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March 8, 2018

Ms. Patricia Carcone
Hoboken Zoning Board
City Hall
Hoboken, NJ 07030

James Bosworth
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Dear Ms. Carcone:

In response to Chuck McGroarty's memorandum, dated July 14, 2017 regarding your appeal of denial of zoning certification for 313 Willow Avenue in Hoboken, NJ, and the subsequent letters from F. Clifford Gibbons, counsel to the Hoboken Zoning Board of Adjustment dated September 13, 2017 and January 11, 2018, I offer the following comments.

McGroarty concurs with the opinion of Hoboken's present Construction Code Official, Ms. Holtzman, that the December 6, 2001 zoning certificate was erroneously issued by Virginia Buonfiglio for new construction at 313 Willow Avenue, and that the applicant would have required variance relief for (1) insufficient lot depth; (2) maximum lot coverage; (3) rear yard

setback; and (4) off-street parking. Mr. Groarty bases his opinion on the various errors contained within the original plans attached to the zoning application dated December 4, 2001 prepared by Dennis M. Devino, AIA of Park Ave Design Group Architecture, and a comparison of same to the City of Hoboken Zoning Ordinance (Chapter 196). F. Clifford Gibbons, Counsel to the Hoboken Zoning Board of Adjustment, concludes in his subsequent letter that Virginia Buonfiglio may have been "confused" by these errors, resulting in the erroneous issuance of the first certificate of Zoning Compliance.

It is not clear, however, what version of Chapter 196 Mr. McGroarty compared Mr. Devino's plans to. Furthermore, all of the erroneous information noted by Mr. McGroarty was, at the time of application, either correctly provided to the Zoning Officer on the application form itself or in the survey attached to the application. Other errors were either of no consequence, or the result of Hoboken's failure to codify recent amendments to Chapter 196 that were not readily available to the public, nor to the City's own officers. The applicant, the applicant's architect, the Zoning Officer, and the Construction Code Official, were all apparently unaware that Chapter 196 had been amended only seven weeks prior to the December 2001 filing of the application. Mr. McGroarty's memorandum states in paragraph 5: "per the copy of the zoning ***in place*** in 2001 ***as provided by Ann Holtzman***" (emphasis added). He does not certify that he is comparing the application to the published ordinance that was actually available to the public and city officers at the time of the application. A copy of Chapter 196 from 2002, after the application for zoning compliance, evidences a partially codified ordinance which was available to the public, in use at offices of the applicant's architect, and quite possibly used by City officials that contained §196-40(F). It is this section of the ordinance that allows for the proposed new construction described in the December 2001 Zoning Application to proceed to building permits without variance relief. To quote Section 196-40(F) in full as it appeared in the Hoboken Zoning Ordinance prior to October of 2001:

§ 196-40. Design standards for off-street parking areas.
F. In residential districts where a site is utilized as a parking facility as referred to in §196-39 above, the following exemptions shall be granted for new construction which accommodates, to the greatest extent possible, the same number of vehicles parked on the site at the time of the adoption of this ordinance. Note however, that the new or enlarged building may not exceed the maximum height permitted in the district unless stated below:
(1) Vacant sites with open parking:
The ground floor containing the parking for the new construction may cover 100% of the lot up to a height of ten (10) feet.
(2) Sites with existing structures:

Whatever non conforming lot coverage and yard setbacks existing at the time the ordinance is adopted shall shall be permitted to be recreated in the new building even where the entire existing structure is torn down, so long as the non conforming lot coverage recreated is related to the parking use only.

