SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CITY OF NEW ROCHELLE

Index No. 54190/2016

Plaintiff,

- against -

Defendants' Response to The City's Additional Facts

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a. F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC.,

Defendants.

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KATHERINE ZALANTIS an attorney duly licensed to practice law in the State of New York affirms under penalty of perjury as follows herein. I am a member of the firm of Silverberg Zalantis LLC, attorneys for the Defendants Flavio La Rocca ("Flavio"), Maria La Rocca ("Maria"), Flavio La Rocca & Sons, Inc. a.k.a F. Larocca & Sons, Inc. ("F. LaRocca & Sons") and FMLR Realty Management LLC ("FMLR LLC"; Maria, Flavio, F. Larocca & Sons and FMLR LLC shall collectively be known as "Defendants") and I submit this Response to the City's "additional facts" (set forth in its Response to Defendants' Statement of Facts Pursuant to Rule 202.8(g)(b) dated August 4, 2022, NYSCEF Doc. No. 169) under New York Court Rules § 202.8-g with the City's paragraphs copied for ease of reference and then the response as follows:

128. Defendants Flavio LaRocca and Maria LaRocca are the owners of several businesses in New Rochelle. They are the only two members of FMLR Realty Management LLC. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 12:22-13:8; Doc. No. 133 (City Ex. 19 (Interrogatory Responses)) at p. 7, No. 5; Doc. No. 136 (City Ex. 22 (Maria LaRocca Dep.)) at 13:20-17:10. They are also the owners of LaRocca & Sons, Inc. a.k.a. F. LaRocca & Sons, Inc. (hereinafter, "LaRocca Inc."), a company that performs landscaping and masonry construction for residential and light

commercial properties. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 15:11-23; Doc. No. 133 (City Ex. 19 (Interrogatory Responses)) at p. 7, No. 5; Doc. No. 136 (City Ex. 22 (Maria LaRocca Dep.)) at 14:17-15:7. Maria LaRocca is the majority owner of LaRocca Inc. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 43:19-44:5. Flavio LaRocca is the President of LaRocca Inc., and Maria LaRocca is the Vice President of LaRocca Inc. and manages the office, including all day-to-day operations. Doc. No. 133 (City Ex. 19 (Interrogatory Responses)) at p. 7, No. 5; Doc. No. 136 (City Ex. 22 (Maria LaRocca Dep.)) at 19.

Admit.

129. 436 Fifth Avenue, owned by Defendants, is located at the corner of Fifth Avenue and East Street. Doc. No. 120 (City Ex. 6 (2014 Survey)); Doc No. 150 (City Ex. 36 (Aerial)); Doc. No 122 (City Ex. 8 (2002 Deed)). The southern boundary of 436 Fifth Avenue runs along Fifth Avenue, and the eastern boundary of 436 Fifth Avenue runs along the western side of East Street. Doc. No. 120 (City Ex. 6 (2014 Survey)); Doc. No. 150 (City Ex. 36); Doc. No. 122 (City Ex. 8 (2002 Deed)) at Schedule A (describing an area of land running along "the westerly side of East Street" and the "northerly side of Fifth Avenue").

Admit, except that since January 30, 2008, defendant FLMR LLC has owned and currently owns 436 Fifth Avenue (see Defendants' Statement of Material Facts dated May 27, 2022 ("SMF") ¶ 6 and Defendants' Exhibit ("DEx") "7".

130. The eastern border of East Street abuts Flowers Park, also known as City Park, a City owned park. Doc. No. 120 (City Ex. 6 (2014 Survey)); Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 110:15-111:10 (the Parcel is off of East Street on Flowers Park property); Doc. No. 118 (City Ex. 4 (2022 Title Report)) (Property located on eastern side of East Street is owned by the City of New

Rochelle); Doc. No. 158 (City Ex. 44 (park deed)) (conveying land at the intersection of "the easterly line of East Street with the northerly line of 5th Avenue" to the City).

Admit, except according to the City, Flowers Park is "an active 20 acre park which houses 3 ball fields, a basketball court, playground, picnic area for rent, Sidney E. Frank Skate Park, Fosina Stadium natural turf field and the artificial turf Skidelsky Field Complex." (See DEx. "62"[1]). The Parcel abuts the Sidney E. Frank Skate Park and none of the park recreational features are on the Parcel (see City's Exhibit "21" (NYSCEF Doc. No. 135) entitled "photos depicting parcel after fence.")

131. Title to the bed of East Street as shown on Map No. 1728 is certified in the City of New Rochelle by deed dated April 30, 1914, recorded June 27, 1919, in Liber 2201 cp 231. Doc. No. 118 (City Ex. 4 (2022 Title Report)) at p.1; Doc. N0. 153 (City Ex. 39 (certified 1914 deed)).

Deny. Whether the City acquired title to East Street is a question of law for the Court and as set forth in Defendants' Memorandum of Law and Reply Memorandum of Law the City never accepted the deed, but in any event, mere acceptance by the City of a deed of a "gift" of public streets is insufficient as a matter of law to convey title in East Street to the City.

132. All of the streets on Map No. 1728, including East Street, were conveyed to the City of New Rochelle by Hadert Realty Co. by deed dated April 30, 1914 recorded on June 27, 1919 in Liber 2201. Doc. No. 118 (Ex. 4 (2022 Title Report)) at p.1; Doc. No. 119 (City Ex. 5 (2015 Title Report)) at PLTF062-63 (Deed); Doc. No. 153 (City Ex. 39 (certified 1914 deed)).

[1] For continuity and to avoid confusion, Defendants continue the numbering of exhibits from the exhibits attached to the Statement of Material Facts submitted with its moving papers (NYSCEF Doc. No. 47).

Deny. At its June 2, 1914 meeting, the City Council adopted a resolution ("1914 Resolution" at DEx. "18" pp. 186-187) accepting only five of the seven streets listed in the 1914 Deed and the City did not accept East Street. Therefore, East Street remains a private street as a matter of law. *See* Defendants' Supporting and Reply Memoranda of Law

133. The deed does not contain a provision for reentry on the land. Doc. No. 119 (City Ex. 5 at PLTF063 (1914 Deed)); Doc. No. 153 (City Ex. 39 (certified 1914 deed)).

Admit the language of the 1914 Deed, which speaks for itself.

134. Ownership of East Street was conveyed to the City by Hadert Realty Co. in the 1914 deed as a public right of way. Doc. No. 119 (City Ex. 5 at PLTF062-063 (1914 Deed)); Doc. No. 153 (City Ex. 39 (certified deed)). East Street remains a public right of way to this day and is used for public purposes including emergency access to properties along East Street and utilities. Doc. No.154 (City Ex. 40 (Moran Aff.)) at ¶¶2-5.

Deny as the City did not acquire title to East Street as a matter of law under both common law and statutory law (*see* Defendants' Supporting and Reply Memoranda of Law). Streets on a filed subdivision map are deemed private until formally accepted by a resolution of a local legislative body and here, the City never issued a resolution accepting East Street (*see* Defendants' Supporting and Reply Memoranda of Law). As a matter of law, neither: (1) the execution of the 1914 quitclaim deed conveying all seven streets as "public streets or highways" before the City issued a resolution accepting only five of the seven streets (but not East Street); nor (2) recording this quitclaim deed in 1919, converted East Street from a private street to a public street (*see* Defendants' Supporting and Reply Memoranda of Law).

Further, the public's use alone of East Street is not sufficient to convert East Street from a private street to a public street since the record establishes the City never engaged in any activities identified in the case law that could indicate ownership, such as repairing and maintaining the street (*see* Defendants' Supporting and Reply Memoranda of Law).

135. As part of his work with LaRocca, Inc., Flavio LaRocca reads and consults property surveys. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 37:7-38:2.

