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Rule 1:40 Qualified Mediator

December 5, 2024

Via Email Only

The Township Committee of the Township of Lakewood
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Re: Ordinance 2024-40; 2024-41

Dear Sirs and Madams:

This office represents the interests of Giti Tenenbaum with regard to the issue of the Ordinances 2024-040 and 2024-041 which are before the Committee on Second Reading and public hearing at tonight's December 5, 2024, meeting. My client owns property located in the proposed overlay zone at issue, located at Block 499 Lot 19.02.

Ordinance 2024-40

Ordinance 2024-40 is purportedly being adopted pursuant to N.J.S.A. 40:56-1 *et seq.* The statute mandates that:

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[a]ll assessments levied under this chapter for any local improvement shall in each case be as nearly as may be in proportion to and not in excess of the peculiar benefit, advantage or increase in value which the respective lots and parcels of real estate shall be deemed to receive by reason of such improvement. N.J.S.A. § 40:56-27

Although the Court in *Crispino v. Twp. of Sparta* grappled with the assessment of a dam, the Court continually drew comparisons to N.J.S.A. § 40:56-27. “The justification for any special assessment levied for the purpose of financing a local improvement, N.J.S.A. 40:56-27, or an improvement to a privately owned dam, N.J.S.A. 58:4-12, is that the assessed property has received a benefit from the improvement.” Crispino v. Twp. of Sparta, 233 (N.J. 2020). However, “[i]f there is no peculiar benefit, advantage or increase in value to the property from the improvement, then there is no basis for imposing an assessment. Id.

Ordinance 2024-40 calls for the owners within the new School Overlay Zone to pay a local development assessment to the designated developer. There is no clear formula for how the assessment will be calculated, only that interest will be charged against all owners for the duration of the time that the developer is completing the improvements.

Under N.J.S.A. 40:56-21:

All assessments for benefits for local improvements under this chapter shall be made by the officer or board charged with the duty of making general assessments of taxes in the municipality, except where there is provided by law a board for the making of all such assessments, in which case all assessments shall be made by such board.

The governing body of every municipality in which no board is provided by law for the making of all assessments for benefits accruing from local improvements may by ordinance create a general board for that purpose, which board shall thereafter make all such assessments.

The assessment contemplated by Ordinance 2024-40 is not going to be assessed by any municipal board, but rather, by the Developer, Newport Join Venture, an entity that is comprised of property owners inside the Newport Improvement District. Per the ordinance, it will submit estimates of its cost to implement the improvements to the area, including its engineering fees, cost to actually construct the improvements, attorney fees, surveying, environmental studies, insurance, management fees, consultation fees, escrows, and bonding. Furthermore, it is unclear if the hearing procedures available to an assessed

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property owner under N.J.S.A. 40:56-26 will be honored under this ordinance. N.J.S.A. 40:56-26 provides that hearing be made available to any assessed property owner as to the particular benefit. The hearings are to take place before the board making the assessment and property owners are entitled to present witnesses. Here, it appears that Ordinance 2024-40 is simply determining that the Developer is entitled to reimbursement for the work that must be done if he would like to construct his project.

Interestingly, the Township is not performing the improvements themselves, nor are they contracting it out to the lowest bidder. Rather, as noted above, and in the ordinance, the Developer is undertaking the improvements as a result of a petition pursuant to N.J.S.A. 40:56-3. As per N.J.S.A. 40:56-3:

The governing body of a municipality may undertake any improvement mentioned in this chapter **at the request of a number of petitioners who shall agree to pay the cost of the improvement and all expenses incidental thereto, and any other charge imposed by the governing body. The petitioners shall file with the governing body a statement showing the improvement desired, the real estate owned by each of them, and the proportion of cost each is willing to pay.** The statement shall be verified by each of the petitioners and, before any such work or improvement is commenced, **the petitioners shall enter into bond with sufficient surety to the municipality in double the amount of the cost of the improvement** as estimated by the engineer of the municipality conditioned for the prompt payment of the cost of the improvement and all expenses incidental thereto and charges imposed. The governing body may require further security for such payment as it may deem advisable, and when so secured may proceed to make the improvement. Upon the completion thereof the governing body shall determine the cost and expense thereof **and cause the same to be collected from the petitioners.**

The meeting materials for this hearing do not contain copies of any of the documents related to this alleged petition. Neither the petition itself, the breakdown of the real estate owned by the petitioners, nor the costs each petitioner will be paying was included with the meeting materials. Further absent is the alleged Developer's Agreement that the Developer will or has entered with the Township to construct the improvements. As such, the public has no way of reviewing the full record before the Committee prior to the hearing.

