

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.,

**AFFIRMATION IN
OPPOSITION TO
DEFENDANTS’ MOTION
FOR SUMMARY
JUDGMENT**

Defendants.
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PETER A. MEISELS, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:

1. I am a member of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys for plaintiff City of New Rochelle (the “City”). As such, I am fully familiar with the facts and circumstances of this action based upon my review of the legal file maintained by my office and consultation with our client.

2. I submit this affirmation in opposition to Defendants’ motion for summary judgment.

3. The exhibits attached hereto are subsequently referred to “City Opp. Ex. #”. The exhibits attached to the City’s motion for summary judgment, which was filed electronically on May 31, 2022, are referenced by the Document Number on the electronic docket, and “City Ex. #” pursuant to CPLR 2214(c).

Exhibits

4. Attached hereto as **Exhibit 1** is a true and accurate copy of the transcript of the May 17, 2021, deposition of Patrick A. Bongo.

5. Attached hereto as **Exhibit 2** is a true and accurate copy of the 1998 Resolution in which the City granted an easement over East Street to PAB Landscaping, LLC.

6. Attached hereto as **Exhibit 3** is a true and accurate copy of the Site Plan associated with a Building Permit issued to the prior owners of 436 Fifth Avenue, which was marked as Defendants Exhibit L at the deposition of Paul Vacca. *See* Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 56-57.

7. Attached hereto as **Exhibit 4** is a true and accurate copy of the Building Permit Number B20000387, issued to the prior owner of 436 Fifth Avenue, which was marked as Defendants' Exhibit K at the deposition of Paul Vacca. *See* Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 56.

8. Attached hereto as **Exhibit 5** is a true and accurate copy of the video recording created by Robert Cox on May 16, 2015. *See* Doc. No. 143 (City Ex. 29 (Cox Dep.)) at 6:6-7:15. This is being submitted to the court on a disk.

9. Attached hereto as **Exhibit 6** is a true and accurate copy of pages 6-8 of the July 8, 2021 deposition of Bernardo Rivera.

10. Attached hereto as **Exhibit 7** is a true and accurate copy of a list of private streets in New Rochelle from the Department of Public Works, produced in this action by the City with Bates number PLTF127. *See also* Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 41-42 (if there is a list of private streets, the DPW would maintain the list).

Summary of Argument

11. Defendants fail to establish *prima facie* entitlement to summary judgment on the Defendants' first three causes of action for trespass, negligence, and nuisance. Defendants' argument that they did not cut down any trees and that other individuals parked on the Flowers

Park Parcel prior to May 16, 2015, are irrelevant to the City's claims, as those allegations, even if true, do not negate the underlying elements of trespass, negligence, and nuisance. Rather, as demonstrated in the City's pending motion for summary judgment, the City is entitled to summary judgment on these claims.

12. Based on the testimony of Robert Cox and Paul Vacca, there is a triable question of fact as to whether Defendants removed trees and other vegetation during their work on the Flowers Park Parcel on May 16, 2015; accordingly, summary judgment on the City's fourth and fifth causes of action is improper.

13. Defendants fail to establish *prima facie* entitlement to summary judgment on the City's sixth cause of action for encroachment/nuisance as Defendants' do not dispute that their contractor's yard extends over 10 feet beyond their property line, nor have they produced any evidence that would rebut the City's ownership of East Street. It is not necessary for East Street to have been designated a public street for the City to establish a claim for encroachment. The City has produced un rebutted evidence that it is the owner of fee title in East Street. Accordingly, Defendants' argument that East Street was not designated as a public street are irrelevant to the City's claim for encroachment on public property. As demonstrated in the City's pending motion for summary judgment, the City is entitled to summary judgment on its sixth cause of action.

14. Finally, the City agrees to withdraw the first through fifth causes of action against Maria LaRocca in her individual capacity. However, the City does not withdraw its sixth cause of action as against Maria LaRocca. The evidence demonstrates that Maria LaRocca was aware of the 10-foot-plus encroachment into East Street, individually communicated with a surveyor who confirmed the encroachment, and continued to refuse to remove the encroachment or apply

for a permit for the encroachment from the City, preferring to continuing to use public property for the benefit of the private business she owns with Flavio LaRocca, of which she is the majority shareholder. Accordingly, there is sufficient evidence to hold Maria LaRocca liable in her individual capacity on the City's sixth cause of action, and she should not be dismissed from the case.

Conclusion

15. For the reasons stated above, set out in the City's Response to the Defendants' Statement of Material Facts, and in the accompanying memorandum of law in opposition, the Defendants' motion for summary judgment should be denied.

Dated: White Plains, New York
August 4, 2022

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for the City of New Rochelle



By: _____
Peter A. Meisels
Eliza M. Scheibel
1133 Westchester Avenue
White Plains, NY 10604
Tel. No. (914) 323-7000
Our File No.: 07367.00101

**CERTIFICATION OF
WORD COUNT SPECIFICATIONS**

I hereby certify, pursuant to 22 NYCRR 202.8-b (a) (b) and (c), that the foregoing computer generated affirmation was prepared using a proportionally spaced typeface as follows:

Specifications:

Name of typeface: Times New Roman

Point Size: 12 pts

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Word Count: The total number of words in this affirmation, inclusive of point headings and footnotes if applicable, and exclusive of the pages containing the caption and signature block is 905 words, which is in compliance with the word count limit of 7000 words.

Dated: White Plains, New York
August 4, 2022

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER LLP
Attorneys for Plaintiff



Peter A. Meisels

1133 Westchester Avenue
White Plains, NY 10604
(914) 323-7000
Our File No. 07367.00101

EXHIBIT 1

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CITY OF NEW ROCHELLE,
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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
May 17, 2021
1:59 p.m.

DEPOSITION of a Non-Party
Witness, PATRICK BONGO, taken by the
Respective Parties, pursuant to Subpoena,
held via Veritext Virtual, before Barbara
Tortora, a Certified Shorthand Reporter
and Notary Public of the State of New
York.

1

2 A P P E A R A N C E S :

3

4 WILSON ELSER MOSKOWITZ EDELMAN
5 & DICKER, LLP

6 Attorneys for Plaintiff
7 1133 Westchester Avenue
8 White Plains, New York 10604

9 BY: PETER MEISELS, ESQ.

10 -AND-

11 ROLAND KOKE, ESQ.

12

13

14

15 SILVERBERG & ZALANTIS, LLC

16 Attorneys for Defendants
17 120 White Plains Road, Suite 305
18 Tarrytown, New York 10591

19 BY: KATHY ZALANTIS, ESQ.

20

21

22 ALSO PRESENT:

23 Flavio La Rocca

24 Maria La Rocca

25 * * *

1

2 IT IS HEREBY STIPULATED AND AGREED by
3 and between counsel for the respective
4 parties hereto that all rights provided by
5 the C.P.L.R., and Part 221 of the Uniform
6 Rules for the Conduct of Depositions,
7 including the right to object to any
8 question, except as to the form, or to
9 move to strike any testimony at this
10 examination, are reserved; and, in
11 addition, the failure to object to any
12 question or to move to strike any
13 testimony at this examination shall not be
14 a bar or waiver to make such motion at,
15 and is reserved for, the trial of this
16 action.

17 IT IS FURTHER STIPULATED AND AGREED
18 that this examination may be signed and
19 sworn to, by the witness being examined,
20 before a notary public other than the
21 notary public before whom the examination
22 was begun, but the failure to do so, or to
23 return the original of this examination to
24 counsel, shall not be deemed a waiver of
25 the rights provided by Rules 3116 and 3117

1
2 of the C.P.L.R. shall be controlled
3 thereby. IT IS FURTHER STIPULATED AND
4 AGREED that the filing of the original of
5 this examination shall be and the same
6 hereby is waived.

7 (Bongo Exhibit 1 was marked for
8 identification, as of this date.)

9 P A T R I C K B O N G O, having first
10 been duly sworn by Barbara Tortora, a
11 Notary Public of the State of New York,
12 was examined and testified as follows:

13 EXAMINATION BY

14 MR. MEISELS:

15 Q. What is your full name?

16 A. Patrick Bongo.

17 Q. What is your present home
18 address?

19 A. 76 Maple Avenue, Pelham, New
20 York 10803.

21 Q. Thank you for appearing, being
22 on time and so forth. Got a few questions
23 to ask. I'm going to try to make it
24 brief. In the event that you don't
25 understand the questions or I don't speak

1 BONGO

2 clearly enough, just please tell me and
3 I'll do my best, okay, to rephrase them.
4 I'm going to call your attention back to
5 May of 2015.

6 A. Okay.

7 Q. Back in May of 2015, did you own
8 premises located on East Street in New
9 Rochelle?

10 A. You clicked off, what was that?

11 Q. Back in May of 2015, did you own
12 premises located on East Street in New
13 Rochelle?

14 A. Yes, I did. Yes, I do.

15 Q. You still do; is that right?

16 A. Yes.

17 Q. How long have you owned those
18 premises?

19 A. Oh, God, I would have to say
20 maybe early '80s.

21 Q. From those premises you run a
22 business?

23 A. Yes, I do.

24 Q. Is that PAB Contracting?

25 A. Corp., correct.

1 BONGO

2 Q. Am I correct that PAB stands for
3 Pat A. Bongo?

4 A. Yeah, a couple of here and
5 there. Now it does.

6 Q. Am I correct that you're
7 located, your business is located across
8 from Flowers Park?

9 A. Flowers Park, yes, yes.

10 Q. Are you familiar with Mr. Flavio
11 La Rocca?

12 A. Yes.

13 Q. How long have you known him?

14 A. Oh, God, I don't know. Maybe
15 fifteen, twenty years. Fifteen years.

16 Q. As far as you know, does he
17 operate a business on East Street as well?

18 A. Yes, he does.

19 Q. Is that located across from
20 Flowers Park?

21 A. Correct.

22 Q. Going back to May of 2015, what
23 kind of work was PAB doing?

24 A. We do roadway restoration for
25 utility companies.

1 BONGO

2 Q. Are you still doing that same
3 kind of work today?

4 A. Yes.

5 Q. How long have you done that kind
6 of work?

7 A. I would say, the early '80s.

8 Q. Could you explain to those of us
9 who don't understand construction what
10 roadway reconstruction work means? You're
11 explaining it to a third grader, how would
12 you explain it?

13 A. In other words, whatever --
14 whatever damages are done by the utility
15 company, whether it be concrete, blacktop,
16 landscaping, when they're done doing what
17 they have to do to repair their lines, we
18 go back and bring it to its original
19 restoration.

20 Q. If they make a cut in a paved
21 road, you go and repair the cut?

22 A. Correct.

23 Q. Do you actually make the cut or
24 just do the repairs?

25 A. No, we have work orders. We

1 BONGO

2 receive work orders for what we have to do
3 at every given location.

4 Q. Your orders include actually
5 creating the excavation or do you merely
6 repair it?

7 A. Well, we repair it. We repair
8 what's there. We might -- like you said,
9 whatever -- whatever has to be repaired,
10 whether it be excavation of the blacktop
11 or excavation of the concrete or
12 excavation of the top soil, we take it out
13 and put it back, correct.

14 Q. Back in May of 2015, what kind
15 of equipment did you use?

16 A. I don't understand the question.

17 Q. What kind of equipment did PAB
18 paving own that you did repairs with?
19 What kind of equipment did you use to make
20 those repairs?

21 A. Mack trucks. CASE backhoes.
22 Regular construction, road construction
23 equipment.

24 Q. Could you explain to those
25 people who don't understand it what

1 BONGO

2 regular construction equipment includes?

3 A. Construction equipment is -- I
4 wouldn't even remember at that time what
5 kind of construction equipment I had at
6 that present time. But construction
7 equipment to do asphalt work or to do
8 concrete work is self-explanatory. It's
9 whatever at that time we needed to perform
10 that work. To answer your question, it's
11 trucks, backhoes, a steam roller or
12 whatever might be to do that restoration.

13 Q. Do you still have that kind of
14 equipment today?

15 A. Probably not the same stuff, but
16 on the order of that.

17 Q. Same kind of equipment?

18 A. Same kind, yes.

19 Q. Back in May of 2015, do you
20 recall how many employees you had?

21 A. Probably the same my entire
22 life, fifteen to twenty.

23 Q. Is your business a year-round
24 business or seasonal?

25 A. Seasonal.

1 BONGO

2 Q. What's your season?

3 A. Depending on the weather, I
4 would say December 15th to April 15th.
5 So, in other words, that's our working
6 time, April 15th to December 15th. And
7 then we're shut down from December 15th to
8 April 15th.

9 Q. I understand.

10 Back in May of 2015, where did
11 your employees park their cars every day?

12 A. I believe some parked over here.
13 I remember taking -- going to get permits
14 for the park down below. I paid for
15 parking permits for them to park down
16 below. And then I think at one point
17 after paying for the parking permits for a
18 few years they -- I went to go pay one
19 year and they removed the fee, so we
20 continued to park in the parking lot down
21 below.

22 Q. When you say the parking lot
23 down below, do you mean the parking lot
24 that's in the park?

25 A. Yes, yes, down below. Yes, down

1 BONGO

2 in Flowers Park, correct.

3 Q. Concerning those who parked
4 along East Street back in 2015, where on
5 East Street did they park?

6 A. I have no idea. I don't -- they
7 report in the gate when they come to work.

8 Q. Can you identify an address
9 called 2525 Palmer Avenue?

10 A. Yes, that's my office.

11 Q. Can you identify a person by the
12 name of Joe Guglielmo?

13 A. I think he owns the building.

14 Q. Does he own the building that
15 you operate your business in?

16 A. Yes.

17 Q. Do you know whether or not he
18 ever rented any of his space to Mr. La
19 Rocca to keep Mr. La Rocca's equipment?

20 A. No, not at all.

21 Q. You think he did not do that?

22 A. I don't know. I have no idea.
23 I don't know anything of his business.

24 Q. Do you recall back in May of
25 2015 that there was any construction work

1 BONGO

2 done across East Street to create parking
3 spaces?

4 A. I heard something about it.
5 That was the day of my daughter's
6 graduation from college, and I was at
7 Madison Square Garden that day, and I
8 wasn't even around that day.

9 Q. I'm going to show you a video
10 that's been previously marked as
11 Plaintiff's number 13 and see if this
12 refreshes your recollection of what
13 happened back in May of 2015?

14 A. I don't see it.

15 Q. It's coming, relax.

16 A. I'm new at this.

17 Q. None of us are old hands at this
18 procedure.

19 A. I'm waiting.

20 Q. We're having a problem loading
21 the video. Let's go on to the next
22 exhibit, that might be helpful. We're
23 going to show you what's previously been
24 marked as Exhibit 3A for identification.
25 Do you see it?

1 BONGO

2 A. Yeah, I see it.

3 Q. Mr. Bongo, can you identify
4 anybody who is shown in that photograph?

5 A. No.

6 Q. In reference to the truck, the
7 yellow truck --

8 A. Yes.

9 Q. -- have you ever seen that truck
10 before?

11 A. I have no way of telling. I
12 mean, I see the name on the truck, but
13 other than that I wouldn't know -- if the
14 truck passed me on the street I wouldn't
15 know I seen it before.

16 Q. Right. You can't identify
17 anybody in the photograph?

18 A. No.

19 Q. The scene that's depicted in
20 that photograph, can you identify what
21 that photograph shows?

22 A. Not really, no. I mean, I see
23 four people standing in an area.

24 Q. Do you know where that area is?

25 A. I mean, it looks like that, but

1 BONGO

2 I can't be 100 percent sure.

3 Q. What does it look like?

4 A. It kind of looks like out front
5 here, but I can't be positive.

6 Q. Let's move on. This is still
7 the same exhibit. Can you identify what's
8 shown in that photograph?

9 A. Anybody? Can I tell whose
10 there?

11 Q. Firstly, can you tell whose
12 there?

13 A. No.

14 Q. Can you identify what the
15 photograph depicts?

16 A. No.

17 Q. Have you ever seen what's
18 depicted in that photograph before?

19 A. No.

20 Q. Did you ever see across from
21 your business those piles of wood chips?

22 A. I can't remember that, no. I
23 would have to say no. But I can't -- no.

24 Q. This is a third photograph of
25 the same exhibit, okay. Can you identify

1 BONGO

2 the cars that are shown?

3 A. No.

4 Q. Do you know who those cars
5 belong to?

6 A. No.

7 Q. Do you know whether any of them
8 belong to your employees?

9 A. No.

10 Q. You see where the cars are
11 parked?

12 A. Kind of, yeah.

13 Q. Do you know your employees used
14 to park at that location?

15 A. I have no idea.

16 Q. The machinery that's there, what
17 kind of machinery is that?

18 A. Looks like a little loader.

19 Q. Does that belong to you?

20 A. No.

21 Q. Do you know who it belonged to?

22 A. No.

23 Q. The scene that's depicted in the
24 photograph, have you ever seen that
25 before?

1 BONGO

2 A. The what?

3 Q. That photograph depicts a
4 certain scene and my question to you is,
5 have you ever seen that scene before?

6 A. I have no idea. It just looks
7 like a green area to me.

8 Q. You don't recognize it; is that
9 correct?

10 A. Yes, I do not.

11 Q. I'm showing you the next
12 photograph in that exhibit, a yellow
13 truck.

14 A. Yes.

15 Q. Do you know who that belongs to?

16 A. Just by looking at the door, I
17 recognize the logo on the door.

18 Q. What is that logo?

19 A. I guess Flavio La Rocca & Sons.

20 Q. Do you recognize the scene
21 that's depicted in the photograph?

22 A. Not 100 percent, no, I don't.

23 Q. Any percent?

24 A. I mean, I'm looking at an area
25 that it could be possibly, but I can't be

1 BONGO

2 sure. It's not clear enough. It's a long
3 time. I can't say 100 percent that's --
4 that I recognize, because I don't.

5 Q. The automobiles that are in the
6 photograph, can you identify any of them?

7 A. No. The automobiles, no.

8 Q. And the people?

9 A. No.

10 Q. Do you know whether or not the
11 scene depicted in this photograph is an
12 area that's across East Street from your
13 place of business?

14 A. I cannot be positive on that,
15 no.

16 Q. We're going to try to get the
17 video to work. If not, we'll move on.
18 Take a three minute break, and we'll try
19 to get the video to work. If not, we'll
20 move on.

21 A. Okay.

22 (At this time, a recess was
23 taken.)

24 Q. We're going to show you what's
25 previously been marked as Exhibit 13. Mr.

1 BONGO

2 Bongo, I'm going to ask you if you can
3 identify any of the people that are shown
4 in this frame of the video?

5 A. No.

6 Q. Somebody noted here, that says
7 Flavio La Rocca in white shirt. Can you
8 tell if that is Mr. La Rocca in the white
9 shirt?