Admit.

136. Prior to purchasing the property at 436 Fifth Avenue, Flavio LaRocca reviewed two surveys of the property, including a survey prepared by land surveyor Rob Iaropoli dated November 2000 (the "2000 Survey"). Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 45:24-46:8, 47:14-48:19 (2000 Survey is a survey Mr. LaRocca reviewed prior to purchasing 436 Fifth Avenue).

Admit that although Mr. LaRocca testified that he reviewed a 2000 survey prior to purchasing 436 Fifth Avenue, this 2000 survey was actually a 2000 as-built plan of the prior owners' rip-rap (rock wall) improvement to the 436 Fifth Avenue property, which 2000 as-built plan was filed with the City and produced by the City in discovery ("2000 As-Built" at DEx. "30").

137. The surveys that Flavio LaRocca reviewed at the time of the purchase showed that a fence with a sliding gate on the eastern side of 436 Fifth Avenue encroached over ten feet into East Street. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 46:19-25 (testifying that "[t]he fencing was in East Street."), 48:6-49:3; Doc. No. 124 (City Ex. 10 (2000 Survey showing "sliding gate" located

in East Street, over 10 feet east of property line for 436 Fifth Avenue); Doc. No. 138 (City Ex. 24 (Senor Dep.)) at 36:25-38:25 (testifying that 2000 survey shows a 10-foot encroachment).

Admit that the 2000 As-Built (DEx. "30") depicted the contractor's yard's fencing, gates and other portions of the Property extending onto East Street. However, the City still issued permits and certificates of occupancy based upon the 2000 As-Built that depicted the contractor's yard's fencing, gates and other portions encroaching onto East Street.

Specifically, after approving the 436 Fifth Avenue's prior owners' (the Maffeis) proposed plan to construct a rip rap slope (or rock wall) (see stamped approved plan dated August 3, 2000 entitled "proposed riprap" at DEx. "31"), the City issued the Maffeis Building Permit Number B200387 dated August 3, 2000 (at DOEx. "32") for this commercial renovation permit (see also DEx. "20", pp. 56-57 (Vacca Depo)) and then approved an amended plan that depicted the rip rap slope along only approximately two-thirds of the rear of the property instead of along the entire rear as per the original plan (see stamped approved amended plan dated January 2, 2001 at DEx "31"; see also DEx. "20" p.60, l.1-10 (Vacca Depo)). Included in Building Permit No. B200387 (at DEx. "32") was the condition to "[s]ubmit as-built survey, prepared by a Licensed Surveyor, to show compliance with approved plans."

The City's Deputy Commissioner of Development and Building Official Paul Vacca explained (see DEx. "20", p. 58), as follows:

> Q. Can you explain what the conditions to a building permit are just generally?
> A. Just general conditions put in place to coincide with the parameters of the project.
> Q. Okay. And is it a requirement that this particular applicant would have to submit an as-built plan to get a Certificate of Occupancy or a COC [Certificate of Compliance]?

A. Well, it says, "Submit as-built survey prepared by a surveyor to show compliance with approved plans." So, yes.

138. The property on the opposite side of East Street from 436 Fifth Avenue is part of City Park (aka Flowers Park) and has been owned by the City since 1911. Doc. No. 118 (City Ex. 4 (Title Report)); Doc. No. 158 (City Ex. 44 (park deed)).

Admit that Flowers Park is a municipal park.

139. The LaRoccas knew that the property on the eastern side of East Street was owned by the City of New Rochelle. *See e.g.,* Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 110-111; Doc. No. 136 (City Ex. 22 (Maria LaRocca Dep.)) at 63:16-20 (LaRoccas asked the City if they could purchase the skate park parcel); Doc. No. 129 (City Ex. 15 (March 2003 Letter)); Doc. No. 130 (City Ex. 16 (2003 Letters to City)).

Admit that Defendants knew that the property across the street from 436 Fifth Avenue on East Street was the City's municipal land, but deny that Defendants solely sought to purchase the property as they inquired about leasing or renting the property used by Persico Construction as a staging area as referenced in the City Manager's March 17, 2003 letter (attached as City's Ex. 15).

140. City of New Rochelle Code § 224-1 "Interference with lands or improvements" provides that "No person shall modify, alter or in any manner interfere with the line or grades of any park or park street, not take up, move or disturb any curb, gutter stone, flagging, tree, tree box, railing, fence, sod, soil or gravel thereof, except by direction of the Commissioner of Parks and Recreation or under the Commissioner's permit."

Admit the text of City Ordinance § 224-1, which speaks for itself.

141. At his deposition, Flavio LaRocca testified that he was familiar with the property referred to as the "Parcel" and he marked the area with a large yellow circle on a copy of the 2014 Survey, and described it as off of East Street. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 104:21-105:11, 110:21-111:10; Ex. 13 (2014 Survey with LaRocca Markings). Flavio LaRocca testified that the "Parcel" lies within Flowers Park. *Id.* at 110:21-111:10.

Admit.

142. Flowers Park abuts the eastern side of East Street. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 111:5-10; Doc. No. 120 (City Ex. 6 (2014 Survey)). The "Parcel" is a certain number of feet off of East Street, to the north of 436 Fifth Avenue and the skate park, and is part of Flowers Park. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 110:21-111:10; Doc. No. 120 (City Ex. 6 (2014 Survey)); Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 131:11-25 and 134:14-21 (Flavio has seen City employees clear garbage from the Parcel and maintain the Parcel); Doc. No. 150 (City Ex. 36 (Aerial)).

Deny that the "'Parcel' is a certain number of feet off East Street" as: (a) the City's 2014 Survey depicts that there is no clear delineation through curbing or otherwise between East Street and the City's park borders and the asphalt or macadam street surface extends in places onto the City's property (see City's Ex. "13"); and (b) the City's 2022 Survey produced for the first time in the City's moving papers (City's Ex. "34") of the "Parcel" clearly depicts "irreg[ular] macadam pavement" extending onto the Parcel.

143. In their Interrogatory Responses in this action, the Defendants refer to the Parcel as the "Parking Area." *See* Doc. No. 133 (City Ex. 19 (Interrogatory Responses)).

Admit.

144. Flavio LaRocca testified that the video recorded by Robert Cox is a fair and accurate depiction of the work he did "to rake out the parcel" on May 16, 2015. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 156:15-21. All of the individuals seen working on the Parcel in the video are LaRocca Inc. employees. Doc. No. 142 (City Ex. 28 (Maya Dep.)) at 18:12-21, 19:13-22:22. 145. The video depicts Defendants' employees spreading a subbase material over the parcel and then compacting it with a small steamroller. City Opp. Ex. 5 (video).

Deny that there was any spreading of "subbase material" to the extent this implies anything other than existing gravel and to clarify Flavio confirmed that the work depicted in the video was a fair and accurate depiction of work performed by LaRocca Inc. "from 2012 to approximately 2016 to rake out the Parcel" (City's Ex. 7 at 156:15-21) and admit Mr. Maya's cited testimony.

146. Flavio LaRocca admits that he instructed his employees to "rake out" the Parcel. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 107:6-15, 117:17-119:16 (Flavio LaRocca instructed his employees Felipe Maya and Martin Sanchez to "rake out" and "recompact" the Parcel). They performed the "rake out" "to allow for continued parking of vehicles by the employees of Benny Tree Service and PAB Paving" on the Parcel. Ex. 19 (Response to Interrogatories) at p. 5 Response No. 2 (describing what the men depicted in Photograph 1a are doing).

Admit that Flavio instructed his employees to "rake out" the Parcel, but deny that it was to facilitate parking on the Parcel.

