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October 25, 2018
(Corrected version – November 20, 2018[1])

Richard Berkley, Esq., Chairperson
City of Albany Board of Zoning Appeals
200 Henry Johnson Blvd.
Albany, New York 12210

RE: 372 New Scotland Avenue
USDO Use Interpretation 100418.001

Dear Mr. Berkley,

I am writing to appeal the following listed decisions and interpretations of the USDO made by Mr. Spencer, his staff, and the Department of Buildings and Regulatory Compliance relating to 372 New Scotland Avenue in Albany, and ask that you put this appeal on the soonest possible Board of Zoning Appeals agenda. I have owned and lived at 380 New Scotland Avenue for over 30 years – which is located on the corner of Ramsey Place and New Scotland Avenue directly across Ramsey Place from 372 New Scotland Avenue - and am the Common Council member who represents the 9th Ward and submit this appeal in both capacities. The decisions and interpretations I am appealing are:

1. USDO Use Interpretation 100418.001 issued on October 4, 2018 improperly finding that "micropigmentation services" and "esthetician skin care" are not included in the definition of a listed uses in the USDO and improperly concluding they are an "office" use rather than a "personal and business service." (Attachment A)

2. The final decision issued by Mr. Spencer on October 17, 2018 (Attachment B) improperly concluding that:
    a. 372 New Scotland Avenue had been a legal non-conforming use;
    b. The business offering micropigmentation and esthetician services is an "office" use.
    c. The USDO only requires the sign in front of 372 New Scotland to be covered up when it became obsolete – as opposed to requiring it to be removed as required by Section 375-(1)(5)(ii)(E).

3. The Certificate of Occupancy issued on August 28, 2018 improperly determining that permitted uses at 372 New Scotland Avenue included "personal business services." This represents a change of use which required the prior approval of the Board of Zoning Appeals which was not obtained. (Attachments C and D)

[1] Corrections have been made solely on pages 19, 21 and 22, primarily to the date cited. The corrections have been footnoted on those pages.

4. The decision issued by Mr. Spencer on August 9, 2018 improperly concluding that 372 New Scotland Avenue was a legal non-conforming "office" as of that date. (Attachment E)

I am asking the Board of Zoning Appeals to find:

1. The proposed use is a "personal or business service" which is not a legal non-conforming use at 372 New Scotland Avenue.
2. USDO Use Interpretation 100418.001is null and void because the Chief Planning Officer exceeded his authority by declaring the proposed use an "office use" since the proposed use clearly falls within the definition of a "tattoo parlor" and a "beauty parlor" which are a "personal or business service" pursuant to the clear and unambiguous language of the USDO.
3. Any determination made pursuant to USDO §375-3(A) (3) that the proposed business is more like an "office" use than a "personal or business service" is contrary to the clear language and intent of the USDO and a circumvention of the USDO and the authority of the BZA, the Planning Board, and the Common Council.
4. Since the proposed services are a "personal or business service," the proposed use is a change or "substitution" or "conversion" of use at 372 New Scotland Avenue that requires BZA approval.
5. The Certificate of Occupancy issued on August 29, 2018 indicating that "Personal Business Service" is a permitted use at 372 New Scotland Avenue is null and void because it is clearly a "substitution" or "change in use" that required the prior approval of the Board of Zoning Appeals pursuant to USDO §375-5(F)(3)(d) and this matter was never submitted to the BZA and did not have its approval. It is also directly at odds with USDO Use Interpretation 100418.001.
    a. This appeal is timely because the Division of Planning and the Director of Buildings and Regulatory Compliance repeatedly denied me access to this permit or any knowledge of it: I made five oral and written requests for it between my learning about it on September 27th and was not provided with access to it until October 19th (but was not advised it was available and learned of it on October 24th). The Director of Buildings and Regulatory Compliance also failed to disclose its existence to me on September 10th when I made a broad inquiry as to whether "Buildings/Codes/Planning received any inquiries regarding the zoning for 372 New Scotland Avenue and its possible grandfather status? Any inquiries regarding building permits or anything else related to this property?"
6. The proposed new use is not "the same or a less intense land use category" pursuant to USDO §375-5(F)(3)(d) – which prohibits the "substitution" or "change in use" - because :
    a. "personal or business service use" requires a Conditional Use Permit in a MU-NE zone, and an "office" use is a permitted use in a MU-NE zone without a CUP, thus warranting a higher level of review; and
    b. Any conclusion that the operation of a "personal or business services" use are considered to be "the same or a less intense land use category" would essentially be a conclusion that the requirement that a "personal or business

service" use obtain a CUP to operate in an MU-NE district is arbitrary and capricious.

7. The premises at 372 New Scotland Avenue were not a pre-existing "legal non-conforming use" as of August 9, 2018 because the nonconforming office use was discontinued in the late 1980s when it was used as professional 'home office;" and, further, was not used as a chiropratic office from June 27, 2017 when Seth Kohl was arrested – both of which the city was on notice of before it issued its August 9, 2018 letter and its decision after reconsideration on October 17, 2018 (Attachment B) with no valid evidence to the contrary. Thus, the decisions issued on August 9, 2018 and October 17, 2018 with regard to the non-conforming status of this property should be declared null and void.
8. Once the non-conforming use was discontinued, it cannot be re-established. Since the premises are not providing services as of October 25,2018 and do not have, and have not applied for, the licenses and registrations to operate at these premises, the nonconforming use has clearly been discontinued for more than a year.

The reasons for my appealing these decisions and the specific relief requested are outlined below.

I want to make it clear that I have no personal objection to types of services that Ms. Cronin and her daughter are providing and Ms. Cronin seems like a lovely person who is very interested in helping people. It is only that: 1. this is clearly a commercial enterprise that should be operated only in a commercially-zoned district – not in a residential zoned neighborhood - as clearly set forth in the City of Albany Unified Sustainability Development Ordinance (USDO) and 2. these decisions establish an awful precedent that can have far-reaching effects for all neighborhoods throughout the city by allowing clearly "personal or business services" to be treated as "offices" in every residential district in the city where there is currently a non-conforming use, allowing them to be located in MU-NE districts without the required CUP, and allowing the use of arbitrary distinctions to be made in the application of the USDO when businesses are clearly covered by another use category – usurping the authority of the BZA, the Planning Board and the Common Council.

My constituents have repeatedly expressed concerns regarding "creeping commercialization" along New Scotland Avenue and have asked me repeatedly during my campaigns, the entire re-write of the USDO, and during my entire tenure on the Council to provide assurances that I would protect and preserve the residential character of our neighborhood and ensure that the zoning and building codes would be strictly enforced. The above decisions allowing the continuation of a non-conforming use that had been discontinued and allowing for its extension to a new level of use are the antithesis of strict enforcement of our zoning codes and not only jeopardize the New Scotland Avenue neighborhood, but all other residentially and MU-NE zoned areas because of the precedent it sets. As a result, I am making this appeal and asking the Board of Zoning Appeals to give weight to the clear and unambiguous wording in the USDO, help assure the residents of Albany that our zoning codes will be enforced and enforced fairly in accordance with the plain language of the USDO, help assure them that their rights under the law will be acknowledged and respected, and help preserve and protect our neighborhoods so that when residents decide where to live, where to purchase property, they

know that their reasonable expectations as to what uses will be allowed to exist next door to them, across the street, or down the block, will be protected.

That is precisely why the Board of Zoning Appeals, made up of residents of the city, exists – and why I appreciate your anticipated consideration of this appeal and fair and reasonable interpretation and enforcement of the USDO.

POINT I

USDO Use Interpretation 100418.001 should be declared null and void because the Chief Planning Official exceeded his authority to make a determination that the business is an "office use" because businesses providing "esthetician skin care" and "micropigmentation services" are required to be licensed as a "beauty parlor" or "beauty salon" under General Business Law Article 27, and as "tattoo shop" under Albany County Local Law 4 for 1999, respectively – both of which are clearly included in the definition of a listed use in the USDO as a "personal and business service." Interpretation 100418.001 is clearly at odds with the clear language and intent of the USDO. The BZA should declare these services are a "personal and business service," use not an "office" use under the clear language of the USDO. Additionally, any determination made by Mr. Spencer or his staff or any other person employed by the City of Albany with regard to this new use at 372 New Scotland Avenue should be declared null and void because the change in use required prior BZA approval.