10 A. No, I cannot.

11 Q. Can you identify the scene
12 that's depicted in that video?

13 A. Not 100 percent, no.

14 Q. Any percent?

15 A. I'm looking at something
16 similarity (sic), but I can't be sure. It
17 has -- it looks -- I can't be sure. I
18 would say ten percent.

19 Q. Ten percent what do you think it
20 is?

21 A. It looks like a roadway that
22 goes -- that is possibly out front here.
23 But I can't be 100 percent sure because I
24 can't say that.

25 Q. I'll ask you again, can you

1 BONGO

2 identify any of the people shown in that
3 frame of the video?

4 A. No, I cannot.

5 Q. The angle has changed somewhat,
6 can you now identify what's depicted in
7 the photograph?

8 A. Not the area, no. I see a name
9 on the truck, but that's about it. As far
10 as the area itself, I can't say where that
11 area is 100 percent.

12 Q. We changed the angle a bit. Can
13 you identify the people shown in the
14 photograph?

15 A. No, I cannot.

16 Q. Are you able to identify the
17 area, the scene that's depicted in the
18 photograph?

19 A. No, I cannot.

20 Q. Did you ever notice across from
21 your business there was a point in time
22 where there were piles of wood chips?

23 A. No, I do not.

24 Q. That gentleman depicted in the
25 photograph, can you identify who that is?

1 BONGO

2 A. No, I cannot.

3 Q. Can you identify the scene as
4 depicted in the photograph?

5 A. No, I cannot.

6 Q. Can you identify the people that
7 are depicted in this frame of the
8 photograph?

9 A. No, I cannot.

10 Q. Can you identify the scene as
11 depicted in that photograph?

12 A. No, I cannot.

13 Q. Can you identify anyone depicted
14 in this photograph?

15 A. No, I cannot.

16 Q. The person shown has a shirt
17 that says New York Energy Conservation
18 Company. Did you ever know anyone
19 employed by that company?

20 A. No, I do not.

21 Q. In this particular scene, do you
22 notice that on the left side there is a
23 chain link fence?

24 A. Yes, I do.

25 Q. Have you ever seen that chain

1 BONGO

2 link fence before?

3 A. I believe I have.

4 Q. Where did you see it?

5 A. I believe that's the skate park
6 that I'm looking at, which is up here. It
7 is a skate park. If it's the exact one,
8 I'm not 100 percent. But it's getting
9 close to fifty to sixty percent that I
10 recognize that picture.

11 Q. Would that be the skate park in
12 Flowers Park?

13 A. Correct. On top of Flowers
14 Park, correct.

15 Q. With this angle, on the right
16 side now, do you see the chain link fence?

17 A. Yes. I see guard booth.

18 Q. The guard booth for Flowers
19 Park?

20 A. Yes. I shouldn't say guard
21 booth. I guess a booth where they admit
22 the people to the skate park, if that's
23 the one in question. I'm not 100 percent
24 sure, but it looks like the skate park up
25 the road here.

1 BONGO

2 Q. When you the say up the road
3 here, you mean on East Street?

4 A. East Street, correct. Yes, East
5 Street.

6 Q. In reference to the piles of
7 wood chips that are shown to the left of
8 the car, do you recognize those?

9 A. No, not at all.

10 Q. In reference to the frame being
11 depicted now, can you identify any of the
12 motor vehicles that are shown in that
13 photograph?

14 A. Just only by whatever lettering
15 I can see on them. The truck itself I
16 wouldn't -- I can't be sure. What
17 lettering I can see would be the only
18 thing that would make me believe that I
19 noticed the truck.

20 Q. From the lettering, would it
21 appear that those trucks belong to Mr. La
22 Rocca?

23 A. Correct.

24 Q. Can you identify the black chain
25 link fence?

1 BONGO

2 A. Not 100 percent, but it's
3 looking like that's the skate park here on
4 East Street.

5 Q. During the frame of the exhibit
6 that's being shown now, on the right side
7 there's a gray chain link fence. Can you
8 identify that fence?

9 A. It looks like it's Flavio's yard
10 exiting towards 5th Avenue.

11 MR. MEISELS: For the record,
12 this happens to be frame 1:29, if
13 that's helpful.

14 Q. Mr. Bongo, looking at the frame
15 of the video that's shown at the moment,
16 on the right-hand side, can you identify
17 what's depicted in the right-hand side of
18 the video?

19 A. The right-hand side of the
20 video? Well, it looks like the exit to
21 5th Avenue.

22 Q. On the right-hand side, for
23 example, do you see something that's
24 colored green?

25 A. Yes.

1 BONGO

2 Q. Can you identify what that is?

3 A. It looks like a -- some type of
4 screener, maybe a top soil screener.

5 Q. To the best of your knowledge,
6 was that top soil screener located inside
7 Mr. La Rocca's yard?

8 A. I mean, it looks like it's
9 Flavio's yard, yes. I mean, yes, it
10 looked like Flavio's yard.

11 Q. Looking at the frame of the
12 video that's depicted now, do you see on
13 the right-hand side there's a black chain
14 link fence?

15 A. Yes, I do.

16 Q. Can you identify that fence?

17 A. I believe that is the fence of
18 the skate park on East Street.

19 Q. Can you identify any of the
20 other vehicles shown in the picture?

21 A. No, not really. Just -- no.

22 Q. Mr. Bongo, do you see in the
23 frame of the photograph on the right-hand
24 side there's a black truck with a white
25 cab?

1 BONGO

2 A. Yes.

3 Q. Can you identify, does that
4 truck belong to you?

5 A. No, it does not.

6 Q. Did it belong to you?

7 A. No, it does not.

8 Q. Did it back in May 2015 belong
9 to you?

10 A. No, it did not.

11 Q. Do you know who it belonged to?

12 A. I believe it's one of the
13 gentleman on the road here.

14 Q. From the lettering, who would
15 you judge it to be?

16 A. Pete Carino, because I only
17 recognize the truck from the writing on
18 the truck who owns the truck. And how
19 it's written in law, I have no idea. But
20 I do recognize the P. Carino truck being
21 in this premises, on this road.

22 Q. Was Pete Carino one of the
23 businesses located on East Street back in
24 May of 2015?

25 A. Not that I'm aware of.

1 BONGO

2 Q. Are you familiar with a Pete
3 Carino Enterprise?

4 A. No, I am not.

5 Q. Other than in this photograph,
6 have you seen the Pete Carino trucks on
7 East Street in the past?

8 A. Yes, I have.

9 Q. When you noticed those trucks
10 there, did you notice what they were
11 doing?

12 A. No, I do not.

13 Q. Do you still notice Pete Carino
14 trucks on East Street from time-to-time?

15 A. Possibility, yeah, I see him
16 once in a while. I don't -- your know, I
17 don't look. But there's a possibility I
18 seen him before, yes.

19 Q. Do you do business with Pete
20 Carino?

21 A. No, I do not.

22 Q. Do you know if he does business
23 with anyone else on East Street?

24 A. That's his business, that's none
25 of mine.

1 BONGO

2 Q. Please look at the frame of the
3 video that's presently being shown. Can
4 you identify any of the cars shown in the
5 photograph?

6 A. No, I cannot.

7 Q. Can you identify the scene
8 that's shown in the photographs?

9 A. Less than the others. Much less
10 than the others, I can tell you that.

11 Q. When you say less than, that
12 means --

13 A. Yeah, I'm looking at a dirt area
14 with trees and I don't have anything in
15 the picture to show me it's -- you know,
16 that it's -- you know, that I recognize it
17 100 percent, because I don't.

18 Q. In the left third of the
19 photograph do you notice that there's a
20 structure that appears to be lights?

21 A. Yeah.

22 Q. Can you identify those lights?

23 A. No, I cannot.

24 Q. Mr. Bongo, can you identify the
25 scene that's depicted in the frame that's

1 BONGO

2 being shown now?

3 A. I can recognize the house in the
4 back a little more. It's looking like --
5 it's looking like it's on the East Street
6 order.

7 Q. Do you know who owns that house?

8 A. No, I do not.

9 Q. Can you identify any of the
10 vehicles that are shown in the photograph?

11 A. No. They -- no.

12 Q. Can you identify any of the
13 people shown in the photograph?

14 A. No, I cannot.

15 Q. Can you identify the scene
16 that's depicted in the frame of the
17 photograph that's being shown now?

18 A. No.

19 Q. Can you identify any of the
20 people?

21 A. No, I cannot.

22 Q. The equipment that's being used
23 that's colored yellow, in the construction
24 trade, what would you call that?

25 A. I guess it would be called a

1 BONGO

2 roller.

3 Q. A roller?

4 A. An asphalt roller.

5 Q. Back in May of 2015, did you own
6 that roller?

7 A. Did I own that roller?

8 Q. Yes.

9 A. I would -- no. I don't ever
10 think I owned something like that, no.

11 Q. Do you recognize what's depicted
12 in the photograph?

13 A. Excuse me?

14 Q. Do you recognize what's depicted
15 in the photograph?

16 A. The area, no.

17 Q. We're going to show you some
18 photographs. We're showing you a
19 photograph that's been premarked as
20 Exhibit 3A. Can you identify those
21 automobiles?

22 A. No.

23 Q. Back in May of 2015, did you own
24 any of the automobiles that are shown in
25 that photograph?

1 BONGO

2 A. I don't think so.

3 Q. When you say you don't think so,
4 are you certain that you did not?

5 A. No, yeah, I'm -- yes, I'm 100
6 percent positive me personally did not own
7 any of those cars, yes.

8 Q. Do you know whether or not PAB
9 Paving owned them?

10 A. No, 100 percent not.

11 Q. Do you know if any of them were
12 owned by some business entity that belongs
13 to you?

14 A. That I don't know. That I don't
15 know. Not owned by any business -- yeah,
16 no, no, none at all.

17 Q. Do you know if any of those
18 automobiles are owned by your employees?

19 A. That I don't know.

20 Q. Do you know whether or not your
21 employees parked in that location where
22 you see those automobiles?

23 A. I do not.

24 Q. Mr. Bongo, I show you a
25 photograph that's been premarked as

1 BONGO

2 Exhibit 3A, it's one of the 3A exhibits.

3 I apologize, it's Defendant's C, premarked
4 as Defendant's C. Can you identify what's
5 shown in that photograph?

6 A. The area?

7 Q. Yes.

8 A. The far, far left hand very end
9 of the picture looks like the end of East
10 Street. Otherwise, I couldn't be sure.

11 Q. Can you identify any of the
12 vehicles shown in the photograph?

13 A. No, I cannot.

14 Q. Moving on to the next photograph
15 that is in the same exhibit, one of the
16 photographs marked as Exhibit C, do you
17 recognize what's depicted in this
18 photograph?

19 A. I cannot, no.

20 Q. Do you recognize the car?

21 A. No, I do not.

22 Q. Again, this is another
23 photograph that was premarked as
24 Defendant's Exhibit C for identification.
25 Can you identify what's shown in that

1 BONGO

2 photograph?

3 A. The same thing, the left rear
4 looks like the end of East Street.

5 Q. Would it be correct to say that
6 the person who took the photograph was
7 facing the rear end of East Street?

8 A. I'm not a photographer, I
9 couldn't say on that.

10 Q. Looking at that photograph, on
11 the right side of the photograph do you
12 see a raised area, the area that was just
13 being rolled?

14 MS. ZALANTIS: Objection.

15 MR. MEISELS: I'll withdraw the
16 question. Good objection.

17 Q. On the right side of the
18 photograph, do you see a raised area?

19 A. Looks like there's a difference,
20 a raised area of top soil compared to the
21 rest of the grade.

22 Q. Did there ever come a time that
23 you saw people parking in that raised
24 area?

25 A. I have -- I have no idea.

1 BONGO

2 Q. Do you happen to know who has
3 title and owns that raised area?

4 A. No.

5 Q. Would it be fair to say that you
6 don't know whether that's East Street or
7 whether it's part of the Flowers Park?

8 A. That would be correct.

9 Q. I'm showing you what's been
10 premarked as Exhibit II for
11 identification. Are you able to identify
12 which tax lots on East Street actually
13 belong to you or a business that you
14 control?

15 A. I believe it's -- I know it's
16 forty-four and forty-three. I'm not sure
17 if it's forty-two or forty-one. It just
18 might -- it's forty-four and forty-three
19 for sure. But I can't see, I don't have
20 any glasses, I don't know how wide those
21 lots are, how wide. I know it's
22 forty-four and forty-three for sure.

23 Q. (Indicating.)

24 A. That's better.

25 Q. Does that help?

1 BONGO

2 A. It's fifty by 100. In front of
3 the 209, is that a sixty-six? I would
4 have to say it's just forty-four and
5 forty-three. I mean, the block and block
6 number, the depth is nice and clear, and
7 the width is still I can't read it.

8 Q. Fair enough.

9 Looking at the same tax map,
10 okay, is the skate park you identified
11 before located at the corner of East
12 Street and 5th Avenue?

13 A. It is located on the corner of
14 East Street and 5th Avenue, yes. If
15 that's the same pictures we were looking
16 at, yes.

17 Q. When you stand in front of the
18 property that you own that's lots
19 forty-three and forty-four and look
20 straight across East Street, do you see
21 the skate park?

22 A. Well, I mean, if I turn my head
23 to the right I do.

24 Q. What do you see if you turn to
25 the left?

1 BONGO

2 A. If I turn to the left, I see the
3 end of East Street.

4 Q. I'm going to show you what's
5 been marked as Exhibit X for
6 identification. Can you identify what's
7 shown in that photograph?

8 A. No. I mean, it looks like a
9 manhole cover, that's about it.

10 Q. I'm going to show you some
11 additional photographs that have all been
12 previously marked as part of Exhibit X.
13 Can you identify what's shown in the
14 photograph on top?

15 A. I think the right-hand corner --
16 there you go, yes. Actually, the
17 right-hand corner I believe is my gate,
18 and it looks possibly that that is my
19 cement mixer. It's a little blurry, but
20 it looks like we're looking up towards the
21 skate park and on the right-hand side that
22 is my gate and my cement mixer.

23 Q. We're showing you another
24 photograph as part of the same exhibit.
25 Can you identify that building?

1 BONGO

2 A. I think -- I mean, I believe
3 that's on the corner of Ashland and East
4 Place, yes.

5 Q. Do you know who supposedly owns
6 that building?

7 A. No, I do not.

8 Q. We're going to show you an
9 exhibit premarked as Exhibit GG. Can you
10 identify what's shown in that photograph?

11 A. Going by the -- I go for my walk
12 down there, that looks like the back of
13 Flowers Park. And right outside the gate
14 here with the black fence it looks like
15 East Street and Flowers Park down below.

16 Q. In this particular photograph
17 you see there's a white car?

18 A. Yes.

19 Q. Can you identify that car by any
20 chance?

21 A. No, I can't.

22 Q. You notice that next to the
23 white car as you look towards the left of
24 the photograph there's a black chain link
25 fence?

1 BONGO

2 A. Yes, I do.

3 Q. Do you recall having seen that
4 fence being erected?

5 A. No, not -- no, no.

6 Q. Do you recall roughly --

7 A. I don't know what -- I know that
8 it looks like that's the fence out front
9 here. But when it was put up or how it
10 was put up, I have no knowledge.

11 Q. Do you know who put it up?

12 A. No. I don't for sure, no.

13 Q. Looking at that black fence, do
14 you notice that on the side of that fence
15 opposite East Street there's an area that
16 appears to have wood chips on the ground?

17 A. No.

18 Q. Looking at that black fence, do
19 you notice that that black fence, to the
20 left of it, there's East Street, am I
21 correct?

22 A. Basing off of that street,
23 looking to the right is Flowers Park, yes.

24 Q. To the right of that black
25 fence, do you know whether that's part of

1 BONGO

2 Flowers Park?

3 A. That I don't know.

4 Q. Do you know if there was ever a
5 time that people parked there before the
6 fence was erected?

7 A. I can't say. I don't know.

8 Q. I'm going to show you another
9 photograph, part of the same exhibit, and
10 ask you if you can identify that picture?

11 A. Looks like the skate park and
12 check-in booth, whatever you want to call
13 it. The Joe Cassina (phonetic) building
14 down there. I guess that's part of the
15 Flowers Park down there.

16 Q. I show you another photograph,
17 part of the same exhibit, and ask you if
18 you can identify what's shown in that
19 photograph?

20 A. It looks pretty much like the
21 East Street skate park.

22 MR. MEISELS: We would like to
23 take a five-minute break and we'll
24 finish up with any questions we have
25 and then whatever Ms. Zalantis may

1 BONGO

2 have. It's 2:58. We'll try to keep
3 it five minutes.

4 (At this time a recess was
5 taken.)

6 Q. Mr. Bongo, I got a question for
7 you, in various photographs you identified
8 East Street and, as I understand it, the
9 business you own is on East Street. Back
10 in May of 2015, do you recall who
11 maintained East Street, by maintain, I
12 mean plowed the snow, made repairs, paved
13 the street, things of that sort?

14 A. No. Wasn't me.

15 Q. Do you know who did do it?

16 A. No, I do not.

17 Q. Up until today, do you know who
18 maintains East Street?

19 A. Legally, no. Technically, no.

20 Q. Let me ask this question, you
21 have various businesses there, I realize
22 your business is seasonal and may not
23 necessarily be a major concern for you,
24 but do you know who plows the snow off
25 East Street if it gets plow?

1 BONGO

2 A. I do not. I don't know anything
3 about that.

4 Q. Do you know who paved East
5 Street?

6 A. No.

7 Q. Do you know who makes repairs to
8 East Street?

9 A. No, I do not.

10 Q. In the various photographs we
11 looked at you saw there were certain work
12 being done. Do you know what the
13 condition of that premises were before
14 that work was done?

15 A. No, no, I do not.

16 Q. Is it your understanding that
17 you or any of your business enterprises
18 own any part of East Street?

19 A. No, no, not at all.

20 Q. Has there ever been any
21 discussion amongst the people who have
22 businesses located on East Street
23 concerning maintenance of the street?

24 A. You know, I can't be sure. I
25 know there's things that we talked about

1 BONGO

2 over the years, but I can't -- I can't
3 recall.

4 Q. Do you recall ever having
5 attended any meetings either with other
6 business owners on East Street or with the
7 city or anyone concerning maintenance and
8 ownership of East Street?

9 A. Not -- not for those reasons,
10 no. Not that I can remember.

11 MR. MEISELS: My questioning is
12 complete. I think we'll leave it to
13 Ms. Zalantis.

14 EXAMINATION BY

15 MS. ZALANTIS:

16 Q. My name is Kathy Zalantis, I
17 represent the defendants in this action.
18 Thank you for agreeing to appear for this
19 deposition.

