CITY OF PROVIDENCE
ZONING BOARD OF APPEAL

IN RE: Appeals by LGE Realty, LLC from the City's Zoning Violation Notices issued on November 2, 2023 for 487 Hope Street and 491 Hope Street (Plat 6, Lots 415 and 439)

The City of Providence's (Appellee's) Memorandum in Support of its Objection to Appeals

The City of Providence (hereinafter "the City"), by and through its Zoning Enforcement Officer, submits this Memorandum in support of its issuance of Notices of Zoning Violation for 487 Hope Street and 491 Hope Street (collectively the "Properties"). The City requests that the City of Providence Zoning Board of Appeals (the "Board") deny and dismiss the appeals of LGE Realty, LLC ("Appellant") because Appellant fails to meet its burden of demonstrating that the over-paving on the Properties is a legal nonconforming site element. Furthermore, the doctrines of equitable estoppel and laches do not apply.

Facts

These appeals relate to Notices of Violation issued to the Properties on November 2, 2023 for failing to conform to the requirements for vehicle parking spaces, driveway design, and total impervious surface coverage in violation of Zoning Ordinance Sections 1404.A, 1407.B., and 402.A (Table 4-1).[1] *See* Providence Zoning Ordinance of 2014, as amended (the "Ordinance");

[1] The Notice of Violation issued on November 2, 2023 for 491 Hope Street cites Ordinance Violations of Sections 1404.A and 1407.B as well as a violation of front yard impervious and total impervious surface coverage as set forth in Zoning Ordinance Section 402.A (Table 4-1). The Notice of Violation issued on November 2, 2023 for 487 Hope Street cites Ordinance Violations of Sections *1401.B* and 1407.B as well as a violation of total impervious surface coverage as set forth in Zoning Ordinance Section 402.A (Table 4-1) (emphasis added). The citation of 1401.B in

see also the City's Notices of Violation attached hereto as *Exhibit A*. The Properties are located in an R-2 Residential District, which zone is defined by the Ordinance as being one "intended for areas of detached single-family and two-family…residential development of moderate density." *See* Ordinance Art. 4, Section 400C. According to Appellant, both lots are improved with three-family dwellings, *see* Appellant's memorandum, p. 2; however, the City's Department of Inspections and Standards records indicate the Properties are two-family dwellings and have never been approved for three-family units. *See Exhibit B*, which includes property use cards for the lots as well as two zoning board resolutions where an increase in dwelling units on the Properties were denied. Thus, there are only four *legal* dwelling units in the Properties combined.

The Properties share a common driveway with access off Phillips Street for parking. The exact number of parking spaces each of the Properties offers is unclear because the entire front yard of 491 Hope Street is paved and the entire side yard of 487 Hope Street is paved, with no painted lines demarcating spaces in either location. Thus, cars park wherever they can, including on the public sidewalk. *See* photographs attached as *Exhibit C*. However, per the Ordinance, only a total of four parking spaces is required for the Properties combined – one for each *legal* dwelling unit.[2] *See* Ordinance Table 14-1.

Appellant claims that this off-street parking can be accessed via the curb cut for the common driveway. *See* Appellant's memorandum, p. 2. However, there is no possible way cars

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the 487 Hope Street notice is a typographical error; however, the language in the Notice is clear and unambiguous, putting Appellant on notice as to the violation: "[t]he property has been found to be using the corner side yard for the parking of vehicles, accessed by passage over the curb and sidewalk, and resulting in encroachment into the right of way…"

[2] Even including non-legal units that appear to exist on the Properties, the minimum number of parking spaces would be six under the Ordinance, which the common driveway could accommodate.

can access the front of 491 Hope Street via the common driveway. The only way to access the front paved portion of 491 Hope Street requires driving onto the public right of way from Hope Street – either using the neighbor's driveway via easement (of which there is no evidence) or jumping the curb. Furthermore, it is physically impossible to maneuver a vehicle into the side yard paved area of 487 Hope Street using the curb cut of the common driveway without hitting the building itself or encroaching into the public right of way. *See* photographs attached as *Exhibit C*.

LGE Reality, LLC, the owner of the Properties,[3] filed a timely notice of appeal arguing that the paved parking areas on the Properties are legal non-conforming developments or site elements, pre-dating modern zoning regulations, thus not subject to its penalties and restrictions.

