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VIA HAND DELIVERY

November 22, 2019

Francis Boardman, Board Secretary
Planning Board, Borough of Madison
50 Kings Road, Room 206
Madison, NJ 07940

Re: Applications of: *16 Waverly Place, LLC*
Property: 16 Waverly Place
Block: 2702 Lot: 28
Zone: CBD-1
Application: Application for Preliminary and Final Site Plan Approval
Our File No. 2019-5596
Application # P-19-005

Dear Ms. Boardman

This matter is currently scheduled for a continued hearing on December 3, 2019. Enclosed please find sixteen (16) copies of the applicant's revised site plan prepared by Peter Korzen dated April 4, 2019 and revised to November 19, 2019 and revised architectural plans prepared by Marc Marion. (Attached is also an outline of the changes made to the site plan.) In addition, please allow this letter to serve an addendum to our application.

At the last hearing on September 17, 2019 the Board recommended that the applicant meet again with the neighboring property owner at 10 Waverly Place in an effort to address the issue of the lot line windows currently existing on the side of the building at 10 Waverly Place. On October 23, 2019 and November 4, 2019, the applicant and his construction manager met with the Donato's and inspected the second floor condition with respect to the two lot line windows. Unfortunately despite the effort by all, and three separate meetings with the Donato's, the parties were unable to come to an acceptable accommodation. As such, the applicant has decided to move forward with the plans as submitted with the revisions requested and discussed at the last Board hearing.

While we considered trying to revise our building plans, the applicant's professionals will testify that too many issues arise regarding the building and/or fire code, even if we pushed our upper floors off the property line. The tenants at 10 Waverly would still then have to climb down on top of the first level of the applicant's building. This would require that the building at 10 Waverly have a fire escape that will encroach upon the applicant's property. It would also require that the occupants of 10 Waverly climb down onto the applicant's building. This would present liability issues and could pose a significant obstacle in getting liability insurance for applicant's building. In addition, this area of the roof would create an alleyway for garbage, debris, snow and ice, which would create a myriad of other issues, including maintenance to keep the area clear and storm water management. Therefore, even if the applicant provided enough setback, the building at 10 Waverly would likely still not comply with the applicable fire code egress requirements since in all instances occupants would have to traverse the applicant's property. In fact, the current situation appears to be violative of the fire code since there is no effective egress from the those lot line windows without traversing the applicant's property. Moreover, there is no legal authority preventing the construction of our building to the lot line and the CBD-1 zone and Master Plan encourage such construction as set forth below.

The legal issues presented here are somewhat novel in New Jersey although there are some older cases that have dealt with similar issues. If the Board acts to deny the application based upon the neighbor's right to light, air and space, it would be enforcing a right that's not recognizable in New Jersey. The bulk requirements in the zone allow the applicant to build to a zero sideyard setback. While the neighboring property was constructed before the advent of the zoning code, the Borough plan would certainly have considered the existing structures in enacting the zone bulk requirements. In addition, the predecessors in title to the applicant's property would have had no standing to object to the neighboring property being built to the side setback line at the time it was built in the late 1800's or early 1900's. In the reported decision of *King v. Miller*, 8 N.J. Eq.559 (1851), the court clearly ruled that the owner of an adjoining lot has the same right to build on the line as the one who built first. In the *King* case a neighboring property owner's construction would block a window on the neighbor's lot. The court noted that "one party by building on his line cannot claim a prescriptive right to ancient lights, since the adjoining owner has no means of preventing it." At the time of the building of 10 Waverly, the law of the land clearly held that just by building lot line windows, you do not obtain rights to light, air and space. With the introduction of zoning, local municipalities protected the residents' rights to light, air and space by enacting zoning ordinance with required side, front and rear yard setbacks. As such, property owners were then able to enforce their rights based upon the applicable ordinances.

More recently, in the case, *In the Matter of Riverview Development, LLC*, 411 NJ Super 409 (App. Div. 2010) the New Jersey Appellate division held that as a matter of well settled law, "in

the absence of a restrictive covenant, a property owner has no right to an unobstructed view across a neighbor's property." Citing *Bubis v Kassin* 323 NJ Super 601 (App. Div. 1999) While the Supreme Court had an issue with one aspect of the *Bubis* case, the Court left intact the proclamation of the Appellate Division, that in the absence of such a covenant or deed provision, a neighboring landowner has no right under property law to prevent such view obstructions created on the property. *Bubis v. Kassin,* 184 NJ 612 (2005). The court further stated, that "[a]bsent an enforceable deed restriction or easement, the Bergen Ridge residents have no property right to prevent any party, whether it be private or public developer from building a zoning compliant structure that will block their vistas..." *Id* at 434-435.

The applicant is certainly aware of the economic impact our structure will have on the adjoining owner. However, it should be noted that the adjoining owner has enjoyed the aesthetic and economic benefits of the light, air and space without a conforming adjoining structure for many years, but has not gained any property right in common law or in the zone code to continue. The applicant wants to be able to reap the benefits of his investment as well. The court in *Riverview Development*, succinctly and intelligently summed it up by stating, "**the collateral economic impacts upon surrounding properties caused by the siting of an otherwise lawful building are part and parcel of the social compact. They result from the unavoidable interrelatedness of a living world surrounded by other persons and by other things**. (Emphasis added.) *Id* at 435 The Madison Borough Master Plan specifically addressed the changing landscape of the downtown and made single story buildings in the zone non-conforming with the apparent desire to create a more uniform downtown with multiple story, especially on Waverly. As such, the Borough's CBD-1 zone has no minimum side yard setback requirements. This is intended to provide a continuous street wall of storefronts and facades along Main Street and Waverly Place, which is a fundamental planning principle for successful downtowns. A coherent street wall provides a sense of enclosure and creates a pedestrian-oriented downtown environment. It is for this reason that the zoning ordinance promotes the development of attached multi-story, mixed-use buildings in the CBD-1 zone.