20 I just want to share my screen?
21 Can you see my screen?

22 A. Yes, I can.

23 Q. I think you've seen these
24 pictures before previously identified by
25 Mr. Meisels --

1 BONGO

2 A. Just went off.

3 Q. Hold on. Let me do that one
4 more time.

5 A. Yes.

6 Q. You see the white car in this
7 picture?

8 A. Yes, I do.

9 Q. That was previously, I believe,
10 identified as Defendant's GG. To the
11 right of the white car I think you
12 testified is the skate park.

13 A. I believe that is East Street
14 skate park, yes.

15 Q. And to the left of the white car
16 is an area enclosed by a black fence.

17 A. Correct.

18 Q. Going to the second page, again,
19 to the left of the white car is an area
20 enclosed by a black fence. Do you see the
21 area?

22 A. Yes, I do.

23 Q. Is that area enclosed by the
24 black fence across from your property?

25 A. I -- looking at this picture,

1 BONGO

2 yes.

3 Q. Now, that area, that black fence
4 wasn't always there; is that correct?

5 A. That's correct.

6 Q. The skate park to the right of
7 the white car was not always there; is
8 that correct?

9 A. Yeah, it's true, but I don't
10 remember how long ago it was. But, yes, I
11 do believe it wasn't there at my
12 beginning, yes.

13 Q. Have you ever heard of Persico
14 Construction?

15 A. Yes, I did.

16 Q. What's your knowledge of Persico
17 Construction?

18 A. I just know of Persico
19 Construction. They're a contractor. I'm
20 not sure if they're in business, but they
21 were a contractor at one time.

22 Q. Do you recall several years
23 prior when Persico Construction was
24 restoring the Potter Avenue Bridge over
25 Interstate 95?

1 BONGO

2 A. Yes.

3 Q. Do you remember during that time
4 frame whether Persico Construction was
5 using as a staging area the area that is
6 now the skate park and the area enclosed
7 by the black fence?

8 A. I believe so. And I say I
9 believe so because my memory is not as
10 good as it was. But I do recall that that
11 was a possibility. I can't remember 100
12 percent, but I do recall that there was a
13 time when he was using that area.

14 Q. That area being both the area
15 that is now currently the skate park and
16 the area enclosed by the black fence; is
17 that correct?

18 A. No, it's not. It's the -- I
19 believe it was just the skate park was.

20 Q. Were they using it for
21 construction purposes the staging area or
22 for parking of construction vehicles?

23 A. I can't recall. I can't recall.

24 Q. Is it possible they were parking
25 construction worker vehicles in the area

1 BONGO

2 now enclosed by the black fence?

3 A. Sure, anything is possible. It
4 could have been.

5 Q. Do you recall if you have a
6 recollection of that?

7 A. No, I do not.

8 Q. Prior to the erection of the
9 black fence in the area to the left of the
10 white car, what was the condition of that
11 area?

12 A. Basically the same as it looks
13 now.

14 Q. It's the same as it looks now,
15 was covered in seedling and hay or did it
16 have blacktop and gravel?

17 A. Looks the same to me. I
18 don't -- I don't recall what it looked
19 like anything in the previous. I think
20 the area basically is the same.

21 Q. I know you said that you
22 yourself didn't park or any entities or
23 vehicles that you owned didn't park in
24 this area enclosed by the black fence, but
25 it was possible that your employees may

1 BONGO

2 have parked in this area; is that correct?

3 A. It's possible, yes. I would
4 have no way of knowing that. I did
5 purchase parking permits for my men to
6 park in the area below. And I think the
7 city relieved the fee and then they
8 continued to park there.

9 Q. But it's possible they could
10 have parked right in front of your
11 business?

12 A. I don't know where they parked
13 or how they parked. They come to work,
14 they come in the gate.

15 Q. I'm going to show you what was
16 previously marked. Can you see my screen?

17 A. I see you.

18 Q. I'm sorry.

19 A. That's all right.

20 Q. Can you see my screen now?

21 A. No, I just see you.

22 Q. Sorry. One more time. Now can
23 you see my screen?

24 A. Yes, I can.

25 Q. You went through this series of

1 BONGO

2 pictures, I believe, with Mr. Meisels.

3 A. Um-hum.

4 Q. You weren't able to identify any
5 of these vehicles parked in this area?

6 A. Yes.

7 Q. Is this the same area now
8 enclosed by the black fence?

9 A. I can't be 100 percent sure
10 because you're just showing me an area.

11 Q. I'm going to stop sharing and
12 open up another exhibit. Did you notice
13 that red car in the picture I just showed
14 you, the red truck?

15 A. No.

16 Q. Do you see it now, a red truck?

17 A. I see a red truck.

18 Q. Do you see the next picture I'm
19 showing or still seeing the same picture?

20 A. No, I see the next one.

21 Q. You see a red truck here?

22 A. I see a red truck there, yes, I
23 do.

24 Q. This red truck, does that appear
25 to be parked in front of your business?

1 BONGO

2 A. It's a little blurry, but it
3 looks like it's my truck, yes. My
4 cameras, yes.

5 Q. You said your truck. Is that
6 your truck?

7 A. The truck inside the gate.

8 Q. Here. I could show you some
9 other pictures?

10 A. Yep, that's my yard.

11 Q. Do you see this red truck parked
12 outside your gate?

13 A. Yes, I do.

14 Q. Now, just going back to that
15 prior exhibit, does this appear to be the
16 same truck?

17 A. You're showing me the front and
18 back. It's a red truck. They're both red
19 trucks. I don't know if it's the same
20 truck or not.

21 Q. Do you know who owns this red
22 truck that I'm showing you now?

23 A. No.

24 Q. It's Defendant's 0409.

25 A. Unless you give me a plate, I

1 BONGO

2 can ask, but I don't know.

3 Q. Would your employees generally
4 park outside of your gate by your
5 business?

6 A. Yes, they would.

7 Q. It's possible that this same
8 truck that's in D0409 is potentially the
9 truck in the last page of Exhibit 3A; is
10 that correct?

11 A. Possible, yes, it is.

12 Q. What's the condition of East
13 Street?

14 A. You don't want to know. It's,
15 you know, a contractors' area. It's --
16 you know, it suits its purpose.

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

1 BONGO

2 maintenance of the road, no.

3 Q. So you've never seen them
4 asphalt the road?

5 A. No.

6 Q. You've never seen them
7 completely repave the road?

8 A. No.

9 Q. Portions of the road or the road
10 in its entirety?

11 A. Not to my knowledge, no.

12 Q. Have you ever observed Mr. La
13 Rocca or his employees or members of his
14 company paving East Street?

15 A. No.

16 Q. Do you know who paves East
17 Street?

18 A. No, I do not.

19 Q. Are you familiar with the
20 property surrounding your property on East
21 Street?

22 A. Familiar by how?

23 Q. Are you aware of who owns the
24 property surrounding your property?

25 A. Yeah. Basically, yes, yes.

1 BONGO

2 Q. The Guglielmo Group LLC owns the
3 property if I'm looking at your property
4 standing on East Street to the right of
5 your property; is that correct?

6 A. Correct.

7 Q. At any point in time have you
8 ever seen a truck with the logo of F. La
9 Rocca & Sons parked in the Guglielmo
10 property?

11 A. I can't -- I can't remember
12 that, no. I have to say no, I can't
13 remember.

14 Q. Have you ever seen the City of
15 New Rochelle clean or sweep the streets,
16 clean or sweep East Street?

17 A. No. I believe not, no.

18 Q. So you said you set up your
19 business after April 15th.

20 A. Yeah. I mean, basically on
21 the -- on the weather. As the winters
22 grew warmer, we periodically would come in
23 during the winter. But years ago, yes,
24 you know, I would think maybe the last
25 four or five years depending if there was

1 BONGO

2 a warm streak we would come back for a few
3 days. But basically as soon as the
4 weather dropped below freezing we shut
5 down. But in previous years we would lock
6 the gate and didn't come back until the
7 spring.

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.

13 Q. Do you remember Mr. Meisels
14 showed you the video earlier today?

15 A. Yes.

16 Q. Did you observe anyone in that
17 video cutting down trees?

18 A. No.

19 Q. In the area that's now enclosed
20 by the black fence, have you ever observed
21 my client, Mr. La Rocca, cutting down
22 trees in that area?

23 A. Me personally, no.

24 Q. Have you ever observed any
25 employees of Mr. La Rocca cutting down

1 BONGO

2 trees in that area?

3 A. No. Just what you guys showed
4 me supposedly. No. Myself personally,
5 no.

6 Q. You said in that video nobody
7 was cutting down trees, right?

8 A. Yeah, I didn't see anybody with
9 a chain saw, no, cutting down the trees,
10 no, no. You know, I've never seen that.

11 Q. Have you ever observed Mr. La
12 Rocca or any of his employees place wood
13 chips in the area now enclosed by the
14 black fence?

15 A. No.

16 Q. With respect to the area that's
17 now enclosed by the black fence that's
18 against the left of that white car we saw
19 in the picture, have you ever observed Mr.
20 La Rocca and/or any of his employees place
21 asphalt millings in that area?

22 A. No. Me personally, no. I can't
23 recall, no.

24 Q. Do you have any video
25 surveillance cameras on your property?

1 BONGO

2 A. Yes, I do.

3 Q. What direction do they point in?

4 A. I guess they point in all
5 directions. I don't know when they were
6 installed. But they -- yeah, they kind of
7 cover everything.

8 Q. Were they installed back in
9 2015, do you know?

10 A. I believe not. A long time ago.
11 Seven years ago. Yeah, I don't know. I
12 don't know. I don't recall.

13 Q. Do you rent any property on East
14 Street?

15 A. Yes, I do.

16 Q. Is that the lot that's directly
17 adjacent to my client's property?

18 A. Yes, it is.

19 MS. ZALANTIS: I'm going to mark
20 this as Bongo 2. I will forward these
21 exhibit to everybody.

22 (Bongo Exhibit 2 was marked for
23 identification, as of this date.)

24 Q. Do you recognize what's depicted
25 in Bongo 2?

1 BONGO

2 A. Do I?

3 Q. Yes.

4 A. Yes, that's my equipment and my
5 pile of stuff there.

6 Q. When you say your pile of stuff,
7 what is that pile of stuff?

8 A. That's the stuff we clean out
9 the end of the night, probably asphalt or
10 something in the truck. And the next
11 morning we load it back on the truck and
12 take it out.

13 Q. Who do you rent this property
14 from?

15 A. Jennifer Allen.

16 Q. How long have you rented this
17 property from Ms. Allen?

18 A. Maybe three years.

19 Q. As part of your restoration
20 projects that you do, do you ever use any
21 kind of landscaping materials?

22 A. Meaning?

23 Q. Well, you mentioned earlier that
24 you do landscaping as part of your
25 restoration work.

1 BONGO

2 A. Top soil.

3 Q. Would you ever use anything
4 other than top soil?

5 A. No, not that I'm aware of. No.

6 Q. Would you put sod in or --

7 A. Very, very rarely. Mostly top
8 soil and grass seed. Very rarely you get
9 a lawn that requires sod. They'd have to
10 find it and put it down.

11 Q. Mostly top soil and grass seed?

12 A. Correct.

13 Q. Would you ever have an occasion
14 to use wood chips?

15 A. Not really. I mean, if it's one
16 out of thirty years or two out of thirty
17 years, that would be the most of it.

18 MS. ZALANTIS: If you can give
19 me five minutes, please, maybe even
20 less. Thank you.

21 (At this time, a recess was
22 taken.)

23 MS. ZALANTIS: I have nothing
24 further. Please just mark Bongo 3.

25 (Bongo Exhibit 3 was marked for

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BONGO

identification, as of this date.)

THE WITNESS: Can I go?

MR. MEISELS: Yes, thank you.

THE COURT REPORTER: Ms.

Zalantis, are you ordering a copy?

MS. ZALANTIS: Yes.

(Time Noted: 3:30 p.m.)

PATRICK BONGO

Subscribed and sworn to before me

this ____ day of _____, 20____.

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C E R T I F I C A T I O N

I, BARBARA TORTORA, a Shorthand Reporter and a Notary Public, do hereby certify that the foregoing witness, PATRICK BONGO, was duly sworn on the date indicated, and that the foregoing is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.

BARBARA TORTORA

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[second - think]

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New York Code

Civil Practice Law and Rules

Article 31 Disclosure, Section 3116

(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

Veritext Legal Solutions complies with all federal and State regulations with respect to the provision of court reporting services, and maintains its neutrality and independence regardless of relationship or the financial outcome of any litigation. Veritext requires adherence to the foregoing professional and ethical standards from all of its subcontractors in their independent contractor agreements.

Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at www.veritext.com.

EXHIBIT 2

560

July 21, 1998

RESOLUTION NO. 196

RESOLUTION ACCEPTING THE LOW DOLLAR BID OF VINCENT RUSCIANO CONSTRUCTION COMPANY, INC. REGARDING THE SIDEWALK AND CURB IMPROVEMENTS PROJECT NO. 04-999-P69.

WHEREAS, the City solicited sealed bids for the repair of sidewalks and curbs at various locations where notification has been sent to homeowners in the City of New Rochelle, pursuant to the competitive bidding laws; and

WHEREAS, eleven (11) contractors obtained plans and specifications and six (6) contractors submitted valid bids based on estimated guaranties, which could vary based on actual sidewalk work undertaken this year; and

WHEREAS, the Department of Public Works has recommended the award of this project to the low dollar bidder, Vincent Rusciano Construction Company, Inc.; now, therefore,

BE IT RESOLVED by the Council of the City of New Rochelle that the low dollar bid of Vincent Rusciano Construction Company, Inc. for their unit prices set forth on the attached Schedule A is hereby accepted subject to the execution of the appropriate contractual documents and submission of the required surety bonds which the City Manager is hereby authorized to execute. Funds to defray the cost of the foregoing are available in Account SH 463 to cover the estimated contract cost of \$68,222.80, plus a 30% maximum extension of \$20,466.84 and 10 % contingency factor of \$8,868.96 for a total maximum project cost at bid unit prices not to exceed \$97,000.00.

Authenticated and certified) TIMOTHY C. IDONI, Mayor
this 21st day of July, 1998) DOROTHY ALLEN, City Clerk

EAST STREET UTILITY EASEMENT

Introduced : July 14, 1998
Held :
Moved (by) :
and : Unanimously
Seconded (by) :

Yeas: Eodice, Selin, Quash, Fosina, Bramson, Kitchen, Idoni.
Nays: None.

RESOLUTION NO. 197

RESOLUTION AUTHORIZING THE GRANTING OF AN EASEMENT AGREEMENT TO THE OWNER OF LOTS 41 AND 43 IN BLOCK 931 EAST STREET).

BE IT RESOLVED by the Council of the City of New Rochelle:

The granting of an easement to the owner of Lots 41 and 43 in Block 931 (East Street) for the purpose of having various utility services brought to the property is hereby authorized. The owner, for him/herself, its employees, agents and contractors shall:

not in this the property used and not permit any liens to become imposed upon the City's property due to owners', employees', agents' or contractors' work;

not traverse on any other portion of the lands owned by the City, not subject to the agreement;

perform the work in a workmanlike manner;

restore the property of the City to its original condition as prior to entry as soon as practicable and pursuant to municipal requirements, which property is utilized in this agreement, during the construction of any work described above, or during any other time of this agreement and which is damaged during the use and term of this agreement;

maintain property damage and personal injury liability insurance, including contractual liability coverage for independent contractors and provide the City with a certificate of insurance for the above naming the City as an additional insured with notice in the event of non-renewal or cancellation; and

defend and indemnify the City from claims, demands, and suits including legal fees for injury or damage to persons or property, including death, resulting from the owners negligent act or omission or willful misconduct in the installation, maintenance, or operation associated with the various utility services brought to the property;

Subject to an annual consideration of \$3.00 per square foot;

All costs associated with the preparation and filing of said easement agreement shall be borne by the owner; and, upon such other terms and conditions as shall be satisfactory to the City Manager, the Commissioner of Public Works and approved by the Director of Law.

Authenticated and certified) TIMOTHY C. IDONI, Mayor
this 21st day of July, 1998) DOROTHY ALLEN, City Clerk

CREATION OF FOUR POSITIONS-DEPARTMENT OF PUBLIC WORKS

Introduced : July 14, 1998
Held :
Moved (by) :
and : Unanimously
Seconded (by) :

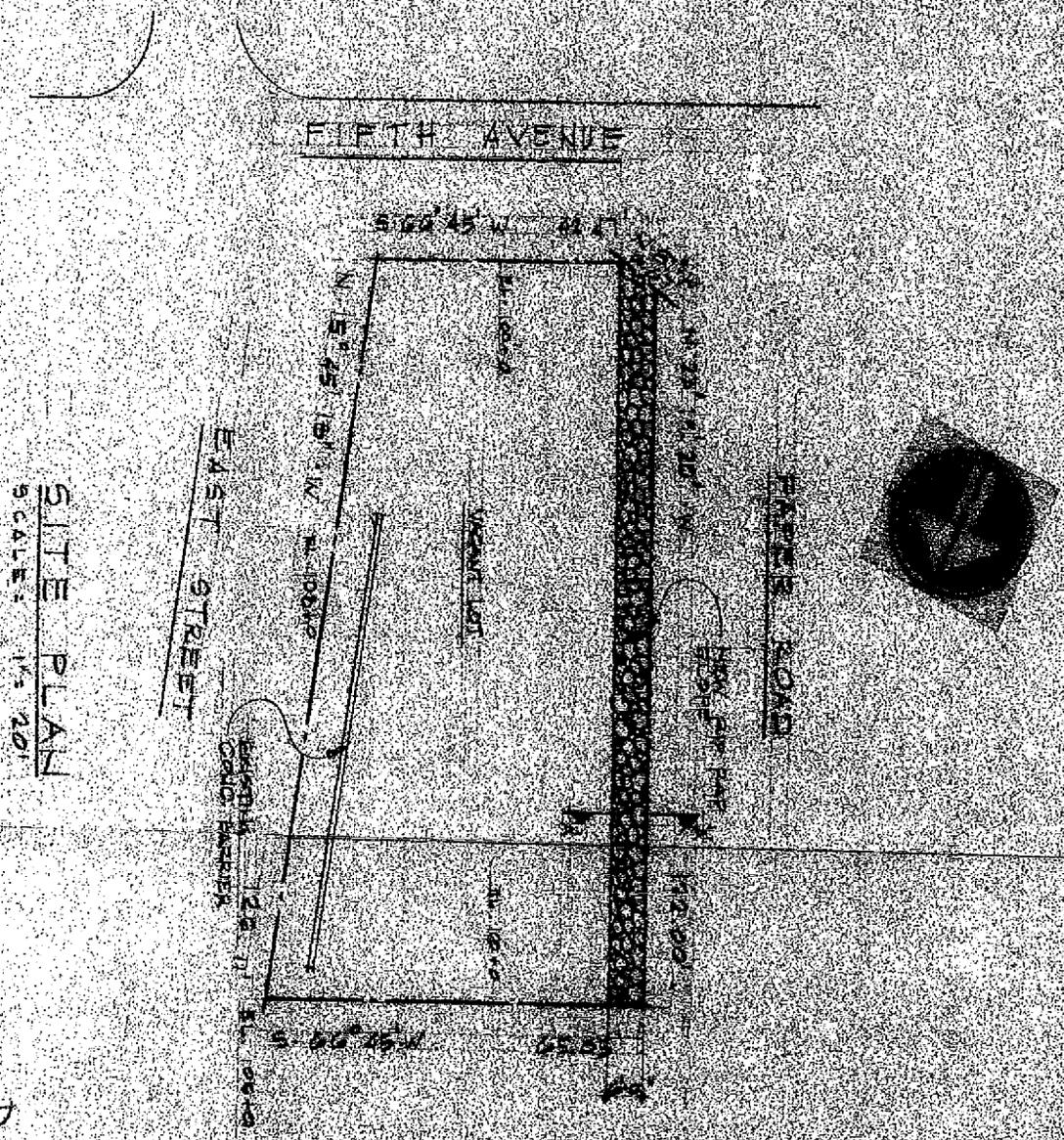
Yeas: Eodice, Selin, Quash, Fosina, Bramson, Kitchen, Idoni.
Nays: None.