147. The City never gave Defendants permission to perform "rake out" work or any other work on the Parcel. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 86:15-18, 160:21-24; Doc. No. (City Ex. 22 (Maria LaRocca Dep.)) at 65:20-24, 72:14-23.

Admit that while the City never gave permission to "rake out" or smooth gravel on the Parcel, it also never gave permission to plow, maintain or repair East Street, but the abutting neighbors were forced to do so in order to maintain access to their properties and the raking out of the Parcel was a result of the plowing activities. And the macadam or street surface of East Street extends onto the Parcel as there is no curbing separating the street line from the Parcel, which resulted in the plows going on the Parcel before the fence was erected.

148. Pat Bongo, the owner of PAB Landscaping, Inc., which owns Lots 41 and 43 on East Street, testified that he does not believe that he or any of the other owners of property on East Street own any portion of East Street. City Opp. Ex. 1 (Bongo Dep). at 40:16-19.

Admit that Mr. Bongo testified as to his belief.

149. Mr. Bongo testified that he has owned property on East Street since the early 1980s. City Opp. Ex. 1 (Bongo Dep). at 5:17-20.

Admit.

150. In 1998, the City, as owner of East Street, granted an easement to the owner of Lots 41 and 43, PAB Landscaping, Inc., on East Street for the purpose of having utility services brought to the property. City Opp. Ex. 2 (1998 Resolution granting easement). In exchange for the easement, PAB agreed to pay the City annual consideration of $3/square foot. City Opp. Ex. 2.

Deny that the City granted an easement as the City attached only the resolution authorizing the granting of the easement (see City Opp. Ex. 2) and not an actual easement, and further deny the City had the authority to grant an easement on East Street as it does not own it (see response to ¶ 134).

151. Mr. Bongo has observed the City removing garbage that was dumped on East Street. City Opp. Ex. 1 (Bongo Dep). at 49:20-25.

Admit that Mr. Bongo testified as follows at 49:17-25 to 50:2:
17 Q. Have you ever observed the city
18 repairing potholes on East Street?
19 A. Never.
20 Q. Have you ever observed the city
21 doing any maintenance whatsoever on East
22 Street?
23 A. Maybe picking up garbage once or
24 twice. Something that was dumped there,
25 they maybe picked it up. But as far as
26 maintenance of the road, no.

(See Bongo Depo (DEx. "11") at pp. 49-50.)

152. Mr. Bongo has never observed disturbed aggregate or asphalt on East Street after the winter that needed to be returned to its proper place. City Opp. Ex. 1 (Bongo Dep). at 52:8-12.

Denied as Mr. Bongo actually testified as follows (at p. 52, lines 8-12):

8 Q. What was the condition of East
9 Road after the winter when you came back,
10 was there loose aggregate and asphalt on
11 the road that needed to be back in place?
12 A. Nothing that inconvenienced me.

(See Bongo Depo (DEx. "11") at p. 52.)

153. Section 111-38 of the City Code, entitled "Encroachments onto public property restricted" provides in relevant part:

> Except as hereinafter provided, no portion of a building or other structure shall encroach upon or project into any street, alley, park or other public property without a special permit having been issued therefor by the Council of the City of New Rochelle, New York, except as specifically stated in § 111-39, and the owner of any building, any part of which encroaches on public property, shall be liable to the City of New Rochelle for damage which may result to any person or property by reason of such encroachment, whether or not such encroachment is specifically allowed by the State Code.

A. Removal of projections. The owner of a building or other structure, any part of which projects in or encroaches upon public property, shall remove said projection or encroachment upon being ordered to do so by the Building Official, and the City of New Rochelle shall not be liable for any damages resulting to the property by reason of such order.

E. Permits revocable. Any permit granted or permission expressed or implied in the provisions of this code to construct a building so as to project beyond the street lot line shall be revocable by the City of New Rochelle, New York, at will.

F. Existing encroachments. Parts of existing buildings and structures which already project beyond the street lot line or building line may be maintained as constructed until their removal is directed by the proper municipal authorities.

Section 111-38 of the City Code is available at https://ecode360.com/6734253.

Admit the text of City Ordinance § 111-38, which speaks for itself, but the City cannot enforce removal or seek damages relating to the encroachment on East Street under City Ordinance § 111-38, because East Street is a private street as a matter of law and City Ordinance § 111-38 only applies to public property (see Defendants' supporting and reply memoranda of law).

154. New Rochelle City Code § 111-40 provides for penalties for encroachments onto public property. It states:

A. Notice of violation. The Building Official shall serve a notice of violation or order on the person responsible for the erection, construction, alteration, extension, repair, use or occupancy of a building or structure in a violation of the provisions of this Chapter or the State Code or in violation of a detailed statement or a plan approved thereunder or in violation of a permit or certificate issued under the provisions of this Chapter, and such order shall direct the discontinuance of the illegal action or condition and the abatement of the violation.

B. Prosecution of violation. If the notice of violation is not complied with promptly, the Building Official shall request the Corporation Counsel to institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of this Chapter or the State Code or of the order or direction made pursuant thereto.

C. Violation penalties. For any and every violation of the provisions of this Chapter or the State Code, the owner, general agent or contractor of the building or premises where such violation has been committed or shall exist . . . shall be subject to a fine not more than $2,500 for a first offense and not more than $5,000 for a second or subsequent offense within three years of a first or other offense of this Chapter, or to imprisonment for not more than 15 days, or both, and each and every day the violation continues after the owner, general agent or contractor of the building or premises where such violation occurred has been notified thereof shall be deemed to be a separate and distinct violation.

D. Abatement of violation. The imposition of the penalties herein prescribed shall not preclude the legal officer of the municipality from instituting appropriate action to prevent unlawful construction or to restrain, correct or abate a violation or to prevent illegal occupancy of a building, structure or premises or to stop an illegal act, conduct, business or use of a building or structure in or about any premises.

Section 111-40 of the City Code is available at: https://ecode360.com/6734272.

Admit the text of City Ordinance § 111-40, which speaks for itself, but the civil action before this Court is neither the means nor the venue to impose penalties against Defendants for alleged violation of City Ordinance § 111-38 (which is part of Chapter 111 entitled "Building Construction") (see Defendants' supporting and reply memoranda of law).

Dated: Tarrytown, New York
September 9, 2022

SILVERBERG ZALANTIS LLC

By: 

Katherine Zalantis
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Tarrytown, New York 10591
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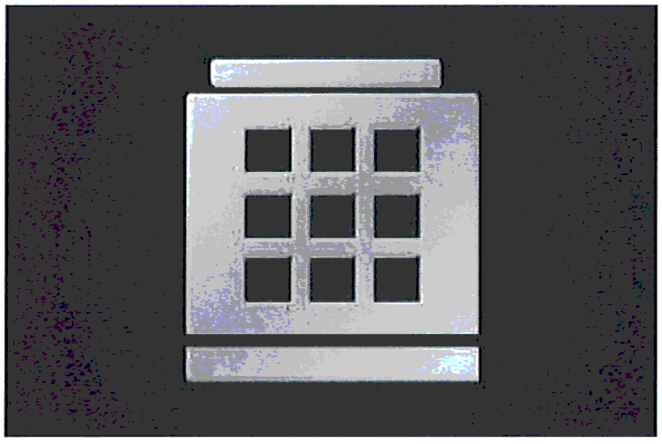
Exhibit "62"

Facilities

Flowers (City) Park



Features

- Baseball / Softball
- Basketball
- Grill
- Parking
- Pavilion
- Playground
- Public Restrooms
- Stadium
- Tables
- Walking Track

This is an active 20 acre park which houses 3 ball fields, a basketball court, playground, picnic area for rent, Sidney E. Frank Stake Park, Fosina Stadium natural turf field and the artificial turf Skidelsky Field Complex. Annual park parking applications are available at the City Clerks Office or can be downloaded. Please return completed applications to the City Clerks Office. Click here for application

Flowers (City) Park

Fifth Avenue & Potter Avenue
New Rochelle, NY 10801

Rating

This facility has not yet been rated.

