

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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CITY OF NEW ROCHELLE

Index No. 54190/2016

Plaintiff,

- against -

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

Defendants.  
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**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT**

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## Introduction

This memorandum of law is respectfully submitted on behalf of Plaintiff, the City of New Rochelle (the “City”), in opposition to Defendants’ motion to for summary judgment.

## Preliminary Statement

Defendants’ motion for summary judgment dismissing the City’s claims should be denied. Defendants fail to show prima facie entitlement to summary judgment on the City’s claims. Instead, of addressing the elements underlying each of the City’s causes of action, Defendants focus largely on irrelevant, strawman issues, while attempting to impugn the integrity of the local journalist who first reported the Defendants’ trespass on City property, and imputing malicious intent to City public servants.

When Defendants’ irrelevant arguments and baseless accusations are brushed aside, it is apparent that the City’s claims are well-founded, and that there is no basis to grant summary judgment to Defendants. Rather, the undisputed facts actually show that the City can satisfy the elements of its first, second, third, and sixth causes of action (for trespass, negligence, nuisance, and encroachment, respectively), and is entitled to summary judgment on those claims pursuant to its own pending motion for summary judgment. *See* Doc. Nos 111-158 (May 31, 2022). Additionally, there are triable issues of fact regarding the fourth and fifth causes of action for conversion and for violation of RPAPL § 861, which preclude summary judgment.

First, as set out in the City’s motion for summary judgment (and undisputed in the Defendants’ motion), on May 16, 2015, Defendants trespassed on the Flowers Park Parcel and performed work on it so that it could be used as a parking lot, without the City’s permission. The disputed question of whether Defendants’ removed trees while performing this work is irrelevant

to the City's claims for trespass, negligence, and nuisance. Accordingly, there is no basis to dismiss these claims.

Second, the City's claim for encroachment by Defendants' contractor's yard into City-owned property on East Street is not dependent on East Street being designated a public street. Accordingly, Defendants' argument that East Street was not designated to be a public street is irrelevant. East Street is City-owned property, even if it was not designated to be a public street. It is undisputed that Defendants' contractors' yard at 436 Fifth Avenue extends 10 feet past Defendants' property line into East Street. Defendants fail to cite any authority that would call the City's ownership of East Street into question. The case law cited by Defendants regarding dedication of public streets is not on point, and is ultimately irrelevant to the question of encroachment and nuisance.

According, Defendants' motion for summary judgment should be denied in its entirety.

### **Pertinent Facts and Procedural History**

Defendants' statement of facts focuses largely on irrelevant issues. The City has responded in detail in its Response pursuant to Rule 202.8-g(b) (hereinafter "Response to SMF"), and set forth those additional facts which show that summary judgment for defendants is not warranted.

The key facts establishing the City's claims are as follows. The City has owned Flowers Park and the adjacent property known as East Street for over 100 years, and was the owner of the properties on May 16, 2015. Response to SMF at ¶¶130-132. The parties have referred to an area of land in Flowers Park and directly adjacent to East Street as the Parcel. *Id.* at ¶¶78-79, 141-142.

On May 16, 2015, Flavio LaRocca directed the employees of LaRocca Inc. to enter the Flowers Park Parcel to perform work, which included spreading a subbase material (which appeared to witnesses to be asphalt) and compacting the subbase with a small steamroller in order

to make the Parcel suitable for parking. Response to SMF at ¶¶144-146, 83-84.<sup>1</sup> Mr. LaRocca further testified that the Parcel is part of Flowers Park, which is owned by the City of New Rochelle. Response to SMF at ¶141; Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 110:21-111:10.<sup>2</sup> Mr. LaRocca testified that he did not have permission from the City to perform any work on the Parcel. Response to SMF at ¶147.

In 1914, Hadert Realty Co., the prior owner of land including an area known as East Street, executed a deed transferring fee title in land including an area known as East Street to the City, indicating that East Street should serve as a public right of way. Response to SMF at ¶¶21-22, 131-134. The deed was recorded in 1919. *Id.* at ¶131. Defendants' contractor's yard at 436 Fifth Avenue extends beyond the Defendants' property line and 10 feet into East Street, where Defendants have a fence/gate. Response to SMF at ¶¶55, 68, 136-137. Surveys prepared and reviewed by the LaRocca's prior to purchasing the property document the encroachment. *Id.* The City served the LaRocca's with notice of the encroachment in 2009 and 2015. *Id.* at ¶¶61-62, 117. In response to the Notices, Defendants hired a surveyor who confirmed, both in 2009 and again in 2016, that the LaRocca's fence is encroaching over 10 feet beyond their property line into East Street. Response to SMF at ¶68. Despite this knowledge, Defendants refuse to apply for a permit from the City for the encroachment such as their neighbor Patrick Bongo (owner of PAB), who was granted permission to encroach on the City-owned East Street. Response to SMF at ¶150. In 1998, the City granted easements to PAB, a landscaping company, owner of two tax lots along East Street (41 and 43) to permit PAB to bring utilities to its place of business for an annual fee of

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<sup>1</sup> Flavio testified that the video at City Opp. Ex. 5 accurately reflects the work his employees performed on May 16, 2015. Response to SMF at ¶144.

<sup>2</sup> Pursuant to CPLR 2214(c), where the City cites a document that was previously filed as an Exhibit to the City's summary judgment motion, the City will cite the docket number on the electronic docket ("Doc. No.").

\$3.00/sq ft. *Id.* Further, Defendants refuse to remove their encroachment. Doc. No. 154 (City Ex. 40 (Moran Aff.)). Accordingly, the City filed the instant action.

### Argument

In reviewing Defendants' motion for summary judgment, this Court "must determine whether the defendants met their burden of establishing a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Chiara v. Town of New Castle*, 126 A.D.3d 111, 120 (2d Dep't 2015). Moreover, where, as here, a defendant admits facts establishing the plaintiff's claims, summary judgment for the defendant should be denied and a competing summary judgment motion by the plaintiff should be granted. *See Jarmuth v. Nunnerley*, 2019 N.Y.Misc. LEXIS 1697 (Sup. Ct. N.Y. Cnty. Apr. 5, 2019) (denying plaintiff's cross-motion for summary judgment on defamation claim based on defendant's statement that plaintiff was trespassing and granting defendant's motion for summary judgment where plaintiff admitted at deposition to entering defendant's property without permission).

### POINT I

#### **DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE FIRST FIVE CAUSES OF ACTION**

##### **A. Removal of Trees Is Not a Necessary Element of the First Three Causes of Action**

Defendants argue that if they did not remove trees from the Parcel on May 16, 2015, then they cannot be liable for any of the City's first five causes of action. This is incorrect. Contrary to Defendants' arguments, the City's claims are not only about the alleged removal of trees. Rather, the City's Complaint alleged that the "case arises from the defendants' brazen misappropriation of City property for their private personal and business use." Doc. No. 1 (Compl.) at ¶1. By Flavio LaRocca's own admission, on May 16, 2015, he entered the Parcel and

instructed his employees to perform work, including leveling the ground and spreading gravel (or a similar granular material) and compacting it with a steamroller to create a smooth, flat surface for parking. Response to SMF at ¶¶143-146. Mr. LaRocca testified that he did this, even though he knew the Parcel was part of Flowers Park which was owned by the City, and that he did not have permission from the City to perform work on the Parcel. Response to SMF at ¶¶139, 141, 147; Doc. No. 121 (City Ex. 7 (Flavio Dep.)) at 110:21-111:10.

Whether Defendants also removed trees as part of their work on the Parcel is disputed. However, the removal of trees is not a necessary element of the City's first three causes of action, which allege trespass, negligence, and nuisance.

“The elements of a cause of action for trespass are an intentional entry onto the land of another without justification or permission.” *Johnstone v. Babad*, 170 A.D.3d 692, 694 (2d Dep't 2019) (citation omitted). A defendant's testimony as to his unauthorized use of the property of another is sufficient to establish trespass. *See CSC Acquisition-NY, Inc. v. 404 Cty. Rd. 39A, Inc.*, 2011 N.Y. Misc. LEXIS 559, \*36 (Sup. Ct. Suffolk Cnty. Jan. 6, 2011).

Here, Flavio LaRocca testified that (1) he directed his employees to enter the Parcel on May 16, 2015 and perform a “rake out” of the property, including the leveling of the terrain and steamrolling the Parcel to prepare it for use as a parking lot; (2) Mr. LaRocca knew the Parcel was part of city-owned Flowers Park; and (3) the City did not give Mr. LaRocca permission to perform any kind of work on the Parcel. This evidence is sufficient to establish trespass.

Defendants' statement of facts spends numerous paragraphs recounting who may or may not have previously parked on or near the Parcel.<sup>3</sup> These alleged facts are immaterial to the City's

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<sup>3</sup> The City disputes whether vehicles had been parking in the area being compacted by Defendants on May 16, 2015. But again, this dispute is not material as prior parking in the area would not defeat the City's claims.

claims. Whether others parked on or near the Parcel in the past does not negate Defendants' admissions that they entered and performed work on the Parcel on May 16, 2015, even though Mr. LaRocca knew the Parcel was owned by the City, and knew he did not have permission to perform work on the Parcel. *See generally Parkview Assocs. v. New York*, 71 N.Y.2d 274, 282 (1988) (“[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches”) (citation omitted).

Even the case cited by Defendants support the City's cause of action for trespass. In *Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853 (2d Dep't 2012), the court explained: “Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act. ‘Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter.’” *Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853, 855 (2d Dep't 2012) (internal citation omitted).

With respect to the City's claim for negligence, Defendants argue that if they did not violate laws regarding removal of trees or the placement of impervious material on the ground, they could not have been negligent. This is incorrect – an individual's duty with respect to public property, and park property, extends beyond simply not removing trees or spreading impervious materials. It is well established that park property is held in trust for the public use and that one has a duty not to misappropriate public property for private use. Accordingly, Chapter 224 of the New Rochelle City Code, regarding Parks, provides in § 224-1, that “no person shall modify, alter or in any manner interfere with the line or grades of any public park or park street, nor take up, move or disturb any . . . tree, . . . sod, soil or gravel thereof, except by direction of the Commissioner of Parks and Recreation or under the Commissioner's permit.”

Flavio LaRocca admits that, at the very least, he instructed his employees to move or disturb the gravel and terrain on the Parcel without permission of the Commissioner. Accordingly, Defendants' work on the Parcel on May 16, 2015, also constituted negligence, even if it did not involve removal of trees or the spreading of impervious materials.<sup>4</sup>

With respect to the City's third cause of action, it is well established that interference with the public's use of public property constitutes a public nuisance.

A public nuisance exists for conduct that amounts of a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority.

*532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center*, 96 N.Y.2d 280, 292 (2001); *see also Volunteer Fire Assn. of Tappan, Inc v. County of Rockland*, 101 A.D.3d 853, 856 (2d Dep't 2012) (where a party has entered upon the property of another, "causing physical damage to, and depriving the plaintiff of the use and enjoyment of its property," that party may be liable for trespass and nuisance).

Here, it is undisputed that Defendants entered upon park property belonging to the City to level and compact an area for a parking lot for the private businesses on East Street without the permission of the City. Response to SMF at ¶¶144-147; Doc. No. 133 (City Ex. 19 Response to Interrog.)). Whether the neighboring contractors previously parked their vehicles on or near the Parcel, or whether Defendants were simply facilitating greater and easier parking use of the Parcel is irrelevant. Creation or continued use of park property for the private abutting landowners

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<sup>4</sup> Notably, compacting soil, which Defendants concede they did, also causes it to be more impervious than if it were loose.

interferes with the public's use of the property, and caused damage which required the City to take steps to preserve the property.

Accordingly, Defendants' motion for summary judgment must be denied as it relates to the City's first three causes of action.

### **B. Defendants' Attack on Mr. Cox Does Not Defeat the City's Claims**

Defendants assert that "[t]he City's first through fifth causes of action are based upon the delusions and rantings of a website called Talk of the Sound and its owner/blogger Robert Cox." LaRocca Opp. at 2. But, Mr. Cox was not having a "delusion" when he observed several of Defendants' employees spreading material (that appeared to be asphalt) as a subbase for parking, nor was Mr. Cox having a "delusion" when he observed Defendants' employee operating a small steamroller on City property to compact the subbase so that the property could be used for parking, nor did he imagine the large piles of woodchips on the Parcel. Response to SMF at ¶¶144-146; Doc. No. 143 (City Ex. 29 (Cox Dep.)) at 11:4-21. Indeed, as noted above, Mr. Cox recorded all of these activities on video and Flavio LaRocca admitted that the video accurately depicts the work he instructed his employees to perform on that day. Response to SMF at ¶144; City Opp. Ex. 5 (video); Doc. No. 121 ((City Ex. 7 (Flavio Dep.)) at 156. Paul Vacca, Deputy Commissioner of Development for the City, also inspected the Parcel later in the day on May 16, 2015 and testified that he "observed an area that appeared to have been prepped with subbase material," *i.e.*, "a granular material. Sometimes it's gravel. Sometimes it's a mixture of gravel, stone, sand. So it's like a subbase material for our parking areas." Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 27:9-28:10. Thus, Defendants cannot avoid liability for their conduct by casting aspersions on a local reporter.

**C. Whether Defendants Removed Trees and Vegetation from the Flowers Park Parcel is a Disputed Issue of Fact**

Mr. Cox testified that prior to May 16, 2015, the Parcel contained trees and undergrowth. Doc. No. 143 (City Ex. 29 (Cox Dep.)) at 38:8-12; *see also id.* at 18:3-12. Mr. Cox further testified that on the morning of May 16, 2015, he received a telephone call from a concerned City resident alerting him to work being done in the area of East Street, including the cutting down of trees using chainsaws. *Id.* at 7:16-9:13. Mr. Cox went to East Street to investigate and saw large piles of woodchips, trucks, and workers on the Parcel. *Id.* at 9:16-11:21. It can be reasonably inferred from Mr. Cox's testimony that trees and vegetation were removed from the Parcel on May 16, 2015, prior to Mr. Cox's arrival. Paul Vacca also testified that when he visited the Parcel later in the day on May 16, 2015, there appeared to have been "clearing" performed on the Parcel. Doc. No. 140 (City Ex. 26 (Vacca Dep.)) at 30:2-4. Accordingly, there is a dispute of fact as to whether and to what extent, Defendants removed trees or other vegetation from the Parcel.

In sum, regardless of whether Defendants removed trees and vegetation as part of the work performed on May 16, 2015, even the admitted actions of entering and preparing the Parcel as a parking lot constitute trespass, negligence and nuisance under the City's first through third causes of action. Moreover, the testimony of Mr. Cox and Mr. Vacca creates a question of fact as to whether Defendants removed trees or other vegetation from the Parcel. Thus summary judgment dismissing the fourth and fifth cause of action is also unwarranted.

## POINT II

### DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE SIXTH CAUSE OF ACTION FOR ENCROACHMENT

#### A. East Street Is Not a Private Street

Defendants argue that the City's cause of action for encroachment should be dismissed because East Street is not a public street, and therefore, must be a private street. But Defendants' argument fails because it is not necessary for East Street to be a "public street" for the City to establish a claim for encroachment on public property. *See e.g., Bayer v. Pugsley*, 176 N.Y.S.2d 848 (Sup. Ct. Monroe Cnty. July 16, 1958) *aff'd*, 7 A.D.2d 828 (4th Dep't 1958). The City's power to acquire property is not limited to acquiring property for use as a public street. *See* N.Y. Gen. City Law § 20 ("every city is empowered: . . . (2) To take, purchase, hold and lease real and personal property within and without the limits of the city . . ."). And claims for nuisance and encroachment are not limited to encroachment upon lands officially deemed public streets. *See* New Rochelle Code § 111-38 (prohibits encroachments on all "public property"); *CSC Acquisition-NY, Inc. v. 404 County Rd. 39A, Inc.*, 2011 N.Y. Misc. LEXIS 559 (Sup. Ct. Suffolk Cnty. Jan 6, 2011) (ordering removal of encroachment on neighboring property); *People v. Vanderbilt*, 26 N.Y. 287 (1863) (ordering removal of pier which encroached upon harbor and thereby constituted a public nuisance). Even if East Street is not a "public street," East Street is public property utilized as a right of way, including for utility connections and emergency vehicles, and Defendants are encroaching, well beyond their property line, into East Street.

In this action, the City has produced both the deed and title reports conclusively establishing that the City owns fee title in East Street. The property known as "East Street" was conveyed to the City via deed in 1914, which was recorded in 1919. Doc. No. 153 (City Ex. 39 Deed). Thus, title vested in the City, and it has never been conveyed by the City to anyone else.

Doc. No. 118-119 (City Exs. 4 and 5 (2022 and 2015 Title Reports)). The deed, recorded in 1919, is prima facie evidence of ownership. *See Kernan v. Williams*, 125 A.D.3d 1440, 1441, (4th Dep't 2015) (deeds which "are more than 10 years old and therefore are 'prima facie evidence of their contents'" citing CPLR 4522). The 2022 Title Report is also presumptive evidence of ownership which Defendants have not rebutted. RPAPL § 321; *Ridgway v. Hawkins*, 123 A.D. 15 (2d Dep't 1907); *New York & Brooklyn Suburban Inv. Co. v. Leeds*, 100 Misc. 2d 1079 (Sup. Ct. Suffolk Cnty. Sept. 21, 1979); *see also County of Rockland v. EklecCo*, 769 N.Y.S.2d 298, 300 (2d Dep't 2003) (looking to title search to determine owner of fee interest in roadway); *Suchmacher v. Manana Grocery*, 73 A.D.3d 1017, 1017 (2d Dep't 2010) ("documents such as deeds . . . are essentially unassailable"). The City has established that it is the owner of East Street.

The City also established, via surveys and Defendants' testimony that Defendants are encroaching into East Street without permission. *See, e.g.*, Response to SMF at ¶¶50, 56, 61-62, 68. That East Street was not adopted as a public street in 1914, is irrelevant to the City's claims for encroachment on public property. Where fee interest is transferred to a municipality, the property is owned by the municipality, even if it is not subsequently made into a public highway.

For example in *Bayer v. Pugsley*, 13 Misc.2d 610 (Sup. Ct. Monroe Cnty. July 16, 1958) *aff'd* 7 A.D.2d 828 (4th Dep't 1958), petitioner's property abutted a street designated as "Walnut Park." In seeking issuance of a building permit, the petitioner argued that Walnut Park was a public highway. The street had been designated on maps filed with the county in 1926, which were endorsed by the Town. "Thereafter, by deed dated August 14, 1937 and recorded in Monroe County Clerk's office January 23, 1938, the owners of the tract deeded to the Town of Irondequoit the fee of the street designated on said map as Walnut Park." *Id.* at 850. The Town then adopted a resolution instructing the Highway Superintendent to lay out Walnut Park as a public highway,

but the Superintendent refused to do so, advising that it was not in the public interest. *Id.* While a portion of Walnut Park was subsequently used as a public highway, the portion abutting petitioner's property was not. Accordingly, the court held that while Walnut Street was town-owned property in light of the deed, it was not a public street:

Although the town, by the acceptance of the deed, obtained a fee of the entire street, the fact that it may have delayed opening the same did not deprive it of title nor of its right to open the same for the public at a later time.

*Bayer*, 176 N.Y.S.2d at 851 (citing *New York C. & H. R.R. Co. v. Buffalo*, 200 N.Y.113 (1910) (“Where the title is taken in fee, although for the purposes of a highway, there is no limitation upon the municipality's ownership of the land.”).

The cases cited by Defendants support the City's argument that East Street constitutes public property even if it was not accepted as a public street. For example, in *Romanoff v. Village of Scarsdale*, 50 A.D.3d 763 (2d Dep't 2008), cited by Defendants, the plaintiff property owner appealed an RPAPL 15 order from this court, which declared that the respondent village owned the unimproved portion of a road abutting the plaintiff's property, where the plaintiff opposed a neighbor's effort to have the unimproved portion opened for emergency access. The court explained that the Village owned a fee title in the road:

The instrument, which named the grantor and the grantee, described the land conveyed, bound the developers 'successors and assigns,' contained the developers notarized signature and corporate seal, and was subsequently recorded by the Village Clerk, thus bore the hallmarks of a deed of conveyance.

50 A.D.3d at 765. Like the deed at issue in *Romanoff*, the 1914 deed here names the grantor (Hadert Realty Co.) and the grantee (the City of New Rochelle), describes the land conveyed, bound Hadert's "successors and assigns," contained the notarized signature, and was subsequently recorded with the Westchester County Clerk on June 27, 1919 in Liber 2201 page 231. Accordingly, the deed conveyed fee interest in East Street to the City.

Notably, neighboring properties on East Street have acknowledged the City's ownership of East Street. In 1998, PAB Construction, obtained an easement from the City Council over East Street for the purpose of connecting utility services to its East Street properties. Response to SMF at ¶¶149-150. In exchange for the easement, PAB agreed to a nominal fee to the City. *Id.* Defendants, by contrast, have refused to apply to the City Council for a permit for their encroachments.

Where a municipality acquires title to a piece of property, even if the original purpose of the property was for use as a public highway, the municipality does not subsequently lose title to the property because it has not been used for highway purposes. *See, e.g., Clarkstown v. Brent*, 400 N.Y.S.2d 165, 166 (2d Dep't 1977), *lv. denied* 44 N.Y.2d 645 (1978) (Town could not "abandon" highway where fee in land in question had been conveyed to town by deed (citing *Fusaro v. D'Angelo*, 41 A.D.2d 567 (2d Dep't 1973))).

In *No-Dent Props., Inc. v. Commissioner of Town of Hempstead Dept. of Hwys.*, 138 A.D.3d 702 (2d Dep't 2016), the plaintiff owned property abutting Bishop Road and brought an action seeking a declaration that Bishop Road was an abandoned highway pursuant to Highway Law § 205. "In 1942, 'all right, title and interest' in Bishop Road was dedicated to the Town 'for highway purposes.'" *No-Dent Props., Inc.*, 138 A.D.3d at 702. However, plaintiff alleged that when he purchased his property in 1998, Bishop Road was "an unpaved dirt pathway" that led to "nowhere[.]" *Id.* The plaintiff further alleged that "it paved the length of Bishop Road, painted stripes for parking stalls to provide spaces for its customers, and erected a six-foot fence, enclosing the full width of the roadbed." *Id.* Further, plaintiff alleged that there had been no regular vehicular traffic over Bishop Road for at least 15 years. *Id.* The Appellate Division affirmed dismissal of the plaintiff's claims. There could be no abandonment of the property where the town had acquired

a fee to the land in question” even if the land had not been put to use as a public highway and even if the plaintiff had purportedly improved and maintained the property. *Id.* at 703. While section 205 of the Highway Law is not directly at issue here, the principle is the same: once the City acquired title to East Street, title remains with the City, regardless of whether East Street was put to use as a public highway.

Defendants do not cite any case to the contrary. Plaintiff cites no legal authority to support its assertion that East Street remained a private street despite the recorded deed transferring title to the City, nor any evidence that would rebut the deed and 2022 Title Report (or the other evidence of ownership in the record). Indeed, none of the cases cited by Defendants hold that property conveyed to a municipality becomes private property if it is not accepted as a public street.

Defendants cite *Town of Lake George v. Landry*, 96 A.D.3d 1220 (3d Dep’t 2012). There the court held that, where a dedication of a public street was made in 1973, the town started plowing the street at least as of 2005, and formally accepted the dedication in 2009, the street had become a public street. The 30-plus gap between dedication and acceptance as a public street was “not fatal, as the mere ‘lapse of time does not extinguish an offer of dedication, which may be accepted at any time prior to a valid revocation by all interested parties.’” *Town of Lake George*, 96 A.D.3d at 1221, n.3.

In *Desotelle v. Town Bd.*, 301 A.D.2d 1003 (3d Dep’t 2003), cited by Defendants, the court rejected a petition to compel the town to maintain a strip of land as an official “town road.” The Court held that, while the property had been deeded to the town, and the town was the owner in fee simple absolute of the strip of land (known as Pine Tree Drive), the absence of subsequent action of acceptance as a public highway defeated the petitioners’ claim. 301 A.D.2d at 1003-

1004. The court did not, however, hold that Pine Tree Drive was no longer town property; only that the town could not be compelled to maintain its property as a public street.

Finally, in *Perlmutter v. Four Star Dev. Assoc.*, 38 A.D.3d 1139 (3d Dep't 2007), the court considered whether the unimproved portion of "Our Street" was a public highway. While noting that "a town's acceptance of a deed conveying the fee to an unimproved strip of land is not enough to create a public highway[.]" the court ultimately concluded that the record demonstrated that the entirety of Our Street (the improved and unimproved portions) had become a public highway. 38 A.D.3d 1140-1141. While *Perlmutter* is largely irrelevant, it reinforces the principle that conveyance of title to property and dedication as a public highway are distinct issues. Upon conveyance of the deed, "Our Street" was owned in fee simple by the municipality, but was not necessarily a public street. Accordingly, the cases cited by Defendants, concerning dedication of public streets are simply not relevant to the City's encroachment claim.

Plaintiff also asserts that streets depicted on subdivision maps are "deemed private" until formally accepted as public streets. Pl. Memo. at 8. But here, East Street was not only depicted on a subdivision map. It was separately conveyed to the City via a recorded deed. Thus, Plaintiff's subdivision map argument is not applicable.

In addition to the title search, presumptively establishing the City's ownership of East Street, Plaintiff's argument that East Street is a private street is also wholly contradicted by the record in this case: East Street was conveyed to the City by a 1914 deed which did not contain a reverter provision; there is no indication that Hadert Realty Co., the prior owner of East Street, ever exercised ownership over East Street after the 1914 resolution declining to accept East Street as a public street, instead Hadert Realty Co. consented to recording the deed five years later in 1919. Moreover, the City has exercised ownership over East Street as public property to be kept

open to the public. *See e.g.*, City Opp. Ex. 2 (City Council resolution granting easement over East Street to PAB Construction for purposes of utility services); City Opp. Ex. 7 (East Street is not included on the City DPW's list of "private streets"); Doc. No. 154 (City Ex. 40 (Moran Aff.)) at ¶¶3-4. Thus, Plaintiff has failed to produce any evidence that East Street is a private street, and summary judgment dismissing the City's sixth cause of action for encroachment on East Street is improper.

**B. This Court Should Order Defendants' to Apply for a Permit for the Encroachment on Fifth Avenue**

Defendants do not dispute that Fifth Avenue is a public street, and that surveys conclusively establish that the Defendants' "stone masonry wall" encroaches over their property line. Response to SMF at ¶120; *See e.g.*, Doc. No. 128 (City Ex. 14 (2016 Survey)).

At this time, the City is not seeking the removal of the encroachment; however, the City is seeking to be a responsible caretaker of public property. The City cannot simply cede public streets to private property owners, and it is not possible for the City to foresee whether future public interests may require the removal of the encroachment. *See, e.g.*, City Code § 111-38(E) (the City cannot issue permanent permits for encroachments; rather, all permits for encroachments are revocable). Accordingly, Defendants' should be required to apply for a permit for the encroachment, pursuant to City Code. Defendants assert in their motion papers that they have no objection to applying for such a permit, Def. Mem. at 18, but inexplicably, have not done so.

Because Defendants cannot dispute that the stone masonry wall is located beyond their property line in a public street, they raise various procedural and extraneous arguments which lack merit and do not defeat the City's claim.

First, Defendants argue that they received permission for the wall encroachment in 2003 from a city employee, Raj Mehta. Initially, Defendants did not disclose Raj Mehta as someone

with knowledge of the claims in this action in response to Plaintiff's Interrogatory No. 1. Doc. No. 133 (City Ex. 19 (Response to Interrogatories)). Nevertheless, the consent argument fails because an individual city employee cannot consent to an encroachment on public property, nor effectively give away public property. Pursuant to City Code, only the City Council can issue such a permit. New Rochelle City Code § 111-38; *see also Casa Wales Hous. Dev. Fund Corp. v. City of New York*, 129 A.D.3d 451, 451 (1st Dep't 2015) ("where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established regulations, no liability can result unless the prescribed procedure is complied with and followed.")

Second, contrary to plaintiff's assertions, a continuous encroachment into a public street is a nuisance. *See Tinker v. New York, O. & W. R. Co.*, 157 N.Y. 312 (1898) (encroachment into a public street is "unlawful and a nuisance" unless it is (1) "reasonably necessary for the transaction of business" and (2) does not "unreasonably interfere with the rights of the public"). Defendants' argument that their encroachment is not interfering with the public's use of the sidewalk does not defeat the illegality of the encroachment:

The law has always regarded any unauthorized continuous obstruction of a public highway as a nuisance *per se*. (Per *DENIO*, *Ch. J.*, 14 N.Y. 506). The general principle is settled, that any obstruction of a public highway, for an unreasonable length of time, however lawful the business which is sought to be prosecuted, is indictable as a public nuisance, *although room enough might still be left for the accommodation of the public*. The public are entitled to the use and enjoyment of the whole of the highway, and no individual can appropriate a portion of it to his own exclusive use, and shield himself from responsibility to the public by saying that enough is still left for the accommodation of others (9 Wend. 571, *supra*).

*Moore v. Jackson*, 1875 N.Y. Misc. LEXIS 16, \*4 (Sup. Ct. 1875); *Id.* at \*7 ("the courts have inflexibly adhered to the strict and only safe rule of the common law, that the public rights are to be jealously guarded and not infringed upon" lest "the public would eventually find that private enterprise had usurped the prerogative and rights which should never have been impaired").

With respect to the City's claim under City Code § 111-38, entitled "Encroachments onto public property restricted," Defendants arguments against liability are based on a misreading of the statutory language.

The first half of § 111-38 states that "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[.]" (emphasis added). Section 111-40, provides for progressive statutory "violation penalties" of \$2,500 and \$5,000 "for any and every violation of the provisions of this Chapter or the State Code." Defendants' fence/gate and storage on East Street which encroaches 10-feet into East Street constitutes a "structure" that encroaches on "public property," and thus is a violation of Chapter 111, for which penalties may be imposed under § 111-40.

In arguing against the imposition of liability under § 111-38, Defendants focus on the second half of § 111-38, which provides "and the owner of any building, any part 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 ..." *See* Def. Mem. at 16-17. This portion of § 111-38 effectively creates a statutory indemnification obligation running from owners of encroaching "buildings" to the City where third parties are injured by the encroachment. *See e.g. Kaplan v. New York*, 269 A.D. 856 (2d Dep't 1945) (city asserting cross-claim against encroaching homeowner for damage to injured plaintiff). But the City is not seeking to hold Defendants liable for "damages to a third party or property" under § 111-38. The City is seeking remedies of statutory violation penalties, as well as injunctive relief to remedy the encroachments. Accordingly, Defendants arguments that its encroachments are not "buildings" under the second provision of § 111-38 is misplaced. Indeed, Defendants' interpretation of § 111-

38 is at odds with principles of statutory construction, as it reads the words “or other structure” out of the law. *See Matter of State of N.Y. v. James F.*, 50 Misc. 3d 690, 699-700 (Sup. Ct. N.Y. Cnty. Nov. 16, 2015) (“It is a fundamental principle of statutory construction, of course, that a court must assume every word in a statute has a meaning and was inserted for a purpose.”) (citing *Matter of Bliss v Bliss*, 66 N.Y.2d 382 (1985); *Direen Operating Corp. v State Tax Com.*, 46 A.D.2d 191 (3d Dep’t 1974); McKinney’s Cons Laws of NY, Book 1, Statutes § 231).

Additionally, Defendants citation to the definition of “structure” in Chapter 331-4, which provides definitions solely for “the purpose of this chapter” is, by its own terms, not applicable to Chapter 111.

Defendants’ other procedural arguments should be rejected. First Defendants’ cite no authority for the proposition that the November 2015 Notice to Remove was materially defective because the City official who signed the notice was the Commissioner of Public Works instead of the City Building Official. Defendants do not dispute that the City has the authority to issue notices of violation and removal of encroachments. As noted in the letter, the Commissioner of Public Works is charged with operation and maintenance of public streets. Section 281-26 of the City Code authorizes the Commissioner of Public Works “to remove or direct the removal of any vehicle, article or thing which may encumber or obstruct any street or public place within the City.”

With respect to Defendants’ belated argument as to this court’s jurisdiction, Defendants fail to cite any authority that the City Court has exclusive jurisdiction over claims for a violation of City Code. Rather, the Supreme Court has unlimited civil jurisdiction and “has the power to hear a case regardless of whether it could have been brought in a different court.” *238-240 7th Ave. Corp. v. Lizcano*, 70 Misc. 3d 1219(A) (Sup. Ct. N.Y. Cnty. Mar. 1, 2021) (citing NY Const,

art VI, § 1). Accordingly, Defendants' belated argument that an encroachment claim should be restarted in City Court should be rejected. Finally, as noted above, the City's encroachment claim is not based solely on City Code § 111-38, but also on the common law and the City's duty to keep the public street and property free of encroachments.

Accordingly, Defendants fail to establish entitlement to summary judgment on the City's sixth cause of action based on encroachments.

### POINT III

#### **MARIA LAROCCA IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE SIXTH CAUSE OF ACTION**

While generally, “a member of a limited liability company ‘cannot be held liable for the company’s obligations by virtue of his [or her] status as a member thereof,’” a member can be individually liable where the plaintiff shows that the limited liability company “was dominated [by the owners] as to the transaction attacked and that such domination . . . resulted in wrongful . . . consequences.” *Matias v. Mondo Props. LLC*, 43 A.D.3d 367, (1st Dep’t 2007); *see also DiMauro v. United LLC*, 2013 N.Y. Misc. LEXIS 6718, \*11 (Sup. Ct. Westchester Cnty. Jan. 8, 2013).

Here, Flavio LaRocca and Maria LaRocca owned 436 Fifth Avenue in their individual capacities from 2002 through 2008, during which time the cited encroachments existed and during were apparent on the property surveys provided at the time of purchase. Response to SMF at ¶¶3, 50, 135-136. In 2008, the LaRocca’s transferred ownership of 436 Fifth Avenue to defendant FMLR Realty Management LLC (“FMLR LLC”). Flavio and Maria are the only members of FMLR, LLC; they are also the only shareholders of defendant Flavio LaRocca & Sons Inc (“LaRocca, Inc.”), with Maria LaRocca owning a majority share. Response to SMF at ¶128. Maria LaRocca is the Vice President of LaRocca, Inc., and manages the office, including all day-to-day

operations. *Id.* Including Flavio and Maria LaRocca, LaRocca Inc. has just five employees. Doc. No. 136 (City Ex. 22 (Maria LaRocca Dep.)) at 20:8-21:16. Thus, it is undisputed that Flavio LaRocca and Maria LaRocca dominate the operation of FMLR LLC and LaRocca Inc.

Maria LaRocca has been aware of the encroachment onto East Street, yet has taken no action to remedy it. Indeed, it was Maria LaRocca who, in 2016, reached out to surveyor Eliot Senor, who had completed a survey for the LaRoccas in 2009. Mr. Senor's company responded in 2016 that "the fence is approximately 10 feet on the outside of the property line as indicated on our original field sketch." Response to SMF at ¶68; Doc. No. 136 (City Ex. 22 (Maria Dep.)) at 156:2-23. Maria LaRocca understood that Senor was "saying that the fence is approximately ten feet outside the property line" *id.* at 156:24-157:5, yet Maria LaRocca has not caused FMLR LLC or LaRocca Inc. to remove the encroachment or file a permit application with the City for the encroachment. Accordingly, there are sufficient triable issues of fact as to Maria LaRocca's domination of the LLC and corporate defendants, and her contribution to the encroachment by those defendants to rebut Defendants' arguments as to summary judgment for Maria LaRocca as to the City's sixth cause of action. The City withdraws its first through fifth causes of action as to Maria LaRocca in her individual capacity.

### **Conclusion**

For the foregoing reasons, 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: \_\_\_\_\_

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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 memorandum of law in opposition was prepared using a proportionally spaced typeface as follows:

*Specifications:*

Name of typeface: Times New Roman

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*Word Count:* The total number of words in this memorandum of law, inclusive of point headings and footnotes if applicable, and exclusive of the pages containing the caption and signature block is 6983 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



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Our File No. 07367.00101

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

----- x  
CITY OF NEW ROCHELLE

Index No. 54190/2016

Plaintiff,

- against -

**Defendants' Response to  
Statement of Material Facts  
Under 22 NYCRR 202.8-g**

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

KATHERINE ZALANTIS an attorney duly licensed to practice law in the State of New York affirms under penalty of perjury as follows herein. I am a member of the firm of Silverberg Zalantis LLC, attorneys for the Defendants Flavio La Rocca (“Flavio”), Maria La Rocca (“Maria”), Flavio La Rocca & Sons, Inc. a.k.a F. Larocca & Sons, Inc. (“F. LaRocca & Sons”) and FMLR Realty Management LLC (“FMLR LLC”; Maria, Flavio, F. Larocca & Sons and FMLR LLC shall collectively be known as “Defendants”) and I submit this Response to the City’s Statement of Material Facts under New York Court Rules § 202.8-g with the City’s paragraphs copied for ease of reference and then the response as follows:

1. 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. Ex. 7 (Flavio Dep.) at 12:22-13:8; Ex. 19 (Interrogatory Responses) at p. 7, No. 5; Ex. 22 (Maria LaRocca Dep.) at 15:23-17:10.<sup>1</sup> 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

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<sup>1</sup> All exhibits referenced herein are attached to the accompanying Affirmation of Peter A. Meisels, dated May 31, 2022.

masonry construction for residential and light commercial properties. Ex. 7 (Flavio Dep.) at 15:11-23; Ex. 19 (Interrogatory Responses) at p. 7, No. 5; Ex. 22 (Maria LaRocca Dep.) at 14:17-15:7. Flavio LaRocca is the President of LaRocca Inc., and Maria LaRocca is the Vice President of LaRocca Inc. Ex. 19 (Interrogatory Responses) at p. 7, No. 5.

**Deny** that Defendants Flavio LaRocca and Maria LaRocca are the owners of “several businesses” that operate in New Rochelle as they are the shareholders/owners of LaRocca Inc. that operates in New Rochelle. They are also members of FMLR Realty Management LLC, which is the owner of 436 Fifth Avenue.

2. LaRocca Inc. has a primary place of business of 71 Potter Avenue, New Rochelle. Ex. 22 (Maria LaRocca Dep.) at 15:13-16. Maria LaRocca manages the office of LaRocca Inc., including the performance of all bookkeeping, payroll, insurance, and day-to-day operations. Ex. 22 (Maria LaRocca Dep.) at 19:8-18. LaRocca Inc. uses property located at 436 Fifth Avenue, New Rochelle, New York, as a contractor’s yard to store its equipment and vehicles. Ex. 7 (Flavio Dep.) at 17:7-12

**Admit.**

### **The Properties at Issue**

3. In September 2002, Defendants Flavio LaRocca and Maria LaRocca purchased property located at 436 Fifth Avenue, New Rochelle, New York, from John and Rose Maffei. Ex. 7 (Flavio Dep.) at 44:11-45:23; Ex. H (2002 Deed). In a deed recorded March 18, 2008, Flavio and Maria LaRocca transferred ownership of 436 Fifth Avenue to their Limited Liability Company, FMLR Management LLC. Ex. I (2008 Deed); Ex. 22 (Maria LaRocca Dep.) at 25:4-15, 28:4-16.

**Admit.**

4. 436 Fifth Avenue is located at the corner of Fifth Avenue and East Street. Ex. 6 (2014 Survey); Ex. 36 (Aerial); 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. Ex. 6 (2014 Survey); Ex. 36; Ex. 8 (2002 Deed) at Schedule A (describing an area of land running along “the westerly side of East Street” and the “northerly side of Fifth Avenue”).

**Admit.**

5. The eastern border of East Street abuts Flowers Park, also known as City Park, a City-owned park. Ex. 6 (2014 Survey); Ex. 7 (Flavio Dep.) at 110:15-111:10 (the Parcel is off of East Street on Flowers Park property); Ex. 4 (2022 Title Report) (Property located on eastern side of East Street is owned by the City of New Rochelle); Ex. 44 (park deed) (conveying land at the intersection of “the easterly line of East Street with the northerly line of 5<sup>th</sup> Avenue” to the City).

**Admit.**

6. Originally, East Street and several other streets were created and laid out on a subdivision map entitled “Fifth Avenue Heights” dated April 1907 and filed in the Register’s Office of Westchester County (now County Clerk’s Office, Division of Land Records) on June 7, 1907 as Map No. 1728. Ex. 4 (2022 Title Report) at p.1.

**Admit**, but see also, the 1907 Filed Subdivision Map (attached as Defendants’ Opp. Ex. (“DOEx.”) “1”). 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 DOEx. “1”). Further, the 1907 Subdivision Map shows 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 DOEx. “1”).

7. 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. Ex. 4 (2022 Title Report) at p.1; Ex. 39 (certified 1914 deed).

**Deny.** Whether the City acquired title to East Street is a question of law and as set forth in Defendants’ Memoranda of Law in Opposition submitted herewith (“Defendants’ Opp. MOL”), mere acceptance by the City of a deed of a “gift” of public streets is insufficient as a matter of law to convey title in East Street to the City.

8. 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. Ex. 4 (2022 Title Report) at p.1; Ex. 5 (2015 Title Report) at PLTF062-63 (Deed); Ex. 39 (certified 1914 deed).

**Deny.** At its June 2, 1914 meeting, the City Council adopted a resolution (“1914 Resolution” at DOEx. “2” pp. 186-187) accepting only five of the seven streets listed in the 1914 Deed and the City did not accept East Street. Therefore, East Street remains a private street as a matter of law. *See* Defendants’ Opp. MOL

9. The 1914 deed provides:

[T]he party of the first part [Hadert Realty Company] . . . does hereby remise, release and forever quit-claims unto the said party of the second part [City of New Rochelle], its successors and assigns forever, ALL the right, title, interest and easement of the said party of the first part, of, in and to all those certain lots, pieces or parcels of land, situate, lying and being in the City of NEW ROCHELLE, Westchester County, New York, known and distinguished as Weeks Place, Pine Brook Road, Crest View Street, Chatsworth Place, Ashland Street, East Place and East Street, upon a certain map entitled “Fifth Avenue Heights, in the City of New Rochelle, Westchester County, New York” L.E. Van Etten, Civil Engineer, April 1907, which map has been duly filed in the office of the Register of Westchester

County. TOGETHER with the right to the party of the second part, 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, together with the right to the party of the second party, its successors or assigns, to repair said streets and avenues as there shall be occasion. . . .TO HAVE AND TO HOLD the above granted premises unto the said party of the second part, its successors and assigns forever. . . .

