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May 3, 2016

William Moore, Chair
Saratoga Springs Zoning Board of Appeals
474 Broadway
Saratoga Springs, New York 12866

Re: Interpretation Request – Appeal from Brewton, et al.
27 Jumel Place – UR-3

Dear Chairman Moore:

We represent the interests of ANW Holdings, Inc. ("ANW" or "Respondent") with respect to its application for the renewal of area variances granted by the Saratoga Springs Zoning Board of Appeals ("Board") in 2013 and 2014 related to 27 Jumel Place ("Property"). ANW has appeared before the Board once in 2016 in order advance its renewal request for the previously granted variances; however, its application has been removed from consideration purportedly due to the recently filed Appeal and Request for Interpretation (the "Appeal") of the February 22, 2016 Zoning Determination related to ANW's project which found that the proposed use was permitted within the zone and no use variances is required. The Appeal has been filed by Jonathon Tingley, Esq, on behalf of his clients Samuel Brewton, Gerald and Debra Mattison, and Sandra Cohen ("Appellants") which appeal asserts that (1) ANW's application be stayed automatically until its appeal is decided; and (2) a use variance is required.

While we recognize that the Appeal is directed to a decision by the City Zoning and Building Inspector, ANW has a vested interest in the outcome of the ZBA's decision on this matter and, as such, respectfully provides this submission for consideration. Based upon all the reasons set forth below, we ask that the Board deny the Appellant's Appeal because (1) ANW's proposed project meets the definition of single family residence as permitted in the UR-3 Zone and is thus a permitted use; (2) the arguments advanced in the Appeal are a mischaracterization of both the City Zoning Code, as well as the proposed project itself; (3) the appeal is untimely; and (4) the determination made on February 22, 2016 was not based upon any additional information or change of circumstances to deviate from prior precedent and findings related to this project.

A. Third Party Stay is Impermissible

At the outset, it is noted that Attorney Tingley cites to the City's Zoning Code §8.4.2(c) for the proposition that there is an automatic stay with the filing of his clients' administrative appeal of a zoning determination. Section 8.4.2(c) states in its entirety:

> "An appeal shall stay all **enforcement proceedings** relating to any violation under appeal unless the administrative official charged with the enforcement of the Zoning Ordinance finds that such stay would cause imminent peril to life or property."

It is clear from a reading of §8.4.2 that the City provision stays only proceedings to enforce alleged violations of the Zoning Code. In this case, there is no pending violation or enforcement proceeding against ANW or the appealing neighbors or any other entity. Therefore, the provision of the City Zoning Code cited by Attorney Tingly for an automatic stay of the ANW's application is erroneous.

In light of the clear inapplicability of the City stay provision, Attorney Tingley's letter then cites to the General City Law §81-a[6] for the proposition that the state law applies stays more broadly to "all proceedings in furtherance of the action appealed from" and would operate to create an automatic stay [See Tingley ltr, p. 2]. However, there is binding Appellate Division case law which holds that a third party appeal of a zoning determination **does not** create an automatic stay under the state law. See Bonded Concrete, Inc. v. Town of Saugerties, 282 A.D.2d 900 (3d Dep't 2001) (holding that the NYS Town Law does not operate as an automatic stay for third party appeals; see People v. City of Watervliet Zoning Board of Appeals, 2013 N.Y. Misc LEXIS 6853 (Sup Ct Albany Co 2013) (holding "that the automatic stay provision of NYS City Law §81-a[6] governing appeals to a Zoning Board of Appeals does not apply to the filing of an appeal by third parties"). The courts have found that the legislative intent of the automatic stay provisions for zoning boards of appeals is to protect property owners from enforcement of a notice of violation while his or her appeal is pending and not for third party appeals. See People v. Baris Shoe Co, 174 Misc2d 529 (Dist Ct Nassau Co 1997).

To be sure, an extension of automatic stays to the filing of third-party appeals would subject all applications, not just ANW's, to whim of neighbors who seek to slow or inhibit the due and timely consideration of such applications by the Board. Such a result is neither outlined in the language or expressed as the intent of either the City Zoning Code or General City Law 81-a[6]. As such, ANW respectfully requests that no stay be recognized as applicable to its application for renewal of its area variances and that its application be heard at the next meeting of the Zoning Board of Appeals.