Availability

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CITY OF NEW ROCHELLE, Index No. 54190/2016

Plaintiff,

-against-

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC,

Defendants.

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REPLY AFFIDAVIT IN FURTHER SUPPORT OF SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss
COUNTY OF WESTCHESTER)

FLAVIO LA ROCCA, being duly sworn, deposes and says:

1. I am one of the named defendants in the above referenced action.

2. I respectfully submit this Reply Affidavit in further support of Defendants' motion under CPLR § 3212 for an order granting Defendants summary judgment dismissal of Plaintiff's Complaint in its entirety.

3. As detailed in my original affidavit, had the City done the slightest due diligence before bringing this action instead of accepting a blogger's erroneous claims as gospel, the City would have learned that the Parcel was used as a parking area long before May 16, 2015 and therefore, my employees and I could not have created the parking area on May 16, 2015 as the Talk of the Sound alleged.

4. Despite the City's far-reaching claims based upon the Talk of the Sound's false allegations, the City does not (and cannot) dispute there is no evidence that Defendants cut down

"numerous full sized trees", cleared land to create a parking lot and in the process "potentially deposited contaminated materials on the cleared land" called the "Parcel".

5. The City's first through fifth causes of action have morphed from the Complaint's allegations that Defendants allegedly cut down "numerous full-sized trees on the Parcel" which were of "potentially significant historic and financial value", to the City's opposition claim that it does not matter whether Defendants cuts down trees or not. But it does matter. Three of the first five causes of action relate to cutting of trees – not raking of existing gravel. Similarly, the claims that Defendants created a parking area on May 16, 2015 cannot stand when all the evidence points to this parking area existing before May 16, 2015.

6. My attorneys advise that as a matter of law, Defendants' raking and smoothing out gravel that had been there for years and became dislocated due to rain and Defendants' plowing is not a trespass. The City cannot establish Defendants' actions were intentional or unjustified given: (1) the City does not maintain East Street, leaving the East Street property owners no option other than to maintain East Street ourselves; and (2) there is no clear delineation (or curbing) between the Parcel and East Street.

7. Likewise, had the City examined its own records, it would have known that the City affirmatively rejected East Street as a public street. The City cannot dispute that the City never accepted East Street. I am advised by my attorneys that East Street remains a private street as a matter of law and the City has no basis to seek damages or injunctive relief under City Code § 111-38 regarding public property. While the City struggles with what should be a straightforward concept, a private street is not a public street or public property. The City's sixth cause of action as it relates to East Street fails.

8. The City's sixth cause of action alleging nuisance and seeking removal or damages related to a purported encroachment on Fifth Avenue (a public street) arises purely from spite. We contended the City did not want really Defendants to remove the beautifully finished garden wall/planting bed holding in an extensive and full row of Arborvitae trees that screens the Fifth Avenue side of the contractor's yard from view. Predictably, the City admits that it does not want Defendants to remove the finished garden wall/planting bed. The City now advises the Court that "[a]t this time, the City is not seeking the removal of encroachment."

9. The City's admission establishes that the City cannot possibly prevail on any claim for any type of alleged nuisance claim relating to Fifth Avenue. My attorneys advise that any claim for damages fails as a matter of law since under City Ordinance § 111-38 only building owners are potentially liable for damages and our attractive planting bed/wall does not meet the legal definition of a "building" nor does it apply to fencing or planting beds holding in the plantings.

10. To save face, the City now claims Defendants should have to obtain a license under City Ordinance § 111-38 for the Fifth Avenue encroachment even though it never sought this relief. But the City's side-step attempt also fails because as detailed in our moving papers, the civil action before this Court is neither the means nor the venue to enforce or impose penalties against Defendants for alleged violation of City Ordinance § 111-38.

11. As detailed in the moving papers, the City Building Inspector has never even issued Defendants a notice of violation or order regarding the Fifth Avenue encroachments, which is the initial step the City must complete to seek to remedy an alleged violation under City Ordinance § 111-40.

12. The City's claim that Defendants allegedly "cite no authority for the proposition that the November 2015 Notice to Remove was materially defective because the City official who signed the notice was the Commissioner of Public Works instead of the City Building Official" is almost comical given we cited to City Ordinance § 111-40, which mandates the "Building Official" issue the notice of violation. The City does not and cannot dispute that the Commissioner of Public Works is not a "Building Official" and it is not Defendants' burden to prove a negative. The City well knows that Building and Public Works are separate City departments. Attached are the pages from the City's own website showing the directory of staff for these separate department with no overlap of staff (See Exhibit "A"). The City wants this Court to save it by reading language into a statute simply not there. The City has not satisfied the conditions precedent under its own Ordinance to be entitled to the relief it seeks regarding Fifth Avenue.

13. Apparently sensing that its claims are slipping away, the City has stepped up its harassment tactics.

14. Since we submitted our opposition papers, we have had weekly if not daily interactions with the police, including police calling my business and police patrol cars visiting my yard.

15. In 2021, I was charged, by information, with separate violations of the City's noise ordinance in separate actions arising from my business operations at my contractor's yard on East Street – namely, City Code § 213.5(G)(1) in *People v. LaRocca* (CR-06674-20) and City Code § 213-5(F)(1) in *People v. LaRocca* (CR-02984-21). But both charges were dismissed by the Court (Judge Eileen Songer McCarthy, City Court Judge) in decisions dated April 23, 2021 and August 19, 2021, respectively.

16. As the City's attempt to charge me formally in City Court failed (twice), the City has used its police and its presence to harass and intimidate my employees and me, which has only escalated since the submission of our moving papers.

17. Specifically, on August 8, 2022 at around 1:15 pm, a police officer came to our office to advise that they were allegedly getting noise complaints and that a City councilwoman kept requesting that the police take action and pressuring the police to act. On August 10, 2022, this same police officer called our offices numerous times.

18. We had our attorney reach out the police officer on August 11, 2022 to explain that our contractor's yard was a pre-existing legal nonconforming use that had operated for decades. The police officer advised that they were not going to pursue any formal enforcement action but they wanted to "work something out" with us. Our attorney advised the police officer that we were unclear what could informally get worked out when the nature of a contractor yard to open in the morning so our workers could get to the job site early; but that the flip side of this operation was our business closes before other businesses – on most business days, there are no operations (or noise) after 4:30 or 5:00 pm.

19. Frankly, we do not understand why the police are targeting my business when all along East Street are contractor yards and East Street is filled with trucks going up and down the street at all hours of the day. Many of my contractor neighbors operate in the mornings and make substantial noise. Yet, somehow, the City and the City councilwoman is only concerned with alleged noise coming from my contractor's yard even though we have continued to operate how we have for decades.

20. With all that we have gone through as a small business, including operating during a pandemic, we now also have to contend with police regularly coming to my contractor's yard.

21. This is extremely stressful for my employees and me, and it interferes with our normal day-to-day operations. It also threatens to ruin my reputation and prevent me from generating new clients since my neighbors, the public and potential clients see the police there almost every day.

22. The City is harassing me and interfering with my business even though all I am doing is operating as I have for decades, as is my constitutional right to continue the legal nonconforming contractor's yard. The City is targeting a lawful business during its normal business operations after years of our business operating in exactly the same manner.

23. The City has demonstrated that it will stop at nothing, regardless of its lack of evidence and merit; but this Court should not allow this action to proceed and should grant summary judgment dismissing the City's Complaint in its entirety.

WHEREFORE, it is respectfully requested that this Court grant the Defendants' motion in its entirety.

