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August 31, 2021

By Email (rcusumano@harrison-ny.gov)

Hon. Paul Katz, Acting Chairman and Members of the
Town/Village of Harrison Zoning Board of Appeals
Alfred F. Sulla, Jr. Municipal Building
1 Heineman Place
Harrison, NY 10528

Re: Appeal of Building Permit issued to Immobiliare Assets LLC
62 Winfield Avenue, Block 313, Lot 5

Dear Chairman Katz and Members of the Zoning Board of Appeals:

As you know, we represent Douglas Amann, the owner of the residence at 15 Braxmar Drive North, which adjoins the property that is the subject of this appeal to the southeast, and Amanda Genovese, who owns the residence at 2 Cricklewood Lane, which adjoins the subject property to the northeast. I am writing in response to the Board's invitation to make a further and final submission with respect to this matter in advance of the Board's scheduled meeting on September 9, 2021.

Initially, I must address the unprecedented nature of these proceedings, which have been characterized by egregious departures from the Board's customary practices, violations of well-established law, and inexcusable delays that have violated my clients' rights to due process and prejudiced the outcome against them. The chronology is important.

June 10, 2021 Hearing

The first hearing on this matter before this Board occurred on June 10, 2021. My clients complied with all applicable deadlines for submission of materials. At that meeting, following my oral presentation on behalf of my clients, this Board disclosed that it had in its possession and had read two memoranda: one from Clifford Davis, Esq., the attorney for the builder, to Deputy Village Attorney Andrea Rendo, dated December 2020, and the other from Ms. Rendo to the Building Inspector, believed to be dated that same month (although we have never seen it).

Neither of these memos had been disclosed to me or my clients at or prior to the meeting. The failure of this Board to do so violated one of the fundamental principals of zoning board procedure:

> "Because zoning board of appeals proceedings are quasi-judicial, all parties, applicant and opponent alike, must be given an opportunity to refute any evidence presented. Evidence or facts which board members have had an opportunity to consider outside of a hearing or after a hearing has been closed must be divulged and the parties should be permitted to provide additional evidence with respect thereto (citations omitted). Absent such an opportunity, the due process rights of participants will have been disregarded and any decision will be subject to challenge.

Matter of Cilla v Mansi, 2002 WL 1275122 (Supreme Court, Suffolk County 2002), citing 48 Syracuse L. Rev. 1075.

The importance of Ms. Rendo's memo was made apparent by one Board member's comment at the meeting that my clients would not like the outcome of a Board vote, based upon the contents of two memoranda that the Board had considered if an adjournment did not occur. Had these memos been shared with my clients before this meeting, as required by law, we would have had an opportunity to rebut them at the meeting. The Board's failure to do so resulted in an additional delay in resolving this matter, knowing full well that the builder would continue to build. In fact, we still have never seen Ms. Rendo's memo.

Further, at the June 10th hearing, Mr. Davis requested an adjournment on the grounds that he had received copies of our submissions from Ms. Cusumano "late" and he was prohibited from saying anything about the application in light of a possible claim by the builder against its title insurance company as a result of evidence brought to light in our submissions. Mr. Davis's claims were disingenuous. His December 2020 memo already constituted a comprehensive submission – any additional arguments to rebut my clients' submission would not have taken long. In addition, any dispute between his client and its title insurance company is a private matter of no import to this Board.

Most importantly, this Board's rules do not permit adjournments at the request of anyone other than the applicant. Town Code Section A238-7 states: "Adjournments of any given matter scheduled to come before the Board may be granted to an applicant requesting such an adjournment …" Mr. Davis's client is not the applicant in this case. In fact, on behalf of my clients, I vehemently objected to the granting of any adjournment. The Board's granting of an adjournment at the opponent's request was a departure from its customary practices, violated the Town Code and resulted in an additional delay in resolving this matter, with full knowledge that the builder would continue to build.

July 8, 2021 Hearing

The next hearing on this matter before this Board occurred on July 8, 2021. On June 15th, my client submitted a Freedom of Information Law request to the Town of Harrison for the two memoranda discussed above. That request was denied on June 17th. On June 23rd, I submitted a letter to Chairman Katz reiterating my request for the two memoranda. I never received a response. On June 25th, my client's appeal of the FOIL denial was granted, in part, and we received a copy of the memorandum from Mr. Davis to Ms. Rendo dated December 11, 2020. The Town has

continued to refuse to provide a copy of the memorandum from Andrea Rendo to the Building Inspector dated that same month on that grounds that it constituted: (1) "inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. Instructions to staff that affect the public; iii. Final agency policy or determinations; external audits;" and (2) "advice of counsel."

The Town's and this Board's response to the request for the Rendo memo to the Building Inspector misapprehends the law. Ms. Rendo's memo no doubt contains a mixture of evidence or facts and advice of counsel based thereon. Assuming Ms. Rendo's advice of counsel is subject to a claim of privilege, the evidence or facts on which it is based is not. "Where, as here, the municipal board has placed significant reliance on [the report] in question, fairness requires that the petitioners be given a chance to rebut the evidence or materials or assertions contained in [that report]." *Capitol Real Estate, Inc. v. Town Bd. of* Town of Charlton, 2003 WL 22244938 (Supreme Court, Saratoga County 2003), citing *Matter of Hampshire Management Co. v Nadil,* 241 AD2d 496 (2nd Dept 1997), *lv denied* 91 NY2d 806 (1998); *Matter of Cilla*, *supra* and cases cited therein. The Board's and Law Department's continued withholding of the Rendo memo to the Building Inspector violates my clients' rights to due process.