Prior to the vote on the proposed resolution, Council Member Fosina inquired if a head custodian or facilities manager was needed at the new Police/Court facility.

J. Robert Dolan, Commissioner of Public Works, stated that the job specification for the senior position calls for the skills needed as a facilities manager.

When Council Member Eodice inquired if the Maintenance Tradesworker would work exclusively at the new Police/Court facility, Commissioner Dolan responded that while the new facility will be the base of operation for the new position, the employee could work at any City building.

EXHIBIT 3



SITE PLAN
SCALE: 1" = 20'

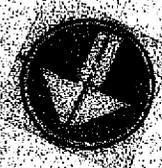
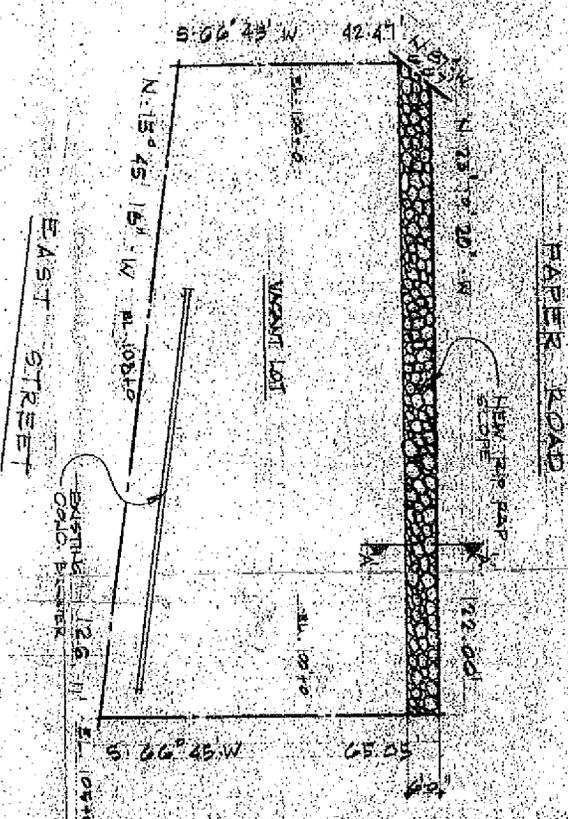
Defendants
EXHIBIT

24
1/25/20



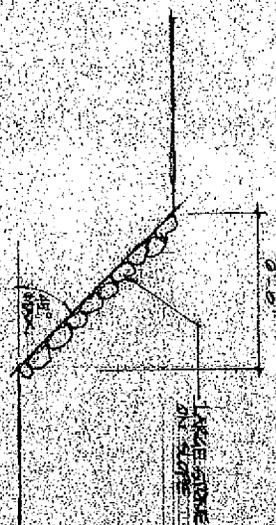
PLTF009

FIFTH AVENUE



SITE PLAN
 SCALE: 1" = 20'

RIPRAP SECTION
 SCALE: 1/4" = 1'-0"



**CITY OF NEW ROCHELLE
 BUREAU OF BUILDING**

THESE PLANS AND APPLICATION WERE EXAMINED AND APPROVED AS NOTED. THEY SHALL NOT BE CONSTRUED AS AUTHORITY TO VIOLATE, CANCEL, ALTER, OR SET ASIDE ANY PROVISIONS OF THE BUILDING CODE, ZONING ORDINANCE, OR ANY OTHER LOCAL, COUNTY OR STATE REGULATIONS.

PLANNING DATE: 08-02-2021
 PLAN NO: 620000387



THOMAS E. HAYNES, ARCHITECT
 570 YONKERS AVENUE
 YONKERS, NEW YORK

PROPOSED RIPRAP AT 440 EAST AVENUE

EXHIBIT 4

Department of Development
Bureau of Buildings
515 North Avenue
New Rochelle, N.Y. 10801



(914) 654-2035
Fax: (914) 654-2031

Peter Warycha, C.E., C.E.O.
Deputy Building Official

Noel Shaw, Jr.,
R.A., AIA., NOMA, P.P., C.E.O.
Building Official

City of New Rochelle
New York

BUILDING PERMIT

Permit Number: **B20000387** Permit Date: **Thursday, August 03, 2000**

Section / Block / Lot(s): **551000-003.000-0931-000029-** Zoning:

Property Owner: **JOHN MAFFEI
ROSE MAFFEI
307 HORNIDGE Rd
MAMARONECK, NY 10543**

Job Location: **436 Fifth Ave**

Type of Permit **Commercial Renovation Permit**

Permission is granted to:
construct a rip rap slope

Conditions of the Building Permit:

1. All work shall be executed in strict compliance with the permit application, approved plans, and the New Rochelle Zoning Code, New York State Uniform Fire Prevention and Building Code, and all other applicable laws, rules, and regulations. This building permit does not constitute authority to build in violation of any Federal, State, or local law.
2. Construction must begin within 90 days of date of permit issuance. The work shall not be suspended or abandoned for a period of 6 months. Otherwise, the building permit will be rendered null & void.
3. Revisions to the work which deviate from the stamp approved plans shall be submitted to the Bureau of Buildings for approval before the changes are made. The approved plans and building permit shall be retained on the job and made available to the builder and the building construction inspector at all times.
4. Contractor to request all required building construction inspections, as indicated on the attached sheet.

THIS BUILDING PERMIT SHALL BE POSTED AND IN FULL VIEW AT THE JOB SITE.

Noel Shaw, Jr.
for
Noel Shaw, Jr.
Building Official

Defendants
EXHIBIT
K

This building permit is issued subject to the following approvals: See page two for conditions where applicable

RH *2/25/20*

NYSCEF DOC. NO. 165

RECEIVED NYSCEF: 08/04/2022

Section / Block / Lot(s): 551000-003.000-0931-000029-

Job Location: PLTE108
436 Fifth Ave

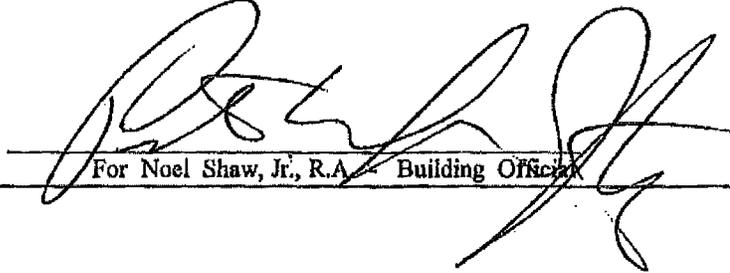
Page 2

Permit Number: B20000387

Date: Thursday, August 03, 2000

- 1: Applicable rules and regulations shall be strictly adhered to and complied with.
- 2: Contractor to request/file all required inspection(s).
- 3: Subject work shall be done on referenced property only.
- 4: Must stake out property line prior to start of rip rap work.
- 5: Submit as-built survey, prepared by an Licensed Surveyor, to show compliance with approved plans.
- 6: Upon completion of said job, must file request for final inspection and Certificate of Occupancy.

pw:js



For Noel Shaw, Jr., R.A. Building Official

EXHIBIT 5

5.16.2015 Video

Submitted to Court via CD

EXHIBIT 6

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

- - - - -x

CITY OF NEW ROCHELLE,

Plaintiff,

-against-

Index No: 54190/2016

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

1133 Westchester Avenue
White Plains, New York

July 8, 2021

11:32 a.m.

DEPOSITION of BERNARDO F. RIVERA, a
NON-PARTY WITNESS in the above-entitled
action, held at the above time and place,
taken before Helen Wandzilak, a Notary
Public of the State of New York, pursuant
to Subpoena and stipulations between
Counsel.

* * *

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APPEARANCES :

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER, LLP
Attorneys for Plaintiff
1133 Westchester Avenue
White Plains, New York 10604

BY: PETER A. MEISELS, ESQ.

ROLAND T. KOKE, ESQ.

SILVERBERG ZALANTIS, LLC
Attorneys for Defendants
120 White Plains Road
Suite 305
Tarrytown, New York 10591

BY: KATHERINE ZALANTIS, ESQ.

ALSO PRESENT (VIA ZOOM VIDEOCONFERENCE) :

Flavio La Rocca

Maria La Rocca

* * *

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STIPULATIONS

IT IS HEREBY STIPULATED, by and among the attorneys for the respective parties hereto, that:

All rights provided by the C.P.L.R., and Part 221 of the Uniform Rules for the Conduct of Depositions, including the right to object to any question, except as to form, or to move to strike any testimony at this examination is reserved; and in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and is reserved to, the trial of this action.

This deposition may be sworn to by the witness being examined before a Notary Public other than the Notary Public before whom this examination was begun, but the failure to do so or to return the original of this deposition to counsel, shall not be deemed a waiver of the rights provided by Rule 3116, C.P.L.R., and shall be

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controlled thereby.

The filing of the original of this deposition is waived.

IT IS FURTHER STIPULATED, a copy of this examination shall be furnished to the attorney for the witness being examined without charge.

* * *

Page 5

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2 B E R N A R D O F. R I V E R A,
3 having been first duly sworn/affirmed by a
4 Notary Public of the State of New York,
5 upon being examined, testified as follows:

6 EXAMINATION BY MR. MEISELS:

7 Q What is your name?

8 A Bernardo F. Rivera.

9 Q What is your address?

10 A 274 Clove Road, New Rochelle,
11 New York 10804.

12 Q Mr. Rivera, thank you for
13 showing up today and being so patient.

14 My name is Peter Meisels.

15 [Discussion held off the
16 record.]

17 Q Mr. Rivera, my name is Peter
18 Meisels. We represent the City of New
19 Rochelle in a lawsuit which you have
20 nothing to do with.

21 We subpoenaed your testimony as
22 what they call a "non-party witness".
23 That means somebody who may have
24 information but is not a party to the
25 lawsuit. Okay?

Page 6

1 BERNARDO F. RIVERA

2 Am I correct, you own Benny's
3 Tree Service?

4 A Yes.

5 Q And how long has Benny's Tree
6 Service existed?

7 A Probably around 2006.

8 Q And, as of today, where is
9 Benny's Tree Service located?

10 A We're blocking a lot. But they
11 seem to call that East Street.

12 At the time of that, I did not
13 own the property. I purchased the
14 property a year after.

15 Q And when you say "of that", do
16 you mean the incident --

17 A Yes.

18 Q -- that this lawsuit is about?

19 A Yes.

20 Q And at the time -- we're talking
21 about mid May 2015?

22 A Yes. It was a long time ago.

23 Q Correct. So we're talking about
24 the same time period?

25 A Yes, I was renting and -- I was,

Page 7

1 BERNARDO F. RIVERA

2 you know, renting the property at that
3 time.

4 Q And your business was there, but
5 as a tenant?

6 A Yes.

7 Q And I notice, on the Internet,
8 that there is an address that says 49 Park
9 Place.

10 A I don't own that property no
11 more. We moved to 274 Clove.

12 The business is there. But my
13 home, you know, my office is in my home.

14 So Park Place, we sold that and
15 we moved 274 Clove Road.

16 Q Okay.

17 A This one, you come up on the
18 Internet and everything, it stills comes
19 under Park Place.

20 Q It will, forever.

21 A Yeah.

22 Q Now, going back to May of 2015.
23 What kind of business was Benny's Tree
24 Service?

25 A Tree service.

Page 8

1 BERNARDO F. RIVERA

2 Q Tree service. And what kind of
3 services did it provide? What kind of
4 work did it do?

5 A Tree work. Planting.

6 You know, anything to deal with
7 outdoors and trees and bushes.

8 Q So that would be things, such as
9 repairing trees that get knocked down in a
10 storm?

11 A Yes.

12 Q Planting new trees?

13 Are you familiar -- do you know
14 Mr. Flavio La Rocca?

15 A Yes, we've been neighbors for
16 years.

17 Q And have you ever done any
18 projects with him?

19 A Yes, I have.

20 Q Now back, going back to May of
21 2015, what kind of equipment did Benny's
22 Tree Service own?

23 A We have, pretty much, we still
24 have bucket trucks, chip trucks, you know,
25 dump trucks.

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CERTIFICATION

I, Helen Wandzilak, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose testimony as herein set forth, was duly sworn by me; and that the within transcript is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of July, 2021.



HELEN WANDZILAK

* * *

EXHIBIT 7

CITY OF NEW ROCHELLE - LIST OF PRIVATE STREETS / PATHS

#	STREET NAME	SERVICES PROVIDED												REMARKS	
		STREET LIGHTS		GARBAGE PICK UP		SNOW PLOWING		LEAVES / REPAIRS		SEWER	DRAINS	DPW RECOMMENDATION			
		YES	NO	YES	NO	YES	NO	YES	NO				TO ACCEPT / NOT		
1	Arbor Glen	2009		N											BY CLINTON AVE AT THOMAS PL
2	Beachfront Lane	1973		N	Y			N		N	S			NO	BY WATER AT POTTERS LN
3	Barberry Lane	1927		N		N		N		N	D			NO	NORTH AVE TO EASTBOUND NORTH OF PAINE LAKE
4	Beacon Street	1957		N		N		N		N			N	NO	NORTH OF DAVENPORT , WEST OF CHURCH ST BY WATER
5	Brittaney In	2005		N											BY DAVENPORT AVE
6	Brookridge	1986		N		N		N		N	S			NO	NORTH QUAKER RIDGE RD WEST OF WEAVER ST
7	Brookwood	1986		N		N		N		N	S			NO	WESTSIDE PINEBROOK BLVD SO OF HUTCHINSON P'KWAY
8	Central Dr	1899		N		N		N		N				NO	PREMIUM POINT AREA EAST OF EMMERSON AVE
9	Cherry Lawn Blvd	2007		N											BY WEAVER STREET
10	Dogwood Lane	1899	Y		Y			N		N					PREMIUM POINT AREA EAST OF EMMERSON AVE
11	Dogwood Place	1899	Y		Y			N		N				NO	PREMIUM POINT AREA EAST OF EMMERSON AVE
12	Cambridge Ct	2009		N											EAST SIDE OF WILMOT ROAD NORTH OF STRATTON RD
13	Club Way	2007		N											BY WEAVER STREET
14	Colangelo Place	1895	Y		Y			N		N				NO	WEST OF WEBSTER AVE NORTH OF WASHINGTON AVE
15	Cooper Birch	2006		N											KENSINGTON WOOD BY WILMOT ROAD
18	Emerson Drive / PT.	1997		N	Y			N		N	S			NO	EAST OF EMMERSON AVE BY WATER
20	Garden Walk	1927		N		N		N		N				NO	EAST OF VALLEY RD SOUTH OF BARBERRY LN
26	Jason Lane	1977		N	Y			N		N				NO	OFF OF SUSSEX RD
27	Indian Hill Townhouses	1988		N		N		N		N				NO	ON PINEBROOK BLVD BY ALBERT LEONARD RD
29	Lee Court	1940	Y		Y		Y			N	S			NO	WEST OF DRAKE AVE NORTH OF PELHAM RD
31	Mad Stone Ct	2007		N											BY WEAVER STREET
33	Malysana Lane	2002		N	Y			N		N	S			NO	BY DAVENPORT AVE
34	Mill Pond Lane	2006		N	Y			N		N	S			NO	WESTSIDE OF CHURCH ST AT DAVENPORT
35	Pinebrook Hollow	2002		N	Y			N		N	S			NO	NORTH OF VAN ETEN BLVD AT PINEBROOK BLVD
36	Piping Rock Way	2007		N											BY WEAVER STREET
37	Premium Point Rd	1899		N		N		N		N			N	NO	SOUTH OF MAIN ST AT SUNHAVEN RD
38	Pryer Manor Road	1924	Y		Y		Y			N			N		PREMIUM POINT AREA EAST OF EMMERSON AVE
39	Quaker Lane	1962		N		N		N		N	S			NO	NORTH AVE EASTBOUND NORTH OF AVON LN
41	Schoen Lane	2007		N	Y			N		N	S				NEXT FIRE STATION AT STRATTON ROAD
43	Sheldon Place	N/A	Y		Y			N		N	S			NO	NORTH OF REMINGTON PL EAST OF WEBSTER AVE
45	Shinnecock Way	2007		N											BY WEAVER STREET
46	Shore Club Drive	2000		N	Y			N		N	S				BY WATER AT POTTERS LN
47	Stonygate Oval	2006		N	Y			N		N	S				KENSINGTON WOOD BY WILMOT ROAD
48	Sutton Manor Lane	1921		N		N		N		N	D			NO	BY WATER AT SUTTON MANOR ROAD AT ECHO AVE
49	Tall Spruce Loop	2002		N											KENSINGTON WOOD BY WILMOT ROAD
50	Tennis Lane	1927		N		N		N		N	S & D			NO	OXFORD RD TO VALLEY RD BY TENNIS COURTS
51	Terrace Park Lane	2006		N	Y			N		N	S			NO	WEYMAN AVE AT PELHAN ROAD
53	West Way	2006		N	Y			N		N	S			NO	UNION AVE AT FIRST STREET
54	Westminster Court	1925		N	Y			N		N	S			NO	WEST OF WEBSTER AVE NORTH OF WATKINS PL
55	Wildwood Circle	1924	Y		Y		Y			N			N		PREMIUM POINT AREA EAST OF EMMERSON AVE
56	Wykagyl Drive	1922		N	Y			N		N	S			NO	EAST OF NORTH AVE BY NORTHFIELD RD
57	Private ROW - Wilmot Rd. W. side	1951		N	Y			N		N			N	NO	172 TO 190 WILMOT RD.
58															

NOTE : YEAR INDICATES WHEN THE SUB-DIVISION WAS APPROVED BY THE CITY COUNCIL / PLANNING BOARD INCLUDING THE STREET NAME.