FLAVIO LA ROCCA

Sworn to before me this
31st day of August, 2022

Notary Public

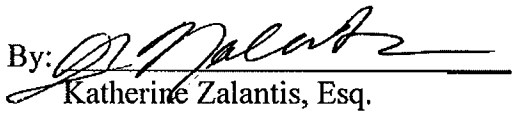
KATHERINE ZALANTIS
Notary Public, State of New York
No. 02ZA5067359
Qualified in Westchester County
Commission Expires 10/15/22

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 202.8-b that the foregoing **REPLY AFFIDAVIT IN FURTHER SUPPORT OF SUMMARY JUDGMENT** was prepared on a computer using Microsoft Word indicating the following:

Word Count. The total number of words, inclusive of point headings and footnotes, and exclusive of the caption, table of contents and signature block, is 1571.

SILVERBERG ZALANTIS LLC

By: 

Katherine Zalantis, Esq.
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120 White Plains Road, Suite 305
Tarrytown, New York 10591
(914) 682-0707
zalantis@szlawfirm.net

Exhibit "A"

Buildings

Physical Address:
515 North Ave.
New Rochelle, NY 10801

Phone:
(914) 654-2035

Fax:
(914) 654-2031

Staff

Name	Title	Email	Phone
Vacca, Paul	Commissioner of Buildings	EMail	(914) 654-2035
Ben-Habib, Soraya	Deputy Building Official	EMail	(914) 654-2034
Guglielmo, Joseph	Plans Examiner		(914) 654-2026
Jovasevic, Ljubisa	Plans Examiner		(914) 654-2020
O'Hare, Regina	Assistant to the Building Official		(914) 654-2033
Pantelis, Kelly	Principal Clerk-Title Searches		(914) 654-2030
Bazon, Kyle	Senior Clerk		(914) 654-2018
DeSousa, Maria	Sr. Customer Service Rep		(914) 654-2027

Building Inspectors

Phone:
(914) 654-2035

Staff

Name	Title	Phone
Berino, Jeff	Code Enforcement Officer	(914) 654-2051
Delgado, Tony	Code Enforcement Officer	(914) 654-2024
English, Terence	Code Enforcement Officer	(914) 654-4807
Giraldi, William	Code Enforcement Officer	(914) 654-4808
Nanna, Anthony	Code Enforcement Officer	(914) 654-2025
Lord, Jason	Code Enforcement Officer	(914) 654-2028
Turchioe, Dominick	Code Enforcement Officer	(914) 654-2011

Plumbing Inspectors

Phone:
(914) 654-2037

Staff

Name	Title	Email	Phone
Pesco, Joe	Plumbing Inspector	Email	(914) 654-2037

Return to Staff Directory

Public Works

Physical Address:
515 North Avenue
New Rochelle, NY 10801

Phone:
(914) 654-2130

Fax:
(914) 654-2195

Link: Public Works

Phone: (914) 654-2131

Hours
Monday - Friday
8:30 am - 4:30 pm

Staff

Name	Title	Email	Phone
Moran, James J.	Commissioner	jmoran@newrochelleny.com	(914) 654-2134
Paladino, Jessica	Deputy Commissioner of Public Works	jpaladin@newrochelleny.com	914-654-2129
Gil, Sugehiry	Secretary to Commissioner	sgil@newrochelleny.com	914-654-2132
Mignanelli, Jennifer	Principal Clerk / Street Opening Permits	jmignane@newrochelleny.com	914-654-2133

Bureau of Forestry

Directions

Physical Address: View Map
224 E Main St
New Rochelle, NY 10801

Phone:
(914) 235-3549

Hours
Monday-Friday
7:00am-3:00pm

Staff

Name	Email	Phone
Rebholz, Paul	Email	(914) 235-3549

Engineering

Physical Address:
515 North Ave
New Rochelle, NY 10801

Phone:
(914) 654-2131

Hours
Monday - Friday
8:30 am - 4:30 pm

Staff

Name	Title	Email	Phone
Sbano, Patrick	Director of Traffic Engineering		914-654-2135
Alfonzo-Larrain, Alvaro	Assistant City Engineer		914-654-2136
Peragine, Domenick	Engineering Technician	Email	(914) 654-2913

Sanitation and Recycling

Directions

Physical Address: View Map
224 E Main St
New Rochelle, NY 10801

Phone:
(914) 235-4654

Link: Sanitation and Recycling Page

Hours
Monday - Friday
7:00 am - 3:00 pm

Staff

Name	Title	Email	Phone
Bonacci, William	Manager of Refuse Collection	Email	
Shanahan, Pamela	Dispatch Clerk		914-235-4654

Sewers and Drains

Directions

Physical Address: View Map
40 Pelham Rd
New Rochelle, NY 10801

Phone:
(914) 235-3567

Fax:
(914) 235-3592

Link: Sewers and Drains Page

Hours
Monday - Friday
7:00 am - 3:30 pm

Staff

Name	Title	Email	Phone
Oliveira, Alexander	Manager of Sewers & Drains	Email	914-654-2309
Russo, Anthony	Assistant Superintendent of Sewers		914-235-3567

Streets and Highways

Directions

Physical Address: View Map
224 E Main St
New Rochelle, NY 10801

Phone:
(914) 235-4029

Fax:
(914) 235-3858

Hours
Monday - Friday
7:00 am - 3:30 pm

Staff

Name	Title	Email
O'Keefe, John	Manager of Streets and Highways	Email
Bracamonte, Bianca	Dispatch Clerk	Email

Traffic Services Division

Directions

Physical Address: View Map
40 Pelham Rd
New Rochelle, NY 10801

Phone:
(914) 235-8257

Hours
Monday - Friday
7:30 am - 3:30 pm

Staff

Name	Title	Email	Phone
Sbano, Patrick	Dir. of Traffic Engineering	Email	914-654-2135
Rosa, Pete			(914) 235-3859

Return to Staff Directory

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

CITY OF NEW ROCHELLE, Index No. 54190/2016

Plaintiff,

-against-

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC,

Defendants.

----------x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL OF THE CITY'S COMPLAINT

SILVERBERG ZALANTIS LLC
Attorneys for Defendants
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FLAVIO LA ROCCA & SONS, INC. a.k.a F. LAROCCA & SONS, INC. and
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Table of Contents

Preliminary Statement

Defendants submit this Reply Memorandum of Law in further support of their application under CPLR § 3212 for summary judgment dismissal of the City's Complaint.

Argument

I. The City's First through Fifth Causes of Action Should be Dismissed

The Complaint's allegations of the first through fifth causes of action (trespass, nuisance, negligence, conversion and RPAPL 861, respectively) that Defendants "cut down trees, cleared the land, and created a parking lot"[1] have been conclusively dispelled in discovery. The City now tries to distance itself from these claims because it knows they are false. But if there are no facts, there is no claim.