USDO Use Interpretation 100418.001deals exclusively with a business that proposes to provide two types of services:

1. "esthetician" services that can only be provided in a licensed "beauty salon" (See General Business Law Article 27; *See* NYS Division of Licensing Services Guide to New York State Beauty Salons and Spa (Attachment F); https://dos.ny.gov/licensing/guides/guidetosalons.html ; and

2. "micropigmentation services," a form of tattoo, that can only be provided in a "tattoo shop" registered pursuant to Albany County Local Law 4 for 1999. *See Ibid*; *See also*, License and Registration for Ms. Cronin. (Attachment G)

The language of the USDO is clear and unambiguous: the operation of a beauty parlor or salon and the operation of a tattoo parlor or shop required to be registered pursuant to Albany County Local Law 4-1999 are **"personal or business services."** ***See*** USDO §375-6(B) definition of "personal or business services" listing "beauty parlor" and USDO §375-3(4)(d) listing "tattoo parlors" under "Personal or Business Service" and referring to the requirements of Albany County Local Law 4-1999.

None of the services described in USDO Use Interpretation 100418.001 require any other individual certification or business license. They are not "medical" or "professional" services as none of the services require a professional license and the use of the term "para-medical" in the description of the service implying that it is some sort of "professional" or "medical" service is misleading. The fact that Ms. Cronin happens to be a nurse is irrelevant. "Micropigmentation" is simply a type of "tattoo." It does not require a nursing license to perform it; it only requires

certification as a "tattoo artist" and registration of the place of business as a "tattoo shop" pursuant to Albany County Local Law 4 for 1999.

A "licensed esthetician" is not a "profession;" it is an occupational license issued by the New York State Department of State the way licenses are issued for all other "beauty specialists" that can *only provide services in a licensed beauty salon*. *See* https://dos.ny.gov/licensing/guides/guidetosalons.html - NYS Division of Licensing Services Guide to New York State Beauty Salons and Spas. (Attachment F)

The provision of either one of these services on the premises requires a determination that the business is a "personal or business service," not an "office."

Since both of these uses are already explicitly included in the USDO definition of "personal and business services" and the USDO is clear and unambiguous, Mr. Spencer lacked the authority to make a decision pursuant to USDO 375-3-(A)(3) – or certainly exceeded his authority in making a determination that was contrary to the unambiguous language and intent of the USDO. As such, USDO Use Interpretation 100418.001 must be declared null and void and the BZA should find the proposed business is a "personal or business service."

The fact that USDO Use Interpretation 100418.001 uses specific terminology referring to just one type of beauty specialist that provide services in a licensed beauty parlor or salon, and just one type of tattoo services, rather than using the broader, more common terminology that these services fall under does not change the fact that both clearly require licensure as a beauty salon and a tattoo shop, and therefore, are clearly listed uses in the USDO as "personal or business services."

The Chief Planning Official cannot ignore the plain language of the USDO. In order to reach a completely different result than is dictated by the clear and unambiguous language of the USDO, the Chief Planning Official's "interpretation" deviates from the entire classification structure set forth in the USDO which classifies types of businesses – not individual occupations or services.

Additionally, Mr. Spencer's interpretation to permit these "personal and business services" to operate as an "office" is a complete circumvention of the USDO's plain language, and therefore is:

1. A usurping and circumvention of the BZA's authority to review and approve any substitution of any nonconforming use by a different nonconforming use. *See* USDO §375-5(F)(3)(d);
2. A circumvention of the rights of adjoining property owners and members of the public to receive notice of any such potential change of use and have an opportunity to comment on the proposed change in use as required by various provisions of the USDO; and
3. A change that is so at odds with the plain language of the USDO that is requires both the approval of the Planning Board and Common Council via express amendments to the USDO to except "micropigmentation" from the definition of a "tattoo parlor" or shop and except "esthetician services" from the definition of a "beauty parlor" or salon.

As a result, USDO Use Interpretation 100418.001 should be declared null and void because Mr. Spencer lacked the authority, or exceeded his authority, to make such a determination because the USDO already unambiguously and unequivocally lists the uses described in his interpretation as "personal and business services." Interpretation 100418.001 is also clearly arbitrary and capricious and at odds with the clear language and intent of the USDO. The BZA should declare these services are a "personal and business service," use not an "office" use under the clear language of the USDO. Additionally, since this is clearly a new nonconforming use at 372 New Scotland Avenue any and all determination made by the Chief Planning Official or his staff or any other person employed by the City of Albany with regard to this new use at 372 New Scotland Avenue should be declared null and void because the change in use required prior BZA approval.

A. **The provision of "esthetician services" requires a "beauty salon" license for the proposed use and the USDO clearly and unambiguously classifies all beauty parlors or salons as a "Personal or Business Service."**

The USDO is clear and unambiguous: "Any business that primarily performs a support service for an individual or business, including, but not limited to a… ***beauty parlor***…." falls within the definition of a ***"personal or business service."*** (*emphasis supplied*) USDO §375-6(B).

Interpretation 100418.001 notes that the business will provide "esthetician skin care" by a "NYS Licensed Esthetician."[2] It improperly concludes that this is not a "listed use," when, in fact, it is a "listed use" since the definition of "personal or business service" expressly lists "beauty parlor" and "esthetician services" can only be provided in a licensed "beauty salon," or "beauty parlor." *See* General Business Law Article 27.

Importantly, the interpretation does not impose any limitations on the provision of "esthetician" services in an "office" use other than further limiting retail sales. The limitation regarding only "corrective in nature" procedures is only directed at micropigmentation services; not esthetician services. Additionally, the interpretation does not limit the number of individuals who can provide services in this, or any other beauty salons and tattoo shops that might fall within this interpretation. The new owner has advised my husband that she has expanded the business space into the second floor, thereby almost doubling the business space. Additionally, the floor plans submitted on August 20, 2018 show 3 treatment rooms on the first floor, along with a waiting room, receptionist, and office. (See Attachment G-1 Application for a Change of Use and Floor Plans.) As a result, it is easily possible to have 4-6 individuals/employees providing services on the premises in a location that has only had a sole practitioner working (mostly in the basement) for the past 50 years. This interpretation, if left to stand, minimally will allow beauty salons providing "esthetician services" to operate anywhere a professional or other office has existed as a nonconforming use or pursuant to a variance, as well as in MU-NE areas without the need for a CUP. Since the interpretation provides no basis for distinguishing between esthetician beauty specialists and other beauty specialists, more than likely, this opens the door to

[2] In my conversations with staff, it appears that at least one person was under the impression that Ms. Cronin would be the sole provider of services at the property and that she is both a "NYS Licensed Registered Nurse and a NYS Licensed Esthetician." Ms. Cronin is not a licensed esthetician. A second person, Nora Quinn, is providing those services at her current office and is expected to provide them at 372 New Scotland Avenue."

beauty salons opening in any non-conforming office use because the distinction made has no foundation, is arbitrary and capricious, and therefore, unconstitutional.

Although the USDO Use Interpretation 100418.001 states the business cannot provide "uses typically associated with personal service," this provision will be completely unenforceable as USDO Use Interpretation 100418.001 is expressly approving the provision of "esthetician" services which can only be provided by a "beauty specialist" in a licensed beauty salon, and hence, are inseparable from a "personal service." Under the rules of construction, this specific interpretation finding esthetician services can be provided in an "office" overrides the general terms of the USDO unless his decision is overturned by the BZA.

The New York State Department of State (NYSDOS) **Consumer Guide to "New York State Beauty Salons and Spas"** provides information regarding "estheticians" and other beauty specialists. (*See* Attachment F: NYS Division of Licensing Services Guide to New York State Beauty Salons and Spas; https://dos.ny.gov/licensing/guides/guidetosalons.html.)

New York State General Business Law Article 27 establishes five designations of "beauty specialists:" "Cosmetologist," "Esthetician," "Nail Specialist," "Natural Hair Styling Specialist," and "Waxing Specialist." *Ibid*. Any business providing any of these services, are required to be licensed as an "appearance enhancement business" – which the NYSDOS refers to on its webpage by the more commonly known terminology "beauty salons and spas." The business license must be displayed at the entrance or another conspicuous location in spa or salon where the licensed activities are performed. *Ibid*.

General Business Law Article 27 makes no distinction for the business license based upon the type of beauty specialist licensee providing services therein – they are all identically licensed as an "appearance enhancement business", i.e., "beauty salon." **Consequently, any location providing "esthetician skin care" services or any of the other beauty care specialties is required to be licensed by the NYSDOS as a "beauty salon."** The City of Albany, the Board of Zoning Appeals, and the Chief Planning Official have absolutely no basis for concluding that a business providing services for any one or more of these specialties – all of which must be performed in a licensed "beauty salon" – are not a "beauty salon" or "beauty parlor."

