CARMODY
TORRANCE | SANDAK | HENNESSEY LLP

MEMORANDUM

To: City of Norwalk Zoning Commission

From: Carmody Torrance Sandak & Hennessey LLP

Date: November 18, 2020

Re: #5-20SPR/#07-20CAM (61 Wall Street); #6-20SPR/#08-20CAM (17 Isaacs Street) Site Plan Review and Coastal Area Management Site Plan Review Applications, and #4-20R Zoning Amendment Application (the "Applications") – ***Easement Question***

A member of the public, Jason Milligan, has raised questions relating to the above-referenced Applications in regards to certain alleged easement rights. In particular, Mr. Milligan has stated he has an easement over a portion of 61 Wall Street which has been encroached upon by the existing development at the property, which the Applications seek to complete.

This memo is intended to clarify the jurisdiction of the Zoning Commission and provide background information regarding the question raised.

Zoning Commission Scope of Review

Connecticut law establishes that zoning commissions have the authority to hear and decide applications before them regardless of whether title disputes exist. Thus, the Commission is authorized to consider and conduct a hearing on the Applications regardless of whether issues with respect to easement rights exist (which has been contested per further discussion below).

Zoning commissions are vested with the authority to regulate land use, but only areas specified in State enabling legislation.[1] Such authority does not extend to title disputes, and "***[i]t is well settled that a commission cannot decide issues of title or ownership of real property***."[2] Thus, "[w]hen [a] commission acts on a special permit or site plan, it acts in an administrative capacity and its function is to determine whether the applicant's proposed use is one that satisfies the standards set forth in existing regulations and statutes," and not to make title-related determinations.[3] Simply put, planning and zoning "[c]omission[s] ha[ve] no legal authority to adjudicate property rights."[4]

[1] *See Eden v. Town Plan and Zoning Comm'n of Bloomfield*, 139 Conn. 59, 63 (1952).

[2] *Cybulski v. Planning & Zoning Comm'n of Town of Enfield*, 43 Conn. App. 105, 110 (1996), *cert. denied*, 239 Conn. 949 (1996) (*citing Beckish v. Manafort,* 175 Conn. 415, 422 n. 7 (1978); 9 Connecticut Practice, R. Fuller, Land Use Law and Practice (1993) § 8.3) (emphasis added)).

[3] *Cybulski, supra*, 43 Conn. App. at 110.

[4] *Patrell v. Zoning Comm'n of Town of Old Lyme*, No. 094009623, 2011 WL 3211287, at *10 (Conn. Super. Ct. June 28, 2011) ("[w]hen a land use agency reviews applications to it, it cannot properly consider private property interests and deed restrictions"); *see also Lunn v. Darien Zoning Board of Appeals*, Docket No. CV-92299972, 1994

Connecticut General Statutes specifically provide a mechanism for resolving ownership disputes over real property, via a judicial quiet title action.[5] Thus, where parties disputed the existence of, and effect of a subdivision on, an easement in connection with the approval of a subdivision application, a Connecticut Appellate Court has explained that, "[t]he [zoning] commission does not have the authority to determine whether the claimed right of way was a legally protected and enforceable prescriptive easement, since that conclusion can only be made by judicial authority in a quiet title action governed by General Statutes § 47-31."[6] Similarly, another court has explained that a zoning commission does "not have the authority to determine whether [a] claimed right-of-way is a public highway," which, again can only be settled by the courts.[7]

The Easement Claims

The questions raised by Mr. Milligan are in fact already in the appropriate forum – we are aware of pending litigation in the Connecticut Superior Court, Judicial District of Stamford, captioned *IJ Group, LLC v. Municipal Holdings, LLC*, Docket No. FST-CV-19-6041541-S ("Easement Litigation"). IJ Group, LLC ("IJ Group"), of which Mr. Milligan appears to be the principal, is the purported record owner of the adjacent properties located at 67 Wall Street and 69 Wall Street, which filed the lawsuit against the current owner of 61 Wall Street, Municipal Holdings, LLC ("Municipal Holdings"). While the Zoning Commission cannot consider this private title issue, the remainder of this memo summarizes the various defenses raised for the easement claims in the pending lawsuit.

