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***Via FedEx and E-Mail (rcusumano@harrison-ny.gov)***

Hon. Paul Katz, Chairman
and Members of the Zoning Board of Appeals
Town/Village of Harrison
1 Heineman Place
Harrison, New York 10528

***Re: CAL. Z21-018 Amann & Genovese – 62 Winfield Avenue***
***Appeal of Building Permit: Tax Map Block 313, Lot 5***

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

On behalf of Angela and Paul Gerardi, the owners of 62 Winfield Avenue, we write in advance of the ZBA's September 9 meeting to supplement our August 4 Letter and to respond to the August 31 letter from Applicants' Counsel. Counsel fails to rebut our legal arguments—offering no basis to conclude that 62 Winfield merged with 9 Braxmar and lost status as a buildable lot. But even more concerning is that Counsel now introduces surmise, false citations, and spin to try to persuade the ZBA to overturn Building Inspector Rocco Germani's interpretation and to rule its way. We could not leave this unaddressed.

First, Counsel spends four and a half pages lodging complaints with Your Board's process. None is legitimate. More important: none changes what the outcome here should be or offers a reason to vote the Applicant's way. For example:

- The Applicants cite Town Law § 267-a(8) and claims Your Board was obligated to issue a decision "within 62 days of the initial hearing on the matter."[1] Except Town Law 267a(8) doesn't contain the word "initial." Rather, it requires that the ZBA reach a decision "within 62 days after the conduct of said hearing," which, as Your Board knows, could occur across multiple nights, across multiple months. Hearings are adjourned and continued all the time before being closed. Decisions can frequently come up to a year after the "initial" hearing. Hearings are not fully "conducted" until they are completed. Yet Applicants also claim the ZBA is not empowered to adjourn its own hearings,[2] citing Town Law Section A238-7, which provides circumstances where adjournments "may be granted to an applicant;" and

[1] August 31 Ltr. from R. Spolzino at 4.

[2] August 31 Ltr. from R. Spolzino at 2.

Counsel asserts this is the *only* way an adjournment could be granted. This ignores, for example, Section 235-57(f), which says "The Board of Appeals may adjourn at any time for discussion and viewing of the properties." As Your Board knows, and your Town Attorneys will conform for you, adjournments are common and permitted.

- We hope these strange and patent contortions of the law will compel Your Board to ask: What else is Counsel overstating? For example, at numerous points Counsel complains about not having an opportunity to make a submission or being allowed to speak. But by now the Applicants have sent Your Board reams of submissions. No court could ever find that the Applicants were denied "due process." That this Board allowed both sides to make submissions and be heard—and insisted on its hearing being officially recorded—is not impropriety. It is the opposite. It is good process. What would be improper is if (as Counsel suggests) this Board accepted, as its official memorialization of the meeting, Counsel's "flash drive" with a slapdash—at times inaudible—recording that someone in the room assembled. And while Applicants go on to claim that this resulted in supposedly prejudicial delay—during which time the house at 62 Winfield continued to be built—why haven't the Applicants sought an injunction? The Gerardis were issued a building permit, were never issued a stop-work order; and they built. All the while the Applicants have play-acted as helpless, despite being fully able (and legally *required*) to ask a court for an injunction.[3] Add that to the list of reasons the Applicants' threatened litigation is doomed: if this ever went to court, the Applicants' case has been mooted by their failing to meet their affirmative obligation to seek an injunction.[4]

- Finally, we note that these procedural mole hills the Applicants try to make into mountains fail for another reason. Even if Your Board finds them to be persuasive (and we hope you do not), they offer no reason to vote the Applicants' way. Procedural complaints (fictitious as they may be) do not compel Your Board to deviate from an appropriate and rational interpretation of the law. Regardless of process, Your Board is duty-bound to get the result right—and no "procedural irregularity" justifies reaching a different result or putting a thumb on the scale for the Applicants.