At this Board's July 8th meeting, counsel for each party to this matter presented oral arguments and all members of the public present were given an opportunity to be heard. This Board's customary practice at its meetings, followed in this instance, is to deliberate at the meeting's end on each matter heard, followed by polling each member for his decision (yea or nay). Following that poll, the Chairman asks for a motion to close the matter and prepare findings. The vote on this motion typically reflects the same result as the Chairman's poll. In this case, the Chairman's poll resulted in 4 yeas and 1 nay and the Board's decision to close the matter and prepare findings passed by a vote of 4 to 1. Once a matter is closed, the Board's customary practice is to draft findings that are subject to formal vote at its next monthly meeting, which in this case was scheduled for August 12th.

Post-July 8, 2021 Hearing

Shortly after the July 8th hearing, I was informed by Ms. Cusumano that no audio or video recording of the hearing was made by the Town, which she claimed was due to inadvertence. As a result, she said, the Law Department required that the matter be re-heard at a special Board meeting convened for this purpose on August 4th. She advised that special rules would apply to the August 4th hearing: only counsel to the parties would be permitted to speak at the hearing and the public could attend and observe but not speak. Ms. Cusumano also advised that the Board did not intend to re-hear other applications heard at the July 8th meeting despite the purported audio/video recording mishap.

The singling out of my clients' application for special treatment (i.e., a re-hearing when no other applications from July 8th would be re-heard) violates my clients' due process and equal protection rights. The July 8th meeting must be given either full effect or no effect with respect to all applications heard on that date. It is arbitrary and capricious to claim that the July 8th hearing is valid with respect to all applications other than my clients'.

When we learned that the additional meeting was to be scheduled, we provided a flash drive containing an audio recording of the July 8th meeting to Ms. Cusumano, as well as a transcript of

the recording. We were told, however, that the Law Department rejected the use of the recording as a record of the meeting because it was not made by the Town.

As we said at the time, any of the numerous persons present at the meeting on July 8th, including members of the Zoning Board of Appeals and Town staff, could review the audio recording and attest to its accuracy. In our view, that would create a sufficient record of the July 8th meeting and avoid the need for the special meeting on August 4th. This Board's and the Law Department's determination not to accept the proffered audio recording and transcript of the July 8th meeting was arbitrary and capricious and prejudicial to my clients' interests.

The arbitrary and capricious nature of this Board's decision to hold an August 4th re-hearing is apparent in its determination to prohibit members of the public from speaking at the re-hearing. If the underlying reason for the re-hearing was a failure to record the July 8th meeting, then members of the public should have been allowed to speak on August 4th just as they were on July 8th. The failure to allow members of the public to speak at the August 4th re-hearing violates my clients' due process and equal protection rights. They and their neighbors who wish to speak should not have been prohibited from doing so.

Ms. Cusumano also advised that the Board would not accept any additional written submissions prior to the August 4th meeting on the grounds that the matter was closed. She said that any additional submissions would only be accepted at the hearing, which would prevent Board members from reading them prior to the hearing. The bizarre and Kafkaesque procedural constraints imposed on my clients with respect to this matter are without precedent and have deprived them of the fair hearing and the substantive due process to which they are entitled.

August 4th Hearing

Upon opening the August 4th meeting, the Board immediately went into executive session for advice of counsel with the Law Department. Upon reconvening in regular session, the Board approved findings for matters heard and closed at the July 8th meeting, other than my clients' matter. The Board then adopted a resolution to reopen my clients' matter by a unanimous vote. Next, the Law Department recommended to the Board that it decline to hear any oral arguments from counsel to the parties and immediately adjourn the matter to its September 9th meeting, allowing further written submissions until that date. The Board motioned to adopt the Law Department's recommendation, which passed by a unanimous vote. The Board also made clear that it would not convene again until its regularly scheduled meeting on September 9th.

Town Code Section 235-58J requires that this Board decide upon each appeal within 62 days after the conduct of the initial hearing on the matter, which time can be extended with the consent of the applicant. Town Law section 267-a(8) contains an identical provision. The 62-day period following the June 10th initial hearing, never extended with the consent of the applicant, ended on August 11th. As a result, this Board is now in violation of its statutory deadline to decide this appeal. Meanwhile, the Board is aware that the builder continues to build.

This Board's actions at the August 4th hearing exemplify its mercurial approach to this application. The Board has repeatedly represented that it will do one thing, and then does another. For example, we were told that counsel for each of the parties would have the opportunity to present oral argument on August 4th, then when the time came that opportunity was denied. A special meeting was set for August 4th in order that the Board could correct the recording mishap

on July 8th, then that rationale was ignored when on August 4th all oral presentations were banned. My clients had every right to believe that the Board would following its customary practice of issuing and adopting formal findings one month after voting to close the matter, but in the end that practice was ignored.

My clients have relied on this Board to reach an expeditious decision in accordance with statutory timeframes. In so relying, they have refrained from pursuing other legal avenues to protect their interests. Indeed, my clients are constrained from commencing legal action by the requirement that they must first exhaust their administrative remedies before this Board.

This Board's procedural miscues and reversals with respect to this matter have been arbitrary and capricious in the extreme. Collectively, they evidence bad faith and complicity on the part of this Board in a concerted effort to deny my clients' rights to due process and equal protection under the law. We vehemently object. This Board's disregard of its statutory obligation to reach a timely decision has allowed the builder to continue his hellbent race to complete a house and pool on a 0.3-acre lot in a one-acre zone, a flagrant violation of the Town's zoning code.

The Merits

Despite everything that has gone on here procedurally, the Board, at least until now, has reached the only decision that is rational and consistent with the law – granting the appeal and revoking the building permit. My clients respectfully request that it not depart from that on September 9th. There is no reason to do so.