In particular, the documents filed in the pending litigation to date set forth the following defenses:

- The easement was abandoned;
- The easement was terminated;
- The easement cannot be enforced because:
    - IJ Group brought its lawsuit for an improper purpose;
    - IJ Group waived its rights;
    - IJ Group is estopped;
- An injunction is an improper remedy since IJ Group has not been harmed; and
- An injunction is an improper remedy since a quantifiable remedy exists in the form of money damages.

WL 65284 (Conn. Super. Ct. February 25, 1994); *Florian v. Cheshire Planning & Zoning Comm'n*, No. CV020279661, 2003 WL 21384237, at *12 (Conn. Super. Ct. May 30, 2003).

[5]*See* Connecticut General Statutes § 47-31; *Gagnon v. Mun. Planning Comm'n of Ansonia*, 10 Conn. App. 54, 58 (1987), *cert. denied*, 203 Conn. 807 (1987).

[6]*Gagnon, supra*, 10 Conn. App. at 58 ("Because a commission is not a court of law, its authority is stringently limited. It can only apply its regulations to the proposals which appear before it. It cannot make law.").

[7]*Cybulski, supra*, 43 Conn. App. at 110. Note, in *Cybulski*, the applicable zoning ordinances specifically required that an applicant provide "evidence of an interest in the property for which application is made sufficient to enable application for the use and/or development for which approval is sought. Submission of this evidence shall be representation by the applicant that sufficient interest is in his possession . . . ." *Id.* at 111 fn 4. Thus, the court in that case reviewed whether the zoning commission had been presented with sufficient evidence that the subject road was a public highway (a town road) to support its approval of applicant's special use permit authorizing applicant's use of said road.

1. Abandonment and Termination.

The first two defenses contend that the easement no longer exists and no longer burdens 61 Wall Street. The pleadings in the pending litigation indicate that the easement at issue originated from a 1956 agreement between the Norwalk Parking Authority ("NPA") and Nordray Realty Corporation ("Nordray") when NPA granted Nordray and its successors the limited right to maintain a loading platform together with the right of access over 61 Wall Street. The easement was conditioned on the annual payment of two hundred dollars ($200) by Nordray or its successors to NPA or its successors. Municipal Holdings claims that in 2008, this easement was abandoned by Nordray's successor, Fairfield County Bank Corporation ("Bank"). Municipal Holdings further claims that in 2015, the Bank and NPA's successor, POKO-ISWR Developers, LLC ("POKO"), acknowledged the abandonment and POKO formally terminated the easement.

a. Abandonment Defense.

In terms of the specific claims of abandonment, Municipal Holding indicates that the Bank, which is IJ Group's predecessor in interest to 67 and 69 Wall Street, abandoned the easement when it installed a drive-through bank-teller directly over the easement area. Municipal Holdings further states the Bank stopped using the loading dock and access easement because it had alternative access to the buildings at 67 and 69 Wall Street for loading and unloading purposes, and because the Bank installed a drive-through teller for its business needs. Municipal Holdings also explains that the Bank ceased making the easement payments at this same time and did not make or attempt to make any payments between then and 2015. Municipal Holdings claims that since the Bank abandoned the easement in 2008, IJ Group did not obtain any easement rights when it purchased 67 and 69 Wall Street in 2018, a decade later.

Municipal Holdings relies on the following legal authority for its abandonment defense: "Abandonment implies a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances." *Friedman v. Town of Westport*, 50 Conn. App. 209, 213 (1998) (landowner abandoned easement when conveying a portion of property without reserving right to use easement). "Most frequently, where abandonment has been held established, there has been found present some affirmative act indicative of an intention to abandon . . . but [even] nonuse, as of an easement, or other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment." *Glotzer v. Keyes*, 125 Conn. 227, 333 (1939).

For example, removing an easement area or demolishing an easement area may establish abandonment. *See Ballard v. SVF Foundation*, 181 A.3d 27, 38 (R.I. 2018) (court "hard pressed to envision a more decisive act of abandonment than relocating the very driveway over which the easement runs"); *see also Ruffalo v. Waters*, 348 A.2d 740, 741 (Pa. 1975) (tearing down subject of easement over twenty-years ago constituted abandonment). Along the same lines blocking or closing off access to an easement may also establish abandonment. *See Bank of Fayetteville, N.A. v. Matilda's Inc.*, 803 S.W.2d 549, 550–51 (Ark. 1991) (finding abandonment when doorway offering access was brick-closed for 29 years); *see also Duffy Street S.R.O., Inc. v. Mobley*, 471 S.E.2d 507 (Ga. 1996) (new building that blocked access to easement area sufficient for abandonment).