Ex. E at PLTF063 (1914 Deed) (emphasis added); Ex. 39 (certified 1914 deed).

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

10. The deed does not contain a provision for reentry on the land. Ex. E at PLTF063 (1914 Deed); Ex. 39 (certified 1914 deed).

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

11. A title search of East Street conducted by First American Title Insurance Company in 2022 shows that the City has owned East Street continuously since 1914 and that no part of East Street has ever been conveyed to any of the owners of property abutting East Street. Ex. 4 (2022 Title Report) at p.1-2.

**Deny** since mere acceptance of a deed is not sufficient to convey title and the City never adopted a resolution accepting East Street as required under common law and statutory law, the City did not acquire title to East Street and East Street remains a private street as a matter of law. *See* Defendants' Opp. MOL

12. In order to be accepted as a city street, a street must comply with municipal requirements. *See generally* New Rochelle City Code § 281-17 ("No street shall be accepted by the City unless said street is completed with all curbs, sidewalks, lights, sewer system, drain system and monuments or as per the requirements of the Commissioner of Public Works."); §281-20 (requirements for construction of street).

**Deny** that New Rochelle City Code § 281-17 governs a city's acceptance of streets on a filed subdivision map, which instead, is governed by New York General City Law § 34 (see Defendants' Opp. MOL), but **admit** the statutory language of City Code § 281-17, which provision was adopted in 1988.

13. Subsequently, at a June 2, 1914 meeting of the New Rochelle City Council, the Clerk read a communication from the Assistant Corporation Counsel which stated, *inter alia*, "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 the 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 it is." Ex. 27 (Minutes) at PLTF120.

**Deny** the City's timing implication (indicated by the its usage of the word "subsequently") as City Code § 281-17 was enacted in 1988 and long after the June 2, 1914 meeting, but **admit** that the City Council's June 2, 1914 meeting minutes (DOEx. "2" 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

(see DOEx. "2" at p. 179).

14. At the June 1914 City Council meeting, the Council passed a resolution accepting streets within Fifth Avenue Heights which were "properly monumented and are fifty feet in width" as public streets. Ex. 27 (Minutes) at PLTF124. East Street, which was not fifty feet in width, was not accepted as a public street, but remained a public right of way. See Ex. 27 (Minutes) at PLTF124; Ex. 40 (Moran Aff.) at ¶¶2-4; Ex. 39 (deed).

**Deny** as East Street was not accepted by the City Council in 1914 or thereafter, East Street remains a private street as matter of law (*see* Defendants' Opp. MOL). The City Council did not follow the Assistant Corporation Counsel's recommendation to accept East Street (*see infra*). Specifically, in its 1914 Resolution, the City Council accepted only five of the seven streets listed in the 1914 Deed as follows:

On motion of Councilman Valentine, seconded by Councilman Inbglis 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).

(DOEX. "2", pp. 186-187 (*emphasis added*)).

It is undisputed that the City never issued a resolution accepting East Street and never accepted East Street. The City's then Deputy Commissioner and current Commissioner of Development and Building Official Paul Vacca testified at deposition in this action as follows:

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* City's Ex. "26", p. 37 (Vacca Depo)).

15. Ownership of East Street was conveyed to the City by Hadert Realty Co. in the 1914 deed as a public right of way. Ex. E at PLTF062-063 (1914 Deed); 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. Ex. 40 (Moran Aff.) ¶¶2-5.

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

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

### **Defendants' Encroachment on East Street**

16. As part of his work with LaRocca, Inc., Flavio LaRocca reads and consults property surveys. Ex. 7 (Flavio Dep.) at 37:7-38:2.

#### **Admit.**

17. 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"). Ex. 7 (Flavio Dep.) at 45:24-46:8, 47:14-48:19 (2000 Survey is a survey Mr. LaRocca reviewed prior to purchasing 436 Fifth Avenue).

**Admit** that although Mr. LaRocca testified that he reviewed a 2000 survey prior to purchasing 436 Fifth Avenue, this 2000 survey was actually a 2000 as-built plan of the prior owners' rip-rap (rock wall) improvement to the 436 Fifth Avenue property, which 2000 as-built plan was filed with the City and produced by the City in discovery ("2000 As-Built" at **DOEx. "3"**).

18. 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. Ex. 7 (Flavio Dep.) at 46:19-25 (testifying that "[t]he fencing was in East Street."), 48:6-49:3; Ex. 10 (2000 Survey showing "sliding gate" located in East Street, over 10 feet east of

property line for 436 Fifth Avenue); Ex. 24 (Senor Dep.) at 36:25-38:25 (testifying that 2000 survey shows a 10-foot encroachment).

**Admit** that the 2000 As-Built (DOEx. “3”) depicted the contractor’s yard’s fencing, gates and other portions of the Property extending onto East Street. However, the City still issued permits and certificates of occupancy based upon the 2000 As-Built that depicted the contractor’s yard’s fencing, gates and other portions encroaching onto East Street.

Specifically, after approving the 436 Fifth Avenue’s prior owners’ (the Maffeis) proposed plan to construct a rip rap slope (or rock wall) (see stamped approved plan dated August 3, 2000 entitled “proposed riprap” at **DOEx. “4”**), the City issued the Maffeis Building Permit Number B200387 dated August 3, 2000 (at **DOEx. “5”**) for this commercial renovation permit (see also City’s Ex. “26”, pp. 56-57 (Vacca Depo)) and then approved an amended plan that depicted the rip rap slope along only approximately two-thirds of the rear of the property instead of along the entire rear as per the original plan (see stamped approved amended plan dated January 2, 2001 at **DOEx “6”**; see also City’s Ex. “26” p.60, 1.1-10 (Vacca Depo)). Included in Building Permit No. B200387 (at **DOEx. “5”**) was the condition to “[s]ubmit as-built survey, prepared by a Licensed Surveyor, to show compliance with approved plans.”

The City’s Deputy Commissioner of Development and Building Official Paul Vacca explained 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 (City's Ex. "26") at p. 58).

In accordance with the 2000 Building Permit's conditions, the Maffeis submitted the 2000 As-Built (at DOEx. "3") and the City subsequently issued a Certificate of Occupancy on January 16, 2001 (at DOEx. "7"), which Mr. Vacca explained is "a document that closes out the building permit" (Vacca Depo (City's Ex. "26") at p. 61).

In sum, the City accepted the 2000 As-Built and the City issued a certificate of occupancy to 436 Fifth Avenue's prior owners (the Maffeis) on January 16, 2001 even though and in spite of the fact that the 2000 As-Built depicted the encroachment onto East Street (see DOExs. "3" and "7") – which were not installed by Defendants but by their predecessors-in-interest.

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 DOEx. "8").

Further, On May 19, 2003, Defendants obtained a building permit from the City for removal, regrading and excavating at the Property (as DOEx. "9"). 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 (DOEx. "10", p. 1.), which was stamped approved and signed by the City Building Official on May 19, 2003 (at DOEx. "10", p. 2). The City approved the removal of rock outcrop even though the plan depicted the contractor's yard extending onto East Street (DOEx. "3").

19. At the time that Flavio and Maria La Rocca purchased 436 Fifth Avenue, they obtained a title insurance policy from Commonwealth Land Title Insurance Company. Ex. 12 (Title Insurance Policy) at D0001-D0015; Ex. 7 (Flavio Dep.) at 49:5-53:9.

**Admit** and further note that 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 DOEx. "8"), even though and in spite of the fact that the 2000 As-Built (DOEx. "3") depicted the encroachment onto East Street.

20. Even though Flavio LaRocca had reviewed the 2000 Survey prior to purchasing 436 Fifth Avenue and had a copy in his possession, the 2000 Survey was not provided to Commonwealth Title Insurance Company. Ex. 7 (Flavio Dep.) at 49:5-53:9 (reviewed property surveys before purchasing the property) and Ex. 12 (Title Insurance Policy) at D0013 (Commonwealth could not locate an existing survey).

**Deny** as there is no record evidence that the 2000 As-Built, which was filed with the City by the Maffeis and produced by the City in discovery, was in Defendants' possession or control to produce to a title company prior to their purchase of 436 Fifth Avenue.

21. The Commonwealth Title Insurance Policy states that "the policy excepts any state of facts an accurate survey would show. When a survey showing the premises described in Schedule A is received, same will be read into the existing title report. THIS COMPANY IS UNABLE TO LOCATE AN EXISTING SURVEY OF THE PREMISES DESCRIBED IN SCHEDULE 'A'." Ex. 12 (Title Insurance Policy) at D0013.

**Admit** the language of the title policy, which speaks for itself.

22. LaRocca, Inc. utilizes numerous trucks and other machinery and equipment as part of its business. LaRocca Inc. owns about 10 trucks, including 5 dump trucks, as well as pick-up trucks and vans, and three trailers. Ex. 7 (Flavio Dep.) at 22:23-24:24. LaRocca Inc. also uses tractors, skid-skeeters (like a Bobcat four-wheeled, with a bucket on front), mini excavators, payloaders, compactors, and smaller equipment, like roto-tillers. Ex. 7 (Flavio Dep.) at 24:25-25:17, 26:22-27:11. LaRocca Inc. stores its trucks and equipment at 69-71 Potter Avenue and at 436 Fifth Avenue. At times, it has also stored trucks on the property of Guglielmo Landscaping, one of Mr. LaRocca's neighbor's on East Street. Ex. 7 (Flavio Dep.) at 17:25-19:23.

**Admit.**

23. 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. Ex. 4 (Title Report); Ex. 44 (park deed).

**Admit** that Flowers Park is a municipal park.

24. The La Roccas knew that the property on the eastern side of East Street was owned by the City of New Rochelle. *See e.g.*, Ex. 7 (Flavio Dep.) at 110-111; Ex. 22 (Maria LaRocca Dep.) at 63:16-20 (LaRoccas asked the City if they could purchase the skate park parcel); Ex. 15 (March 2003 Letter); Ex. 16 (2003 Letters to City).

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

25. Flavio LaRocca wanted to use the land directly across East Street from 436 Fifth Avenue for his business. At the time that Flavio and Maria LaRocca purchased 436 Fifth Avenue, the property at the corner of Fifth Avenue and East Street, immediately across East Street from 436 Fifth Avenue, was cleared and was being used by Persico Construction as a staging area for construction projects that were underway for the City. Ex. 7 (Flavio LaRocca) at 87:2-25, 89:10-18; Ex. 15 (2003 Strome Letter).

**Deny** as Flavio LaRocca testified that at the time Defendants purchased 436 Fifth Avenue, the “parcel as defined in the complaint” (and which area Mr. LaRocca circled in yellow at his deposition on City’s Ex. “13”) (see City’s Ex. “7” (Flavio Depo) at 105:4-11) was “more wooded” in that there was “more vegetation in the area, more trees, shrubbery and vegetation in that area,” but Persico Construction subsequently came in, “cleared out that area,” placed gravel and wood chips on the parcel (see City’s Ex. “7” (Flavio Depo) at 88:15-89:21; see also, 61:9:23)) and used the Parcel as a parking area for their employees and the adjacent area (where the skate park is currently located) as a staging area (see City’s Ex. “7” (Flavio Depo) at p. 108-109).

26. On March 6, 2003, Flavio inquired of the City as to whether he could rent the area across East Street following Persico Construction’s use. Ex. 15. On March 17, 2003, City Manager Charles B. Strome III informed Flavio LaRocca that Persico’s use of the property was intended to be temporary and the City intended to be turn the space into additional parking for the park; thus, it would not be available to lease. Ex. 7 (Flavio LaRocca) at 87:2-88:6; Ex. 15 (2003 Strome Letter).

**Admit** that the City Manager’s March 17, 2003 letter provides that Defendants inquired whether they could rent or lease “City-owned property on Fifth Avenue” that “is currently

being used by Persico Construction as a staging area” and that the City advised that it intended to turn the space into additional park parking after Persico Construction vacated the site (City’s Ex. “15”).

27. After Persico Construction vacated the property across East Street, the City turned that area into a public skate park, the Sidney E. Frank Skate Park. Ex. 36 (Aerial); Ex. 7 (Flavio Dep.) at 60:14-61:20.

**Deny** as this is only partially accurate since only a portion of the area on the other side of East Street was turned into a skate park. The area adjacent to what is now the skate park (i.e. the Parcel, which Flavio circled in yellow at his deposition on City’s Ex. “13”), which Persico previously cleared and applied gravel to, remained a cleared open space with gravel (City’s Ex. 7 (Flavio Depo) at 85:2-12; 107:12-109:12); and City’s Ex. 36 (Aerial).

28. LaRocca, Inc. sometimes parks its trucks in East Street in front of the yard at 436 Fifth Avenue. Ex. 7 (Flavio Dep.) at 78:14-79:2; *see also* Ex. 22 (Maria LaRocca Dep.) at 64:14-65:8; Ex. 20 (photo of LaRocca pick-up in East Street). The City has not given LaRocca Inc. permission to park its vehicles in East Street. Ex. 22 (Maria LaRocca Dep.) at 65:15-19.

**Admit** that while the City has not given LaRocca Inc. permission to park vehicles on East Street, no permission from the City is needed to park on a private street as a matter of law (*see* Defendants’ Opp. MOL).

29. In a letter dated June 22, 2009 and signed by Paul Vacca, the Deputy Commissioner of Development, and Jeffrey C. Coleman, then-Commissioner of Public Works, the City notified Mr. LaRocca that it had come to the City’s attention “that the legal non-confirming contractor’s yard at [436 Fifth Avenue] is encroaching on City property, specifically, the public right of way

along East Street.” Ex. 17 (6/22/09 letter); Ex. 7 (Flavio Dep.) at 90:24-91:9; Ex. 26 (Vacca Dep.) at 14:24-15:4.

**Admit** the text of the June 22, 2009 letter, which speaks for itself (City’s Ex. “17”).

30. According to Flavio LaRocca, following receipt of the June 22, 2009 letter, he and his wife had a meeting with Paul Vacca and Jeffrey Coleman. Ex. 7 (Flavio Dep.) at 92:13-93:4. At the meeting, the City did not give the LaRoccas permission to encroach on East Street. Ex. 7 (Flavio Dep.) at 93:17-25. Rather, the issue was to be discussed further, after the LaRoccas obtained a survey. *Id.*

**Admit.**

31. Flavio LaRocca hired Gabriel E. Senior, P.C., a licensed land surveying company, to stake out the eastern side of his property at 436 Fifth Avenue, abutting East Street. Ex. 7 (Flavio Dep.) at 93:22-94:18; Ex. 25 (Senior Invoice – Flavio Ex. 10); Ex. 24 (Senior Dep.) at 16:8-23, 29:4-9; 32:17-20.

**Admit.**

32. Eliot Senior is the owner and president of Gabriel E. Senior, P.C. Ex. 24 (Senior Dep.) at 14:21-15:5. Mr. Senior is a New York State licensed land surveyor and a licensed engineer. Ex. 24 (Senior Dep.) at 16:23-18:25. He is a member of the New York State Association of Professional Land Surveyors, among other professional associations. Ex. 24 (Senior Dep.) at 19:22-20:15.

**Admit.**

33. Gabriel E. Senior, P.C. performed a stake out of the eastern boundary of 436 Fifth Avenue in or about September of 2009. Ex. 24 (Senior Dep.) at 29:17-20; Ex. 25 (Senior File) at p.9. Mr. Senior reviewed all of the measurements taken at the property. Mr. Senior also reviewed

the 2000 Survey, among other documents. Ex. 24 (Senor Dep.) at 33:16-25, 35:23-36:12; and Ex. 25 (Senor File) at Page 4.

**Admit**, except that the only document Gabriel E. Senor, P.C. produced to Defendants in 2009 was the “stake out sketch” dated September 10, 2009 (see **DOEx. “11”**). Although 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 **DOEx. “12”**, at page 10 of 13; City’s Ex. “25” (Senor Depo.), p. 79-80), based upon what was provided to Defendants in 2009 – namely, the stake out sketch (at **DOEx. “11”** and City’s Ex. “25” (Senor Depo.), p. 85) – it was impossible for Defendants to conclude that the contractor’s yard’s fencing along the front property line encroached on East Street (City’s Ex. “25” (Senor Depo.), 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.

(City’s Ex. “25” (Senor Depo.), p. 81).

34. In Mr. Senor’s professional opinion, the measurements taken at 436 Fifth Avenue were sufficient to mark the property line. Ex. 24 (Senor Dep.) at 43:3-25.

**Admit** that while Mr. Senor testified to the sufficiency of the internal measurements taken by his company that were never produced to Defendants prior to this litigation (*see supra* response to ¶ 33), Mr. Senor 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 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 “conc[rete]

base” located one-foot from the intersection of the upper property line and East Street (Senor Depo. (City’s Ex. “25” (Senor Depo.), p. 47-49).

35. At his deposition, Flavio LaRocca testified that the 2009 stake out showed that the fence/gate used by 436 Fifth Avenue only encroached into East Street by “10 inches.” Ex. 7 (Flavio Dep.) at 99:3-18.

**Deny** as Flavio testified that what he believed to be the surveyor marking done in 2009 (and not the stake out sketch), which was done in orange-pink marking on the concrete wall (see pictures of same attached as **DOEx. “13”**), indicated that the contractor’s yard fencing encroached only approximately 10 inches onto East Street over the property line (City’s Ex. “7” (Flavio Depo), p. 98-99).

36. In fact, the stake out performed by Gabriel E. Senor, PC showed that Defendants’ chain link fence/sliding gate was over 10 feet past the boundary line of 436 Fifth Avenue into East Street. Ex. 24 Senor Dep. at 55:11-57:12. These findings were consistent with what the 2000 Survey showed, *i.e.*, that the fence/gate was encroaching into East Street by over 10 feet. Ex. 24 (Senor Dep.) at 36:25-38:25; Ex. 10 (2000 Survey); Ex. 23 (7/6/16 Email from LaRocca to Gabriel Senor PC); Ex. 24 (Senor Dep.) at 71:11-72:25 (statement that fence is approximately 10 feet outside the property line is accurate).

**Deny** as the stake out sketch (DOEx. “11”) does not depict that the fence/gate encroaching into East Street by over 10 feet as Mr. Senor himself testified at his deposition that it would be impossible to ascertain that the fencing encroached on East Street from the stake out sketch (DOEx. “11”) provided to Defendants in 2009:

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.

(City's Ex. "25" (Senor Depo.), p. 81).

\* \* \* \* \*

Q. Okay. So in that [July 6, 2016] 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.

(City's Ex. "25" (Senor Depo.), p. 82-83).

37. The findings of the stake out were conveyed to Defendants in approximately September or early October 2009. Ex. 24 (Senor Dep.) at 60:24-62:21. Mr. Senor *never* told the LaRoccas that their fence/gate was only encroaching into East Street by mere inches. Ex. 24 (Senor Dep.) at 64:19-65:2. Mr. Senor testified that both the 2000 Survey and his own stake out showed that the LaRoccas' fence was encroaching into East Street by over 10 feet. Ex. 24 (Senor Dep.) at 36:25-38:25 (2000 Survey shows chain link fence associated with 436 Fifth Avenue is 10-plus feet to the east of the property line).

**Deny** that any findings by Gabriel Senor P.C. relative to an encroachment onto East Street were conveyed to Defendants in 2009 as the only document provided to Defendants in 2009 was the stake out sketch dated September 10, 2009 (DOEx. "11"), which does not depict any encroachments on East Street as testified to by Mr. Senor (City's Ex. "25" (Senor Depo.), p. 81; 82-83; see response to ¶ 36).

38. Licensed land surveyor Ward Carpenter prepared a survey map for the City dated December 8, 2014 (the "2014 Survey") which includes property along East Street in New Rochelle, including 436 Fifth Avenue. Ex. 6. During his deposition, Flavio LaRocca reviewed the 2014 Survey and used pink highlighter to mark an area outside the boundary of 436 Fifth

Avenue to LaRocca Inc.'s fence in East Street with diagonal stripes. Ex. 7 (Flavio Dep.) at 100:14-101:8, 102:4-104:4; Ex. 13 (2014 Survey with LaRocca Markings). LaRocca Inc. uses the entirety of the pink shaded area as its own property; LaRocca Inc. has placed metal and wood shelving in the pink area, which it uses to store tools, cones, silt fencing, wheelbarrows, hand tools, shovels, rakes, and other tools. Ex. 7 (Flavio Dep.) at 102:20-103:7; Ex. 13 (2014 Survey with LaRocca Markings).

**Admit** that Ward Carpenter prepared the 2014 Survey (City's Ex. "6"), which depicts various properties including the "Parcel" (as referenced in the City's complaint) and various encroachments on East Street from various abutting properties; and further admit that Flavio was requested to highlight the 2014 Survey in various colors at his deposition (see City's Ex. "13").

39. On November 18, 2015, the City issued a Notice to Remove to Defendant FMLR Management, LLC regarding the encroachment of property at 436 Fifth Avenue into city property. Specifically, in a notice dated November 18, 2015, signed by Alexander Tergis, then-Commissioner of Public Works for the City of New Rochelle, the City notified Defendants that the City had recently completed a survey showing 436 Fifth Avenue and the survey revealed that Defendants were encroaching on City property. Ex. 18 (2015 Tergis Letter). The letter identified the following, non-exhaustive list of items as encroaching or intruding on and over City owned real property: "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." Ex. 18 (2015 Tergis Letter).

**Admit** the text of the 2016 Tergis Letter (City's Ex. 18), which speaks for itself.

40. After receiving the November 18, 2015 letter, the LaRoccas contacted an attorney. Ex. 7 (Flavio Dep.) at 173:10-174:16. They also reached out to Gabriel E. Senor, P.C. again. Ex. 23 (July 2016 email).

**Admit.**

41. On July 6, 2016, the LaRocca's sent Gabriel E. Senor, P.C. a copy of an April 13, 2016 survey prepared by Ward Carpenter, along with a 1986 survey, Senor's 2009 stake out drawing, and the property description from their deed. Ex. 24 (Senor Dep.) at 68:24-69:13; Ex. 23 (7/6/16 Email from LaRocca to Gabriel Senor PC with attachments). Maria LaRocca did not include the 2000 Survey in her email to Gabriel E. Senor, PC. Ex. 23.

**Admit.**

42. Mr. Senor reviewed the 2016 Ward Carpenter Survey. Ex. 24 (Senor Dep) at 57:13-22; Ex. 25 (Senor File) at p.11. The 2016 survey shows that the Defendants' fence/gate is past the eastern border of Defendants' property at 436 Fifth Avenue. Ex. 24 (Senor Dep) at 59:13-16; Ex. 25 (Senor File) at p.11. The 2016 survey also shows that there are jersey barriers located to the east of the fence/gate, encroaching even farther into East Street. Ex. 25 (Senor File) at p.11.

**Admit.**

43. On July 6, 2016, Gabriel E. Senor, P.C. responded to Maria LaRocca, by e-mail, informing her "The fence is aprox. 10 FT on the outside the property line as indicated on our original field sketch." Ex. 23 (7/6/16 Email from LaRocca to Gabriel Senor PC); Ex. 24 (Senor Dep.) at 71:11-72:25 (statement that fence is approximately 10 feet outside the property line is accurate). Maria LaRocca received this email and understood that Gabriel Senor PC was stating "that the fence is approximately ten feet outside the property line." Ex. 22 (Maria LaRocca Dep.) at 156:2-157:5.

**Admit** that while Mr. Senor advised of this via email dated July 6, 2016, he conceded at deposition 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 [July 6, 2016] 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.

(City's Ex. "25" (Senor Depo.), p. 82-83).

44. To date, the LaRoccas have not removed the encroachments into East Street (i.e. the fence with gates, shelving, etc.). Ex. 40 (Moran Aff.) at ¶5; Ex. 7 (Flavio Dep.) at 172:20-173:9. The LaRoccas have declined to apply for a license for the use of any part of East Street.

**Admit** that Defendants have not removed the encroachments during the pendency of this litigation as there is no requirement to remove said encroachments and no requirement to apply for a license from the City to use a private road. *See* Defendants' Opp. MOL.

#### **Trespass on the Flowers Park "Parcel"**

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

**Admit** the text of City of New Rochelle Code § 224-1, which provision speaks for itself.

46. In the Complaint, the City alleged that Flavio LaRocca and LaRocca, Inc. employees entered an area of land adjacent to East Street, which the Complaint referred to as the

“Parcel” and removed trees from the Parcel and began to prepare it for use as a parking lot for their personal use. Ex. 1 (Complaint).

**Admit** that the City’s Complaint with only an attorney’s verification (City’s Ex. “1”) makes such allegations but no evidence has been produced to support these claims.

47. 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. 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. Ex. 7 (Flavio Dep.) at 110:21-111:10. Flavio LaRocca also marked the Guglielmo property where Larocca, Inc. formerly stored some trucks with a green X. Ex. 7 (Flavio Dep.) at 104:21-105:11; Ex. 13 (2014 Survey with LaRocca Markings).

**Admit.**

48. Flowers Park abuts the eastern side of East Street. Ex. 7 (Flavio Dep.) at 111:5-10; Exhibit 6 (December 8, 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. Ex. 7 (Flavio Dep.) at 110:21-111:10; Exhibit 6 (December 8, 2014 Survey); 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); Ex. 36 (Aerial)

**Deny** that the “Parcel’ is a certain number of feet off East Street” as: (a) the City’s 2014 Survey depicts that there is no clear delineation through curbing or otherwise between East Street and the City’s park borders and the asphalt or macadam street surface extends in places onto the City’s property (see City’s Ex. “13”); and (b) the City’s 2022 Survey

produced for the first time in the City's moving papers (City's Ex. "34") of the "Parcel" clearly depicts "irreg[ular] macadam pavement" extending onto the Parcel.

49. In their Interrogatory Responses in this action, the Defendants refer to the Parcel as the "Parking Area." *See* Ex. 19 (Interrogatory Responses).

**Admit.**

50. Prior to May 16, 2015, the Parcel contained trees and undergrowth. Ex. 29 (Cox Dep.) at 38:8-12.

**Deny** as numerous witnesses testified that the Parcel was used as parking area prior to May 16, 2015 (**DOEx. "14"** (Rivera Depo), p. 42-43; 70; 71; City's Ex. "28" (Maya Depo), p. 55; 39-40); City's Ex. "7" (Flavio Depo), p. 86; 105; 133)).

In 2002 or 2003, prior to the construction of the skate park, the Parcel was cleared by Persico Construction to use as a parking area for its employees when Persico Construction was hired by the City to do construction work on the nearby Potter Avenue Bridge (City's Ex. "7" (Flavio Depo), p. 61; 89; 109).

The 2014 Google Earth image of the Parcel – taken long before May 16, 2015 – 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 **DOEx. "15"**).

Defendants averred in its interrogatory responses that parking on the Parcel had existed for years (City's Ex. "19") and Flavio testified that prior to the City installing the black fencing, vehicles used to park on the Parcel (City's Ex. "7" (Flavio Depo)), including vehicles of employees of the businesses along East Street (*Id.* at p. 133).

Mr. Rivera further testified that from the time he first started renting his property on East Street (prior to 2015 (Rivera Depo (DOEx. "14"), p. 6, 7, 10-11)) before he

purchased it in 2016 (Rivera Depo (DOEx. "14"), p. 6) until the City fenced off the Parcel, cars would always park on the Parcel, including before March 2015 – two months prior to when the City claimed Defendants created 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 (the Complaints is attached as City's 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 (DOEx. "14"), 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 (DOEx. "14"), 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 (DOEx. "14"), p. 71).

In reviewing the picture attached to the Complaint from May 16, 2015 (City's Ex. "1" (the Complaint), p. 6 of Exhibit "1" to the Complaint), Mr. Rivera was further able to

identify one of the vehicles (the red truck) as belonging to an employee of PAB Contracting Corp., which same red truck is depicted parked in front of that business on a later date after the black fence was installed (Rivera Depo (DOEx. "14"), p. 72; **DOEx. "16"** (at Bates Nos. D0409; D0410 and D0415 (depicting the red truck and the black fence)).

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 (DOEx. "14"), p. 76).

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 City's Ex. "43") and Mr. Rivera identified the car parked in that area as his car (Rivera Depo (DOEx. "14"), p. 46).

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 (City's Ex. "28), p. 55).

\*\*\*\*\*

Q. We're going back to the last photograph I showed you which is part of Plaintiff's 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 (City's Ex. "28), p. 39-40).

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 of whether the Parcel area (currently fenced in with a black fence) was ever used as parking area prior to May 16, 2015 (City's Ex. "29" (Cox Depo), p. 81). Yet the testimony of Mr. Cox, someone who conceded he has no firsthand knowledge of the use of the Parcel before May 16, 2015, is the only evidence the City can cite for this claim.

51. Shortly before May 16, 2015, the City changed the parking policy at City Park (Flowers Park). Prior to this time, parking at City Park on weekdays was free. The City announced that it would begin charging for parking at City Park. Ex. 29 (Cox Dep.) at 42:24-43:15).

**Deny** as there is no corroboration for Mr. Cox's claim from the City itself and it is not credible given the City issued a letter dated November 25, 2015 advising that the City would be offering free parking at the Flowers Park parking lot without mention of the purported reversal of a decision made approximately 6-months earlier to charge for parking (see City's Ex. "35").

52. Robert Cox is a local journalist in New Rochelle who publishes articles on an online news website, Talk of the Sound. Ex. 29 (Cox Dep.) at 5:17-25.

**Deny** that Mr. Cox is a journalist in the sense of a journalist that reports factual unbiased news, but **admit** he does write stories that he posts on a website called Talk of the Sound.

53. On May 16, 2015, Robert Cox received a telephone call between 8:00am and 9:00am from a concerned resident alerting him to work being done in the area of East Street, New

Rochelle, including the cutting down of trees using chainsaws. Ex. 29 (Cox Dep.) at 7:16-9:13. At approximately 9:15am, Mr. Cox went to East Street to investigate. Ex. 29 (Cox Dep.) at 9:3-4. When he arrived, Mr. Cox did not see chainsaws, but did see large piles of woodchips, trucks, and work; he began video recording the activity. Ex. 29 (Cox. Dep.) at 9:16-11:21; Ex. 30 (“May 16, 2015” video). He filmed for several hours, and then created a composite video of clips taken on May 16, 2015, which he uploaded to YouTube and published on Talk of the Sound. Ex. 29 (Cox Dep.) at 6:6-7:6; 42:6-16 (Cox was present for about 3 hours); Ex. 30 (video).

**Deny** that the person Mr. Cox received the telephone call from was a “concerned resident” as Mr. Cox did not identify the person as such but testified that “the person calling was somebody who had some connection to the area. I’ll just leave it at that.” (City’s Ex. 29 7:25-8:3), but **admit** the remainder of paragraph as being Cox’s testimony.

54. Flavio LaRocca testified that the video is a fair and accurate depiction of the work he did “to rake out the parcel[.]” Ex. 7 (Flavio Dep.) at 156:15-21. All of the individuals seen working on the Parcel in the video are LaRocca Inc. employees. Ex. 28 (Maya Dep.) at 18:12-21, 19:13-22:22.

**Admit** but to clarify Flavio confirmed that the work depicted in the video was a fair and accurate depiction of work performed by LaRocca Inc “from 2012 to approximately 2016 to rake out the Parcel” (City’s Ex. 7 at 156:15-21) and further admit Mr. Maya’s cited testimony.

55. While on East Street on May 15, 2016, Mr. Cox observed people raking out a substance that appeared to be asphalt over the surface of the Parcel, and then using a mini steamroller to pack down the ground. Ex. 29 (Cox Dep.) at 11:4-12. Mr. Cox testified that Flavio LaRocca was present during the work depicted in the video, and that the workers were going back

and forth between the Parcel and 436 Fifth Avenue. Ex. 29 (Cox Dep.) at 9:16-11:21; 14:3-16. After a few hours, the workers had erected a parking lot on the Parcel. Ex. 29 (Cox Dep.) at 42:12-21.

**Deny** the reference to May 15, 2016 (which appears to be a typographical error), but further deny that a parking lot was erected on May 16, 2015 as numerous witnesses testified that that the Parcel was used a parking area prior to May 16, 2015 and there are images that conclusively depict this (see response to ¶ 50).

**Deny** that any new surface material was added to the Parcel as Mr. Maya, who was working at the Parcel and is shown in the video testified 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.

(City's Ex. "28" (Maya Depo.), p. 16).

56. Mr. Cox published multiple articles about the LaRoccas on Talk of the Sound, including a May 26, 2015 article entitled "Who Is Flavio LaRocca Part IV" regarding the activities on the Parcel on May 16, 2015, and which included the composite video recording, as well as photographs. Ex. 29 (Cox Dep.) at 116:17-118:8; Ex. 31 ("Who Is Flavio La Rocca ? – Part VI" Article). The City included six photographs from Talk of the Sound as an exhibit to its Complaint in this matter. Ex. 1 (Complaint with Exhibits).

**Admit** that Mr. Cox published a series of inflammatory articles about Flavio LaRocca and his family and admit that the City's Complaint is based exclusively upon the unsupported claims made by Talk of the Sound.

57. In their Interrogatory responses, Defendants admit that the photographs attached to the Complaint depict the Parcel (which has since been fenced off by the City), that the individuals seen in the photographs working on the Parcel are LaRocca Inc. employees, and that the trucks and equipment seen in the photographs belong to LaRocca Inc. Ex. 19 (Interrogatory Responses) at Response to Request No. 2. For example, the first photograph attached to the Complaint (1(a)) to the Complaint shows Defendants' employees raking out the Parcel. Ex. 1; Ex. 7 (Flavio Dep.) at 121:16-23; Ex. 19. The second photograph attached to the Complaint (1(b)) shows Defendants' employees raking and using a ride-on compactor on the Parcel. Ex. 7 (Flavio Dep.) at 136:6-137:7.

**Admit** that the video and photographs depict Defendants' employees raking and smoothing out the gravel on 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' employees.

58. However, Defendants asserted that the large piles of mulch or woodchips that can be seen on the Parcel were placed on the Parcel by one of the neighboring businesses on East Street (either Benny's Tree Service or PAB Paving) and not by LaRocca Inc. Ex. 19 (Interrogatory Responses) at Response to Request No. 2.

**Admit.**

59. In the articles published on Talk of the Sound, it was reported that the work done on the Parcel included the removal of trees and vegetation. Ex. 29 (Cox Dep.) at 70-71. For example, an article published on November 9, 2015, reported that "On the morning of Saturday May 16<sup>th</sup>, Flavio LaRocca and his employees leveled a stand of trees and greenery on public property, in the area behind Sidney Frank Skate Park. . . . LaRocca 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. 33 (Article) at D0120; Ex. 29 (Cox Dep.) at 70-71.

**Deny** as although Talk of the Sound made these unsupported claims, there is no proof they actually occurred in the record.

First, Mr. Cox claimed in a Talk of the Sound article (titled “Who is Flavio La Rocca? – Part VIII) that “on the morning of Saturday May, 16<sup>th</sup>” 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.” (See City’s Ex. “33”, *emphasis added*).

But at deposition, Mr. Cox admitted that he did not actually observe trees 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.

(City’s Ex. “29” (Cox Depo.), p. 71-72).

Second, first-hand witnesses who were present at the Parcel on May 16, 2015 testified that there were no trees or brush removed. Mr. Maya, who identified himself as the person shown in the video from May 16, 2015 operating the machine (City’s Ex. “28” (Maya Depo.), 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.”

(City's Ex. "28" (Maya Depo.), p. 14). Mr. Maya also testified that he did not do any landscaping work in May of 2015 (City's Ex. "28" (Maya Depo.), p. 12) and while he saw the wood chips on the Parcel, he did not know where they came from (City's Ex. "28" (Maya Depo.), p. 13) as they were placed there when he was not at work (City's Ex. "28" (Maya Depo.), p. 18). 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.

(City's Ex. "28" (Maya Depo.), 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

(City's Ex. "28" (Maya Depo.), p. 47).

Martin Sanchez, who has worked for F. LaRocca & Sons for fifteen years (see deposition transcript of Martin Sanchez taken on May 28, 2021 (DOEx. "17"), p. 7) 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 City's Ex. "43"], do you see that picture?

A. Yes.

Q. I'm talking about the first page of Defendant's GG [attached as City's Ex. "43", 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. (DOEx. "17"), p. 29-30).

Third, as for Talk of the Sound's allegation that LaRocca's crew "dumped broken chunks of toxic asphalt," the undisputed testimony from LaRocca Inc.'s workers was that they were spreading and flattening out 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.

(City's Ex. "28" (Maya Depo.), p. 16).

Further, the City retained D&B Engineers and Architects, PC ("Retained Engineer") to conduct sampling and testing of the asphalt-like 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) (DOEx. "18").

Fourth, although Talk of the Sound claimed LaRocca's crew "piled up the asphalt to create a berm to screen the resulting 'parking lot' from prying eyes at City Park," Mr. Cox testified at deposition that the alleged asphalt "berm" referenced was actually the existing pile of wood chips (Cox Depo (City's Ex. "29"), p. 72-73), which is depicted in

the video (City's Ex. "30") and pictures attached to the Complaint (see Exhibit "1" to Complaint (attached as City's Ex. "1").

60. At his deposition in this matter, Mr. Cox testified that he had personally observed people raking out a substance that appeared to be asphalt over the surface of the Parcel, and then using a mini steamroller to pack down the ground. The report regarding workers removing trees from the Parcel was based on information Mr. Cox received from a confidential source that he would not reveal. Ex. 29 (Cox Dep.) at 70-76.

**Deny** that any trees were removed from the Parcel as set forth above (see response to ¶ 59) and the City cannot rely upon inadmissible evidence – namely, third-hand information allegedly provided by a confidential source to Talk of the Sound.

61. When the City learned of the work being done on the Parcel on May 16, 2015, Mr. Vacca visited the Parcel the same day. Ex. 26 (Vacca Dep.) at 26:17-21, 27:6-21. When he arrived at the Parcel, Mr. Vacca "observed an area that appeared to have been prepped with some subbase material." Ex. 26 (Vacca Dep.) at 27:23-28:2. "Subbase" is a material put down to prepare for a parking area, it can be a mixture of gravel, stone, and sand. Ex. 26 (Vacca Dep.) at 28:6-10.

**Admit** Mr. Vacca's testimony, but the first-hand witnesses testifies that existing gravel was raked and spread (see response to ¶ 58).

62. The City erected a fence around the Parcel to prevent further construction on the Parcel and any use of the Parcel for parking. Ex. 29 (Cox Dep.) at 44:16-45:15; Ex. 26 (Vacca Dep.) at 92:12-20 and Ex. 43 (Vacca Dep. Ex. GG); Ex. 21 (Photos D0402-405); Ex. 34 (2022 Survey); Ex. 40 (Moran Aff.) at ¶6.

**Admit** that the City erected a fence.

63. In 2022, the City obtained a survey map which demarcates the area of the Parcel where the chain link fence was installed. Ex. 34 (2022 Survey). The Parcel is part of City Park/Flowers Park. Ex. 4 (2022 Title Report).

**Admit** that the Parcel is part of City Park/Flowers Park, but City's 2022 Survey produced for the first time in the City's moving papers (City's Ex. "34") of the "Parcel" clearly depicts "irreg[ular] macadam pavement" extending onto the Parcel.

64. While Flavio LaRocca admits that the work his employees were performing on the Parcel was to facilitate its use as a parking lot, he denied that LaRocca Inc. or its employees have ever utilized the "Parcel" to park their vehicles. Ex. 7 (Flavio Dep.) at 106:20-25. According to Defendants, it is only employees of neighboring properties on East Street that park in the Parcel. Ex. 7 (Flavio Dep.) at 128:16-130:7; Ex. 19 (Interrogatories Response) at p. 4 Response No. 2 (Photograph (a) attached to Plaintiff's Complaint "Depicts a now fenced-off area near Flowers Park that had been used at that time the photograph was taken (and for many years before and even months after) by the neighboring property owners, Benny Tree Service and PAB Paving for parking of their employees' vehicles "Parking Area").

**Admit** that Flavio instructed his employees to "rake out" the Parcel, but deny that it was just to facilitate parking on the Parcel by other businesses (see response to ¶ 65 *infra*).

65. However, Flavio LaRocca admits that he instructed his employees to "rake out" the Parcel. 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 perform the "rake out" "to allow for continued parking of vehicles by the employees of Benny Tree Service and PAB Paving" on the Parcel. Ex. 19 (Response to Interrogatories) at p. 5 Response No. 2 (describing what the men depicted in Photograph 1a are doing).

**Admit** that Flavio LaRocca instructed his employees to “rake out” the Parcel, but deny that it was just to facilitate parking on the Parcel by other businesses.

Flavio testified that starting in around 2012 or 2013, F. LaRocca Inc. began raking out the Parcel to remove displaced gravel resulting from the plowing (City Ex. “7” (Flavio Depo.), p. 119-120) and would rake the Parcel once or twice a year in around April or May (City Ex. “7” (Flavio Depo.), p. 126; 135). At that time, F. LaRocca 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 (City Ex. “7” (Flavio Depo.), p. 119). As a result, Defendants would plow all of East Street from the beginning of East Street to the entrance of the last property (the Guglielmo yard) at the end of East Street so F. LaRocca Inc. could access their equipment (Flavio Depo. (City Ex. “7” (Flavio Depo.), p. 80; 85; 119-120).

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 [by Persciso]. 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.

(City Ex. “7” (Flavio Depo.), p. 85).

When asked how the snowplowing affected the Parcel (the yellow circled area on the City’s Ex. “13”), 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?

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.

(City's Ex. "7" (Flavio Depo.), p. 110).

The 2014 Survey depicts that there is no clear delineation through curbing or otherwise between East Street and the City's park borders (City's Ex "6"; DOEx. "14") and the just produced 2022 Survey (City's Ex. "34") further clearly depicts that a portion of City Park/Flowers Park is asphalted and that East Street's macadam/asphalt extends onto the City Park/Flowers Park property.

66. Flavio LaRocca testified that LaRocca Inc. conducts snowplowing on East Street in order to clear the way for LaRocca Inc. to access the vehicles that it stored further down East Street at the Guglielmo property between 2012 and approximately 2016 or 2017. Ex. 7 (Flavio Dep.) at 107:12-15, 109:14-23.

