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VIA EMAIL – susan.barden@saratoga-springs.org

AND U.S. MAIL

Zoning Board of Appeals
City of Saratoga Springs
City Hall – 474 Broadway
Saratoga Springs, New York 12866

**Re: Brewton, et al. Interpretation Request; ZBA No. 2887; Parcel No. 166.13-1-50.2
Project: ANW Holdings, LLC, 27 Jumel Place**

Dear Zoning Board of Appeals:

Please accept this as the Appellants' response to comments and questions in the above-referenced appeal seeking an interpretation of the Zoning Ordinance.

1. Mr. Brewton, Mr. and Mrs. Mattison, and Ms. Cohen Have Standing to Prosecute this Appeal and To Seek the Interpretation Requested.

A concern was raised at the May 9, 2016 Zoning Board of Appeals meeting concerning whether neighbors of a proposed project have standing to file an interpretation request and to pursue an appeal at the Zoning Board of Appeals. Owners and residents of properties that adjoin a property on which a land use project is proposed have standing as aggrieved parties (Matter of Youngewirth v. Town of Ramapo Town Board, 98 AD3d 678, 680 [2d Dep't 2012]; Bonded Concrete, Inc. v. Zoning Bd. of Appeals, 268 AD2d 771, 772 [3d Dep't 2000]; Matter of McGrath v. Town Board of Town of N. Greenbush, 254 AD2d 614, 616 [3d Dep't 1998]; Matter of Sun-Brite Car Wash v. Bd. of Zoning & Appeals, 69 NY2d 406, 413 [1987]). The Appellants each live at or own property located at [REDACTED] Lake Avenue (Tax Map Parcel No. 166.13-1-4) and [REDACTED] Lake Avenue (166.13-1-6), which are located adjacent to the Project Site, and the complaints of the Appellants regarding the project are appropriate zoning concerns sufficient to give Appellants standing (Matter of Rosch v. Town of Milton Zoning Bd. of Appeals, 142 AD2d 765, 766 [3d Dep't 1988]). As such, Appellants are persons aggrieved by the February 22, 2016 Determination and have standing to appeal therefrom.

2. This Appeal is Timely.

Counsel for ANW Holdings, LLC has argued that this appeal is not timely. Both the Zoning Ordinance and state law provides that an application for appeal from a determination of the building inspector must be submitted within 60 days after the decision was filed (Zoning

Ordinance, § 8.4.1 [B]; N.Y. Gen. City Law § 81-a [5] [b]). Appellants have appealed from a decision dated February 22, 2016. This appeal was filed on March 18, 2016, well within the 60-day time period.

3. This Appeal is Not Barred by Administrative Res Judicata.

Counsel for ANW Holdings, LLC has argued that this appeal is barred by administrative res judicata because the building inspector rendered a determination in 2013 that only area variances were required. Administrative res judicata bars a party from re-litigating an issue that it has already unsuccessfully litigated before. A prior determination of a building inspector is not entitled to any administrative res judicata effect. First, an erroneous determination by the building inspector does not prevent later enforcement of the ordinance, even where there are harsh results (Matter of Twin Town Little League Inc. v. Town of Poestenkill, 249 AD2d 811, 811–12 [3d Dep’t 1998]; Town of Putnam Valley v. Sacramone, 16 AD3d 669, 670 [2d Dep’t 2005]). Second, a building inspector’s determination is not an adjudication, but is instead a ministerial act of applying the Zoning Ordinance to a particular application. Since administrative res judicata is designed to prevent re-litigation by the same parties of the same issues, it only applies where the prior administrative action was actually an adjudication (see Matter of Tillie Venes v. Community School Bd., 43 NY2d 520, 523–25 [1978]). Appellants herein were not parties to the building inspector’s 2013 determination, were not given a full and fair opportunity to participate in the building inspector’s 2013 application review, and therefore cannot be viewed as having already litigated the issue that is presented on this appeal.

4. The February 22, 2016 Determination Must Be Reversed.

The specific use for which the subject land is proposed to be designed, maintained, and occupied is a seven-family residential use. As stated at the May 9, 2016 Zoning Board of Appeals meeting, the proposed use by seven families, with seven dwelling units, on a single lot is a multi-family residential use not permissible in the UR-3 zoning district.