Second, on the merits of this matter: Applicants' Counsel fails to rebut the critical legal points compelling a finding that Building Inspector Rocco Germani got it right. Specifically, the entire case hinges on a single question: did the lots merge or didn't they? If 62 Winfield never

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[3] Stockdale v. Hughes, 189 A.D.2d 1065, 1066–68 (3d Dep't 1993) ("[the owner] commenced construction on the subject complex promptly upon issuance of the building permits . . . . [T]he petitioners lived immediately adjacent . . . and, thus, the clearly discernible construction activity in the [area] during this extended period must have been evident to petitioners, organized as they were to prevent such activity, and yet they permitted it to proceed, satisfied, it seems, to rest upon the ultimate success of their appeals to the ZBA. We conclude that petitioners failed to make sufficient efforts to safeguard their rights here by failing to seek an injunction or stay to prevent construction . . . .").

[4] There were no administrative remedies to exhaust to seek an injunction. Indeed, certain issues Counsel raises, like title or vested rights, are outside ZBA jurisdiction anyway and *have* to be decided by a court.

merged with 9 Braxmar, it retained its status as a buildable lot. It does not matter that the neighborhood is now in a one-acre zone. The neighborhood was subdivided into less-than-an-acre lots before one-acre zoning was imposed on the area, and all the lots are grandfathered in and buildable (unless they lost that status through merger). Counsel even acknowledges this, saying "the right to build on the property at 62 Winfield could have been grandfathered under the earlier zoning if it had [not merged]."[5] Regarding merger: Allen v. Adami set the precedent in New York that mergers are the rare exception, not the rule; they only happen when "clearly" provided for in a "strict" reading of Town law, and "any ambiguity" "must be resolved in favor of the property owner." 39 N.Y.2d 275, 277 (1976); see Substandard Lots, 1 N.Y. Zoning Law & Prac. § 7:41 ("a merger is generally not effected simply because two parcels come into common ownership"). Here, the lots didn't merge—at least not "unambiguously" or "clearly"—for several reasons:

- In our August 4 Letter, we cited a set of cases where Courts have held that lots that abut in an L-shape don't merge.[6] Only lots that tidily form a box—where merger would create a new, orderly polygon—"adjoin" and potentially merge. Applicants' Counsel's letter claims this case is different by making up factors to distinguish it: Counsel claims that the length of the abutting border matters; concocts a "perpendicular" test; and claims that the look of the "L" matters. But none of the L-shaped-lot cases drew this distinction or said these details mattered. Applicants' Counsel is the one who manufactured these caveats. Counsel even offers pictures of the L-shaped lots in the cases and tries to portray them as somehow different from 62 Winfield and 9 Braxmar. And yet, they look the same. They're all L's. These lots do not adjoin under the law and did not merge.

- Mergers only happen if "strictly" and "unambiguously" commanded by statute. See Adami, 39 N.Y.2d at 277. Here, the Harrison Zoning Code only allows mergers "where such merger is necessary for the lot to conform with the dimensional regulations of this chapter." Harrison Zoning Ordinance § 235-5(D). Counsel tries to avoid this by claiming the "long history of the word necessary" actually means 'not necessary.'[7] Hard to believe as that may be, it gets worse: Counsel claims that Black's Law Dictionary supports its backwards definition. Here's the problem: it doesn't. Whether by mistake or sheer confusion, Counsel doesn't actually cite Black's Law Dictionary despite claiming to. Counsel cites a random website called "thelawdictionary.org," which is not Black's Law Dictionary—but rather appears to be an anonymous and unauthorized site whose Twitter account has been

[5] August 31 Ltr. from R. Spolzino at 6.

[6] See Substandard Lots—Common ownership of adjacent lots, 1 Am. Law. Zoning § 9:69 (5th ed.) ("Lots are not regarded as adjoining where they form an "L", part of one being contiguous to the other."); Blue Ridge Garden, Inc. v. Oswald, 44 A.D.2d 567 (2d Dep't 1974) ("relation of lots to each other being such as to form an 'L' shape, did not 'adjoin' the other lot"); Creamer v. Young, 16 Misc. 2d 676, 681 (Sup. Ct. Nassau Co. 1959) (noting that "[i]n *Land Purchasing Corp. of America v. Schlimm*, N.Y.L.J., Nov. 29, 1957, p. 13 . . . two parcels . . . formed an 'L' shaped plot of land . . . were separate and distinct plots"); Rathkopf's The Law of Zoning and Planning § 49:19. Back-to-back or "L" shaped lots, 3. (4th ed.) (lots that "form an L shape, have been held not to adjoin each other").