**Deny** that this was the reason LaRocca Inc. conducted snowplowing as LaRocca Inc. plows East Street because the City does not maintain or repair East Street, including plowing the street.

It is undisputed that the City does not maintain East Street (see the City's Response and Objections to Defendants' First Set of Interrogatories dated February 3, 2020 (at **DOEx. "19"** at ¶ 5). 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.

(City's Ex. "26" (Vacca Depo.), p. 36).

The City does not perform snow plowing, street cleaning, trash removal, paving or asphaltting work or other maintenance work on East Street (see **DOEx "19"** at ¶ 5).

Defendants admit that LaRocca Inc. only plowed the full length of East Street between 2012 and approximately 2016 or 2017 when it was storing vehicles at the Guglielmo property so it could access the Guglielmo site.

67. East Street does not have gravel on it; the surface of East Street is blacktop. Ex. 7 (Flavio Dep.) at 111:17-21. Accordingly, when LaRocca Inc. plows snow on East Street, it does not move any gravel onto the Parcel. Ex. 7 (Flavio Dep.) at 111:22-112:3.

**Deny** as East Street's macadam area extends on the City Park/Flowers Park parcel and therefore, the plow would necessarily travel over the City Park/Flowers Park parcel and displace any existing gravel on the Parcel as further testified to by Flavio:

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

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 [the Parcel] 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.

(City's Ex. "7" (Flavio Depo.), p. 110).

68. When LaRocca Inc. "rakes out" the Parcel, it uses "a machine to rake out the high spots, then we rake out by hand, and then a compactor to stabilize it." Ex. 7 (Flavio Dep.) at 112:11-21. "[T]o rake out the high spots," Defendants use "[e]ither a skid-steer or a payloador"; then they use "[e]ither a walk-behind or ride-on tamper" to compact the area after it is raked out. Ex. 7 (Flavio Dep.) at 112:22-113:7. A "skid-steer" is a small four-wheeler Bobcat with a bucket in front. Ex. 7 (Flavio Dep.) at 25:10-17. On May 16, 2015, when Mr. Cox filmed employees of LaRocca Inc. working on the Parcel, a motorized compacting roller was on hand to smooth out and compact the gravel after Defendants' employees had finished raking. Ex. 19 (Interrog. Responses) at p. 5 re Exhibit 1 (b); Ex. 1 at Photo 1(b). A LaRocca Inc. employee was using the compactor on the Parcel. Ex. 22 (Maria LaRocca Dep.) at 70:17-71:24; Ex. 28 (Maya Dep.) at 13:12-15:25 (the video depicts Mr. Maya using a machine on the Parcel).

**Admit.**

69. The third photograph attached to the Complaint (1(c)) shows a "payloador" owned by Defendants "to spread out the larger piles of gravel disturbed by snow plowing of the Parking Area" Ex. 19 (Interrog. Responses) at p. 5; Ex. 1 (Complaint with Photo 1(c)); Ex. 7 (Flavio Dep.) at 140:9-141:5.

**Admit.**

70. The City never gave Defendants permission to perform "rake out" work or any other work on the Parcel. Ex. 7 (Flavio Dep.) at 86:15-18, 160:21-24; Ex. 22 (Maria LaRocca Dep.) at 65:20-24, 72:14-23.

**Admit** that while the City never gave permission to “rake out” or smooth gravel on the Parcel, it also never gave permission to plow, maintain or repair East Street, but the abutting neighbors were forced to do so in order to maintain access to their properties and the raking out of the Parcel was a result of the plowing activities (see responses to ¶¶ 65-67). And the macadam or street surface of East Street extends onto the Parcel as there is no curbing separating the street line from the Parcel, which results in the plows going on the Parcel before the fence was erected.

71. In a letter dated November 25, 2015, the City notified Mr. LaRocca that, beginning on January 1, 2016, the City would be offering free parking at the Flowers Park parking lot for employees of area businesses. Ex. 35 (11/25/15 letter). The letter “urged” Mr. LaRocca and his employees “NOT to part on-street in residential areas, where business and employee parking has created significant neighborhood concerns.” *Id.*

**Admit** the text of the letter, which speaks for itself.

### **Alleged Removal of Jersey Barriers**

72. Flavio LaRocca testified that when he purchased 436 Fifth Avenue in 2002, there were over 40 jersey barriers on the property. Ex. 7 (Flavio Dep.) at 63:2-16.

**Admit.**

73. A “jersey barrier” is a concrete structure used to delineate areas when doing construction work. They range in size from 4 feet to 20 feet long, and can weigh between approximately 1,000 and 4,000 pounds. Ex. 7 (Flavio Dep.) at 61:24-62:7, 63:17-19.

**Admit.**

74. In early 2003, Flavio moved approximately 40 to 44 of the jersey barriers out of his property and into East Street, stacked outside the fence/gate on the eastern side of 436 Fifth Avenue. Ex. 7 (Flavio Dep.) at 64:21-67:19; Ex. 1A (area marked in pink).

**Admit.**

75. The jersey barriers did not contain any markings identifying them as belonging to Defendants. Ex. 7 (Flavio Dep.) at 70:9-16.

**Admit** but point out that the jersey barriers did not belong to the City nor its contractors and were on the side of East Street abutting Defendants' Property and the City does not dispute that the jersey barriers did not belong to the City nor its contractors.

76. The jersey barriers remained in East Street for several months. Ex. 7 (Flavio Dep.) at 70:22-71:10. The jersey barriers were still in East Street when Defendants allege that they were taken by a contractor, Persico, around the time of the construction of the skate park at Flowers Park and moved to the opposite side of East Street, next to what is now the skate park. Ex. 7 (Flavio Dep.) at 68:10-69:23; Ex. 22 (Maria LaRocca Dep.) at 45:2-20.

**Admit** and attached as **DOEx "20"** are pictures of the jersey barriers that the City is currently using and getting the benefit from to protect its skate park installation. .

77. LaRocca Inc. does not use jersey barriers in its business, and LaRocca Inc. did not replace the jersey barriers after they were moved to the other side of East Street in 2003. Ex. 22 (Maria LaRocca Dep.) at 51:2-5, 50:21-25.

**Admit.**

78. In this litigation, Defendants produced two letters dated June 11, 2003 and November 17, 2003 from Flavio LaRocca to City Manager Charles Strome and DPW Commissioner William Zimmerman. Ex. 16. The June 11, 2003 letter states, “the contractor who has been staging at the city-owned property on Fifth Ave (directly across from our yard) has moved 20 of our jersey barriers along the opposite side of East Street.” Ex. 16.

**Admit.**

79. Mr. Cox testified that, based on his sources, he believed that Mr. LaRocca had moved the jersey barriers next to the skate park as he was “staking out his territory” . . . for the purpose of parking his vehicles, equipment and so forth. Same thing he was doing on the other side of the street.” Ex. 29 (Cox Dep.) at 104:25-105:24, 106:7-18.

**Admit** that Mr. Cox testified as to his beliefs, but Mr. Cox is not a mind reader and does not know what Mr. La Rocca’s intentions were.

80. Construction of the Sidney E. Frank Skate Park was completed in approximately 2005 or 2006. *See* Ex. 7 (Flavio Dep.) at 61.

**Admit.**

**Maintenance of East Street**

81. According to Flavio LaRocca, since September 2002, when he purchased the property at 436 Fifth Avenue, the City has not maintained East Street, though the City uses East Street to access East Place. Ex. 7 (Flavio Dep.) at 76:13-20.

**Admit** and further provide that the City need not rely only upon Flavio’s testimony as the City admitted in its interrogatory response that it does not maintain East Street and the City Deputy Commissioner of Development and Building Official Paul Vacca testified that he

was advised by the City's engineer that "we [the City] don't maintain anything there." (See response to ¶ 66).

82. When he and his wife purchased 436 Fifth Avenue in September 2002, Flavio never had any expectation or understanding that the City would maintain East Street. Ex. 7 (Flavio Dep.) at 77:6-16. Instead, the seller of the property, Mr. Maffei, told Flavio LaRocca that each property owner abutting the street would maintain the area abutting their property. Ex. 7 (Flavio Dep.) at 77:6-12. The "maintenance" includes "cleaning any debris, sweeping, snowplowing, and repairing the road if needed." Ex. 7 (Flavio Dep.) at 76:24-77:2.

**Admit.**

83. The City has plowed snow from East Street for emergency purposes. Ex. 26 (Vacca Dep.) at 34:14-19.

**Admit** that Mr. Vacca stated this, but he also testified that the City does not maintain East Street (Vacca Depo. (City's Ex. "26", p 36) and the City admitted it does not maintain East Street. (See DOEx. "19" at ¶ 5).

**Procedural History**

84. On April 1, 2016, the City filed a Summons and Complaint in this action. Ex. 1. The City asserted claims for (i) trespass, (ii) negligence, (iii) nuisance, (iv) conversion, (v) violation of N.Y. Real Property Actions and Proceedings Law § 861, and (vi) nuisance by encroaching on East Street and Fifth Avenue. The City seeks, *inter alia*, compensatory damages, consequential damages, statutory damages, a permanent injunction prohibiting the Defendants from Encroaching on City property, punitive damages, attorney's fees and costs, prejudgment interest, and such other and further relief as the Court may deem just and proper.

**Admit** that the City filed a Complaint, which speaks for itself.

85. The City's Complaint cites and relies upon sections 111-38, 111-39, and 111-40 of the New Rochelle City Code. Ex. 1 at ¶54, and p.11 subpart (d).

**Admit** that the City's Complaint relies upon certain statutes, which Complaint speaks for itself.

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

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

- A. Removal of projections. The owner of a building or other structure, any part of which projects in or encroaches upon public property, shall remove said projection or encroachment upon being ordered to do so by the Building Official, and the City of New Rochelle shall not be liable for any damages resulting to the property by reason of such order.
- E. Permits revocable. Any permit granted or permission expressed or implied in the provisions of this code to construct a building so as to project beyond the street lot line shall be revocable by the City of New Rochelle, New York, at will.
- F. Existing encroachments. Parts of existing buildings and structures which already project beyond the street lot line or building line may be maintained as constructed until their removal is directed by the proper municipal authorities.

**Admit** the text of City Ordinance § 111-38, which speaks for itself, but the City cannot enforce removal or seek damages relating to the encroachment on East Street under City Ordinance § 111-38, because East Street is a private street as a matter of law (see Defendants' Opp. MOL).

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

- A. Notice of violation. The Building Official shall serve a notice of violation or order on the person responsible for the erection, construction, alteration, extension, repair, use or occupancy of a building or structure in a violation of the provisions of this Chapter or the State Code or in violation of a detailed statement or a plan approved thereunder or in violation of a permit or certificate issued under the provisions of this Chapter, and such order shall direct the discontinuance of the illegal action or condition and the abatement of the violation.
- B. Prosecution of violation. If the notice of violation is not complied with promptly, the Building Official shall request the Corporation Counsel to institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of this Chapter or the State Code or of the order or direction made pursuant thereto.
- C. Violation penalties. For any and every violation of the provisions of this Chapter or the State Code, the owner, general agent or contractor of the building or premises where such violation has been committed or shall exist . . . shall be subject to a fine not more than \$2,500 for a first offense and not more than \$5,000 for a second or subsequent offense within three years of a first or other offense of this Chapter, or to imprisonment for not more than 15 days, or both, and each and every day the violation continues after the owner, general agent or contractor of the building or premises where such violation occurred has been notified thereof shall be deemed to be a separate and distinct violation.
- D. Abatement of violation. The imposition of the penalties herein prescribed shall not preclude the legal officer of the municipality from instituting appropriate action to prevent unlawful construction or to restrain, correct or abate a violation or to prevent illegal occupancy of a building, structure or premises or to stop an illegal act, conduct, business or use of a building or structure in or about any premises.

**Admit** the text of City Ordinance § 111-40, which speaks for itself, but the civil action before this Court is neither the means nor the venue to impose penalties against Defendants for alleged violation of City Ordinance § 111-38 (which is part of Chapter 111 entitled “Building Construction”) (see Defendants’ Opp. MOL).

88. The defendants were served with the Summons and Complaint in early April, 2016 and the affidavits of service were filed on April 19, 2016. *See* NYSCEF 54190/2016, Doc. Nos. 6-10 (filed April 19, 2016).

**Admit.**

89. The parties entered multiple stipulations extending the time for Defendants to answer, ultimately extending the time to answer to September 30, 2018. *See* NYSCEF 54190/2016, Doc. Nos. 13, 14, 15, 16, 17, 18, 20, 21; Ex. 37 (final stipulation).

**Admit.**

90. Defendants did not file an answer by September 30, 2018. Instead, Defendants filed a Verified Answer with Counterclaims on April 30, 2019. Ex. 2 (Answer).

**Admit** but note that there was understanding between counsel that an extension of time would be granted while the parties were discussing a potential resolution of this litigation.

91. On May 17, 2019, Plaintiffs filed a Reply to Counterclaims. Ex. 3 (Reply).

**Admit.**

92. A Note of Issue was filed in this case on March 30, 2022. Ex. (Note of Issue).

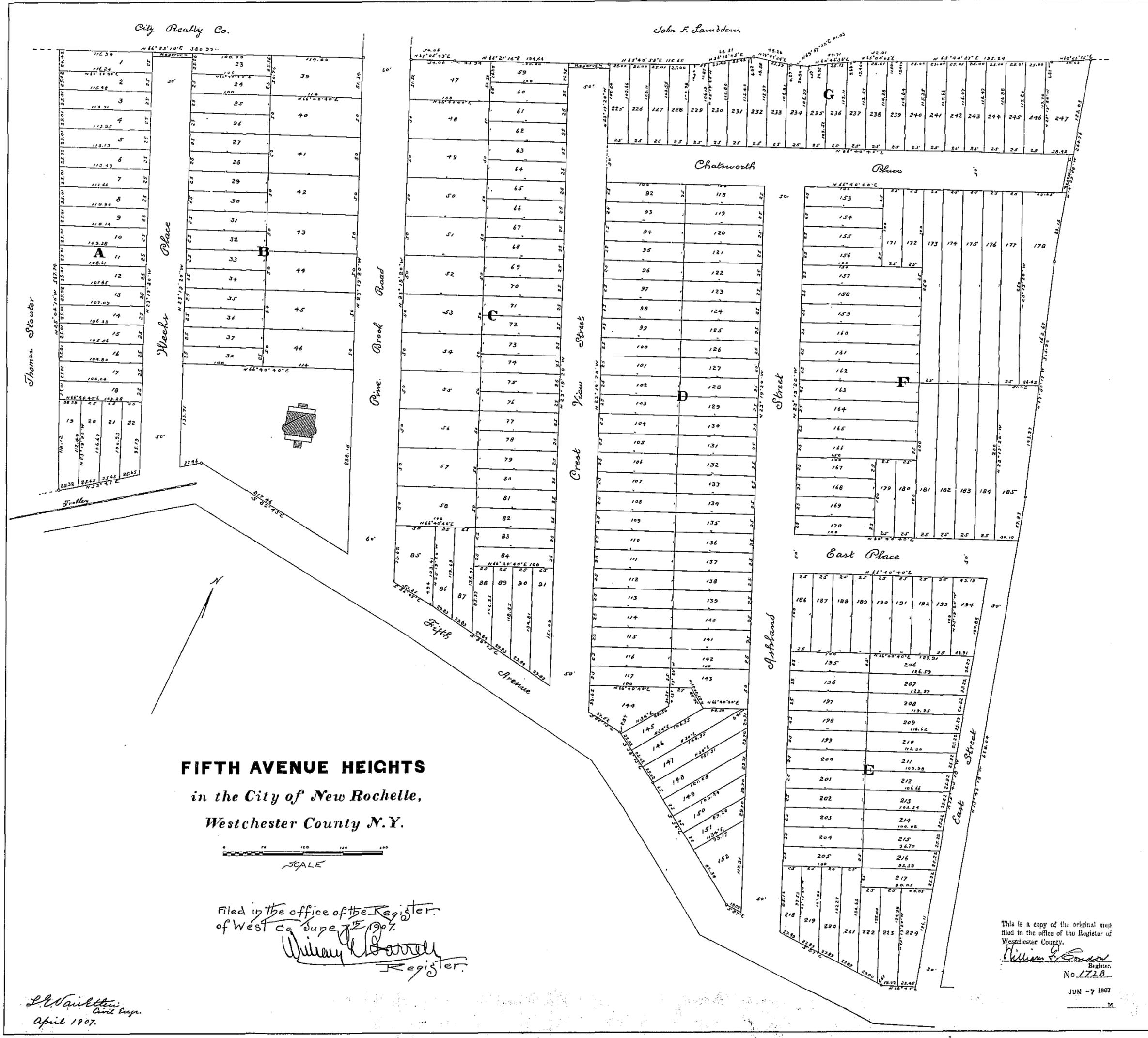
**Admit** and while the City omits an exhibit reference above, the Note of Issue is attached as the City's Ex. "38".

Dated: Tarrytown, New York  
August 4, 2022

SILVERBERG ZALANTIS LLC

By: *Katherine Zalantis*  
Katherine Zalantis  
Attorneys for Defendants  
120 White Plains Road, Suite 305  
Tarrytown, New York 10591  
(914) 682-0707  
zalantis@szlawfirm.net

Exhibit "1"



**FIFTH AVENUE HEIGHTS**  
in the City of New Rochelle,  
Westchester County N.Y.



Filed in the office of the Register  
of Westchester County N.Y. 1907.

*William G. Conson*  
Register.

This is a copy of the original map  
filed in the office of the Register of  
Westchester County.  
*William G. Conson*  
Register.  
No. 1728

JUN -7 1907

*L. L. Vaillette*  
Civil Eng.  
April 1907.

FILED MAP No 1728

1728

Exhibit "2"

COUNCIL  
CITY OF NEW ROCHELLE, N. Y.

MINUTES  
OF  
REGULAR MEETING

HELD TUESDAY, JUNE 2, 1914  
IN THE COUNCIL CHAMBERS  
CITY HALL

Members of Council:

EDWARD STETSON GRIFFING, Mayor.

GEORGE VALENTINE,  
President.

CHARLES KAMMERMEYER,  
City Clerk.

COUNCILMEN:

THE APPENZELLER

STEPHEN W. HUNTINGTON

WILLIAM S. INGLIS

MAX C. KOCH

ADAM C. KISTINGER

JOHN STELLA

HARRY SCOTT

GEORGE VALENTINE

Regular meeting of the Council held Tuesday, June 2, 1914, in the  
Council Chambers, City Hall Building, corner of Main and Mechanic streets,  
11:17 A.M.

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June 2, 1914.

The roll being called the following answered to their names:

Hon. Edward Stetson Griffing, Mayor; Councilmen Appenzeller, Huntington, Inglis, Kistingner, Koch, Stella, Scott Valentine.

President Valentine presided.

The Minutes of April 29; May 5, 7 and 19, 1914, were confirmed, there being no corrections.

President Valentine announced that this was the evening set for a public hearing upon the advisability of purchasing real property in this City for dock purposes, and stated that the Council would hear any one who desired to be heard in regard to the matter.

The Council was addressed by Messrs. Gregory M. Dillon, F. M. Wells, H. J. Weldon, F. J. Cuthbertson and John P. Hutchinson who protested against the purchasing of any property at this time. The Council was also addressed by His Honor the Mayor, Frank J. New, Henry A. Siebrecht, Sr., Fred. L. Merritt, F. S. Fisher, James R. Butterworth and H. L. Childs who spoke in favor of the purchasing of property for dock purposes. No one else appearing, the hearing was declared closed.

President Valentine also announced that this was the evening set for a public hearing upon the proposition to purchase property owned by the Salem Baptist Church and known as the "John Coates' property" on 11th Road in Jerusalem woods as a proposed site for a contagious hospital in this City, and stated that the Council would hear any one who desired to be heard in regard to the matter. No one appearing, the hearing was declared closed.

President Valentine also announced that this was the evening set for which objections could be made to the proposed construction of sewer in Warren Street extension from the now existing sewer in Guion Street to the intersection of Guion and Warren Street extension, and through Warren Street for a short distance, as per plan submitted by the Department of Public Works under date of May 19, 1914; also the proposed construction of curb, gutter and flag sidewalks on that part of Thurston Place, both sides between Webster Avenue and Fourth Street where sidewalk is not now laid, and the construction of flag sidewalk on Beechwood Avenue, both sides from the railroad bridge to Main Street, where sidewalk has not been laid, and the construction of curb, gutter and sidewalk on Clinton Avenue, both sides, from DeWitt Place to Winyah Avenue—in accordance with the declaration of intention and the resolutions adopted by the Council on May 19, 1914, and the Clerk read the notice of public hearing after which it was stated that the Council would hear any one who desired to be heard either for or against the same. No one appearing, and the Clerk having announced that no written objections had been filed, the hearing was declared closed.

President Valentine also announced that this was the evening set for which objections could be made to the proposed construction of sewer from the present terminus on Fifth Avenue to sewer Weeks Place, State Street, Sylvan Place and that part of Pinebrook Road which can be drained

June 2, 1914.

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this system—in accordance with the declaration of intention and the resolution adopted by the Council on May 19, 1914; and the Clerk read the notice of public hearing after which it was stated that the Council would hear any one who desired to be heard either for or against the same.

The Clerk read a petition from property owners in the vicinity of Fifth Avenue favoring the construction of the proposed sewer in the above named streets; also protest from Mrs. Julia M. Ash against the construction of the said sewer at the proposed depth, which were on motion ordered received and filed.

The Council was also addressed by Messrs. John Martin and A. E. Dixon who spoke in favor of the proposed construction of said sewer. No one else appearing, the hearing was declared closed.

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

June 2, 1914.

Honorable Council,  
New Rochelle, N. Y.

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 it is.

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

The Clerk read a communication from the Westchester Electric Railroad Company, acknowledging receipt of copy of report of Railroad Commissioners in regard to the construction of switches in this City; also communications from the Department of Public Works in regard to the re-setting and paving of West Main Street from the Soldiers' Monument to the City and also submitting estimates of cost for construction of curb, gutter and sidewalks on Thurston Place, both sides, between Webster Avenue and Fourth Street; for construction of a drain to abate nuisance of stagnant water on Hickory Street, and for construction of concrete curb, brick gutter and four foot concrete sidewalks on Fifth, Sixth, Seventh and Eighth Streets, both sides, from Union to Washington Avenues, which were on motion ordered received and filed.

The Clerk read a communication from the Department of Public Works submitting plan, profile and estimate of cost for construction of sewer in North Terrace, which was on motion ordered received and referred to the Councilmen of the First Ward.

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June 2, 1914.

The Clerk read a communication from the Department of Public Works submitting estimate of cost for macadamizing that part of Calton Crescent and Calton Terrace between Aberfoyle Road and Argyle Avenue for a distance of about 1350 feet, which was on motion ordered received and referred to the Councilmen of the Third Ward.

The Clerk read a communication from the Board of Fire Commissioners requesting the installation of a hydrant on Main Street opposite the Thanhouser Film Company, which was on motion ordered received and referred to the Fire and Water Hydrant Committee.

The Clerk read the following report from the Fire and Water Hydrant Committee, which was on motion of Councilman Stella, seconded by Councilman Koch, ordered received and filed and the recommendation approved and adopted. The roll call showing the following vote:

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kistinger, Koch; Scott, Stella.

Nays: None.

June 2, 1914.

To the Honorable The Council,  
City of New Rochelle, N. Y.

Gentlemen:

Your Fire and Water Hydrant Committee would recommend the installation of the following hydrants:

Two on Plain Avenue;

Two on Pleasant Avenue;

One on Fifth Avenue, east of Mill Road.

The installation of the above hydrants is to be under the supervision of the Chief of the Fire Department.

Respectfully submitted,

FRANK C. KOCH,

JOHN APPENZELLER,

WILLIAM S. INGLIS,

GEORGE VALENTINE,

HARRY SCOTT

Fire and Water Hydrant Committee

The Clerk read the following report from the Lighting Committee, which was on motion of Councilman Scott, seconded by Councilman Inglis, ordered received and filed and the recommendation approved and adopted. The roll call showing the following vote:

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kistinger, Koch, Scott, Stella.

Nays: None.

June 2, 1914.

To the Honorable The Council,  
City of New Rochelle, N. Y.

Gentlemen:

Your Lighting Committee would recommend the installation of a

June 2, 1914.

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gas lamp on Avon Road, 450 feet east of North Avenue; the installation of said light to be under the supervision of the Chairman of the Lighting Committee.

Respectfully submitted,

WILLIAM S. INGLIS,

GEORGE VALENTINE,

FRANK C. KOCH,

Lighting Committee.

On motion of Councilman Stella, seconded by Councilman Appenzeller, the following resolution was adopted. The roll call showing the following vote:

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kistinger, Koch, Scott, Stella.

Nays: None.

WHEREAS, the Railroad Committee has heretofore submitted a report to this Council under date of May 19, 1914, recommending that the Westchester Electric Railroad Company be granted permission to construct the following switches in this City:

1 switch at the corner of Division Street and Railroad Place;

1 switch at the corner of Bridge Street and Railroad Place;

1 "cross-over" switch at Mechanic Street extension and Railroad Place, so as to connect with the tracks now laid on Mechanic Street extension;

AND WHEREAS, an error was made in the location of one of said switches, now, therefore,

BE IT RESOLVED, that said report of the Railroad Committee be corrected to read in part as follows:

1 switch at the corner of Division Street and Railroad Place;

1 switch at the corner of Huguenot and Bridge Streets;

1 "cross-over" switch at Mechanic Street extension and Railroad Place so as to connect with the tracks now laid on Mechanic Street extension;

AND BE IT FURTHER RESOLVED, that the City Clerk forward a copy of the resolution to the Westchester Electric Railroad Company. (Approved, June 3, 1914.)

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

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kistinger, Koch, Scott, Stella.

Nays: None.

WHEREAS, the Department of Public Works has submitted to this Council, under date of May 19, 1914, an estimate of cost for the repaving of North Avenue from Beechmont to Paine Avenue, with asphalt pavement, said estimate being approximately \$6,930.00, and the

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June 2, 1914.

assessable portion thereof being approximately \$2,632.00, to be paid by the Westchester Electric Railroad Company, and the balance—\$4,298.00 to be borne by the City at large, now, therefore,

BE IT RESOLVED, that the sum of \$4,298.00 be appropriated from the Council Fund "for any general or local improvement" and the sum of \$2,632.00 be appropriated from the proceeds of the sale of construction certificates to pay for the assessable share of said work and placed to the credit of the Department of Public Works; and

BE IT FURTHER RESOLVED, that said Department of Public Works proceed at once with said work. (Approved, June 3, 1914.)

On motion of Councilman Kisting, seconded by Councilman Koch, the following resolution was adopted. The roll call showing the following vote:

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kisting, Koch, Scott, Stella.

Nays: None.

WHEREAS, the Department of Public Works has, under date of June 2, 1914, submitted an estimate of cost to this Council for the construction of a drain in Hickory Street to abate nuisance of stagnant water which runs into private property from said street; said estimate being approximately \$250.00; and

WHEREAS, the Board of Health has requested the construction of said drain, now, therefore,

BE IT RESOLVED, that the sum of \$250.00 be appropriated from the Council Fund "for drains" and placed to the credit of the Department of Public Works to pay for said work; and

BE IT FURTHER RESOLVED, that said Department proceed with said work at once. (Approved, June 3, 1914.)

On motion of Councilman Koch, seconded by Councilman Kisting, the following resolution was adopted. The roll call showing the following vote:

Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kisting, Koch, Scott, Stella.

Nays: None.

BE IT RESOLVED, that the Council hereby declares its intention to construct a sewer in the following named street and avenue, to-wit: **Mount Aetna Place;**

BE IT FURTHER RESOLVED, that the City Clerk advertise the aforesaid local improvement, pursuant to Section 282 of the City Charter, specifying Tuesday, June 16, 1914, as the time within which objections may be filed. (Approved, June 3, 1914.)

On motion of Councilman Valentine, Seconded by Councilman Scott, the following resolution was adopted. The roll call showing the following vote:

June 2, 1914.

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Ayes: President Valentine; Councilmen Appenzeller, Huntington, Inglis, Kisting, Koch, Scott, Stella.

Nays: None.

WHEREAS, the City of New Rochelle has heretofore authorized the issuance of construction certificates for various improvements in said City and has also authorized various improvements for the payment of which bonds or construction certificates are authorized to be issued; and

WHEREAS, it is desired to issue bonds, to be known as Municipal Improvement bonds, for the purpose of paying the City's share of the cost of such improvements, including such part of such construction certificates as represent the City's share of the improvements for which the same were issued, now, therefore,

BE IT RESOLVED, that bonds be issued in the name, on behalf and upon the credit of the City of New Rochelle to the amount of NINETY THOUSAND TWO HUNDRED (\$90,200.00) DOLLARS; said bonds to be dated July 1, 1914, and to bear interest at the rate of four and one-half (4½%) per centum per annum, payable semi-annually on the first days of May and November in each year; said bonds shall be numbered from one to . . . , both inclusive, and shall be for such denomination or sum each as the purchaser thereof may desire, and shall be known and designed as "MUNICIPAL IMPROVEMENT BONDS, Series A. of 1914." The principal and interest shall be payable at the office of the Treasurer of the City of New Rochelle; said bonds shall be in such form as the Comptroller shall hereafter prescribe and shall contain a recital that they are issued pursuant to and in conformity with the provisions of Chapter 559 of the Laws of 1910, and that the proceeds thereof shall be used as hereinafter provided. The principal of said bonds shall be payable as follows: \$10,000.00 on the 1st day of May, 1916, and \$10,000.000 on the 1st day of May of each and every year thereafter to and including the 1st day of May, 1923, and \$10,200.00 on the 1st day of May, 1924; and

BE IT FURTHER RESOLVED, that there be levied and raised by the Council of said City, by a tax, a sum sufficient to pay the interest and principal of the said bonds as the same shall become due; and

BE IT FURTHER RESOLVED, that the Comptroller be and he is hereby authorized and directed to proceed with the sale of said bonds as provided by the present City Charter; and

BE IT FURTHER RESOLVED, that the proceeds of said bonds be applied to the purposes aforesaid, including the payment of the City's share of the following improvements and the redemption of construction certificates issued therefor, to-wit:

In redeeming the unpaid balance of the City's share of Construction Certificates Nos. 57 and 58, issued for

June 2, 1914.

the construction of the Huguenot Park drain, maturing in 1914 amounting to.....\$4,495.00  
 In redeeming Construction Certificates Nos. 59 to 86, both inclusive, maturing in 1914, amounting to.... 55,355.00  
 In paying the cost of paving lower Main Street, with brick, from the Soldiers' Monument to the Pelham line, excepting that part between the trolley tracks and two feet outside of same, amounting to..... 30,350.00

Total,.....\$90,200.00

BE IT FURTHER RESOLVED, that no part of such proceeds shall be applied to current operating expenses, repairs or supplies, for the City's share of the cost of curbs, gutters or sidewalks (Approved, June 3, 1914.)

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

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

Nays: None.

BE IT RESOLVED, that the Council hereby declares its intention to construct natural stone gutter on the following named street and avenue, to-wit: **Otsego Avenue, both sides, full length;**

BE IT FURTHER RESOLVED, that the City Clerk advertise the aforesaid local improvement, pursuant to Section 282 of the City Charter, specifying June 16, 1914, as the time within which objections may be filed, and

BE IT FURTHER RESOLVED, that the Department of Public Works be directed to submit estimated cost to the Council for the above mentioned work at a meeting to be held on June 16, 1914. (Approved, June 3, 1914.)

On motion of Councilman Stella, seconded by Councilman Appenzeller, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

WHEREAS, the Department of Public Works has submitted to this Council an estimate of cost for grading Seventh and Eighth Streets from Union to Washington Avenues; said estimate being approximately \$950.00, it being necessary to do said work before the proposed construction of curb, gutter, and sidewalk on these streets is commenced now, therefore,

BE IT RESOLVED, that the sum of \$950.00 be appropriated from the Council Fund "for any general or local improvement" and placed

June 2, 1914.

the credit of the Department of Public Works to pay for said work; and BE IT FURTHER RESOLVED, that said Department proceed at once with said work. (Approved, June 3, 1914.)

On motion of Councilman Appenzeller, seconded by Councilman Stella, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

WHEREAS, the Department of Public Works has submitted to this Council at a meeting held on June 2, 1914, an estimate of cost for the construction of concrete curb, brick gutter and four foot concrete sidewalks on Fifth, Sixth, Seventh and Eighth Streets, both sides, from Union to Washington Avenues; said estimate being approximately \$4,325.00, and the assessable portion being approximately \$3,839.00, now therefore,

BE IT RESOLVED, that the sum of \$3,839.00 be appropriated from the sale of sidewalk certificates and the sum of \$486.00 be appropriated from the Council Fund "for any general or local improvement" and placed to the credit of the Department of Public Works to pay for said work; and

BE IT FURTHER RESOLVED, that the Department of Public Works proceed at once with said work. (Approved, June 3, 1914.)

On motion of Councilman Appenzeller, seconded by Councilman Stella, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

WHEREAS, the Department of Public Works has submitted to this Council at a meeting held on May 19, 1914, an estimate of cost for the construction of a sewer in Warren Street extension from the now existing sewer on Guion Street to the intersection of Guion and Warren Street extension, thence through Warren Street for a short distance, as per plan submitted by said Department, at an approximate cost of \$1,000.00, and the assessable share being approximately \$275.00, now, therefore,

BE IT RESOLVED, that the sum of \$275.00 be appropriated from the proceeds of the sale of sewer certificates to be redeemed by an issue of bonds as provided in the City Charter, and the sum of \$725.00 be appropriated from the Council Fund "for any general or local improvement" and placed to the credit of the Department of Public Works to pay for said work; and

BE IT FURTHER RESOLVED, that the Department of Public Works proceed at once with said work. (Approved, June 3, 1914.)

186

June 2, 1914.

On motion of Councilman Stella, seconded by Councilman Appenzeller, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

WHEREAS, the Department of Public Works has submitted to this Council at a meeting held on June 2, 1914, an estimate of cost for the construction of curb, gutter and flag sidewalks on that part of Thurston Place, both sides, between Webster Avenue and Fourth Street where sidewalk is not now laid; said estimate being approximately \$2,200.00 and the assessable portion being approximately \$2,000.00, now therefore,

BE IT RESOLVED, that the sum of \$2,000.00 be appropriated from the proceeds of the sale of sidewalk certificates and the sum of \$200.00 from the Council Fund "for any general or local improvement" and placed to the credit of the Department of Public Works to pay for said work; and

BE IT FURTHER RESOLVED, that said Department of Public Works proceed at once with said work. (Not approved.)

On motion of Councilman Stella, seconded by Councilman Appenzeller, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

BE IT RESOLVED, that the Department of Public Works prepare and submit to this Council—estimate of cost for re-surfacing Washington Avenue from Grand to Charles Streets. (Approved, June 3, 1914.)

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

June 2, 1914.

187

View Street, Chatsworth Place and Ashland Street (Fifth Avenue Heights) be and the same are hereby accepted as public streets. (Approved, June 3, 1914.)

The Clerk read the following resolution, which was on motion of Councilman Scott, seconded by Councilman Huntington, laid on the table. The roll call showing the following vote:

Ayes: Councilmen Appenzeller, Huntington, Kistingner, Koch, Stella, Scott.

Nays: President Valentine; Councilman Inglis.

WHEREAS, the Department of Public Works has submitted to this Council, under date of May 19, 1914, an estimate of cost for the re-paving of North Avenue between the N. Y., N. H. & H. R. R. bridge and Fifth Avenue, with block asphalt; said estimate being approximately \$17,900.00, and the assessable portion thereof being approximately \$7,400.00, to be paid by the Westchester Electric Railroad Company, and the balance, \$10,500.00 to be borne by the City at large, now, therefore,

BE IT RESOLVED, that the sum of \$10,500.00 be appropriated from the Council Fund "for any general or local improvement", and the sum of \$7,400.00 be appropriated from the proceeds of the sale of construction certificates to pay for the assessable share of said work and placed to the credit of the Department of Public Works; and

BE IT FURTHER RESOLVED, that said Department of Public Works proceed at once with said work.

On motion of Councilman Scott, the Clerk was instructed to submit to the Council at the next meeting a statement of the appropriations made for this year from the Council Fund "for any general or local improvement."

On motion of Councilman Huntington, seconded by Councilman Scott, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

RESOLVED, that the City Clerk procure an estimate for a suitable, fire-proof vault to be built in the City Hall for the preservation of City records. (Approved, June 3, 1914.)

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

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

Nays: None.

BE IT RESOLVED, that the Department of Public Works prepare and submit to this Council—estimate of cost for construction of curb,

188

June 2, 1914.

gutter and flag sidewalks on the unfinished portion of Summit Avenue (Approved, June 3, 1914.)

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

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

Nays: None.

BE IT RESOLVED, that the Department of Public Works prepare and submit to this Council—estimate of cost for construction of concrete curb, concrete sidewalk (4 ft.) and brick gutter on Clove Road between Chauncey and Mayflower Avenues. (Approved, June 3, 1914.)

The Clerk read the following resolution, which was on motion of Councilman Scott, seconded by Councilman Huntington, laid on the table. The roll call showing the following vote:

Ayes: Councilmen Appenzeller, Huntington, Kistingner, Stella, Scott.

Nays: President Valentine; Councilmen Inglis, Koch.

WHEREAS, the Department of Public Works has submitted to this Council, under date of May 19, 1914, an estimate of cost for the resurfacing of North Avenue from Fifth to Mayflower Avenues, with bitulithic pavement; said estimate being approximately \$8,120.00 and the assessable portion thereof being approximately \$4,060.00, to be paid by the Westchester Electric Railroad Company, and the balance \$4,060.00 to be borne by the City at large, now, therefore,

BE IT RESOLVED, that the sum of \$4,060.00 be appropriated from the Council Fund "for any general or local improvement" and the sum of \$4,060.00 be appropriated from the proceeds of the sale of construction certificates to pay for the assessable share of said work and placed to the credit of the Department of Public Works; and

BE IT FURTHER RESOLVED, that said Department of Public Works proceed at once with said work.

On motion of Councilman Huntington, seconded by Councilman Scott, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

WHEREAS, a resolution was duly adopted at a meeting of this Council held April 7, 1914, as follows:

"Be it Resolved, that the Board of Estimate and Apportionment be requested to issue construction certificates to defray the cost of resetting curb and the paving of lower Main Street from the Soldiers' Monument to the Pelham line, with brick, excepting that part between the tracks of the trolley company and two feet outside the same, as per estimate of the Commissioner of Public Works,

June 2, 1914.

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"April 6, 1914, amounting to \$34,000.00 to defray the cost of said work; and

"Be it further Resolved, that the proceeds of the sale of said certificates be placed to the credit of the Department of Public Works. (Approved April 15, 1914.)" now, therefore,

BE IT RESOLVED, that said resolution be and the same hereby is amended by striking therefrom the following words, namely: "resetting curb and" which are the 22nd, 23rd and 24th words in said resolution. (Approved, June 3, 1914.)

On motion of Councilman Huntington, seconded by Councilman Scott, the following resolution was adopted. The roll call showing the following vote:

Ayes: Councilman Appenzeller, Huntington, Kistingner, Koch, Scott, Stella.

Nays: President Valentine; Councilman Inglis.

WHEREAS, the Department of Public Works has submitted an estimate of the cost of resetting curb and furnishing and setting new curb on lower Main Street from the Soldiers' Monument to the Pelham line, said estimate being approximately \$3,650.00, now, therefore,

BE IT RESOLVED, that the sum of \$3,650.00 be appropriated from the Council Fund "for any general or local improvement" and placed to the credit of the Department of Public Works to pay for said work. (Approved, June 3, 1914.)

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

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

Nays: None.

RESOLVED, that the City Comptroller be authorized to retain Messrs. Caldwell, Masslich & Reed, of No. 111 Broadway, New York City, for the purpose of supervising the issuance of bonds by the City and rendering an opinion upon the legality thereof. (Approved, June 3, 1914.)

On motion of Councilman Huntington, seconded by Councilman Scott, the following resolution was adopted. The roll call showing the following vote:

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

Nays: None.

RESOLVED, that the Commissioner of Public Works submit an estimate of cost for construction of a concrete sidewalk (full width) for a distance of about 125 feet in length in front of the new public library building on Main Street. (Approved, June 3, 1914.)

On motion of Councilman Koch, seconded by Councilman Inglis, the

190

June 2, 1914.

Mayor was requested to appoint a committee of ten citizens to act in conjunction with the Fire and Water Hydrant Committee in the matter of the request of the New Rochelle Water Company that the City of New Rochelle obtain permission to tap the New York Aqueduct for future water supply; said committee to report back to the Council. Motion carried and so ordered.

The Clerk read a communication from Hans Sonner in regard to furnishing series of band concerts in the various wards, which was on motion ordered received and referred to the Department of Parks, Docks and Harbors.

On motion of Councilman Stella, the privilege of the floor was extended to Charles E. Woodruff, Health Officer of this City, who urged the Council to make speedy provision for a contagious hospital so that the City may comply with the new State law which requires the complete isolation of a number of diseases. He opposed the location of such a hospital on the outskirts of the City on account of the great expense to equip the same.

Councilman Stella spoke in favor of the purchasing of the property of the Baptist Church as a site for a contagious hospital.

On motion the Council adjourned.