The attached NYSDOS website page on Beauty Salons and Spas makes it clear that estheticians can provide *any* of the services provided by *any of the other beauty specialists* except for hair and nail services.[3] This further establishes the complete lack of basis for any determination that treats "esthetician services" differently than any of the other licensed beauty specialists. Services that estheticians typically provide include facials, waxing (including waxing of eyebrows which is a 5 minute stop-in service), threading, chemical hair removal, bikini waxing, manual or mechanical extraction (i.e. tweezing of eyebrows or other hair), make-up application, steaming, and face and body masks, etc. – all of which are commonly found in various beauty salons. See https://www.estheticianedu.org. None of these services are medical or corrective in nature.

[3] Since people may be more familiar with the specialty of "cosmetologist" as a person who provides services in a beauty salon, I note that the NYSDOS webpage notes that cosmetologists can provide skin care and waxing services that estheticians provide.

In fact, the estheticianedu website derisively notes

> "***Although the term "medical esthetics" is often thrown around, esthetics is not a medical practice*** and estheticians are not allowed to diagnose, prescribe, or treat skin conditions or diseases. Instead, ***medical skin care services are left strictly up to licensed medical professionals, such as dermatologists***." (*emphasis supplied*)

The person who will be providing "esthetician skin care" services at 372 New Scotland Avenue (Ms. Cronin's daughter, Nora Quinn , *See* http://www.colourcosmeticstudio.com/ ; Attachment G-2 and G-3) is not licensed as a "professional." She is solely licensed as "beauty specialist" known as an "esthetician" by the NYS Department of State. See https://www.scheduicity.com/scheduling/CCSYB8 (Attachment G-3, G-4) This is not a "professional license." It is a trade or occupational license, like other trade and occupational licenses issued by the NYSDOS, including, but not limited to: "nail specialist," "waxing specialist," "document destruction contractor," "security alarm installer," "ticket reseller." *See* NYSDOS Division of Licensing website. Consequently, treating "esthetician services" as a "professional service" akin to doctors, dentists and professional designers that provide services in an "office" setting is contrary to the plain language of New York State law and the USDO.

For a classic example of how esthetician services can be marketed and a list of typical esthetician services, visit: https://estheticsonmain.com/. No reasonable person looking at this website could seriously suggest this is NOT a beauty parlor or salon.

While NYSDOS does not use the USDO term "beauty parlor," it is clear that the term is synonymous with "beauty salon." Merriam-Webster's on-line dictionary defines a "Beauty Shop" as

> "an establishment or department where hairdressing, facials, and manicures are done. — called also beauty parlor, beauty salon." [4] https://www.merriam-webster.com/dictionary/beauty%20shop.

Whenever interpreting laws, codes and regulations, words are required to be ascribed their plain meaning; "beauty salon" and "beauty parlor" are synonymous and are used interchangeably.

Importantly, if the City and the BZA concludes that a "beauty parlor" is not a "beauty salon" licensed by the NYSDOS, then none of the beauty salons licensed by NYSDOS would automatically fall within the USDO definition of a "personal or business service" and every type of business providing beauty specialists services would require a special interpretation.[5] This would render the term "beauty parlor" explicitly included in the definition of a "personal or business service" meaningless. Such an illogical determination is completely lacking in common sense is absurd and cannot be allowed to stand.

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[4] I note that this definition explicitly mentions "facials" – a common service provided by estheticians.

[5] And, if this determination is left to stand, the Chief Planning Official would be able to pick and choose which subspecialties are a "personal or business service," and which are simply an "office" notwithstanding they would all be required to licensed as a beauty salon by the NYSDOS.

It would equally absurd to conclude that just because the USDO definition does not list the different types of individual beauty specialists' licenses, that it is not explicitly listed in the permitted use table or included in the definition of a listed service. It is the overriding business of "beauty salon" or "beauty parlor" that is the listed "use" that is clearly included in the definition of a "personal or business service" and that is more than ample.[6] USDO Use Interpretation 100418.001's classification of an individual's area of specialization within a licensed business is directly contrary to the entire classification system contained in the USDO which lists the overriding business, not the individual occupations or specific services provided within the business. There is simply nothing in the New York State statute or the USDO that provides any basis for concluding that one of the beauty specialists licensed by the NYSDOS is not operating a "beauty parlor" or "beauty salon," but others licensed beauty specialists are.

As a result of the foregoing, all beauty specialists licensed by the Department of State are required to perform such services in a licensed "beauty salon" or "beauty parlor" which is clearly included as a "personal or business service" use in the USDO. All the City of Albany Department of Planning or Department of Buildings and Regulatory Compliance needed to do with regard to an inquiry regarding the provision of "esthetician services" was to advise the applicant that since such services are required to be provided in a licensed beauty salon or parlor, they are a "personal or business service." This did not, and should not, require a formal interpretation to address an allegedly "unlisted use."

Consequently, the Chief Planning Official exceeded his authority in making a determination pursuant to USDO section 375-3(A)(3) that this is an "office" uses and the BZA should declare USDO Use Interpretation 100418.001 null and void.

Additionally, the BZA should declare "esthetician services" are required to be provided in a beauty parlor or salon which is already a listed use, and therefore, clearly falls within the definition of a "personal or business service."

Further, since USDO Use Interpretation 100418.001has explicitly been made issued to address the proposed use with regard to a property that is alleged to have status as a legal non-conforming use for an "office" (372 New Scotland Avenue), and the beauty salon is a substitution of use for that address, Mr. Spencer was also completely lacking in authority to make any determinations of an acceptable new use without submitting the question to the Board of Zoning Appeals pursuant to USDO Section 375-5(F)(3)(d).

As a result, I ask that the Board of Zoning Appeals to determine that any determination made by the Chief Planning Official with regard to this new use at 372 New Scotland Avenue is null and void and determine this is a "personal or business service" that then requires the prior approval of the BZA pursuant to USDO §375-5(F)(3)(d).

B. The provision of "micropigmentation services" requires a "tattoo shop" registration under Albany County Local Law 4 for 1999 and the USDO clearly and unambiguously establishes that businesses regulated under Albany County Local Law 4 for 1999 are a "Personal or Business Service."

[6] Otherwise, the USDO would also need to list all other occupations or specific services even though the overall business establishment is listed, e.g., "chef," "cook," "bar tender," "licensed teacher," "professor," "embalmer," "undertaker," "funeral director," "dermatologist," "mechanic," "veterinarian," "pet washer," etc.

The USDO is clear and unambiguous: businesses regulated as "tattoo parlors" or "tattoo shops" under the Albany County Local Law 4 for 1999 are a "Personal or Business Service." USDO § 375-3(C) (4)(d)(iii) listing additional standards for specific uses, under "Personal or Business Service" expressly lists "tattoo parlors" stating they "are subject to regulation pursuant to New York State Public Health Law Article 4-A, Albany County Local Law 4 for 1999, or other such prevailing regulations." The unambiguous intent of this language is clarify that tattoo parlors or shops regulated pursuant to the Albany County Local Law 4 for 1999 are a "business or personal service" and must comply with the requirements of those laws.

Micropigmentation services are simply another name for a type of tattooing that is regulated under the Albany County Local Law 4 for 1999**.** We need not look any further than Ms. Cronin's current certification as a "Tattoo Artist" and registration of her current location as a "Tattoo Shop" with the Albany County Department of Health. (Attachment G) As with beauty salons, it is the business establishment that is registered and described in the USDO as the "use," not the particular specialty of an individual or a listing of individual services in a licensed business.[7] The "use," plain and simple, is a "tattoo shop" regulated pursuant to Albany County Local Law 4 for 1999. The manner in which anyone might choose to describe and market their services is irrelevant to the determination as to whether the "use" is already a "listed use" or already included in the definition of a listed uses not. Consequently, since "micropigmentation services" unequivocally requires certification as a "tattoo artist" and such services can only be provided in a registered "tattoo shop" which is explicitly listed as a "personal or business service, the Chief Planning Official exceeded his authority in issuing USDO Use Interpretation 100418.001 or making any other determination that this business is anything other than a "personal or business service."