The current (as of March 5, 2018) City of Hoboken Zoning Ordinance, as provided by municode.com, shows that §196-40(F) was repealed by ordinance DR-14 on October, 17 of 2001. The current Ordinance reads as follows:

§ 196-40 Design standards for off-street parking areas.
[Amended 2-18-1998 by Ord. No. R-294; 12-2-1998 by Ord. No. R-357; 10-17-2001 by Ord. No. DR-14]. ...
F. (Reserved)
[Amended 1-7-1987 by Ord. No. V-91; 6-21-1989 by Ord. No. P-58; 2-18-1998 by Ord. No. R-294; 6-7-2000 by Ord. No. R-445; ***repealed 10-17-2001 by Ord. No. DR-14]***
G. Responsibilities of Owners.... (emphasis added)

From the information provided in Mr. Bosworth's certification, it is clear the repeal was not codified into published copies of the ordinance until 2004. From 2001 to 2004, published copies of the Hoboken Zoning Ordinance only partially codified DR-14 and still included §196-40(F). The amending Ordinance, DR-14, a copy of which was made available by the Hoboken City Clerk, as well as the public notices for the Amendment which were published in the Jersey Journal (certified by Patricia Heath on October 30, 2001) amends Section 40 and omits Section F, but without showing the text of Section F in strikethrough to indicate its deletion (~~like this~~). Showing the deleted language in strikethrough text is not mandatory of course, but is a commonly used practice to accurately display the intent of the ordinance. The two notices published by the Jersey Journal advertising DR-14 never show the language in Section F in strikethrough text, which would more clearly indicate what was intended to be repealed. So while it appears to be true that the application did, in fact, require relief from the R-1 zoning requirements identified by McGroarty, none of the City's officers, nor professionals hired by the applicant, evidence any knowledge that §196-40(F) had been repealed. Finally, no member of the public or any City official who may have had knowledge of the repeal of §196-40(F) ever contested or objected to the Certificate of Zoning Compliance or issuance of building permits, even after notice of intent to commence construction were promulgated to those who may have been harmed by such noncompliance with the newly adopted zoning requirements. Finally, in a

copy of a fax dated March 19, 2004 between the City of Hoboken and Coded Systems Incorporated who printed the ordinance, and which was made available by Coded Systems Inc., show the City of Hoboken using strikethrough text in a version of DR-14 intended to clarify which portions of the ordinance were supposed to have been deleted three years earlier.

Below is a point by point response to Mr. McGroarty's memorandum, in light of the fact that a version of Hoboken's Ordinance that still contained deleted language was in print, and may well have been relied upon both by City officers and the public. It is important to point out that typographical errors are common on architectural plans and in applications for development, usually the result of using a template or failing to edit information from a previous project, and not due to any intentional obfuscation.

1. Mr. McGroarty says that the architect made a typographical error misstating the zoning district and the applicable chapter of the city code, "196-16 Zoning District: R-3" and not "196-14: Zoning District: R-1." As noted by Mr. McGroarty, the Zoning Application and the First Certificate of Zoning Compliance both provide the correct R-1 zone designation, evidencing that the zoning officer did, in fact, know which zone and which sections of the ordinance the application was required to conform to.

2. Mr. McGroarty says that the Zoning Information table lists the requirements of the R-3 Zone and not those of R-1 Zone. For lot area, the correct R-1 requirement is actually lower (2000 square feet, not 2500 square feet) than the R-3 requirement, and is therefore of no consequence, as the lot was and is conforming to the R-1 minimum lot area. The lot depth is correct as R-1 and R-3 require the same 100 feet. The subject lot has a depth of only 95 feet, however it is my opinion that variance relief is not required, as this was not a subdivision application seeking to create that lot dimension. The 95 foot lot depth was a pre-existing nonconforming condition that cannot easily be remedied. Moreover, several other lots on this same block also have a depth of only 95 feet. While the owner/applicant did document attempts to purchase the additional 5 feet, no such purchase was ever made. The zoning ordinance should not be held retroactive on lot subdivisions that pre-existed the ordinance. Otherwise the zoning ordinance would be a regulatory taking, as there would be no as-of-right use of the property, leaving all possible development and use to the discretion of a board. Furthermore, it is common practice for development applications to note all nonconformities with adopted zoning requirements, but to only seek a variance for any *new* nonconformities being

