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August 12, 2021

Via Email and Hand Delivery

Chairman Kevin Puzio and Board Members
Borough of Fair Lawn Zoning Board of Adjustment
8-01 Fair Lawn Avenue
Fair Lawn, NJ 07410

**Re: Applicant: Roman Inasaridze
23-07 Rosalie Street
Block 3323, Lots 23 and 24
Fair Lawn, New Jersey (the "Property")**

Dear Chairman Puzio and Board Members:

Please be advised that our office represents the Applicants in the above referenced application. At the last meeting questions were asked about when and how the existing two-family dwelling came into existence even though the Zoning Officer had determined it to be a pre-existing, nonconforming use¹. Since that time research has been done to provide a historical analysis of the Property.

Before doing so, it is of paramount importance that the Board realize that the Applicant is an innocent party and did everything expected of them when purchasing the Property. They retained an attorney to do the closing and prior to closing title the Borough issued a Certificate of Occupancy for a two-family dwelling (See Exhibit "A"). As far as the Applicant was concerned, the Property was being used as permitted by the Borough. In fact, the Borough's tax records indicate that since at least 1978 through the present the Property has been assessed as a two-family dwelling (See Exhibit "B")². Point being, the use

1 My client reserves any and all rights with regard to this initial determination made by the Zoning Officer.

2 Please note that the 1978 tax record was a folder in the Borough's tax office. A copy could not be made. However, Ms. Peck can confirm its existence.

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of the Property as a two-family dwelling was open and obvious, even acknowledged, by the Borough. Furthermore, there are inspection stickers for the two electrical panels from 1972 approved by Middle Department Association of Fire Underwriters (See Exhibit "C"). Mr. C. Joseph Smith, the Applicant's planner, who also happens to be a longtime resident of Fair Lawn and former Chairman of the Fair Lawn Zoning Board of Adjustment, can confirm that this company was subcontracted by the Borough to do inspections of electrical panels during the time this inspection sticker was issued.³ Point being, there is nearly 50 years' worth of evidence that the Borough knew this Property was being used as a two-family dwelling.

With that said, the Borough's initial Zoning Ordinances were adopted in 1954. There are no records that indicate that the use of this Property as a two-family dwelling predated the adoption of the ordinances. Therefore, we are unable to conclusively prove that the two-family dwelling on the Property is a valid preexisting, nonconforming use. Meaning, before the Board can analyze the Applicant's request for an expansion of the two-family dwelling, the Board must first grant the Applicant use variance relief pursuant to N.J.S.A. 40:55D-70(d)(1) in order to continue to use the **existing** Property as a two-family dwelling.

While researching the Borough's files, minutes of a July 2, 1956 land use board hearing were found in which the Property was denied a special exemption to use the property as a two-family dwelling (See Exhibit "D"). Based on the scant information available on this nearly 70 year old decision, and the change in circumstances, a finding of res judicata cannot be made. In order for the doctrine of res judicata to be applicable, it must be found that:

1. The second application is substantially similar to the first;
2. The same parties or their privies are involved;
3. There must be no substantial change in the application itself or conditions surrounding the property;
4. There must have been adjudication on the merits in the first case; **and**
5. Both applications involve the same cause of action.

Ten Stary Dom Partnership v. Mauro, 216 NJ at 39 (2013). If the Board determines that just one of these elements is inapplicable, res judicata is not applicable and application for the **existing** Property being used as a two-family dwelling must be heard. For example, the Supreme Court in Russell v. Bd. of Adjustment of Tenafly, 31 NJ 58, 65 (1959) noted that where the same owner and same property are involved in a second application for a variance, that alone is insufficient to act as a bar; one "must also show that the second application is substantially similar to the first, ***both as to the application itself and the circumstances of the property involved***" (emphasis added). . In Cohen v. Fair Lawn, 85 NJ Super. 234 (App. Div. 1964), the court noted

³ There is a case to be made for municipal estoppel based on the issuance of the Certificate of Occupancy among other findings discussed later on in this letter. With that said, this Board does not have jurisdiction to make legal determinations of estoppel. Therefore, my clients reserve any and all rights related to bringing such a claim.
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that “changed circumstances or other good cause may warrant reconsideration by the local authorities.” Id. at 237.

Consideration should first be given to Factors 1, 5 and 3 above. This pertains to the relationship between the application from July 1956 and the application before the Board today. First and foremost, it must be reiterated that there is little to no information about this application. It should be noted that the minutes only reference the existing dwelling being “converted” into a two-family dwelling. There is no discussion of an expansion of the dwelling at that time. Subsequent to the 1956 denial, in August 1956 and August 1960, the then owner obtained building permits to construct additions which includes a second story over the then single story dwelling (See Exhibit “E”). Therefore, the existing dwelling is larger and more conducive for a two-family dwelling. Given the second story which now exists, the two applications are not substantially similar with the second story constituting a substantial change in the application.

The next factor we would like to address is the second half of Factor 3 above. The circumstances surrounding the Property have drastically changed since the denial from 1956⁴. This denial happened nearly 70 years ago. It actually predates the Municipal Land Use Law where a use variance is now the relief sought not a special exemption. There are presently 15 two-family dwellings within a 1-2 block radius of the Property (See Exhibit “F”). The use of the Property as a two-family is now consistent with the surrounding neighborhood. Furthermore, the expanding development pattern of the surrounding neighborhood has changed as is typical throughout the Borough. As a result, a two-family dwelling on the Property will have much less of an impact on the surrounding neighborhood than it would have had in 1956.

Furthermore, the nature of housing has evolved over the last 70 years. People are looking for a diverse housing mix in neighborhoods like Fair Lawn. No longer is the single-family dwelling an absolute must. With single-family dwellings getting more expensive, people are discovering other ways to afford living in a community like Fair Lawn. People are less willing to extend themselves for homes they cannot afford. As a result, we have seen a significant rise in the popularity of dwelling units like apartments, condominiums and two-family dwellings. Two-family dwellings also give more people the opportunity to move to the suburbs because the second dwelling unit provides an income stream that allow someone to buy a home in Fair Lawn that would otherwise not afford it. For all these drastic changes, the standards and/or analysis used by the Board in 1956 is no longer relevant.

Given the difference in the applications, the changed circumstances and other “good causes” mentioned above, *res judicata* does not apply.

At the hearing we will initially provide expert testimony justifying the d(1) use variance for the two-family. If approved, expert testimony will be provided justifying the variance relief requested for the expansion of a non-conforming use based on the addition to the structure which was initially proposed by

⁴ Besides the fact that the dwelling doubled in size since the 1956 denial.
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the Applicant.

As always, your attention to this matter is greatly appreciated. Thank you.

Very truly yours,

/s/ Andrew S. Kohut

Andrew S. Kohut

ASK/me
Encl.