I encourage members of the BZA to visit the website for Ms. Cronin's business, "Colour Cosemetics Studio, Inc.," which is currently operating at 1525 Western Avenue: http://www.colourcosmeticstudio.com/ (See Attachment G-2) This website makes it clear that the services Ms. Cronin is providing involve tattooing. She describes her application of "permanent cosmetic makeup" as a highly specialized method of "tattoo." The services she is providing also far exceed the "description of proposed use" set forth in USDO Use Interpretation 100418.001 which attempts to limit these services to those that "corrective in nature." They include "microblading," "permanent makeup cosmetic tattoo," "3D Microbladed eyebrows," "feathered or powdered eyebrows," "combination shaded & hairstroke brows," "permanent eyeliner," "eyelash enhancement," "lip stain & lip liner," "hair follicle stimulation," and "tattoo removal and lightening." Most people would not consider these "para-medical" procedures or "corrective" procedures, but facial appearance enhancement services like the application of cosmetics in a beauty salon – only permanent. The lead heading on Ms. Cronin's website is not

[7] Notably, USDO Use Interpretation 100418.001 never provides a short label or gives a name to the type of business that is being addressed in this interpretation, unlike what is done for all other businesses in the USDO. Instead, it lists a sampling of the individual services being provided and 2 of the 3 licenses of the providers of the services (which explicitly fails to mention the "tattoo artist" certification.) The USDO does not contain such a lengthy description of any type of business, essentially just listing a series of services being provided. This shows the extent to which the Chief Planning Official has gone to circumvent the clear and unambiguous language of the USDO. It is also another form of "spot zoning," with an exception being created for a particular applicant.

"para-medical micropigmentation," but "The Art of Permanent Cosmetic Micropigmentation." The restoration of the areola/nipple complex which is the first service mentioned in the description contained in USDO Interpretation 100418.001 only appears on the website after this long list of predominantly cosmetic tattoo procedures. The website also contains no limitations on these predominantly cosmetic services or gives any implication that such services will be limited to "reconstruction" or "corrective" procedures as USDO Interpretation 100418.001 states in the footnote.

To be clear, "restoration" of the "areola/nipple complex" by "micropigmentation" is NOT "re-constructive surgery" of the breast or "cosmetic surgery." Those services can only be provided by a licensed physician. It is the application of a tattoo/pigmentation to the nipple or areola area to enhance or correct the appearance of the breast and nipple area. I highlight this point not to diminish the significance that this service can be to women, but to make it clear that this is NOT a medical procedure that makes it akin to a service being provided in a doctor's office. The issue is not the worthiness of the provision of the service, but whether it is appropriate to classify this service as an "office" based upon the inference they are "medical services."

The website's variance from USDO Interpretation 100418.001 intent to limit this service to "corrective" procedures highlights the flaw in trying to say a "tattoo shop" is not a "tattoo shop" simply based upon the owner's description of the services, and perhaps, a perception that some "tattoo" services are more worthy than others. The interpretation attempts to create an artificial distinction that ultimately will be unenforceable. It begs the questions: "what is body art?" and who is to decide what is "body art" and what is not? Everything listed on the colourcosmetic.com website is a body or facial appearance enhancement, regardless of the purpose. Many would argue, so is the tattoo that they have. Ultimately, the distinction being made seems to be based upon an unstated preference for one type of clientele that might patronize Ms. Cronin's shop versus the clientele that might visit another tattoo artist's shop. Such distinctions are disturbing and should not be condoned or solidified by official action. The distinction is unenforceable, arbitrary and capricious and should not be allowed to stand. This is a tattoo shop, and the authorization of this tattoo shop on these premises will forever preclude the City from preventing the establishment of another tattoo shop on these premises precisely because the distinctions attempted to be made are arbitrary and capricious, not supported by the law, and completely unenforceable.

Albany County Local Law 4 for 1999 defines "tattoo" as "to mark or color the skin by pricking in coloring matter so as to form indelible marks or figures or by the production of scars." The County Law also defines "Tattoo and/or body piercing shop" which requires registration as such as "any room or space where tattooing or body piercing is practiced or where the business of tattooing or body piercing is conducted or any part thereof." Hence, Ms. Cronin's current business on Western Avenue is licensed as a "Tattoo Shop" and her proposed business at 372 New Scotland Avenue will be required to be licensed as a "Tattoo Shop." (Attachment G)

The County Law does not use the term "tattoo parlor" as that term appears in our USDO. (Section 375-3(C) (4)(d)(iii)) However, it is clear that the use of the term "tattoo parlor" in the USDO is intended to refer to all "tattoo shops" regulated by Albany County Local Law 4 for

1999 since Section 375-3(C) (4)(d)(iii) listing standards for "personal or business service" expressly states

> "Tattoo parlors are subject to regulation pursuant to…. Albany County Local Law 4 for 1999, or other such prevailing regulations."

Additionally, when construing statutes, codes and regulations, words are to be ascribed their everyday meaning. In an extensive review of on-line definition resources, a "tattoo parlor" is simply a place to get tattoos….which is what Ms. Cronin's business is. "Tattoo Parlor" or "Tattoo Parlour" is defined as:

> "a place where people go to get tattoos." - https://www.merriam-webster.com/dictionary/tattoo%20parlor

> "any place in which is offered or practiced the placing of designs, letters, scrolls, figures, symbols *or any other marks upon or under the skin* of any person with ink or any other substance, resulting in the permanent coloration of the skin, *including permanent make-up or permanent jewelry*, by the aid of needles or any other instrument designed to touch or puncture the skin." (emphasis supplied) https://definedterm.com/tattoo_parlor

> "a place where you can go to get a tattoo." - https://www.ldoceonline.com/dictionary/tattoo-parlour

There is absolutely no basis in the USDO to conclude that a use that is required to be registered as a "tattoo shop" under the County Law is not covered by this definition. The Chief Planning Official is not at liberty to give a different interpretation to the USDO Section 375-3(C) (4)(d)(iii) based upon some vague notion that some "tattoo shops" registered under the Albany County Local Law 4 for 1999 are "tattoo parlors" and others are not although the USDO expressly uses the term "tattoo parlor" with an express reference to businesses required to be registered pursuant to Albany County Local Law 4 for 1999.

No distinction has been made by the Albany County Department of Health and no distinction can be made by the Chief Planning Official or the Board of Zoning Appeals since the USDO clearly refers to all tattoo shops regulated by Albany County Local Law 4 for 1999.

As a result, there is no basis for a determination that this "use" is not an explicitly listed use or that it is not already included in the definition of a listed use, and Mr. Spencer's interpretation is not authorized by the USDO, and should be declared null and void.

Additionally, it should be noted that the description of Ms. Cronin's services are most like the "appearance enhancement businesses" that are otherwise known as "beauty salons" and discussed further above. The name of her business "Colour Cosmetics" and the description provided make it clear that a lot of the services she provides are essentially a type of semi-permanent cosmetology. The fact that she provides services by appointment is irrelevant; so do many beauty salons, barber shops, which are "personal or business services."

Additionally, unlike most "office" uses, "micropigmentation" services involves the extensive use of needles and pigments which have many potential environmental and health impacts that a chiropractor's office or most other "office" uses do not. As a result, the Albany County DOH imposes significant requirements regarding the design and operation of a tattoo parlor that include precautions regarding the use and disposal of sharps and infectious diseases. Since tattoo parlors are otherwise considered a "personal or business service" because of some of these concerns, and therefore, are required to get a CUP to operate in a MU-NE area whereas an office does not, this interpretation, if it is allowed to stand, can be used to declare such distinctions arbitrary and capricious and therefore, unenforceable.

As a result of the foregoing, there was absolutely no basis for Mr. Spencer to claim that the type of tattoo services being provided by Ms. Cronin are not already explicitly included in the listed use of "personal or business service. As such, the Chief Planning Official lacked the authority to make a determination pursuant to USDO section 375-3(A)(3) that this was an "office" use. The BZA should declare USDO Use Interpretation 100418.001 null and void and find the proposed use is a "personal or business service."

Further, since the Chief Planning Official has made this interpretation with regard to a property that is alleged to have status as a legal non-conforming use for a professional office, and the operation of a tattoo shop is a "substitution" of use, Mr. Spencer was also completely lacking in authority to make any determinations of an acceptable new use without submitting the question to the Board of Zoning Appeals pursuant to USDO Section 375-5(F)(3)(d).

C. The services described in USDO Use Interpretation 100418.001 do NOT involve the provision of professional services, nursing services or medical services, does not require a nursing license, and consequently, is not akin to a doctor's office, dental office or other professional office.

In reaching the conclusion that "micropigmentation services" are an "office" use, Interpretation 100418.001 seems to rely heavily on the idea they are comparable to other services provided in professional offices such as a doctor, dentist, and professional designer offices simply because they are provided by a registered nurse. This would be relevant if, in fact, the services being provided require a professional nursing license – but they do not. They require a "certificate" as a "tattoo artist" and a license from the Department of State to perform esthetician services.