In the course of everything that has been said or submitted in the course of these proceedings, no one has ever disputed the fundamental fact that Immobiliare has been permitted to build in a one acre zoning district on a lot that is less than one-third of an acre. There is also no dispute that from 1940, when the Town of Harrison conveyed the property, until 2019, when it was conveyed to Immobiliare, the property at 62 Winfield Avenue had always been conveyed together with the adjoining property at 9 Braxmar Drive South. That is the essence of a merger. All of the arguments to the contrary that have been presented earlier in these proceedings or now, are specious.

The fact that 62 Winfield Avenue satisfied the minimum lot size requirement in 1929 when it was created, as counsel for Immobiliare argues, is irrelevant.[1] The zoning was changed in 1974 to

[1] Contrary to the position taken by Immobiliare, there is a real question as to whether this property was ever actually buildable. The Winfield Glen subdivision map designates 62 Winfield Avenue as Lot 58. We assume that the inclusion of this lot on the map means that it complied with the applicable dimensional regulations of the Harrison zoning code at the date thereof. However, the map shows a 100-foot pipe easement extending from Lot 58 through Lot 57 (the current 15 Braxmar Drive North) to Braxmar Drive North. The inclusion of this easement indicates that the Town Board deemed it a necessary condition to Lot 58's status as a buildable lot. This is entirely sensible as the easement was needed for Lot 58 to access utilities on Braxmar Drive North, the only source of utilities at the time. Mr. Davis acknowledged this in his memo to Ms. Rendo when he states: "[i]f 62 Winfield was not created as a buildable lot then it certainly would not have been given a 100 feet pipe easement over a neighboring property to access utilities located on Braxmar Dr." It does not appear from the public records, however, that the developer ever followed through on creating the easement. A diligent search of County land records and the chain of title for 15 Braxmar Dr. North shows that the purported easement was never memorialized in writing nor recorded in County land records. If creating the easement was necessary to make Lot 58 a buildable lot on the subdivision map, the failure of the developer to satisfy the condition would defeat any claim that Lot 58 was ever buildable.

As a result, and contrary to the conclusion of the Building Inspector and opposing counsel, 62 Winfield was not

require a minimum lot size of one acre. Although the right to build on the property at 62 Winfield Avenue could have been grandfathered under the earlier zoning if it had been held in single and separate ownership, it was not. From 1940 to 2019 it was owned jointly with the adjoining parcel at 9 Braxmar Drive North. That defeats any grandfathering claim Immobiliare thinks it has because it cannot satisfy the minimum lot size requirement of the zoning law. That makes the building permit invalid and requires that it be revoked. Any decision to the contrary by this Board will open up not only this neighborhood but every other area of the Village/Town to building on substandard lots.

Immobiliare has no "vested rights"

Under New York law, a property owner has no right to the existing zoning status of his land unless his right has become "vested" before the zoning change is made. *See, e.g., Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, 152 A.D.2d 365 (2d Dep't 1989), aff'd 77 N.Y.2d 114 (1990). While "there is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right,'" (*Matter of Estate of Kadin v Bennett*, 163 A.D.2d 308 (2d Dep't 1990) [citations and internal quotation marks omitted]), there is no basis on which Immobiliare can claim vested rights here. Vesting requires substantial construction and substantial expenditures prior to the enactment of the more restrictive zoning ordinance. *Id.* "Where . . . there has been no construction or other change to the land itself," a property owner has no right to complete a project permitted under an earlier zoning classification. There was no such construction and there were no such expenditures here. The zoning was changed in 1974; nothing was built on the property until 2021.

A successor-in-interest can succeed to vested rights where they exist. See *Elsinore Prop. Owners Assn. v Morwand Homes*, 286 App. Div. 1105 (2d Dep't 1955). But if there are no vested rights, there is nothing to succeed to. And the history of the property here establishes that the original developer had no vested rights:

- As has already been noted, the developer made no efforts to memorialize the pipe easement relating to 62 Winfield in writing or otherwise take any steps to ensure the availability of utilities for that lot.
- By deed dated July 19, 1929 and recorded on March 27, 1930 in Westchester County records at Liber 3018 of deed page 322, the developer transferred the parcels of land designated as Braxmar Drive North, Braxmar Drive South, Braxmar Lane, Claiborne Road and Glendale Road to the Town of Harrison for "highway purposes of every kind and description, including the laying, constructing or improving with pavement the surface of any road, street, lane or avenue, and the maintenance and repair of the same; the installation, maintenance and repair of sidewalks and gutters; the installation, operation, maintenance and repair of sewer, water and gas mains or pipes, and connections thereto, and the operation, maintenance and repair of the same." Thus, the developer never made any expenditures to establish the subdivision's infrastructure. Instead, the developer relied upon the Town to perform most of the work.

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a buildable lot at its inception.

- By May 1931, the developer had sold only 2 of the 60 lots in the subdivision (lot 27 plus a portion of lot 28 to Emma Rindfleish by deed dated December 16, 1930 and recorded on December 16, 1930 in Westchester County records at Liber 3107 of deeds at page 29; and lot 5 to George R. and Mary Elizabeth Breckenridge by deed dated March 18, 1931 and recorded on March 19, 1931 in Westchester County records at Liber 3129 of deeds at page 441), which signifies that no homes had been built until those dates at the earliest. A review of Harrison Tax Assessor's records indicates that most homes in the subdivision were not built until 1939. By then, the developer had exited the scene due to tax foreclosure as described below.
- By 1934, the developer was seriously delinquent in its payment of local property taxes on the 58 unsold lots, leading to a tax foreclosure sale by court order on July 8, 1934. The sale was conducted by public auction, with the Town of Harrison as the winning bidder for $47,521. Title was conveyed to the Town by deed dated July 8, 1934 and recorded on February 25, 1935 in Westchester County records at Liber 3426 of deeds at page 100. The modest purchase price, for nearly the entire 18 acres of the subdivision, indicates that the developer had not yet undertaken substantial construction nor incurred substantial expenditures.
- Whatever expenditures were incurred by the developer apparently did not include property taxes due and owing. A developer would typically give the highest priority to payment of such taxes in order to prevent loss of the property through foreclosure. If the developer could not even afford to keep current on property taxes due, it is unlikely that at the same time it was undertaking substantial construction and incurring substantial expenditures on subdivision improvements.