B. Background and History

The Property has been before the Board on several occasions, dating back as far as 1957. The site was home to a manufacturing operation in what was, then and now, a largely residential area. The pre-existing, non-conforming building is a large concrete structure covering approximately 49.5% of the lot. At the front and rear of the lot, there is currently under one foot of setback as the

building is located directly on the property lines. Over time, the use on the site evolved from manufacturing to a ballet school and apartment building; and, even at one time, a non-conforming karate studio.

In 2013, John Witt, ANW's representative, filed an application for area variances to "tear down existing building and build a seven unit **single family** condominium project." (See Exhibit A – 2013 Application; emphasis added). The project had the potential to reduce the overall lot coverage and density both from the existing non-conforming building and the maximum allowable use which is four duplexes (or eight residential units). The 2013 application (currently known as "Downton Walk") requested several area variances to construct the project, to wit: maximum building coverage, maximum principal building on one lot[1], minimum front yard setback for two units on Jumel Place, and minimum rear yard setback for two units at the rear. Following receipt of ANW's application, the Zoning and Building Inspector determined that solely area variances were required for the project because the single family use was permitted within the zone. The Board requested an advisory opinion from the Planning Board which was issued in favor of the project. Following a public hearing on the matter, the Board voted to approve the area variances as requested and made several specific factual findings related to the relief granted.

In 2014, ANW came again before the Board in order to expand upon the relief granted in the 2013 application. First, ANW requested the ability to increase the fence height from 6 feet to 8 feet in order to provide additional screening to neighbors. Second, the front stoops on the units closest to Jumel Place required additional relief from the front yard setback. Third, the maximum building coverage request increased from 43.5% to 46%; representing a 2.5% change. Again, following receipt of the application, the Zoning and Building Inspector determined that solely area variances were required for the project but that the use was permitted within the zone. Following a public hearing on the matter, the Board voted to approve the area variances as requested and made several specific factual findings related to the relief granted.

In 2016, ANW was finally able to move forward with the process of purchasing the Property following the resolution of issues related to the estate probate process involving the current owner. However, ANW's variances from 2014 had lapsed pursuant to the Saratoga Springs Zoning Ordinance eighteen months after the approval (November 1, 2015). As a result, ANW was required to renew its request for the area variance relief in order to proceed with the project. On January 19, 2016, ANW filed an application for a renewal of the area variances and the application was first heard on February 22, 2016 by the Board. Once again, following receipt of the application, the Zoning and Building Inspector determined that area variances were required for the project but that the use was permitted within the zone. At the meeting, ANW presented the application and reiterated several times on the record that *none* of the project elements has changed since the 2013 and 2014 approvals.

[1] The maximum principal building on one lot is of particular importance to the instant matter but was not addressed by the Appellants within the Appeal. Section C of this letter will outline this issue in detail.

C. ANW's Project Contains Single-Family Units on One Lot

While Attorney Tingley presents significant information in the Appeal concerning the alleged limitation of condominiums in the UR-3[2], the appeal mischaracterizes the facts by intimating that ANW's proposed seven **single-family residences** on the Property are actually multifamily dwellings without a single substantiating fact or reasonable interpretation of the City Zoning Code. From the earliest filing in 2013 and including through to the renderings provided in 2016, ANW has maintained the position that the proposed project is made up of separate single family dwelling units which will be owned pursuant to Article 9-B of the NYS Real Property Law (commonly known as the New York State Condominium Act) as it relates to its common areas – as those terms are defined in the state law. In short, the Appellants are arguing for an interpretation related a multifamily dwelling project which **has not been proposed**.

It is ANW's position that the confusion brought about by the Appeal stems from the difference between "use" and "type of ownership" related to condominiums – an issue which has been addressed by New York State courts.

1. USE:

The discussion of use must begin with the current UR-3 permitted uses and their related definitions. In the UR-3, the principal permitted uses are single family residences and two family residences (Table 2: Use Schedule). According to Appendix A of the City Zoning Code, the definitions of these uses are as follows:

> *Residence – Single-Family*: A residential structure containing one dwelling unit.
> *Residence – Two-Family*: A residential structure containing two dwelling units.