The Complaint claimed no less than 10 times that Defendants cut down "full-sized", "historic and valuable" trees.[2] Now, the City's watered-down position is: "the City's claims are not only about the alleged removal of trees"[3] and "the removal of trees is not a necessary element of the City's first three causes of action."[4]

The City's attempt to rehabilitate the Talk of the Sound's Robert Cox is futile. Cox undeniably lied in his Talk of the Sound article reporting he was "on hand" as Defendants "chopped down trees" and "ground them up."[5] However, at deposition, Cox admitted he did not observe any trees being cut down and chopped up.[6] He also acknowledged the police were called before he arrived at the Parcel at approximately 9:15a.m. and that the police reported "it as an

[1] Defendants' Statement of Material Facts at NYSCEF Doc. No. 47 ("SMF") Ex. "1", ¶21, 31.
[2] *Id.* at ¶1, 11, 15-16, 40, 44.
[3] City's Opposition Memorandum of Law ("Opp.MOL"), p.4.
[4] *Id.* at p.5.
[5] SMF¶91.
[6] SMF¶92.

unfounded complaint."[7] The City cannot explain: (1) when the alleged chopping and grounding of trees occurred if not witnessed by the police, Cox or anyone else or (2) why there was no evidence of the trees, including stumps that are challenging and time-consuming to remove. And Cox's alleged reliance upon an unidentified, third-party observation is not in admissible form, constitutes impermissible hearsay and does not raise a triable issue of fact.[8]

Further, Cox's claim that prior to 5/16/2015 the Parcel contained trees and overgrowth, a statement not corroborated by any other testimony (either from City employees or neighboring property owners), is also proven false by the 2014 Google Earth image depicting a cleared parcel used for commercial parking.[9]

There are no issues of fact whether Defendants cut down trees, because there is no evidence they did. Accordingly, the City's fourth and fifth causes of action, for conversion and violation of RPAPL 861, respectively, must be dismissed as they related exclusively to the false allegation Defendants cut down trees.[10] The City makes virtually no effort in its opposition memorandum to defend these claims other than one feeble sentence alleging issues of fact whether trees were removed.[11] But if there were issues of fact, the City would have vigorously opposed dismissal of these claims, especially when RPAPL 861 allows for treble damages for stumpage value of trees.[12] Accordingly, this Court should dismiss the City's fourth and fifth causes of action.

Equally false are the claims Defendants created a parking lot on the Parcel. Although the Complaint claimed Defendants created the parking lot on 5/16/2015,[13] the City now bafflingly

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[7] SMF Ex. "49", p.8.
[8] *Allstate Inc. Co. v. Keil*, 268 A.D.2d 545, 545 (2d Dep't 2000).
[9] SMF¶97.
[10] SMF Ex. "1", p.7-8.
[11] Opp.MOL p.9.
[12] RPAPL 861(1).
[13] SMF Ex. "1", ¶21.

claims "who may or may not have previously parked on or near the Parcel" is "immaterial."[14] The City does not bother to address the 2014 Google Earth image of commercial vehicles parked on the cleared Parcel.[15] Numerous witnesses, including an owner of another contractor's yard on East Street, testified the Parcel was used for parking before 5/16/2015, including in 2002-2003 for City contractors.[16]

As the documentary and testimonial evidence establishes the Parcel was used as a parking lot years before 5/16/2015, which the City concedes, there are no issue of fact that Defendants did not create a parking lot on 5/16/2015 as the City claims.

Removing the City's claims established to be false (that Defendants removed trees and created a parking lot on 5/16/2015), the following undisputed facts remain:

- The City does not maintain East Street, leaving the abutting property owners, including primarily Defendants, to do so to gain safe access to their properties[17]
- There is no discernible distinction between East Street and the Parcel and there is no curbing or other delineation between the two[18]
- In plowing and maintaining East Street, gravel would dislodge from the Parcel and filter into East Street[19]
- Besides maintaining East Street, Defendants would move the displaced gravel from East Street back onto the Parcel and flatten it out[20]

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[14] Opp.MOL, p. 5.
[15] SMF¶97.
[16] SMF¶101-07.
[17] SMF¶33-48.
[18] SMF¶88-89.
[19] SMF¶88.
[20] SMF¶84-88.

- The Parcel is vacant land near the dead end of East Street[21] and there is no evidence the City nor any members of the public used the Parcel for any municipal/park purpose,[22] and the City only learned of the parking occurring on the Parcel for years after the Talk of the Sound article and video[23]

Based upon these facts, Defendants did not commit trespass, negligence or nuisance as a matter of law and the Court should dismiss these claims.

The City's argument regarding its public nuisance claim is premised upon an alleged "substantial interference with the exercise of a common right of the public" and that the City was allegedly deprived "of the use and enjoyment of the Parcel."[24] However, the City does not allege how the Parcel's use by the City or the public was hindered by Defendants moving displaced gravel onto the Parcel and flattening it out. There is no evidence that the City even knew this was happening for years before 5/16/2015, which would not have been the case if the City ever utilized the Parcel, or if its utilization of the Parcel was impeded. Because the City cannot demonstrate the essential element of a nuisance claim, its third cause of action should be dismissed.

The City's negligence claim is premised upon conclusory statements of an individual's "duty" regarding public property and public parks, but the only legal citation is to City Ordinance ("CO") 224-1,[25] which it has never cited before throughout this 6-year litigation. Notably, this is a different Code provision than those the Complaint cited, which involved removal of trees on City property (CO 301-4) and placing impervious material on public grounds (CO 301-7).[26] The City avoids referencing those Code provisions because it knows Defendants did not remove trees from,

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[21] SMF¶79-80.
[22] Defendants' Response to City's Additional Facts, ¶130.
[23] SMF Ex. "1", ¶11-12, 15.
[24] Opp.MOL, p.7.
[25] Opp.MOL, p.6.
[26] SMF Ex. "1", ¶27-28.

or placed impervious material on, the Parcel, as evidenced by their new flawed position that Defendants could still be negligent even "if they did not violate laws regarding removal of trees or the placement of impervious material on the ground."[27]

However, the City's reliance upon CO 224-1 also fails. First, a local law cannot support a negligence per se claim. "As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence."[28] Because this is a local law, not a state statute, CO 224-1 cannot support a negligence per se claim.

Second, even if CO 224-1 could support a negligence per se claim, or constitute evidence of negligence, the City's claim still fails because Defendants did not violate it. CO 224-1 states "[n]o person shall modify, alter or in any manner interfere with the line or grades of any park or park street, nor take up, move or disturb any curb, gutter stone, flagging, tree, tree box, railing, fence, sod, soil or gravel thereof, except by direction of the Commissioner of Parks and Recreation or under the Commissioner's permit."[29] There is no evidence Defendants engaged in any of these activities. Gravel from the Parcel would become displaced due to weather events and Defendants' snowplowing of East Street. Defendants returned the gravel to the Parcel to maintain the grade. Defendants' actions conformed with CO 224-1's intent to keep the Parcel in the same state that had existed for years. Defendants exercised the same, if not greater, degree of care than a reasonably prudent person under the circumstances[30] by maintaining East Street and reinserting on the Parcel gravel that had become displaced.

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[27] Opp.MOL, p. 6.
[28] *Elliott v. City of New York*, 95 N.Y.2d 730, 734 (2001).
[29] Attached to Addendum.
[30] *Gray v. Gouz, Inc.*, 2014 A.D.2d 390, 390 (2d Dep't 1994).

Third, even with a purported CO 224-1 violation, the Code provides administrative remedies through issuing a permit,[31] or bringing a proceeding in City Court.[32] Instead, the City is wasting judicial resources needlessly litigating this issue in a negligence claim to further its vendetta against Defendants. Therefore, whether the City's sparse second cause of action can be read as a negligence and/or negligence per se claim, it fails regardless.

And regarding the City's trespass claim, it again deviates from its longstanding position that Defendants removed trees and created a parking lot and instead merely asserts Defendants entered and performed work on the Parcel on 5/16/2015.[33] The City attempts to discard as immaterial the fact that other people parked on the Parcel before 5/16/2015, but this illustrates the crux of this case. The City did not sue those persons, including the person who continued parking on the Parcel after it was fenced off.[34] How is it a trespass for Defendants, but not the others? Why are the alleged harm and damages only being attributed to Defendants, based upon Defendants redistributing and smoothing out gravel on the Parcel on one day?