But even if the developer had completed substantial construction and incurred substantial expenditures on subdivision improvements, courts have found that "where the amended zoning ordinance relates only to lot size or other restrictions with respect to development, and the site improvements made under the original subdivision plat would be equally useful or valuable, a vested right in the subdivision as approved could not be claimed on the basis of those improvements." *See Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, *supra*; see *Ramapo 287 Ltd. Partnership v Village of Montebello*, 165 A.D.2d 544 (3d Dep't 1991). The amendments to Harrison's zoning ordinance in 1974 were of precisely this type.

If there were vested rights, they were abandoned

Even if there was at some time a right to build with respect to 62 Winfield Avenue, and even if that right had become vested, an owner who has acquired vested rights may be divested of that right where there is abandonment, recoupment or an overriding benefit to the public to be derived from the enforcement of the amended zoning ordinance. *See Matter of Putnam Armonk v Town of Southeast*, 52 A.D.2d 10 (2d Dep't 1976).

The Building Inspector and opposing counsel appear to rely on the Town Board's approval of the subdivision map on May 2, 1929 as the basis for their conclusion that 62 Winfield Avenue is a buildable lot. That ignores the astonishing 90-year gap since then, during which the successors in interest to the developer have taken no action to whatsoever to develop 62 Winfield Avenue. The failure to act over such a long period of time constitutes an abandonment *per se* of the

developer's vested right to build. *See Matter of Putnam Armonk v Town of Southeast*, *supra*; *Matter of RC Enters. v Town of Patterson,* 42 A.D.3d 542 (2d Dep't 2007); *Meilak v Town of Coeymans*, 225 A.D.2d 972 (3d Dep't 1996); *Dwyer v McTygue*, 137 Misc. 2d 18 (Sup. Ct., Saratoga Cty. 1987). There is a good reason for this: the factors affecting the welfare, quality of life and safety of the community which were considered by the Town Board in approving the subdivision over 90 years ago have changed markedly in focus, intensity and in number.

Any right there may have been to build was defeated by the change to one-acre zoning

The lot at 62 Winfield Avenue is not protected from the effects of subsequent zoning changes by the concept of continuance of a nonconforming use, as embodied in Section 235-51 of the Harrison zoning code. When Harrison's current zoning ordinance became effective in 1974, the lot was vacant and unimproved – the possibility of erecting a dwelling on it was merely contemplated at best. "A party seeking to overcome a restrictive zoning ordinance must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective." *Matter of Mar-Vera Corp. v Zoning Bd. of Appeals of the Vil. of Irvington*, 84 A.D.3d 1238 (2d Dep't 2011). Since 62 Winfield Avenue was never used for a nonconforming purpose, it is not entitled to any exemption from the current zoning ordinance pursuant to permitted continuance of a nonconforming use.

62 Winfield merged with 9 Braxmar Drive North

The merger provision of the Harrison zoning code is set forth in section 235-5(D) of the code:

> Adjoining lots which are now or which hereafter, under circumstances, come to be held in common ownership shall be deemed merged and treated for all purposes as a single lot, regardless of whether or not such merger is recorded upon any Tax Map or other official record, where such merger is necessary for the lot to conform with the dimensional regulations of this chapter."

Our previous submissions of May 17, 2021 and July 1, 2021 describe at length the common ownership history of the adjoining lots at 62 Winfield Avenue and 9 Braxmar Drive North, including the common ownership in 1974, when the current zoning ordinance became effective, and for the 45 years that followed. These submissions thoroughly document our reasoning as to why we conclude a merger has occurred. For the sake of brevity these arguments will not be repeated here. The remainder of this submission addresses points raised by opposing counsel in opposition to a finding of merger.

Opposing counsel argues that the term "adjoining lots" is a term of art upon which the courts have applied an interpretational gloss and that the properties at issue in this case are not adjoining lots under that gloss. This argument has several flaws. For one, the term "adjoining" appears over 40 times in the Harrison zoning code in the context of describing two things that are contiguous to each other, yet the term is never defined. This indicates that the term is intended to have its common, everyday dictionary meaning, which is "touching or bounding at a point or line" (https://www.merriam-webster.com/dictionary/adjoining). Under this definition, 62 Winfield Avenue and 9 Braxmar Drive North are clearly adjoining lots.