Conversely, Attorney Tingley attempts to mischaracterize ANW's project as proposing multifamily residences which is defined as "a residential structure containing **three or more** dwelling units." It is self-evident that the differentiating factor between each of these definitions is the number of dwelling units located within a single structure. It is equally self-evident that the application of ANW (Exhibit A) and the plans provided to the Board show a site layout which includes seven independent structures, each containing a single family dwelling unit, which is consistent with the definition of Residence-Single Family - a permitted use in the UR-3.

2. TYPE OF OWNERSHIP:

The Appellants make much of ANW's accurate characterization of its project as a "condominium" within ANW's application materials. ANW concedes that the City Zoning Code does contain a definition for "condominium" which 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." (Appendix A) (emphasis added)

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[2] ANW strongly disputes the accuracy of Attorney Tingley's premise that "Residence – Multifamily" is the same as "Condominium" under the City Code.

As such, a condominium as a **use** under the City Zoning Code definition must be a "multifamily dwelling" – which is undefined in the Code but would arguably be similar to "Residence – Multifamily: A residential structure containing three or more dwelling units."[3] As noted above, however, ANW's proposed **use** is neither a Condominium nor a Residence-Multifamily as those terms are defined by the Zoning Code. Rather, ANW's proposal is seven single family dwelling units on one lot; not seven dwelling units within one structure as argued by the Appellants –which single family residences are permitted uses.

There is no dispute that Downton Walk will be a condominium property pursuant to the NYS Condominium Act. Importantly, New York State law outlines that which is a "condominium" for statutory purposes with respect to the form of ownership, including the shared ownership of common elements and units. Under the Condominium Act, the Downton Walk project is a lawful condominium form of ownership because of its shared elements and will be reviewed by the NYS Department of Law for approval. Therefore, the definition of a "condominium" as a use under the City Zoning Code is of no consequence to the present application which is describing Downton Walk's form of ownership. To use the City Zoning Code to thwart New York State's ability to regulate condominiums as a form of ownership of units with common elements would be barred by the doctrine of preemption and contrary to statutory purpose and intent.

In short, it is ANW's position that "condominium" under the City Zoning Code is not synonymous with "condominium" under the NYS Condominium Act concerning the form of ownership under Article 9-B. Importantly, courts have noted the limitation of local municipalities to regulate, through zoning, forms of ownership such as condominiums which are regulated by New York State. In P.O.K. RSA v. New Paltz, the Appellate Division, Third Department found that "municipalities have no inherent capacity to mandate the manner in which property may be owned or held. They must acquire such power by the State. Absent such a delegation of power, a municipality cannot employ a zoning ordinance to exclude or discriminate against the condominium form of ownership." 157 A.D. 15 (3d Dep't 1990). Such exclusion and discrimination is improper because "it is use rather than form of ownership that is the proper concern and focus of zoning and planning regulations." North Folk Motel, Inc. v. Grigonis, 93 A.D.2d 883 (2d Dep't 1983).

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3 Notably, "multifamily dwelling" is not defined within the Zoning Code but is contained within the definition of "condominium." The failure of the Code to define a term within the definition of condominium is construed against the municipality and in favor of the property owner in accordance with ordinary meaning. Mamaroneck Beach and Yacht Club Inc. v. Zoning Board of Appeals of the Village of Mamaroneck, 53 A.D.3d 494, 498 (2d Dep't 2008). ANW takes the position that the ordinary meaning of "multifamily dwelling" is similar to that of "Residence – Multi-Family" which requires a single structure to contain three or more dwelling units. Appellants assume and speculate that the separation of the buildings "by a few feet" must create multifamily residences – even when their interpretation finds no support in the Code. Such arguments by the Appellants would be an impermissible and a derivation of the law that vagueness or ambiguity is resolved in favor ANW. Assumptions and conjecture are not permitted in order to interpret a zoning code.

3. **MAXIMUM PRINCIPAL BUILDING VARIANCE**

For the reasons set for in Points 1 and 2 above, there is simply no reading of the Code which supports a finding that there are three or more dwelling units within a single structure in Downton Walk. Furthermore, ANW is free to use the term 'condominium' as a description of its form of ownership under Condominium Act. However, as a last resort, the Appellants cite to a lack of subdivision into seven individual lots as a factor upon which this Board may base an interpretation. The Appellants are incorrect.