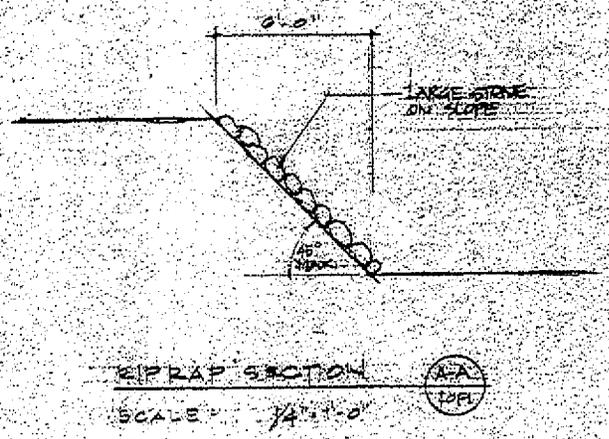
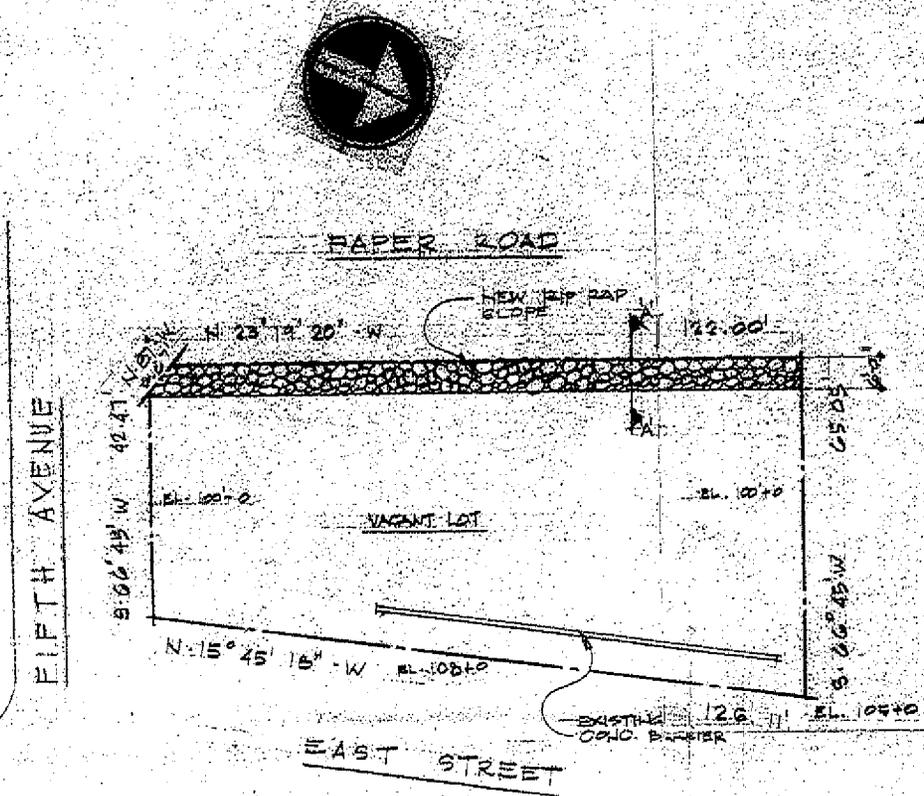


City Clerk

Exhibit "3"



Exhibit "4"



**SITE PLAN**  
SCALE: 1" = 20'

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.

PLAN NO. **620000387** DATE **08-03-20**

Sup. Included

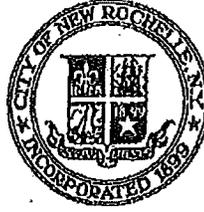


**THOMAS E. HAYNES ARCHITECT**  
370 YONKERS AVENUE  
YONKERS, NEW YORK

**PROPOSED RIPRAP**  
RIPRAP  
466 FIFTH AVENUE

Exhibit "5"

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



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

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

Peter Warycha, C.E., C.E.O.  
Deputy 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.**

*[Handwritten Signature]*  
for  
Noel Shaw, Jr.  
Building Official

Defendant's  
**EXHIBIT**  
K

*[Handwritten]* RH 2/25/00

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

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

Page 2

Job Location: PLTE108  
436 Fifth Ave

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

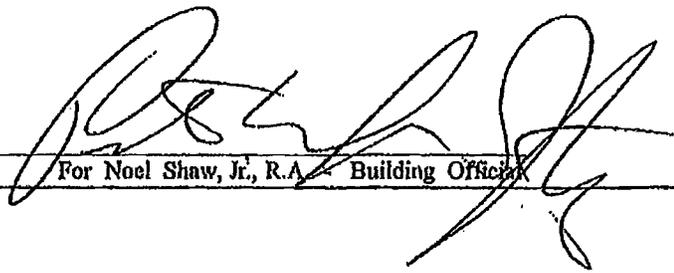
  
For Noel Shaw, Jr., R.A. Building Official

Exhibit "6"



CITY OF NEW ROCHELLE

AND APPLICANT HEREBY REQUESTS THE CITY ENGINEER TO CONSIDER AND APPROVE THESE PLANS AND APPROPRIATE TO BE CONSTRUED AS AUTHORITY TO ALTER, OR SET ASIDE ANY PROVISIONS OF BUILDING CODE, ZONING ORDINANCE, OR ANY OTHER LOCAL, COUNTY OR STATE REGULATIONS.

*[Signature]*

PLAN NO. **20000387** DATE **08-03-00**



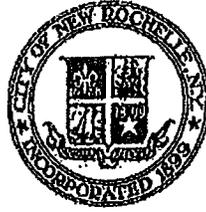
APPROVED PLANS  
NO. **20000387**  
APPROVED  
**01-02-01**

**SITE PLAN**  
SCALE: 1" = 20'

PLTF102

**Exhibit "7"**

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

**CERTIFICATE OF OCCUPANCY**

Certificate of Occupancy C20010011  
Section/Block/Lot 551000-003.000-0931

Date: Tuesday, January 16, 2001  
Zoning:

Job Location: 436 Fifth Ave

This Certificate of Occupancy certifies that the  
construct a rip rap slope

has been completed, inspected and conforms substantially with the approved plans bearing PERMIT # B20000387  
and with the applicable requirements of the New Rochelle Building Code, Zoning Ordinance, the New York Uniform  
Prevention and Building Code and all other applicable laws, rules, and regulations.

PW:js

No addition or alteration or change in use of the structure or land is permitted without a new building  
permit and Certificate of Occupancy. This Certificate is issued pursuant to the following approvals:

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

Defendant's  
**EXHIBIT**

P  
RH 2/25/20

**Exhibit "8"**

TITLE NO. 0514-14755 BV

**ABSTRACTERS' INFORMATION SERVICE, INC.**

138-72 QUEENS BOULEVARD BRIARWOOD, N.Y. 11435  
(718) 291-5900 (516) 742-2290 (914) 761-4451 FAX (718) 291-6681

**BUILDING VIOLATION SEARCH**

DATE: 12/23/02

PREMISES: 436 FIFTH AVENUE, NEW ROCHELLE

COUNTY: WESTCHESTER

CITY: NEW ROCHELLE

SECTION: 3 BLOCK: 931 LOT: 29&30

DEPARTMENT OF BUILDINGS

A search of Building Department records indicate the following:

There were no pending violations found on file as per search dated: 12/23/02

See attached for pending violations found on file as per search dated:

**IMPORTANT NOTICE ABOUT SEARCH INFORMATION ABOVE**

Abstracters' Information Service Inc. does hereby certify that the records of the above mentioned governmental agency have been examined and that the information recorded above is a true and accurate abstraction of the information furnished by the agency.

This report is submitted for information purposes only. Liability is limited to the cost of the search.

This search does not include other agency violations, nor does it include open permit information, refer to Certificate of Occupancy report. 0514-14755

**Exhibit "9"**

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



Phone: (914) 654-2035  
FAX: (914) 632-3031

Noel Shaw, Jr.,  
Deputy Commissioner/Building Official



Peter Warychn,  
Deputy Building Official

City of New Rochelle  
New York

Permit #/	MP-2003-0029
Issued on	5/19/2003 0:00:00
Parcel #/	00029
Permit type	Excavation
Zoning	R-2
Project #/	JS-2003-0465
Use Group	
Const. Class	
Estimated Cost	\$1000.00
Total Fee	\$100.00
Check #/	2847

## BUILDING PERMIT

Permission is hereby granted to:

OWNER: FLAVIO LA ROCCA  
OWNER ADDRESS: 2 TRINITY PLACE, NR 10805  
JOB LOCATION: 436 FIFTH AVE.

### TO PERFORM THE FOLLOWING WORK:

TYPE OF PERMIT: Excavation

WORK DESCRIPTION: Removal and regrading 20' X12' X 8" Rockledge.  
Excavating.

### 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 required by Code.
5. During excavation, care must be taken to cover piles of loose dirt and soil and trucks transporting those materials to and from the site should have tarps or appropriate covering to prohibit blowing dust and sand from contaminating the neighboring properties or surrounding streets and curbs.
6. After completion of the work, all debris and loose material is to be removed, leaving the site reasonably clean and orderly.
7. At completion of the excavation, applicant shall request a final inspection and fill out an application for a Certificate of Occupancy and pay all required fees.

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

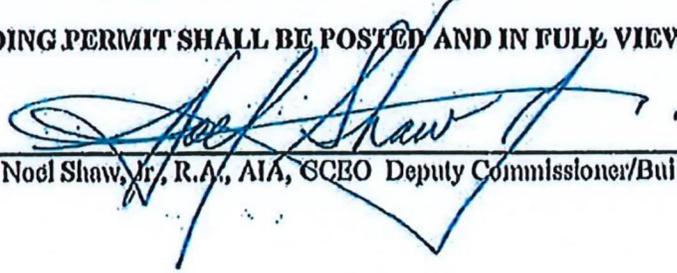
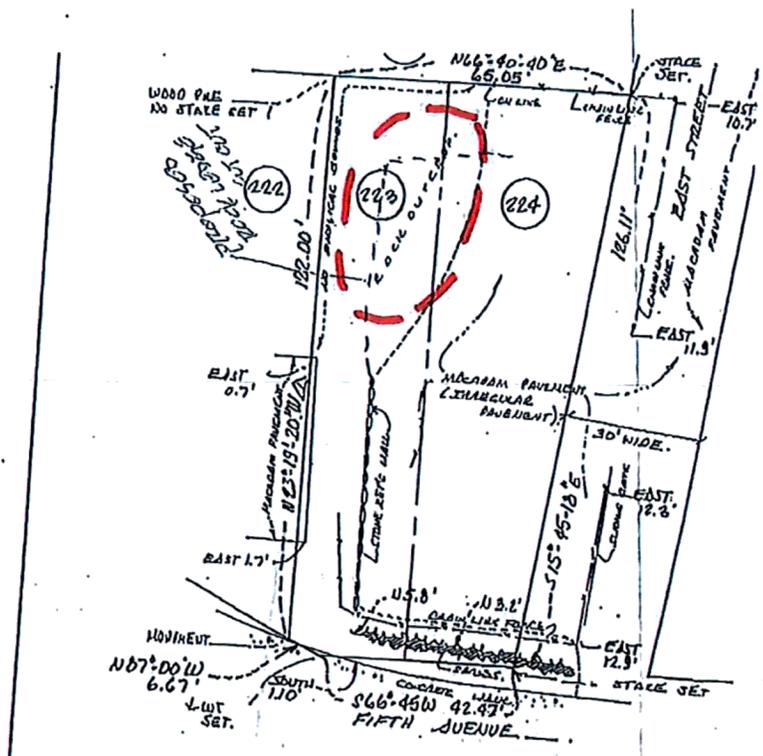
  
Noel Shaw, Jr., R.A., AIA, SCEO Deputy Commissioner/Building Official

Exhibit "10"



AREA = 186,600 sq. ft.

**General Notes:**

- 1) The sole intent of this property is to be graphic and all other surveying should not be used for its development.
- 2) This map was prepared by the Association of Professional Surveyors of the State of New York.
- 3) Elevation is shown or located by spot heights.
- 4) This map is based on the abstract of title and the information shown on the survey and is an approximation of the actual location of the corners.
- 5) Only the information shown on this map is to be considered true and correct.
- 6) Unauthorized alteration is a violation of State Education Department.

CLASSIFIED TO: 101  
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Prepared By:  
 Rob Taropoli, L.S.  
 271 North Avenue, Suite 316  
 New Rochelle, New York  
 10801  
 (914) 632-2200

FILE: 11/13/01  
 MAP: 11/14/01  
 REV: A

SURVEY OF LOTS 223 (PARTIAL) AND 224 (PARTIAL) ON A CERTAIN MAP ENTITLED "AVENUE HEIGHTS" IN THE CITY OF NEW ROCHELLE, WESTCHESTER COUNTY, NEW YORK.  
 DATE: 1"=201'  
 DATE: 100.15.2001

JOB  
 D0258

**CITY OF NEW ROCHELLE  
BUREAU OF BUILDINGS**

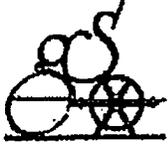
THESE PLANS AND APPLICATION WERE EXAMINED AND APPROVED AS NOTED. THEY SHALL NOT BE CONSTRUED AS AUTHORITY TO VIOLATE, CANCEL, ALTER, OR SET ASIDE ANY PROVISIONS TO THE BUILDING CODE, ZONING ORDINANCE, OR ANY OTHER LOCAL, COUNTY OR STATE REGULATIONS.

*Joe Skawit*  
 \_\_\_\_\_  
 PERMITTING OFFICIAL

PERMIT NO: MP-2003-0029      DATE: 5-19-03

D0259

Exhibit "11"

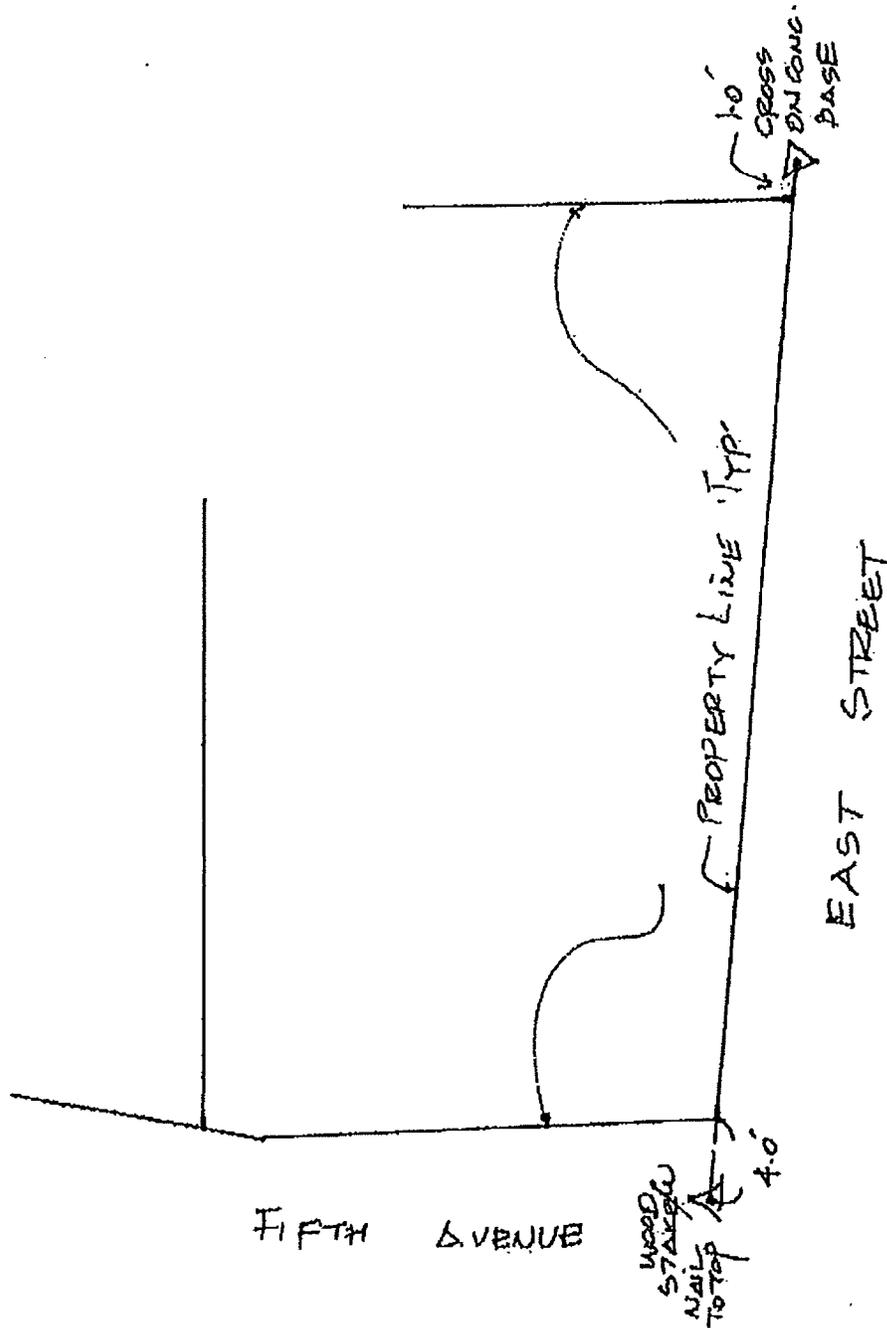


Gabriel E. Senior  
90 North Central Ave.  
Hartsdale, NY 10530  
914-422-0070 fax 914-422-3009

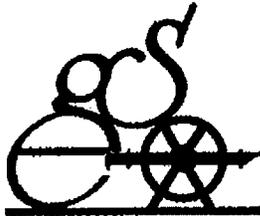
Job# 1728-E-224.  
Address: 436 5TH. AVENUE. N.Y.  
Sheet 1 of 1 Date 9-10-09  
Field Crew RB KA Scale NTS

STAKE OUT SKETCH:

2 MARKERS ON  
PROPERTY LINE  
EXTENSION AS  
SHOWN.



**Exhibit "12"**



**Gabriel E. Senor, P.C.**  
**Engineers Planners Surveyors**

90 N. Hartsdale Ave.  
Hartsdale, NY 10530  
Tel. (914) 422-0070  
Fax (914) 422-3009  
info@gesenor.com

**LETTER OF TRANSMITTAL**

**DATE: 1-21-2021**

**OUR FILE No. 1728-E-224**

**Sent Via**

**US Mail**

**[ X ]**

**TO: Scott Mendelsohn**  
**Wilson, Elser, Moskowitz, Edelman & Dicker LLP**  
**1133 Westchester Ave.**  
**White Plains, NY 10604**

**RE: City of New Rochelle v. Flavio La Rocca - File No.: 07367.00101**

***ENCLOSED PLEASE FIND:***

**Information from our files regarding the stakeout performed at 436  
Fifth Ave., New Rochelle**

**Eliot Senor, P.E., L.S.**  
**(914) 422-0070**  
**info@gesenor.com**

DATE ORDERED: **10-Aug-09**                      DATE DUE:                      **JOB # 1728-E-224**

FILE MAP#    LOT    BLOCK

TAX MAP TOWN: **New Rochelle**                      SECT                      SHT                      BLOCK      LOT

CERTIFICATIONS:

BANK:

TITLE COMPANY:

OWNER/PURCHASER:

**Client/phone#:**                      **Flavio LaRocca / 914-447-0173**

**SERVICES REQUIRED:**    **Stake Out East Side of Lot #224**

DRAFTING REQUIREMENTS

**DEED PROVIDED**

RESEARCH:

---

**STREET ADDRESS:** 436 5<sup>th</sup> Avenue, New Rochelle                      **JOB # 1728-E-224**                      **JMP**

**Atlas Page:**

**BILLING/CLIENT:**                      **Flavio LaRocca / 914-447-0173**

**FEE QUOTE:**

**DEPOSIT:**  
**DATE RECEIVED:**  
**AMOUNT:**  
**CREDIT:**

**FAX**

**EMAIL**

**GABRIEL E. SENOR, P.C.**  
 90 North Central Ave.  
 Hartsdale, NY 10530

# Invoice

**PAID**  
**10/15/2009**

BILL TO			INVOICE #
FMLR REALTY MANAGEMENT LLC Flavio LaRocca 436 5th Avenue New Rochelle, NY 10804			GB 1705-4133
			DATE
			9/10/2009
			RE:
			436 5th Avenue New Rochelle
TERMS	LOCATION	TOWN	DUE DATE
Due Upon Receipt			9/10/2009
FOR PROFESSIONAL SERVICES RENDERED			AMOUNT
Stake Out East Side of Lot #224 Pd \$675 dep Ck#1031 8/11/09 Pd \$225 in full Ck#1034 10/15/09 Stakeout Sketch Emailed to Flavio 9/10/09			900.00
<p><i>RO 1728-E-224</i></p>			

**Please Remit By Check To:**  
**Gabriel E. Senior**  
 90 North Central Avenue  
 Hartsdale, NY 10530

**Telephone Number:**  
 (914) 422-0070

**Fax:** (914) 422-3009

**Or Remit ACH To:**  
 J.P. Morgan Chase  
 Routing Number - 021000021  
 Account Number: 3010228750

**info@gesenor.com**

**Or Call Office With Credit Card Information -**  
 Visa, MasterCard, & American Express are  
 Accepted

Any additional copies of prints/CAD files, after three months of services, will be an additional charge of \$300. These proposal are valid for three months. Thank You.

<b>Total</b>	\$900.00
<b>Payments/Credits</b>	-\$900.00
<b>Balance Due</b>	\$0.00



HARRISON PARK CEMETERY

THIS IS TO CERTIFY THAT I HAVE SURVEYED  
lots 223 & 224 as shown on "Map of Fifth  
Avenue Heights in the City of New Rochelle, West  
Co., N.Y."

RICHARD A. SPINELLI  
723 EAST BOSTON POST ROAD  
MAMARONECK, N. Y.  
TEL: 381-1337

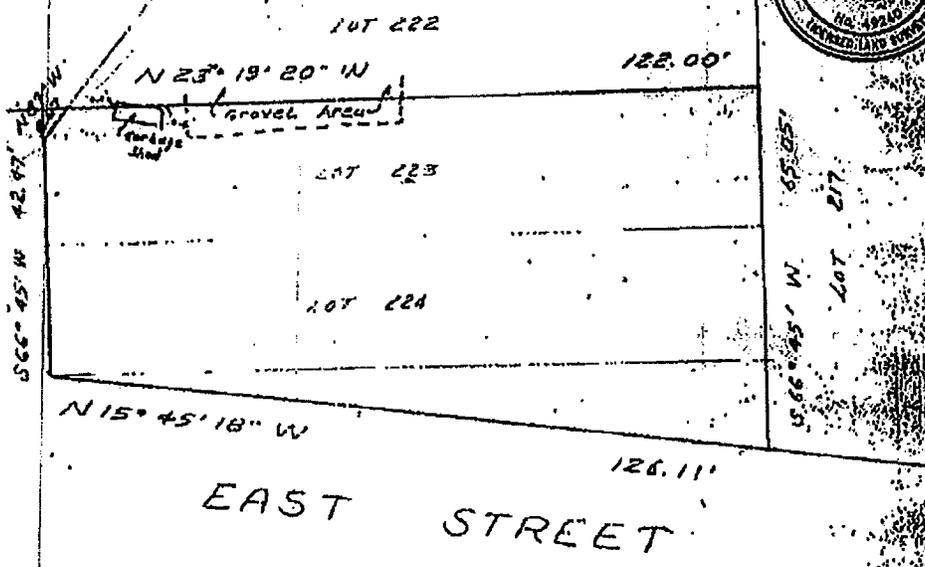
FILED IN THE WESTCHESTER COUNTY CLERK'S OFFICE, DIVISION OF LAND RECORDS  
(FORMERLY REGISTER'S OFFICE) June 7, 1907 AS MAP # 1728.

I HAVE LOCATED ALL EXISTING BUILDINGS AND LINES OF POSSESSION AS SHOWN HEREON.  
I HEREBY CERTIFY THIS SURVEY TO  
LIABILITY IS LIMITED.

SURVEY AND MAP COMPLETED Dec. 12, 1986 SCALE ONE INCH TO 20 FEET.

GUARANTEED IN ACCORDANCE WITH THE MINIMUM STANDARDS FOR TITLE SURVEYS OF THE NEW YORK STATE LAND TITLE ASSOCIATION  
NOTE: ALL CERTIFICATIONS MADE HEREON ARE VALID FOR THIS MAP AND  
COPIES THEREOF ONLY IF SAID MAP OR COPIES BEAR THE IMPRESSED  
SEAL OF THE SURVEYOR WHOSE SIGNATURE APPEARS HEREON.

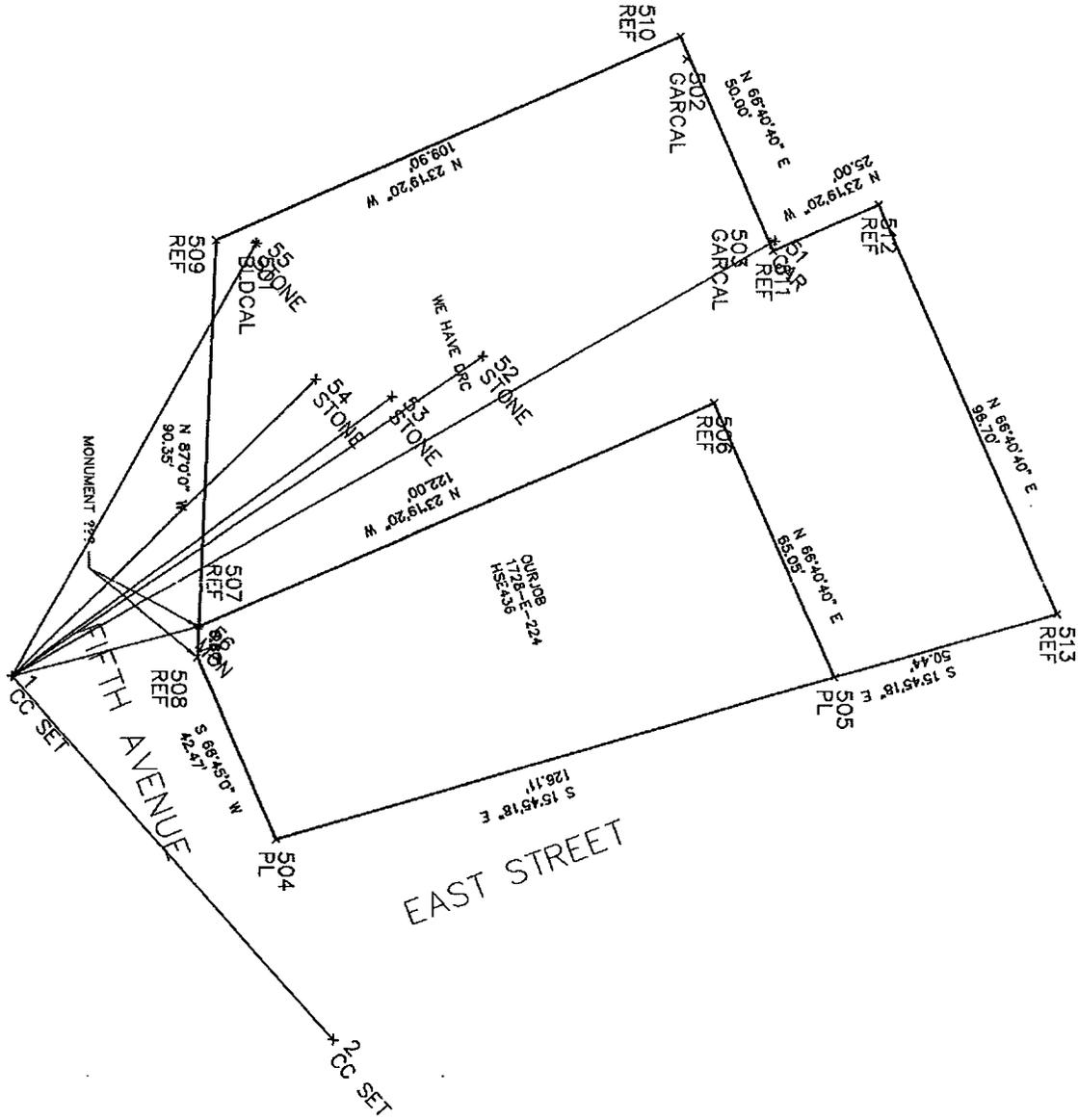
*Richard A. Spinelli*  
RICHARD A. SPINELLI  
N.Y.S. LAND SURVEYOR NO. 11840  
EXPIRES 12/31/2000  
2-11-86

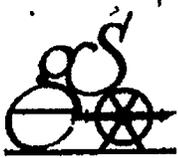


EAST STREET

		5TH AVE & EAST STREET		
1,	7694.3631,	17262.1501,	-99999,	CC SET
2,	7763.5105,	17340.3945,	-99999,	CC SET
56,	7735.0747,	17251.5060,	-99999,	MON
504,	7751.4903,	17297.1879,	-99999,	PL
505,	7872.8626,	17262.9460,	-99999,	PL
506,	7847.1064,	17203.2060,	-99999,	REF
508,	7734.7256,	17258.1669,	-99999,	REF

P:\DWG Drawings\ROM\NO1728.dwg



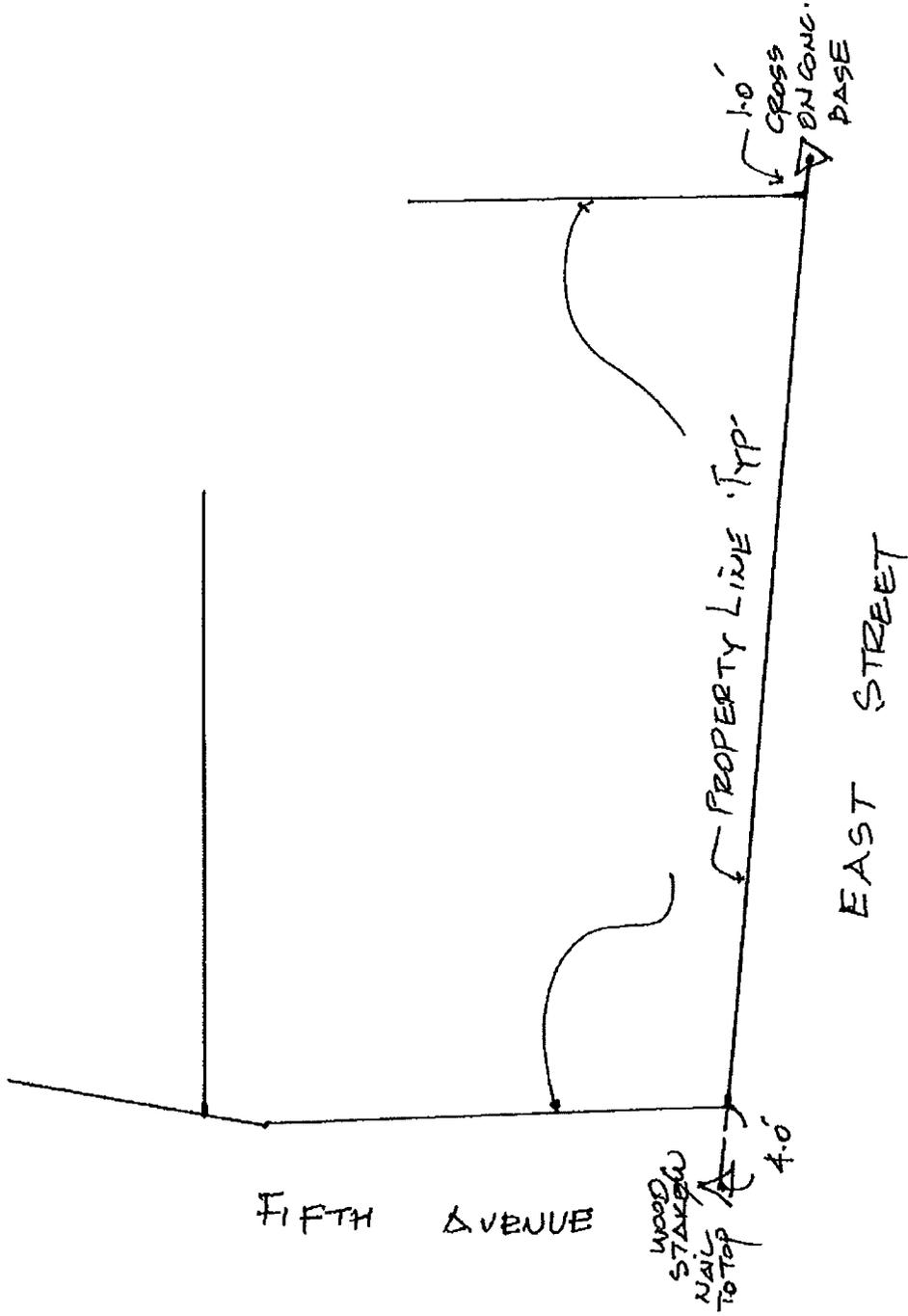


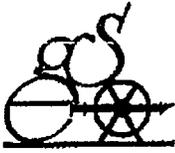
Gabriel E. Senor  
90 North Central Ave.  
Hartsdale, NY 10530  
914-422-0070 fax 914-422-3009

Job# 1728-E-224.  
Address 436 5TH. AVENUE. NR.  
Sheet 1 of 1 Date 9-10-09  
Field Crew RB KA Scale NT3

STAKE OUT SKETCH:

2 MARKERS ON  
PROPERTY LINE  
EXTENSION AS  
SHOWN.



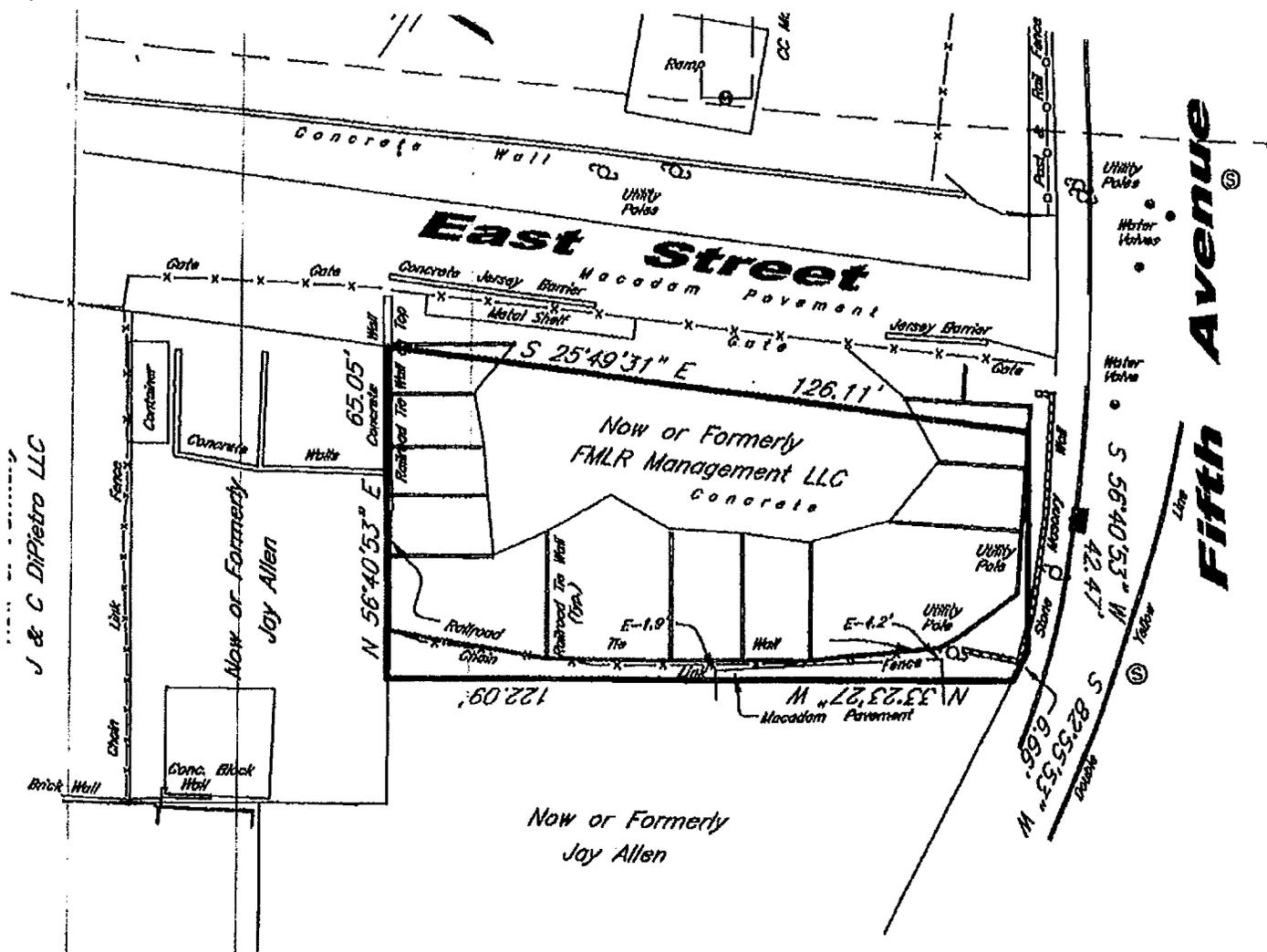


Gabriel E. Senor, P.C.  
 90 North Central Ave.  
 Hartsdale, NY, 10530  
 914-422-0070  
 914-422-3009 fax

Job # 1728-E-224  
 Address 436 5<sup>TH</sup> AVE, NR  
 Sheet      of      Date 09-10-09  
 Field crew RB/KA Scale NTS

Sta #	BS#	BS Dist	Sta IH	Sta elev.	Rod HS		
Pnt	H ANG	H Dist	V Difference	V ANG	ROD HT	ELEV	REMARKS
1-2		104.42					
51 (A)	281.59.02	190.91					
52 (B)	277.31.46	123.74					
53 (C)	275.22.46	102.55					
54 (D)	267.27.24	92.42					
55 (E)	251.20.45	107.97					
56 (F)	296.48.58	42.08					





Survey of Property  
 prepared for  
**City of New Rochelle**  
 in the City of  
**New Rochelle**

Westchester County, N.Y.  
 Scale 1"=30' Apr. 13, 2016

*The premises being Lot 29, Block 931, Section 3 as shown on the official Tax Assessment Maps of the City of New Rochelle.*

## TITLE NO:REL14350-W

## SCHEDULE A

ALL that certain plot, piece or parcel of land situate, lying and being in the City of New Rochelle, County of Westchester and State of New York, and known as Block 931, Lots 29 and 30 on the Official Tax Assessment Map of the City of New Rochelle and also known and designated as Lots 223 and 224, Block "E" on a certain entitled, "Map of Fifth Avenue Heights", filed June 7th, 1907 as Map No. 1728, which property is bounded and described as follows;

BEGINNING at a point where the northerly side of Fifth Avenue is intersected by the division line between Lot 223 and Lot 222;

THENCE RUNNING along the same, North 23 degrees 19' 20" West, 122.00 feet to a point and the intersection of Lot 223, Lot 222 and Lot 217;

THENCE RUNNING along the division line between Lot 223, Lot 224 and Lot 227 on a course North 66 degrees 45' East, 65.05 feet to the westerly side of East Street;

THENCE RUNNING along the same on a course, South 15 degrees 45' 18" East, 126.11 feet to the intersection of the westerly side of East Street and the northerly side of Fifth Avenue;

THENCE RUNNING along said northerly side of Fifth Avenue the following 2 courses and distances:

South 66 degrees 45' West, 42.47 feet; and  
North 87 degrees West, 6.67 feet to the point or place of BEGINNING.

FOR CONVEYANCING ONLY, IF INTENDED TO BE CONVEYED: TOGETHER WITH ALL RIGHT, TITLE AND INTEREST OF, IN AND TO ANY STREETS, ROADS OR AVENUES ABUTTING THE ABOVE DESCRIBED PREMISES, TO THE CENTER LINE THEREOF.

2022 08 04 11 12 AM

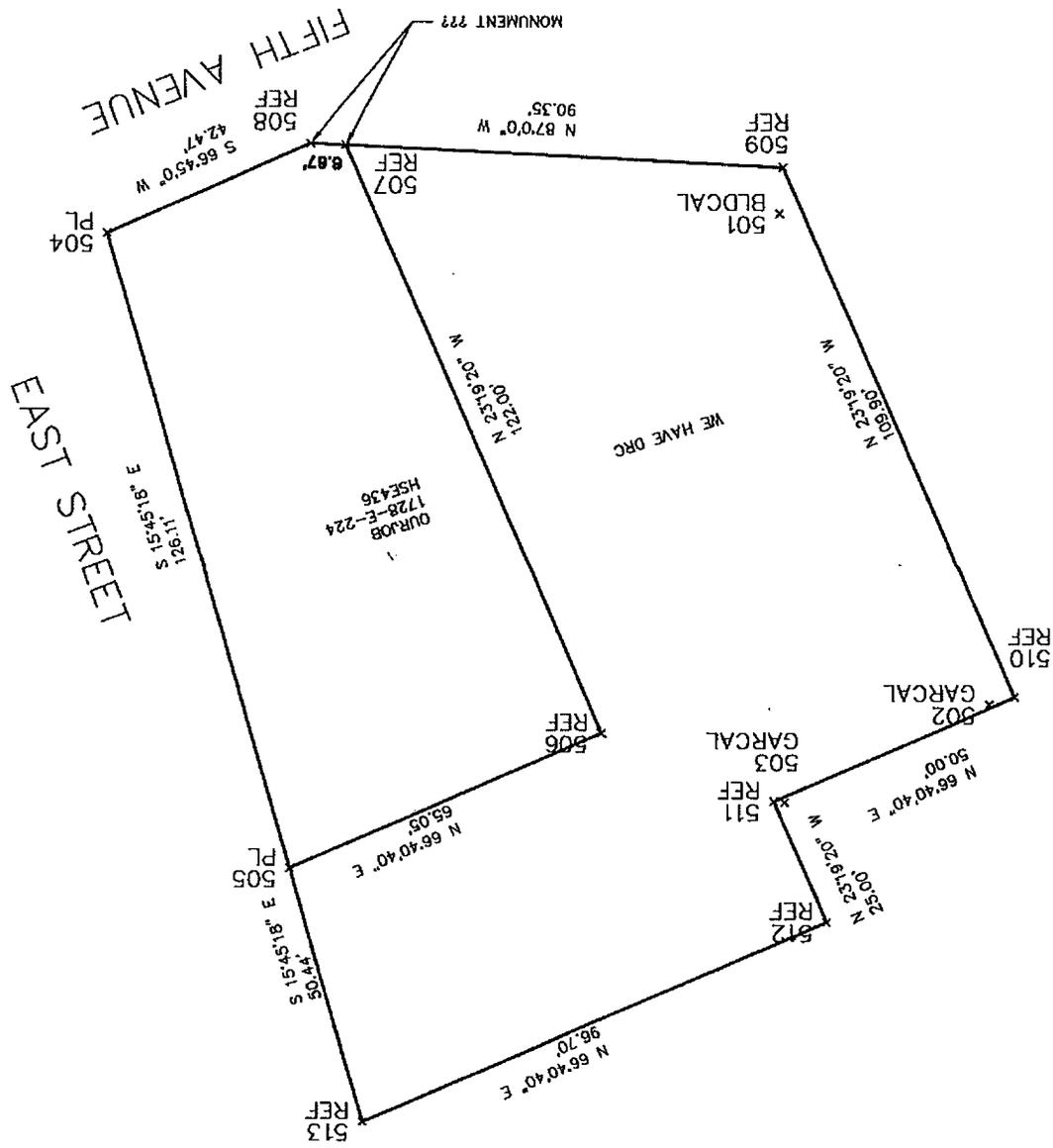


Exhibit "13"



Exhibit "14"

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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

\* \* \*

1

2

## STIPULATIONS

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4

5

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

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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.