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,

-----x
Defendants. -----x

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENT OF FACTS PURSUANT TO
RULE 202.8-g(b)**

1. 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 make this Statement of Material Facts upon information and belief, based upon a review of the files maintained in our office relating to this action, including the Verified Complaint with Exhibits dated and filed April 1, 2016 ("Complaint," Exhibit "Ex. " 1" filed by Plaintiff City of New Rochelle ("City" or "Plaintiff"), Defendants' Verified Answer with Affirmative Defenses and Counterclaims ("Answer, Ex. "2") and Plaintiff's Verified Reply (Ex. "3").

Response to No. 1: Not disputed.

2. In accordance with New York Court Rules § 202.8-g, I respectfully submit this Statement of Material Facts in support of the Defendants' motion under CPLR § 3212 for an order granting Defendants summary judgment dismissal of Plaintiff's Complaint in its entirety. As there are numerous exhibits supporting this motion, an **Exhibit List** is attached.

Response to No. 2: Not disputed.

The Property:

3. On September 18, 2002, Maria and Flavio purchased the property known as 436 Fifth Avenue in the City of New Rochelle and designated on the City's tax map as 3-931-0029 (the "Property"; see also, Bargain and Sale deed conveying the property from John and Rose Maffei to Flavio and Maria dated September 18, 2002 and recorded on November 12, 2002 attached as Ex. "4").

Response to No. 3: Not Disputed.

4. The Property is a corner lot located on Fifth Avenue and an unnamed street (per the City's tax map) known as East Street (attached as **Ex. "5"** is the relevant portion of the City's tax map with the Property highlighted in yellow).

Response to No. 4: Not disputed that the Defendants' property, 436 Fifth Avenue is located at the corner of Fifth Avenue and East Street. Disputed that Defendants' Exhibit 5 is a portion of the City's tax map. Defendants offer no foundation for their assertion that this is the City's tax map nor is it a certified record. Rather, the document states its source is the Westchester County GIS, website <http://giswww.westchestergov.com>. The document contains a disclaimer, stating that the document

is for informational purposes only, and should not be relied upon. The Westchester County GIS website also contains a disclaimer, stating in part:

“ . . . The County of Westchester hereby disclaims any liability for any and all damage, loss, or liability which may result, directly or indirectly, from the use of this GIS mapping system by any person or entity.

Tax parcel boundaries represent approximate property line location and should NOT be interpreted as or used in lieu of a survey, property boundary description, or a definitive municipal tax map. Property descriptions must be obtained from surveys or deeds. As this data was compiled from many different sources, discrepancies will exist along some municipal boundaries. **Authoritative and approved tax maps for this municipality ONLY reside with the local assessor.** For more information please contact the local assessor's office.”

<https://giswww.westchestergov.com/taxmaps/default.aspx?sMun=NewRochelle> (last visited August 3, 2022).

5. The entrance into the Property is from East Street. Attached as Ex. "6" are recent Google images of the Property with the first image showing the Property's frontage along Fifth Avenue, the second image showing the Property's location on both streets and the third image showing the entrance into the Property from East Street.

Response to No. 5: Not disputed that there is an entrance to 436 Fifth Avenue off of East Street. Disputed that Defendants' Exhibit 6 represents “recent Google images” of the Property as there is no information identifying the date of the images or how they were obtained.

6. On January 30, 2008, Maria and Flavio conveyed the property to FMLR Management LLC (see Ex. "7"). Maria and Flavio are both members of FMLR (see Deposition Transcript of Flavio LaRocca taken March 5, 2020 ("Flavio Depo") attached as Ex. "8", p. 13).

Response to No. 6: Not disputed.

Legal Nonconforming Contractor's Yard:

7. When Maria and Flavio purchased the Property in 2002, the Property was being used as a contractor's yard by the former owners (see Affidavit of Flavio LaRocca ("Flavio Aff.") ¶ 12).

Response to No. 7: Not disputed.

8. The City's Department of Building has established that the Property is a "non-conforming, pre-existing contractor's yard" for the "storage of construction materials and equipment" (see City's Bureau of Building property cards attached as Ex. "9").

Response to No. 8: It is not disputed that the property cards from the Department of Buildings, dated May 1, 1996 and January 17, 2001 (Defendants' Ex. 9) describe the property as being used as a "non-confirming, pre-existing contractor's yard" to store construction materials and equipment. Disputed that the Department of Buildings "established" anything. *See* Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 88:11-23.

9. Paul Vacca, the then Deputy Commissioner of Development/Building Official and Jeffrey C. Coleman, PE, Commissioner of Public Works stated in a jointly signed letter dated June 22, 2009 that the contractor's yard at the location of 436 Fifth Avenue is a "legal non-conforming contractor's yard" (see Ex. "10").

Response to No. 9: Not disputed.

10. As a "legal" or "preexisting" nonconforming use, the contractor's yard use has existed before the current zoning regulations and is entitled to remain and continue to operate.

Response to No. 10: Disputed. This is a legal argument, not a statement of fact, and it is a legal question that is not at issue in this litigation which concerns trespassing, nuisance, and encroachment onto City Property, not Defendants' "use" of 436 Fifth Avenue under zoning laws. Nor is the purported "fact" supported by citation to any admissible evidence. The City takes no position at this point in time as to whether Defendants' current use of the property complies with applicable zoning laws.

11. Defendants continue to use the Property as a contractor's yard for storage of material and equipment in connection with F. LaRocca & Sons' operations, which performs regrading work and stone work, installing retaining walls, steps and patios, and performing drainage work (Flavio Depo. (Ex. 9), p. 21; 42).

Response to No. 11: Not Disputed.

Other Properties on East Street:

12. The other properties along East Street are also all contractor yards (see deposition transcript of Patrick Bongo taken May 17, 2021 ("Bongo Depo.") attached as Ex. "11", p. 49; *see infra*). Also attached is Google Earth image depicting the various contractor yard properties along East Street (Ex. "12").

Response to No. 12: Not disputed, though the City notes that Defendants' Exhibit 12 contains no information as to when the image was captured.

13. Directly abutting the Property on East Street is the property designated on the City's tax map as 3-931-0035 (see tax map at Ex. "5") which PAB Landscaping, Inc. rents out (Bongo Depo. (Ex. 11), p. 55) for storage of materials and construction vehicles (see pictures of this property rented by PAB Landscaping, Inc. at Ex. "13").

Response to No. 13: Not disputed.

14. Since the early 1980s, PAB Landscaping, Inc. has also owned two other tax lots further down East Street from the Property (designated as 3-931-0041 and 3-931-0043 (see tax map at Ex. 5; *see also* Survey of Property prepared for the City of New Rochelle dated December 8, 2014 ("2014 Survey") attached as Ex. "14") from which PAB Contracting Corp. operates a contractor's yard in connection with its contracting business performing roadway restoration for utility companies (Bongo depo (Ex. "11") p. 5-6; 7-9). Attached as Ex. "15" are pictures of PAB Contracting Corp's contractor yard with pictures of cars parked in front of the yard.

Response to No. 14: Disputed that Defendants' Exhibit 5 is a City tax map. See Response to No. 4. Otherwise, not disputed.

15. The lot on East Street designated on the City's tax map as 3-931-0039 (see tax map at Ex. "5") is owned by Ben Riv Realty LLC on which there is a contractor's yard that Benny's vTree Service (that does tree service and planting work) has operated from since 2006 (see deposition transcript of Benardo F. Rivera taken on July 8, 2021 ("Rivera Depo.") Ex. "16", p 6; 8).

Response to No. 15: Disputed. At page 6 to 8 of his deposition, Mr. Rivera testified that he has operated Benny's Tree Service since around 2006, and that he was renting property on East Street

in May 2015, and that he purchased the lot a year later. He did not testify that he had been operating from East Street since 2006.

16. The lot on East Street designated on the City's tax map as 3-931-0037 (see tax map at Ex. "5") is owned by J&C DiPietro LLC, which also uses the lot as a contractor's yard (see also 2014 Survey at Ex. "14"; Google Earth image as Ex. "12" and Flavio Aff. ¶ 11. The lot at the corner of East Street and East Place designated on the City's tax map as 3-931-0001 (see tax map at Ex. "5") is owned by Gugliehno Group LLC, which uses the lot as a contractor's yard in connection with its landscaping business (Flavio Depo (Ex. "8"), p. 19-20; 81).

Response to No. 16: Not disputed.

17. The two lots at the end of East Street (fronting on East Place) and designated on the City's tax map as 3-932-0005 and 3-932-0001 (see tax map at Ex. "5") are both owned by R&B Arbito LLC, which uses the lot in connection with its business operations (see also 2014 Survey at Ex. "14" and Flavio Aff ¶ 11).

Response to No. 17: It is not clear that the facts asserted in No. 17 are supported by the materials cited. The City notes that Defendants' Exhibit 14 indicates that the lots are owned by R&G Arbitrio, LLC.”

East Street:

18. East Street was created by subdivision, which subdivision map was filed as map number 1728 on June 7, 1907 entitled "Fifth Avenue Heights, in the City of New Rochelle ("1907 Subdivision Map") at Ex. "17".

Response to No. 18: The City does not dispute that “East Street was created and laid out on a subdivision map entitled ‘Fifth Avenue Heights,’ dated April 1907” as recounted in the 2022 Title Report. *See* Doc. No. 118 (City Ex. 4 2022 Title Report) at 2. The City cannot admit or deny whether a right of way existed at that location prior to 1907.

19. The 1907 Subdivision Map depicts 247-lots as well as seven newly-formed streets: Weeks Place, Pine Brook Road, Crest View Street, Chatsworth Place, Ashland Street, East Place and East Street (see Ex."17").

Response to No. 19: Not disputed that the subdivision Map depicts 247 lots and the listed streets. It is not clear from the subdivision map that all of the streets were “newly formed.” It is also not material to the issues in this case.

20. The 1907 Subdivision Map show five of the streets (Weeks Place, Pine Brook Road, Crest View Street, Chatsworth Place and Ashland Street) as 50 feet wide, while East Place and East Street are 30 feet wide (see Ex. "17").

Response to No. 20: Disputed. It appears that the subdivision map depicts East Place as 50 feet wide, not 30 feet wide; otherwise, undisputed.

21. On April 30, 1914, Hadert Realty Company issued a quit-claim deed to the City deeding "all the right, title, interest and easement" of Hadert Realty Company to Weeks Place, Pine Brook Road, Crest View Street, Chatsworth Place, Ashland Street, East Place and East Street as shown on the 1907 Subdivision Plat ("1914 Deed") at **Ex. "18"**.

Response to No. 21: Not disputed.

22. The 1914 Deed provides that the seven streets "shall forever be public streets or highways, and may be used and enjoyed as such, together with the right to the party of the second part [the City], its successors or assigns, to repair said streets and avenues as there shall be on occasion."(see Ex. "18").

Response to No. 22: Disputed. The deed states "TOGETHER with the right to the party of the second part [the City] its successors and assigns, and its agents and servants, and any other person or persons, for it and their benefit and advantage, at all times freely to pass and repass on foot or with animals, vehicles, loads or otherwise, through and over the said streets or avenues, to the end that said streets and avenues *may* be forever public streets or highways, and may be used and enjoyed as such . . ."

23. The City Council's June 2, 1914 meeting minutes (see **Ex. "19"** at p. 179) reflect that a June 2, 1914 correspondence from the City's Assistant Corporation Counsel regarding the 1914 Deed and East Street specifically, was read at the City Council's June 2, 1914 meeting as follows:

The Clerk read the following communication from the Assistant Corporation Counsel, which was on motion ordered received and filed:

June 2, 1914

Gentlemen:

Pursuant to resolution of the Council, I have examined the deed of the Hadert Realty Company to the City conveying as public streets, certain private streets in Fifth Avenue Heights and find the said deed to be in proper form and duly executed.

My attention has been called to the fact that East Street, one of the

streets named in deed, is but thirty feet wide. This street borders on City Park and in view of this fact, it might be well for the City to accept it as is.

Yours very truly,
FRANK X. FALLON,
Assistant Corporation Counsel

Response to No. 23: Not disputed.

24. The City Council, however, did not follow the Assistant Corporation Counsel's recommendation to accept East Street (*see infra*).

Response to No. 24: Disputed that the Assistant Corporation Counsel's letter constitutes a "recommendation" to accept East Street as a public street. Rather, the recommendation was to accept the deed as being in proper form. Not disputed that the City Council did not designate East Street as a public street at the June 2, 1914 meeting. However, the City Council followed the advice of counsel in accepting conveyance of East Street "as is," as demonstrated by the recording of the Deed.

25. At that same June 2, 1914 meeting, the City Council adopted a resolution ("1914 Resolution" at Ex. "19" pp. 186.187) accepting only five of the seven streets as follows:

On motion of Councilman Valentine, seconded by Councilman Inglis the following resolution was adopted. The roll call following the vote:

Ayes: President Valentine, Councilmen Appenzeller, Huntington, Inglis, Kistingner, Koch, Scott, Stella

Nays: None

WHEREAS, the Department of Law, by communication dated June 2, 1914, has advised this Council that Weeks Place, Pinebrook Road, Crest View Street, Chatsworth Place and Ashland Street (Fifth Avenue Heights) are public streets and that the City may accept them as public streets if it so desires; and

WHEREAS, the Department of Public Works has, by communication dated

May 19, 1914, advised this Council that the said streets have been properly monumented and are fifty feet in width now, therefore,

BE IT RESOLVED, that Weeks Place, Pinebrook Road, Crest View Street, Chatsworth Place and Ashland Street (Fifth Avenue Heights) be and the same are hereby accepted as public streets (Approved June 3, 1914).

Response to No. 25: Disputed. The City Council accepted and designated only those streets that were at least 50 feet wide and properly monumented as “public streets.”

26. The City never issued a resolution accepting East Street.

Response to No. 26: Disputed. Upon approval by the Corporation Counsel as to execution and form and recommendation to accept East Street, the Deed was then recorded, including East Street. Defendants fail to cite any admissible evidence to support their assertion. *See* 22 NYCRR 202.8-g(d). The City did not issue a resolution accepting East Street as a public street at the June 2, 1914 meeting. To the City’s current knowledge, the City has never issued a resolution adopting East Street as a public street. However there is no dispute that the Deed was approved as to form and recorded.

27. The City never accepted East Street.

Response to No. 27: Disputed. Defendants fail to cite any admissible evidence to support their assertion. *See* 22 NYCRR 202.8-g(d). The City did not issue a resolution accepting East Street as a public street at the June 2, 1914 meeting. To the City’s current knowledge, the City has never issued a resolution adopting East Street as a public street,” having nothing to do with transfer of title.

28. The City’s then Deputy Commissioner and current Commissioner of Development and Building Official Paul Vacca testified:

Q. You don't have knowledge of what the Department of Public Works does in connection with public streets?

MR. MENDELSON: Objection to form.

A. Typically the Department of Public Works will go out and maintain public roads. I don't, to the best of my knowledge, I don't believe that the street -- this is a paper street and it was never accepted by the City.

BY MS. ZALANTIS:

Q. Okay. When you say this is a paper street, are you referring to East Street?

A. Yes.

Q. It's your understanding East Street was never accepted by the City; is that correct?

A. Correct.

(see deposition of Paul Vacca taken on February 25, 2020 ("Vacca Depo.") at **Ex. "20"**, p. 37).

Response to No. 28: Not disputed that Mr. Vacca testified that, to his knowledge, the City had not accepted East Street as a public street.

29. Over five years after the City in the 1914 Resolution accepted only five of the seven streets of the 1907 Subdivision Map, the 1914 Deed was recorded on June 27, 1919 (in Liber 2201, page 231) (see recording information for 1914 Deed at **Ex. "21"**).

Response to No. 29: Disputed to the extent that the City clarifies that the 1914 Resolution accepted only five of the seven streets transferred by the deed as public streets. The City accepted the conveyance of title for all seven of the streets, as demonstrated by the recording of a deed conveying all seven streets. Doc. No. 153 (City Ex. 39 – Certified Copy of Deed); Doc. No. 118 (City Ex. 4 – Certified Title Report).

30. On the City's 1929 Official Map, the location for East Street is depicted but is not named as a street on the official map (see City' 1929 Official Map with highlighting of East Street for ease of reference attached as **Ex. "22"**).

Response to No. 30: Not disputed, that the location of East Street is depicted by not named as a street on the Defendants' Exhibit 22. No information is provided as to the source of this document, which bears Defendants' Bates numbers.

31. Although East Street appears on the City's current zoning map as a named street (see Ex. "23"), East Street does not appear as a named street on the City's tax map (see tax map as Ex. "5").

Response to No. 31: Not disputed, but this alleged fact is immaterial to the issues in this case.

32. The five streets created by the 1907 Subdivision Map that were accepted by the City in the 1914 Resolution all appear as named streets on the City's tax map — namely, Weeks Place, Pinebrook Road, Crestview Place, Chatsworth Place and Ashland Avenue (relevant portion of City's tax map depicting the surrounding streets at Ex. "24").

Response to No. 32: Not disputed, but the City notes that East Place, which was not accepted as a public street in the 1914 Resolution, is also depicted on the tax maps as a named street.

Maintenance of the Five Accepted Streets Compared to East Street

33. The City's Department of Public Works "provides and maintains the City's physical facilities through its various operations bureaus and services," including "cleaning of streets and highways," "maintenance, repair, construction, reconstruction and resurfacing of streets" and "removal of ice and snow from public thoroughfares" (see City's Public Work Department overview at Ex. "25").

Response to No. 33: Not disputed.

34. The "functions" of the City's Bureau of Streets & Highways include "mechanical sweeping of streets, maintenance and repair of roads, . . . blacktop and pothole repairs, street sweeping, roadside maintenance, on-street trash removal" (see City's Bureau of Streets and Highways overview as Ex. "26").

Response to No. 34: Not disputed.

35. The City maintains, repairs and plows the five streets that were part of the 1907 Subdivision that were accepted by City in the 1914 Resolution -- namely, Weeks Place, Pinebrook Road, Crestview Place, Chatsworth Place and Ashland Avenue. (Flavio Aff. at ¶ 13).

Response to No. 35: Not disputed, but note they were accepted and designated "public streets."

36. The City does not maintain East Street (see Plaintiff's Response and Objections to Defendants' First Set of Interrogatories dated February 3, 2020 (at Ex. "27") at ¶ 5).

Response to No. 36: Not disputed that the City does not regularly provide repair work on East Street. Disputed that the City has not ever "maintained" East Street. The City maintains East Street as necessary to provide emergency access to properties along East Street, and has removed obstructions, such as trash dumped on East Street. *See* Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 88:11-23; City Opp. Ex. 1 (Bongo Dep). at 49:20-25; *see also* Doc. No. 154 (City Ex. 40 – Moran Aff.) at ¶¶3-4.