Aside from the missing materials and resultant determinant to the public's right to participate, the ordinance here does not contemplate a situation where the petitioners under

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N.J.S.A. 40:56-3 pay the governing body to undertake improvements. Rather, it is a situation where the Developer seems to have petitioned for improvements, appointed itself to do the work, and is, with the assistance of the Township, demanding that everyone else in the district pay for it. At this point, it remains unclear as to whether or not all of the requirements of N.J.S.A. 40:56-3 have even been followed with respect to the estimates and bonding required within a petition.

Moreover, a 7% annual interest is going to be assessed against any property owner who is not a part of the Newport Joint Venture, based on the estimated costs. There is no provision in Ordinance 2024-20 for a timeline of when the improvements need to be made. As such, the accrual of interest is inequitable under these circumstances. Conceivably, the Ordinance allows the Developer to accrue interest fees for an indeterminate amount of time based on an estimated cost, and then collect a potentially inflated sum. This would lead to a windfall to the Developer well over and above the particular benefit to the property owners contemplated by the above statutes.

Furthermore, Ordinance 2024-20 allows certain non-developer single family homeowners to be exempt from paying the assessment, however, it obligates any future buyer to pay the full amount of the fee, plus 7% interest per year starting at the closing date. This provision also does not have an end date as to its effectiveness. This greatly devalues any single-family homeowner's property, subjecting the potential buyer to not only the above uncertainty, but to the very real possibility that they will be assessed a fee for potentially decades old improvements. Moreover, it does not speak to what happens if a residential owner is obligated by ordinance to connect to the newly available water and sewer system.

In fact, it appears that the Ordinance is specifically designed to benefit the interests of the Developer at the expense of the current residential owners who will now face the addition of new uses such as banquet halls, the overcrowding and uncertainty which comes with the deficient bulk requirements as outlined above, and the loss of their property values due to the interest accrual, lack of time tables, and unclear lot size requirements. To make matters worse, Ordinance 2024-40 obligates them to pay for this harm to their own interests.

As to my client specifically, her property is currently under deed restriction for use only as a single-family dwelling on a lot that is under 3 acres. The Ordinance, as it reads, opens her, and anyone else in her position, to the very real possibility that they would be unable to sell their home for fair market value, even a decade after the fact because the new buyer would be faced with a full assessment plus interest payments for 10-year-old improvements. It is worth repeating that there is no formula for calculating the assessment,

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nor is the assessment paid to a municipal body charged with such assessment. Rather, it is paid directly to the Developer based off of any costs they see fit to incur over any period of time they see fit to incur them. The Ordinance, as written, appears that it could amount to an illegal taking of my client's property in violation of her rights under the New Jersey Constitution.

Finally, the Committee should also be wary of Ordinance 2024-40's prohibition on "permits or approvals from any governing board" in the absence of written permission from the Developer. Furthermore, the ordinance states:

The Township shall not approve any Subdivisions, Site Plans, Site Plan Exemptions, Zoning Permits, Building Permits or Road Opening Permits for any development which impacts or benefits from the infrastructure improvements defined herein without (a) complying with the provisions of this ordinance; (b) written approval from the Developer and the General Contractor, approving said development, assuring that there is sufficient capacity for the infrastructure for the district; (c) that they have paid their pro-rata share reimbursement of the cost.

Ordinance 2024-40 will now prohibit an individual from being approved on an application for a currently permitted use, without sign-off from a third party. There is no standard which the Developer will be held to for his determination that "there is sufficient capacity for the infrastructure." As such, landowners are placed completely at the mercy of the Developer's whims, preventing them from the otherwise permitted use and enjoyment of their property and their rights to apply for applications for development under the Municipal Land Use Law. Such could constitute a violation of both a non-developer's property rights under the New Jersey Constitution, the Municipal Land Use Law, and the applicable unlawful takings laws.

Further, as the Committee is likely aware, N.J.S.A. 40:55D-90 prohibits moratoriums on development. As the Committee is also likely aware, schools are already permitted in the underlying zones. The above paragraphs call for an assessment from the Developer, with no definitive end date, as to whether or not the infrastructure is sufficient to support a given application by anyone aside from the Developer. Naturally, this determination, however it will be made, cannot be made until the improvements are constructed. As noted, there is no set timeline for the construction. As such, Ordinance 2024-40 constitutes an illegal moratorium on development and cannot be passed by this Committee.