The mere marketing or describing a service as a "para-medical" service does not make it a "medical service" or a "professional service" akin to a doctor's office or a dental office. Similarly, the use of the term "restore" does not mean this is reconstructive surgery or cosmetic surgery or another medical procedure. As noted above, even the esthecianedu website derides the use of the word "medical" in connection with services that are not provided by a licensed physician and makes it clear that such marketing practices are misleading.

"Professional services" are those services that require the person to have the appropriate professional license issued by the NYS Education Department to perform them pursuant to New York State Education Law, Title 8. If the provision of a particular service does not require a professional license, then it is not a "professional service" and anyone can perform them. Each of

the professions have their own board within the State Education Department which licenses individuals and issue determinations regarding what services fall within the scope of practice of a particular profession.

For over 20 years I was an attorney in the New York State Department of Health and was a recognized expert in many fields, including the scope of practice of health professions, ethical medical conduct, and the corporate practice of a profession. *See, e.g.,* The New York Bar Association and Medical Society of the State of New York's "***Legal Manual for New York Physicians"*** Chapter 38, by Judy L. Doesschate, Esq. and Andrew Roth, Esq. I conducted continuing legal education programs on this topic and was a panelist at many forums on these topics. Based upon my over 20 years of expertise and review of current literature and determinations issued by the NYS Board of Nursing, I can state unequivocally there are NO interpretations by the NYS Board of Nursing or any other entity in New York State that has found the scope of practice of nursing includes the provision of "para-medical micropigmentation" services. There is also no such thing recognized in NYS law as a "para-medical micropigmentation" service. Either a medical or other health care service requires a professional license or it does not. Hence, the provision of "micropigmentation" services does not require a nursing license and does not require any other professional license: It is not a professional service.

There are other problems with the apparent assumption underlying that Ms. Cronin is performing "professional nursing" services when she is performing "micropigmentation services:"

1. Nurses cannot practice independently[8]. To verify this point, one need only ask yourself – "When was the last time I saw or went to a nurse's office that was completely separate and apart from a physician's office?"
2. Nurses can only perform "nursing services" pursuant to a doctor's written order or prescription. But doctors don't prescribe micropigmentation services.
3. Professionals cannot practice their profession independently within a corporation unless it is a "professional corporation." Ms. Cronin's corporate name is: "Colour Cosmetic Studio, Inc.," It is not a professional corporation because it does not end with the letters "P.C." as is required under the professional corporation law. Thus, her corporation is a standard business corporation which is not authorized to practice a profession.
4. Professionals can only practice their profession within a business corporation if the business corporation is authorized by and licensed pursuant to some specific statute to provide the services it is providing. For example, hospitals, nursing homes and clinics are authorized to provide professional medical and nursing care if they are licensed under PHL Article 28, home health agencies can provide professional nursing services if they are licensed under PHL Article 36, etc. *See,* The New York Bar Association and Medical Society of the State of New York's "***Legal Manual for New York Physicians"*** Chapter 38, by Judy L. Doesschate, Esq. and Andrew Roth, Esq.

[8] The only partial exception is a "Nurse Practitioner" who has a special license and requires a collaborative agreement with a licensed physician.

As a result, it would be unlawful for Ms. Cronin to provide professional nursing services under the corporate name "Colour Cosmetic Studio, Inc." But since she is not providing professional nursing services when she performs "micropigmentation services," and because she is certified as a "tattoo artist" – which is the only license she needs to perform "micropigmentation services" – she is not violating the law.

Esthetician services also do not require a professional license. They only require a license from the Department of State – which, in no way refers to it as a "professional" service.

As a result of the foregoing, there is no basis to conclude that any of the proposed services listed in USDO Use Interpretation 100418.001 are professional nursing services or in any way akin to services provided by a doctor, dentist, professional designer or any other professional in an office. Hence, there is no basis for treating this business any differently than any other "beauty salon" or "beauty parlor" or "tattoo shop" licensed and registered pursuant to General Business Law Article 27 and Albany County Local Law 4 for 1999 or to deviate from the clear and unambiguous language in the USDO. It is an artificial distinction that is not supported by the USDO, Albany County Local Law 4 for 1999, New York State Law, or the NYS Board of Nursing professional opinions.

Finally, I note that the fact that these services are a "personal or business service" is evident from the fact the Department of Buildings and Regulatory Compliance issued a "Certificate of Occupancy" on August 29, 2018 saying that the permitted uses included "personal business services." USDO Use Interpretation 100418.001 is in direct conflict with the issuance of the Certificate of Occupancy issued on August 29, 2018 listing "personal business service" as a permitted use based upon the exact same description. That is what happens when you reach for an interpretation that is contrary to the clear and unambiguous terms of the law.

D. The Precedent USDO Use Interpretation 100418.001Establishes and Community Concerns.

While the above analysis of the applicable licensure laws should resolve this issue on the basis that the two types of services clearly falling within the USDO definition of "personal or business service," I feel compelled to provide some background so you understand why this is an important decision for my ward and the rest of the city.

Throughout my time on the Council, residents have conveyed their concerns about "creeping commercialization" along New Scotland Avenue destroying the character of our predominantly residential, charming neighborhood. This is especially true of residents who live on New Scotland Avenue and with lots adjoining New Scotland properties or nearby – but it goes beyond that. Residents throughout my neighborhood are concerned that with an ultra-business friendly environment and lack of strict adherence to the zoning and building codes, our neighborhood will deteriorate over time into hit and miss uses that destroy the residential feel, increasing competition for on-street parking and turning us into something similar to parts of Washington and Central Avenues where houses remain a minor portion of the streetscape – often haphazardly converted into commercial space .

It was in this context that we carefully reviewed the proposed zoning maps and worked to eliminate the proposed expansion of MU-NE designations in the 9th Ward for anything that clearly had an original single family or two family use. The consensus was that we like our commercial businesses to be located in the limited commercial space that has been designated, and we allowed the MU-NE use solely for those circumstances in which there were large community school and church buildings that needed to be put to other uses. The goal was to reduce the number of properties that could be converted to commercial or business uses – or to prevent non-conforming business uses alongside people's homes from becoming permanent.

People have expressed regret for the impact that some of the granted variances have had – with some non-occupant business owners not caring for their property, putting up overly large signs, and the like. They have welcomed the expiration of some of the non-conforming uses along New Scotland Avenue.

When Mr. Kohl was arrested in June of 2017 and ceased his practice, I watched for any real estate signs indicating he would be selling the property, and in May of 2018 I wrote the city asking to have his obsolete sign removed. When a for sale sign went up at the end July of 2018, I wrote to the real estate agent advising him that the premises should not be marketed as commercial or mixed-use because any alleged grandfathering status had expired and only a home occupation was allowed – which required the business owner to live on the premises.

In the past few weeks, I have learned that the services will be provided by at least two individuals – one certified as a tattoo artist and the other licensed as an esthetician - whereas services previously provided at this location were provided by one individual, whose wife served as a part-time receptionist. There has never been more than one practitioner on the premises. At a minimum, this will double the foot and car traffic to this location. Because esthetician services can involve 10 minute to one hour appointments, whereas chiropractic services are usually scheduled at least an hour apart, the amount of foot and car traffic to this location is likely to be far more than double. Additionally, Ms. Cronin has decided to eliminate the apartment upstairs and almost double the business area on the premises. If this interpretation is allowed to stand, she can hire or rent out booths to other individuals providing the listed services – and, realistically, any other beauty specialists services since it will be licensed as a "beauty salon." The interpretation imposes absolutely no limit on the number of people who might provide services in any given location who are providing "esthetician" services or "micropigmentation services." Additionally, she will bring customers from far away, as she has already acknowledged that one customer came from Queens to our residential neighborhood.

Once licensed as a "beauty salon," Ms. Cronin can provide other beauty specialist services on the premises because there is NO basis and no rationale argument whatsoever for making a distinction between the beauty specialists that are authorized to provide services in a beauty salon.

And that is a precedent I am concerned this sets for the entire city.

USDO Use Intrepretation 100418.001 authorizes the creation of a beauty salon on the premises because it is required to be licensed as such. Period. It also authorizes the establishment of a tattoo shop on the premises, because it is required to be licensed as such.

Although USDO Use Intrepretation 100418.001 attempts to limit the impact of his improper determination, the reality is there will be no enforcement of the restrictions stated in his interpretation and that his interpretation imposes no limits on the types or purposes of the services being provided by the esthetician.

We have already seen with this precise situation how little regard was given to the requirement that the applicant provide proof of a continuing non-conforming use – despite a half dozen city officials, including members of Mr. Spencer's staff being on notice that the grandfathering status was in question. Any complaints about illegal non-conformities once this business are up and running are equally likely to be met with deaf ears.

