Department of Environmental Protection that the proposed in-ground infrastructure would meet standards applicable to City-owned infrastructure. Instead, the Department of Environmental Protection, by letters dated September 25, 2019, and November 22, 2019, states that the applicant has not submitted sufficient information to make a determination and that the property owner would be responsible for “maintain[ing] all the connections and the internal sanitary and storm drains; and internal water mains. The New York City [sic] will not maintain the connections; and the internal sanitary drain and storm drain and internal water main.”

The scale of the proposed development also presents safety concerns in the event of a fire or other emergency. The Fire Department, by letters dated September 10, 2019, and November 15, 2019, states that it objects to this application because the proposed development “places undue hardship on the department in the event of emergency conditions.” The Fire Department also notes the absence of sprinklers for certain proposed buildings, contrary to minimum fire-

safety standards, and notes that it concurs with the Department of Transportation “that the streets be mapped and the site plans conform to DOT standards for new roads.”

Lastly, the applicant has not substantiated a basis to warrant exercise of discretion, especially given the absence of adequate assurances. The applicant proposes to address the concerns posed and created by the proposed development with a restrictive declaration, giving notice of the proposed HOA and permitting the Fire Department to issue criminal summonses to the homeowners association for failure to abide by such, and states that, with 163 members, *this* homeowners association—which would provide for maintenance of common areas including streets, water and sewer services—would remain viable.

The Board disagrees and finds the contrary would likely result, as it so often has in the past. A homeowners association, comprised of unidentified and unknown future third parties, would pose significant hurdles in the identification of members, management, and funding to provide for sufficient maintenance of the proposed development.

Further, the Board cannot, nor is it aware of any New York City enforcement agency with such power to, enforce parking restrictions on private streets, the violation of which impedes the effective delivery of emergency services.

Based upon its review of the record and inspections of the site and surrounding area, the Board has determined that the record does not demonstrate the presence of “practical difficulties or unnecessary hardship” or “circumstances . . . not requir[ing] the structure[s] to be related to existing or proposed streets or highways,” and the applicant has not substantiated a basis to warrant exercise of discretion.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *uphold* the decisions of the Department of Buildings dated October 11, 2016, December 6, 2016, April 12, 2017, and March 4, 2019, acting on New Building Application Nos. 520266337, 520266346, 520266355, 520266364, 520266373, 520266382, 520266391, 520266408, 520266417, 520266426, 520266435, 520266444, 520266453, 520266462, 520267069, 520267078, 520267087, 520267096, 520267103, 520267112, 520267121, 520267130, 520267149, 520267158, 520267167, 520266471, 520266480, 520266499, 520266505, 520266514, 520266523, 520266532, 520266541, 520266550, 520266569, 520266578, 520266587, 520266496, 520266603, 520266612, 520266621, 520266630, 520266649, 520266658, 520266667, 520266676, 520266685, 520266694, 520266701, 520266710, 520266729, 520266738, 520266747, 520266756, 520266765, 520266774, 520266783, 520266792, 520266809, 520266818, 520266827, 520266836, 520266845, 520266854, 520266863, 520266872, 520266481, 520266890, 520266907, 520266916, 520266925, 520266934, 520266943, 520266952, 520266961, 520266970, 520266989,

2016-4302-A et seq.

520266998, 520267005, 520267014, 520267023, 520267032,
520267041, 520267050, 520267176, 520267185, 520267194,
520267201, 520267210, 520267229, 520267238, 520267247,
520267256, 520267265, 520267274, 520267283, 520267292,
520267309, 520267318, 520267327, 520267336, 520267345,
520267354, 520267363, 520267372, 520267381, 520267390,
520267407, 520267416, 520267425, 520267434, 520267443,
520267452, 520267461, 520267470, 520267489, 520267498,
520267504, 520267513, 520267522, 520267531, 520267540,
520267559, 520267568, 520267577, 520267586, 520267595,
520267602, 520267611, 520267620, 520267639, 520267648,
520267657, 520267979, 520267960, 520267951, 520267942,
520267933, 520267924, 520267915, 520267906, 520267899,
520267880, 520267871, 520267862, 520267853, 520267844,
520267835, 520267826, 520267817, 520267808, 520267791,
520267773, 520267764, 520267755, and 520267746, under the powers
vested in the Board by Section 36 of the General City Law, and this
application shall be and hereby is *denied*.

Adopted by the Board of Standards and Appeals, February 25, 2020.

CERTIFICATION

***This copy of the Resolution
dated February 25, 2020
is hereby filed by
the Board of Standards and Appeals
dated April 20, 2020***



***Carlo Costanza
Executive Director***