In this respect, Municipal Holdings relies on the installation of a drive-through teller directly over the access easement area, and cessation of payments toward the annual easement fee as a material change and an intentional act sufficient to establish its abandonment defense. The implications of an abandoned easement would be that no easement exists to enforce. *See Friedman*, 50 Conn. App. at 213 (refusing to enforce rights in abandoned easement).

b. Termination Defense.

In terms of the specific allegations of termination, Municipal Holdings contends its predecessor in interest to 61 Wall Street, POKO-ISWR Developers, LLC ("POKO"), memorialized the foregoing abandonment, and terminated the easement through correspondence sent to the Bank, dated June 16, 2015. Municipal Holdings particularly alleges that the correspondence was predicated, in part, on conversations between POKO representatives with Daniel Berta, a Bank officer, who agreed that the easement was terminated and that the Bank did not intend to use the easement.

Municipal Holdings further indicates that thirty (30) days later, by letter dated July 15, 2015, the Bank sent correspondence to POKO which for the first time stated that the easement had not been terminated and included supposedly retroactive easement payments. Municipal Holdings claims that the easement was terminated because the Bank failed to cure the default on seven (7) years-worth of easement payments within fifteen (15) days of POKO's June 16 correspondence as required by the express terms of the easement such that the Bank's belated July 15 letter and untimely easement payments, which were rejected, did not revive the already abandoned and terminated easement.

Municipal Holdings also claims that POKO recorded an Affidavit of Facts, dated July 21, 2015, on the Norwalk Land Records on August 3, 2015, at Volume 8211, Page 143, detailing the foregoing facts surrounding the abandonment and termination of the easement, which was never challenged by the Bank.[8] Again, the implications of a terminated easement would be that no easement exists to enforce.

2. Enforcement Defenses.

Municipal Holdings also relies upon the alleged actions of IJ Group, and that of its principal Mr. Milligan, which it claims should preclude IJ Group from enforcing the easement. In particular, Municipal Holdings claims that IJ Group's litigation only intended to gain leverage over the City of Norwalk (the "City") in extensive litigation pending between the City on the one hand and IJ Group and other entities Milligan controls on the other hand ("City Litigation").

The City Litigation is related to the Wall Street Redevelopment Plan (the "Plan"), which was meant to revitalize large areas of the downtown district of the City. *See Redevelopment Agency for City of Norwalk v. ILSR Owners LLC, et al.*, Docket No. X08-CV-18-6038249-S; *IJ Group LLC v. City of Norwalk*, Docket No. X08-CV-19-6044650-S. The City Litigation stems from POKO's default on its construction and loan obligations under the Plan. In the City Litigation, the City alleges that Mr. Milligan and his entities improperly purchased properties

[8]Municipal Holdings also relies upon a Settlement, Release, Deed in Lieu of Foreclosure Agreement, and Warranty Deed, all dated July 7, 2017, in which POKO represented and warranted that 61 Wall Street was free from all encumbrances whatsoever following a transfer of 61 Wall Street to municipal Holdings. The Warranty Deed was recorded on the Norwalk Land Records on July 13, 2017, at Volume 8555, Page 259.

that are a part of the Plan through fraudulent means which Mr. Milligan intended to use as a mechanism to become the redeveloper for the Plan. The City is seeking to void these sales.

Municipal Holdings claims in the Easement Litigation that the purchase of 67 and 69 Wall Street and the subject litigation with Municipal Holdings fits into Mr. Milligan's plan to become the redeveloper on the Plan because the development of 61 Wall Street is at the heart of the Plan and the Easement Litigation is only intended to stall the City Litigation for the sake of leverage with the City in the City Litigation. Municipal Holdings claims that IJ Group does not have a bona fide interest in the easement while the Easement Litigation is predicated on an improper motivation. Municipal Holdings relies on the belief that IJ Group, in conducting its due diligence in the purchase of 67 and 69 Wall Street, should have been on notice that the easement had been abandoned and terminated based upon a review of the Norwalk Land Records and the uncontested Affidavit of Facts, and upon site visit and inspection of 61, 67 and 69 Wall Street revealing the substantial construction built over the alleged easement.