Second, the term "adjoining lots" under section 235-5D has never been the subject of judicial

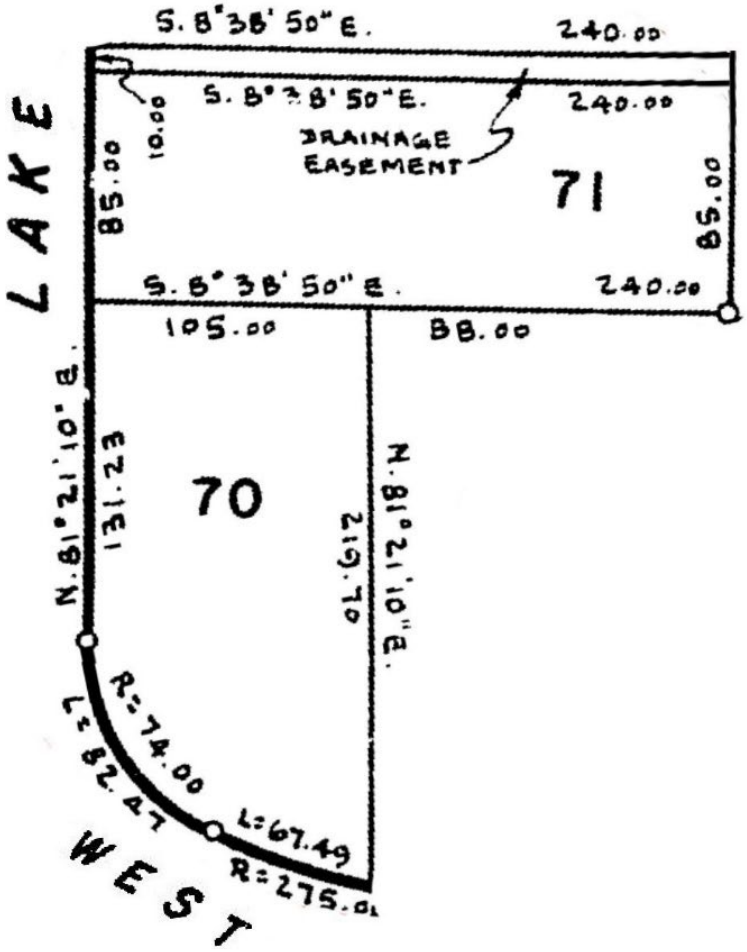
interpretation. The term "adjoining lots" in other municipal zoning codes has been the subject of judicial interpretation but the provisions of those codes differ from Harrison's.

Third, the underlying facts and circumstances of the cases cited by opposing counsel in which courts determined that two contiguous parcels forming an "L"-shape were not "adjoining lots" are completely at odds with the situation here. We have already discussed in detail why these cases are distinguishable from the case at bar in our previous submission of July 1, 2021. Since that time, we have researched the layouts of the underlying properties at issue in each such case: *Wiggin v Kern*, 161 A.D.2d 716 (2d Dep't 1990); *Blue Ridge Gardens, Inc. v Oswald*, 44 A.D.2d 567 (2d Dep't 1974); *Creamer v Young*, 16 Misc. 2d 676 (Sup. Ct., Nassau Cty. 1959); and *Land Purchasing Corp. of America v Schlimm*, N. Y. L. J., November 29, 1957, p. 13, col. 5.

Wiggin v Kern is not applicable to L-shaped parcels so is irrelevant to any such purported doctrine. As quoted in the court's opinion: "The record in this case, however, establishes that the parcels owned by the petitioner did not form an 'L' shape."

Of the two lots involved in the *Blue Ridge Gardens* case, as shown in the diagram below, one was a corner lot and the two lots abutted in a perpendicular manner. The lots were contiguous for the entire length of one of the lot's shortest sides. And there was no logical reason for the two properties to serve as one.

Blue Ridge Garden Case Lots 70 and 71

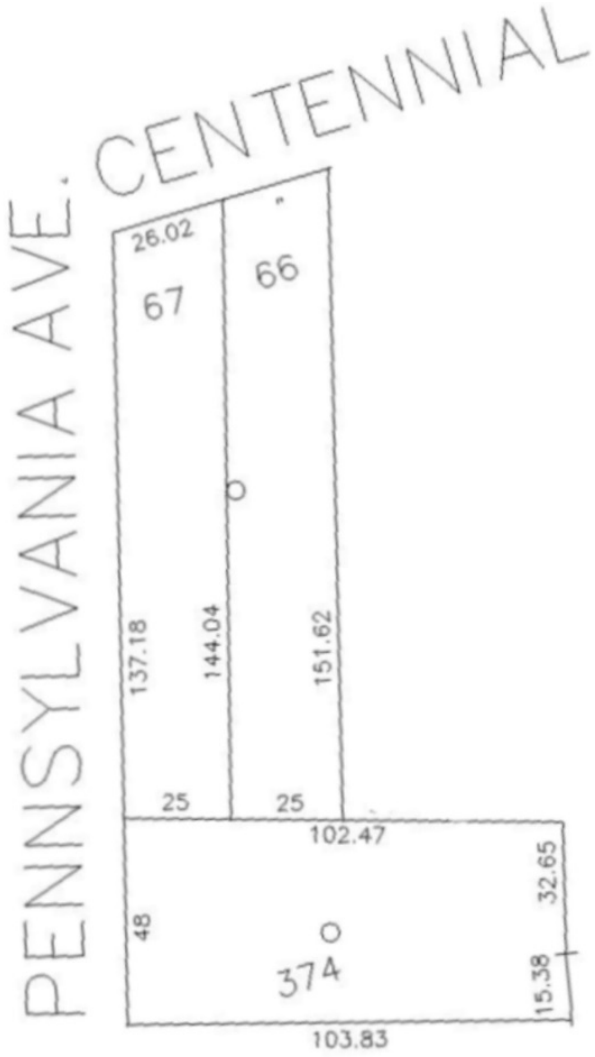


ES

- Lots are perpendicular to each other
- Lots are contiguous for 105 feet of a 240-foot border (44%)
- Lots are contiguous for the entire length of lot 70's shortest side
- There is no logical reason for the two properties to serve as one

Of the two lots involved in the *Creamer* case, as shown in the diagram below, one was a corner lot and the two lots abutted in a perpendicular manner. The lots were contiguous for the entire length of one of the lot's shortest sides. And there was no logical reason for the two properties to serve as one. [At the time of the *Creamer* case, the lots designated as 67 and 66 in the diagram were a single lot.]