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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.

\* \* \*

1

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?

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.

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.

1                   BERNARDO F. RIVERA

2           Q           Anything else you can think of?

3   Or is that basically what you use in the  
4   tree service business?

5           A           Yeah.

6           Q           And back, in 2015, how many  
7   employees did you have?

8           A           Seven to nine.

9                   I can't remember, right now. I  
10   could go back, in to payroll.

11          Q           Approximately?

12          A           Yeah, seven to nine.

13          Q           And do any of those people still  
14   work for you?

15          A           One.

16          Q           What's that person's name?

17          A           Enrique Garcia.

18          Q           Did you ever have occasion to  
19   discuss this incident with Mr. La Rocca?

20          A           No.

21          Q           Did he ever tell you what it was  
22   about?

23          A           No.

24          Q           Did you ever ask him?

25          A           No.

Page 10

1                   BERNARDO F. RIVERA

2           Q           You first occupied the premises  
3 you're in, now, first, as a tenant and  
4 then you bought the premises?

5           A           Yes.

6           Q           Am I right? How long ago did  
7 Benny's Tree Service first occupy those  
8 premises?

9           A           I don't -- I can't remember the  
10 month, the year because we were around the  
11 corner and New Rochelle came in and  
12 changed the zoning.

13          Q           Right.

14          A           And I was looking for a new  
15 place.

16                    So -- 'cause where we were, they  
17 came in and said that commercial vehicles  
18 could no longer park outside, where I was.

19                    So I was looking and I don't --  
20 I can't remember the exact year, the  
21 month.

22                    And it happened -- I rent the  
23 spot two yards down.

24                    So I used to rent one spot, for  
25 one of my vehicles, which I still -- it's

1                   BERNARDO F. RIVERA

2       still there.

3                   And it just came across and end  
4       up renting the yard.

5                   I mean, and, again, I have to go  
6       through all of my paperwork, to look at  
7       the leases and all that.

8                   Because I no longer pay rent, so  
9       there's no real record of that, you know.

10            Q       You own it now?

11            A       Yes.

12            Q       You pay taxes?

13            A       Yes.

14            Q       During the time that your  
15       business was located at East Street --

16            A       Yes.

17            Q       -- who plowed the snow on East  
18       Street?

19            A       Pretty much, we all did.

20                   You know, more or less, it was  
21       Mr. La Rocca because, you know, he was the  
22       first yard and then we would all clean up,  
23       like in front of our yard.

24            Q       And did you ever have occasion  
25       to make repairs to East Street?

1                   BERNARDO F. RIVERA

2           A           Yeah. Occasionally. I always  
3    try to repair what's in front of my  
4    property. We do get potholes. We do.

5           Q           So would it be fair to say that  
6    the businesses on East Street maintain  
7    East Street?

8           A           Yes.

9           Q           Now going back to May of 2015,  
10   where did your employees park their  
11   personal cars?

12          A           At that time, I would say I have  
13   one or two employees that drove.

14                    Because a couple of my employees  
15   lived at the house that -- where I used to  
16   rent, previously, on Plain Avenue.

17                    So two.

18                    So we used to park, down below  
19   because I rented in front of the other  
20   yard, I rented a spot.

21                    So I used to have one of them  
22   park there and a couple cars in front of  
23   my yard.

24          Q           Now, before we started the  
25   actual deposition, there was something on

1                   BERNARDO F. RIVERA

2       the screen, which you're going to see  
3       later, it's titled the "Talk of the  
4       Sound", okay. And you said something  
5       about that guy. Who did you mean? Did  
6       you mean Mr. Cox?

7           A        Yeah, Mr. Cox.

8           Q        And do you know him?

9           A        I don't know him. But I had a  
10       previous problem with him.

11          Q        What was that?

12          A        You know. Because he claimed  
13       that I was illegally dumping in the  
14       schools.

15                   And so I had to come back at  
16       him, if I'm illegally dumping in the  
17       schools, how come I have to go to  
18       security, so they could open up gates for  
19       me.

20                   You know. And put this all  
21       over. He badmouthed me.

22                   You know, he badmouthed people,  
23       without getting to your facts, should be.

24                   Because he had a personal  
25       vendetta from this -- from one of the

1                   BERNARDO F. RIVERA

2       maintenance guys that I grew up with.

3                   They asked me for wood chips, I  
4       dump.

5                   But, when I used to have to dump  
6       the wood chips, I had to pull in the  
7       school, get security, to go open up a back  
8       gate, open the gate, allow me in and  
9       then --

10                  So if I was illegally dumping,  
11       why would security and the Board of  
12       Education open up that gate for me.

13           Q       Did he retract his allegations?  
14       Did he take it back?

15           A       I never really followed up on  
16       it.

17                  But, you know, I'm a small  
18       business. I'm a, you know, I'm an  
19       owner/operator. I don't just set my guys  
20       up and go drive around all day.

21                  No, I'm with my men. I take my  
22       trees down.

23                  And I had some customers call me  
24       up, you know, questioning me, saying how  
25       could you do that.

1                   BERNARDO F. RIVERA

2                   Number one, my children are in  
3 the two schools that I'm dumping chips.  
4 You think I'm going to go in there and  
5 create problems, when I have one kid in  
6 Ward and one kid in Albert Leonard.

7                   You know, I think he just does  
8 things without getting his facts right.

9                   Q           Have you ever spoken to him,  
10 directly?

11                  A           Mr. Cox?

12                  Q           Yes.

13                  A           One time, because a tree fell  
14 down on the house that he lives, but he's  
15 not the owner and I did not know it  
16 was the house he was renting.

17                         So I knocked on his door, had  
18 him move his cars out of the driveway.

19                         And that's the only time I ever  
20 came face-to-face with Robert Cox.

21                         And I told the owner, if I  
22 would've known it was him, I would have  
23 never took this job.

24                  Q           So, for the owner, you took --

25                  A           Same, like you. If you own a

1                   BERNARDO F. RIVERA

2       house, you say go to my rental house, a  
3       tree fell across the property.

4           Q       Right.

5           A       I go over there, I tell you this  
6       is how much it's going to be and you say,  
7       okay, do it, sent me a contract and I did  
8       the work.

9                   When I get over there, I call  
10       him up, because I'm ringing the doorbell,  
11       nobody's answering.

12                   And then -- oh, I was on,  
13       whatever, he's doing his thing.

14                   So I had to wait.

15                   But if I would have known, I  
16       would not accept that job.

17           Q       Going back to May of 2015, I  
18       know, it's a long time ago, was it your  
19       usual practice to stay at your business,  
20       on East Street or was it your practice to  
21       go out with your crew, every day, on jobs?

22           A       I would go out.

23                   We'd meet in the yard. We set  
24       everybody up, because I have a landscape  
25       part.

1                   BERNARDO F. RIVERA

2                   And I send everybody that has to  
3 go out and work for the day, what do you  
4 need.

5                   We all meet and then we usually  
6 go out, about.

7           Q           We're going to show you a video,  
8 okay. And, basically, it is a video that  
9 was made by Mr. Cox.

10                   And we're going to go through  
11 it. I'm just going to ask you about what  
12 you see in the video.

13                   [Video recording is playing and  
14 shared via Zoom.]

15           Q           I'm going to ask you to take a  
16 look at what is shown at stop number  
17 twelve on -- and this is Exhibit 13,  
18 Plaintiff's Exhibit 13.

19                   And we're looking at stop number  
20 twelve.

21                   Can you identify what you see in  
22 the photograph?

23           A           I see a machine and I see a few  
24 men standing in the street.

25           Q           Do you recall, having seen what

1                   BERNARDO F. RIVERA

2       you see in the photograph, now, do you  
3       recall having seen that in person?

4           A        No.    But that's a block that  
5       everybody there has machines.

6                    There's machines up and down  
7       that road, all day long.

8           Q        Do you recognize any of the  
9       people?

10          A        No.

11          Q        Were you able to identify any of  
12       the people?

13          A        No, you can't see a face.

14          Q        Okay.   Fair enough.   Let's  
15       continue.

16                    Now, we're, of the same exhibit,  
17       we're now at Stop 21.

18                    First of all, can you recognize  
19       any of the people shown in the video?

20          A        No.    If that's him, that's his  
21       employees, I don't know anybody.

22          Q        When you say "that's him", you  
23       Mr. La Rocca?

24          A        Nah.    You see his trucks.   You  
25       see that there.   But I don't know anybody

1                   BERNARDO F. RIVERA

2       there.

3           Q           Okay. Fair enough.

4                   And do you recall, back in May,  
5       having seen the work that's shown in this  
6       photograph, having seen -- did you see, in  
7       person, what's shown in this photograph?

8           A           No, we -- I pulled in my yard  
9       and we did what we had to do and we left.

10          Q           The same exhibit. Now we're at  
11       Stop 26, okay. Do you see, in the far,  
12       the far right-hand side, what looks like  
13       piles of wood chips?

14          A           Uh-huh.

15          Q           Do you know whether or not  
16       Benny's Tree Service put the wood chips  
17       there?

18          A           I didn't, personally, put 'em  
19       there. So.

20          Q           I'm asking whether your business  
21       would have put them there.

22          A           (Indicating).

23          Q           No?

24          A           (Indicating).

25          Q           At the time, did you see the

1                   BERNARDO F. RIVERA

2   wood chips there?

3           A        I never pay attention to that  
4   park because that's passed my yard.

5                   The city fenced that in.

6           Q        Correct?

7           A        So when I pull, I pull to my  
8   yard. That's passed my yard.

9           Q        Right.

10          A        And it's a little more downhill,  
11   to the right. I never really paid  
12   attention to there.

13          Q        Do you notice in, roughly, the  
14   middle of the photograph, there is a  
15   yellow roller?

16          A        Yes.

17          Q        Do you know who that belongs to?

18          A        I couldn't tell you whose roller  
19   that was.

20          Q        Is it yours?

21          A        No, I don't have rollers. I  
22   don't have machines, like that.

23          Q        But you do have wood chippers?

24          A        Yeah.

25          Q        And did there ever come a time

1                   BERNARDO F. RIVERA

2           that you used your wood chippers to chip  
3           wood from an area along East Street?

4           A           No.  No, just one of the  
5           neighbors came out and asked me to chip  
6           some branches, 'cause there are other  
7           gardeners that I do work for.

8                   But, other than that, no.

9           Q           Did Mr. La Rocca ever ask you to  
10          chip branches for him?

11          A           Actually, no.  No, I did that  
12          for job sites, jobs that he had gave me,  
13          yes, but not, not on the road, no.

14          Q           Not on East Street, okay.  
15                   And do you recognize either of  
16          the two workers that are shown in the  
17          photograph?

18          A           No.

19          Q           Now we're at Stop 43.  Do you  
20          recognize any of the people that are  
21          depicted in that photograph?

22          A           No, I never paid attention to  
23          his workers, to be honest.

24          Q           Is it your understanding, that  
25          these three people are workers, not owners

1                   BERNARDO F. RIVERA

2       of any other business?

3           A        I would assume that, yes.

4           Q        Because they're working?

5           A        (Indicating).   And where one,  
6       two, three, four, five, six -- there were  
7       seven owners on that road.

8                   So these are none of the owners.

9           Q        We're now at Stop 54, okay.   Do  
10       you see the truck that's in the middle of  
11       the picture?

12          A        Yes.

13          Q        And do you know who owns that  
14       truck?

15          A        I guess that's Flavio's, it's  
16       got his name on the door.

17                   Or are you talking to the truck,  
18       to the left?

19          Q        I'm talking about the truck that  
20       is -- the front wheels are slightly to the  
21       left of the middle of it.

22          A        Yes.   Yes, that's Flavio's name  
23       on it.

24          Q        Now, looking to the left of the  
25       photograph, do you see there's a green

1                   BERNARDO F. RIVERA

2       truck?

3           A        Yes, that's my truck.

4           Q        That's your truck.

5           A        And the truck, to the right, it  
6       was my personal vehicle.

7           Q        If your truck and your personal  
8       vehicle were in this photograph, does that  
9       mean that you were at your place of  
10      business?

11          A        No, because my truck, to my  
12      left, is one of my maintenance trucks.

13                   And we don't cut grass on  
14      Saturdays.

15                   My personal vehicle is to go  
16      from my home to my business.

17                   And then I have fifteen trucks,  
18      myself.

19                   So I get in one of my work  
20      trucks and I do what I have to do for the  
21      day.

22                   'Cause I live in residential and  
23      I cannot park a commercial vehicle, at  
24      that time, in my driveway.

25          Q        So given that the truck that you

1                   BERNARDO F. RIVERA

2           use, for when you cut grass, was in the  
3           yard, does that suggest that this picture  
4           was taken on a Saturday?

5           A           Yeah.

6           Q           Do you happen to recall that  
7           particular Saturday?

8           A           Not really. Because I got a  
9           phone call from one of the other owners,  
10          telling me that the police were down  
11          there.

12                    So I really -- I don't remember.  
13          It was like every day. I go there, you  
14          know, I don't -- I stay, if I have to  
15          stay. But that particular day we left  
16          early.

17          Q           And the person, who called you,  
18          what did they say?

19          A           They just asked me if I knew  
20          what was going on, just being a nosey  
21          neighbor.

22                    I mean, that's -- as a matter of  
23          fact, the vehicle, coming down, that was  
24          the neighbor.

25                    Because we have identical -- we

1                   BERNARDO F. RIVERA

2           own the same color, same everything  
3           vehicles.

4           Q           And when you say the vehicle  
5           coming down, you mean the one with the  
6           lights on?

7           A           In the middle, yeah.

8           Q           The one with the lights on.  
9           That actually belonged to the neighbor?

10          A           Yeah.

11          Q           Do you remember the neighbor's  
12          name?

13          A           Joseph Guglielmo.

14          Q           And does he own a business?

15          A           Yeah, he owns the last yard, on  
16          the left.

17          Q           And do you know the name of his  
18          business?

19          A           Probably 'cause the father's --  
20          was the father's. Gotta be Guglielmo.  
21          Something like.

22          Q           Something, Guglielmo. All  
23          right.

24                    We're now at Stop 1:15. Can you  
25           identify any of the vehicles that are

1                   BERNARDO F. RIVERA

2       shown in this photograph?

3           A        They are Mr. La Rocca's  
4       vehicles.

5           Q        And going back to May of 2015,  
6       where did he usually store his vehicles?

7           A        In his yard, usually, every  
8       night, his vehicles.

9                    In the morning, like my  
10       vehicles, I put 'em out. Then, usually,  
11       the road is clear, you don't see 'em.

12          Q        Going back to May of 2015, was  
13       there any difficulty in entering and  
14       having your vehicles enter East Street  
15       from Fifth Avenue? Was there a problem  
16       caused by the width of the road?

17          A        No.

18          Q        Going back --

19          A        Even with those vehicles,  
20       there -- because I park there too, in the  
21       morning.

22                    'Cause, one day, we -- you know,  
23       I have different trucks.

24                    So every day we don't use the  
25       same trucks.

1                   BERNARDO F. RIVERA

2                   Except for the maintenance guy,  
3 Monday through Friday, they use their  
4 maintenance truck.

5                   And you could still pass two  
6 vehicles with all those vehicles parked on  
7 the --

8           Q           Now we're at stop number 1:34.  
9 Looking at the photograph, that's in front  
10 of you, now, to the right side of it,  
11 where there's a gate that's open, is that  
12 Mr. La Rocca's yard?

13           A           Yes.

14           Q           Now, as you see it in the  
15 photograph, do you think it would be  
16 possible for two vehicles to pass each  
17 other?

18           A           Yes. You can't go by a picture.  
19 I'm going by --

20           Q           Your experience?

21           A           -- this is what I do every day,  
22 six days a week, sometimes seven.

23           Q           When you get unlucky, you have  
24 to work Saturday.

25           A           Very rare, you gotta stop, you

1                   BERNARDO F. RIVERA

2       know. 'Cause maybe there's a larger truck  
3       coming, with a larger trailer, that's the  
4       only time you pull over.

5                   We never have issues. Everybody  
6       respects everybody.

7           Q       Now looking at the photograph,  
8       that's shown at Stop 1:46, do you  
9       recognize the truck that's on the right  
10      side of the photograph, the black truck?

11          A       It could be his. But there's no  
12      name on it.

13          Q       Any chance that it's yours?

14          A       No.

15          Q       Now looking at the photograph  
16      that's shown at Stop 2:06, can you  
17      identify the truck that's on the right,  
18      that's on the right side of the  
19      photograph?

20          A       That's my truck.

21          Q       And just looking at the ramps,  
22      would I be correct that this truck is used  
23      to transport equipment?

24          A       Yes.

25          Q       What kind of equipment?

1                   BERNARDO F. RIVERA

2           A           Lawnmowers. That's it.

3           Q           These are ride-around mowers,  
4 right?

5           A           Yeah. Whatever you need to --  
6 we have -- 'cause we have two box trucks  
7 and they both just carry lawnmowers.  
8 That's it. Nothing else ever goes in  
9 these trucks.

10          Q           Now, in the photograph, it shows  
11 that the ramps are down.

12          A           Uh-huh.

13          Q           And the truck is located, in the  
14 photograph, on East Street; is that right?

15          A           Yes.

16          Q           Had the lawnmowers, that were in  
17 the truck, been removed from the truck on  
18 East Street?

19          A           Yes.

20          Q           And what would have been the  
21 reason for taking the lawnmowers out of  
22 the truck on --

23          A           Every Saturday morning the main  
24 guy sharpens the blades, cleans the  
25 machines and get 'em ready for Monday.

1                   BERNARDO F. RIVERA

2                   Because my rule is, Monday, we  
3 fill up with gas, be ready to go, so  
4 you're cutting grass at the first house by  
5 eight o'clock.

6                   So that's what that vehicle was  
7 doing.

8           Q           Now, looking at the same  
9 photograph, at Stop 2:06, do you see that,  
10 to the right of your truck, there's a  
11 black fence?

12           A           Yeah.

13           Q           Okay.

14           A           To the right.

15           Q           To the right?

16           A           Yeah.

17           Q           Now is that fence adjacent to  
18 the skate park?

19           A           Yes, that fence belongs to the  
20 skate park.

21           Q           Now, I'm showing you the  
22 photograph that's at Stop 2:16. Do you  
23 see, it's a green truck with a white cab,  
24 that's on the right side of the  
25 photograph?

1                   BERNARDO F. RIVERA

2           A           Uh-huh.

3           Q           Can you identify that truck?

4           A           That's my truck.  And, if you  
5    rewind, they're both identical.  They're  
6    both, the same color, the same everything.

7                    If you rewind, you'll see the  
8    name, same name and everything on this  
9    vehicle.

10          Q           Fair enough.  It doesn't say  
11    Benny's, does it?

12          A           No, my landscape company is Pete  
13    Carino Landscape.

14          Q           I see.

15          A           My godfather is Patsy Carino.  
16    He got sick.  I started helping him.

17                    So we merged.  You know, he  
18    brought me in and then I end up eventually  
19    buying him out.

20                    And I don't remember if we were  
21    partners then or if I already had bought  
22    him out.  I don't remember what year it  
23    was.

24                    And I made a promise to his  
25    wife, I wouldn't change the name until he

1                   BERNARDO F. RIVERA

2       passes.

3           Q        So he's still alive?

4           A        Actually, he's having heart  
5       surgery today.

6           Q        Wish him well.

7                   Now we're looking at a  
8       photograph that's at stop number 2:25. Do  
9       you see the cars that are parked at the  
10      far right-hand of the photograph?

11          A        Yeah.

12          Q        Can you identify any of those  
13      three cars?

14          A        The only one, that I know of,  
15      that is there, is Mr. Enrique Garcia, he's  
16      my employee.

17                   And that's the first car, on the  
18      right, the pick-up.

19                   The other cars, I don't know  
20      them.

21          Q        Now do you know if he usually  
22      parked in that same location?

23          A        Only on Saturdays. Because  
24      Saturdays, nobody was -- is there.

25                   'Cause the company, to the left,

1                   BERNARDO F. RIVERA  
2           is a union company and they work Monday  
3           through Friday.

4                   So only on Saturdays -- and the  
5           skateboard park was not open yet  
6           because -- you know, then -- because when  
7           they're open they ask us not to park  
8           there.

9                   Which we don't park there  
10          anymore because the city opened up, that  
11          we can park in the city, city parking lot.

12           Q           Do you remember when your  
13          employee, on Saturdays, started parking  
14          where he was parked as shown in the  
15          photograph?

16           A           I don't pay attention to where  
17          people park, you know.

18           Q           Did he park there over a number  
19          of months?

20           A           No. Let me see. Hold on. No.  
21          No. I don't remember.

22           Q           Before May, back in 2015, before  
23          that area was clear, where did he park?

24           A           Either down the hill, in front  
25          of Guglielmo's yard or right in front of

1                   BERNARDO F. RIVERA

2       my yard.

3                   Because right, where that  
4       vehicle is, is still open. But there's  
5       access, where the city could go in there.

6                   So that's still open, that one  
7       parking spot.

8           Q        So am I correct, that after that  
9       area was cleared, he was able to park  
10      there on Saturdays?

11                   MS. ZALANTIS: I'm going to  
12      object as to form.

13           Q        That means you can answer. But  
14      she's has to --

15                   MS. ZALANTIS: I just objected  
16      as to form, but you can answer.

17           A        I don't know why he put it  
18      there.

19                   You know, like I said, I don't  
20      question, as long as my men are in front  
21      of my gate, I don't care, really, where  
22      they park.

23           Q        Of course. And I should  
24      rephrase the question because I wasn't  
25      asking why. I was just asking, did he

1                   BERNARDO F. RIVERA

2       park there on Saturdays, after the area  
3       was cleared.

4           A        No, he -- that --

5                   MS. ZALANTIS:   Objection.

6           A        -- that area was always cleared.

7           Q        So he was always able to park  
8       there on Saturdays, if he wanted to?

9           A        Yes.

10          Q        Let's continue.

11                   Looking at the photograph and,  
12       now were at Stop 2:47, do you recognize  
13       any of the cars that are parked down the  
14       hill?

15          A        I mean, you see a little bit of  
16       Mr. Guglielmo's because I know the car,  
17       'cause we had identical cars.

18                   Other than that, no.

19          Q        Now the "little bit of  
20       Mr. Guglielmo's", is that the truck?

21          A        It's the one behind the truck.  
22                   Because this is a little bit a  
23       ways from my yard.

24          Q        Now is this further down the  
25       hill from your yard?

1                   BERNARDO F. RIVERA

2           A           Yes.

3           Q           So when I say further down the  
4 hill, when I say further down the hill, I  
5 mean further away from Fifth Avenue. We  
6 both mean the same thing, right?

7           A           No, you're technically -- 'cause  
8 as the hill comes down, so where the last  
9 green truck, that's my property line.

10                   My frontage is only fifty feet.

11                   So, technically, I had the two  
12 trucks parked on the opposite side, on the  
13 wall, but I was pretty much in my footage,  
14 there.

15                   So from the back of the last  
16 truck, then, that goes down.

17           Q           Now you're referring to the  
18 green truck, in the last -- in the last --

19           A           Yes.

20           Q           We can go back, just to make  
21 sure I understand.

22                   MR. KOKE: Off the record.

23                   [Discussion held off the  
24 record.]

25           Q           Is that the picture you're

1                   BERNARDO F. RIVERA

2       talking about?

3           A        Yeah.    So, technically, the back  
4       of that truck is the property line.

5                   And, then, as you go, it goes  
6       downhill.

7           Q        So your property is  
8       approximately -- would be from, roughly,  
9       from the back of the truck, fifty feet  
10      towards Fifth Avenue?

11          A        Yes.

12          Q        Mr. Rivera, that was the video.  
13      Is there anything about that video that  
14      would explain better what happened that I  
15      didn't ask you about?

16          A        No.

17                   MR. MEISELS:   I'd like to take a  
18      ten-minute break.

19                   [A short recess was taken.]

20          Q        Mr. Rivera, I'm going to show  
21      you a photograph that's been marked as  
22      Plaintiff's Exhibit 3A.   Do you recognize  
23      any of the people shown in that  
24      photograph?

25          A        It's way too far.

1                   BERNARDO F. RIVERA

2           Q           Do you recognize any of the  
3 vehicles shown in that photograph?

4           A           It says Mr. La Rocca -- you  
5 know, La Rocca & Sons' truck, I suppose.

6           Q           And more towards the center of  
7 it, do you see another yellow truck?

8           A           You mean, all the way to the  
9 right?

10          Q           Well, it's to the right.  
11 There's one yellow truck, all the way to  
12 the left.

13                   And, then, there's one, that you  
14 see, it's almost like the middle of the  
15 photograph; do you recognize that one?

16          A           No.

17          Q           And, then, down the hill, do you  
18 see what looks like a white car?

19          A           Yes.

20          Q           Do you recognize that?

21          A           I thought you were talking about  
22 the white car.

23                   No, the white car never -- the  
24 other truck is the same color as Mr. La  
25 Rocca's vehicles.

1                   BERNARDO F. RIVERA

2           Q           Are those his colors, yellow and  
3 blue? Or what --

4                   Now I'm going to show you what's  
5 been marked as Defendant's C for  
6 identification.

7                   MR. KOKE: Off the record.

8                   [Discussion held off the  
9 record.]

10          Q           Now, what we're showing you is a  
11 second photograph, that's included in  
12 Exhibit 3A.

13                   Do you recall having seen what  
14 is shown in this photograph?

15          A           What do you mean, seen?

16          Q           Did you ever, in person, see  
17 what is shown in the photograph?

18          A           No.

19          Q           And can you identify either of  
20 the two workers that have their backs to  
21 the camera?

22          A           No.

23          Q           Now, in this photograph, do you  
24 see an area that appears to be elevated,  
25 where the workers are raking?

1                   BERNARDO F. RIVERA

2           A           Yes.

3           Q           Prior to May of 2015, did that  
4 area have bushes and trees in it?

5           A           From my knowledge, it was there.  
6 I don't remember too much, but I remember  
7 seeing, there was like piles of stuff  
8 there, whether bushes and trees, no, I  
9 don't remember that.

10          Q           Do you know what kind of stuff  
11 you saw?

12          A           I never really paid attention.

13          Q           And do you see, at the top of  
14 the hill, what looks like piles of wood  
15 chips? Do you know, were those wood  
16 chips?

17          A           I mean, for being in the tree  
18 business, it does look like wood chips.

19          Q           And do you know how those wood  
20 chips got there?

21          A           No.

22          Q           Do you know whether or not  
23 someone working for you put the wood chips  
24 there?

25          A           Not to my knowledge.

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1                   BERNARDO F. RIVERA

2           Q        Do you know why the wood chips  
3 were put there?

4           A        To me, it's to beautify.

5           Q        When you say to beautify, to  
6 spread them out?

7           A        Yeah.

8                   MR. MEISELS: Let's go to the  
9 next photograph.

10          Q        Now I'm showing you what's the  
11 third photograph, in Exhibit 3A.

12                   Looking at the far right-hand  
13 side -- I'm sorry, the fourth photograph,  
14 in Exhibit 3A, looking at the far  
15 right-hand side of the photograph, do you  
16 see that there's some cars parked up, on  
17 the hill?

18          A        Yes.

19          Q        Can you identify any of those  
20 cars?

21          A        The one that I told you belongs  
22 to my one employee. The other ones, I've  
23 never seen before.

24                   My employee still has that  
25 vehicle, so.

1                   BERNARDO F. RIVERA

2           Q           Let's go to the fifth  
3 photograph.

4                   Now, looking at this photograph,  
5 which is number six, the sixth photograph  
6 in Exhibit 3A, do you see the line of  
7 cars?

8           A           (Indicating).

9           Q           How many of those cars can you  
10 identify?

11          A           Just the one.

12          Q           Just the one that belongs to  
13 your employee?

14          A           (Indicating).

15          Q           And that's the one that's all  
16 the way to the right?

17          A           Yes, the first one, on the  
18 right.

19          Q           And you don't recognize any of  
20 the others?

21          A           No.

22          Q           Do you recall having seen,  
23 yourself, those cars parked where they're  
24 shown in the photograph?

25          A           There's always cars parked

1                   BERNARDO F. RIVERA

2       there.

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

6           A           Yeah.

7           Q           -- your property?

8           A           Yeah.

9           Q           Are there cars still parked  
10      there, as of today?

11          A           No, 'cause the city had fenced  
12      the property off. And they just left the  
13      one where actually my employee's parking  
14      is still open.

15          Q           Right. We're going to show you  
16      what's been premarked as Defendant's C for  
17      identification.

18                    Looking at what's been marked  
19      Defendant's C for identification. Can you  
20      identify any of the vehicles shown in that  
21      photograph?

22          A           No.

23          Q           Can you identify that vehicle?

24          A           No.

25                    MR. MEISELS: Let's go to the

1                   BERNARDO F. RIVERA

2           next photograph.

3           Q       Looking at what's been marked as  
4   the third photograph, that's part of  
5   Defendant's C for identification. Is this  
6   the area where people used to and still  
7   park?

8           A       Used to. Can no longer park  
9   there.

10          Q       Because of the fence --

11          A       The city fencing the property.

12                   MR. MEISELS: Let's go to the  
13   next.

14          Q       Can you identify what's shown in  
15   this photograph, which is number four of  
16   Defendant's C?

17          A       It's an open area.

18          Q       It's is, I'm sorry?

19          A       It's an open area.

20          Q       But it's an area that you've  
21   seen before?

22          A       Yeah.

23          Q       Now is this the area, that you  
24   recall, that the city enclosed with the  
25   fence?

1                   BERNARDO F. RIVERA

2           A           I would say not the post next to  
3 the garbage can, a little more over,  
4 that's where the city came in.

5                   But that, everything to the  
6 right is still open.

7           Q           This is the fifth photograph,  
8 which makes up Defendant's Exhibit C for  
9 identification. Does this photograph show  
10 the area where people used to park?

11          A           Yeah, they always park there.

12          Q           Now I'm going to show you what's  
13 been marked as Defendant's II for  
14 identification.

15                   Mr. Rivera, this exhibit, which  
16 has been marked as Defendant's II for  
17 identification, it is a tax map. Can you  
18 identify, from this tax map, which tax  
19 lots you own?

20          A           I would say it would be -- I  
21 believe it's 37.

22          Q           We're going to show you what has  
23 been premarked as Defendant's Exhibit X  
24 for identification. Can you identify  
25 what's shown in that photograph?

1                   BERNARDO F. RIVERA

2           A           Top of a sewer.

3           Q           Do you recall having seen that,  
4 the top of that particular sewer before?

5           A           No.

6           Q           We're going to show you another  
7 shot of the same sewer. Does that help  
8 you recall whether you've ever seen it  
9 before?

10          A           I mean, you could see that it's  
11 going up road. But I never really paid no  
12 mind to it.

13                   That's in front of Guglielmo's  
14 yard.

15          Q           That's in front of Guglielmo's  
16 yard?

17          A           Yes.

18          Q           We're going to show what has  
19 been marked as Defendant's Exhibit GG for  
20 identification.

21                   Firstly, can you identify the  
22 white car that's shown in --

23          A           Yeah, that was my car.

24          Q           That's your car. And, earlier,  
25 in your test --

1                   BERNARDO F. RIVERA

2           A           This is a newer photo because  
3   that car, I already had it for like a  
4   year.

5           Q           Correct. And you had testified  
6   that at some point, after May of 2015, the  
7   city fenced in some area?

8           A           They fenced in that area, like a  
9   month after the -- a month or two -- I  
10   don't even think -- I think a month after  
11   that, what happened.

12          Q           And is the black fence, shown in  
13   that photograph, that would be on the  
14   passenger side of your car, is that the  
15   fence you were talking about?

16          A           Yes.

17          Q           And you recall, that got  
18   installed approximately a month after the  
19   incident --

20          A           More or less. I remember -- I  
21   remember coming in and all of a sudden  
22   there was a fence company there.

23          Q           Now when you say -- you refer to  
24   what happened, okay. In your mind, if  
25   someone asked you, when you say what

1                   BERNARDO F. RIVERA  
2       happened and asked you to explain what you  
3       understood happened, what would you say,  
4       what would be your answer to that  
5       question?

6           A           Well, I didn't know. You know,  
7       like I said, I didn't know too much, what  
8       happened there.

9                   I only know that the city came  
10      in and fenced it in.

11                   And not too -- not even a month  
12      ago, I didn't even know that there was any  
13      kind of lawsuit or any kind of thing going  
14      on.

15           Q           Right. And you said that the  
16      city fenced it in, approximately a month?

17           A           I believe it was a month. You  
18      know, I can't tell you if was a month.

19                   But I remember, when I pulled  
20      in, because they were blocking.

21                   And when I pulled in with my  
22      tree trucks, I gotta go forward and then I  
23      back into my yard.

24                   And I remember the guy moving  
25      the truck for me, 'cause he was blocking

1                   BERNARDO F. RIVERA

2           that area.

3           Q           When you say that you recall  
4           approximately a month after --

5           A           I believe it was a month or so.

6           Q           You recall that happening, you  
7           know, approximately, after what happened,  
8           the question is:

9                    In your mind, if someone asked  
10           you what it is that happened, how would  
11           you explain that, what happened?

12           A           Well, because of, you know,  
13           because of what happened there, you could  
14           tell the city came in, you know.

15                    And I only knew about when the  
16           fen -- when they put the fence in, there  
17           was an issue, really.

18           Q           I appreciate that. But what do  
19           you understood happened?

20           A           Well, when I answered the  
21           subpoena, they told me that they, you  
22           know, they're accusing Mr. La Rocca of  
23           cleaning up or whatever they did to city  
24           property.

25                    That's what I was told on the

1                   BERNARDO F. RIVERA

2 subpoena. I don't know who I spoke to,  
3 when I called the number.

4           Q           So that's what you understood,  
5 as what happened?

6           A           Uh-huh.

7           Q           We're still on the same exhibit,  
8 GG. And that's your car; am I right?

9           A           Yes.

10          Q           Now looking at this second  
11 photograph, in Exhibit GG, do you see, on  
12 the right-hand side, in the front, there  
13 are, looks like piece of concrete, of  
14 concrete --

15          A           The barriers.

16          Q           Barrier, okay. Was that there,  
17 when you first moved to East Street?

18          A           That was there, already there.  
19 When we moved in, that was there.

20          Q           And you moved in, approximately?

21          A           I don't remember if it was '15  
22 or '14. I don't remember the exact.

23          Q           How long had you been there,  
24 before the incident that we're talking  
25 about?

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1                   BERNARDO F. RIVERA

2           A           I can't recall.

3                   I can't recall because, you  
4 know, like I said, there was -- everything  
5 happened fast because where I was, I had  
6 to get out and I had thirty days.

7                   You know, I don't remember what  
8 year. I don't remember.

9           Q           Fair enough. But when you moved  
10 in, that jersey barrier, that barrier was  
11 there?

12          A           Yes.

13          Q           Do you know who put it there?

14          A           No.

15          Q           Do you know who it belongs to?

16          A           No.

17          Q           Same exhibit. One more. That's  
18 your car, right?

19          A           Yes.

20          Q           And, am I correct, that if you  
21 were sitting in your driver's seat, the  
22 skate park would be on your left?

23          A           Yes.

24          Q           We're going to show you what has  
25 been premarked as Bongo (ph) #2 for

1                   BERNARDO F. RIVERA

2       identification.

3                   Can you identify what is shown  
4       in that photograph?

5           A        You see Mr. La Rocca's yard and  
6       you see Mr. Bongo's truck.

7           Q        Is the red truck Mr. Bongo's  
8       truck?

9           A        Yes.

10          Q        Now we're going to show you  
11       what's been marked as Bongo #3.

12                   Can you identify what's shown in  
13       that photograph?

14          A        You see Mr. Bongo's, the front  
15       of his gate, to his yard.

16          Q        And in reference to the blue  
17       car, that's shown at the left of the  
18       photograph, do you know who that belongs  
19       to?

20          A        No.

21          Q        Looking into Mr. Bongo's yard,  
22       as far as you know, is that red truck his?

23          A        Yes.

24          Q        And the red dump-truck, is that  
25       his?

1                   BERNARDO F. RIVERA

2           A           Yes.

3           Q           So his colors are red?

4           A           Yes.

5           Q           What kind of business is he in,  
6 again?

7           A           Blacktop.

8                   MR. MEISELS:   Just one moment.

9           Off the record.

10                   [Discussion held off the  
11 record.]

12           Q           This is the second photograph,  
13 that's part of Bongo 3.  Is the white car,  
14 shown in that photograph, yours?

15           A           No.

16           Q           Do you know whose it is?

17           A           It's gotta be one of his  
18 employees.

19           Q           And the red SUV, do you know who  
20 that belongs to?

21           A           One of the employees.

22           Q           They're consistent, with red?

23           A           Well, the red one, you know, I  
24 see the guy driving that one, you know, he  
25 always says good morning to me as he

1                   BERNARDO F. RIVERA

2       drives by.

3           Q       Let's go to the third one.

4                   Now, looking at the third  
5       photograph, that's part of Bongo 3, to the  
6       left side, you see the black fence?

7           A       Yes.

8           Q       Is that the fence you were  
9       referring to, that the city put up?

10          A       Yes.

11          Q       And, on the right side, you see  
12       automobiles parked perpendicular to the  
13       road?

14          A       Yes.

15          Q       And, I think, you already said  
16       you don't know who owns the white one.  
17       But the red one belongs to one of Bongo's  
18       employees.

19          A       Yeah.

20          Q       I'm showing you what's the  
21       fourth photograph, included in Bongo  
22       Exhibit 3.

23                   Now looking to the right side of  
24       the photograph, there's a car that looks  
25       like a Jeep, I'm not sure what it is, an

1                   BERNARDO F. RIVERA

2           SUV; do you know who owns that?

3           A           No.

4           Q           And then there's a car that's  
5 all the way to the right, do you know who  
6 owns that?

7           A           No.

8           Q           Now I'm showing you the fifth  
9 photograph, that's part of Bongo 3. And  
10 starting on the right-hand side, okay, can  
11 you identify the white car?

12          A           No.

13          Q           That small pickup truck?

14          A           No.

15          Q           The other pickup truck, that's  
16 facing the photographer?

17          A           No.

18          Q           And you already said you can't  
19 identify the Jeep; am I right?

20          A           (Indicating).

21          Q           Looking at the photograph, if  
22 you go to the far right, where they show,  
23 partially show a vehicle, can you identify  
24 that vehicle?

25          A           No.

1                   BERNARDO F. RIVERA

2           Q           Let's go to number six. Can you  
3 identify any of the vehicles shown in  
4 Photograph 6?

5           A           No.

6           Q           If looking at Photograph 6, in  
7 the far right of the photograph, it  
8 appears that there is a house at the  
9 bottom of the hill; do you see that  
10 building?

11          A           Yeah.

12          Q           Do you know who owns that?

13          A           The Arpeggios (ph).

14          Q           Now does their family have a  
15 business on East Street?

16          A           I believe Tommy's still in  
17 business.

18          Q           Tommy Arpeggio (ph)?

19          A           Yeah.

20          Q           What kind of business is he in?

21          A           Construction.

22          Q           Now do they run the business  
23 from that house?

24          A           I assume so.

25          Q           And they live there, also?

1                   BERNARDO F. RIVERA

2           A           No, I don't think so.

3           Q           No. Do you know if they use  
4 East Street to access Fifth Avenue? Or  
5 did they go out the other way?

6           A           You know, I had seen his trucks  
7 go up and down, but I can't, you know.

8                   'Cause you can't enter through  
9 East Place.

10          Q           Place, right.

11          A           So a lot of those vehicles come  
12 through East Place.

13          Q           He really has a choice?

14          A           Yeah. You know, 'cause I'm not  
15 there during the day. I get in my trucks  
16 and we leave.

17                   And sometimes, you know, I go  
18 back to the yard and I have to fix a  
19 machine or something.

20                   But I'm not there, watching the  
21 road.

22          Q           Sure.

23                   MR. MEISELS: #7.

24          Q           This is the seventh photograph,  
25 which is part of Bongo #3. Can you

1                   BERNARDO F. RIVERA

2       identify any of the vehicles that are  
3       shown in that photograph?

4           A        No.

5           Q        But in the far right, is that  
6       the building that you understand belongs  
7       to the Arpeggios?

8           A        Yeah.

9                   MR. MEISELS:   Number eight.

10          Q        Showing you Photograph 8 of  
11       Bongo Exhibit 3, can you identify any of  
12       the vehicles shown in that photograph?

13          A        No.

14          Q        And, am I correct, if you look  
15       at the right side of the photograph, you  
16       see a black chain link fence.

17          A        Yes.

18          Q        And is that the fence that the  
19       city put up?

20          A        Yes.

21          Q        Number nine.   I'm showing you  
22       Photograph 9 of Bongo Exhibit 3.   Can you  
23       identify any of those vehicles that you  
24       see in that photograph?

25          A        Bongo's truck to the left.   And

1                   BERNARDO F. RIVERA

2       the vehicles, no.

3           Q        You explained, that you go to  
4       your place of business in the morning, you  
5       usually leave and you come back at the end  
6       of the day?

7           A        Yes.

8           Q        Did there ever come a time that,  
9       when you came back during the day, that  
10      you saw trees that had been cut down?

11          A        No.

12                   And, again, from my property  
13      line, down to Bongo, down, I really don't  
14      pass that.

15                   You know, I don't pass that.

16                   So I'm not driving down the  
17      road, looking at exactly everything.

18                   But I have never seen anybody  
19      taking a tree down.

20          Q        Did you ever see any trees, on  
21      the ground, that had been cut down?

22          A        No.

23                   MR. MEISELS:   No further  
24      questions.

25                   MS. ZALANTIS:   I just have a few

1                   BERNARDO F. RIVERA

2                   questions. I'll try to be brief.

3                   All the same rules, about  
4                   depositions, apply that Mr. Meisels  
5                   mentioned.