Municipal Holdings sets forth the following defenses upon the basis of these allegations: unclean hands, waiver, and estoppel.

a. Unclean hands

Unclean hands is a defense predicated on "a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue." *Thompson v. Orcutt*, 257 Conn. 301, 310 (2001). Municipal Holdings claims IJ Group commenced the Easement Litigation against Municipal Holdings for the improper purpose of leverage over the City, and is not entitled to the equitable injunctive relief it seeks because it knew at all relevant times before purchasing 67 and 69 Wall Street that the easement was abandoned or terminated, and knew that POKO had constructed a substantial building over the easement.

b. Waiver.

"Waiver . . . is the intentional relinquishment of a known right." *Breen v. Aetna Cas. & Sur. Co.*, 153 Conn. 633, 643 (1966). Municipal Holdings claims IJ Group never intended to use the easement and waived all rights, title, and interest to the easement when it acquired 67 and 69 Wall Street knowing the easement had a large building on it and could no longer be accessed from the rear.

c. Estoppel

Equitable estoppel applies when a party does or says something intended to induce another to believe certain facts and the other party relies upon them. *See Buell Industries, Inc. v. Greater New York Mutual Ins. Co., supra,* 259 Conn. at 547–48, 791 A.2d 489. Municipal Holdings claims IJ Group never intended to use the easement, based upon Mr. Milligan's own assertions, such that it should estopped from asserting any rights to the easement.

3. Propriety of Injunctive relief.

Municipal Holdings also claims that the remedy IJ Group is seeking is unwarranted while IJ Group presents no justifiable basis to preclude further development of 61 Wall Street.

"[T]he issuance of an injunction is an exercise of an extraordinary power . . . ." *Karls v. Alexandra Realty Corp.*, 179 Conn. 390, 401 (1980). A party seeking injunctive relief has the burden of alleging and proving substantial irreparable harm. *Walton v. New Hartford*, 223 Conn. 155, 165 (1995). An injunction is even more unusual and subject to an even higher burden of proof where a plaintiff such as IJ Group seeks mandatory relief such as the removal of a building. *See Tomasso Bros., Inc. v. October Twenty-Four, Inc.*, 230 Conn. 641, 652 (1994). A mandatory injunction requires proof that there is not an adequate remedy at law—in other words, that money damages are insufficient. *Expressway Assocs. II v. Friendly Ice Cream Corp. of Connecticut*, 218 Conn. 474, 478 (1991). Municipal Holdings specifically claims IJ Group cannot prove either (i) irreparable harm or (ii) lack of an adequate remedy at law.

On the first point, the extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. *Kessler v. Securitylink*, No. 071451S, 2001 WL 195340, at *1 (Conn. Super. Ct. Jan. 30, 2001). Municipal Holdings has posited that IJ Group has no interest in a loading platform for loading access to the building at 67 and 69 Wall Street because IJ Group is performing renovations and developing the properties with no intention of making use of the abandoned and unused easement such that it cannot claim any reasonable harm.

On the second point, "[r]elief by way of mandatory injunction is an extraordinary remedy granted in the sound discretion of the court and only under compelling circumstances." *Monroe v. Middlebury Conservation Commission*, 187 Conn. 476, 480 (1982). "Mandatory injunctions are . . . disfavored as a harsh remedy and are used only with caution and in compelling circumstances." 42 Am. Jur. 2d 560, Injunction § 5 (2000). Municipal Holdings posits that IJ Group also cannot meet this standard because it has a more than adequate remedy at law quantifiable as monetary damages for the value of the easement. *See Expressway Assocs. II v. Friendly Ice Cream Corp. of Connecticut*, 218 Conn. 474, 478 (1991) (easement remedies often measured by money damages, namely "the difference in the value of the easement before the interference and its value after it was obstructed.")

In these respects, Municipal Holdings claims that there is no justification for IJ Group's relief seeking the removal of all buildings supposedly impeding access to an abandoned easement area, which would require the order for the destruction of a substantial building as opposed to an award of money damages for the value of the easement.