Putting aside the inequity of how the City uses its bias and deep pockets to prosecute claims, the City cannot establish a trespass as a matter of law. "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn."[35] "The essence of trespass is the invasion of a person's interest in the exclusive possession of land."[36]

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[31] CO 224-1.
[32] CO 224-20, attached to Addendum.
[33] Opp.MOL, p.5-6.
[34] SMF¶104.
[35] *Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853, 855 (2d Dep't 2012).
[36] *Menkes v. Phillips*, 93 A.D.3d 769, 770 (2d Dep't 2012) (*emphasis added*).

The City asserts the Parcel is a park "held in trust for public use"[37] and alleges to be protecting "the public's use of the property."[38] Through the City's own admissions that the Parcel was for public use, it did not have exclusive possession of the Parcel and therefore its claim fails as a matter of law. Further, as neighboring property owners and members of the public, Defendants were justified in believing they could go on the Parcel. And once the City notified Defendants they could no longer go on the Parcel Defendants never reentered the Parcel, unlike others (not sued by the City) who continued to park on the Parcel after the fence was installed.[39]

This Court should grant Defendants summary judgment dismissal of the first through fifth causes of action.

II. The Complaint's Sixth Cause of Action Should Be Dismissed

The City raises no material issues of fact to withstand Defendants' motion for summary judgment dismissal of the City's sixth cause of action for nuisance and injunctive relief under City Ordinance ("CO") 111-38. The City cannot seek removal or damages relating to the encroachment on East Street because as a matter of law, East Street is a private street and not a public street or public property. While Fifth Avenue is a public street, the City now claims it does not want any encroachment removed from Fifth Avenue and therefore, this claim fails.

[37] Opp.MOL, p.6.
[38] *Id.* at p.8.
[39] SMF¶104.

A. East Street Remains a Private Road

In opposition, the City cites inapplicable statutory authority it admits is "not directly at issue here"[40] (like Highway Law § 205 entitled "Town Highways" even though East Street is in a city), but ignores controlling statutory and case law.

The City ignores General City Law ("GCL") § 34 because it cannot dispute this statute controls and mandates East Street is a private street. GCL § 34 mandates any streets depicted on a filed subdivision map are offered for dedication to the public, but such street "**shall be deemed to be private until such time as it has been formally accepted by a resolution of the local legislative body.**"[41]

Here, as the City Council never accepted East Street by resolution, it remains a private street as a matter of law. Specifically, (1) the City admits East Street was "created and laid out" on the 1907 Subdivision Map;[42] (2) the 1907 Subdivision Map depicts 247-lots and seven streets (including East Street);[43] (3) at its June 2, 1914 meeting the City Council adopted a resolution accepting five of the seven streets as public streets (not East Street);[44] and (4) the City has never accepted East Street as a public street.[45] Applying GCL § 34 to these facts, East Street is "deemed to be private."

As East Street is not a public street, the City's CO 111-38 claims fail as a matter of law as this statute (entitled "Encroachments onto public property is restricted") unambiguously only applies to public streets or property. As discussed in Defendants' opening brief, the City has no authority or standing to seek removal of encroachments on a private street.

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[40] Opp.MOL p.14.
[41] GCL §34.
[42] City's Response to Defendants' Statement of Material Facts NYSCEF Doc. No. 169 ("RSMF") ¶18.
[43] SMF¶19.
[44] SMF¶25.
[45] SMF¶28; RSMF¶28.

This Court should also reject the City's reliance upon the 1914 deed and its attempt to ignore controlling case law. A municipality acquires title by "dedication and acceptance" and "[d]edication of a street...is essentially of the nature of a gift by a private owner to the public and it becomes effective when the gift is accepted by the public."[46] Besides an offer and acceptance, there must be "**some formal act on the part of the relevant public authorities adopting the highway**."[47] To acquire title to a roadway by dedication there must be: (1) "complete surrender to public use of the land by the owners;" (2) acceptance by the municipality; and (3) "some formal act on the part of the relevant public authorities adopting the highway, or use by the public coupled with a showing that the road was kept in repair or taken in charge by public authorities."[48] Absent a formal act adopting the property as a public street, a municipality's "acceptance of a deed conveying the fee to an unimproved strip of land is not enough to create a public highway"[49] or for a municipality to acquire title to a street by dedication.[50]

Despite the City's attempt to downplay *Desotelle v. Town Bd. of the Town of Schuyler Falls,*[51] *Desotelle* established there are only two ways a street becomes a municipal street – either by dedication or use – and the mere conveyance of deed without more cannot establish dedication.[52] After reaffirming dedication "requires absolute relinquishment to public use by the owner, acceptance and a formal opening,"[53] the *Desotelle* Court ruled even though there was "a deeded conveyance of the subject strip of land to the Town and a resolution by respondent accepting the deed, there is no record evidence of any subsequent action by the Town to improve,

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[46] *Romanoff v. Vil. of Scarsdale*, 50 A.D.3d 763, 764 (2d Dep't 2008).
[47] *Id.* at 764 (*emphasis added*).
[48] *Town of Lake George v. Landry*, 96 A.D.3d 1220, 1221 (3d Dep't 2012); *see also, EPG Assoc., LP v. Cascadilla School*, 194 A.D.3d 1158, 1160 (3d Dep't 2021).
[49] *Perlmutter v. Four Star Dev. Assoc.*, 38 A.D.3d 1139, 1140 (3d Dep't 2007).
[50] *Id.*
[51] 301 A.D.2d 1003 (3d Dep't 2003).
[52] *Id.*
[53] *Id.*

repair or maintain the strip", nor evidence that the municipality "actually adopted it as a public highway."[54] And therefore, the street was not a public highway.[55]

The City misconstrues the 1958 lower court decision in *Bayer v. Pugsley*[56] as standing for the principle that "[w]here fee interest is transferred to a municipality, the property is owned by the municipality,"[57] but that is not what *Bayer* says. In *Bayer*, the road was not passively "transferred" to the town as the City would have the Court believe; to the contrary, the *Bayer* court made point of noting that "[n]ot only did the Town **accept said deed** but thereafter and on February 3, 1938 the Town Board **adopted a resolution** consenting that the Town Superintendent lay out Walnut Park as a public highway."[58] This conforms with *Desotelle*, which requires not only a formal resolution accepting the deed, but also a subsequent action to adopt or improve the road.

Here, the City took neither of these mandatory affirmative actions.

First, with respect to the deed, the subdivision developer issued a deed in 1914 quit-claiming its interest in the seven streets (including East Street) to the City that "shall forever be public streets or highways..."[59] The City cannot dispute that in 1914 the City Council rejected the advice of its Corporation Counsel to accept East Street even though it was only 30-feet wide because of its proximity to City Park and instead by resolution only accepted five of the seven streets as public streets (not East Street).[60] The City never accepted the deed as it related to East Street, and actually affirmatively rejected the deed by eliminating East Street from the list of streets the deed included. While the City claims it accepted the deed because it was recorded five years

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[54] *Id.* at 1004.
[55] *Id.*
[56] *Bayer v. Pugsley*, 13 Misc. 2d 610 (Sup. Ct. Monroe Co. 1958).
[57] Opp.MOL, p.11.
[58] *Bayer*, 13 Misc. 2d at 611 (*emphasis added*).
[59] SMF¶22.
[60] SMF¶23-25.

after the deed's execution in 1919, it produces no documents evidencing the City's consent to recording. Unlike in *Desotelle* and *Bayer*, the City never accepted the deed, which *Desotelle* establishes is alone insufficient for dedication. The City also took no action to adopt East Street (unlike in *Bayer* where the town board directed the highway superintendent lay out the road as a public highway) or to improve, repair or maintain East Street. The 1914 deed alone (with no affirmative act by the City) cannot establish the City's acceptance, or ownership of, of East Street.