6                   If you don't understand  
7                   something, please, let me know, so I  
8                   can rephrase it.

9                   And, if you need to take a break  
10                  at any point, I just ask that if  
11                  there's a question pending that you  
12                  answer the question first.

13                 A           Uh-huh.

14                 BY MS. ZALANTIS:

15                 Q           You mentioned that you filled  
16                  potholes on the road, on East Street, in  
17                  the area in front of your property.

18                 A           Yes.

19                 Q           What other types of road  
20                  maintenance work do you do in front of  
21                  your property?

22                 A           Well, we plow and we clean it,  
23                  when we can.

24                             It's hard to clean it because we  
25                  have the kids from the skateboard park.

1                   BERNARDO F. RIVERA

2       You know, they're always with the  
3       littering, eating and dumping and it goes  
4       up and down the roads.

5           Q        Have you ever removed refuse  
6       from East Street?   Garbage?

7           A        Yes, we have.

8           Q        And what about after big storms,  
9       do you ever have to do anything to the  
10      road, after big storms?

11          A        What kind of storms?

12          Q        Where there's a lot of rain or  
13      wind?   Anything like that?

14          A        No, because we don't have many  
15      trees from our part, in the beginning.

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

20          A        Never.

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

23          A        Never.

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

1                   BERNARDO F. RIVERA

2           A           Never.

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

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

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

13          A           Yes.

14          Q           Is that correct?

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

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

20          Q           Have you ever seen the city,  
21          ever, plow East Street?

22          A           Never.

23          Q           You mentioned you had fifteen  
24          trucks. And you mentioned a chip truck.  
25          What is a chip truck?

1                   BERNARDO F. RIVERA

2           A           A chipper truck. That's where  
3 we chip the brush.

4           Q           Chipper?

5           A           Chipper. Chipper and then the  
6 truck.

7           Q           And you mentioned about Robert  
8 Cox, that he doesn't get his facts right.  
9 That's something that you said about him.  
10 Can you explain why you said that.

11          A           Well, because I had a personal  
12 thing with him and, you know, he put me  
13 out there, on his, his thing and never --  
14 he never called me, he never spoke to me.

15                    You know, assumed that I was  
16 illegally dumping and never got his facts  
17 rights.

18                    If he would have called the  
19 schools, they would have told him, no, I  
20 was not.

21                    Because Ward Elementary School,  
22 I had to wait until school gets out  
23 because the children and the buses pick up  
24 the children from their parking lot.

25                    Albert Leonard, I had to go into

1                   BERNARDO F. RIVERA

2       security, so they could come out and open  
3       up the gate.

4                   So, you know, he just put this  
5       on me. He never had his facts right.

6                   And when my niece was in school,  
7       she did a report and got the facts from  
8       him and my niece failed that course  
9       because of the fact that they told her  
10      that those facts were not right from  
11      Robert Cox.

12           Q       So, essentially, the school told  
13      her, your niece, that she couldn't quote  
14      something on Robert Cox's?

15           A       Yes.

16           Q       -- website; is that correct?

17           A       Yes.

18           Q       'Cause he's known to not get his  
19      facts right; is that correct?

20           A       Yes.

21           Q       So you described the  
22      experience -- and when you said that he  
23      puts it out there, how does he put it out  
24      there?

25           A       Well, I mean, because he ran

1                   BERNARDO F. RIVERA

2       away, he'd make you to be such a monster,  
3       a bad person.

4                   The only reason why I followed,  
5       because I had that situation and, you  
6       know, I would read the comments.

7                   And, you know, you're following  
8       because it's -- it's putting your name out  
9       there.

10                  And when he went again, on  
11       Flavio, that's how I was saying, he was  
12       going against personal stuff, not going to  
13       what the facts was.

14                  And that's when I just -- I just  
15       never followed him.

16       Q           And when you said he puts it out  
17       there, in his Blog, the Talk of the Sound?

18       A           Yeah. Whatever it was that go  
19       on. Because I put it to follow and then,  
20       you know, it would usually come up on my  
21       phone and you just look at the e-mails.

22       Q           Right. And besides the personal  
23       experience that you have with him, of not  
24       getting the facts right, do you know of  
25       any other people that had similar types of

1                   BERNARDO F. RIVERA

2       experiences?

3           A           Well, I know a few people that  
4       work for the board of education, that he  
5       had, he had done that to, you know, going  
6       after people, personally, you know, that I  
7       happened to know them.

8           Q           And do you think that Mr. Cox  
9       has an issue with the owners or  
10      contractors along East Street?

11          A           I think he has an issue with  
12      everybody else, except for himself.  
13      'Cause you never see him ever put anything  
14      good.

15          Q           So when he said that about you,  
16      personally, is it fair to say that he  
17      published or got out to his following  
18      information, without first asking you  
19      about it or getting a quote from you?

20          A           Yeah.

21          Q           Is that correct?

22          A           Yeah, because he just puts it  
23      out, that I'm illegally dumping.

24                      So if you're claiming, I'm  
25      illegally dumping --

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1                   BERNARDO F. RIVERA

2                   Number one, every school and  
3 everything has cameras.

4                   So if I'm driving down a truck,  
5 in broad daylight, in the back of a  
6 school, to dump wood chips, do you think  
7 I'm going to do that.

8           Q           So you're saying it's something  
9 that could be easily verified?

10          A           He would've called and say, you  
11 know, who gave you permission or who gave  
12 this or who gave that, I would've  
13 answered.

14          Q           And did that impact your  
15 business, in any way?

16          A           It did, a little bit. It did, a  
17 bit. A couple of people cancelled on me.

18                   I can't remember because it was  
19 a long time ago.

20                   But, you know, in the beginning,  
21 a couple of people put jobs on hold, you  
22 know, because this guy was putting that on  
23 me.

24          Q           You also said that he has a  
25 vendetta against someone. Who did he have

1                   BERNARDO F. RIVERA

2       vendetta against?

3                   MR. MEISELS:    Objection as to  
4       form.

5       A           Jimmy Banana (sic).

6                   You know, that's the person that  
7       was head of the maintenance of all the  
8       schools.

9                   And it's like every day, every  
10       week.   You know, after he put that on me  
11       and I started following him.

12                   'Cause, you know, now, he was  
13       putting me like, like Jimmy was doing  
14       this.

15                   So it's just, if you follow and  
16       go back to all his old stuff, you see, he  
17       was just on Jimmy, personally.

18       Q           You also said something to the  
19       effect that on East Street there is  
20       machines up and down that road all day  
21       long.   Can you explain what you meant by  
22       that?

23       A           Well, you have PAB, they go out  
24       with their equipment.

25                   You know, you have the

1                   BERNARDO F. RIVERA

2           Guglielmos, they go out with their  
3           equipment.

4                   You know, you have Tommy. I  
5           don't see Tommy as much.

6                   But you see it.

7                   When I say all day long, I'm not  
8           there. But it's -- businesses are seven  
9           different companies.

10                   So everybody's going in and out  
11           of there with their equipment.

12           Q           So it's fair to say that East  
13           Street is a busy road, in terms of the use  
14           by the contractors?

15                   MR. MEISELS: Objection to form.

16           A           Yeah.

17           Q           So you wouldn't be surprised if  
18           you saw trucks going up and down that road  
19           on pretty much a daily basis --

20           A           Yes.

21           Q           Is that correct?

22                   So you mentioned that you did  
23           some projects with Mr. La Rocca. In any  
24           of those projects, that you worked on with  
25           Mr. La Rocca or his company, have you ever

1                   BERNARDO F. RIVERA

2       seen Mr. La Rocca cut down or anyone from  
3       his company cut down trees?

4           A        No, he had hired me to do it. I  
5       had done a few jobs for him.

6                   And when he had tree work, he  
7       would hire me and I would come in and I  
8       would do his tree work.

9           Q        So the person, that he would use  
10      to cut down trees, would be you or your  
11      employees; is that correct?

12          A        Yes.

13                   MR. MEISELS: Objection to form.

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

21          A        Yes.

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

25          A        Yes.

1                   BERNARDO F. RIVERA

2           Q           And in the entirety of that  
3    area, that's now enclosed with the black  
4    fence, did cars park in that area, both  
5    before and after March of 2015?

6           A           I would say prior, before they  
7    put the fence, yes.

8           Q           Right.

9           A           They can no longer park there  
10   because --

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

13          A           Yes.

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

16          A           Yes.

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

19          A           Yes.

20          Q           And it was used as parking  
21   between March of 2015 and until the date  
22   they put the fence up; is that correct?

23          A           Yes.

24          Q           And you identified one of the  
25   cars was, that you knew, was an employee

1                   BERNARDO F. RIVERA

2       of your company; is that correct?

3           A        Yes.

4           Q        And you also identified, in the  
5       group of pictures -- do you remember the  
6       group of pictures in front of PAB's yard?

7           A        Yes.

8           Q        And there was a red truck there.  
9       And you said you knew the guy that owned  
10      the red truck?

11          A        Yes, you know, we say good  
12      morning. Personally, never --

13          Q        Right.

14          A        You know, "how are you". "Good  
15      morning".

16          Q        But you know he works for PAB?

17          A        Yes.

18          Q        And did you see the picture of  
19      that -- did you also see the picture that  
20      had that red truck in the area, that's now  
21      closed in with the black fence?

22          A        Yeah.

23          Q        Did you ever see Mr. La Rocca,  
24      or anybody from his company, cut down  
25      trees in any area adjacent to East Street?

1                   BERNARDO F. RIVERA

2           A        No.

3           Q        At any time, whatsoever?

4           A        No.

5           Q        So that's correct, at no time,  
6           whatsoever, have you seen Mr. La Rocca or  
7           anybody from his company cut down trees in  
8           an area near East Street; is that correct?

9           A        Yes.

10          Q        And you mentioned you have fifty  
11          feet of frontage, along East Street, your  
12          property?

13          A        I would say, more or less.

14          Q        Approximately?

15          A        I don't remember the exact  
16          measurements.

17          Q        And that you would generally  
18          park -- so from -- you would park in the  
19          area, within that fifty feet of frontage,  
20          but on the opposite side of the street?

21          A        Yeah, a little more up. Because  
22          my -- close friend of my mine rents his  
23          yard out. He's barely there.

24                    So sometimes I'll block his  
25          yard. I have permission, of him, to block

1                   BERNARDO F. RIVERA

2   his yard.

3           Q        If I were looking at East Street  
4   and I was standing on Fifth Avenue,  
5   looking down East Street --

6           A        Yes.

7           Q        -- your yard is to the left --

8           A        Yes.

9           Q        -- correct?

10          A        All the yards are to the left.

11          Q        All the yards are to the left.

12                   And the picture that we saw, the  
13   green box trucks, that was parked on the  
14   right -- the shoulder on the right of East  
15   Street; is that correct?

16          A        Yes.

17          Q        And is that generally where you  
18   would park, on the right of East Street?

19          A        Like when we pull the vehicles  
20   out, maybe one truck might stay there,  
21   that we're not using or whatever.

22                   But, you know, just pull out, do  
23   what we had to do and then we leave for  
24   the day.

25          Q        So, essentially, to the

1                   BERNARDO F. RIVERA

2           shoulder, on the right, again, looking  
3           down --

4           A           Yes.

5           Q           -- East Street?

6                   The shoulder on the right is  
7           more like a staging area? Is that  
8           correct, to say that?

9           A           Yes.

10                   MR. MEISELS: Objection to form.

11           Q           Do you understand what I mean by  
12           staging area?

13           A           Yes.

14           Q           It's an area that you would load  
15           the vehicles and then pull them out to the  
16           job site?

17           A           (Indicating).

18           Q           Yes. And, then, the area to the  
19           right, the right shoulder, again, looking  
20           down East Street, would your employees  
21           park in that area? Or is there no parking  
22           there?

23           A           Well, the fenced in, no more.  
24           But, to the left.

25                   But, no, none of my employees

1                   BERNARDO F. RIVERA

2       park there. They park, except for  
3       Saturdays, because PAB is not there, they  
4       can park in front, 'cause they don't work.

5                   But we have the city parking,  
6       that we're allowed to park in.

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

12      A        I would say 80 percent, yeah.

13      Q        And the reason why your  
14      employees could only potentially park  
15      there, on Saturday, was because the PAB  
16      employees were not there; is that correct?  
17      Yes?

18                   If you could just answer.

19      A        Yes.

20      Q        Do you remember looking at that  
21      pile of wood chips, in pictures, today?

22      A        (Indicating).

23      Q        Yes?

24      A        Yes.

25      Q        In your profession, you

1                   BERNARDO F. RIVERA

2       previously created wood chips, correct?

3           A        Yes.

4           Q        How do you do that?

5           A        We put it into a chipper.

6           Q        You put logs or trees in the  
7       chipper?

8           A        We re-chip up to six to eight  
9       inches, depending on the wood.

10          Q        And what --

11          A        The tree. The tree. You know,  
12       the heart of the tree, you don't want chip  
13       as big because it kills the machine.

14                    The softer the wood, you could  
15       go, you know, eight inches or so.

16          Q        And you're talking about eight  
17       inches in diameter?

18          A        Yeah, depending on what kind of  
19       tree we removed.

20          Q        And based on your experience of  
21       someone that chipped trees, branches  
22       before, how many trees and branches would  
23       have to be chipped to create that pile of  
24       wood chips --

25                    MR. MEISELS: Objection as to

1                   BERNARDO F. RIVERA

2           form, you can answer.

3           A        A good amount.

4           Q        A good amount, meaning, what?

5           A        A normal size tree, you know.

6           Q        What's a normal size tree?

7           A        An 80 to 120 footer.

8           Q        Just so I'm clear, based on your  
9           experience -- and, previously, your  
10          experience cutting down trees, to create  
11          that pile of chips that you saw in the  
12          pictures shown to you today, it would have  
13          to have come from an 80 to 120 foot tree;  
14          is that correct?

15                   MR. MEISELS:  Objection as to  
16          form.

17          A        A complete load of my truck,  
18          yes.

19          Q        And what do you mean by a  
20          complete load?

21                   MR. MEISELS:  Objection to form.

22          A        My truck, full.

23          Q        Do you think, what you saw  
24          today, the pictures of the chips today,  
25          would like be a load of your truck?

1                   BERNARDO F. RIVERA

2                   MS. ZALANTIS:  Objection as to  
3                   form.

4                   A            I mean, it's a picture, you  
5                   can't really look and see how much is  
6                   there.

7                   Q            Right.  We're just estimating.  
8                   Not specifics.

9                   MS. ZALANTIS:  Objection as to  
10                  form.

11                  A            I can't, no.

12                  Q            But is it fair to say that  
13                  amount of wood chips, you would need a  
14                  substantial amount of trees or branches to  
15                  create that amount of wood chips?

16                  MR. MEISELS:  Objection as to  
17                  form.

18                  A            I would say yes.

19                  Q            So when you were answering  
20                  questions about wood chips, previously,  
21                  you said that you didn't, personally, put  
22                  the wood chips in the area that was shown  
23                  in the pictures; is that correct?

24                  A            Yes.

25                  Q            And you don't have any knowledge

1                   BERNARDO F. RIVERA

2       of any of your employees, you don't have  
3       any personal knowledge of any of your  
4       employees putting the wood chips there; is  
5       that correct?

6           A        No.

7           Q        Is it possible that one of your  
8       employees put the wood chips there,  
9       without you knowing about it?

10          A        I can't answer that. Because,  
11       again, we have dumps. We have -- you  
12       know, I have accounts.

13                   My men dump. I pay my bills,  
14       monthly. Do I look at every single date,  
15       no.

16          Q        So it's possible?

17          A        I don't think so.

18          Q        But you wouldn't know, for sure?

19          A        No.

20                   MS. ZALANTIS: Give me one  
21       minute.

22                   One other question:

23          Q        You mentioned the lot owned by  
24       Guglielmo, correct? And you're familiar,  
25       where that lot is?

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1                   BERNARDO F. RIVERA

2           A           Yes.

3           Q           Have you ever seen Mr. La  
4   Rocca's trucks parked in Mr. Guglielmo's  
5   lot?

6           A           No, he has his own yard.

7                   MS. ZALANTIS:   Give me one  
8   moment.

9                   Sorry, just one more question.

10          Q           With respect to Mr. Guglielmo's  
11   lot, do you remember, years prior, that  
12   Mr. La Rocca would rent space in that lot?  
13   And did you ever see trucks parked in that  
14   lot, years ago?

15                   MS. ZALANTIS:   Objection as to  
16   form.

17          A           Not that I remember.

18          Q           You don't remember?

19                   [Continued on the next page to  
20   allow for signature line and jurat.]

21

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BERNARDO F. RIVERA

A No.

MS. ZALANTIS: I have nothing further.

MR. MEISELS: Standard stips?

MS. ZALANTIS: Yes.

MR. MEISELS: Standard stips.

Thank you very much.

[TIME NOTED: 1:20 p.m.]

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BERNARDO F. RIVERA

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Subscribed and sworn to  
before me this \_\_\_\_\_  
day of \_\_\_\_\_, 2021.

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Notary Public

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I N D E X

WITNESS	EXAMINATION BY	PAGE
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E X H I B I T S

RIVERA                      DESCRIPTION

Exhibit A            subpoena

[Exhibit A was uploaded to the Veritext Portal]

[Exhibit A was marked via Veritext Virtual]

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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

\* \* \*



[&amp; - barrier]

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[v - zoom]

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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.

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VERITEXT LEGAL SOLUTIONS  
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

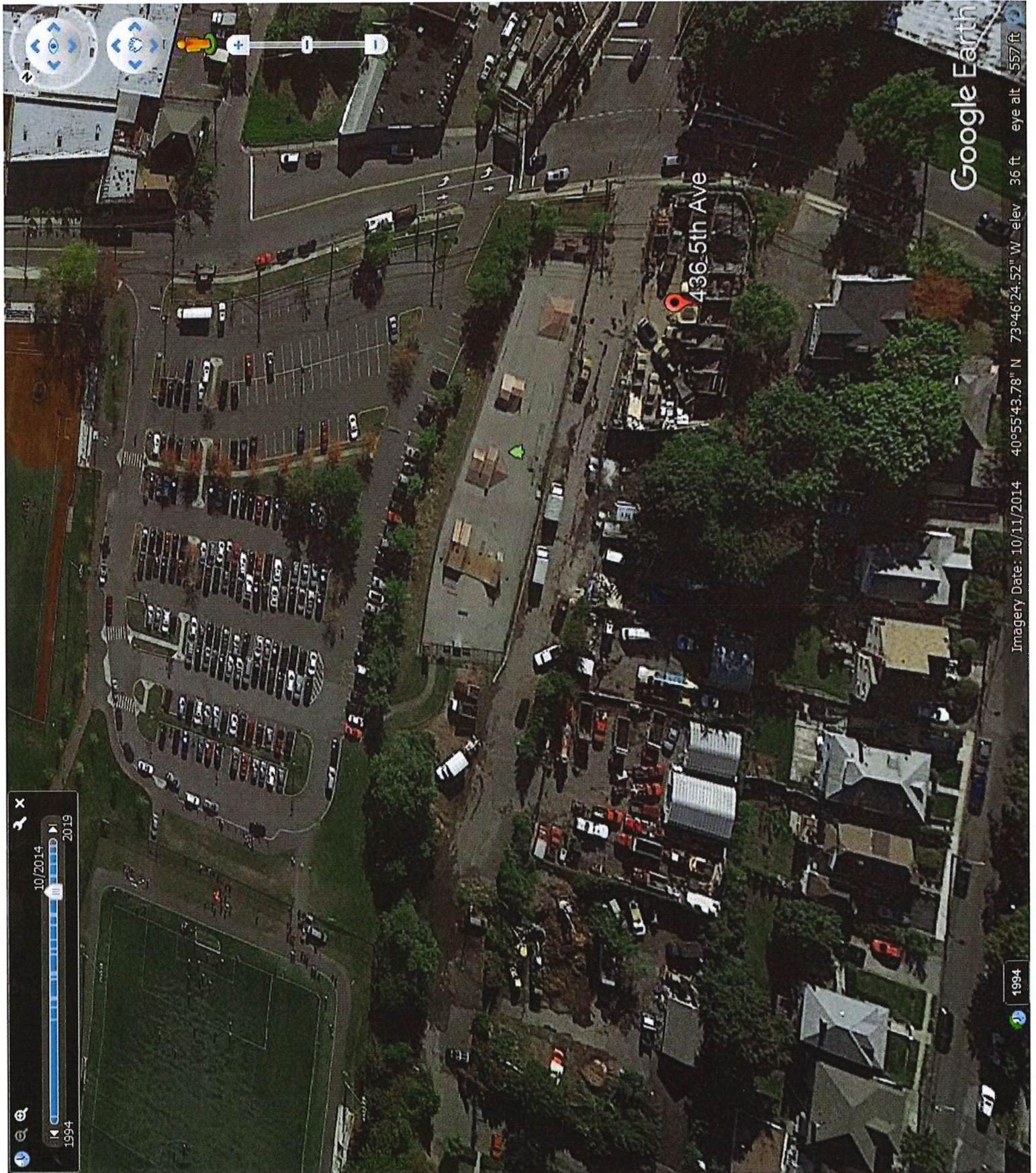
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Exhibit "15"





tabbles®  
 EXHIBIT  
 PH 14

Google earth

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20



4035545.24° N 73°46'24.76" W elev 29 ft 690.9 ft 403 ft



Exhibit "16"



D0408



D0409



D0410



D0411



D0412



D0413



D0414



D0415



D0416

Exhibit "17"

1

2

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

3

-----X  
CITY OF NEW ROCHELLE,

4

PLAINTIFF,

5

- against -

Index No.:

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54190/2016

7

FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA  
ROCCA & SONS, INC., a/k/a F. LA ROCCA &

8

SONS, INC. And FMLR REALTY MANAGEMENT LLC,

9

DEFENDANTS.  
-----X

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DATE: May 28, 2021

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TIME: 1:00 P.M.

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EXAMINATION BEFORE TRIAL of the  
Defendant, FLAVIO LA ROCCA & SONS, INC., by  
MARTIN SANCHEZ, taken by the Plaintiff,  
pursuant to a Court Order, held via  
Veritext Virtual Services, before Edith  
Tirado-Plaza, a Notary Public of the State  
of New York.

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120 White Plains Road, Suite 305  
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BY: KATHY ZALANTIS, ESQ.

ALSO PRESENT:

ROLAND KOKE  
KARA GALLAHER - SPANISH INTERPRETER  
ELITE LANGUAGE SERVICES

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221. UNIFORM RULES FOR THE  
CONDUCT OF DEPOSITIONS

221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

221.2 Refusal to answer when objection is made. A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of the court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

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M. SANCHEZ  
221. UNIFORM RULES FOR THE  
CONDUCT OF DEPOSITIONS

221.3 Communication with the deponent  
An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

IT IS FURTHER STIPULATED AND AGREED that the transcript may be signed before any Notary Public with the same force and effect as if signed before a clerk or a Judge of the court.

IT IS FURTHER STIPULATED AND AGREED that the examination before trial may be utilized for all purposes as provided by the CPLR.

IT IS FURTHER STIPULATED AND AGREED that all rights provided to all parties by the CPLR cannot be deemed waived and the appropriate sections of the CPLR shall be controlling with respect hereto.

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that a copy of this examination shall be furnished, without charge, to the attorneys representing the witness testifying herein.

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COURT REPORTER: Due to the need for this deposition to take place remotely because of the Government's Order for social distancing the parties will stipulate that the court reporter may swear in the witness over the phone/Veritext Virtual video conference and that the witness has verified that he is in fact Martin Sanchez Quiroz.

May I swear in the Spanish interpreter and the witness?

MR. MEISELS: Yes.

MS. ZALANTIS: Yes.

K A R A G A L L A G H E R, a Spanish interpreter, solemnly swore to translate the following questions from English to Spanish and answers from Spanish to English:

M A R T I N S A N C H E Z Q U I R O Z, called as a witness, having been first duly sworn, through an interpreter, by a Notary Public of the State of New York, was

1 M. SANCHEZ

2 examined and testified as follows:

3 EXAMINATION BY

4 MR. MEISELS:

5 Q. Mr. Sanchez, my name is Peter  
6 Meisels. I'm going to be asking you a few  
7 questions. If they're not clear, please  
8 tell me and I will rephrase them; okay?

9 A. Yes.

10 Q. When did you find out that you  
11 were going to have this deposition today?

12 A. Today.

13 Q. Who told you that you would  
14 have the deposition today?

15 A. My boss.

16 Q. Who is your boss?

17 A. Flavio La Rocca.

18 Q. Did he tell you what this  
19 deposition was about?

20 A. No.

21 Q. What do you understand this  
22 deposition is about?

23 A. I don't know what it's about.

24 Q. How long have you worked for  
25 Mr. La Rocca?

1 M. SANCHEZ

2 A. I've been working 15 years for  
3 La Rocca.

4 Q. And were you working for Mr. La  
5 Rocca in May of 2015?

6 A. Yes.

7 Q. Did you ever have occasion to  
8 speak with Miss Zalantis?

9 A. No.

10 Q. Did you ever have occasion to  
11 speak to anybody about this deposition?

12 A. No.

13 MS. ZALANTIS: Can you just  
14 explain who Miss Zalantis is? I'm  
15 not sure if he knows.

16 Q. Mr. Sanchez, when I refer to  
17 Miss Zalantis, I was referring to Kathy  
18 Zalantis who is the lawyer for Mr. La  
19 Rocca. So, with that explanation, did you  
20 ever have occasion to speak with Miss  
21 Zalantis before today?

22 A. No.

23 Q. When I ask the question did you  
24 ever speak with her, I'm including all  
25 communications such as a telephone call or

1 M. SANCHEZ

2 a meeting in person. Are you certain that  
3 you've never spoken to her?

4 A. No.

5 Q. When you say no, do you mean  
6 that you never spoke to her?

7 A. No, I have not spoken to her.

8 MS. ZALANTIS: Can you ask if  
9 a Zoom conference would be included  
10 in the list of ways that we spoke?

11 Q. Mr. Sanchez, did you ever have  
12 a Zoom conference with Miss Zalantis which  
13 something like what we're doing now where  
14 people were speaking to each other through  
15 the computers?

16 A. Yes.

17 Q. Do you recall when that was?

18 A. Yes.

19 Q. I'm not asking you for what you  
20 said to each other, but did you learn that  
21 you would have this deposition today?

22 A. Yes.

23 Q. What did you understand this  
24 deposition was about?

25 A. Some garbage that they said my

1 M. SANCHEZ

2 boss threw out but he didn't throw out  
3 anything.

4 Q. So, you understood that the  
5 deposition would be about your boss having  
6 thrown out garbage; is that right?

7 A. About some trees that were cut  
8 down but we don't do that.

9 Q. So, you understood that the  
10 deposition would be about trees that got  
11 cut down; is that right?

12 A. Yes.

13 Q. Is there any reason that you  
14 would have difficulty answering my  
15 questions today?

16 A. I don't understand.

17 Q. I'm going to ask you questions.  
18 Will you have a problem understanding my  
19 questions?

20 A. No.

21 Q. Will you have a problem  
22 answering the questions?

23 A. No.

24 Q. Are you taking any medication  
25 today?

1 M. SANCHEZ

2 A. No, not today.

3 Q. Did you take any medication  
4 yesterday?

5 A. Yesterday afternoon I took two  
6 pills, Aleve.

7 Q. Am I correct that you have  
8 worked for Mr. La Rocca for 15 years?

9 A. Yes.

10 Q. What kind of work have you done  
11 for Mr. La Rocca over those 15 years?

12 A. I drive for him and I do some  
13 carpentry work for him and I do joiners for  
14 the blue stone. I make the joiners for the  
15 blue stone. It's made out of sand and  
16 cement.

17 Q. Mr. Sanchez, does that mean  
18 that you actually make the joiners that are  
19 used when blue stone is installed on the  
20 job?

21 A. Yes.

22 Q. Do you install the blue stone?

23 A. Yes.

24 Q. Mr. Sanchez, did you go to  
25 public school?

1 M. SANCHEZ

2 A. In my country I went until  
3 sixth grade of elementary school.

4 Q. What country do you come from?

5 A. I'm from Mexico.

6 Q. So, am I correct that you came  
7 from Mexico and you attended up to the  
8 sixth grade?

9 A. Yes.

10 Q. Did you complete the sixth  
11 grade?

12 A. I started working in the fields  
13 then.

14 Q. Did you start working in the  
15 fields after the sixth grade or during the  
16 sixth grade?

17 A. After I left sixth grade.

18 Q. In Mexico when you go to the  
19 sixth grade, how old would you be?

20 A. About 15 years.

21 Q. Are you literate in Spanish?

22 A. Yes.

23 Q. I'm calling your attention to  
24 May of 2015. Do you recall what kind of  
25 work you were doing for Mr. La Rocca in May

1 M. SANCHEZ

2 of 2015?

3 A. So we do all different kinds of  
4 work. So, we do some pavements like I  
5 mentioned, we do walkways, we fix  
6 driveways.

7 Q. Do you ever have to cut down  
8 trees to do your job?

9 A. No, when a tree has to be cut  
10 down then the owner of the house gets in  
11 contact with the company to cut down trees.

12 Q. In 2015 where were you living?

13 A. I live now at the same address  
14 368 North Avenue, Apartment 1, New  
15 Rochelle.

16 Q. Do you work at Mr. La Rocca's  
17 yard on East Street?

18 A. Yes.

19 Q. How do you get from your house  
20 to your job?

21 A. I have a car.

22 Q. So, you drive?

23 A. Yes.

24 Q. Where do you park your car at  
25 work?

1 M. SANCHEZ

2 A. I park it in the city lot.

3 Q. Is that the city lot that's  
4 part of Flowers Park?

5 A. A lot of people park there.

6 Q. But my question was do you park  
7 at the city lot in Flowers Park?

8 A. In the park by the skating.

9 Q. When you say in the park by the  
10 skating, do you mean near the skate park?

11 A. Yes, next to it below.

12 Q. I'm going to show you a short  
13 video and see what parts of it you're able  
14 to describe for us. This video has been  
15 marked as Plaintiff's Exhibit 13 for  
16 identification.

17 Mr. Sanchez, are you able to  
18 see that picture?

19 A. Yes.

20 Q. I'm particularly referring to  
21 the video at 11 seconds. Can you tell me  
22 what is fairly and accurately depicted in  
23 that photograph?

24 A. Yes.

25 Q. Please explain what's shown.

1 M. SANCHEZ

2 A. I can see a machine and some  
3 people. I can't see the rest very well.

4 Q. Do you remember having seen  
5 this back in May of 2015?

6 A. No, I don't remember.

7 Q. Back in May of 2015, did you  
8 work on a project to clear the gravel in  
9 the area where you see the machine?

10 A. Some guys were sent to work on  
11 that but I stayed in the yard to fix some  
12 tools that had broken.

13 Q. Do you remember which guys were  
14 sent to work on it?

15 A. I don't remember because the  
16 guys who had worked here before have left.

17 Q. Do you remember Mr. Maya  
18 working on it?

19 A. No, no, I don't know about him.

20 Q. Did you see any of the work  
21 that those guys were doing?

22 A. I just know that they were  
23 working and cleaning up the gravel because  
24 when it rains a lot of gravel comes down  
25 the road and a lot of potholes are there

1 M. SANCHEZ

2 and they were filling them in.

3 Q. And did you see them do that?

4 A. Yes, because the boss sent them  
5 them to do that to rake the gravel so that  
6 everything would be smoother.

7 Q. Did you see them do that?

8 A. Yes, because you can see the  
9 whole street from there.

10 Q. When you say the whole street,  
11 do you mean East Street?

12 A. Yes.

13 Q. Looking at that photograph  
14 again, do you recall seeing this?

15 A. No.

16 Q. The yellow machine that you see  
17 in the picture, do you know who owns that  
18 machine?

19 A. No, I don't know because all of  
20 Flavio La Rocca's vehicles and machinery  
21 have his name on it and on this one I don't  
22 see that.

23 Q. Do you recognize any of the  
24 people in the photograph?

25 A. No, you can't see them very

Page 16

1 M. SANCHEZ

2 well. They're very far away in the photo.

3 Q. Mr. Sanchez, now are you able  
4 to recognize any of the workers in the  
5 photograph?

6 A. No, I see them even further  
7 away.

8 Q. Mr. Sanchez, am I correct that  
9 the yellow truck on the left belongs to Mr.  
10 La Rocca?

11 A. Yes.

12 Q. Am I correct that the yellow  
13 truck on the right belongs to Mr. La Rocca?

14 A. Yes.

15 Q. Mr. Sanchez, are you now able  
16 to recognize any of the people shown in the  
17 photograph?

18 A. All I can see is the tractor  
19 but I can't see the people well.

20 MS. ZALANTIS: For the record,  
21 you're asking about 29 seconds into  
22 the video.

23 MR. MEISELS: Yes, that's  
24 correct.

25 Q. Mr. Sanchez, do you see the

1 M. SANCHEZ

2 piles of wood chips in the middle of the  
3 photograph?

4 A. Yes.

5 Q. Did you see who put them there?

6 A. No.

7 THE INTERPRETER: If one of the  
8 attorneys can instruct the gentleman  
9 I need to interpret the whole thing  
10 for him because otherwise the whole  
11 thing gets lost.

12 A. No, we didn't bring that there.  
13 I don't know how that got there. I wasn't  
14 there. That's at the other end of the  
15 street. I'm at the other end of the  
16 street. No, I don't know how that got  
17 there.

18 Q. Do you know what happened to  
19 those piles of wood chips?

20 A. No, I didn't notice that.

21 Q. Mr. Sanchez, how old are you?

22 A. 64 years old.

23 Q. Mr. Sanchez, now are you able  
24 to recognize any of the men in the picture?

25 A. Those are some workers from

1 M. SANCHEZ

2 there but, as I said, they've gone.

3 Q. Were they workers for Mr. La  
4 Rocca?

5 A. Yes, because he had sent them  
6 there to rake the gravel that had fallen  
7 from the rain.

8 Q. Do you recall what they were  
9 doing?

10 A. They were raking the gravel  
11 because a lot had come down there.

12 Q. Mr. Sanchez, when you say a lot  
13 had come down there, where did it come  
14 from?

15 A. From up there where the garbage  
16 is thrown out.

17 Q. Mr. Sanchez, do you recognize  
18 the gentleman in the photograph? I'm  
19 referring to 43 seconds on the video.

20 A. No, no, I don't remember him.

21 Q. Do you recognize the gentleman  
22 with the beige shirt?

23 A. No, I don't remember him.

24 Q. Were they working for Mr. La  
25 Rocca at that time?

1 M. SANCHEZ

2 A. Yes.

3 Q. Have they left the job since  
4 then?

5 A. Some people go to work and  
6 they're there for a month or two months and  
7 then they leave.

8 Q. Did these two people leave?

9 A. Yes.

10 Q. Mr. Sanchez, do you recognize  
11 what's shown in this photograph?

12 A. Yes.

13 Q. Tell us what it is.

14 A. You can see some piles of  
15 garbage that was thrown there.

16 MS. ZALANTIS: For the record,  
17 can we reflect that you're asking  
18 about the video at a minutes and two  
19 seconds?

20 MR. MEISELS: Yes.

21 Q. Mr. Sanchez, as I understand  
22 your testimony these workers are cleaning  
23 up garbage?

24 A. No, they're raking the dirt.

25 Q. Do you know who told them to

1 M. SANCHEZ

2 rake the dirt?

3 A. Flavio has two yards and one of  
4 them has gravel inside.

5 Q. Did the gravel that's shown in  
6 this photograph come from Mr. La Rocca's  
7 yard?

8 A. No, it came from the area where  
9 the garbage is thrown out and when it rains  
10 it gets carried down there.

11 Q. Is it your testimony that all  
12 the gravel that we see in this photograph  
13 was carried there by the rain?

14 A. Yes.

15 Q. Mr. Sanchez, I'm referring to  
16 the same video but at 128 seconds. It's  
17 actually 1.28 minutes. Is the yellow truck  
18 shown in the picture Mr. La Rocca's truck?

19 A. Yes.

20 Q. Do you see that there's a metal  
21 gate that is shown in the photograph?

22 A. Yes.

23 Q. Does that gate lead to Mr. La  
24 Rocca's yard?

25 A. Yes.

1 M. SANCHEZ

2 Q. Is that the yard where he keeps  
3 his gravel?

4 A. There we have gravel dirt.

5 Q. Does Mr. La Rocca ever use wood  
6 chips on his jobs?

7 A. No.

8 Q. Mr. Sanchez, do you see the  
9 truck that's shown in this photograph which  
10 in the same video and it's actually at two  
11 minutes and 15 seconds? Do you see the  
12 truck?

13 A. Yes.

14 Q. I'm not talking about the  
15 yellow truck, I'm talking about the black  
16 truck. Do you see the black truck?

17 A. Yes.

18 Q. Does that black truck belong to  
19 one of the contractors who has a yard on  
20 East Street?

21 A. Yes.

22 Q. Do you remember the name of  
23 that contractor?

24 A. His name is Bernie.

25 Q. Mr. Sanchez, did you mean

1 M. SANCHEZ

2 Bernie or Benny?

3 A. Benny.

4 Q. Does Benny still have a yard on  
5 East Street?

6 A. Yes.

7 Q. Do you know what the name of  
8 Benny's business is?

9 A. I just heard that they call him  
10 Benny.

11 Q. Is Benny in the landscaping  
12 business?

13 A. I don't know exactly what they  
14 do. I think they're gardeners. I'm not  
15 sure.

16 Q. Did you ever see Benny's trucks  
17 loaded with wood chips?

18 A. No, I never seen them.

19 Q. When Mr. La Rocca's workers  
20 were cleaning up that gravel area, did  
21 anyone who worked for Benny help out?

22 A. No.

23 Q. Referring to the black truck in  
24 the photograph, do you know if that truck  
25 belonged to Benny?

1 M. SANCHEZ

2 A. That's his vehicle but he sold  
3 it and bought another one.

4 Q. Mr. Sanchez, I'm showing you  
5 the same video but now we're at two minutes  
6 and 42 seconds. Do you recognize what's  
7 shown in the video?

8 A. Yes.

9 Q. Can you explain to us what you  
10 recognize from the video?

11 A. A roller that is rolling over  
12 the gravel that's being raked.

13 Q. Can you identify the person  
14 whose driving the roller?

15 A. The roller is only driven by a  
16 guy named Felipe.

17 Q. Is that Felipe Maya?

18 A. Yes, he's the only one who  
19 drives the machines.

20 Q. Am I correct that Mr. Maya was  
21 employed by Mr. La Rocca?

22 A. Yes.

23 Q. Do you recognize the other  
24 workers in that photograph?

25 A. No, I can't see them well.

1 M. SANCHEZ

2 Q. Do you know whether or not they  
3 were working for Mr. La Rocca?

4 A. As I said, some of the people  
5 only work for a month or two and then they  
6 leave the work.

7 Q. But do you know whether those  
8 other men were working for Mr. La Rocca  
9 when they were raking this gravel?

10 A. Yes.

11 Q. Do you know what these workers  
12 were told to do?

13 A. No, I don't but they were just  
14 raking the dirt.

15 Q. Mr. Sanchez, I'm going to show  
16 you a photograph that was marked as Exhibit  
17 GG and this is the first photograph in a  
18 group that's been marked as GG. Can you  
19 see the photograph?

20 A. Yes.

21 Q. Mr. Sanchez, do you see the  
22 white car in the middle of the photograph?

23 A. Yes.

24 Q. Do you recognize what's shown  
25 in the photograph?

1 M. SANCHEZ

2 A. Yes.

3 Q. Can you explain to us what's  
4 fairly and accurately depicted in that  
5 photograph?

6 A. There's a fence around one part  
7 of the white car.

8 Q. Mr. Sanchez, when you refer to  
9 the fence, do you mean the black metal  
10 fence that is located on the right-hand  
11 side of the car?

12 A. Yes, it's a black fence.

13 Q. Are we talking about the black  
14 fence that would be on the front passenger  
15 side of the white car?

16 A. Yes.

17 Q. Do you remember when that fence  
18 was installed?

19 A. No, I didn't notice that.

20 Q. Do you know who installed it?

21 A. No, I don't know.

22 Q. Mr. Sanchez, do you remember in  
23 the video we saw pictures of workers raking  
24 gravel?

25 A. Yes.

1 M. SANCHEZ

2 Q. Was the gravel that they were  
3 raking inside this fence?

4 A. Yes.

5 Q. Am I correct that the fence was  
6 erected after they raked the gravel?

7 A. Yes.

8 Q. Mr. Sanchez, do you remember a  
9 time when there were trees in the place  
10 where the men were raking the gravel?

11 A. Yes, I had noticed that there  
12 had been trees there.

13 Q. Do you remember when those  
14 trees were removed?

15 A. No, I didn't notice that.

16 Q. Do you remember who removed the  
17 trees?

18 A. No, I don't know who.

19 MR. MEISELS: I have no  
20 further questions of this.

21 MS. ZALANTIS: I have a few  
22 questions.

23 EXAMINATION BY

24 MS. ZALANTIS:

25 Q. The picture that's on the

1 M. SANCHEZ

2 screen now that you're looking at, the area  
3 that's now enclosed by the black fence, do  
4 you see that?

5 A. Yes.

6 Q. You referred a few times to  
7 basura in that area. Can you explain why?

8 A. There had been a lot of garbage  
9 there.

10 Q. Is it fair to say that people  
11 would dump garbage in the area that's now  
12 enclosed by the black fence?

13 A. Yes, because a lot of children  
14 go there because there are fields for  
15 playing.

16 Q. And people would use that area  
17 as a garbage dump?

18 A. They would walk there where the  
19 white car is.

20 Q. I'm asking the area that's  
21 enclosed by the black fence. There would  
22 be garbage dumped in the area that's now  
23 enclosed by the black fence; is that what  
24 you're saying?

25 MR. MEISELS: Objection as to

1 M. SANCHEZ

2 form.