Creamer v Young Case Lots

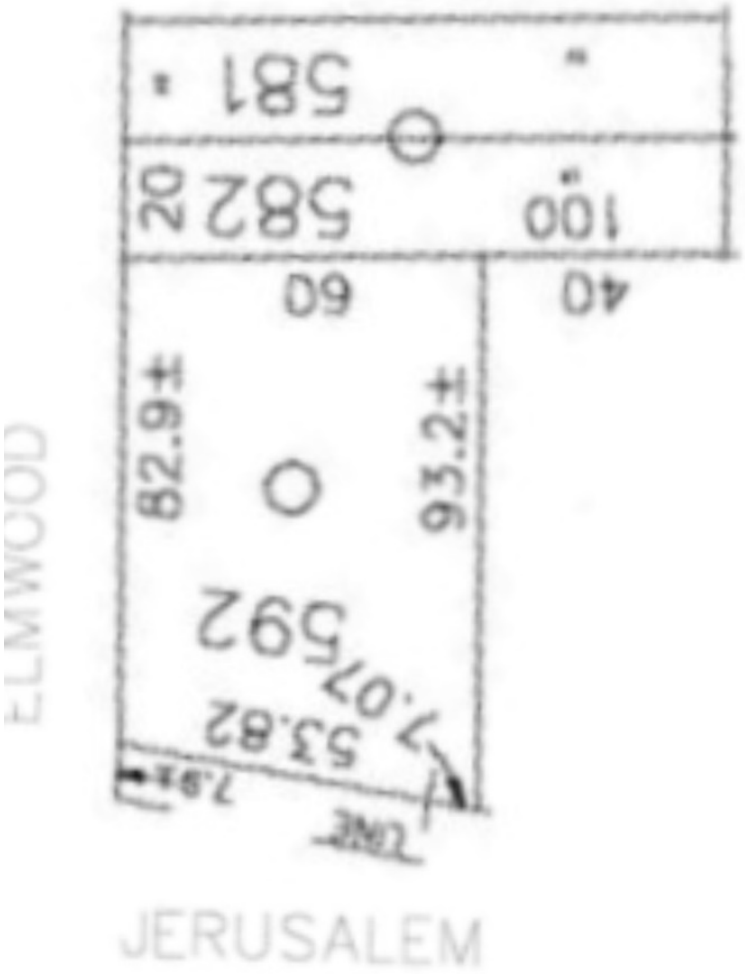


:ES

- Lots are perpendicular to each other
- Lots are contiguous for 50 feet of a 102-foot border (49%)
- Lots are contiguous for the entire length of lots 67 and 66's shortest side
- There is no logical reason for the two properties to serve as one

Of the two lots involved in the *Land Purchasing Corp. of Amer.* case, as shown in the diagram below, one was a corner lot and the two lots abutted in a perpendicular manner. The lots were contiguous for the entire length of one of the lot's second shortest side. And there was no logical reason for the two properties to serve as one.

Land Purchasing Corp. of Amer. Case Lots



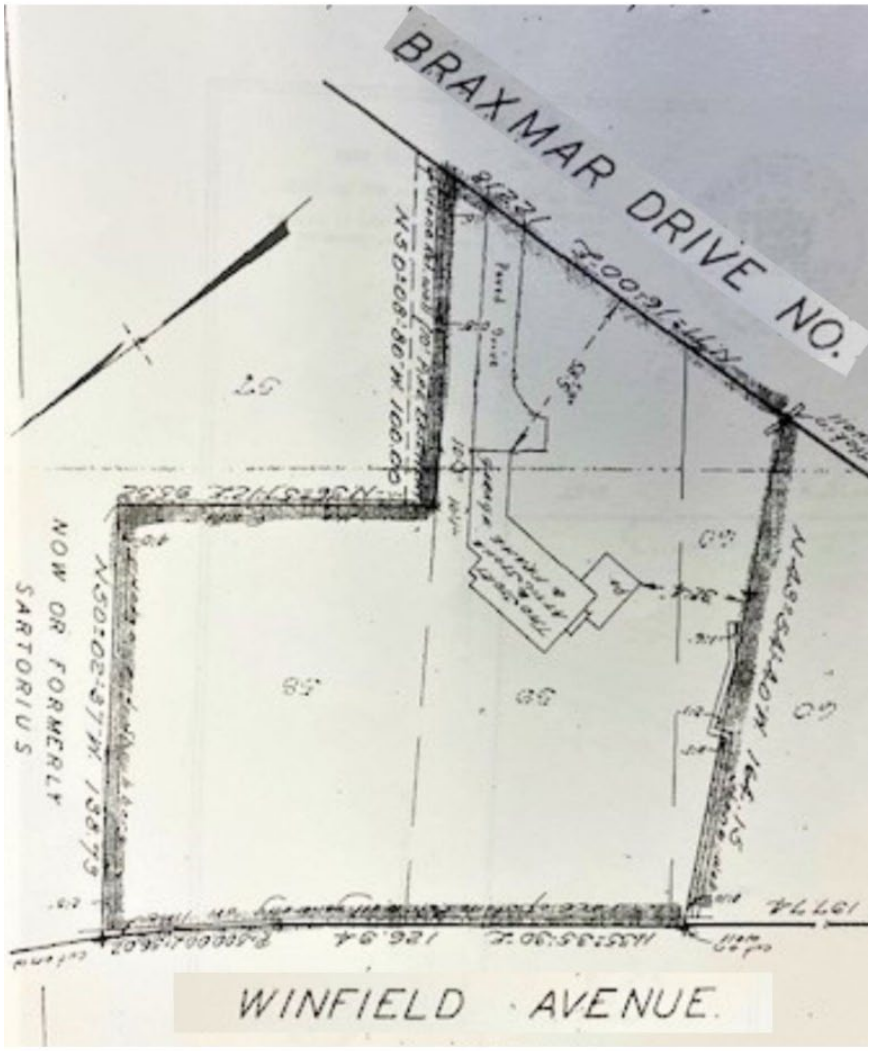
CES

- *Lots are perpendicular to each other*
- *Lots are contiguous for 60 feet of a 100-foot border (60%)*
- *Lots are contiguous for the entire length of lot 592's second shortest side (its shortest side is 54 feet)*
- *There is no logical reason for the two properties to serve as one*