37. The City's Deputy Commissioner of Development and Building Official Paul Vacca testified:

Q. You said it's your understanding that the City does not maintain East Street. What is your basis or understanding?

A. I had a conversation with the City engineer and asked him that very question.

Q. And what were you told?

A. That we don't maintain anything there.

Q. Was there a reason why the City doesn't maintain anything on East Street?

A. No, ma'am.

(Vacca Depo. (Ex. "20", p 36).

Response to No. 37: Not disputed that this was Mr. Vacca's testimony, but see Response to No. 36. Additionally, Mr. Vacca testified that the City plowed East Street in emergencies, and that he did not know whether the City ever collected garbage from East Street or performed paving operations on East Street. Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 34:14-36:1.

38. The City does not perform snow plowing, street cleaning, trash removal, paving or asphaltting work or other maintenance work on East Street (see Ex "27" at ¶ 5).

Response to No. 38: Disputed. The City removes any obstructions to the right of way and has performed snow plowing in emergencies, and has removed trash dumped on East Street. Given that the City has owned East Street for over 100 years, the City cannot state with certainty what work was and was not performed on East Street by the City prior to Mr. LaRocca's ownership of 436 Fifth Avenue.

39. Mr. Vacca testified that the City does not maintain private streets (Vacca Depo (Ex. "20"), p. 37).

Response to No. 39: Disputed. Mr. Vacca testified "I don't think we do any maintenance on private streets." Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 38. He also testified that he was not the right person to ask about maintenance of public streets because that falls within the purview of the Department of Public Works, not the Building Department. *Id.* at 36:15-25.

40. Flavio testified that since he and his wife purchased the Property, the City has never maintained East Street, including plowing East Street (Flavio Depo (Ex. "8"), pp. 76-77).

Response to No. 40: Not disputed that this is what Flavio LaRocca testified to.

41. Bernardo F. Rivera, whose company is Benny Tree Service (formed in 2006 (Rivera Depo. (Ex. "16"), p. 6)) and who owns property on East Street that his company previously rented, testified he never observed the City repairing or maintaining East Street:

Q. Have you ever, since you've had any knowledge of East Street or any involvement in East Street, did anyone from the city maintain East Street?

A. Never.

Q. Have you ever seen anyone from the city make any repairs to East Street?

A. Never.

Q. Have you ever seen anyone from the city fill a pothole on East Street?

A. Never.

(Rivera Depo. (Ex. "16"), p. 61-62).

Response to No. 41: Not disputed that the quoted testimony is from Mr. Rivera's deposition. Disputed that Mr. Rivera has been operating from East Street since 2006. At page 6 to 8 of his deposition, Mr. Rivera testified that he has operated Benny's Tree Service since around 2006, and that he was renting property on East Street in May 2015, and that he purchased the lot a year later. He did not testify that he had been operating from East Street since 2006. City Opp. Ex. 6 (Rivera Dep.) at 6-8.

42. Likewise, Patrick Bongo, whose company, PAB Contractor Corp., has operated from a contractor's yard on East Street since the late 1980s (Bongo Depo (Ex. "11"), p. 5), testified that he has never observed the City doing any maintenance work on East Street and he never saw the City

repair potholes, asphalt or pave East Street (Bongo Depo (Ex. "11"), p. 49-50), or sweep or clean East Street (Bongo Depo (Ex. "11"), p. 51).

Response to No. 42: Not disputed that this is a portion of his testimony. However, Mr. Bongo also testified that he did not know who was technically or legally responsible for maintaining East Street, and that he did not believe that he or any of the other property owners abutting East Street had any ownership interest in East Street. City Opp. Ex. 1 (Bongo Dep.) at 39:17-19, 40:16-19.

43. Prior to Flavio and Maria purchasing the Property, the prior owner of the Property advised Flavio that each property owner along East Street maintained East Street (Flavio Depo. (Ex. "8"), p. 77).

Response to No. 43: Not disputed that this was Mr. LaRocca's testimony; however, the alleged statements of the prior owners are inadmissible hearsay.

44. Specifically, the property owners along East Street are solely responsible for "cleaning any debris, sweeping, snowplowing, and repairing the road if needed." (Flavio Depo. (Ex. "8"), pp. 76-77.

Response to No. 44: Not disputed that Mr. LaRocca testified that the abutting property owners have performed these tasks.

45. Bernardo F. Rivera testified his company has filled potholes in East Street, cleaned East Street, removed garbage from East Street and plowed East Street (Rivera Depo. (Ex. "16") p. 60.).

Response to No. 45: Not disputed.

46. Mr. Rivera further testified that of all the East Street property owners, Flavio does the majority of the maintenance work on East Street:

Q. And would it be fair to say, that the only people that you've ever seen maintain East Street are the owners that have properties along East Street?

A. The one I could say, more, that maintains more than anybody is Flavio La Rocca.

Q. So it is fair to say that Mr. La Rocca maintains the road more than any of the other owners, on East Street?

A. Yes.

Q. Is that correct?

And, is it also fair to say that Mr. La Rocca does the majority of the plowing on East Street?

A. Yeah, as I said that, from the beginning.

(Rivera Depo. (Ex. "16"), p. 62).

Response to No. 46: Not disputed that Mr. Rivera so testified.

47. Felipe Maya, who has worked for F. LaRocca & Sons for 7-8 years (deposition transcript of Felipe Maya taken on May 28, 2021 ("Maya Depo") at Ex. "28", p. 10), testified about the extensive repair work done by F. LaRocca & Sons on East Street:

Q. Do you know who plows the snow on East Street?

A. Yes.

Q. Who does it?

A. I do.

Q. Do you know who repairs East Street?

A. We do.

Q. When you say we do, do you mean Mr. La Rocca's company?

A. Yes.

Q. You said that Mr. La Rocca's company repairs East Street. What does Mr. La Rocca's company do to repair East Street?

A. So, there are quite a few potholes and we fill them in with new black tar. Also where you saw the drain with the cones around it, we fix up those areas so that people can drive by and not get stuck in the holes.

Q. How often does Mr. La Rocca's company do this?

A. We did it every year.

Q. What else does Mr. La Rocca's company do to maintain East Street?

A. We remove the snow in the winter. We remove the gravel when it's there.

Q. How about garbage?

A. We do that too. A lot of people go in that area at nighttime and we clean up their garbage.

Q. How about leaves? Do you do anything with the leaves?

A. Yes, we clean those up too.

Q. The questions I asked you about the leaves and the garbage, just to be clear that was in reference to East Street; is that correct?

A. Yes.

Q. You said you plow East Street. How often have you personally done that; approximately?

A. I've been working with Flavio seven or eight years. I do it every year.

(Maya Depo. (Ex. "28"). pp. 26-27).

Response to No. 47: Disputed. The quoted testimony does not appear as one string of testimony in the deposition. The first eight lines quoted above are from page 26 of Mr. Maya's deposition transcript, 26:9-19. The remainder of the testimony appears at 52:24-54:10.

48. Mr. Maya's reference to the area with the "drain with cones around it" that F. LaRocca & Sons repaired was to pictures he was previously shown of the cones in the road where there were potholes in East Street (see pictures at Ex. "29"; see Maya Depo (Ex. "28" at p.40 (discussing Exhibit marked as Defendant's C).

Response to No. 48: It is not disputed that the photographs in Exhibit 29 depict a drain with cones around it in East Street. It is disputed whether the cited testimony from Mr. Maya supported that assertion, as his testimony at page 40 says nothing about a drain.

Contractor's Yard Extended onto East Street Prior to Defendants' Purchase of the Property:

49. At the time Maria and Flavio purchased the Property in 2002, the existing contractor's yard on the Property extended onto East Street and Defendants did nothing to alter the existing fencing and gates on East Street (Flavio Aff at ¶ 22; *see infra*).

Response to No. 49: Not disputed.

50. An as-built survey from 2000 that was filed with the City and produced by the City in discovery depicted the contractor's yard's fencing, gates and other portions of the Property extending onto East Street ("2000 As-Built") at Ex. "30").

Response to No. 50: Not disputed.

51. Specifically, after approving the prior owners' proposed plan to construct a rip rap slope (or rock wall) (see stamped approved plan dated August 3, 2000 entitled "proposed riprap" at Ex. "31"), the City issued the then Property's owners (the Maffeis) Building Permit Number B200387 dated August 3, 2000 (at Ex. "32") for this commercial renovation permit (*see also* Vacca Depo. (Ex. "20"), p. 56-57) and then approved an amended plan that depicted the rip rap slope 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 Ex "33"; *see also* Vacca Depo (Ex. "20"), p. 60 1. 1-10).

Response to No. 51: Disputed that the Building Permit No. is 200387; the actual Building Permit No. is 2000387. It is not disputed that the prior owners, the Maffei's, were issued a building permit for rip rap work at the rear of the property along the edge of the property opposite East Street. *See* City Opp Ex. 3 (Site Plan). The site plan does not show the encroachments onto East Street. City Opp. Ex. 3 (Site Plan). Moreover, the Building Permit did not authorize encroachments on East Street; it authorized "construct a rip rap slope." Indeed, the Building Permit specifically notes that "This building permit does not constitute authority to build in violation of any Federal, State, or local law." City Opp. Ex. 4 (Building Permit).

52. Included in Building Permit No. B200387 (at Ex. "32") was the condition to "[s]ubmit as-build survey, prepared by a Licensed Surveyor, to show compliance with approved plans."

Response to No. 52: Not disputed, but see correct Building Permit No. in Response to No. 51. However, as noted above, the planned work did not concern encroachments into East Street.

53. The City's Deputy Commissioner of Development and Building Official Paul Vacca explained 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.

(Vacca Depo ("Ex. 20") at p.58).

Response to No. 53: Not disputed.

54. In accordance with the 2000 Building Permit's conditions, the prior owners submitted an the 2000 As-Built (at Ex. "30") and the City subsequently issued a Certificate of Occupancy on January 16, 2001 (at Ex. "34"), which Mr. Vacca explained is "a document that closes out the building permit" (Vacca Depo ("Ex. 20") at p. 61).

Response to No. 54: Not disputed.

55. The 2000 As-Built (at Ex. "30") depicted that there were various encroachments on East Street as testified to by Mr. Vacca:

Q. And is the sliding gate [on the As Built survey] depicted on East Street?

A. It looks like it is depicted on East Street.

Q. And is the chain-link fence depicted on East Street?

A. It appears to be, yes.

Q. Do you see shrubs indicated at the property line that fronts on Fifth Avenue?

A. Yes.

Q. And are the shrubs depicted on East Street, a portion of the shrubs depicted on East Street?

A. They look like they encroach onto East Street, yes.

Q. So the survey seems to indicate that there's an encroachment of a sliding gate onto East Street, correct?

A. Yes.

Q. The survey indicates there's an encroachment of a chain-link fence onto East Street; is that correct?

A. That's what it looks like, correct.

Q. The survey seems to indicate there's an encroachment of shrubs onto East Street; is that correct?

A. That's what it looked like, yes.

(Vacca Depo ("Ex. 20") at pp. 62-63).

Response to No. 55: Not disputed that Mr. Vacca so testified.

56. Gabriel Senor, a licensed surveyor and engineer (see deposition of Eliot Senor taken on March 29, 2021 ("Senor Depo.") at Ex. "35", pp. 17-18), testified that the 2000 As-Built survey (at Ex. "30") contained dimensions indicating that the gate and fencing extended onto East Street between 10.7 feet on one end of the property to 12.9 feet on the other end of the property (Senor Depo (Ex. "35"), p. 36-38).

Response to No. 56: Not disputed that he so testified.

57. Based upon the City's records, the 2000 As-Built was accepted by the City and a certificate of occupancy was issued based upon that 2000 As-Built depicting the encroachment onto East Street (see Exs. "30" and "34"). When Defendants purchased the Property in 2002, there were no open or pending violations that had been issued by the City (see title company's Department of Buildings search finding "no pending violations" for search done December 23, 2002 at Ex. "36").

Response to No. 57: Not disputed; however, as noted above, the Building Permit concerned a rip rap wall, not permission for encroachments on East Street.

Work by Defendants:

58. On May 19, 2003, Defendants obtained a building permit from the City for removal, regrading and excavating at the Property (as Ex. "37").

Response to No. 58: Not disputed. However, this building permit did not concern encroachment onto East Street. Moreover, the permit states that it does not constitute authority to build in violation of any Federal, State, or local law.

59. The area of "rock outcrop" to be removed was marked in red on a copy of the 2000 As-Built depicting the contractor's yard extending onto East Street (Ex. "38", p. 1.), which was stamped approved and signed by the City Building Official on May 19, 2003 (at Ex. "38", p. 2).

Response to No. 59: Disputed that these documents are submitted in admissible form. They are also immaterial as the Building permit concerned removal of the "rock outcrop" in 2003 not permission for encroachments on East Street.

60. The City approved the removal of rock outcrop even though the plan depicted that the contractor's yard extending onto East Street (Ex. "38").

Response to No. 60: Disputed that these documents are submitted in admissible form. They are also immaterial as the Building permit concerned removal of the "rock outcrop" in 2003 not permission for encroachments on East Street.

First Notice of Encroachment:

61. Seven years after Defendants purchased the Property and six years after the City issued Defendants a permit to remove rock at the Property based upon the marked-up As-Built Survey depicting the existing contractor's yard extending onto East Street, the City first raised the issue of a potential encroachment on East Street.

Response to No. 61: It is not disputed that the 2009 Notice of Violation, Doc. No. 131 (City Ex. 17 (2009 Notice)), constitutes the first notice of encroachment sent to Defendants regarding the encroachments on East Street.

62. By letter dated June 22, 2009 to Defendants from Paul Vacca and Jeffrey C. Coleman, PE, the Commissioner of Public Works, the City advised "that it has come to the attention of both this office and the Department of Public Works that the legal non-conforming contractor's yard at the aforementioned location [the Property] is encroaching on City property, specifically the public right of way along East Street" and Defendants were directed to remove the encroachment within 30 days (at Ex. "10").

Response to No. 62: Not disputed.

63. Defendants did not agree that that there was any impermissible encroachment of the existing contractor's yard as the fencing was: (1) in the same location when Defendants purchased the Property; and (2) in the same location when the City issued the permit to Defendants for the rock removal (Flavio Depo (at Ex. "8"), p. 91-92).

Response to No. 63: Disputed and not material to the claims, as intent is not an element of the encroachment claim. Defendants were aware, based on the surveys reviewed at the time they purchased the property in 2002, that their property encroached into East Street, and public documents, including Defendants' deed and the deed for East Street, demonstrated that Defendants' did not own East Street. Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 45:24-46:8, 47:14-48:19; Doc. No. 124 (City Ex. 10 (2000 Survey)). Notably, Defendants did not provide the survey they

reviewed at the time of purchase to their title insurer; accordingly, their title insurance policy contains an exception for “any state of facts that an accurate survey would show.” Doc. No. 126 (City Ex. 12 Title Insurance Policy) at D0006-D0007; Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 49:5-53:9. Nor had Defendants ever applied for or received a permit for the encroachment. Accordingly, Defendants knew or should have known that the encroachments were “impermissible.” Moreover, after receiving the letter, the Defendants hired a surveyor who concluded that their contractor’s yard was encroaching over 10 feet into East Street. Doc. No. 138 (City Ex. 24 (Senor Dep.)) at 29:17-20, 55:11-57:12, 60:24-62:21.

64. “A week or two” after receiving the June 22, 2009 letter (Flavio Depo (at Ex. “8”), p. 92), Flavio and Maria had a meeting at the Property with Mr. Vacca and Mr. Coleman and the City’s representatives advised Flavio and Maria to obtain a survey:

Q. What was discussed at the meeting?

A. The content of this letter.

Q. Was there any resolution to the content of the letter?

A. Yes.

Q. What was the resolution?

A. They both proposed that I would get a surveyor to come out and mark that line to depict where the property was so that they can determine where it was. Because I explained to them that I thought that was my property, and I’ve been using it since I’ve had it, and the previous owner was using it who knows how many years prior to me.

(Flavio Depo (at Ex. “8”), p. 93).

Response to No. 64: Not disputed that this was Mr. LaRocca’s testimony.

65. Subsequently, Defendants retained Gabriel E. Senor, P.C. to “Stake Out Right Side (Paper Street)” (in other words to stake out the property along East Street) and produce a survey sketch

for which he was paid \$900.00 (see Ex. "39"). Gabriel E. Senor, P.C. staked out the property and produced a "stake out sketch" dated September 10, 2009 (see Ex. "40").

Response to No. 65: Not disputed.

66. Gabriel Senor, a licensed surveyor and engineer (Senor Depo. (Ex. 35"), p. 17.18), testified that the two stakes placed by his company were not actually placed on the Property's corners but rather, as indicated on the "stake out sketch", the two markers were placed on to extend beyond both side property lines: (a) four-feet from the intersection of the Fifth Avenue and East Street property lines; and (b) on a "concrete" base" located one-foot from the intersection of the upper property line and East Street (Senor Depo. (Ex. 35"), p. 47-49).

Response to No. 66: Not disputed that Mr. Senor testified that "there was something in the way of each particular corner because the stakes aren't actually on a corner," rather, the stake located at the top of the page (Def. Ex. 40) was located one foot outside the property line of 436 Fifth Avenue, and the stake identified at the bottom of the sketch was "four feet into the right of way, four feet into Fifth Avenue." Doc. No. 138 (City Ex. 24 (Senor Dep)) at 46:5-49:5.

67. In response to the City's subpoena, Mr. Senor's office produced twelve pages of documents, including internal notations and prior surveys not previously provided to Defendants (see Ex. "41", at page 10 of 13; Senor Depo. (Ex. 35"), p. 79-80). But based upon what was provided to Defendants in 2009 — namely, the stake out sketch (at Ex. "40" and Senor Depo. (Ex. "35"), p. 85) — it was impossible to conclude that the contractor's yard's fencing along the front property line encroached on East Street (Senor Depo. (Ex. 35"), p. 80-81):

Q. Okay. So is there anything on this document [the stake out sketch] that shows the

fence is 10 feet outside of the property?

A. No, except for physically going, standing on the line and seeing where everything is located.

Q. Right, but I'm asking about this document in particular, is there anyway --

A. No, it's not a survey, it doesn't show physical information.

(Senor Depo. (Ex. 35"), p. 81).

Response to No. 67: Disputed. First, Mr. Senor testified that certain pages would “not necessarily” have been shared with the LaRoccas, and it was not clarified whether more than simply the Stake Out Sketch was provided to them. Second, even if the LaRoccas could not determine from the Stake Out Sketch that their property was encroaching by 10 feet, the physical markings at the property would have demonstrated a 10-foot encroachment, as Mr. Senor testified: “physically going, standing on the line and seeing where everything is located” would make the 10-ft encroachment apparent. (Senor Depo. (Ex. 35"), p. 81).

