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August 28, 2019

City of Kingston Code Enforcement Office  
Mr. Eric Kitchen, Code Enforcement Officer  
City Hall  
420 Broadway  
Kingston, New York 12401

RE: Request for Interpretation for the Kingstonian  
Project: Memorandum Submittal in Response by the  
Applicant

**VIA E-MAIL AND HAND DELIVERED**

Dear Mr. Kitchen:

In accordance with the August 16, 2019 correspondence of Dan Gartenstein, Esq., this Memorandum is submitted in response to the August 12, 2019 Request for Interpretation made by Ms. Rebecca Martin, Ms. Sarah Wenk and Mr. Ted Griese.

In address of the questions presented, which collectively posit a single issue in that the requestors maintain that affordable housing [20% of the units] must be included as part of the Kingstonian Project, by way of statutory directive of Section 405-27.1 Mixed Use Overlay District City of Kingston Zoning Law ["Zoning Law"] Regulations, I offer the following;

As a legal analysis of the issue presented is to be examined, the plain meaning of the salient provision of the Zoning Law must be examined.

Section 405-27.1(A)(2)(a) of the Zoning Law reads as follows:

"According to the Comprehensive Plan Element, the creation of the Mixed Use Overlay Zoning District has two underlying purposes.

(a) The first purpose is to adaptively reuse existing commercial and industrial buildings to provide rental multifamily housing, including affordable housing, to the

present and future residents of the City of Kingston [emphasis supplied].

Section 405-27.1(B) of the Zoning Law sets forth a listing of "guidelines" and reads in relevant part as follows:

"Proposals within the Mixed Use Overlay Zoning Districts are intended to be based upon the following guidelines:

(a) Guidelines to provide affordable housing pertains to individual proposals to adaptively reuse commercial and industrial buildings for five or more residential units [emphasis supplied].

(b) Of the five or more overall housing units created by individual proposals to adaptively use commercial and industrial buildings for residential purposes, 20% of these units will be dedicated to affordable housing" [emphasis supplied].

The statutory criteria addressing the applicable Special Use Permit requirements for affordable housing is found within Section 405-27.1(D) (1) of the Zoning Law and reads in pertinent part as follows:

"The following uses are subject to the issuance of a Special Use Permit by the Planning Board in accordance with provisions of Section 405-32 of this chapter.

(1) The conversion of existing commercial and industrial buildings or sections of them into residential apartments and went [sic]/live spaces of which some will be dedicated as affordable housing. Such uses will be subjected to Section 405-30, site development plan approval" [emphasis supplied].

Section 405-27.1(E) of the Zoning Law reads as follows:

"Provision of affordable units. The Planning Board shall deny any predict or development under this zoning chapter if the applicant for special use approval does not comply, at minimum, with the following requirements for affordable units.

(1) At least 20% of the residential units in the adaptive reuse of commercial or industrial buildings, of five or more units, shall be established as affordable housing units for rental to qualified affordable housing tenants" [emphasis supplied].

Section 405-27.1(G) of the Zoning Law sets forth certain "Development Standards" for affordable housing units and said section reads as follows:

"Development Standards applicable to adaptive reuse of commercial and industrial buildings that promote a mixed-use mixed-income, pedestrian-based neighborhood. Intent: The safety comfort and interest of pedestrians relates to the extent to which buildings face streets and public open spaces with entrances, windows and usable outdoor space" [emphasis supplied].

In every instance governing affordable housing within the Mixed Use Overly District, the Zoning Law statutory language recites that affordable housing applies only to, "the adaptive reuse of commercial and industrial buildings."

The Kingstonian Project is not adaptively reusing any buildings. In this regard, the Kingstonian is an urban redevelopment project employing newly constructed buildings. Therefore, it is patently obvious that the Kingstonian Project is not governed by any of the foregoing affordable housing guidelines.

I base this conclusion upon the following legal analysis of time honored New York State case law.

A Zoning Law is in derogation of common law, as such, the meaning of terms within any zoning law, are to be construed in a light most favorable to the applicant or landowner. In this regard, zoning restrictions are not to be extended by implication to prohibit a use and will be limited to what is clearly proscribed. Offshore Restaurant Corp. v. Linden, 30 NY2d 160 (1972); FGL&L Property Corp. v. City of Rye, 66 NY2d 111 (1985).

Nowhere within the Zoning Law Section 405-27.1 criteria does any affordable housing applicability arise, other than with respect to adaptive reuse of existing buildings. Accordingly, the dispositive law requires that the plain meaning of the

statute be given its intended effect. 440 East 102<sup>nd</sup> Street Corp. v. Murdock, 285 NY 298 (1941).