Counsel for the ZBA referred to the definition of “Residence – Multifamily” at the May 9, 2016 meeting.¹ “Residence – Multifamily” is defined in the Zoning Ordinance as “a residential structure containing three or more dwelling units” (Zoning Ordinance, App. A at 15). The term “structure” and “dwelling unit” are each specifically defined:

“Structure: **Any constructed or placed material in or upon the ground, including buildings**, towers, sheds, pools, signs and the like, but excluding sidewalks, paving, grading, patios, and the like” (Zoning Ordinance, App. A at 18).

“Dwelling Unit: A residence having direct-access from the outside of the **building** or

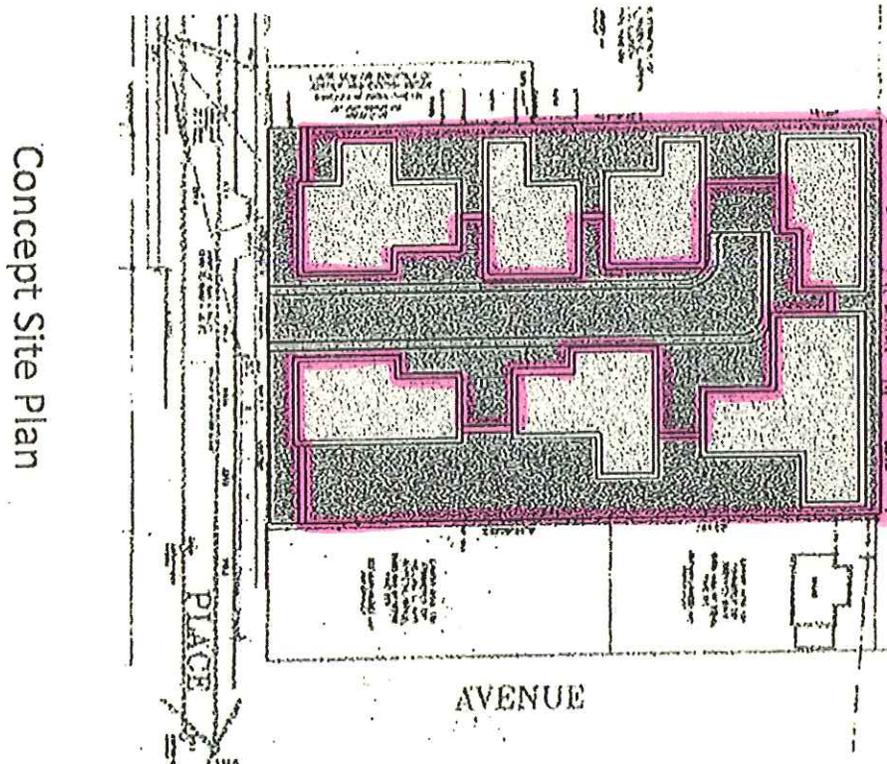
¹ Counsel for the ZBA indicated that he had not heard any reference to this definition by either Appellants’ counsel or counsel for ANW Holdings. Counsel for Appellants did reference the definitions of single family residence, two family residence, and multifamily residence during the ZBA’s discussion with Appellants’ counsel, but pointed out that the definitions used the term “structure”, which is very broadly defined. While the thrust of Appellants’ presentation was to focus the ZBA on the multifamily use of the lot, the Appellants’ position is consistent with the definition of “Residence – Multifamily” given the Zoning Ordinance’s definition of the term “structure”.

through a common hall and a complete kitchen facility for the exclusive use of the occupants” (Zoning Ordinance, App. A at 8).

The definition of “Residence – Multifamily” must be read in conjunction with the definitions of both “structure” and “dwelling unit”. The Zoning Ordinance draws a clear distinction between the term “structure,” “building”, and “dwelling unit,” with the term “structure” having the broadest definition and being inclusive of both “buildings” and “dwelling units”.

In light of the broad definition of “structure”, and the Zoning Ordinance’s clear distinction between the terms “dwelling unit”, “building”, and “structure”, the seven dwelling units proposed by ANW Holdings are within a residential “structure”. Collectively, the seven buildings (which will contain the seven dwelling units) on this lot are a “structure” as that term is defined in the Zoning Ordinance, as they consist of “any constructed or placed material in or upon the ground, including buildings”. Therefore, the residential “structure” on the lot is proposed to contain “three or more dwelling units”, and is therefore a “Residence – Multifamily”.