3 MS. ZALANTIS: You can answer.

4 A. Yes.

5 Q. What kind of garbage?

6 A. People threw just about  
7 everything there.

8 Q. Would you see mattresses there?

9 A. No, not mattresses, but smaller  
10 garbage. I never saw mattresses there.

11 Q. Do you remember you just saw a  
12 video that Mr. Meisels showed you?

13 A. Yes.

14 Q. There's an area where the  
15 workers were raking. Do you remember that  
16 area?

17 A. Yes.

18 Q. Were there ever living trees in  
19 that area?

20 A. Yes, there had been trees  
21 there.

22 Q. How many years ago?

23 A. I don't remember.

24 Q. Were there trees in that area  
25 in 2015?

1 M. SANCHEZ

2 MR. MEISELS: Objection as to  
3 form.

4 A. Around that date is when they  
5 were taken down but I didn't see who did  
6 that.

7 Q. Did Flavio La Rocca's company  
8 take down any trees?

9 MR. MEISELS: Objection to  
10 form.

11 A. No.

12 Q. Did you see anyone from Mr. La  
13 Rocca's company, any employee or Mr. La  
14 Rocca himself take down any trees from that  
15 area where the people were working in the  
16 video?

17 A. No, I didn't see any coworkers  
18 there.

19 Q. Did you see anyone from Flavio  
20 La Rocca's company cut down or remove trees  
21 in the area that the people work raking?

22 A. No.

23 Q. In the area that's enclosed by  
24 the black fence in the picture that you're  
25 looking at on the screen right now,

1 M. SANCHEZ

2 Defendant's GG, do you see that picture?

3 A. Yes.

4 Q. I'm talking about the first  
5 page of Defendant's GG in the area that is  
6 enclosed by the black fence. Have you ever  
7 seen anyone from Flavio La Rocca's company  
8 remove any trees from that area?

9 A. No, none of us took down any  
10 trees.

11 Q. As part of your work at Flavio  
12 La Rocca's company, have you ever seen  
13 anybody take down trees for any project?

14 A. No, we don't do that.

15 Q. You previously testified before  
16 that the gravel was in the area that the  
17 people were working because of the rain.  
18 Can you explain your statement?

19 A. Yes.

20 Q. Can you explain that?

21 A. At the end where the fence ends  
22 it goes down and the gravel is washed down  
23 that way.

24 Q. So, is it fair to say that the  
25 gravel washes onto East Street?

1 M. SANCHEZ

2 A. Yes, because a lot of the rain  
3 water washes down there to the end of the  
4 street.

5 Q. So, is it fair to say that the  
6 area that's now enclosed by the black fence  
7 had gravel in it so that when it would rain  
8 would wash into the street?

9 A. Yes.

10 Q. Then is it fair to say what you  
11 were doing was taking the gravel that had  
12 washed into the street and pushing it back  
13 into the area that is now enclosed by the  
14 black fence?

15 A. Yes.

16 MS. ZALANTIS: I have nothing  
17 further.

18 MR. MEISELS: I just have one  
19 or two follow-up questions.

20 EXAMINATION BY

21 MR. MEISELS:

22 Q. Mr. Sanchez, does the gravel  
23 still wash onto East Street after the fence  
24 was installed?

25 A. Yes.

1 M. SANCHEZ

2 Q. Since the fence was installed,  
3 what is done with the gravel that washes  
4 onto the street?

5 A. We no longer go down to that  
6 yard anymore. It's just where Flavio keeps  
7 some machines.

8 Q. After that fence was installed  
9 did gravel continue to wash onto East  
10 Street?

11 A. Yes, the gravel still goes down  
12 the street.

13 Q. Since the fence was installed,  
14 does anybody try to clean up the gravel  
15 that washes onto the street?

16 A. No, not anymore. We used to  
17 but Flavio doesn't use that yard anymore.

18 Q. Do I understand correctly that  
19 as of today there is gravel that washed  
20 onto East Street that nobody has cleaned  
21 up?

22 A. No, nobody cleans it up.

23 Q. Mr. Sanchez, does Mr. La Rocca  
24 ever hire tree removal services as part of  
25 his projects?

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M. SANCHEZ

A. No, he never contracts extra people.

MR. MEISELS: We have no further questions.

For the record, can we agree that on both depositions standard stips would apply?

MS. ZALANTIS: Yes.

(Whereupon, at 2:10 P.M., the Examination of this witness was concluded.)

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M. SANCHEZ

D E C L A R A T I O N

I hereby certify that having been first duly sworn to testify to the truth, I gave the above testimony.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript of the testimony given by me at the time and place specified hereinbefore.

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MARTIN SANCHEZ

Subscribed and sworn to before me  
this \_\_\_\_ day of \_\_\_\_\_ 20\_\_.

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M. SANCHEZ

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M. SANCHEZ

C E R T I F I C A T E

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

I, EDITH TIRADO-PLAZA, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by 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 10th day of June, 2021.



EDITH TIRADO-PLAZA



[&amp; - communicating]

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[communication - foregoing]

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[spoke - workers]

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[workers - zoom]

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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.

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Exhibit "18"

PLTF010



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Stephen E. Tauss

October 8, 2015

Edward Dunphy  
Special Counsel to the Corporation Counsel  
City of New Rochelle  
515 North Avenue  
New Rochelle, NY 10801

Re: Supplemental Sampling Program  
Fifth Avenue (East Place and Chatsworth Avenue)  
New Rochelle, NY  
D&B No. 3372-06

Dear Mr. Dunphy:

The purpose of this letter is to document the activities undertaken and present the findings of the supplemental sampling program for the property located at Fifth Avenue (East Place and Chatsworth Avenue), in New Rochelle, New York.

**Background**

At the request of the City of New Rochelle (City), D&B Engineers and Architects, P.C. (D&B) conducted sampling in the outdoor area immediately north of the City-owned skate park which is currently fenced off. It was our understanding that the surface characteristics of this area have been altered by an entity other than the City which owns this property. Sampling of the asphalt type material which has been placed in this area was conducted to determine if it contains hazardous constituents. The supplemental sampling program consisted of the following:

- Two samples, identified as SS-01 and SS-02, were collected from two sample locations located in the parking area including one in the northern portion and one in the southern portion of this area as identified on the Sample Location Map provided in Attachment A;
- Samples were collected using a hand auger to a depth of approximately 16 inches below grade;

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PLTF011

D&amp;B ENGINEERS AND ARCHITECTS, P.C.

Edward Dunphy  
Special Counsel to the Corporation Counsel  
City of New Rochelle  
October 8, 2015

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- Samples were screened with a photoionization detector (PID) and the results recorded;
- Samples were collected and analyzed for Target Compound List (TCL) volatile organic compounds (VOCs) by United States Environmental Protection Agency (USEPA) Method 8260, TCL semi-volatile organic compounds (SVOCs) by USEPA Method 8270, pesticides by USEPA Method 8081B, polychlorinated biphenyls (PCBs) by USEPA Method 8082, metals by USEPA Series Methods 6000/7000 and cyanide by USEPA Method 9012B;
- Samples were sent to Chemtech, a New York State Department of Health (NYSDOH) Environmental Laboratory Approval Program (ELAP) certified laboratory for the specified environmental media and analysis. All samples were submitted for analysis utilizing a 10-business day (2-week) turn around time.

### Findings

In order to assist in the evaluation of the chemical data, the soil sample results have been compared to both the Unrestricted Use Soil Cleanup Objectives (SCOs) and the Commercial Use SCOs set forth by the New York State Department of Environmental Conservation (NYSDEC) in 6 NYCRR Part 375. A total of two soil samples were collected from two locations within the Site. PID readings were 16.7 parts per million (ppm) in sample SS-01 and 7.6 ppm in SS-02 as noted in the Daily Field Activity Report provided in Attachment B.

As shown on the data summary tables provided in Attachment C, all sample results were either not detected or were detected at concentrations below the Unrestricted Use SCOs and the Commercial Use SCOs, with the exception of the following:

- Acetone was detected at a concentration of 200 micrograms per kilogram (ug/kg) in sample SS-02 which exceeds the Unrestricted Use SCO of 50 ug/kg but is below the Commercial Use SCO of 500,000 ug/kg;
- Benzo(a)anthracene was detected at a concentration of 1,700 ug/kg in sample SS-02 which exceeds the Unrestricted Use SCO of 1,000 ug/kg but is below the Commercial Use SCO of 5,600 ug/kg, and a concentration of 14,700 ug/kg in sample SS-01 which exceeds both the Unrestricted Use and Commercial Use SCOs;

PLTF012

D&amp;B ENGINEERS AND ARCHITECTS, P.C.

Edward Dunphy  
Special Counsel to the Corporation Counsel  
City of New Rochelle  
October 8, 2015

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- Benzo(a)pyrene was detected at a concentration of 13,300 ug/kg in sample SS-01 and 1,400 ug/kg in sample SS-02 which exceed both the Unrestricted Use SCO of 1,000 ug/kg and the Commercial Use SCO of 1,000 ug/kg;
- Benzo(b)fluoranthene was detected at a concentration of 1,700 ug/kg in sample SS-02 which exceeds the Unrestricted Use SCO of 1,000 ug/kg but is below the Commercial Use SCO of 5,600 ug/kg, and a concentration of 16,300 ug/kg in sample SS-01 which exceeds both the Unrestricted Use and Commercial Use SCOs;
- Benzo(k)fluoranthene was detected at a concentration of 7,300 ug/kg in sample SS-01 and 990ug/kg in sample SS-02 which exceed the Unrestricted Use SCO of 800 ug/kg but are below the Commercial Use SCO of 56,000 ug/kg;
- Chrysene was detected at a concentration of 9,700 ug/kg in sample SS-01 and 1,600ug/kg in sample SS-02 which exceed the Unrestricted Use SCO of 1,000 ug/kg but are below the Commercial Use SCO of 56,000 ug/kg;
- Dibenzo(a,h)anthracene was detected at a concentration of 3,400 ug/kg in sample SS-01 which exceeds both the Unrestricted Use SCO of 330 ug/kg and the Commercial Use SCO of 560 ug/kg;
- Indeno(1,2,3-cd)pyrene was detected at a concentration of 890 ug/kg in sample SS-02 which exceeds the Unrestricted Use SCO of 500 ug/kg but is below the Commercial Use SCO of 5,600 ug/kg, and a concentration of 10,000 ug/kg in sample SS-01 which exceeds both the Unrestricted Use and Commercial Use SCOs;
- Lead was detected at a concentration of 191 ug/kg in sample SS-01 which exceeds the Unrestricted Use SCO of 63 ug/kg but is below the Commercial Use SCO of 1,000 ug/kg;
- Mercury was detected at a concentration of 0.199 ug/kg in sample SS-01 which exceeds the Unrestricted Use SCO of 0.18 ug/kg but is below the Commercial Use SCO of 2.8 ug/kg; and
- Zinc was detected at a concentration of 171 ug/kg in sample SS-01 which exceeds the Unrestricted Use SCO of 109 ug/kg but is below the Commercial Use SCO of 10,000 ug/kg.

PLTF013

D&amp;B ENGINEERS AND ARCHITECTS, P.C.

Edward Dunphy  
Special Counsel to the Corporation Counsel  
City of New Rochelle  
October 8, 2015

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Conclusions/Recommendations

All 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.

The analytical results of the sampling were compared to the soil sampling conducted as part of the *Phase II Environmental Site Assessment for the Proposed DPW Relocation Site, Fifth Avenue (East Place and Chatsworth Avenue), New Rochelle, New York* prepared by D&B dated March 2015. Based on the findings noted above, D&B concludes that the results of the supplemental soil sampling are similar in nature to the results of the soil sampling previously conducted on the property. Since the use of the property is commercial in nature, no further action is required of the areas that were investigated as part of this soil sampling program. However, if in the future the use or zoning of the property is changed, additional investigation may be necessary.

If you have any questions, please do not hesitate to contact me at (914) 467-5300, Ext. 19.

Sincerely,



Brian M. Veith, P.E.  
Senior Vice President

BMV/KM/nc  
Attachments  
#3372BMV100813 ED

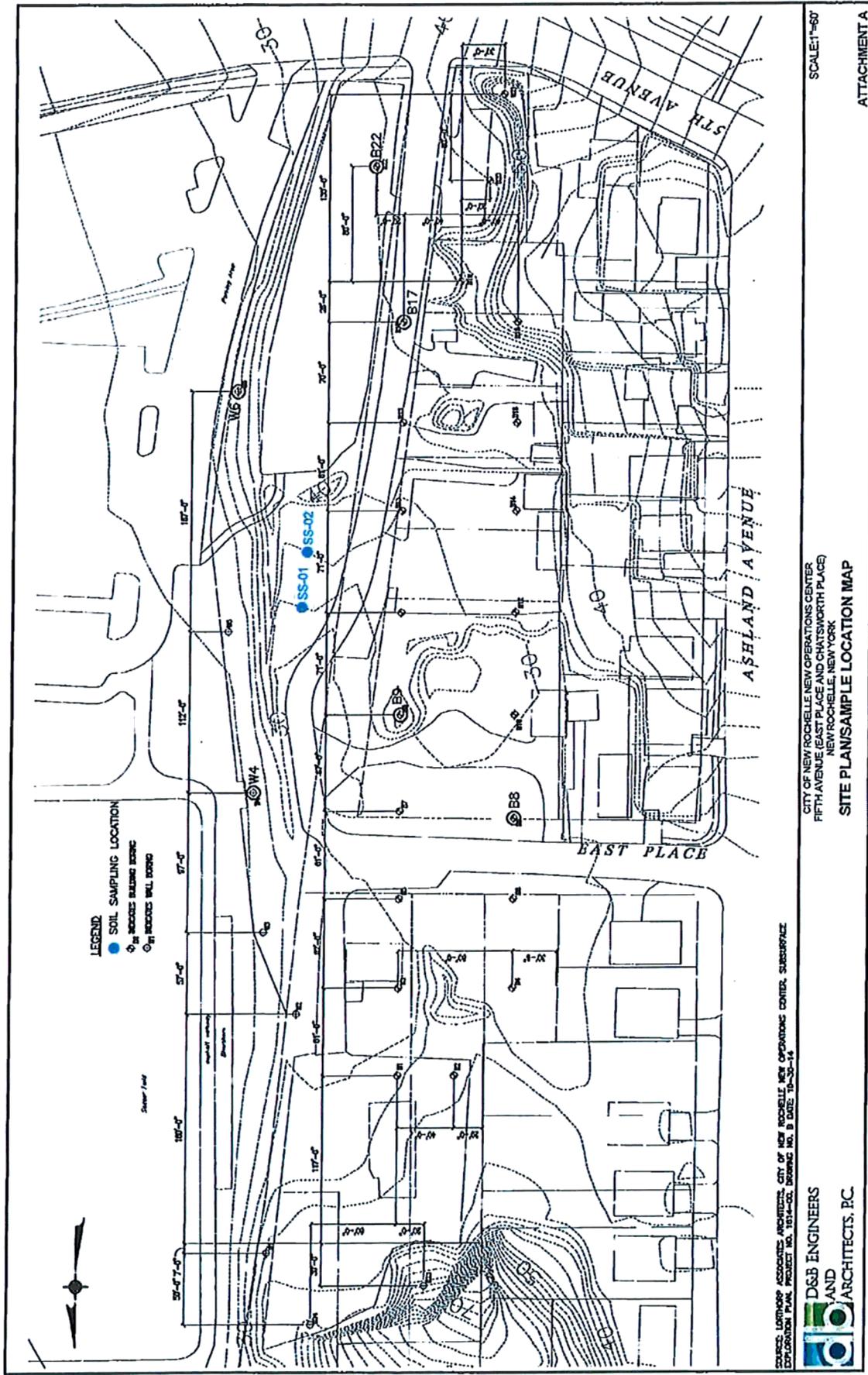
PLTF014

D&B ENGINEERS AND ARCHITECTS, P.C.

**ATTACHMENT A**

**SITE PLAN/SAMPLE LOCATION MAP**

PLTF015



F:\0372 094\0372-CO-5F101.dwg 10/2015 2:22:41 PM 1/28/15

PLTF016

D&B ENGINEERS AND ARCHITECTS, P.C.

**ATTACHMENT B**

**DAILY FIELD ACTIVITY REPORT**



PLTF018

		DATE: Aug. 21, 2015 DAY: Friday
		REPORT NO.
		PAGE NO. 2 OF 2
		PROJECT NO. 3372
<b>DAILY FIELD ACTIVITY REPORT</b>		
<i>DESCRIPTION OF WORK PERFORMED AND OBSERVED</i>		
<p>One D&amp;B personnel with pick axe and shovel, 1 support truck on site. The following soil sampling point locations were completed using hand tools by D&amp;B for the day:</p> <ol style="list-style-type: none"> <li>1. Soil Sampling Point SS-01 completed at the depth of 16". (PID 16.7ppm)</li> <li>2. Soil Sampling Point SS-02 completed at the depth of 16". (PID 7.6ppm)</li> </ol> <p>Two samples were collected from two locations located in the parking area including one in the northern portion and one in the southern portion of this area. Samples were collected using hand tools at a depth of 16" where the surface material changed. All samples were screened with a photolization detector (PID) and the results recorded. All samples were sent to Chemtech, a New York State Department of Health (NYSDOH) Environmental Laboratory Approval Program (ELAP) certified laboratory for the specified environmental media and analysis.</p> <p>The detailed soil description was noted in the bound field log book.</p>		
		REVIEWED BY
PRINT NAME: Peter Mulrean		PRINT NAME:
SIGNATURE:		SIGNATURE:
<input type="checkbox"/> electronic copy to _____ - date:		

PLTF019

D&B ENGINEERS AND ARCHITECTS, P.C.

**ATTACHMENT C**

**LABORATORY DATA SUMMARY TABLES**

PLTF020

Table 1  
City of New Rochelle - Fifth Avenue  
Supplemental Soil Sample Results  
Volatile Organic Compounds

Page 1 of 5

Sample ID Sampling Date	SS-01 8/21/2015	SS-02 8/21/2015	NYCRR 6 Part 375 Unrestricted Use Soil Cleanup Objectives (SCOs) ug/kg	NYCRR 6 Part 375 Commercial Use Soil Cleanup Objectives (SCO) ug/kg
Sample Depth (In Inches)	16	16		
Units	ug/kg	ug/kg		
<b>VOLATILE COMPOUNDS</b>				
1,1,1-Trichloroethane	U	U	680	500,000
1,1,2,2-Tetrachloroethane	U	U	--	--
1,1,2-Trichlorotrifluoroethane	U	U	--	--
1,1,2-Trichloroethane	U	U	--	--
1,1-Dichloroethane	U	U	270	240,000
1,1-Dichloroethene	U	U	330	600,000
1,2,3-Trichlorobenzene	U	U	--	--
1,2,4-Trichlorobenzene	U	U	--	--
1,2-Dibromo-3-Chloropropane	U	U	--	--
1,2-Dibromoethane	U	U	--	--
1,2-Dichlorobenzene	U	U	1100	500,000
1,2-Dichloroethane	U	U	20	30,000
1,2-Dichloropropane	U	U	--	--
1,3-Dichlorobenzene	U	U	2400	280,000
1,4-Dichlorobenzene	U	U	1800	130,000
1,4-Dioxane	U	U	100	13,000
2-Butanone	U	56.7 J	120	500,000
2-Hexanone	U	U	--	--
4-Methyl-2-Pentanone	U	U	--	--
Acetone	U	200	50	500,000
Benzene	U	U	60	44,000
Bromochloromethane	U	U	--	--
Bromodichloromethane	U	U	--	--
Bromoform	U	U	--	--
Bromomethane	U	U	--	--
Carbon Disulfide	U	U	--	--
Carbon Tetrachloride	U	U	760	22,000
Chlorobenzene	U	U	1100	500,000
Chloroethane	U	U	--	--
Chloroform	U	U	370	350,000
Chloromethane	U	U	--	--
cis-1,2-Dichloroethene	U	U	--	500,000
cis-1,3-Dichloropropene	U	U	--	--
Cyclohexane	U	U	--	--
Dibromochloromethane	U	U	--	--
Dichlorodifluoromethane	U	U	--	--
Ethyl Benzene	U	U	1000	390,000
Isopropylbenzene	U	U	--	--
m/p-Xylenes	U	U	260	500,000
Methyl Acetate	U	U	--	--
Methyl tert-butyl Ether	U	U	930	500,000
Methylcyclohexane	U	U	--	--
Methylene Chloride	U	U	50	500,000
o-Xylene	U	U	260	500,000
Styrene	U	U	--	--
t-1,3-Dichloropropene	U	U	--	--
Tetrachloroethene	U	U	1300	150,000
Toluene	U	5.7 J	700	500,000
trans-1,2-Dichloroethene	U	U	190	500,000
Trichloroethene	U	U	470	200,000
Trichlorofluoromethane	U	U	--	--
Vinyl Chloride	U	U	20	13,000
Total Volatile Compounds	0	262.4	--	--

Footnotes/Qualifiers

ug/kg: Micrograms per kilogram

U: Analyzed for but not detected

--: No standard

J: Estimated value

Exceeds Unrestricted Use SCO but below Commercial Use SCO



PLTF021

Table 2  
City of New Rochelle - Fifth Avenue  
Supplemental Soil Sample Results  
Semivolatile Organic Compounds

Page 2 of 5

Sample ID Sampling Date	SS-01 8/21/2015	SS-02 8/21/2015	NYCRR 6 Part 375 Unrestricted Use Soil Cleanup Objectives (SCOs) ug/kg	NYCRR 6 Part 375 Commercial Use Soil Cleanup Objectives (SCOs) ug/kg
Sample Depth (in Inches)	16	16		
Units	ug/kg	ug/kg		
<b>SEMIVOLATILE COMPOUNDS</b>				
1,1-Biphenyl	U	U	--	--
1,2,4,5-Tetrachlorobenzene	U	U	--	--
2,2-oxybis(1-Chloropropane)	U	U	--	--
2,3,4,6-Tetrachlorophenol	U	U	--	--
2,4,5-Trichlorophenol	U	U	--	--
2,4,6-Trichlorophenol	U	U	--	--
2,4-Dichlorophenol	U	U	--	--
2,4-Dimethylphenol	U	U	--	--
2,4-Dinitrophenol	U	U	--	--
2,4-Dinitrotoluene	U	U	--	--
2,6-Dinitrotoluene	U	U	--	--
2-Chloronaphthalene	U	U	--	--
2-Chlorophenol	U	U	--	--
2-Methylnaphthalene	U	U	--	--
2-Methylphenol	U	U	330	500,000
2-Nitroaniline	U	U	--	--
2-Nitrophenol	U	U	--	--
3,3-Dichlorobenzidine	U	U	--	--
3+4-Methylphenols	U	U	330	500,000
3-Nitroaniline	U	U	--	--
4,6-Dinitro-2-methylphenol	U	U	--	--
4-Bromophenyl-phenylether	U	U	--	--
4-Chloro-3-methylphenol	U	U	--	--
4-Chloroaniline	U	U	--	--
4-Chlorophenyl-phenylether	U	U	--	--
4-Nitroaniline	U	U	--	--
4-Nitrophenol	U	U	--	--
Acenaphthene	2100 J	U	20,000	500,000
Acenaphthylene	U	U	100,000	500,000
Acetophenone	U	U	--	--
Anthracene	5000	900 J	100,000	500,000
Atrazine	U	U	--	--
Benzaldehyde	U	U	--	--
Benzo(a)anthracene	14700	1700	1,000	5,600
Benzo(a)pyrene	13300	1400	1,000	1,000
Benzo(b)fluoranthene	16300	1700	1,000	5,600
Benzo(g,h,i)perylene	9300	830 J	100,000	500,000
Benzo(k)fluoranthene	7300	990 J	800	56,000
Bis(2-chloroethoxy)methane	U	U	--	--
Bis(2-chloroethyl)ether	U	U	--	--
Bis(2-Ethylhexyl)phthalate	U	U	--	--
Butylbenzylphthalate	U	U	--	--
Caprolactam	U	U	--	--
Carbazole	2300 J	590 J	--	--
Chrysene	9700	1600	1,000	56,000
Dibenzo(a,h)anthracene	3400 J	260 J	330	560
Dibenzofuran	1600 J	U	7,000	350,000
Diethylphthalate	U	U	--	--
Dimethylphthalate	U	2200	--	--
Di-n-butylphthalate	U	U	--	--
Di-n-octyl phthalate	U	U	--	--
Fluoranthene	20600	3800	100,000	500,000
Fluorene	2900 J	360 J	30,000	500,000
Hexachlorobenzene	U	U	330	6,000

See next page for Footnotes/Qualifiers



PLTF022

Table 2  
City of New Rochelle - Fifth Avenue  
Supplemental Soil Sample Results  
Semivolatile Organic Compounds

Page 3 of 5

Sample ID Sampling Date	SS-01 8/21/2015	SS-02 8/21/2015	NYCRR 6 Part 375 Unrestricted Use Soil Cleanup Objectives (SCOs) ug/kg	NYCRR 6 Part 375 Commercial Use Soil Cleanup Objectives (SCOs) ug/kg
Sample Depth (In Inches)	16	16		
Units	ug/kg	ug/kg		
<b>COMPOUNDS CONTINUED</b>				
Hexachlorobutadiene	U	U	--	--
Hexachlorocyclopentadiene	U	U	--	--
Hexachloroethane	U	U	--	--
Indeno(1,2,3-cd)pyrene	10000	890 J	500	5,600
Isophorone	U	U	--	--
Naphthalene	880 J	U	12,000	500,000
Nitrobenzene	U	U	--	69,000
n-Nitroso-di-n-propylamine	U	U	--	--
N-Nitrosodiphenylamine	U	U	--	--
Pentachlorophenol	U	U	800	6,700
Phenanthrene	15400	4000	100,000	500,000
Phenol	U	U	330	500,000
Pyrene	24000	3100	100,000	500,000
<b>Total Semivolatile Compounds</b>	<b>158780</b>	<b>24320</b>	<b>--</b>	<b>--</b>

Footnotes/Qualifiers

ug/kg: Micrograms per kilogram

U: Analyzed for but not detected

--: No standard

J: Estimated value

Exceeds Unrestricted Use SCO but below Commercial Use SCO

**Exceeds Unrestricted Use SCO and Commercial Use SCO**



PLTF023

Table 3  
City of New Rochelle - Fifth Avenue  
Supplemental Soil Sample Results  
Pesticides and Polychlorinated Biphenyls (PCBs)

Page 4 of 5

Sample ID Sampling Date	SS-01 8/21/2016	SS-02 8/21/2016	NYCRR 6 Part 375 Unrestricted Use Soil Cleanup Objectives (SCOs) ug/kg	NYCRR 6 Part 375 Commercial Use Soil Cleanup Objectives (SCOs) ug/kg
Sample Depth (In Inches)	16	16		
Units	ug/kg	ug/kg		
<b>PESTICIDES</b>				
4,4-DDD	U	U	3	92,000
4,4-DDE	U	U	3	62,000
4,4-DDT	U	U	3	47,000
Aldrin	U	U	5	680
alpha BHC	U	U	20	3,400
alpha-Chlordane	52 P	U	94	24,000
beta-BHC	U	U	36	3,000
delta-BHC	U	U	40	500,000
Dieldrin	U	U	5	1,400
Endosulfan I	U	U	2,400	200,000
Endosulfan II	U	U	2,400	200,000
Endosulfan Sulfate	U	U	2,400	200,000
Endrin	U	U	14	89,000
Endrin Aldehyde	U	U	--	--
Endrin Ketone	U	U	--	--
gamma-BHC (Lindane)	U	U	100	9,200
gamma-Chlordane	26.6	U	94	24,000
Heptachlor	U	U	42	15,000
Heptachlor Epoxide	U	U	--	--
Methoxychlor	U	U	--	--
Toxaphene	U	U	--	--
<b>PCBS</b>				
Aroclor-1016	U	U	100	1,000
Aroclor-1221	U	U	100	1,000
Aroclor-1232	U	U	100	1,000
Aroclor-1242	U	U	100	1,000
Aroclor-1248	U	U	100	1,000
Aroclor-1254	U	U	100	1,000
Aroclor-1260	51 P	U	100	1,000
<b>Total PCBs</b>	<b>51</b>	<b>110</b>	<b>100</b>	<b>1,000</b>

Footnotes/Qualifiers:

ug/kg: Micrograms per kilogram

U: Analyzed for but not detected

--: No standard

P: Indicates >25% difference for detected concentrations  
between the two GC columns

PLTF024

Table 4  
 City of New Rochelle - Fifth Avenue  
 Supplemental Soil Sample Results  
 Metals and Cyanide

Sample ID	SS-01	SS-02	NYCRR 6 Part 375	NYCRR 6 Part 375
Sampling Date	8/21/2016	8/21/2016	Unrestricted Use Soil	Commercial Use Soil
Sample Depth (in Inches)	16	16	Cleanup Objectives (SCOs)	Cleanup Objectives (SCOs)
Units	mg/kg	mg/kg	mg/kg	mg/kg
<b>Metals</b>				
Aluminum	3360	2450	--	--
Antimony	U	U	--	--
Arsenic	6.86	1.67 J	13	16
Barium	81.7	64.1	350	400
Beryllium	0.322	U	7.2	590
Cadmium	1.82	1.02	2.5	9.3
Calcium	67100	20200	--	--
Chromium	12	4.75	30	1,500
Cobalt	5.34	3.31 J	--	--
Copper	37.7	31.3	50	270
Iron	12500	5580	--	--
Lead	191	14.3	63	1,000
Magnesium	37400	4790	--	--
Manganese	231	185	1,600	10,000
Mercury	0.199	0.027 J	0.18	2.8
Nickel	16.3	6.14 J	30	310
Potassium	694	1070	--	--
Selenium	U	3.38	3.9	1,500
Silver	U	U	2	1,500
Sodium	145	247 J	--	--
Thallium	U	U	--	--
Vanadium	21.1	14.4	--	--
Zinc	171	86.5	109	10,000
<b>Cyanide</b>	U	U	27	27

Footnotes/Qualifiers:

- mg/kg: Milligrams per kilogram
- U: Analyzed for but not detected
- : No standard
- J: Estimated value

Exceeds Unrestricted Use SCO but below Commercial Use SCO

Exhibit "19"

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.,

**PLAINTIFF'S RESPONSE  
AND OBJECTIONS TO  
DEFENDANTS' FIRST SET  
OF INTERROGATORIES**

Defendants.  
----- x

PLEASE TAKE NOTICE that plaintiff, CITY OF NEW ROCHELLE, (hereinafter, the "City" or "Plaintiff"), as a for a response and objections to the defendants', FLAVIO LA ROCCA, MARIA LA ROCCA, FLAVIO LA ROCCA & SONS, INC. a.k.a. F. LAROCCA & SONS, INC. and FMLR REALTY MANAGEMENT LLC (hereinafter, the "Defendants"), first set of interrogatories, respectfully sets forth the following:

**GENERAL OBJECTIONS**

1. These "General Objections" are applicable to and incorporated into each of THE CITY's specific responses below as if fully repeated in each response and are intended, and shall be deemed, to be in addition to any specific objection included therein. The stating of specific objections to a request shall not be construed as a waiver of these "General Objections" nor does the restatement of, or specific reference to, a "General Objection" in response to a particular Interrogatory waive any other "General Objection."
2. The disclosure of information and/or the production of documents in response to these Interrogatories and these responses and objections shall be without prejudice to any objections THE CITY may have as to competency, relevance or admissibility of any response

hereto at any hearing or trial in this litigation. Unless otherwise stated, THE CITY's General Objections apply to the entirety of the Interrogatories and accompanying demands to produce, including each and every subparagraph of said documents.

3. THE CITY objects to the Interrogatories to the extent that they require THE CITY to disclose information or produce documents and impose obligations on THE CITY greater than, inconsistent with and/or in addition to those provided for or required by the by the New York Civil Practice Law and Rules ("CPLR"), as interpreted, and applicable case law. To the extent that these Interrogatories do not comply with the CPLR, THE CITY will construe and respond to these Interrogatories in accordance with the CPLR.

4. THE CITY objects to each and every Interrogatory to the extent that, as presently constituted, the requests are vague, overbroad, ambiguous, and/or ill-defined such that the Interrogatory may be reasonably susceptible to various interpretations.

5. THE CITY objects to providing information and documents in response to these Interrogatories to the extent that compilation of such information would be unduly burdensome, oppressive, and unreasonably expensive and/or require unreasonable investigation on the part of THE CITY.

6. THE CITY objects to these Interrogatories to the extent that they are vague, ambiguous, overbroad, unduly burdensome and oppressive, seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence, and seek information beyond that permitted by the CPLR.

7. THE CITY objects to these Interrogatories to the extent that they call for the identification and production of "any," "all" "every" or "each" of a category of documents or information. Such requests place an unreasonable and impossible burden on THE CITY, which

burden is far beyond that imposed by the CPLR. Further, it is unreasonable and impossible to represent, even after a reasonably diligent search, that “any,” “all,” “each” or “every” document, person, or thing falling within a description can be, or has been, located, identified and/or produced or destroyed. Information and documents may be kept in a myriad of locations or files. Many people may have handled them. They may have been moved frequently and may have been arranged, rearranged or reordered. Information and documents may have been lost or may have been part of materials disposed of in accordance with a record retention program. Individuals with discrete knowledge relative to the content, existence and/or storage of documents or information may have left the company, taking that knowledge with them. Therefore, THE CITY cannot warrant or represent that it has presently produced “each” or “all” or “any” or “every” type of requested information, document(s) or thing(s). Nor can THE CITY identify “each” or “all” or “any” or “every” type of requested information, document(s) or thing(s).

8. THE CITY objects to these Interrogatories to the extent that they seek privileged information, documents or materials, including, without limitation, that which was prepared, generated, or received for or in anticipation of litigation, constitutes attorney work product, or is protected by attorney-client privilege, or any other applicable privilege, rule of privacy and confidentiality, immunity, protection, or restriction that makes such information non-discoverable. Any inadvertent disclosure or production shall not be deemed a waiver of the applicable privilege or protection.

9. THE CITY objects to the Interrogatories to the extent that they do not incorporate time limitations. THE CITY is not obligated to produce documents or provide information concerning time periods before or after the relevant time frame.

10. THE CITY objects to each and every Interrogatory on the ground and to the extent that it calls for confidential business information or personally sensitive information, including of third-parties. THE CITY objects to each and every Interrogatory on the ground and to the extent that it seeks the disclosure of confidential financial, trade secret, proprietary, or sensitive business information, or information protected from disclosure by law, agreement, or court order.

11. THE CITY states that these responses have been prepared after a reasonable investigation and are based upon the best information presently available. THE CITY's investigation of the facts and allegations of this case is expected to continue up and through the time of trial. The following responses are given without prejudice to the THE CITY's right to produce evidence of any subsequently discovered facts. To the extent that further investigation may disclose additional information or documents that have been requested, such responsive information and/or documents will be produced via supplemental response(s). THE CITY reserves the right to amend, modify and/or supplement, in part or in whole, its responses to these requests as additional facts and details are ascertained, analysis is made, discovery is undertaken and legal research is completed. THE CITY also reserves the right to introduce subsequently obtained information at trial.

12. THE CITY's decision to provide information requested, notwithstanding the objectionable nature of any of the Interrogatories themselves, is not: (a) a concession that the material is relevant to this proceeding; (b) a waiver of the General Objections or the objections asserted in response to specific Interrogatories; (c) an acceptance by THE CITY of the factual assertions made in the Interrogatories; (d) an admission that any such information exists; or (e) an agreement that requests for similar information will be treated in a similar manner.

13. THE CITY specifically reserves the right to object, as appropriate, to the admission of these written answers as evidence at trial or for any other purpose.

14. The foregoing General Objections are continuing in nature and are incorporated by reference into each of the specific Responses set forth below. Any specific objection set forth in response to a particular Interrogatory is not intended to be a waiver, in whole or in part, of any of the foregoing General Objections. Nothing contained in these responses shall be deemed an admission, concession or waiver by THE CITY to the validity of any claim(s) or defense(s) asserted.

#### INDIVIDUAL RESPONSES

1. State the following:
  - (a) the full name of any and all persons who answered, prepared, or helped prepare the answers to these interrogatories;
  - (b) for each person identified in subparagraph (a) above, set forth their: i) relation to Plaintiff; and ii) the basis of their knowledge concerning the allegations in the Complaint and/or Answers served in connection with this action.

**Response:** The City objects to this Interrogatory as not proper, overly broad, harassing, and that it calls for the production of privileged information.

2. Identify all persons and/or business entities who have knowledge or who the City has reason to believe has knowledge of the facts alleged in the Verified Complaint and Reply to Counterclaims, and for each person/entity identified, briefly summarize the facts of which that person/entity has knowledge or may have knowledge.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing, it is not yet possible to identify all witnesses and The City specifically reserves its right to amend any response. Without waiving said objections, please refer to the City's Response to PC Order, number 7 and the documents produced in connection with the City's responses and objections to defendant's combined document demands.

3. Identify all persons Plaintiff (including its officials, representatives, employees, board members, and/or agents) has communicated with the Defendants from 2002 to the present: (a) about the alleged encroachments on Fifth Avenue; (b) about the alleged encroachments on East Street; and, (c) about City's maintenance of East Street. For responses to each subparagraph above, include the parties to each communication, each person's title, the date of communication(s) and a detailed description of what was discussed.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing, it is not yet possible to identify all witnesses and The City specifically reserves its right to amend any response. Without waiving said

objections, please refer to the City's Response to PC Order and the Verified Complaint including Exhibits 3 and 4 thereto and the documents produced in connection with the City's responses and objections to defendants' combined document demands.

4. State all functions that the City performs with respect to East Street.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing, and that it impermissibly calls for a legal conclusion. Without waiving said objections, refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

5. From 2002 to present, with respect to East Street describe with specificity the dates and times the City, including any of the City's officials, board members, employees, representative, and/or agents performed or engaged in:

- (a) street cleaning;
- (b) snow removal;
- (c) plowing;
- (d) repair work (and explain and describe such work);
- (e) paving and/or asphaltting work (and explain and describe such work);
- (f) maintenance work (and explain and describe such work);
- (g) maintenance of any manhole (and explain and describe such work); and

(h) maintenance of any sewer and/or water lines (and explain and describe such work).

For responses to each subparagraph above, include and state the name and address of the City representatives who did and/or witnessed the work.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, the City does not maintain East Street. The City did repair and protect the Parcel, as defined in the Complaint, including the installation of a fence, due to the destruction of its property by the Defendants. Refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

6. Identify the record owner of East Street and the manner in which ownership was attained.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving

said objections, please refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

7. Explain in detail the basis for the City's position that it has no obligation to maintain or repair East Street.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, please refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

8. Describe and identify with specificity the reasons and evidence upon which the City bases its statement in paragraph 44 of the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to

this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, please refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

9. Identify any and all City officials, representatives, employees, board members, and/or agents who have allegedly witnessed the following with respect to the property referenced in the Verified Complaint as the "Parcel":

- (a) the Defendants' alleged construction of an alleged parking lot or parking area;
- (b) the Defendants' alleged clearing of land; and
- (c) the Defendants' alleged removal of trees or plantings.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, refer to the documents provided in connection with the City's responses to the defendants' combined document demands, with the addition of William Zimmerman of the Parks Department.

10. Identify any and all City officials, representatives, employees, board members, and/or agents who have allegedly witnessed the following with respect to the City's Property on or near Flowers Park:

- (a) the Defendants' alleged construction of an alleged parking lot or parking area;
- (b) the Defendants' alleged clearing of land; and
- (c) the Defendants' alleged removal of trees or plantings.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, refer to the documents provided in connection with the City's responses to the defendants' combined document demands, with the addition of William Zimmerman of the Parks Department.

11. State each and every date and time, and describe in detail for each date and time the exact actions of Defendants, when the City alleges Defendants engaged in the following with respect to the property referenced in the Verified Complaint as the "Parcel":

- (a) the Defendants' alleged construction of an alleged parking lot or parking area;
- (b) the Defendants' alleged clearing of land; and

(c) the Defendants' alleged removal of trees or plantings.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

12. State each and every date and time, and describe in detail for each date and time the exact actions of Defendants, when the City alleges Defendants engaged in the following with respect to the City's Property on or near Flowers Park:

(a) the Defendants' alleged construction of an alleged parking lot or parking area;

(b) the Defendants' alleged clearing of land; and

(c) the Defendants' alleged removal of trees or plantings.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion.

Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving said objections, refer to the documents provided in connection with the City's responses to the defendants' combined document demands.

13. State the amount of the City's alleged damages, and how that amount was calculated, related to the "consequential damages including but not limited to the value of the removed trees, loss of value of the Parcel, and property damage" as alleged in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving these objections, refer to the documents provided in connection with the City's response to the defendants' document demands.

14. State the amount of the City's alleged damages, and how that amount was calculated, related to the City's RPAPL § 861 claim alleged in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed

narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving these objections, refer to the documents provided in connection with the City's response to the defendants' document demands.

15. State the amount of the City's alleged damages, and how that amount was calculated, related to the "consequential damages including but not limited to the costs of constructing the fence to prohibit access to the parking lot and the costs of removing the parking lot and restoring the Parcel to its prior location" as alleged in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving these objections, refer to the documents provided in connection with the City's response to the defendants' document demands.

16. State the amount of the City's alleged damages, and how that amount was calculated, related to the City's claim for statutory damages under City Code § 111-40 alleged in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad,

unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Without waiving these objections, refer to the documents provided in connection with the City's response to the defendants' document demands.

17. Describe in detail the reason the City claims it is entitled to punitive damages as set forth in the Verified Complaint and the amount of damages the City is seeking.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing.

18. Describe in detail the reason the City claims it is entitled to attorneys' fees and costs as set forth in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing.

19. Describe in detail the reason the City claims it is entitled to prejudgment interest at the maximum legal rate as set forth in the Verified Complaint.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing.

20. Identify any and all experts you intend to rely on at trial.

**Response:** The City incorporates the General Objections as if fully set forth herein. The City objects to this Interrogatory on the grounds and to the extent that it is overly broad, unduly burdensome, vague, and ambiguous. Furthermore The City objects to this Interrogatory, which improperly purports to require the City to provide a detailed narrative of its case and provide a legal conclusion. Additionally, The City objects to this Interrogatory as premature because fact discovery is ongoing. Subject to the foregoing objections, the City will provide the requested information in accordance with the timeline outlined in the CPLR.

Dated: White Plains, New York  
February 3, 2020

Respectfully submitted,

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



---

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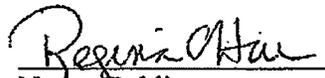
VERIFICATION

STATE OF NEW YORK            )  
  ) ss:  
COUNTY OF WESTCHESTER    )

I, PAUL VACCA am the Commissioner of Buildings for the City of New Rochelle. I have read foregoing responses to Defendants' First Set of Interrogatories and I am familiar with the contents thereof, and am informed and believe that the responses are true and correct. The same are true to my knowledge, except those matters therein stated upon information and belief, and as to those matter, I believe them to be true.