More importantly, when Ms. Cronin retires or sells her business, or her property, any assurances she has made about the way she will run her business will be irrelevant. The precedent will have been set for both a beauty salon and a tattoo shop to operate on the premises and any attempt to impose the limitations stated in Interpretation 100418.001 on a future business is likely to be alleged to be arbitrary and capricious – as there is no basis in law for the distinction the interpretation has attempted to make – and will be found to be completely unenforceable. Hence, there is no question that this interpretation has set the stage for future beauty salons, tattoo shops, or endless legal battles to preserve and protect the neighborhood – in the way the residents of this Ward thought it was going to be preserved and protected when we adopted the revised USDO and fought so hard to retain our residential zoning.

So – what has happened at 372 New Scotland is a great example of what we fear for our entire neighborhood and city….and USDO Use Interpretation 100418.001 would substantially compound the infraction – the morphing of home offices and non-conforming uses into even higher levels of non-conforming uses and greater impacts on the surrounding neighborhood. This is what tears at the fabric of our community and worries residents, i.e. that we have to be ever-vigilant to guard against creeping commercialization, because the government, on the basis of incomplete information and understanding of a business and the potential impacts, and without notice to anyone with an interest, will allow non-conforming uses to run unabated and ever-expanding. The government will not protect us: Will not enforce the laws uniformly and fairly and with common sense interpretations.

What was, and should have always been a 1 to 2 family home at 372 New Scotland Avenue[9], possibly with a home/professional office with a one to 2 foot sign, was allowed to morph into a "professional office" with a huge, lit commercial sign, without the owner being required to live there.

Now, USDO Use Intrepretation 100418.001 would allow this space to morph again into a full commercial use higher level of use – for a tattoo shop and beauty salon – that is otherwise only allowed in MU-NC commercial districts and higher. These are services that are not even allowed to exist in an MU-NE district without obtaining a Conditional Use Permit. Yet, Mr. Spencer has unilaterally authorized them in an R-2 district with no notice to residents in the area,

[9] According to a neighbor who babysat for the family who lived at 372 New Scotland in the mid-1960's, the house was a single family house that occupied 2 floors; a physician's practice was located in the basement and solely used a rear entrance. That is a far cry from what the use has evolved into and is now proposed.

no opportunity to be heard, no application of any standards with regard to the impact on the neighborhood, and no review by the BZA in accordance with the standards required by New York State law. This is why I believe this interpretation is a complete circumvention of the USDO, and usurping of the power and authority of the BZA, the Planning Board and the Common Council.

And this determination sets the stage for future owners of this property to say (or get eventual rulings) that "all personal and business uses' are now allowed in this location as a "non-conforming" use, (including dry cleaning establishments, laundromats, shoe repairs, print shops, photocopying services, mailing services, and sign shops.) Potential "substituted " uses for this upgraded level of use of a "personal or business service" that have the same level of intensity according to the use table includes restaurants, indoor recreation or entertainment, and general retail, would now be able to argue they are entitled to be located in any residential zone as a non-conforming use as of right.

We have all seen the negative impacts of the slippery slope we have been on with increasing commercial uses being allowed to operate in residential areas without community input. Now, this interpretation, pushes the allowed uses for a non-conforming use in an R-2 district even further. It also would allow these tattoo shops and beauty salon services (under a different name) to be established in ANY MU-NE district without requiring a CUP contrary to the clear intent of the law.

This sets an awful precedent, not only for my ward, but for the entire city. If USDO Use Intrepretation 100418.001 is allowed to stand, we might as well throw out the entire zoning ordinance – and, any resident's, property owner's or neighborhood's sense that the zoning laws will be respected, enforced and given reasonable, common-sense interpretations. Can we really say with confidence that this is not a possible result in light of the improper and directly conflicting decisions being appealed here – most of which were made without following proper protocols and are based on little to no investigation or credible documentary evidence?

What other terms can tattoo artists, beauty specialists, trades people and other come up with to describe their services that will allow a circumvention of the clear language of the code?

I note too, that this interpretation is a clear circumvention of the BZA's authority to review a substitution of a non-conforming use. This is clearly a change in use from an "office" to a "personal or business service" that would normally require the BZA to find that the new "non-conforming use" is "the same or a less intense land use category based upon Table 375-3-1 (Permitted Use Table)." I also question whether the transition from a professional office to a different type of office use should have been reviewed by the BZA in any case – especially since the definition of "office" has been expanded under the USDO to include uses that most people would not envision could be operating next door to their residence after only having a "professional office" operate there for years.

Again, I ask that you not condone this improper interpretation of the USDO that only exacerbates people's concerns about "creeping commercialization" and the lack of adherence to our zoning code. This use is clearly and unambiguously, a "personal and business service" under

our code that did not require an interpretation, and therefore, this interpretation should be voided. In the alternative, the interpretation should be amended simply to site the unambiguous definitions and provisions in the USDO to conclude that the services being provided are "personal and business services" and that, as a result, the change of use was required to be submitted to the BZA for approval– which would be required to determine whether the new "use", i.e., is the same or a less intense land use category based on table 375-3. That table makes it clear that "personal or business services" is a higher use than an "office" because an "office" is a permitted use in a MU-NE zone, but "personal and business services" require an CUP in an MU-NE zone.

POINT II

The final decision issued by Mr. Spencer on October 17, 2018 (Attachment B) should be overturned because he improperly determined that: a. 372 New Scotland Avenue had been a legal non-conforming use as of August 9, 2018; b. The business offering micropigmentation and esthestician services is an "office" use; and c. The USDO only required the sign in front of 372 New Scotland to be covered up when it became obsolete – as opposed its removal as required by Section 375-(1)(5)(ii)(E).

A. The final decision issued by Mr. Spencer on October 17, 2018 (Attachment B) should be overturned and declared null and void because he improperly determined that 372 New Scotland Avenue had been a legal non-conforming use as of August 9, 2018, and failed to obtain competent documentary evidence before making a determination.

1. The alleged legal nonconforming use ceased to exist before Mr. Kohl acquired the property because the immediate prior professional business located at 372 New Scotland Avenue was run by an individual who lived in the upstairs apartment. As a result, the chiropractor operated a legal "home office" and any prior non-conforming use was discontinued and could not be re-established.

Mr. Spencer's October 17, 2018 email regarding 372 New Scotland Avenue's "grandfather status" notes that our "records and research" indicate that the property had been used as a doctor's office, podiatry office and chiropractic office since 1950. His August 9, 2018 determination only states "the property was used as an office prior to the effective date of any regulation prohibiting such use." There is no dispute that the premises were used by various professionals as an office. However, in at least one case prior to Mr. Kohl's purchase of the property in 1989, the property was used as a legal conforming "home office," thereby discontinuing any claim to the "office" being legal non-conforming office under the zoning code.

I advised Robert Magee, Mr. LaJoy, the Mayor, the Mayor's Chief of Staff and Corporation Counsel William Kelly of this fact in an email dated June 9, 2018. (Attachment H)

I also advised them that Mr. Kohl had stopped using this as a chiropractor's office on June 27, 2017[10] and asked them to send a letter to Mr. Kohl

[10] Date has been corrected on 11-20-18– original incorrectly listed June 27, 2018 here

> "on June 27th letting him know unequivocally that as of June 27th the premises are no longer grandfathered in and the only activities permitted on the premises are those authorized under R-2 zoning. (so he can't sell to some unsuspecting soul arguing it can legally be used for a professional office....)" (Attachment H)

I also advised Mr. Spencer of both of these facts in an email I sent to him on September 28, 2018 in which I copied Mr. Glass, Mr. LaJoy, the Mayor, and others and thanked him for his agreement to take another look at this. (Attachment I)

My knowledge of these facts is based upon the fact I have lived across the street from 372 New Scotland Avenue since December of 1987 and observed the former chiropractor's comings and goings all hours of days, nights and weekends – sometimes with his girlfriend who also lived upstairs. My driveway is directly across the street from the driveway for 372 New Scotland and the front door of my house directly faces the side of 372 New Scotland Avenue.

A review of the Polk's City Directory shows that "New Scotland Chiropractic Office" was the sole tenant at 372 New Scotland Avenue from around 1985 until long after Seth Kohl purchased the property in 1989. This is consistent with the owner of the business living upstairs (and likely getting two utility bills for the same location). Prior to 1985, Polk's lists both a professional and a tenant for most years. Thus, the absence of a separate listing in Polk's for a tenant from 1985 through 1990 and beyond is further proof the upstairs apartment was occupied by the owner of "New Scotland Chiropractic Services."

