Common Council, January 6, 2020

Resolution to enforce the restrictive covenant for 563 New Scotland Avenue.

Jonathon Tingley

My name is Jonathon Tingley. I am with the law firm Gilchrist and Tingley. Our office address is 251 River Street, in Troy. We represent the property owner, at issue, it is FM Promontory Capital, LLC, that has offices at 18 Locus Street, Albany. I practice land use including litigation rising out of land use disputes, my entire legal career.

I do have a letter to submit because I do need to post the record and make sure that this Council is on notice of the legal impacts of pursuing enforcement of a Declaration of Restrictions and Covenants that has been amended by the property owner. In particular, I am speaking with respect to Resolution 90.122.91R, and I am respectfully requesting on behalf of the property owner that the City, that the Common Council, disapprove that resolution this evening. That Declaration that is at issue was executed in May of 2017, and it was executed in connection with the prior project proposal. That project was never approved. In fact, it was withdrawn. There were no approvals issued. There was no construction undertaken. And most importantly, there was no transfer of any interest or right or title in any part of that property following the execution of that Declaration. That's significant. That's significant because until that is done, the property owner that retains title to the full property, retains the right to amend, and even revoke that Declaration of Restrictions and Covenants. After that prior project was withdrawn, Jankow Companies proposed a different project which underwent a very extensive, in excess of a year long, review. Fourteen residents from West Lawrence Street approved of the Jankow project as proposed. The BZA approved of the Jankow project, particularly with the building height along New Scotland Avenue of five stories. And the Planning Board approved the project. It also adopted a negative declaration under SEQR which means that that project, as determined by the lead agency, would have no potential significant adverse environmental impacts and that includes in respect to traffic. The City of Albany has no interest or title in any of the property that was subject to that May 2017 Declaration. In fact, no third party had any interest or title. And what that means is that FM Promontory Capital, LLC, as the owner, was fully entitled to revoke that Declaration completely. Which means that it necessarily had the authority to amend it and it did so in accordance with the approved project that Jankow presented that was thoroughly reviewed by the Zoning Board. Thoroughly reviewed by the Planning Board. And for which fourteen residents of West Lawrence Street signed a letter in support, in particular, of the building height along New Scotland Avenue.

The Resolution would authorize a *lawsuit*. The claim to enforce a Restriction in a Declaration of Covenant and Restrictions has been legally and properly amended by the property owner, lacks any legal merit whatsoever. It's an effort. This lawsuit would be an effort to undermine an appropriately reviewed project that was approved. And this Council, as I understand it, has been advised by its Counsel, Corporation Counsel, that the legal claim that would be pursued lacks legal merit. And I'll allow the Council to rely on its [One minute remaining] Thank you. I'll allow the Council to rely on its own Counsel, Corporation Counsel, for that opinion, but with that opinion, I will agree. The City, if it adopts a Resolution authorizing enforcement of a Declaration that has been amended, *proceeds at its own risk.* All necessary approvals have been obtained and this project is shovel ready. We are urging the Common Council to heed the advice of Corporation Counsel and disapprove the Resolution. And Mr. President, if I may, I do have a submission that I would like to submit.

President – Absolutely.