In contrast, 62 Winfield Avenue does not involve a corner lot and is parallel to 9 Braxmar Drive North, not perpendicular to it, as shown in the diagram below. The lots are contiguous for the entire length of 62 Winfield Avenue's second longest side. And among the logical reasons for the two properties to serve as one is that the orientation of the dwelling on 9 Braxmar Drive North, *i.e.*, parallel to Braxmar Drive North and at approximately a 45-degree angle with Winfield Avenue, makes 62 Winfield Avenue ideally suited as a backyard for the dwelling at 9 Braxmar

Drive North. Further, as stated in our previous submission of May 17, 2021, a very large rock outcropping behind 9 Braxmar Drive North restricts the usable backyard of that lot.

62 Winfield Ave. and 9 Braxmar Dr. North



- Lots are parallel to each other (side-by-side)
- Lots are contiguous for 133 feet of a 233-foot border (57%)
- Lots are contiguous for the entire length of 62 Winfield's second longest side (its longest side is 138 feet)
- The orientation of the residence (fronting on Braxmar Dr. N.) is such that 62 Winfield naturally serves as a rearyard

This comparison shows that the underlying facts and circumstances of the *Blue Ridge Gardens*, *Creamer* and *Land Purchasing Corp. of Amer.* cases, on which opposing counsel so heavily relies, are readily distinguishable from the situation here. The respective courts' conclusions in those

cases that the lots at issue were not adjoining is understandable given that each case involved a corner lot, the two lots at issue were perpendicular to each other, and there was no logical reason for the lots to serve as one. Neither of the lots at issue here is a corner lot, the two lots are parallel to each other and there is ample reason for combining the two. In fact, they have functioned as one lot for over 80 years. For these reasons, and despite opposing counsels' arguments to the contrary, there is no reason to depart from the obvious conclusion that 62 Winfield Avenue and 9 Braxmar Drive North are "adjoining lots," and are therefore subject to the merger provision of the Harrison zoning code.

Opposing counsel claims that the phrase "… where such merger is necessary for the lot to conform with the dimensional regulations of this chapter" in Harrison's merger provision limits mergers to cases in which the resultant merged lot would meet or exceed dimensional zoning requirements. This argument ignores the long history of judicial interpretation of the word "necessary," the basic principle of zoning that embraces the concept of ultimate elimination of nonconforming uses, and the precedents of this Board.

The fact that the two parcels together do not even make up a conforming lot cannot be a basis for finding there was no merger. Counsel for the property owner can reach that conclusion only by reading the word "necessary" final clause of section 235-5(D) as imposing the condition that lots will merge only if, together, they are sufficient to form a conforming parcel and will not merge – and will be buildable separately – if they do not. If that were the case, the minimum lot size provision in this zoning district and every other zoning district is meaningless. All one would have to do to build on a substandard lot is find two really substandard lots. And two lots that were each almost conforming could not be put together to create on conforming lot. Counsel has failed to explain how that makes any sense at all. What "necessary" means in that context is that neither lot can reach the minimum lot size without the other, i.e., that they are substandard. The clause is included to prevent the irrational result that two conforming adjoining lots would merge simply by being held in common ownership.

Even a technical reading of the code cannot lead to the conclusion the property owner's counsel would have the Board reach. Black's Law Dictionary states: "the word 'necessary' does not always import an absolute physical necessity, so strong that one thing, to which another may be termed 'necessary,' cannot exist without that other. It frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. *See McCulloch v. Maryland*, 4 Wheat. 310 (1819)." (https://thelawdictionary.org/necessary/) This clarifies that the word "necessary" embraces an action that is convenient or useful to attaining the desired end. In the case of the zoning code's merger provision, the meaning of the word "necessary" is sufficiently elastic to encompass a situation where the merging of two lots would reduce the extent of dimensional nonconformity, though not eliminate it entirely.

Accepting counsel's interpretation of "necessary" would undermine the basic principle of zoning which embraces the concept of ultimate elimination of nonconforming uses. See *Matter of Harbison v City of Buffalo*, 4 N.Y.2d 553 (1958). Interpreting "necessary" to encompass the situation where the merging of two lots would reduce the extent of dimensional nonconformity, but not eliminate it entirely, is more consistent with this concept. It would also lead to undesirable

results. For example, if two adjoining 0.6-acre lots held in common ownership in a one-acre zone were merged to the extent indispensably necessary to conform to the dimensional regulations, the result would be two lots: a 1.0-acre lot and a 0.2-acre lot, because it would not be indispensably necessary to have merged the surplus 0.2 acres to comply with the dimensional regulations.