I have annexed an affidavit from my husband, Tom Keefe, regarding his observations at the time, which were consistent with mine. (Attachment J) We took particular note of his status as a "home office" because we were surprised to learn there was a business use across the street from us and learned about the "home office" exemption at the time. It is clear this legal conforming use existed for more than a year before Mr. Kohl purchased the property as we lived across the street for 15 months before Mr. Kohl purchased the property and that chiropractor had been there many years before that. Hence, any claim to a "legal nonconforming use" ceased to exist before Mr. Kohl purchased the property. Under the USDO and prior zoning code, once a legal non-conforming status is discontinued for a year or more it cannot be re-established.

USDO §375-5(F)(1) clearly anticipates that the Chief Planning Official will require *evidence* showing that a nonconforming use was continuously maintained such as utility bills, property tax statements[11], leases, subleases, or "notarized affidavits from property owners within 300 feet of the property" before making such a determination. In my October 2, 2018 FOIL request, I asked for all documentation relating to all determinations made with respect to 372

[11] My understanding from a neighbor is that Mr. Kohl claimed this property as his home residence for a period of time and received the STAR exemption for the property. There was also an extended period of time at the beginning of his ownership that Mr. Kohl had no upstairs tenant. Both suggest that Mr. Kohl may have claimed this as his residence for a period of time – which would have also been a legal conforming use and the abandonment of any legal non-conforming use to the extent anyone could argue that one existed at the time.

New Scotland Avenue. There was absolutely no evidence, documentation or notations produced to support Mr. Spencer's determination regarding the nonconforming use.

Since Mr. Spencer's determination is not based upon any evidence and he and his staff were provided with information that is clearly contrary to any finding that this was not a "continuously maintained" nonconforming use, and since the applicant failed to provide any competent proof of a continuously maintained nonconforming use as required by the USDO, the determinations made on October 17, 2018 and August 9, 2018 should be vacated. I ask the BZA to find that Mr. Spencer's final determination after reconsideration on October 17th, and his initial August 9th determination regarding the non-conforming status of 372 New Scotland Avenue are in improper and should be rescinded and replaced with a determination that the legal nonconforming "office" use 372 New Scotland Avenue expired prior to August 9, 2018.

2. Any alleged continuing legal nonconforming use ceased to exist on June 27, 2018, if not long before, and cannot be re-established.

On June 27, 2017[12] Seth Kohl was arrested for his inappropriate sexual contact with female patients. It was widely covered in the press making it unlikely that anyone would want to use his services after that. *See, e.g.,* https://www.timesunion.com/news/article/Albany-chiropractor-accused-of-groping-patients-11250914.php , https://www.news10.com/news/chiropractor-accused-of-having-sexual-contact-with-female-patients-arrested_20180313101637870/1037450376 , http://baddoctordatabase.tumblr.com/post/162332542402/dr-seth-kohl http://spectrumlocalnews.com/nys/capital-region/crime-safety/2017/09/29/albany-chiropractor-faces-new-sexual-abuse-charges A sticky note appeared on his office door that day saying the office was closed and remained there for at least a week. Neither I nor my husband saw Mr. Kohl and his wife, who served as his receptionist, for several weeks after that – and then, only when he came to do minimal property maintenance in grubby clothes. From June 27, 2017[13] through the sale of his property, I never observed him wearing the "work clothes" he always wore when he came to perform chiropractic services, i.e., he typically wore dress pant slacks, a button down shirt and tie when he arrived in the morning for work. From June 27, 2017[14] on, neither I, nor my husband , saw any evidence of patients coming and going as I had over the years of living across the street from this property. (See Attachment J)

The first time I became aware that the property was being actively marketed was on or about July 30, 2018 – a full 13 months after Mr. Kohl's arrest and the cessation of his practice. This is well beyond the 12 month time frame for discontinuance of a nonconforming use.

In my October 2, 2018 FOIL request, I asked for any documentation that Mr. Spencer relied upon in making a determination that there was a continuing non-conforming use as 372 New Scotland Avenue and received nothing. Mr. Spencer's October 17th does not state what

[12] Date has been corrected on 11-20-18 – original incorrectly listed June 27, 2018 here
[13] Date has been corrected on 11-20-18 – original incorrectly listed June 27, 2018 here
[14] Date has been corrected on 11-20-18 – original incorrectly listed June 27, 2018 here

evidence he considered or relied on to make this determination. His August 9th letter solely states

> "Your application states that up until September 2017, the property was used as an office."

Thus, it appears that the sole "evidence" Mr. Spencer relied on is a single unsworn, unsigned statement in the application submitted by a person who had no personal knowledge of the facts stated therein. The statement involves circumstances at 372 New Scotland Avenue that existed 11 months prior to the applicant even having an interest in the property. This is not competent "evidence" by any standard.

The USDO clearly anticipates that the Chief Planning Official will require the applicant to provide substantial competent documentary evidence before issuing a determination confirming a continuing nonconforming use by saying:

> "it shall be the applicant and/or property owner's responsibility to provide any and all documentation of evidence required to support a nonconformity claim." USDO §375-5(F)(1)

The USDO then lists the types of documentary evidence that is expected, including

> "evidence of goods and services rendered from the property (dated or with an affidavit as to the data of the evidence), or notarized affidavits form the owner of property within 300 feet of the subject property." USDO §375-5(F)(1)(b)(ii)

It would have been easy enough for Mr. Spencer to require the applicant to get Mr. Kohl to submit redacted evidence of patient payments connected with billings for services rendered after June 27, 2017[15] prior to making a determination or require the applicant to speak with neighbors. If he had, he more than likely would have had gotten the real story as to whether the office was still open after June of 2017 through [16]August of 2018 and[17] had been a continuing legal nonconforming use. The failure to require the applicant to provide the bare minimum of real proof, undermined the rights of all adjoining property owners as well as residents in the neighborhood who oppose the commercialization of residential neighborhoods.

As a result, it is clear that Mr. Spencer's decisions regarding his October 17th and August 9th determinations regarding the non-conforming status of 372 New Scotland Avenue did not meet the minimum standards for issuance of the certificate of nonconformity. He had no evidence from a competent source before making this decision and made an assumption regarding "records available to this office" – which presumably was the City Directory. Since there was no real evidence to support the decision, the decision regarding nonconformity should be declared null and void.

[15] Date has been corrected on 11-20-18– original incorrectly listed June 27, 2018 here

[16] On 11-20-18, inserted correction of "after June of 2017 through"

[17] On 11-20-18 inserted "and" to read properly.

If this decision is allowed to stand, then every property owner in the city should be concerned that the City can and will issue certificates of nonconformity on the unsworn statements of individuals with no personal knowledge who have a vested interest in the outcome – thereby allowing non-conforming uses to flourish.

B. The final decision issued by Mr. Spencer in his October 17, 2018 email should be reversed because he improperly determined that a business providing "micropigmentation" and "esthestician" services is an "office" use when such a business is clearly a "personal or business service."

I ask that the BZA reverse this determination and make the findings requested at the beginning of this appeal for the reasons spelled out and the information and documentation provided in connection with POINT I above.

C. The final decision issued by Mr. Spencer on October 17, 2018 should be overturned because he improperly determined that the USDO only requires the sign in front of 372 New Scotland to be covered up when it became obsolete – as opposed requiring its removal as required by Section 375-(1)(5)(ii)(E).

In May and June of 2018, I asked Mr. LaJoy, Director of Buildings and Regulatory Compliance, and others to require Mr. Kohl to remove all signs advertising chiropractic services at 372 New Scotland Avenue because Mr. Kohl was no longer practicing as a chiropractor due to his arrest and conviction for sexually abusing patients. Despite my providing Mr. Magee and Mr. LaJoy with USDO §375-4(I)(5)(a)(ii)(E) which clearly requires the removal of any obsolete sign that no longer advertises an existing business on the premises, no action was taken.

At the end of July, this sign was covered with white board, and despite several inquiries, I was never told why this was allowed to persist until seeing Mr. Spencer's October 17, 2018 email determination which noted that he asked the applicant to cover up the sign, rather than remove it because of a conflict between two USDO provisions.

USDO §375-4(I)(5)(a)(ii)(E) expressly states:

> "Any on-premises sign that no longer advertises an existing business conducted or product sold on the premises upon which such sign is located **shall be removed** unless it is architecturally or historically significant, or is considered to be a character-defining feature of the building or district." (*emphasis supplied*)

The language is clear and unequivocal; removal of the sign is required.