68. On July 6, 2016, Gabriel Senor's office sent the following email to Defendants that Mr. Senor testified he dictated to his receptionist: "[t]he fence is aprox. 10Ft on the outside [sic] the property line as indicated on our original field sketch" (Ex. "42"; see Senor Depo. (Ex. 35"), p. 72).

Response to No. 68: Not disputed.

69. At deposition, however, Mr. Senor explained that it would be impossible to ascertain whether the fencing encroached on East Street from the stake out sketch provided to Defendants in 2009:

Q. Okay. So in that e-mail that you read before, you said that you dictated that the fence is 10 feet outside of the property line, you couldn't tell -- you couldn't come up with this information — that information by looking solely at this document, page 8 of 13 [the stake out sketch]; is that correct?

A. That's correct.

(Senor Depo. (Ex. 35"), p. 82-83)

Response to No. 69: Not disputed that this was Mr. Senor's testimony. However, as noted above, even if the LaRoccas could not determine from the Stake Out Sketch that their property was encroaching by 10 feet, the physical markings at the property would have demonstrated a 10-foot encroachment. Since Mr. Senor testified that the survey demonstrated a 10-foot encroachment eastward from Defendants' property into East Street, and the surveyors physically marked the corners of the property. Doc No. 138 (City Ex. 24 (Senor Dep.)) at 25 (staked the property lines so the client can see where the property lines are relative . . . to what's there), 55:11-57:12 (findings of the 2009 stake-out were that the Defendants' fence was over 10-feet past their property line into East Street); (Senor Depo. (Ex. 35"), p. 81).

70. The surveyor marking done in 2009, which Flavio testified was done in orange-pink marking on the concrete wall (see pictures of same attached as Ex. "43"), indicated that the contractor's yard fencing encroached only approximately 10 inches onto East Street over the property line (Flavio Depo (Ex. "8"), p. 98-99).

Response to No. 70: Disputed but immaterial to the claims at issue. Mr. LaRocca's self-serving testimony is not credible given Mr. Senor's testimony that the encroachment was 10-feet, that the surveyor marked the corners of the property (with a four foot and one foot extension at each end, though not in the direction of the encroachment), and Mr. Senor's testimony that he never told Mr. LaRocca that the encroachment was only 10 inches. Doc No. 138 (City Ex. 24 (Senor Dep.)) at 64:19-65:2. He also testified that the ten-foot encroachment would be apparent if you were

physically standing on the property after it had been staked. Doc No. 138 (City Ex. 24 (Senor Dep.)) at 81.

71. Based upon the understanding in 2009 (and prior to Mr. Senor's explanation in 2016) that the fencing only extended 10 inches over the property line abutting East Street, the City indicated that no further action was necessary (Flavio Aff. ¶ 25).

Response to No. 71: Disputed that this is what Mr. LaRocca claims happened. Mr. Vacca has no recollection of discussing the encroachment with the LaRoccas in 2009. Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 16:1-20. Further, even if a building Official issued an approval based upon a mistake, it is not binding on the City.

72. Nothing further was raised by the City about an alleged impermissible encroachment onto East Street for years until after false claims were made about purported actions taken by Defendants in 2015 (see Complaint (Ex. "1"), 110 to 18).

Response to No. 72: Disputed. The City does not dispute that it sent the Defendants a notice of violation dated November 18, 2015. The City disputes any implication that the second notice of encroachments is related to purported "false claims."

Skate Park:

73. After Defendants purchased the Property, the City undertook and completed construction of a skate park located directly across East Street from the Property (and other properties abutting the Property) as depicted in the aerial Google Earth image attached with red arrow pointing to the Property (at Ex. "44"). Construction started in or about 2003 and was completed in 2005 or 2006 (Flavio Depo (Ex. "8"), p. 61).

Response to No. 73: Not disputed.

Eminent Domain:

74. In or about 2014, Plaintiff initiated a plan to acquire Defendants' Property and the other contractor's yard properties along East Street by eminent domain to use for the site of the City's Department of Public Works (Flavio Depo (Ex. "8"), p. 56; Answer (Ex. "2") ¶¶ 89-92)

Response to No. 74: Disputed. Plans were discussed to use eminent domain to acquire property on East Street as an option for the relocation of the City's Department of Public Works yard, but never came to fruition.

75. Defendants vocally opposed the City's eminent domain plan. (Answer (Ex. "2") ¶ 90).

Response to No. 75: Not disputed that the LaRocca's opposed the concept of relocation the City yard to East Street.

76. Ultimately, the City did not pursue acquisition of the Property and other East Street properties by eminent domain (Answer (Ex. "2") ¶ 91).

Response to No. 76: Not disputed that the City did not pursue acquisition of the Property as the City developed alternative relocation plans.

77. In connection with or around the time of the proposed eminent domain, the City had a survey (the 2014 Survey) prepared of all the properties along East Street (attached as Ex. "14").

Response to No. 77: Not disputed that the City had a survey prepared in 2014.

Alleged May 16, 2015 Incident Regarding the Parcel:

78. Based entirely upon a video and photographs from a "local news website" called Talk of the Town (the Video at Ex. "45"; photographs attached to the Complaint (Ex. "1") as Exhibit "1" to the Complaint), the Complaint alleges that:

on or about May 16, 2015, Defendants, their agents, servants and employees, entered the Parcel with landscaping equipment and began clearing the land to create a parking lot. Defendants' actions included cutting down numerous full-sized trees on the Parcel, leaving woodchips on the site. Defendants used a steamroller to create a parking surface. As part of this process, Defendants deposited potentially contaminated materials on the cleared area. Attached hereto as Exhibit 1 are copies of a photograph taken on May 16, 2015 showing Defendant Flavio La Rocca and his employees clearing the Parcel and constructing the parking lot. These photographs were obtained from the local news website Talk of the Sound, at <http://newrochellestalk.com/content/who-flavio-la-rocca-part> -iv (last visited March 23, 2016)

(see Complaint (Ex. "1"), ¶ 15).

Response to No. 78: Disputed that the City's complaint was based "entirely" on the reports by Talk of the Sound, though the City did consider such reports, videos, and photographs. *See e.g.*, Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 26:17-29:1 (went to the Parcel on May 16, 2015 and saw that it was being prepared for use as a parking lot).

79. The Parcel referred to in the Complaint is further down from the Property and on the other side of East Street from the Property adjacent to the skate park (Complaint (Ex. "1"), ¶ 12).

Response to No. 79: Not disputed.

80. The Parcel as defined in the Complaint is depicted in an aerial Google Earth image as the area adjacent to the skate park where the white truck shown in the image is parked (*see* Ex. "46"; *see* Flavio Depo. (Ex. "8"), p. 83-84).

Response to No. 80: Not disputed that the image at Defendants Ex. 46 includes the Parcel, and that the white truck is on part of the Parcel.

81. The Parcel as defined in the Complaint is also marked with a yellow highlighted circle on a highlighted version of the City's 2014 Survey (at Ex. "47"; Flavio Depo (Ex. "8"), p. 105).

Response to No. 81: Not disputed that Flavio LaRocca marked Defendants Ex. 47 with a yellow circle to indicate the area of the Parcel.

82. While the Complaint's allegations are based upon the video from Talk of the Sound, the video does not depict Defendants (or their agents, servants and employees), cutting down trees on the Parcel, leaving woodchips on the Parcel or creating a parking lot on the Parcel (Ex. "45").

Response to No. 82: Disputed that the Complaint's allegations are based entirely on the video from Talk of the Sound. See Response to No. 78. Not disputed that the video does not show Defendants actively cutting down trees or leaving woodchips on the Parcel. Disputed that the video does not depict Defendants creating a parking lot on the Parcel. City Opp. Ex. ____ (video).

83. Rather, the video depicts Defendants' employees raking and smoothing out the gravel of the Parcel with rakes and with a compactor machine, and depicts a pile of woodchips already on the Parcel — not being placed there by Defendants.

Response to No. 83: Not disputed that the video depicts Defendants' employees raking, smoothing, and compacting a subbase material on the parcel with a small steam roller, and that it also depicts multiple piles of woodchips on the Parcel. City Opp. Ex. 5 (video).

84. Flavio LaRocca testified that starting in around 2012 or 2013, F. LaRocca & Sons Inc. began raking out the Parcel to remove displaced gravel resulting from the plowing (Flavio Depo. (Ex. "8"), p. 119-120) and would rake the Parcel once or twice a year in around April or May (Flavio Depo. (Ex. "8"), p. 126; 135).

Response to No. 84: Not disputed that this was Mr. LaRocca's testimony. Disputed that this is what Mr. LaRocca and his employees were doing on May 16, 2015 given that (1) the video does not appear to depict merely smoothing pre-existing gravel that was disturbed by plowing, as opposed to large amounts of a subbase that were placed on the parcel and spread/smoothed/compacted to facilitate use of the Parcel as a parking lot and (2) it is not clear how plowing snow from East Street would disturb gravel on the Parcel. *See* City Opp. Ex. 5 (video); Doc. No. 121 (City Ex. 7 Flavio Dep.) at 109:14-112:3, 130:16-24, 145:15-147:24 (Defendants' various explanations for how snowplowing would disturb the parcel, Plaintiff's counsel expressing confusion as to how snowplowing disturbs the Parcel, and Defendants' eventual concession that the plow does not enter the Parcel when they plow East Street).

85. At that time, F. LaRocca & Sons Inc. stored some of its equipment at the Guglielmo's contractor's yard located at the end of East Street at the corner of East Street and East Place (Flavio Depo. (Ex. "8"), p. 119) and as a result, Defendants would plow East Street to the entrance of the Guglielmo yard located at the end of East Street so they could access their equipment (Flavio Depo. (Ex. "8"), p. 80 (discussing Ex. "46" (marked as P7)); Flavio Depo., p. 85; 119-120).

Response to No. 85: Not disputed.

86. Flavio explained as follows:

Q. Has Flavio LaRocca & Sons ever done anything to the parcel?

A. We just raked the ground.

Q. What is the reason the ground is raked?

A. Because when we would plow that area to get into where we were storing the equipment in Guglielmo's yard, we would disturb that area which was gravel and wood chips thrown down by previously. We just raked the area that we would disturb.

Q. How did it become Flavio LaRocca & Sons' responsibility to rake the parcel?

A. Just because we entered into the property down below Guglielmo's yard. The City would not maintain the road. We would plow it to gain access because otherwise we cannot enter our trucks and equipment and we would damage the area as the plows would go by. And as a courtesy to my neighbors who were there, we just raked out the area and that's it.

(Flavio Depo. (Ex. "8"), p. 85).

Response to No. 86: Not disputed that this was Mr. LaRocca's testimony. But see Response to No. 84.

87. Pictures taken prior to F. LaRocca & Sons Inc. raking and flattening the gravel on the Parcel on May 16, 2015 depict the poor condition of the East Street, the runoff and standing water (Ex. "48"; Flavio Aff at ¶ 16).

Response to No. 87: Disputed. There is no foundation for the photographs contained in Exhibit 48. There is no testimony cited concerning the date the photographs were allegedly taken or who took them. The City further disputes that the photographs depict "run off" as Flavio LaRocca never mentioned "run-off" or drainage issues during his deposition, or in Defendants' Responses to Plaintiff's Interrogatories. Instead, in his deposition testimony and Interrogatory Responses, Flavio LaRocca stated Defendants performed work on the Parcel to facilitate its use as a parking lot for his neighbors. *See e.g.*, Doc. No. 133 (City Ex. 19 (Interrogatory Responses) at No 6 ("the pictures attached to the Complaint depict Defendants . . . maintaining the long existing Parking Area by smoothing and compacting the gravel that had become displaced as a result of snowplowing"); Doc. No. 121 (City Ex. 7 (Flavio Dep.) at 85. The City further disputes that the photographs in Defendants' Exhibit 48 depict "runoff" or a "poor condition. Regardless, this alleged dispute is immaterial to the City's claims.

88. When asked how the snowplowing affected the Parcel (the yellow highlighted area on the Marked 2014 Survey at Ex. "47"), Flavio further explained:

Q. So we interrupted you. How does the snowplowing affect the yellow area?

A. When we snowplowed this area, at times, because it's a steep hill going down, our trucks with the snow, depending on how much [snow], or ice, would skid off and scrape into the yellow area where the gravel was at, and some of the gravel would be pushed onto East Street and some of the gravel would be piled up in mounds for the snowplow.

MR. MENDELSON: For the record, he moved his finger up East Street north and then skipped his hand and moved his hand into the yellow area and came back out.

A. Correct. Because in order for us to gain entrance here where the gate was, no one would ever plow this road, so we would plow it so we could gain access.

Q. When you're pointing, you're pointing to an area that's outside of the boundary of East Street. Is it your testimony that your company plows outside of East Street?

[A]. I'm sorry. Excuse me. I --

Q. Does your company only plow East Street or does it also plow property that's to the east of East Street?

A. They abut one another. So when you have 6 inches or a foot of snow on the ground, you can't tell where the line is.

(Flavio Depo. (Ex. "8"), p. 110).

Response to No. 88: Not disputed that this is what Mr. LaRocca testified to. However, the above-quoted testimony runs from 109:14-110:20 of the Flavio LaRocca deposition. Upon further questioning, Mr. LaRocca admitted that the area where the parking lot was allegedly created is a certain number of feet off of East Street, that there is no gravel on East Street to be pushed onto the Parcel during plowing operations, further casting doubt on his explanation of the reason for instructing his employees to work on the Parcel on May 16, 2015. Doc. No. 121 (City Ex. 7 Flavio Dep.) at 110:21-112:3.

89. The 2014 Survey itself depicts that there is no clear delineation through curbing or otherwise between East Street and the City's park borders (Ex. "14").

Response to No. 89: Not disputed that the 2014 Survey does not identify curbing between East Street and the Park.

90. The person that took, edited and uploaded the video from May 16, 2015 was Robert Andrew Cox who is a journalist and owner of Talk of the Sound (see deposition transcript of Robert Andrew Cox taken on August 4, 2021 ("Cox Depo") at Ex. "49", pp. 5,-6).

Response to No. 90: Not disputed.

91. Talk of the Sound claimed in an article (titled "Who is Flavio La Rocca? — Part VIII) Mr. Cox wrote that "on the morning of Saturday May, 16th" Talk of the Sound "was **on hand** as La Rocca and his crew chopped down trees, ground them up, dumped broken chunks of toxic asphalt, piled up the asphalt to create a berm to screen the resulting 'parking lot' from prying eyes at City Park and used a steamroller to pack down more asphalt to create a parking surface." (Ex. "50" (*emphasis added*)).

Response to No. 91: Not disputed.

92. At deposition, Mr. Cox admitted that he was not actually present at the Parcel to observe trees allegedly being chopped down and ground up:

Q. What does on hand mean, in this first line of that paragraph?

A. It means I was present on the scene.

Q. But were you present on the scene, when trees were being chopped, allegedly chopped down?

A. Well, I was on scene for what took place that day and I'm describing what took place that day, based on what I believe, based on my sources, so yes.

Q. But were you present, personally, on the scene when trees were being chopped down?

A. No.

Q. And were you present, personally, on the scene when trees were being ground up?

A. No.

(Cox Depo (Ex. "49"), p. 71-72).

Response to No. 92: Not disputed.

93. The City retained D&B Engineers and Architects, PC ("Retained Engineer") to conduct sampling and testing of the asphalt type material allegedly dumped on the Parcel, which Retained Engineer produced its letter report to the City dated October 8, 2015 concluding that there was no contamination (or toxic asphalt dumped as claimed by Cox or Talk of the Sound) (Ex. "51").

Response to No. 93: Disputed with respect to the findings of the Engineer's Report. The engineer's report stated that "Sampling of the asphalt type material which has been placed in this area was conducted to determine if it contains hazardous constituents." __ Def. Ex. 51 at PLTF010. The Report further stated that, "[a]ll compounds/constituents analyzed for were either not detected or were detected at concentrations below their respective Unrestricted Use SCO and Commercial Use SCO in the soil samples, *with the exception of one VOC, two SVOCs and three metals which exceeded their respective Unrestricted Use SCO but were below their respective Commercial Use SCO. There were several exceptions including five SVOCs which exceed both their respective Unrestricted Use and Commercial Use SCOs.*" Def. Ex. 51 at PLT013. The Report further stated that the results were consisted with prior testing performed in March 2015, Def. Ex. 51 at PLT013.

94. Mr. Cox testified that the "berm" referenced was actually the existing pile of wood chips (Cox Depo (Ex. "49"), p. 72-73), which is depicted in the video (Ex. "45") and pictures attached to the Complaint (see Exhibit "1" to Complaint (attached as Ex. "1" hereto).

Response to No. 94: Not disputed.

95. Subsequent to May 16, 2015, the City fenced in the Parcel area with a black fence (see pictures of the fenced in Parcel area, including pictures with cars and trucks still parking on the City's property next to the black fence attached as **Ex. "52"**). The City paid \$1,930 to install the black fence (Ex. "**53**").

Response to No. 95: Not disputed.

96. Despite the Talk of the Sound's claim that Defendants created a parking lot on the Parcel on May 16, 2015, Mr. Cox testified that he had no knowledge whether the Parcel area (currently fenced in with a black fence) was ever used as parking area prior to May 16, 2015 (Cox Depo (Ex. "49"), p. 81).

Response to No. 96: Not disputed.

97. The 2014 Google Earth image of the Parcel — taken before May 16, 2015 -however, depicts a truck with an attached trailer and other trucks parked on the Parcel (see historical Google Earth Image from 10/2014 and enlarged portion of same attached as **Ex. "54"**).

Response to No. 97: Not disputed that Defendants' Exhibit 54 depicts vehicles in the area of the Parcel, disputed to the extent that Defendants seek to infer that the cleared area on the Parcel after May 16, 2015 was not larger than the cleared area in 2014.

98. Flavio testified that prior to the City installing the black fencing, vehicles used to park on the Parcel (Flavio Depo (Ex. "8"), p. 86; 105), including vehicles of employees of the businesses along East Street ((Flavio Depo (Ex. "8"), p. 133).

Response to No. 98: Not disputed.

99. Flavio testified that neither his business vehicles nor his employees ever parked on the Parcel ((Flavio Depo (Ex. "8"), p. 84; 86; 106).

Response to No. 99: Not disputed that Mr. LaRocca testified that there were vehicles parked on the Parcel prior to May 16, 2015, but denied that he or his employees had ever parked on the parcel.

100. Benny Rivera testified his employee's vehicle is depicted in the video and pictures of cars from May 16, 2015 parked on the Parcel (Rivera Depo (Ex. "16"), p. 32-33 (discussing video at 2:25 (attached hereto as Ex. "45") and p. 41 (regarding the 3rd and 6th pages of Marked Deposition Exhibit 3A (which is Exhibit "1" to the Complaint (attached hereto as Ex. "1"))

Response to No. 100: Not disputed, specifically, Mr. Rivera testified that the first truck on the right (which would be closest to the skate park) belonged to his employee, but this is not the portion of the Parcel that was being cleared by defendants.