  
\_\_\_\_\_  
PAUL VACCA

Sworn to before me on  
December 3<sup>rd</sup>, 2020  
JAW                                Ⓡ

  
\_\_\_\_\_  
Notary Public

Regina O'Hare  
Notary Public, State of New York  
No. 01OH5067784  
Qualified in Westchester County  
Commission Expires Oct. 28, 2022

Index No. 54190/2016

Scott Mendelsohn  
07367.00101

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

---

CITY OF NEW ROCHELLE

Plaintiff,

- against -

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

Defendants.

---

**PLAINTIFF'S RESPONSE AND OBJECTIONS TO  
DEFENDANTS' FIRST SET OF INTERROGATORIES**

---

**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

*Attorneys For* Plaintiff

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---

Exhibit "20"

























SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
CITY OF NEW ROCHELLE,

Index No. 54190/2016

Plaintiff,

-against-

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

Defendants.  
-----X

**MEMORANDUM OF LAW IN OPPOSITION TO THE CITY'S  
SUMMARY JUDGMENT MOTION**

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### Preliminary Statement<sup>1</sup>

Defendants respectfully submit this Memorandum of Law in opposition to the Plaintiff City of New Rochelle's ("City") motion for summary judgment.

This Court should deny the City's motion for summary judgment on its sixth cause of action's claims for nuisance and injunctive relief related to East Street. The City's reliance upon a quote it attributes to Lord Ellenborough from an 1812 case that "No man may make a stable yard of the King's highway"<sup>2</sup> is telling as it demonstrates the City's arrogance and ignorance. While the City views itself as a king as it arrogantly seeks removal of an encroachment from East Street even though the City deigns not to maintain East Street like any other City public street, the City fails to comprehend that East Street is not a public street. As East Street is a private street as a matter of law, the City's sixth cause of action regarding East Street fails. And as the City does not seek summary on its sixth cause of action regarding Fifth Avenue, there is no basis to grant the City summary judgment on such claim.

This Court should likewise deny the City's motion on its first through fifth causes of action as, in the very least, there are sharp issues of material fact. The City ran to Court accepting as gospel the claims of a blogging website, Talk of the Sound, that on May 16, 2015 Defendants cut down trees, dumped contaminated materials and created a parking lot on City property. But the video and photographs from Talk of the Sound the City relies upon do not support these claims and the record is devoid of evidence to support them. Further, this Court should deny the City's motion seeking dismissal of Defendants' counterclaims.

The City has failed to establish its entitlement to judgment as a matter of law. But even if the Court found they did, Defendants have raised material issues of fact that preclude the granting

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<sup>1</sup> Defined Terms are set forth in the Response to Statement of Material Facts ("RSMF").

<sup>2</sup> *Rex v. Cross*, 3 Camp. 224 (1812).

of the City's motion. This Court should deny the City's motion for summary judgment in its entirety.

### **Counter-Statement of Facts**

The City's claims relate to two land areas in the City: (1) East Street; and (2) the "Parcel" that is part of the City's Flowers Park.<sup>3</sup> Defendants' property, 436 Fifth Avenue, is on East Street<sup>4</sup> and further down from Defendants' property along East Street and on the opposite side of the street (and abutting the skate park) is the "Parcel".<sup>5</sup>

Although the City claims East Street is a public street, East Street is, and always has been, a private street.<sup>6</sup> The City never accepted East Street by resolution.<sup>7</sup> Further, the City admits it does not maintain or repair East Street.<sup>8</sup> In 1914, the City affirmatively rejected East Street as a public street.<sup>9</sup> Nothing has changed since 1914 as the City has never accepted East Street.<sup>10</sup>

Although the City's Complaint alleges that on May 16, 2015 Defendants cut down "numerous full-sized trees" and cleared land to create a parking lot, and in the process "potentially deposited contaminated materials on the cleared land" abutting East Street (the Parcel),<sup>11</sup> no evidence supports these claims.

Defendants could not have created a parking area on the Parcel on May 16, 2015 as numerous witnesses testified that the Parcel was a parking area prior to May 16, 2015.<sup>12</sup> Persico

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<sup>3</sup> City's Ex. 1A ("Parcel" indicated by yellow circle).

<sup>4</sup> RSMF¶ 3.

<sup>5</sup> RSMF¶¶4-5.

<sup>6</sup> RSMF¶14.

<sup>7</sup> RSMF¶14.

<sup>8</sup> RSMF¶66.

<sup>9</sup> RSMF¶14.

<sup>10</sup> RSMF¶14.

<sup>11</sup> City's Ex. "1", ¶15.

<sup>12</sup> RSMF¶50.

Construction cleared the Parcel in 2003 or 2004 (prior to the skate park's construction) to use as a parking area for its employees when the City hired Persico to do construction on a nearby bridge.<sup>13</sup> And a 2014 Google Earth image of the Parcel, taken before May 16, 2015, depicts a truck with an attached trailer and other trucks parked on the Parcel.<sup>14</sup>

While Mr. Cox alleged in the Talk of the Sound he 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” on the Parcel, he admitted at deposition he did not actually observe this.<sup>15</sup> First-hand witnesses present at the Parcel on May 16, 2015 testified there were no trees or brush removed.<sup>16</sup>

As for Talk of the Sound's allegations that LaRocca's crew “dumped broken chunks of toxic asphalt” on the Parcel, the undisputed first-hand witness testimony was that they were spreading and flattening out existing gravel.<sup>17</sup> Further, the City retained an engineering firm to conduct sampling and testing of the Parcel, who concluded there was no contamination or toxic asphalt.<sup>18</sup> Regarding the “berm”, Mr. Cox admitted at deposition this referred to a pile of woodchips (and not asphalt as he “reported”).<sup>19</sup>

All that was unearthed during extensive discovery, including numerous costly depositions, was Defendants raked and smoothed out existing gravel on the Parcel that became displaced due to rain and snowplowing Flavio's company performs as part of maintaining East Street.<sup>20</sup> The

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> RSMF¶59.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> RSMF¶65.

City does not maintain East Street<sup>21</sup>, leaving the property owners to maintain East Street, including snowplowing.<sup>22</sup> This City should have thanked Defendants, not sued them.

### Argument

#### **I. The City Failed to Establish Entitlement to Summary Judgment on Its Sixth Cause of Action**

The City is not entitled to summary judgment as a matter of law on its sixth cause of action alleging a public nuisance and seeking removal of an encroachment on East Street. Besides the irrelevant and antiquated 1812 case,<sup>23</sup> the City relies on inapplicable case law<sup>24</sup> regarding encroachments on public roads when East Street is not a public road. The City's motion fails from the first sentence in claiming East Street it is public road as it is and remains a private street as a matter of law and by the City's own actions (or inactions).

The City wrongly bases its entire claim that East Street is a public road on the 1914 Deed (recorded in 1919),<sup>25</sup> even though it is well-settled that absent a formal act adopting the property as a public street, a municipality's "acceptance of a deed conveying the fee to an unimproved strip of land is not enough to create a public highway."<sup>26</sup> Here, as there has been no formal act or resolution by the City accepting East Street, East Street remains a private street and the City's claim fails.

The requirement for a formal act of acceptance or resolution by the City is mandated under both statutory and common law. General City Law § 34 entitled "Subdivision review, record of

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<sup>21</sup> DOEx. "19", ¶5; *see also*, City's Ex. "26", p.36.

<sup>22</sup> RSMF¶65.

<sup>23</sup> *Rex v. Cross*, 3 Camp. 224 (1812).

<sup>24</sup> City's Memorandum of Law, p.11-13.

<sup>25</sup> RSMF¶7; City's Ex. "39".

<sup>26</sup> *Perlmutter v Four Star Dev. Assoc.*, 38 A.D.3d 1139, 1140 (3d Dep't 2007), *relying upon*, *Desotelle v. Town Bd. of Town of Schuyler Falls*, 301 A.D.2d 1003, 1004 (3d Dep't 2003) and *In re Hunter*, 163 NY 542, 548 (1900).

plats” (which applies to the City) statutorily mandates that any streets depicted on a filed subdivision map are offered for dedication to the public, but such street is “deemed private” until “formally accepted by resolution of a local legislative body”:

4. Cession or dedication of streets, highways or parks. (a) All streets, highways or parks shown on a filed or recorded plat are offered for dedication to the public unless the owner of the affected land, or the owner's agent, makes a notation on the plat to the contrary prior to final plat approval. **Any street, highway or park shown on a filed or recorded plat shall be deemed to be private until such time as it has been formally accepted by a resolution of the local legislative body, or until it has been condemned by the city for use as a public street, highway or park.**<sup>27</sup>

Likewise, under common law, a municipality acquires title to real property by “dedication and acceptance” and “[d]edication of a street...is essentially of the nature of a gift by a private owner to the public and it becomes effective when the gift is accepted by the public.”<sup>28</sup> However, “[t]he test of the validity of a dedication, like the test of the validity of other gift or transfer, is, primarily, whether there has been complete relinquishment on the one side and acceptance on the other.”<sup>29</sup> In *Romanoff v. Village of Scarsdale*,<sup>30</sup> the Second Department ruled besides an offer and acceptance, there must be “**some formal act on the part of the relevant public authorities adopting the highway.**”<sup>31</sup> Dedication requires “a complete surrender to public use of the land by the owners, acceptance by the town [municipality], and some formal act on the part of the relevant public authorities adopting the highway, or use by the public coupled with a showing that the road was kept in repair or taken in charge by public authorities.”<sup>32</sup>

Contrary to the City’s position, that the 1914 Deed mentions East Street does not transform East Street from a private to a public street. The Appellate Division in *Desotelle v. Town Bd. of*

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<sup>27</sup> General City Law § 34(4) (*emphasis added*).

<sup>28</sup> *Romanoff v. Vil. of Scarsdale*, 50 A.D.3d 763, 764 (2d Dep’t 2008).

<sup>29</sup> *Id.*

<sup>30</sup> 50 A.D.3d 763 (2d Dep’t 2008).

<sup>31</sup> *Id.* at 764 (*emphasis added*).

<sup>32</sup> *Town of Lake George v. Landry*, 96 A.D.3d 1220, 1221 (3d Dep’t 2012).

*the Town of Schuylers Falls*<sup>33</sup> ruled even though fee simple title to a 50-foot wide strip of land was conveyed to the town and the town board accepted the deed, this was not a public street.<sup>34</sup> The Court reaffirmed that while a street may become public by dedication or use, “[d]edication, in turn, requires absolute relinquishment to public use by the owner, acceptance and a formal opening.”<sup>35</sup> The Court ruled even though there was “a deeded conveyance of the subject strip of land to the Town and a resolution by respondent accepting the deed, there is no record evidence of any subsequent action by the Town to improve, repair or maintain the strip”, nor evidence that the municipality “actually adopted it as a public highway.”<sup>36</sup> The Court ruled as there was insufficient evidence of dedication, the street was not a public road.<sup>37</sup>

In contrast to *Desotelle*, the Appellate Division in *Town of Lake George v. Landry*<sup>38</sup> ruled the municipality had acquired title by dedication as besides conveyance by deed, the Town issued a formal resolution accepting the road and also maintained the road. Relying on the Second Department’s *Romanoff*<sup>39</sup> case, the *Landry* Court found that besides the deed conveying the land on the 1949 subdivision map known as Beatty Road for “street purposes”, the “Town Board adopted a resolution formally accepting Beatty Road as a public highway in August 2009,[<sup>3</sup>] and even defendant acknowledges that plaintiff [the town] began plowing Beatty Road in January 2005 and graded a portion thereof later that year.”<sup>40</sup> The Court ruled “[s]uch proof, in our view, is more than sufficient to establish that plaintiff acquired title to Beatty Road by dedication, thereby shifting the burden to defendant to raise a question of fact in this regard.”<sup>41</sup>

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<sup>33</sup> 301 A.D.2d 1003 (3d Dep’t 2003).

<sup>34</sup> *Id.* at 1003-04.

<sup>35</sup> *Id.* at 1003.

<sup>36</sup> *Id.* at 1004.

<sup>37</sup> *Id.* at 1003-04.

<sup>38</sup> 96 A.D.3d 1220 (3d Dep’t 2012).

<sup>39</sup> *See supra* p.5-6.

<sup>40</sup> *Id.* at 1221-1222.

<sup>41</sup> *Id.* at 1222.

Here, the City never accepted East Street or issued a resolution accepting East Street and the underlying material facts are undisputed. The City admits “East Street and several other streets were created and laid out”<sup>42</sup> on the 1907 Subdivision Map<sup>43</sup> that depicts 247 lots and seven newly-formed streets (Weeks Place, Pine Brook Road, Crest View Street, Chatsworth Place, Ashland Street, East Place and East Street).<sup>44</sup> On April 30, 1914, Hadert Realty Company issued the 1914 Deed quit-claiming to the City “all the right, title, interest and easement” of Hadert to the seven streets.<sup>45</sup> The 1914 Deed provides 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.”<sup>46</sup> At the City Council’s June 2, 1914 meeting, a correspondence from the City’s Assistant Corporation Counsel was read, which recommended the City accept East Street since it abutted the City’s park.<sup>47</sup>

However, the City Council did not follow the recommendation to accept East Street, because at that same June 2, 1914 meeting the City Council adopted a resolution<sup>48</sup> accepting only five of the seven streets and not accepting East Street.<sup>49</sup> Since 1914, the City never accepted East Street through a resolution or otherwise as the City’s Commissioner of Development and Building Official Paul Vacca testified to in this action:

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

MR. MENDELSON: Objection to form.

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<sup>42</sup> RSMF¶6.

<sup>43</sup> DOEx. “1”

<sup>44</sup> DOEx. “1”.

<sup>45</sup> City’s Ex. “39”.

<sup>46</sup> *Id.*

<sup>47</sup> DOEx. “2”, p.179.

<sup>48</sup> DOEX. “2” p.186-187.

<sup>49</sup> *Id.*

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.<sup>50</sup>

Aside from never accepting East Street, the record is clear the City also never engaged in any other activities identified in case law that indicates ownership, such as repairing and maintaining the street. The City does not maintain or repair East Street.<sup>51</sup> And it is irrelevant that the public uses East Street as this alone does not make East Street a public street.<sup>52</sup> Rather, the “Court of Appeals has further determined that use by the public is insufficient to establish property as a public highway absent some showing that the property was in fact kept in repair or taken in charge by public authorities.”<sup>53</sup> East Street was never “kept in repair or taken in charge” by the City as the property owners (and mostly Defendants) maintain and repair East Street.<sup>54</sup>

Here, unlike in *Desotelle*, the City never issued a formal resolution accepting the 1914 Deed, which even if it did, would be insufficient without the City adopting a formal resolution accepting East Street. And unlike in *Landry*, after the 1914 Deed, the City never issued a resolution accepting East Street nor maintained East Street. *Desotelle* and *Landry* establish that even under common law, the City did not acquire title to East Street by dedication despite the 1914 Deed. Here, the City's only formal action was to accept five of the seven streets. In not accepting East Street, the City affirmatively rejected it.

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<sup>50</sup> City's Ex. "26", p. 37.

<sup>51</sup> RSMF¶¶66.

<sup>52</sup> *Desotelle v. Town Bd. of Town of Schuylers Falls*, 301 A.D.2d 1003, 1003-04 (3d Dep't 2003).

<sup>53</sup> *Id.*

<sup>54</sup> RSMF¶¶82-83.

As General City Law § 34 mandates East Street is “deemed to be private”, the City’s claims under City Ordinance § 111-38 fail as a matter of law. The City’s reliance upon City Ordinance § 111-38 entitled “Encroachments onto public property is restricted” is wholly misplaced as this statute relates only to public streets or property.<sup>55</sup> Giving effect to its unambiguous, plain meaning,<sup>56</sup> City Ordinance § 111-38 only applies to public streets or property and is inapplicable to East Street – a private street.

Even were East Street a public street (which it is not), the City’s civil action before this Court is neither the means nor forum to impose penalties against Defendants for alleged violation of City Ordinance § 111-38 (which is part of Chapter 111 entitled “Building Construction”). Rather, City Ordinance § 111-40 entitled “Penalties for offenses” sets forth the procedure for violations of Chapter 111 (Building Construction) of the Code, including: (1) requiring 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”; (2) the prosecution of the violation by Corporation Counsel; and (3) details of penalties that may be assessed including fines and imprisonment.<sup>57</sup> The City should have brought its claim in City Court, which has jurisdiction over City Ordinance violations. The Uniform City Court Act § 203 provides “[t]he [city] court shall have jurisdiction over the following actions provided that the real property involved is located in whole or in part within the city:...(2) An action brought to impose and collect a civil penalty for a violation of a state or local laws for...any applicable local housing maintenance codes, building codes and health

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<sup>55</sup> Attached to Addendum.

<sup>56</sup> *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013).

<sup>57</sup> City Ordinance § 111-40 attached to Addendum.

codes.”<sup>58</sup> As the violation alleged by the City relates to the City’s Building Construction Ordinance, City Court has jurisdiction and not this Court.

This Court should disregard the City’s misplaced attempt to frame Defendants’ defenses in their own inaccurate words only to knock them down. Defendants need not obtain the City’s permission to encroach on a private street nor have Defendants ever alleged an adverse possession claim over a public street. Rather, Defendants’ position is that the City’s claim is barred as a matter of law, because East Street is a private street.

The City lacks standing to bring a nuisance or any other claim relating to encroachments on East Street. As explained by the Second Department, “[i]t is well established that when property is described in a conveyance with reference to a subdivision map showing streets abutting on the lot conveyed, easements in the private streets appurtenant to the lot generally pass with the grant.”<sup>59</sup> And “[t]he grantees of lots abutting a street on a filed map are entitled to have the land so demarcated remain as a street forever absent its abandonment, conveyance, condemnation, or adverse possession.”<sup>60</sup> The owners of lots abutting East Street along the same side of East Street as the Property, which are depicted on the 1907 Subdivision Map (which includes no lot owned by the City), would have to bring a claim alleging the encroachment somehow precludes their use of the street.<sup>61</sup> And such a claim by the private property owners would likely fail given (1) the encroachment does not preclude access<sup>62</sup> and (2) the 2000 As-Built plan<sup>63</sup> is conclusive evidence the fencing enclosing Defendants’ contractor’s yard has extended onto East Street for over 20 years, potentially entitling Defendant to title in the encroaching area by adverse possession against

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<sup>58</sup> Uniform City Ct. Act § 203.

<sup>59</sup> *Fischer v. Liebman*, 137 A.D.2d 485, 487 (2d Dep’t 1988).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> City’s Ex. “6”.

<sup>63</sup> DOEX. “3”

the private lot owners.<sup>64</sup> But this issue is not before the Court and on the issue before the Court, the City lacks standing to assert property right claims regarding a private street.

This Court should deny the City's summary judgment motion on its sixth cause of action as the City never acquired title to East Street by dedication or otherwise, and East Street remains a private street in which the City has no rights or interest. Although Defendants do not deny Fifth Avenue is a public street maintained by the City, the City does not seek summary judgment on its sixth cause of action related to Fifth Avenue. Thus, this Court should deny the City's summary judgment motion on its sixth cause of action in its entirety.

## **II. The City is Not Entitled to Summary Judgment on its First Through Fifth Causes of Action**

This Court should deny the City's motion for summary judgment on its first through fifth causes of action, which are based upon the delusions of a website called Talk of the Sound and its owner/blogger Robert Cox. The City claims Defendants, on May 16, 2015, cut down "numerous full-sized trees" and cleared land to create a parking lot, and in the process "potentially deposited contaminated materials on the cleared land" abutting East Street (the Parcel).<sup>65</sup> The City's insurmountable problem is the video<sup>66</sup> and photographs from Talk of the Sound<sup>67</sup> the City relies exclusively upon do not support these claims and there is no other evidence to support them. At best, issues of fact preclude granting the City summary judgment on its first through fifth cause of

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<sup>64</sup> *DuMaurier v. Lindsay-Bushwick Assoc.*, 39 A.D.3d 460, 461 (2d Dep't 2007) (for adverse possession under common law it is necessary to establish "that the possession was hostile and under claims of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years").

<sup>65</sup> City's Ex. "1" at ¶15.

<sup>66</sup> City's Ex. "30".

<sup>67</sup> City's Ex. "1", subexhibit "1".

action, but the absence of any evidence supports the dismissal of these claims entirely (as requested in Defendants' motion for summary judgment).

Here, the Court cannot grant the City summary judgment on its first through fifth causes of action as the City produced no evidence Defendants cut down any trees, cleared land and/or created a parking lot. Defendants could not have created the parking area on the Parcel<sup>68</sup> on May 16, 2015 as the City alleges, because cars had been parking there for years.<sup>69</sup> Numerous witnesses, including an owner of another contractor's yard on East Street, testified the Parcel (now enclosed with a black fence the City installed) was used for parking before May 16, 2015.<sup>70</sup> The 2014 Google Earth image depicts at least three trucks parked on the Parcel (including a truck with a trailer parked on a horizontal angle).<sup>71</sup> Clearly, the parking area could not have been created by Defendants on May 16, 2015 or "full-sized trees" cut down from the Parcel on May 16, 2015 when trucks were parked on the cleared lot in 2014. Likewise, there is no evidence Defendants cut down trees,<sup>72</sup> nor that Defendants deposited contaminated asphalt on the Parcel.<sup>73</sup>

A. First Cause of Action:

The City's first cause of action for trespass alleges "Defendants intentionally entered the Parcel, cut down trees, cleared the land, and created a parking lot."<sup>74</sup>

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission..."<sup>75</sup> The City produced no evidence supporting

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<sup>68</sup> RSMF¶25.

<sup>69</sup> RSMF¶50.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; DOEx. "15".

<sup>72</sup> RSMF¶59.

<sup>73</sup> *Id.*

<sup>74</sup> City's Ex. "1", ¶21.

<sup>75</sup> *Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland*, 101 A.D.3d 853, 855 (2d Dep't 2012).

Defendants cut down trees, cleared land or deposited potentially contaminated materials on the Parcel. Rather, all that was unearthed during discovery, including the numerous costly depositions, was that Defendants raked and smoothed out existing gravel on the Parcel that became displaced due to rain and snowplowing Flavio's company performs as part of maintaining East Street.<sup>76</sup> The City admits it does not maintain East Street,<sup>77</sup> leaving the property owners to maintain East Street, including snowplowing East Street.<sup>78</sup>

As a matter of law, Defendants' raking and smoothing out gravel that had been there for years and became dislocated due to rain and Defendants' plowing is not a trespass and in the least, questions of fact exist on whether Defendants' actions were intentional or unjustified given the City does not maintain East Street. The record evidence was that the raking and smoothing of existing gravel was done because of Defendants' plowing.<sup>79</sup> There is no clear delineation (or curbing) between the Parcel and East Street. Rather, as depicted on the City's 2014 Survey<sup>80</sup> the asphalt area of East Street (which is a private street not owned or maintained by the City)<sup>81</sup> extends onto the Parcel (the City's property). This is further evidenced in the 2022 Survey<sup>82</sup> of the Parcel, produced for the first time in the City's motion papers, that clearly depicts "irreg[ular] macadam pavement" extending onto the Parcel. The City's surveys themselves establish the road surface extending upon the Parcel, further demonstrating Defendants' action were not intentional nor unjustified. Again, in the very least, there are questions of fact precluding summary judgment for the City.

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<sup>76</sup> RSMF¶65.

<sup>77</sup> DOEx. "19", ¶5; City's Ex. "26", p.36.

<sup>78</sup> RSMF¶65.

<sup>79</sup> RSMF¶65.

<sup>80</sup> City's Ex. "6"

<sup>81</sup> See *supra*, Point I.

<sup>82</sup> City's Ex. "34".

B. Second Cause of Action:

The City cannot establish its entitlement to summary judgment on its second cause of action sounding in negligence or negligence per se premised on purported actions of which there is no evidence they ever occurred. The Complaint cites City Ordinance § 301-4 providing it is unlawful to remove trees or plants “on City property without a written permit”<sup>83</sup> and City Ordinance § 301-7 providing it is unlawful to “place or maintain upon the ground in any public place any stone, cement, or other impervious material.”<sup>84</sup> The Complaint also cites Real Property Actions and Proceeding Law (“RPAPL”) § 861 providing it is unlawful to cut trees on the City’s land.<sup>85</sup>

As explained by the Second Department:

Under common law, a person is negligent when he fails to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. When a statute designed to protect a particular class of persons against a particular type of harm is invoked by a member of the protected class, a court may, in furtherance of the statutory purpose, interpret the statute as creating an additional standard of care. Violation of such a statutory standard, if unexcused, constitutes negligence per se so that the violating party must be found negligent if the violation is proved. Negligence per se is not liability per se, however, because the protected class member still must establish that the statutory violation was the proximate cause of the occurrence.<sup>86</sup>

Here, the City can establish neither negligence nor negligence per se because the City fails to produce evidence to support its claims. No evidence of the purported unlawful actions exists. There is no evidence Defendants cut down trees on the Parcel or deposited new gravel on the Parcel as prohibited in the City’s ordinance. The City cannot establish a negligence claim because Defendants did not fail to exercise the degree of care a reasonably prudent person would. If

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<sup>83</sup> City’s Ex. “1”, ¶27; City Ordinance § 301 attached to Addendum.

<sup>84</sup> City’s Ex. “1”, ¶28.

<sup>85</sup> City’s Ex. “1”, ¶29.

<sup>86</sup> *Dance v. Town of Southhampton*, 95 A.D.2d 442, 444-45 (2d Dep’t 1983).

anything, Defendants exercised a greater degree of care in maintaining and repairing the Parcel adjacent to the street (East Street). Maintaining East Street is something Defendants and Defendants' neighbors did, not the City.

Regarding negligence per se, the Second Department made clear the alleged statutory violation **must be proved**. The City cannot make baseless allegations, cite to some statutes and claim negligence per se. The burden is on the City to prove Defendants' actions occurred, a burden the extensive discovery record does not support. As the City cannot prove Defendants engaged in any activities that allegedly violated the statutes the City cited, the City cannot establish it's entitled to summary judgment for negligence per se.

C. Third Cause of Action

Similarly, the City's summary judgment motion on its third cause of action for nuisance fails because it is based upon actions for which there is no factual support in the record. The City alleges "Defendants' creation of a parking lot on the Parcel was intentional or negligent and unreasonable"<sup>87</sup> and interferes with the City's use and enjoyment of the Parcel.<sup>88</sup> Again, there is no evidence to support Defendants "created" a parking lot on the Parcel when the evidence establishes the parking lot had existed for years before when the City alleges it was created. The City also cannot establish there was alleged interference with the City's use and enjoyment of the Parcel where it had been a parking lot for years without the City saying a word. The City can establish no element of a nuisance claim as a matter of law and is not entitled to summary judgment in its favor.

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<sup>87</sup> City's Ex. "1", ¶35.

<sup>88</sup> City's Ex. "1", ¶36.

D. Fourth and Fifth Causes of Action:

Finally, this Court should deny the City's motion for summary judgment on its fourth and fifth causes of action for conversion and RPAPL § 861 violation, respectively. These claims are based upon the unfounded claims that on May 16, 2015 Defendants "cut down and destroyed numerous full-sized, potentially valuable and historic trees standing wholly upon the Parcel."<sup>89</sup> Again, the record is devoid of evidence to support Defendants cut down any trees, especially valuable and historic trees as the City claims.

For the foregoing reasons, this Court should deny the City's motion seeking summary judgment on its first through fifth causes of action.

**III. This Court Should Deny the City's Motion Seeking Dismissal of Defendants' Counterclaims**

There is no basis to dismiss Defendants' counterclaims as they should instead be severed and allowed to continue as issues of fact preclude granting the City summary judgment.

A. There is No Basis to Dismiss Defendants' Second Counterclaim

The City's motion seeking summary judgment dismissal of Defendants' second counterclaim is premature until there is a determination whether East Street is private or public, which is put into issue in the City's sixth cause of action.<sup>90</sup> Historically, it has been understood that East Street is a private street and that is why it is repaired, maintained and improved by the abutting property owners, but mostly Defendants. Now, in this litigation, the City claims it is a public street to which it has the right to preclude any encroachments. The City is trying to have

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<sup>89</sup> City's Ex. "1", ¶40, 44.

<sup>90</sup> See *supra*, Point I.

its cake and eat it too – it is not a public street so the City need not maintain it, but it is a public street so the City can control it. This defies logic and the law.

Defendants’ second counterclaim addresses the inequities in the City’s contradictory position by claiming unjust enrichment for the expenses Defendants incurred since 2002 repairing, maintaining and improving East Street if the Court determines East Street is a public street<sup>91</sup> (despite any formal resolution by the City accepting East Street as mandated by common law and statutory law), because then the City should have been maintaining it all along.<sup>92</sup> Conversely, if there is a final, non-appealable determination that East Street is a private street (that the City cannot control), Defendants represent they will withdraw such counterclaim.

The City offers no legal theory under which East Street is a public street, but yet the City need not maintain and repair it like other public streets. If East Street is a public street (which Defendants do not concede), the City has been unjustly enriched by forcing abutting private property owners to expend private funds and resources to maintain and repair a street that should have been maintained and repaired by the City. And given the nature of the claim, neither failing to file a notice of claim nor laches bars Defendants’ second counterclaim.

First, as Defendants’ second counterclaim is equitable, Defendants did not have to file a notice of claim.<sup>93</sup> The Second Department ruled:

General Municipal Law § 50–e mandates that a notice of claim must be served as a condition precedent to the commencement of a tort action against a municipality. Section 50–e(1)(a) provides, in relevant part, that a “notice of claim” is required “in any case founded upon tort.” Section 50–i, entitled “Presentation of tort claims; commencement of actions,” is similarly limited to torts.<sup>94</sup>

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<sup>91</sup> City’s Ex. “2”, ¶104-109.

<sup>92</sup> *Id.*

<sup>93</sup> *Johnson v. City of Peekskill*, 91 A.D.3d 825, 826 (2d Dep’t 2012).

<sup>94</sup> *Id.*

The Second Department in *Johnson v. City of Peekskill*<sup>95</sup> held “plaintiff’s claim is not subject to the notice of claim statute because his claim is primarily equitable in nature.”<sup>96</sup> Here, as Defendants’ claim sounding in unjust enrichment is equitable,<sup>97</sup> Defendants did not have to file a notice of claim.

Second, Defendants’ claim is not barred by laches. The laches doctrine “is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party.”<sup>98</sup>

Here, Defendants did not unreasonably or inexcusably delay in asserting their second counterclaim. The City accepted the 2000 As-Built and issued a certificate of occupancy to 436 Fifth Avenue’s prior owners (the Maffeis) on January 16, 2001, even though the 2000 As-Built depicted the encroachment onto East Street.<sup>99</sup> And when Defendants purchased the Property in 2002, there were no open violations.<sup>100</sup> The City’s actions evidenced its belief that East Street is a private street, which also followed the City’s hands-off approach in not maintaining or repairing East Street like other public streets.<sup>101</sup> The City first raised a purported encroachment on East Street in 2009,<sup>102</sup> but the City took no action leading Defendants to believe the City agreed any encroachment was de minimus. It was not until November 18, 2015 that the City issued a Notice to Remove regarding Defendants’ purported encroachment on East Street.<sup>103</sup> The City shortly

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<sup>95</sup> 91 A.D.3d 825 (2d Dep’t 2012).

<sup>96</sup> *Id.* at 826.

<sup>97</sup> To prevail on an unjust enrichment claim, a party must show: “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” *Marini v. Lombardo*, 79 A.D.3d 932, 934 (2d Dep’t 2010).

<sup>98</sup> *Skrodelis v. Norbergs*, 272 A.D.2d 316, 316 (2d Dep’t 2000).

<sup>99</sup> DOEx. “3” and “7” and RSMF¶18.

<sup>100</sup> DOEx. “8” and RSMF¶18.

<sup>101</sup> RSMF¶66.

<sup>102</sup> RSMF¶29.

<sup>103</sup> RSMF¶39.

thereafter commenced this action<sup>104</sup> and in their Answer Defendants interposed their second counterclaim.<sup>105</sup>

Further, the City has not been prejudiced. If East Street is a public street, the City has improperly foisted the burden of its maintenance onto the private landowners. The City cannot establish that it has been prejudiced by this as the City maintains public streets.<sup>106</sup> If anything, it is the Defendants who are prejudiced by the City's delay in bringing this claim because the City let the property owners maintain East Street at their sole expense for decades thinking it was their obligations to do so and then the City swoops in and claims it has the right to control what occurs on a street it refuses to maintain. The City should take a hard look at its own actions before it claims laches against Defendants.

B. There is No Basis to Dismiss Defendants' First Counterclaim

The Court should deny the City's application to amend its Reply to assert affirmative defenses of statute of limitations and laches, and upon so doing, also deny the City's application for summary judgment dismissal of Defendants' first counterclaim.

The City, through its hired contractors, stole \$40,000 worth of Defendants' personal property.<sup>107</sup> The City does not dispute this. The City knew it did not purchase the jersey barriers, and when Defendants first brought this issue to the City's attention in 2003,<sup>108</sup> the City did not return the jersey barriers and did nothing to remedy the situation. Instead, the City doubled-down by affixing the jersey barriers to the ground in the City skate park – directly across the street from

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<sup>104</sup> City's Ex. "1".

<sup>105</sup> City's Ex. "2".

<sup>106</sup> <https://www.newrochelleny.com/71/Public-Works> (including in list of the City's Department of Public Works' duties "cleaning of streets and highways").

<sup>107</sup> City's Ex. "2", ¶94-103.

<sup>108</sup> RSMF¶78.

Defendants' Property where they see them every day.<sup>109</sup> This is not just a civil issue, this is criminal. This reflects the City's approach toward Defendants, to bully the lowly property owner and small business owner while hiding behind its bankroll of taxpayer dollars and qualified immunity.

The message this Court would send to the City if it grants any aspect of the City's motion is that the City can: (1) take someone's valuable personal property without any repercussions; (2) refuse to maintain a public street for decades and then bring a claim against the property owner that maintained the street for decades for an encroachment that predated their ownership of the Property – and that the City approved; and (3) sue based upon the unsubstantiated statements of a blogger, doing no due diligence to confirm their accuracy, and spend tens, if not hundreds, of thousands of taxpayer dollars on claims that have no legitimacy because the blogger testified he did not actually see anything he claimed seven years earlier.<sup>110</sup> The Court would be condoning the City's abhorrent behavior toward Defendants for nearly two decades and encouraging the City to continue this behavior toward Defendants and other City residents and business owners.

CPLR § 3025(c) authorizes amendments to pleadings “absent prejudice or surprise resulting from the delay.”<sup>111</sup> There will absolutely be prejudice to Defendants if the City is permitted to assert these affirmative defenses and move for summary judgment on them. While the City claims Defendants waited too long to assert its claim regarding the stolen jersey barriers, the City waited even longer to bring the claim regarding the alleged encroachment on East Street – a street it has refused any obligation of for decades – for an encroachment the City approved and issued a certificate of occupancy in **2000**.<sup>112</sup> This level of hypocrisy is not unexpected from the

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<sup>109</sup> RSMF¶76.

<sup>110</sup> RSML¶59.

<sup>111</sup> *Alomia v New York City Tr. Auth.*, 292 A.D.2d 403, 406 (2d Dep't 2002).

<sup>112</sup> RSML¶¶17-18.

City as they do not believe the rules apply to them, but for the Court to allow the City's claim to stand while dismissing Defendants' claim would be incredibly prejudicial and unfair.

The City claims it was not aware of the timeframe of the stolen jersey barriers when they filed their Reply. That is an interesting assertion given the City's Reply "den[ie]d the truth" of several allegations contained in Defendants' first counterclaim, including that the City took Defendants' jersey barriers and the value of the jersey barriers.<sup>113</sup> How did the City have the knowledge to deny certain claims, but did not know when those claims they had denied occurred? Further, perhaps the City would have had that information when they filed their Reply, obviating the need to amend the Reply over three years later, had the Reply been reviewed and verified by a City official with firsthand knowledge as opposed to their attorney.<sup>114</sup> Perhaps it is because no one from the City wanted their name associated with this litigation, and which is why the City's Complaint was also verified by their attorneys.<sup>115</sup> Moreover, the verifications of the Complaint and Reply both stated the attorney issuing the verification was "acquainted with the facts,"<sup>116</sup> but based upon the City's motion papers, that was not the case. The City cannot claim ignorance when they filed the Reply when they did nothing to obtain the information to submit an informed and complete pleading.

For all of these reasons, the City's application to amend its Reply and for summary judgment dismissal of the first counterclaim should be denied in their entirety.

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<sup>113</sup> City's Exs. "2" and "3", ¶¶96, 99.

<sup>114</sup> City's Ex. "3".

<sup>115</sup> City's Ex. "1".

<sup>116</sup> *Id.*; CPLR §3020(d)(2).

#### IV. This Court Should Deny the City's Motion for Summary Judgment

The City has not satisfied the standard for summary judgment. Summary judgment must be denied when the movant fails to meet “their initial burden of demonstrating the absence of a triable issue of fact.”<sup>117</sup> When the movant fails “to make a prima facie showing of entitlement to judgment as a matter of law,” the motion for summary judgment must be denied, “regardless of the sufficiency of the opposing papers.”<sup>118</sup> “The drastic relief of ‘[s]ummary judgment should not be granted where there is any doubt as to the existence of a triable issue.’”<sup>119</sup> The Second Department explains because “[s]ummary judgment is the procedural equivalent of a trial,” it “must be denied if any doubt exists as to a triable issue or where a material issue is arguable.”<sup>120</sup>

It is well established that “summary judgment should only be granted where there are no material and triable issues of fact’ and that ‘issue finding, as opposed to issue determination, is the key to summary judgment.’”<sup>121</sup> “The function of the Court is not to determine issues of fact or credibility, but merely to determine whether such issues exist.”<sup>122</sup> The Second Department has established that “[i]n reviewing a motion for summary judgment, the court accepts as true the evidence presented by the nonmoving party”<sup>123</sup> and the party opposing summary judgment is entitled to “the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties.”<sup>124</sup> In *Herrin v. Airborne Freight Corp.*,<sup>125</sup> the Second Department ruled the lower court erred in granting summary judgment even though

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<sup>117</sup> *Paulin v. Needham*, 28 A.D.3d 531, 531-32 (2d Dep’t 2006).

<sup>118</sup> *Id.* at 532.

<sup>119</sup> *Encarnacion v. State*, 49 A.D.3d 1038, 1039 (3d Dep’t 2008).

<sup>120</sup> *Rivers v. Birnbaum*, 102 A.D.3d 26, 42 (2d Dep’t 2012), quoting *Dykeman v. Heht*, 52 A.D.3d 767, 769 (2d Dep’t 2008).

<sup>121</sup> *Paulin*, 28 A.D.3d at 531, quoting *Stretch v. Tedesco*, 263 A.D.2d 538, 539 (2d Dep’t 1999).

<sup>122</sup> *Rivers*, 102 A.D.3d at 42.

<sup>123</sup> *Fleming v. Graham*, 34 A.D.3d 525, 526 (2d Dep’t 2006), *rev’d on other grounds*.

<sup>124</sup> *Nicklas v. Tedlen Realty Corp.*, 305 A.D.2d 385, 386 (2d Dep’t 2003).

<sup>125</sup> 301 A.D.2d 500 (2d Dep’t 2003).

the defendants established their prima facie entitlement to summary judgment since plaintiff “successfully opposed the defendants’ motion by raising a triable issue of fact.”<sup>126</sup>

Here, the City failed to establish its entitlement to judgment as a matter of law. But even if the Court found they did, Defendants have raised material issues of fact that preclude granting the City’s motion.

### **Conclusion**

Based on the foregoing, this Court should deny the City’s motion for summary judgment in its entirety.

Dated: Tarrytown, New York  
August 4, 2022

Respectfully submitted,

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<sup>126</sup> *Id.* at 501.

# ADDENDUM

City of New Rochelle, NY  
Friday, May 27, 2022

## Chapter 111. Building Construction

### Article V. Fire Limits; Encroachments and Projections Onto Public Property

#### § 111-38. Encroachments onto public property restricted.

[Amended 3-18-2003 by Ord. No. 63-2003]

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.

City of New Rochelle, NY  
Friday, May 27, 2022

## Chapter 111. Building Construction

### Article VI. Enforcement

#### § 111-40. Penalties for offenses.

[Amended 3-18-2003 by Ord. No. 63-2003; 10-16-2007 by Ord. No. 238-2007]

- 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.

City of New Rochelle, NY  
Friday, May 27, 2022

## Chapter 301. Trees and Shrubs

### Article II. Trees on City Property

#### § 301-4. Permit required.

[Amended 4-15-1986 by Ord. No. 87-1986]

Except upon order of the Commissioner of the Department of Public Works, it shall be unlawful for any person without a written permit from said Commissioner to remove, destroy, cut, break, climb or injure any tree, plant or shrub or portion thereof that is planted or growing in or upon any public highway or public place within the City, or cause, authorize or procure any person to remove, destroy, cut, break, climb or injure any such tree or shrub or portion thereof; or to injure, misuse or remove or cause, authorize or procure any person to injure, misuse or remove any device set for the protection of any tree, plant or shrub in or upon any public highway or public place.

City of New Rochelle, NY  
Friday, May 27, 2022

**Chapter 301. Trees and Shrubs**  
**Article II. Trees on City Property**  
**§ 301-7. Use of impervious materials.**

[Amended 4-15-1986 by Ord. No. 87-1986]

It shall be unlawful for any person, except with a written permit of the Commissioner of the Department of Public Works, to place or maintain upon the ground in any public highway or public place any stone, cement or other impervious material or substance in such a manner as may obstruct the free access of air and water to the roots of any tree, plant or shrub in any such highway or place. Unless otherwise provided for in such written permit, there must be maintained about the base of the trunk of each tree in such highway or place at least nine square feet of ground for a tree three inches in diameter, and for every two inches of such diameter there must be an increase of at least one square foot of open ground.

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 202.8-b that the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION** was prepared on a computer using Microsoft Word indicating the following:

**Word Count.** The total number of words, inclusive of point headings and footnotes, and exclusive of the caption, table of contents and signature block, is 6952.

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