Mr. Spencer's October 17, 2018 email notes that he believes there is a conflict between this provision and USDO §375-4(J)(d)(iii) regarding "sign maintenance" which provides

> "Signs that contain messages that have become obsolete because of the termination of the use or business or product advertised, or for

> some other reason, shall have such message removed within 60 days after becoming obsolete, unless the sign is architecturally or historically significant, or is considered to be a character-defining feature of the building or district, or has been approved as an historic sign by the Historic Resources Commission."

Mr.Spencer's interpretation ignores USDO §375-4(I)(2)(b) which states:

> "In [sic] there is any other conflict between two or more sign regulations in this USDO, the stricter provision shall apply."

In this case, the removal of the sign in its entirety is clearly the stricter provision. Since the removal of the particular message rendered the entire sign useless, requiring the removal of the entire sign is also the only reasonable interpretation. Instead, what happened is a New Scotland Avenue residential district wound up with an oversized white billboard like this:

If Mr. Spencer's interpretation is allowed to stand without correction, then we can expect similar blank, white billboards to be allowed to persist indefinitely throughout the city with the City having relinquished any ability to require their removal.

I note that it was not necessary to find there was a conflict between these two provisions. A reasonable interpretation of the two provisions taken together would be to allow a sign to remain up if, after the removal of the obsolete message or business name, the sign still advertises services or the name of another business at the location, and only require removal of the entire sign when all business names listed are no longer accurate for the location. This interpretation is consistent with the stated purposes of the sign ordinance and in the best interests of our community to avoid having our city peppered with blank, obsolete signs that serve no purpose other than to litter the streetscape. As a result, I ask that the Board of Zoning Appeals either rescind or modify Mr. Spencer's interpretation to be consistent with this more reasonable interpretation of the alleged conflict between the code provisions.

POINT III

The Certificate of Occupancy issued on August 29, 2018 stating that a "personal or business service" is a permitted use at 372 New Scotland Avenue should be declared null and void because this is clearly a "substitution" of the alleged legal non-conforming use of an "office" which required the prior approval of the Board of Zoning Appeals pursuant to USDO §375-5(F)(3)(d) and it did not have such prior approval. Further, a determination should be made that the proposed new "outpatient/personal business use" does not meet the criteria for a BZA determination that the "alternate use is in the same or a less intense land use category based on Table 375-1(Permitted Use Table)."

The Certificate of Occupancy issued on August 29, 2018 states that the uses permitted at 372 New Scotland Avenue are "Outpatient/Personal Business Service." (Attachment C) Since this property was considered a legal nonconforming "office" use prior to August 29, 2018, this clearly represents a "substitution" or "change of use." (See Mr. Spencer's August 9, 2018 letter and October 17, 2018 email – Attachments B and E) Mr. LaJoy expressly labeled it as a "change of use" on September 27, 2018 (Attachments C and D)

USDO §375-5(F)(3)(d) provides

> "No nonconforming use may be converted to a different nonconforming use unless the Board of Zoning Appeals determines that the alternative use is the same or a less intense land use category based upon Table 375-3-1 (Permitted Use Table.)"

Since this "change of use" was never submitted to the Board of Zoning Appeals, this certificate of occupancy must be declared null and void.

I further ask the Board of Zoning Appeals to find that USDO §375-5(F)(3)(d) prohibits this substitution of use because it is not "the same or a less intense land use category" pursuant to because :

a. "personal or business service use" requires a Conditional Use Permit in a MU-NE zone, and an "office" use is a permitted use in a MU-NE zone without a CUP. Thus, the Permitted Table of Uses clearly establishes a "personal or business service" use as warranting a higher level of review; and

b. Any conclusion that the operation of a "personal or business service" use are considered to be "the same or a less intense land use category" would essentially be a conclusion that the requirement for a "personal or business service" to obtain a CUP to operate in an MU-NE district is arbitrary and capricious.

I note that this is directly contrary to USDO Use Interpretation 100418.001, and as such, both must be declared to be null and void.

POINT IV

The decision issued by Mr. Spencer on August 9, 2018 improperly concluded that 372 New Scotland Avenue was a legal non-conforming "office" as of that date and should be reversed.

On August 9, 2018 Mr. Spencer issued a letter in response to Zoning Compliance Certification application concluding 372 New Scotland Avenue

> "was used as an office prior to the effective date of any regulations prohibiting such use. Such use therefor exists as a legally non-conforming use subject to the provisions of §375-5(F)(3) of the USDO."

As I noted in POINT II A above, this decision was not based upon any competent evidence. The Chief Planning Official failed adhere to the bare minimum requirements set forth in USDO §375-5(F)(1) for obtaining competent evidence before issuing this determination. Further, all of the evidence supports a determination that this is not a continuing legal nonconforming use because: 1. the individual providing chiropractic services on the premises before Mr. Kohl purchased the property lived on the premises and converted it to a "home office" use, thereby discontinuing any legal nonconforming use; and 2. Mr. Kohl discontinued the use of his office in June of 2017, thereby stopping discontinuing any possible allegation that there was a continuing legal nonconforming use in August of 2018.

I ask that the BZA declare this determination null and void and reverse this determination for the reasons spelled out and the information and documentation provided in connection with POINT II A above.

POINT V

All aspects of this appeal must be determined to be timely with regard to each and every decision made with regard to 372 New Scotland Avenue because:

1. **It is settled law that when property owners receive no actual notice of the issuance of a permit or a decision, they can appeal within 30 days after they reasonably became chargeable with notice. As I had no constructive notice of any decisions made, or applications made and I only received actual notice on September 27, 2018, this appeal is timely.**

It is settled law that when property owners who are adversely affected by a decision do not receive actual notice of a decision when it is issued, they can appeal within 30 days after they reasonably became chargeable with notice or receive actual notice. *See* Matter of Iacone v Building Department of Oyster Bay Cove Vil., 32 AD3d 1026 (1st Dept 2006); Farina v Board of Zoning Appeals, 294 AD 2d 499 (2002). Though I had inquired on September 10, 2018 whether the Buildings and Regulatory Compliance or Planning Department had received any inquiries regarding the zoning for 372 New Scotland Avenue, and its possible grandfather status, building permits or anything related to this property, I was not told about the August 9th decision or the August 29th decision until September 26th and 27, 2018, respectively. I also was expressly denied a copy of the August 29, 2018 Certificate of Occupancy despite four requests between September 27th and October 4, 2018 and was not provided with access to a copy until October 19, 2018. Therefore, this appeal for all matters addressed herein is timely.

My efforts to seek enforcement of the illegal nonconforming use and to learn of anything having to do with the marketing, sale and potential inquiries and determinations about this property and any zoning or code determinations have been extensive and been met with many blockades. The government officials should not be rewarded for their decisions to deny me information and refusal to provide me with copies of decisions on a timely basis by preventing my appeal. If the BZA requires more information about the saga I have been through in trying to acquire information about this property and related decisions and documents in order to declare this a timely appeal, I will be glad to provide that additional information.

2. The Chief Planning Official is required to post a final decision regarding a development application online within 10 days of the final decision and did not do so with regard to the Zoning Compliance Certificate

The Chief Planning Official is required to post a copy of any final decision regarding a development application online within 10 days of the final decision. USDO §375-5(B) states "[t]he following table lists the types of development applications authorized by this USDO…" The table referred to includes building permits and zoning clearance. The introduction to USDO §375-5(E) also makes it clear these are "development applications." The USDO regarding "zoning clearances" states that the zoning clearance process can be used "to confirm that a lot, structure, or use is a valid nonconforming lot, structure or use under the USDO." The application form on which Ms. Cronin submitted her request for a determination is entitled "Zoning Compliance Certificate Application." The form indicates it is used to identify the zoning district in which a property is located and provides a determination as to whether the current use of the property is a permitted, conditional or nonconforming use," and consequently, appears to be a "zoning clearance" development application.

Thus, any final determination regarding the zoning clearance of a property is required to be posted on-line within 10 calendar days of the determination. I have repeatedly checked the City Planning Department website since the posting of the "for sale" sign in front of 372 New Scotland Avenue and found no record regarding ANY actions taken with regard to 372 New Scotland Avenue. Consequently, any decision made before October 4, 2018 with regard to any zoning determinations made with regard to 372 New Scotland Avenue must be declared to be non-binding and void and this appeal is timely.

Wherefore, I respectfully request the Board of Zoning Appeals nullify all decisions made with regard to 372 New Scotland Avenue regarding its nonconformity, permissible uses, certificate of occupancy and related matters and find that the proposed uses are "personal or business services" that cannot be provided on the property because the property lost its nonconforming status, and in any case, the substitution is not permitted because it is a more intense use than the alleged existing nonconformity of an "office" use.

Sincerely

Judy L. Doesschate

Attachments

cc: L. Alpert
B. Glass