sought by the application, not for all existing nonconformities that were either previously approved or grandfathered. In any event, the Zoning Officer did not abuse her discretion and is authorized by law to make the determination if variance relief is required. The Zoning Officer at the time came to the conclusion that none was required, presumably because the lot depth was an existing condition of the lot, and not a newly requested lot dimension through subdivision. Section 196-22, Lot Regulations, further states that "The area or dimensions of any lot... shall not **be reduced** to less than the minimum required by this chapter," (emphasis added) which the zoning application in this dispute does not do. It was already done. Furthermore, "if a dimension is already less than a required minimum, such area or dimensions shall not be further reduced." The zoning application did not propose any reduction to a lot dimension. Variance relief for lot depth was not required.

As further evidence that variance relief would not typically be required for new construction on an undersized lot, the practice of only requiring relief from new variances sought by a development application was eventually clarified and amended into Hoboken's Zoning Ordinance. The current ordinance, provided by municode, allows for the continuation of nonconforming lot in §196-5.1:

> *§ 196-5.1Nonconforming uses, structures and lots.*
> *A. Continuation. [Amended 6-17-2015 by Ord. No. Z-350]*
> *(1) A use, structure or lot lawfully in existence at the effective date of this Chapter that has been made nonconforming as a result of the passage of this Chapter or any applicable amendments hereto may continue to function as the same nonconforming use, structure or lot, and may change ownership, provided that all other conditions of this article are met.*
> *(2) Structures that are nonconforming as to height, yard setbacks, or lot coverage that are in existence on the effective date of this Chapter or become so as a result of any amendment hereto may undergo bulk alteration without variance only in cases where the alterations will bring the structure into conformity with the height, yard setbacks and lot coverage requirements for the zone in which the structure is located. In all other cases, where an alteration is proposed that does not eliminate the nonconformity entirely, or where an alteration will intensify the nonconformity in any way, the application shall be referred to the appropriate board as required subject to the variance or variances needed.*
> ***(3) Lots that do not conform as to width, depth or square feet requirements set forth in this Chapter that are lawfully pre-existing lots not created by variance and in existence on the effective date of this Chapter or that become so as a result of any amendment hereto may be built upon, and existing structures already thereupon may be altered without variance,*** *provided any structure or alteration conforms with the standards for height, yard setbacks and lot coverage pursuant to Chapter 196, Zoning. In such cases, bulk requirement percentages, where applicable, shall be applied instead of feet. (emphasis added)*

Regarding the maximum permitted lot coverage of 60%, the 30 foot rear yard setback, and the maximum building extent of 70 feet from the front lot line, reliance by the zoning officer on a published ordinance which still contained §196-40(F) explains the decision not to require variance relief for these items. Section 40(F) clearly states that sites with existing open parking can preserve the parking by allowing for a ground floor parking level with 100% lot coverage. Section 40(F) makes clear that new construction may exceed the permitted building height to accommodate the ground floor parking level with a height up to 10 feet. If one section of the Zoning Ordinance provides **exemptions** to allow for a ground floor parking level with 100% lot coverage, relief cannot be required from other regulations that limit lot coverage, require a rear yard, or limit the building extent from the front property line. Those regulations within the R-1 Zone can only be applied to the residential floors above the exempted ground floor parking level, which was the case here. If the Zoning Officer was familiar with §196-40(F), which can be assumed since it appears to have been in the zoning code from 1987 onwards, and was not provided an updated version that deleted this section, then the Zoning Officer's action to issue the First Certificate of Compliance was clearly reasonable and routine. We now understand that Ordinance DR-14 repealing §196-40(F) was in fact adopted by the Hoboken City Council on October 17, 2001. By the time of the application (seven weeks later on December 4, 2001), the amendment had not been codified or had been only partially codified into the City's published ordinance. The Hoboken Municipal Council had made an about-face with regards to parking policy, from a concern that the City may not have enough parking and should attempt to preserve as much off-street parking as possible, to a concern about having too much parking and eliminating minimum parking standards and even prohibiting some parking. This can understandably give municipal officers policy whiplash. For at least a few months after amending the zoning ordinance, it appears the old rules were still being followed by City officials, as well as the applicant's professionals.