101. Mr. Rivera further testified that from the time he first started renting his property on East Street (prior to 2015 (Rivera Depo (Ex. "16"), p. 6, 7, 10-11)) before he purchased it in 2016 (Rivera Depo (Ex. "16"), p. 6) until the City fenced off the Parcel, cars would always park on the Parcel, including before March 2015 — two months prior to Defendants' alleged creation of the parking lot on May 16, 2015 as claimed by Talk of the Sound:

Q. Do you recall having seen, yourself, those cars parked where they're shown in the photograph [asking about Ex. 3A. p. 6, which is page 6 of Exhibit "1" to the Complaint (attached hereto as Ex. "1")]?

A. There's always cars parked there.

Q. When you say always, were there cars parked there from the time you first started renting --

A. Yeah.

Q. -- your property?

A. Yeah.

Q. Are there cars still parked there, as of today?

A. No, 'cause the city had fenced the property off. And they just left the one [spot] where actually my employee's parking is still open.

(Rivera Depo (Ex. "16"), p. 42-43).

Q. You saw a lot of pictures today, of an area fenced in with a black fence. Do you recall seeing those pictures, today? Or do you have personal knowledge of that area, that's currently fenced in by the city with the black fence; is that correct?

A. Yes.

Q. So that area, before the fence was there, cars used to park in that area; is that correct?

A. Yes.

(Rivera Depo (Ex. "16"), Rivera, p. 70)

Q. Correct. So before the fence was up --

A. Yes.

Q. -- that area was used as parking; is that correct?

A. Yes.

Q. And it was used as parking before March of twenty-fifteen, correct?

A. Yes.

(Rivera Depo (Ex. "16"), p. 71)

Response to No. 101: Not disputed.

102. Mr. Rivera was further able to identify one of the vehicles in the picture attached to the Complaint (Exhibit 1, p. 6 of Ex. "1") of the line of cars from May 16, 2015 (the red truck) as an employee of PAB Contracting Corp's vehicle, which same red truck is depicted parked in front of that business on a later date after the black fence was installed (Rivera Depo (Ex. "16"), p. 72; Ex. "15" (at Bates Nos. D0409; and D0410 and D0415 (depicting the red truck and the black fence))).

Response to No. 102: Not disputed.

103. Mr. Rivera further testified that 80% of those parking on the Parcel (prior to the black fence's installation) were PAB Contracting Corp's employees:

Q. So prior to the city installing that black fence, enclosing the area, would it generally be that the PAB employees would park in that area, that's now enclosed with the black fence?

A. I would say 80 percent, yeah.

Q. And the reason why your employees could only potentially park there, on Saturday, was because the PAB employees were not there; is that correct?

Yes?

If you could just answer.

A. Yes

(Rivera Depo (Ex. "16"), p. 76).

Response to No. 103: Not disputed.

104. The one remaining parking spot referenced by Mr. Rivera post-installation of the black fence is between the skate park's fencing and the black fencing as depicted in the attached picture (at Ex. "55") and Mr. Rivera identified the car parked in that area as his car (Rivera Depo (Ex. "16"), p. 46).

Response to No. 104: Not disputed that with respect to a single picture, Mr. Rivera testified that his car was in the open space outside the black fence and near the skate park.

105. Felipe Maya, an employee of F. LaRocca & Sons, Inc. for 7-8 years, also testified that the Parcel area was used for parking prior to May 16, 2015:

Q. Before the date of that video, did cars used to park in that area that is shown in the video where the work was being done?

A. Yes, there have always been cars parked there.

(Maya Depo (Ex. "28), p. 55).

Q. We're going back to the last photograph I showed you which is part of Plaintiffs Exhibit 3-A. Is this where people parked after you pushed back the gravel and it was compacted?

A. Yes, it was like that before and after. I just put the gravel back in its place.

Q. Mr. Maya, when you say that it was like that before and after, do you mean that people were parking there before you put the gravel back in its place? A.

Yes, it's always been like that. All I did was put some gravel back.

(Maya Depo (Ex. "28), p. 39-40).

Response to No. 105: Not disputed that this was Mr. Maya's testimony. This is immaterial to the City's claims. The City disputes whether Mr. Maya's testimony is credible given that he testified that cars were always parking there "because they're always arriving there for the park," Def. Ex. 28 at 55:20-25, whereas the testimony of Mr. Rivera was that the individuals parking on the parcel were employees of Mr. Bongo, not visitors to Flowers Park.

106. In 2002 or 2003, prior to the construction of the skate park, the Parcel was also used as a parking area for employees of Persico, a contractor hired by the City to do construction work on the nearby Potter Avenue Bridge (Flavio Depo. (Ex. "8"), p. 61; 89;109).

Response to No. 106: Not disputed that this was Mr. LaRocca's testimony.

107. While doing the bridge work, Persico cleared out the area where the skate park is now located to use as their staging area (Flavio Depo. (Ex. "8"), p. 61;) and the Parcel was used as parking for Persico's employees (Flavio Depo. (Ex. "8"), p. 108-109). Persico placed gravel on the Parcel and this gravel remained after Persico finished the work (Flavio Depo. (Ex. "8"), p. 107; 113).

Response to No. 107: Not disputed that this was Mr. LaRocca's testimony.

108. On March 6, 2003, Defendants inquired about renting or leasing the area used by Persico and the City responded by letter dated March 17, 2003 providing that while this area was currently being used as a staging area by Persico, it was the City's intention to create an overflow parking lot in that area and therefore "it is not available for lease/rental following Persico's uses." (Ex. "56").

Response to No. 108: Not disputed.

109. Mr. Bongo testified that he saw neither in the video nor ever observed Flavio or his employees cutting down trees:

Q. Do you remember Mr. Meisels showed you the video earlier today?

A. Yes.

Q. Did you observe anyone in that video cutting down trees?

A. No.

Q. In the area that's now enclosed by the black fence, have you ever observed my client, Mr. La Rocca, cutting down trees in that area?

A. Me personally, no.

Q. Have you ever observed any employees of Mr. La Rocca cutting down trees in that area?

A. No. Just what you guys showed me supposedly. No. Myself personally, no.

Q. You said in that video nobody was cutting down trees, right?

A. Yeah, I didn't see anybody with chain saw, no, cutting down the trees, no, no. You know, I've never seen that.

Q. Have you ever observed Mr. LaRocca or any of his employees place wood chips in the area now enclosed by the black fence?

A. No.

(Bongo Depo. (Ex. "11"), p. 52-53).

Response to No. 109: Not disputed.

110. Likewise, Mr. Rivera testified he never saw Flavio or anyone from Flavio's company cut down any tree in any area adjacent to East Street at any time (Rivera Depo. (Ex. "16"), p. 72-73).

Response to No. 110: Not disputed.

111. Mr. Maya, who identified himself as the person pictured in the video from May 16, 2015 driving the machine (Maya Depo. (Ex. "28"), p. 13-14), testified that he was "cleaning out the gravel and the dirt that accumulates after snowstorms and things like that and pushing it off the road." (Maya Depo. (Ex. "28"), p.14).

Response to No. 111: Not disputed that this was Mr. Maya's testimony. Disputed that Mr. Maya was cleaning gravel that accumulates after snowstorms. See Response to No. 84, *supra*.

112. He testified that he did not do any landscaping work in May of 2015 (Maya Depo. (Ex. "28"), p. 12) and while he saw the wood chips on the Parcel, he did not know where they came from (Maya Depo. (Ex. "28"), p. 13) as they were placed there when he was not at work (Maya Depo. (Ex. "28"), p. 18):

Q. I'm not sure I understand. You say you leave work at 4:30; correct?

A. Yes.

Q. Are you saying to us that those wood chips were placed when you were not there?

A. Correct.

(Maya Depo. (Ex. "28"), p. 17-18).

Response to No. 112: Disputed to the extent that Mr. Maya did not testify that he did not do any landscaping work in May of 2015. See Maya Depo at 12. Also disputed because the video depicts Defendants' employees, including Mr. Maya spreading subbase and compacting it. City Opp. Ex. 5 (video).

113. Mr. Maya further testified no brush was removed from the Parcel and that he did not see any trees on the Parcel or anyone using a wood chipper:

Q. In the area where you were spreading the gravel, was it necessary to remove any brush?

A. No, there was no brush there.
There was nothing.

(Maya Depo. (Ex. "28"), p. 18).

Q. If you were sitting in the driver's seat of the car, am I correct that the area that would be to your right would be the area where you pushed back the gravel?

A. Yes.

Q. In that area, did you ever see any trees?

A. No.

Q. Did you ever see anybody using a wood chipper?

A. No

(Maya Depo. (Ex. "28"), p. 47).

Response to No. 113: Not disputed

114. Mr. Maya testified that the video depicted workers spreading out the gravel (Maya Depo. (Ex. "28"), p. 15 discussing video at 22 seconds) and that the gravel being spread was existing gravel:

Q. Where did the gravel that you spread come from?

A. It was already there. When it snows and it rains that all gets pushed down and it was already down there.

Q. Was it necessary to bring in more gravel?

A. No.

(Maya Depo. (Ex. "28"), p. 16)

Response to No. 114: Not disputed that this was Mr. Maya's testimony. Disputed that this is credible given the video evidence. Nevertheless, this dispute is not relevant to the City's claims.

115. Martin Sanchez, who has worked for F. LaRocca & Sons for fifteen years (see deposition transcript of Martin Sanchez taken on May 28, 2021 (Ex. "57"), p. 7) testified as follows after being shown the video (at 11 seconds):

Q. I'm particularly referring to the video at 11 seconds. Can you tell me what is fairly and accurately depicted in that photograph?

A. Yes.

Q. Please explain what's shown.

A. I can see a machine and some people. I can't see the rest very well.

Q. Do you remember having seen this back in May of 2015?

A. No, I don't remember.

Q. Back in May of 2015, did you work on a project to clear the gravel in the area where you see the machine?

A. Some guys were sent to work on that but I stayed in the yard to fix some tools that had broken.

Q. Do you remember which guys were sent to work on it?

A. I don't remember because the guys who had worked here before have left.

Q. Do you remember Mr. Maya working on it?

A. No, no, I don't know about him.

Q. Did you see any of the work that those guys were doing?

A. I just know that they were working and cleaning up the gravel because when it rains a lot of gravel comes down the road and a lot of potholes are there and they were filling them in.

Q. And did you see them do that?

A. Yes, because the boss sent them to do that to rake the gravel so that everything would be smoother.

Q. Did you see them do that?

A. Yes, because you can see the whole street from there.

Q. When you say the whole street, do you mean East Street?

A. Yes.

(Sanchez Depo. (Ex. "57"), p. 14-15).

Response to No. 115: Not disputed that this was Mr. Sanchez's testimony. Disputed that it is credible given that Mr. Sanchez's testimony that the workers were "cleaning up gravel because when it rains a lot gravel comes down the road" is not consistent with Mr. LaRocca's testimony

that he instructed his employees to work on the Parcel because the gravel had been disturbed by snow plowing.

116. 116. Mr. Sanchez similarly testified that he did not observe any trees being removed from the Parcel:

Q. Did Flavio La Rocca's company take down any trees?

MR. MEISELS: Objection to form.

A. No.

Q. Did you see anyone from Mr. LaRocca's company, any employee or Mr. La Rocca himself take down any trees from that area where the people were working in the video?

A. No, I didn't see any coworkers there.

Q. Did you see anyone from Flavio La Rocca's company cut down or remove trees in the area that the people work [were] raking?

A. No.

Q. In the area that's enclosed by the black fence in the picture that you're looking at on the screen right now, Defendant's GG [attached as Ex. "58"], do you see that picture?

A. Yes.

Q. Pm talking about the first page of Defendant's GG [attached as Ex. "58", p. 1] in the area that is enclosed by the black fence. Have you ever seen anyone from Flavio La Rocca's company remove any trees from that area?

A. No, none of us took down any trees.

Q. As part of your work at Flavio La Rocca's company, have you ever seen anybody take down trees for any project?

A. No, we don't do that.

(Sanchez Depo. (Ex. "57"), p. 29-30).

Response to No. 116: Not disputed.

Second Notice of Encroachment:

117. After the claims made by Talk of the Sound, Defendants received another letter from the City about the alleged encroachment. By letter dated November 18, 2015 entitled "Notice to Remove" from Alexander Tergis, Commissioner of Public Works, the City advised it "recently

completed an examination of the area" of the Property and the City's review "revealed that at certain points where your property and the property of other owners in the area borders the neighboring property owned by the City, there are circumstances where certain improvements, such as a fence with gates, a row or rows of hedges, a concrete wall and in one instance a metal shelf used for storage of materials and equipment, encroaches and intrudes on and over City owned real property." (Ex. "59").

Response to No. 117: Not disputed that this is what part of the November 18, 2015 notice states.

Post-Litigation Survey

118. This action was commenced by the City thereafter on April 1, 2016 (see Ex. "1").

Response to No. 118: Not disputed.

119. After the commencement of this action, the City had the surveyor, Ward Carpenter Engineers, prepare a survey of the Property dated April 13, 2016, which was produced in the context of this litigation ("2016 Property Survey" at Ex. "60").

Response to No. 119: Not disputed that the second Ward Carpenter Engineers survey is dated April 13, 2016. Disputed to the extent Defendants seek to infer that the survey was not requested until after this action was commenced on April 1, 2016.

120. The 2016 Property Survey depicts a relatively minor encroachment of a "stone masonry wall" extending beyond the Property line but coming flush with the sidewalk running besides Fifth Avenue.

Response to No. 120: Not disputed that the 2016 survey depicts the encroaching "stone masonry wall." Disputed that the encroachment is "minor."

121. As depicted in the attached Google images of the Property from Fifth Avenue (at Ex. "61" and Ex. "6"), the "stone masonry wall" is actually a low garden wall that is the base of planter with an iron railing on top behind which are large Arborvitae trees. The planting base and planting screen the entire contractor's yard fencing and all other parts of the contractor's yard from view along Fifth Avenue.

Response to No. 121: Not disputed.

122. This garden wall planter was erected with the knowledge and consent of the City in or about 2003. Flavio was advised by Raj Mehta of the City's Department of Public Works, who came to the site and stated that so long as the garden wall/planter remained on the Property's side of the sidewalk and did not extend onto the sidewalk itself and was only four feet high, it was fine to construct the garden wall/planter where it is currently located Flavio Aff at ¶ 29.

Response to No. 122: Disputed. Defendants did not identify Raj Mehta, in response to the City's Interrogatory No 1, which stated "Identify all persons having knowledge of the facts relevant to the subject matter of the Complaint, Answer, Affirmative Defenses and Counterclaims" Doc No. 133 (City Ex. 19 Response to Interrogatories). Accordingly, Defendants should not now be able to raise alleged hearsay statements made in 2003. Nevertheless, this dispute is immaterial as Raj Mehta would not have authority to authorize an encroachment on Fifth Avenue.

123. The garden wall/planter system was constructed as directed as it extends only up to the sidewalk along Fifth Avenue (see Ex. "6" and Ex. "61") and is a total of four feet high (Flavio Aff. off 31).

Response to No. 123: Disputed that Mr. LaRocca was “directed” to construct the wall/planter system.

124. The location of the garden wall/planter is in line with the City's own fence in front of its skate park, which the 2016 Survey depicts as extending beyond the skate park's record property line and located in the area between the sidewalk and skate park's property line almost abutting the sidewalk (see 2016 Survey, Ex. "60").

Response to No. 124: Disputed.

125. And if this garden wall/planter was not in place, the large Arborvitae could not grow as high and full without extending onto the sidewalk area and impeding access (Flavio Aff at 133).

Response to No. 125: Disputed. The Arborvitae could be pruned to avoid encroachment.

126. The 2016 Property Survey also depicts a portion of the contractor's yard extending onto East Street, which is how the Property has been since at least 2000.

Response to No. 126: Not disputed that the 2016 Survey depicts encroachment from 436 Fifth Avenue into East Street. Disputed that the encroachment has been the same since 2000. The 2000 Survey depicts a sliding gate as the outer edge of the encroachment. The 2016 Survey depicts further encroachment by concrete jersey barriers placed outside the gate by Defendants. Doc. No. 128 (City Ex. 14 (2016 Survey)).

127. Prior to this litigation, the City never raised any issue with respect to an encroachment onto Fifth Avenue and upon information and belief, does not want Defendants to remove the encroachments on Fifth Avenue. The removal of the attractive garden wall/planter finished on one

side in attractive stone with an iron railing and plantings, would result in a complete loss of screening.

Instead, the fencing and other portions of the contractor's yard would be visible from Fifth Avenue.

Response to No. 127: Defendants fail to cite any admissible evidence to support their assertion.

See 22 NYCRR 202.8-g(d). Disputed that there are no means to shield the contractor's yard without encroaching upon Fifth Avenue.

PLAINTIFF'S ADDITIONAL FACTS IN ACCORDANCE WITH RULE 202.8-g(d)

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 13:20-17:10.¹ 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.

¹ All exhibits referenced herein are attached to the accompanying Affirmation of Peter A. Meisels, dated May 31, 2022.

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").

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).

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. NO. 153 (City Ex. 39 (certified 1914 deed)).

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)).

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)).

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.

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.

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).

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).

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)).

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)).

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."

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.

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)).

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)).

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).

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).

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.

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.

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.

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.

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.

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.

153. Section 111-38 of the New Rochelle City Code, entitled “Encroachments onto public property restricted,” provides:

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.

- B.** Maintenance of projections. All such projections on buildings shall be structurally safe and shall be kept in safe condition and shall be repaired when necessary in the opinion of the Building Official and at the expense of the owner of the building from which they project.
- C.** Below grade. No part of a building hereafter erected below grade that is necessary for structural support of the building shall project beyond the lot lines, except that the footings of street walls or their supports located at least eight feet below grade may project not more than 12 inches beyond the street lot line.
- D.** Projections necessary for safety. In any specific application, the Building Official may designate by approved rules such architectural features and accessories which are deemed desirable or necessary for the health or safety of the public and the extent to which they may project beyond the street lot line or the building line subject to all provisions and restrictions that may be otherwise prescribed by law, ordinance or rule of the authorities having jurisdiction.
- 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>.

154. Section 111-40 of the New Rochelle City Code, entitled "Penalties for offense," provides:

- 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 and the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist and the owner, general agent or contractor, lessee or tenant of any part of a building or premises in which part such violation has been committed or shall exist and the general agent, architect, engineer, builder or contractor or any person who commits, takes part or assists in such violation or who maintains any building or premises in which any such violation 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>.

155. Defendants have never applied to the City Council for a permit for their encroachments, though the encroachments continue to exist. *See* Doc. No. 154 (City Ex. 40 (Moran Aff.)) at ¶5.

Dated: White Plains, New York
August 4, 2022

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