This interpretation is supported not only by the specific definition of the term “structure” in the Zoning Ordinance, but also by the fact that this project additionally proposes to connect each dwelling unit (and each building) to the next by fencing, as shown below:



Source: ANW Holdings Area Variance Application

As depicted in ANW Holdings' area variance application, the project site includes one continuous "structure", containing seven buildings (and seven dwelling units) with fencing² that connects each building and that fully encloses the side and rear yards. The fact that there is no roof or covering enclosing the area inside the fences and buildings is not relevant. There is one continuous "structure", as that term is defined under the Saratoga Springs Zoning Ordinance, and that "structure" contains seven dwelling units.

Counsel for ANW Holdings, LLC stated that the Zoning Board of Appeals should not consider the intent of the Zoning Ordinance in interpreting its language. However, a statute such as a zoning ordinance must be construed as a whole, reading all of its parts together, **all of which should be harmonized to ascertain legislative intent**, and giving meaning to all words used (Erin Estates, Inc. v. McCracken, 84 AD3d 1487, 1489 [3d Dep't 2011]; Veysey v. Zoning Board of Appeals of City of Glens Falls, 154 AD2d 819, 819 [3d Dep't 1989]). "The task in interpreting a statute or ordinance is to **give effect to the intent of the body which adopted it**" (Briar Hill Lanes, Inc. v. Town of Ossining Zoning Bd. of Appeals, 142 AD2d 578, 580 [2d Dep't 1988]).

The intent of the City Council in adopting the Zoning Ordinance (and in particular in setting the permissible uses in the UR-3, UR-4/4A, and UR-5 zoning districts) is set forth in Table 1, which provides:

| | |
|--|--|
| Urban Residential – 3 (UR-3) | To conserve, maintain and encourage single family and two-family residential uses . |
| Urban Residential – 4 (UR-4) Urban Residential – 4A (UR-4A) | To accommodate a mix of-single, two-family and multi-family residential uses . |
| Urban Residential – 5 (UR-5) | To accommodate multi-family residential development at moderately high densities and to encourage a mixture of housing types. |

(Zoning Ordinance, Table 1)

In adopting these distinct zoning districts, the City Council set forth a clear intent, legislatively stated and formally adopted, that multi-family residential uses would be permissible in the UR-4/4A and UR-5 zoning districts, but not in the UR-3 zoning district.

Moreover, **the City Council sought to avoid the very scenario presented here**, where a developer seeks to put a single lot in the UR-3 zoning district to multi-family residential use by merely increasing the number of "principal buildings per lot". The Zoning Ordinance provides that:

² A fence also falls within the definition of "structure", and confirms that a lack of a roof is irrelevant in determining what is the "structure" on any given lot. "Fence: An unroofed barrier or enclosing **structure**, including retaining walls" (Zoning Ordinance, App. A at 9).

“In the UR-4, UR-4A, and UR-5 Districts, more than one principal building for single and two-family uses are permitted” (Zoning Ordinance § 2.3 [A][2]).

This provision is critical. “[W]here a law expressly describes a particular . . . thing . . . to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded” (Calenzo v. Shah, 112 AD3d 709, 711 [2d Dep’t 2013]; Town of Eastchester v. New York State Bd. of Real Prop. Servs., 23 AD3d 484, 485–86 [2d Dep’t 2005]).

The City Council specifically excluded from this provision the UR-3 zoning district, the intent of which is to “conserve, maintain and encourage single family and two-family residential uses”, but included the UR-4, UR-4A, and UR-5 therein, all of which are intended to accommodate multi-family residential uses. The City Council legislatively sought to avoid the precise scenario presented here, where a developer could construct more than three dwelling units on a single lot in the UR-3 zoning district merely by increasing the number of principal buildings on the lot.