The courts have made clear that a property owner cannot obtain an easement, implied or otherwise, through the lapse of time or by implication. In *Blumberg v. Wiess*, 129 NJ Eq. 34 (1941), the court was clear, "[t]here is no occasion to determine whether-and, if it may, under what circumstances, the grant of an easement of light and air may arise by implication. It would seem that on principle such a grant should not be made to rest upon implication of fact or of law, unless reasonably deductible from the grant itself, considered in relation to the subject matter, as within common intention of the parties, or it is grounded in real and obvious necessity. *Id* at 826. Although as of 1933, the New Jersey courts still recognized the doctrine of an easement of light and air as part of the common law of the state but only with respect to first, a "separation of title, second, that, before the separation takes place, the use which gives rise to the easement shall

have been so long and continued and so obvious or manifest as to show it was meant to be permanent, and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained." See *Engel v. Siderides,* 112 NJ Eq. 431 (1933). The *Engel* case made clear that there had to be a separation of land, ie., subdivision and common ownership, first and foremost. There is no such condition in our case.

Moreover, the court in *Blumberg,* clearly stated what is most applicable here, in addressing the distinction between a covenant or restriction provided for by a Grantor in a Deed and one by implication. The court stated,

> And this doctrine is especially applicable to easements of light and air. Such easements by implication are a development of the common law when land was sparsely settled, and community life comparatively simple; and it is now obsolete since not adapted to modern conditions in this country. It has its true foundation not upon reasons of sound public policy, but rather upon the mutual assent of the parties to the grant. Under such general policy, urban communities would be greatly hindered in their physical development. Land in the centres of population could not be put to its most effective use, and the public interest would be thereby plainly disadvantaged. Comprehensive planning and zoning are now the means by which the common need in this behalf is served. And it would also run counter to the statutes requiring notice of encumbrances against realty, and thus unsettle the title to land. The prospective grantee would find it difficult, if not altogether impossible, to determine whether the lands were so encumbered, and, if so, to what extent. *Blumberg v. Weiss*, 129 N.J. Eq. 34, 39–40, (1941)

The court further stated that, [o]rdinarily, landowners have an equal right under the law to build to the line of their respective tracts. In so doing, they are merely exercising a legal right, and, by the same token, there is no infringement of the rights of the adjoining owner. It would seem to be axiomatic that this basic right of ownership cannot be lost by the mere lapse of time. The English doctrine of ancient lights does not obtain in this state. King v. Miller, 8 N.J.Eq. 559, 55 Am.Dec. 246; Hayden v. Dutcher, 31 N.J.Eq. 217; Bloom v. Koch, 63 N.J.Eq. 10, 50 A. 621. See, also, Cerra v. Maglio, 98 N.J.Eq. 481, 131 A. 96, affirmed, 100 N.J.Eq. 341, 134 A. 916, and Engel v. Siderides, 112 N.J.Eq. 431, 164 A. 397. *Id at 39-40.*

In this matter, there is no restrictive deed or covenant preventing the further development of the applicant's property, there is no easement of record, there is no agreement between predecessors in title, and there is no evidence that these properties were under mutual ownership and any rights were retained in a divestment deed. The Borough code explicitly permits building to the

lot line as there is a zero sideyard setback so the applicant's plan does not violate or infringe upon the neighbor's side yard in any way. Based upon the law and facts presented herein, and as will be presented at the hearing of this matter, it is applicant's position that the neighboring property owner at 10 Waverly Place does not have a recognizable right under common law, pursuant to the Madison Borough Code or through any recorded deed or easement to the light, air and space between the buildings. As such, there are no adjoining property owner sideyard setback rights upon which the applicant can infringe upon. The applicant's proposed structure is fully complying with the Borough's sideyard setback. As such, the approval of the application will not be substantially detrimental to the neighboring owner.

Very truly yours,

AZZOLINI & BENEDETTI, LLC

Steven Azzolini, Esq.

cc: Vincent Loughlin, Esq. via email w/o enc.
Paul Peterson, 16 Waverly Place, LLC via email w/o enc.
Todd Sardini via email w/o enc.
Peter Korzen, PE via email w/o enc.
Marc Marion, AIA via email w/o enc.
Keenan Hughes, PP via email w/o enc.

Exhibit A
Revisions to Korzen Engineering Site Plan dated April 4, 2019 and revised to November 19, 2019

Cover Sheet

Added PB Applic. No.
Added hairpin striping notation in Parking & Loading Requirements table
Updated traffic sign information and non-internally illuminated note in Sign Requirements table

Existing Conditions Plan

Added PB Applic. No.

Dimensioning & Grading Plan

Added PB Applic. No.
Added dumpster & bollards
Shifted dumpster parking space east to provide room
Removed AC units
Designated 2 types of parking signs
Added General Note 9 about AC units on roof

Construction Details

Added PB Applic. No.
Added Wall-Mounted Sign Legend & Bollard Details