[7] August 31 Ltr. from R. Spolzino at 14.

suspended for violating Twitter's terms and conditions.[8] Unsurprisingly, the *real* Black's Law Dictionary says what Your Board might expect: "necessary" means "necessary":

"**necessary** *adj.* (14c) **1.** That is needed for some purpose or reason; essential. **2.** That must exist or happen and cannot be avoided; inevitable." Necessary, Black's Law Dictionary (11th ed. 2019).

When the Harrison Code says bringing lots from nonconformity into conformity is "necessary" for merger to take place, it means what it says; and here, that condition is not met.[9] If there were any doubt, the preceding Code section states: "nor shall any lot or land or part thereof be used, merged, apportioned or subdivided except in conformity with the provisions of the Table of Dimensional Regulations . . . ." Harrison Zoning Ordinance § 235-5 (C)(1). To quote the Applicants' Counsel: "The lots are both substandard, with 9 Braxmar Drive North at 0.44 acres and the subject property at 0.30 acres. The combined lots at 0.74 acres would still be substandard . . . ."[10] No merger has taken place. 62 Winfield remains its own, separate lot, and it is buildable as a prior-nonconforming lot, like *every* lot in this development is.[11]

- There are many other common-law pre-conditions for merger that we touched on in our last letter, like that there needs to be "unambiguous" evidence that the lots were "materially" used together.[12] The Applicants try to satisfy this by pure speculation as to how the properties were used over the last century, like whether there were "efforts to memorialize a pipe easement" decades ago, or timely payment of taxes, or guesswork about

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[8] August 31 Ltr. from R. Spolzino at 14.
https://twitter.com/intent/follow?original_referer=https%3A%2F%2Fthelawdictionary.org%2F&ref_src=twsrc%5Etfw%7Ctwcamp%5Ebuttonembed%7Ctwterm%5Efollow%7Ctwgr%5Eblackslawonline&screen_name=blackslawonline

[9] Counsel also claims that this section only means to prevent already-conforming lots from merging. True, it does. But it also prevents substandard lots from merging into still-substandard lots. Merger in Harrison only happens where it would bring a substandard lot from non-conformity into conformity. Here it doesn't. Counsel also claims this "undermine[s] the basic principle of zoning which embraces the concept of ultimate elimination of nonconforming **uses**." August 31 Ltr. from R. Spolzino at 14 (emphasis added). That's **uses**, not bulk. There is no similar compulsion in the law for eliminating grandfathered lots that doing comply with updated bulk requirements. Regardless, here, merger wouldn't eliminate noncompliance. It would just create a new, still-non-compliant, L-shaped, out-of-character lot.

[10] May 17 Ltr. from R. Spolzino at 6.

[11] The Applicants' ARB submission listed 32 homes it claimed to be the "neighborhood," all less than an acre. Many smaller than 62 Winfield, including the Applicants'. Now, Counsel revised that "study" to add nine more to what it claims to be the "neighborhood," to include larger lots. Counsel appears willing to say whatever it thinks it must. Regardless, even if this new study is to be believed, still, almost all the lots are less than an acre and there is nothing out of character for the Gerardis to build a home on 62 Winfield.

[12] Barkus v. Kern, 160 A.D.2d 694, 696 (2d Dep't 1990) (merger requires that the lots were "used in conjunction with each other or that one lot materially enhances the value or utility of another").

a developer's expenditures on the subdivision's infrastructure a hundred years ago.[13] That, along with unsworn say-so that the Applicants once witnessed a picnic table and a swing set on 62 Winfield.[14] These meandering accusations are hardly "clear" or "unambiguous," nor arguably even relevant. More important: they are not the sort of bases upon which Your Board should revoke a duly issued building permit and ruin a family's home. Your Board should require more precision than the Applicants' Counsel offers. A court certainly will.

We ask that Your Board leave Building Inspector Germani's permit intact. And we once again encourage you to seek the confidential guidance and advice of your experienced Town Attorneys. We thank Your Board for its time and attention to this matter, and we will be at the September 9 meeting to answer any questions you may have.

Respectfully submitted,

ZARIN & STEINMETZ

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[13] August 31 Ltr. from R. Spolzino at 6.

[14] August 31 Ltr. from R. Spolzino at 16.