Standard of Review

Since these are appeals from Notices of Violation issued by the City's Zoning Official, the Zoning Board of Appeals reviews this matter *de novo*. In short, the Zoning Board of Appeals stands in the shoes of the Zoning Official and must review all the evidence in the record anew, making its own determinations regarding its credibility and weight. In doing so, however, the Zoning Board of Appeals may give some consideration to the "interpretation placed on [an] ordinance by the municipal official responsible for enforcing it[.]" *New England Expedition-Providence, LLC v. City of Providence*, 773 A.2d 259, 263 (R.I. 2001). Finally, in exercising its powers, the Zoning Board of Appeals "may… reverse or affirm wholly or partly and may modify the order, requirement, decision, or determination appealed from and may make any orders,

[3] Appellant acquired the Properties from I&R Realty Corp. via Quit-Claim Deed on September 12, 2012, per Appellant's memorandum of law.

requirements, decisions, or determinations that ought to be made, and to that end has the powers of the officer from whom the appeal was taken." *See* R.I. Gen. Laws § 45-24-68.

Argument

A. The Parking Areas and Impervious Surface Coverage Do Not Constitute Legal Non-Conforming Site Elements

Appellant maintains that the Notices of Violation were issued in error because they violate Ordinance Article 20, Section 2004 and § 45-24-39 of the Zoning Enabling Act with respect to continuation of nonconforming site elements. Per Ordinance Section 2004, the definition of a nonconforming site element is "a site development element, such as landscaping, fences, or walls, lighting, *parking*, and *site paving*, *that at one time conformed to the requirements of this Ordinance*, but because of subsequent amendments, has been made nonconforming." (Emphasis added.) The Rhode Island Supreme Court offers further clarification: "a 'nonconforming [element] is a particular [element] that does not conform to the zoning restrictions applicable to the property but which [element] is protected because *it existed lawfully* before the effective date of the enactment of the zoning restrictions and has continued unabated since then.'" *Cigarrilha v. City of Providence*, 64 A.3d 1208, 1212 (R.I. 2013) (emphasis added).

Importantly, the burden of proving a non-conformity is upon the person or corporation asserting the nonconformity because "[t]he policy of zoning is to abolish nonconforming [elements] as speedily as justice will permit." *Cigarrilha*, at 1213, citing *Duffy v. Milder*, 896 A.2d 27, 37 (R.I. 2006). "The proponent of a nonconforming [element] must shoulder that

burden because the law views nonconforming [elements] as "thorn[s] in the side of proper zoning [which] should not be perpetuated any longer than necessary." *Cigarrilha*, at 1213, citing *Duffy* at 37.

In this instance, in order to succeed in this Appeal and have the parking, driveway design, and over-paving on the Properties declared a legal nonconformity, Appellant is required to prove that, at one point in time, these particular site elements conformed to the requirements of the Ordinance or they were in place prior to 1923, the year in which Providence adopted its first zoning ordinance.[4] It cannot show either.

Prior zoning ordinances for the City of Providence dating back as early as the 1950s demonstrate that parking maximums were in place as early as 1953, and, by 1988, both parking and impervious surface limits were present as well as curb cut requirements – making the Properties' site elements *illegal* non-conforming. Specifically, in 1953 there is a residential parking capacity maximum "not to exceed (a) one more than the number of families housed on the lot, or (b) one vehicle for each 2500 square feet of lot area, whichever is greater." *See* Providence Zoning Ordinance issued June 1953, attached hereto as *Exhibit D.* The common driveway that the Properties share would have provided enough space for six parking spaces, which is the maximum allowed for *legal* dwellings in the 1953 Ordinance. By 1988, there were limits on where driveways could exist as well as their maximum dimensions (inclusive of 33% front yard paving maximum and a rear yard maximum of 50%).

Also, importantly, by 1988, curb cuts for driveways, as regulated by the Department of Public Works, are referenced and required. *See* Providence Zoning Ordinance issued November 1979, including amendments attached hereto as *Exhibit E*. Curb cuts are of particular

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[4] *See Cigarrilha v. City of Providence*, 64 A.3d 1208, 1211 (R.I. 2013).

significance because they define and protect the public right of way from vehicular traffic. It speaks for itself that since there are no curb cuts present on the Properties that would access the areas in question, they are *illegal* nonconforming site elements.

Furthermore, when reviewing aerial historical photographs of the Properties, the front and side yards of the Properties are not paved in 1972 and are not paved in 1981. *See Exhibit F*, attached hereto. Only by 1997 do they appear to have pavement/cars parked in the areas in question – and per the 1994 Zoning Ordinance in effect at the time, the Properties were limited to 1.5 parking spaces per legal dwelling unit (6 in this case), and 33% front yard paving maximum, as well as 50% rear yard maximum. *See* Providence Zoning Ordinance issued June 1994, attached hereto as *Exhibit G*.