Likewise, the City did not acquire title to East Street through use. The *Desotlle* court explained the Court of Appeals established public use alone is insufficient to establish a public street "absent some showing that the property was in fact kept in repair or taken in charge by public authorities."[61] The City admits it "does not regularly" provide repair work along East Street[62] and it does not dispute the ample testimony from City staff and neighboring property owners that the City does not maintain East Street (but that Defendants do).[63] Although the City claims it snowplowed East Street "in emergencies," removed "trash dumped on East Street"[64] and used East Street to access utilities,[65] *EPG Associates, LP v. Cascadilla School*[66] establishes general municipal services cannot establish title to the City by use.

In *EPG Associates*, the Court ruled the fact that adjoining property owners "receive mail service and that the City provides certain municipal services, such as sewer, water, fire hydrants and garbage collection—services for which the adjoining property owners pay taxes—and the City once oiled and stoned the street in 1940 were insufficient to raise a question of fact as to whether the City accepted any such purported dedication or that the street was otherwise taken over and

[61] *Desotelle*, 301 A.D.2d at 1003-04.
[62] RSMF¶36.
[63] RSMF¶37;41-47.
[64] RSMF¶37-38
[65] RSMF¶134.
[66] 194 A.D.3d 1158 (3d Dep't 2021).

maintained by the City."[67] The Court explained "this is particularly so given **the unrebutted evidence that the adjoining property owners paid to have the street paved, pay to have the street privately plowed in the winter and hand painted and installed their own stop sign.**"[68] Thus, the Court ruled that the street was a private road as a matter of law.

The City relies upon case law related to abandoning a street that is inapplicable as the City fails to establish it acquired title to East Street by dedication or use in the first instance. This Court should also disregard the City's misplaced reliance upon general deed propositions when controlling case law establishes dedication of a street is in "nature of a gift" thereby requiring offer, acceptance and "some formal act" by the City accepting or adopting East Street. As East Street remains a private street, the City's claims fail as a matter of law.

B. There is no Unlawful "Encroachment" on Fifth Avenue

The City asserts "[a]t this time, the City is not seeking removal of the encroachment" on Fifth Avenue[69] and therefore, this Court must dismiss this claim.

The City's admission it wants the garden wall/planting bed to remain establishes the City cannot prevail on any nuisance claim. The extensive screening along Fifth Avenue is not a nuisance as the garden wall/planting bed screens the contractor's yard from view and creates a more appealing visual environment.[70]

There is no nuisance *per se* because there is no obstruction of public highway as the garden wall/planting bed is on the side of the sidewalk closest to the Property and does not interfere with street or sidewalk access.[71] For a nuisance *per se*, the City must demonstrate Defendants created

[67] *Id.* at 1162.
[68] *Id.* at 1162-1163 (*emphasis added*).
[69] Opp.MOL p.16.
[70] SMF¶121.
[71] SMF¶123.

a situation that endangers or injures the property, health, safety, or comfort of a considerable number of persons.[72] The City cannot establish this where the Fifth Avenue improvements are a benefit to the City and the public, especially when the City admits it does not want the alleged encroachment removed.

Finally, there is no basis for the City's CO 111-38 claims alleging an encroachment on Fifth Avenue.[73] First, it is the City and not Defendants that misconstrue CO 111-38 and Defendants refer the Court to their opening brief on this point. Second, the City's claim for damages fails since under CO 111-38 only building owners can be liable for damages and Defendants' planting bed/wall and fencing do not meet the legal definition of a "building."

The City now claims Defendants should have obtained a license for the Fifth Avenue encroachment even though its Complaint does not seek this relief. But this also fails because as detailed in our moving papers, this civil action is neither the means nor the venue to enforce or impose penalties for alleged violation of CO 111-38. The City cites no support for its position that this Court has jurisdiction to enforce CO 111-38 and that Uniform City Court Act 203 granting jurisdiction to New Rochelle City Court can be ignored.

The City Building Inspector has never issued Defendants a notice of violation or order regarding the Fifth Avenue encroachments, which is the required initial step to remedying an alleged violation under CO 111-40. The November 2015 Notice to Remove was materially defective because it was signed by the Commissioner of Public Works where CO 111-40 mandates the "Building Official" issue the notice of violation. The City does not and cannot dispute that the Commissioner of Public Works is not a "Building Official" because Building and Public Works

[72] *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 403 (2d Dep't 1997).
[73] SMF Ex. "I", ¶54-55.

are separate departments.[74] The City wants this Court to read language into a local law that is not there. But the City has not satisfied the conditions precedent under its own Ordinance to obtain the relief it seeks regarding Fifth Avenue.

III. The Complaint Should Be Dismissed Against Maria

By arguing only that Maria is not entitled to summary judgment on the sixth cause of action, the City concedes the Complaint's first five claims fail against Maria. There is no legal basis to pierce the corporate veil against Maria on the sixth claim. The case the City relies upon, *Matias v. Mondo Properties LLC*,[75] establishes plaintiffs bear "a heavy burden of showing that the company was dominated by the owners as to the transaction attacked and that such domination resulted in wrongful consequences."[76] Like in *Matias* where the Court ruled plaintiffs failed to raise issues of fact, the City alleges no issues of fact to support piercing the corporate veil against Maria. The City's claims about Maria's alleged awareness of the encroachment are particularly weak as: (1) when Maria and Flavio purchased the Property in 2002, the existing contractor's yard extended onto East Street and Defendants (including Maria) did nothing to alter the existing fencing and gates on East Street; and (2) the City issued building permits and a certificate of occupancy to the prior owner based upon plans depicting the East Street encroachment.[77] There is no reason to pierce the corporate veil "to prevent fraud or to achieve equity"[78] where the City's relief can be obtained through the corporate entity.

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[74] Reply Affidavit, Ex. "A".
[75] 43 A.D.3d 367 (1st Dep't 2007).
[76] *Id.* at 367.
[77] SMF¶49-57.
[78] *Morris v. New York State*, 82 N.Y.2d 135, 140 (1993).

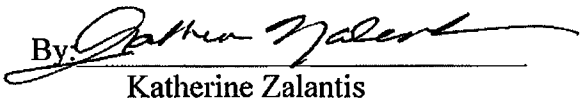
Conclusion

The Court should grant Defendants' motion in its entirety.

Dated: Tarrytown, New York
September 9, 2022

Respectfully submitted,

SILVERBERG ZALANTIS LLC

By: 

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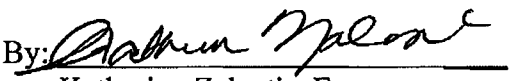
CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 202.8-b that the foregoing REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL OF THE CITY'S COMPLAINT was prepared on a computer using Microsoft Word indicating the following:

> **Word Count**. The total number of words, inclusive of point headings and footnotes, and exclusive of the caption, table of contents and signature block, is 4193.

SILVERBERG ZALANTIS LLC

By: 

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ADDENDUM

City of New Rochelle, NY
Friday, September 9, 2022

Chapter 224. Parks

§ 224-1. Interference with lands or improvements.

[Amended 10-18-1988 by L.L. No. 1-1988; 3-16-2004 by Ord. No. 60-2004]
No person shall modify, alter or in any manner interfere with the line or grades of any park or park street, nor take up, move or disturb any curb, gutter stone, flagging, tree, tree box, railing, fence, sod, soil or gravel thereof, except by direction of the Commissioner of Parks and Recreation or under the Commissioner's permit.

§ 224-20. Penalties for offenses.

[Amended 10-18-1988 by L.L. No. 1-1988]

A. In addition to the penalties provided in Subsection **B** of this section, the fishing permit of any person convicted of a violation of § **224-19** may be revoked.

B. An offense against the provisions of this chapter shall be punishable by a fine of not more than $250 or by imprisonment for not more than 15 days, or both.