The term "adaptive reuse is not defined within the Zoning Law. Therefore, Section 405-2(J) of the Zoning Law controls with respect to definitional applicability and said section reads as follows:

"Words not specifically defined shall have their ordinary meaning as in Webster's New International Dictionary".

Webster's Dictionary defines the term "adaptive reuse" in the following manner:

"The renovation and reuse of the pre-existing structures (such as warehouses) for new purposes." This is not occurring in the instant matter.

In the absence of a defined term within Zoning Law, the term will be given its common definition and as otherwise directed by the Zoning Law language, as is the case herein. Bonded Concrete, Inc. v. Zoning Board of Appeals of the Town of Saugerties, 268 AD2d 771 (3<sup>rd</sup> Dept. 2000), lv. den. 94 NY2d 764 (2000); Birney v. New York City Department of Health and Mental Hygiene, 34 Misc3d 1243 (2012).

In construing a zoning regulation, "the issue is not whether the use is permissible, but rather whether it is prohibited". DeMasco v. Zirk, 62 AD2d 92 (1978). Therefore, the City of Kingston Zoning Enforcement Officers determination to permit the Kingstonian Project Application to proceed before the City of Kingston Planning Board is entitled to deference and a presumption of legality. Incorporated Village of Atlantic Beach v. Gavalas, 81 NY2d 322 (1993).

Moreover, in the event of any ambiguity in a Zoning Law, all ambiguous language is to be resolved in favor of the Applicant or landowner. Nicklin McKay v. Town of Marlborough Planning Board, 14 AD3d 858 (3<sup>rd</sup> Dept, 2005).

In this case, ambiguity is not present, inasmuch as the relevant statutory recitals are crystal clear in establishing that affordable housing only applies to, "adaptive reuse of commercial and industrial buildings." This identical phrase is repeated within the Zoning Law multiple times and if the City of Kingston Common Council had intended for affordable housing to be required for every project situate within the Mixed Use Overlay District, the legislative body would have stated the

same. New Amsterdam Construction Company v. Stecker, 3 NY2d 34 (1958); Gillen v. Zoning Board of Appeals of the Town of Cortlandt, 144 AD2d 433 (1988).

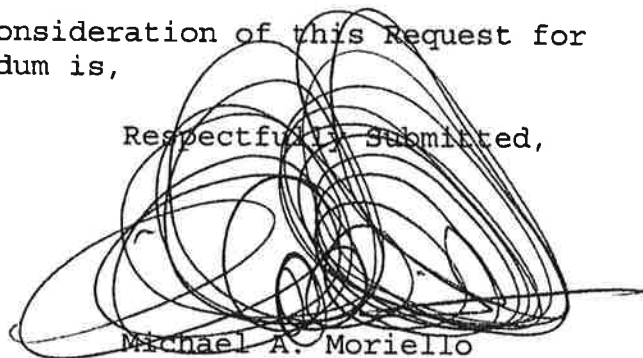
Were the City of Kingston to follow the hyperbole of the project opponents and apply a non-existent affordable housing requirement to the Kingstonian Project, this would constitute a patent imposition of a prohibited impact exaction upon my client. Kahmi v. Planning Board of the Town of Yorktown, 59 NY2d 385 (1983); Albany Area Builders Association v. Town of Guilderland, 74 NY2d 372 (1999).

Conjecture, speculation and conclusory claims by the project opponents cannot lawfully constitute substantial evidence sufficient to overrule the rationally based administrative determination to permit the forwarding of the Kingstonian Project before the City of Kingston Planning Board, without an affordable housing component.

Based upon all of the foregoing, there has been no waiver or violation of any Zoning Law 20% affordable housing requirement with respect to issuance of a Special Use Permit, as affordable housing guidelines do not apply to new construction within the Mixed Use Overlay District under the City of Kingston Zoning Law.

Thanking you for your consideration of this Request for Interpretation, this Memorandum is,

Respectfully Submitted,

A large, dense, and somewhat chaotic handwritten signature in black ink, consisting of many overlapping loops and lines. The signature is positioned to the right of the typed name 'Michael A. Moriello'.

Michael A. Moriello

MAM:def

cc: Mr. Joseph Bonura, Jr.  
Mr. Brad Jordan  
Dennis M. Larios, PE  
Daniel Gartenstein, Esq.  
Ms. Sue Cahill  
[all via e-mail]