This provision is also what distinguishes this case from Boni Enterprises, LLC v. Zoning Board of Appeals of Clifton Park (124 AD3d 1052 [3d Dep’t 2015]), the case cited by counsel for ANW Holdings at the May 9, 2016 ZBA meeting. According to counsel for ANW Holdings, that case stands for the proposition that 74 one-family dwellings can be developed on a single lot, without need for subdivision. **But the zoning ordinance in that case specifically provided that “[m]ultiple buildings on a lot are allowed as long as the overall density limitations of this article are not exceeded”.** That provision is directly contrary to the provision in the Saratoga Springs Zoning Ordinance, both in terms of the limitation of a single principal building for each single lot, and in terms of the express provision allowing multiple one-family and two-family buildings in the UR-4/4A and UR-5 zoning districts, but not in the UR-3 zoning district.

Also significant is the fact that the Zoning Ordinance defines “condominium”, but does not list “condominium” as a permissible use in the UR-3 zoning district. While condominiums, under both state and local law, are ownership arrangements, they are also by definition, “multi-family” and “multi-unit”. Under state law, a condominium “building” is defined as “a **multi-unit** building or buildings, or a group of buildings **whether or not attached to each other**, comprising a part of the property” (Real Property Law § 339-e [1]). Under local law, a “condominium” is a “multifamily dwelling containing individually owned dwelling units, wherein the real property title and ownership are vested in an owner, who has an undivided interest with others in the common usage areas and facilities which serve the development” (Zoning Ordinance, App. A at 7). ANW Holdings’ proposal is a multi-family condominium, in which seven dwelling units will be individually owned by their respective occupants, with each unit owner owning a common, undivided interest in the underlying real property and the common elements. The ownership and use of the lot (consisting of the underlying real property and all common elements) will be by the owners of all seven dwelling units. The very fact that ANW Holdings is proposing a condominium form of ownership demonstrates that the proposed use necessarily *is* a multi-family or multi-unit use.

Concern was expressed at the May 9, 2016 ZBA meeting that Appellants’ presentation concerning the precedential impact of a determination on this appeal was alarmist and was akin to

“the boy who cried wolf”. Rest assured that there was no intent to be alarmist, nor to inflame the public or the Zoning Board of Appeals. But while Appellants respect the concern expressed, the precedent set by the decision on this appeal is a consideration that the ZBA must consider in determining this appeal, since in construing a legislative enactment, the literal meaning of words may not be adhered to or suffered to defeat the manifest intent of the legislation (Seltzer v. City of Yonkers, 286 App. Div. 557, 560 [2d Dep’t 1955]).

The City Council’s manifest intent for the UR-3 zoning district will be thwarted by an interpretation upholding the February 22, 2016 determination. If the ZBA interprets the Zoning Ordinance to allow the use of a single lot in the UR-3 zoning district for seven dwelling units as a “single family residence” use, it is true that any future applications proposing multiple two-family buildings (the scenario presented by Appellants’ presentation) on a single lot in the UR-3 zoning district would require area variance review by the ZBA. But the **use** of the single lot for as many dwelling units as can fit thereon in two-family or one-family buildings would nonetheless be considered a **permissible use** in the UR-3 zoning district, which runs directly contrary to the clear intent expressed by the City Council.

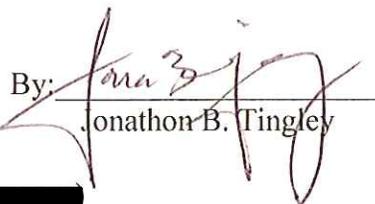
And that clear intent, legislatively expressed in the Zoning Ordinance at Table 1, Table 2, and § 2.3 [A][2], is that:

- **In the UR-3 zoning district, the permitted uses are limited to one single-family residential use or one two-family residential use on any one lot; and**
- **Multiple family residential uses, regardless of whether all dwelling units are in a single building or contained in a number of principal buildings on one lot, are intended for the UR-4, UR-4A, and UR-5 zoning districts.**

The Zoning Ordinance may not be interpreted in a way that thwarts the very clear legislative intent expressed by the City Council for the UR-3 zoning district. As noted previously, the reversal of the February 22, 2016 Determination and interpretation does not equate to denial of the Project. It merely enforces the current zoning for the UR-3 zoning district and requires the developer to either demonstrate its entitlement to a use variance to permit the Project as currently proposed, or alternatively, to secure subdivision approval to create separate lots so that the use of each lot is either a single-family permitted use or a two-family permitted use.

Very truly yours,

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By: 
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cc: Mark Schachner, Esq.

(via email – )