The principal building limitation per lot is set forth within the City Zoning Code itself and it is self-evident that an owner can seek area variance relief from this restriction so as to allow more than one principal building on a single lot. Section 2.3-A of the Zoning Code states, in relevant part, that "only one principal building may be established on any one lot provided that the minimum area, width and dimensional requirements of the district are met for each principal building." Therefore, an owner **may** either (1) subdivide his lands to allow for more lots on which to place a single principal building **or** (2) seek an area variance to place more than one principal building on a single lot. In 2013, ANW came to the Board to request an area variance of the maximum principal building limitation under Section 2.3-A from one building on the lot to seven buildings. The relief was granted.

The Appellants attempt to equate "multiple buildings on site" with "multiple dwelling units within a single structure" strains interpretation far beyond the reasonable and into the wholly unfounded. While the word 'multiple' is used in the Appeal synonymously, the words are not the same for purposes of this interpretation. ANW was entitled to seek relief from Section 2.3-A to place seven, single-family units on the Property. Any attempt to argue that multiple buildings on site is the equivalent of a 'multifamily dwelling' is contrary to statutory interpretation, common usage of the words, and the definitions provided by City Zoning Code itself.

For all the reasons set forth above, ANW's proposed project does not require relief from the use restrictions in the UR-3 and the determination of the Zoning and Building Inspector should be upheld.

D. The Appeal is Time Barred

It is also the position of ANW that the appeal of the February 22, 2016 determination is time-barred. New York General City Law 81-a(5)(b) provides:

> "An appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken."

ANW first brought applied for relief for the project in 2013, at which time a zoning determination on the merits was made by the Zoning and Building Inspector. The determination

in 2013 was that area variances were necessary for the project but not use variances. It is solely due to a lapse in time that ANW is required to renew its application for relief. There has been no evidence submitted to the Board of any material changes in circumstances for the project components or neighborhood composition since the original determinations were made. Moreover, ANW is not seeking any additional or different relief which would change the previously considered impacts to the neighborhood. As a result, the zoning determination of 2013 is determinative on the issue of whether a use variance is required and the statute of limitations provided by General City Law 81-a(5)(b) of sixty days has long since run. To be sure, the Appellants would like the benefit of a second (or third) bite of the apple, having not appealed the original determination in 2013. Such a bite would be prejudicial to ANW, as well as contrary to principals of res judicata.

The doctrine of administrative res judicata (or claim preclusion) applies to the Appeal of the 2016 determination made by the Zoning and Building Inspector. The Appellants had a full and fair opportunity to seek relief from the zoning determination originally made in 2013 which was based upon the very same facts and project elements for Downton Walk. See DiCostanzo v. Zoning Board of Appeal of the Village of Saltaire, 2015 NY Slip Op 30051(U) (applying the doctrine of administrative res judicata to zoning officer determinations); See Jensen v Zoning Bd. of Appeals of the Village of Old Westbury, 130 AD2d 549, 550 (2nd Dept. 1987), citing Ryan v NY Tel. Co., 62 NY2d 494, 499 (1984). As such, the Appeal is untimely and should be dismissed.

In conclusion, it bears noting that the Appellants' citations to the 2015 Comprehensive Plan are irrelevant and misdirected. As extensively noted above, there is no reading of the City Zoning Code (of which the Comprehensive Plan is not a part) which supports a determination that Downton Walk is a condominium as that term is defined within the Code. In truth, the proposed project is a single family residential development on a single lot with common elements to be owned pursuant to the Condominium Act. Furthermore, the Comprehensive Plan is a planning and supportive tool for the City Council in its efforts to pass zoning legislation for the future of the City. The Board does not exist to carry out the legislative function of the City Council; and even if it did, this project comports with the single and two family residences called for in the CRN-1 and the RN-2.

I respectfully request that this letter be made part of the record for the Appeal. I thank the Board for its courtesies in this matter.

Sincerely,

M. Elizabeth Coreno

Cc: Anthony Izzo
Susan Barden
John Witt