3. Mr. McGroarty says, the Project Data information table has the wrong zone, wrong block number, and wrong lot area. The zoning application form provided the correct zone, correct block and lot number and the survey attached to the application provided the correct block and lot numbers and the correct lot dimensions of 25 by 95, from which the correct lot area can easily be calculated and which was not below the required 2000 square feet and was therefore of no consequence. The First Certificate of Zoning Compliance has the correct block and lot

numbers, correct address, and zone, The Zoning Officer could not have been confused about these facts, and did write the correct information on the certificate.

4. The Planner maintains that the Location Map points to the wrong location on the wrong block. As with the information in (3) above, it is not likely that the Zoning Officer was confused about the location of the proposed building as all the information in the First Certificate of Zoning Compliance was correct.

5. Agreed, §196-14(F)(1)(a) does not permit parking for new or existing residential use. If a published ordinance that contained repealed language was in use, there would have appeared to have been a conflict within the zoning code. It is the purview of the Zoning Officer to interpret the zoning and resolve any such conflicts. A decision was made in the moment of Hoboken's about-face with regards to parking, that §196-40(F) took precedence over §196-14(F)(1)(a), which is difficult to second guess today.

6. As noted earlier, the 95 foot lot depth was correctly presented on the survey and on the zoning application. While the plans depicted a 100 foot building in the hope of purchasing the additional 5 feet, a correction to the plans to remove 5 feet from the ground floor level could easily have been agreed to prior to permitting. As there can be no variance relief or permission granted by the City to encroach onto another property, this correction to the plans would have been mandatory, but would have no bearing on the necessity of any relief from zoning regulations or necesitate a site plan review.

7. Agreed, the title block on every sheet of the architect's plans refers to "Willow Street" on Lot 6 and not "Willow Avenue" on Lot 7. While the many errors on the plans are indeed unfortunate and sloppy, to say they created "considerable confusion" is pure conjecture on the part of Mr. McGroarty. In my 19 year career as a staff review planner for Jersey City, I can attest that multiple errors similar to these are common when reviewing applications for development and architectural plans. While they may sometimes cause minor confusion and irritation, they are rarely ever the cause of any real mistakes. It is worth noting that a "Willow Street" does not exist within the City of Hoboken, and therefore mistaking "Avenue" for "Street" was not likely to cause much confusion for any City Officer or the public.

The amendment repealing §196-40(F), only seven weeks before the application was submitted, was not fully codified, and a published Zoning Ordinance from 2002 still contained exemptions for ground floor parking levels with 100% lot coverage. Published ordinances that were improperly codified were generally available at the time of application, and were quite possibly in use by the City's own officers. **It is far more probable that a published Zoning Ordinance that permitted the proposed project, and not the typographical errors on the architectural plans that were easily corrected by City staff, that caused the First Certificate of Zoning Compliance to be issued, along with subsequent building permits. Those building permits were then substantially relied upon by the applicant.** The applicant proceeded to pull foundation permits, provide multiple notices of his intent to commence construction, and removed an underground storage tank at great expense in preparation for construction. Appeal periods passed without any objections by neighbors or by any City officer who may have caught the mistakes. The substantial reliance on both the Zoning Certificate and subsequent permits should be respected and the board should grant Mr. Bosworth the relief he is requesting under the particular circumstances of this case. Further, the First Certificate of Zoning Compliance and subsequent Building Permits should not be revoked.

As a further matter, the issue of permit expiration and extension must be addressed. I believe the Zoning Officer, relying on a published copy of the Hoboken Zoning Ordinance which included the zoning exemptions necessary for the project despite having been recently repealed, acted within her discretion to issue the First Certificate of Zoning Compliance on December 6, 2001. Subsequently, a foundation permit was issued on December 4, 2002, less than one year after the First Certificate was issued and before the expiration of same. It is my opinion that the Permit Extension Act is applicable and extended all permits.

Sincerely,

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