In affidavits attached to its Memorandum of Law, Appellant claims that the paved site elements have existed "for at least the last 30 years," per the affidavit of Lonn Greenberg, and "for at least the last 40 years," per the affidavit of Gary Greenberg.[5] These averments do not make the paved area of the front and side yards legal nonconforming site elements – because they were never in compliance at any given time with the City's Zoning Ordinance.

In summary, a review of earlier versions of the Providence Zoning Ordinance demonstrates that, *prior to* actual paving of the areas in question on the Properties, (1) parking maximums were present (an entire yard could not be used for parking), (2) impervious surface coverage limited the amount of allowable paving, and (3) curb cuts were required to define and limit vehicular encroachment onto the public right of way. Appellant cannot point to, and have

[5] The earliest Appellant can demonstrate cars actually parked in the front yards in question is 2007. *See Appellant's Exhibit A*. In 2007, the 1994 Zoning Ordinance along with its 2002 amendments would have been in effect (*Exhibit G*), wherein Article III, Section 304 has 'maximum lot coverage' in the table of 40% and Article VII, Section 703.2 maintains the 1.5 parking spaces/dwelling unit.

not pointed to, any historical zoning ordinance in which the current parking conditions of the Properties would be deemed compliant.

Thus, the evidence presented by Appellant fails to demonstrate that the over-paving on the Properties is a *legal* nonconforming site element, and Appellant has failed to meet its burden of proof. The Notices of Violation issued by the City should stand because the Properties are, indeed, in violation of Ordinance Section 1404.A ("[V]ehicle parking spaces….shall not encroach onto the public right of way.") and 1407.B ("Curb cuts shall be required to provide access to parking areas from the public right of way.") as well as in violation of the limits of total impervious surface coverage as set forth in Section 402.A (Table 4-1).

B. The Doctrines of Equitable Estoppel and Laches Do Not Apply

Although Appellant did not assert or argue the doctrine of equitable estoppel and/or laches in its memorandum in main, the City will briefly address these arguments in case they are raised in oral argument to the Board.

The doctrine of equitable estoppel is a legal principle that a local government will be precluded from exercising its zoning powers when a property owner, relying in good faith upon some act or omission of the government, has made such extensive obligations and incurred such extensive expenses that it would be highly inequitable and unjust to destroy the rights which the owner has ostensibly acquired. *See* Rathkopf's The Law of Zoning and Planning § 65:29 (4th ed.). The Rhode Island Supreme Court has further clarified equitable estoppel requirements, providing that "[t]he indispensable elements of an estoppel are, first, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is

claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representations or conduct in fact did induce the other to act or fail to act to his injury." *Cigarrilha*, at 1213, citing *Lichtenstein v. Parness*, 99 A.2d 3, 5 (R.I. 1953). There is no evidence whatsoever in this case that the City acted or made any representations which induced Appellant to act. Previous non-enforcement of the Ordinance to the Properties is not an "act" which would precipitate the application of equitable estoppel. Nor is there any evidence of detrimental reliance in this case.

Turning to the doctrine of laches, another equitable defense, it would require the Appellant to demonstrate that "(1) there has been negligence that has led to 'a delay in the prosecution of the case,' and (2) … that delay has prejudiced the adverse party." *Cigarrilha*, at 1214. In this case there is no evidence of negligence or prejudice to the adverse party, and courts "do not use laches to sanction an illegally established nonconforming [element] in contravention of the Zoning Ordinance." *Cigarrilha*, at 1214.

Perhaps more importantly, both equitable estoppel and laches are *equitable* defenses that only a court of law has jurisdiction to apply, per R.I. Gen. Laws § 8-2-13. This Board does not have the authority to apply equitable considerations. *See Town and Country Mobile Homes, Inc. v. Zoning Bd. of Review of City of Pawtucket*, 165 A.2d. 510, 512 (R.I. 1960) ("the board was without jurisdiction to consider equitable estoppel…").

Conclusion

In summary, the Appellant has failed to meet its burden of proof that the over-paving on the Properties is a legal non-conforming site element. The Notices of Violation citing the Properties as non-compliant with Ordinance Sections 1404.A (encroachment onto public right of

way) and 1407.B (required curb cuts) as well as Section 402.A (Table 4-1) (limiting total impervious surface coverage) must be upheld.

For the reasons explained in this memo, the City, by and through its Zoning Enforcement Officer, respectfully requests that this Board uphold the Notices of Violation and dismiss the Appellant's appeal.

The City of Providence

By and through its Zoning Official,
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