Finally, opposing counsel's interpretation of Section 235-5D runs counter to this Board's established precedents. In the local case that led to the Court of Appeals' decision in *Matter of Ifrah v Utschig*, 98 N.Y.2d 304 (2002), this Board addressed the situation where two substandard lots in a one-acre zone were deemed merged as a result of common ownership, even though the resultant merged lot was only 0.77 acres. The Court of Appeals ultimately decided that this Board had correctly denied a variance. What is critical about the case, however, is the fact that a variance was required and that, in circumstances identical to the situation presented here, the Village/Town had determined that the property owner had no right to build without the variance. The Court of Appeals described the facts:

> In 1996, petitioner Philippe Ifrah purchased a 0.77-acre parcel of land on Fenimore Drive in the Town of Harrison, Westchester County. A single-family residence constructed in 1928 sits on the southern portion of the parcel. The Town's 1928 subdivision map originally designated the property as two separate lots. Those lots merged in 1974 as a result of common ownership. Some time after the original subdivision but prior to the merger, the Town adopted a zoning ordinance designating the area in which the parcel is located as a residential district, which requires one acre of land and a 100-foot minimum lot width for the construction of a one-family dwelling.
>
> Shortly after purchasing the property, petitioner sought to subdivide the already nonconforming parcel into two separate lots. According to petitioner's plan, the lot containing the existing dwelling would be approximately 0.40 of an acre with a width of 93.13 feet, and the second lot, on which a new dwelling would be constructed, would be approximately 0.37 of an acre with a width of 79.16 feet. Petitioner applied for the four area variances required for the subdivision.
>
> After a public hearing, site visit and consideration of all the statutory factors set forth in Town Law § 267-b, respondent Zoning Board of Appeals of the Town of Harrison unanimously denied petitioner's application. The Board held that the granting of the variance would create two substantially substandard lots, both deviating from the one-acre requirement by 60% or more. The Board also held that the variances would have a significant impact upon, and change the character of, the neighborhood.

98 N.Y.2d at 306-307. The Village Attorney's Office is surely aware of this precedent. Village Attorney Jonathan Kraut argued the case in the Court of Appeals. There is no apparent explanation for why the Village/Town is taking a different position here.

The properties are factually one

62 Winfield Avenue and 9 Braxmar Drive North were used as one property for 90 years. There is no real basis for disputing that. Counsel attempts to do so by misstating the factual basis for that argument, stating "… the two lots had to not just be commonly owned, but **materially** used

together; and the best the Applicants offer towards this requirement is that a swing set was placed on 62 Winfield" [emphasis as in original]. We take extreme issue with this statement. Our previous submissions document the extensive and material use that the prior owners of 9 Braxmar Drive North made of 62 Winfield Avenue, including hosting children's recreational equipment such as a permanent wooden playset, swing set, trampoline, lacrosse goals and targets, miniature playhouse, and more. Further, real estate listings reflect that the prior owners offered both lots for sale in 2017 as a single unit. Our submission of May 17, 2021 in particular describes in exhaustive detail these and other facts that support a finding that the two lots were not held in "single and separate" ownership and were used in conjunction with each other.

These facts were corroborated by testimony from our client, Douglas Amann, who owns the adjoining property to the southeast of 62 Winfield Avenue, at this Board's July 8, 2021 hearing. In the context of describing the activity on that lot by the common owners of the adjoining properties, Mr. Amann said: "[T]here were items in the backyard, picnics, family gatherings, there was no fence separating this property."

The undersized lot is inconsistent with the neighborhood

Opposing counsel makes the unsupported claim that the 62 Winfield Avenue lot at 0.3 acres is consistent with the other lots in the area. Far from it. The attached neighborhood study shows that 76% of the lots in the area exceed 0.3 acres. In other words, 62 Winfield Avenue is an outlier among the neighborhood's substandard lots.

Opposing counsel also appears to take the position that having two separate lots of 0.3 acres (62 Winfield Avenue) and 0.44 acres (9 Braxmar Drive North) is more consistent with the character of the neighborhood than a single merged lot at 0.74 acres. The logic and policy implications of this conclusion are questionable. First of all, the two lots have existed in their current configuration and were used as one lot by common owners for 80 years, so merging the lots would not change the character of the neighborhood one whit. Secondly, having 62 Winfield Avenue and 9 Braxmar Drive North as two separate buildable lots undermines the concept of ultimate elimination of nonconforming uses. By contrast, the merging of two lots furthers this concept in that it would reduce the extent of dimensional nonconformity.

The attached neighborhood study highlights the possible precedential impacts if the building permit for 62 Winfield Avenue is allowed to stand. Of the 41 homes in the neighborhood, 22 are situated on multiple-lot parcels (*i.e.*, parcels consisting of more than one lot from the original subdivision maps). Upholding the Building Inspector's erroneous ruling that 62 Winfield Avenue is a buildable lot could fuel a building boom among these homeowners (or their heirs) in an effort to cash in on separate lots of 90 years ago.

Finally, we would note that The submission of an affidavit of Immobiliare's managing member with costs and pictures reflects Immobiliare's strategy from the beginning of this matter – delay and keep building until the members of the Board felt uncomfortable enforcing the requirements of the zoning code. As we have previously discussed with the Board, however, if the building is illegal, which it is, it must come down, despite Immobiliare's efforts to complete it. The Court of Appeals addressed that very point in *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 282 (1988) ("[T]he mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results").

Conclusion

For all of these reasons, we respectfully request, on behalf of Mr. Amann and Ms. Genovese that this board nullify the building permit issued by the Building Inspector with respect to 62 Winfield Avenue. 62 Winfield Avenue and 9 Braxmar Drive North were one parcel for 90 years. They merged. The zoning law does not allow them to be torn apart into two separate undersized lots without a variance from this Board. Immobiliare never even asked for variance. The illegal building permit they were able to obtain should not be allowed to stand.

Very truly yours,

Robert A. Spolzino

cc: Paul Noto, Esq.
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