Ordinance 2024-41

Ordinance 2024-41 amends the Lakewood Unified Development Ordinance (“UDO”) to create a School Overlay Zone. Ordinance 2024-41 underwent a master plan consistency review as required by N.J.S.A. 40:55D-26 on November 26, 2024. After the review, the Planning Board submitted a report, per the statute, to the Committee. That report, however, was not made a part of the materials for this public hearing. This office had to obtain a copy, attached hereto as **Exhibit A**, via an OPRA request. A member of the public who may have been interested in the ordinance, but unaware of the need to request it via OPRA, may reasonably presume that no consistency report was ever submitted due to the absence of same from the hearing documents for the Second Reading. As such, the Committee should table the Second Reading until the public has been properly appraised of the documents which make up the record for the Committee’s decision.

Based upon this office’s review of the Planning Board’s report, and the substance of Ordinance 2024-41, there is no realistic way for the Committee to find that the ordinance is Consistent with the Master Plan.

Firstly, the inclusion of wedding halls/simcha halls into the zone is at odds with the Master Plan of Lakewood, as can be seen through the Planning Board’s handling of Ordinance 2022-46, which was adopted in December of 2022. Specifically, Ordinance 2022-46 permitted banquet facilities as accessory uses to schools, in **non-residential zones** only. The Planning Board specifically included the limitation of school banquet halls to non-residential zones and made a finding of Master Plan consistency for Ordinance 2022-46 based thereon. The overlay zone at issue falls over the R-20 and R-40 residential zones and the A-1 Agricultural Zone. Per the Land Use Element of the Master Plan, the purposes of these zones are as follows:

A-1 Agricultural Zone: The purpose of the A-1 (Agricultural) Zone is to permit customary and conventional agricultural uses (incl., the processing or sale of agricultural products). Other permitted uses include: farmhouses and associated dwellings; single-family detached dwellings; places of worship, and public and private schools. The minimum lot size of the A1 (Agricultural) Zone is two acres.

R-20: the purpose of the R-20 (Residential) Zone is to permit single-family detached housing, places of worship, and public and private schools. The minimum lot size for single-family detached housing in the R-20 (Residential) Zone is 20,000 square feet.

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R-40: The purpose of the R-40 (Residential) Zone is to permit single-family detached housing, places of worship, and public and private schools. The minimum lot size for all permitted uses except houses of worship is 40,000 square feet.

It should be noted that wedding halls/simcha halls are not permitted in any of the above zones. The inclusion of this use into the School Overlay Zone implicates all of the concerns the Planning Board had with including wedding halls/simcha halls in a residential zone to begin with.

A zoning ordinance must be clear and explicit in its terms, setting forth adequate standards to prevent arbitrary and indiscriminate interpretation and application by local officials. J.D. Constr. Co. v. Freehold Tp. Bd. of Adj., 119 N.J. Super. 140, 149 (Law Div.1972); Schack v. Trimble, 48 N.J. Super. 45, 53 (App.Div.1957), aff'd 28 N.J. 40, (1958); Jantausch v. Verona, 41 N.J. Super. 89, 104, (Law Div.1956), aff'd 24 N.J. 326 (1957). Further, as per the court's analysis in Morristown Road Associates v. Mayor and Common Council and Planning Bd. Of Borough of Bernardsville, 163 N.J. Super. 58, 63 (Law Div. 1978):

As other ordinances, zoning ordinances are required to be reasonably definite and certain in terms so that they may be capable of being understood. The boundaries or limits of zones or district must be clearly and definitely fixed, and the restriction on property rights in the several zones must be declared as a rule of law in the ordinance and not left to the uncertainty of proof by extrinsic evidence. The rule of certainty and definiteness of zoning ordinances verges on or is identical with the rule that they must establish a clear rule or standard to operate uniformly and govern their administration, in order that arbitrariness and discrimination in administrative interpretation and application be avoided.

Ordinance 2024-41 stands in clear violation of the requirement for specificity. Firstly, the ordinance states that the bulk standards for school development and/or dormitories shall be governed by the underlying zoning requirements. The first issue is obvious: dormitories are not permitted under the underlying zoning.

The second issue is that when addressing the "Bulk Standards for School Development with Housing" in Paragraph 6, the ordinance indicates that "dormitories are not housing for purposes of this ordinance." The ordinance then proceeds to set forth the bulk requirements for "all school development and/or dormitories whether with or without

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additional residential housing as defined in Sections 9-11". The ordinance then lists the bulk standards associated with same. Interestingly, when one looks at paragraphs 9-11, specifically paragraph 11, one will see that the bulk standards for residential housing are entirely different than the ones listed for a school "with or without additional residential housing." As such, it is impossible to determine what the ordinance is indicating the standards to be. This is a clear and obvious violation of the preceding case law. It should be further noted that the existing underlying zoning similarly does not provide for permitting dormitories as a use whether principal or accessory.

Furthermore, Ordinance 2024-41 also permits various accessory uses which are "customarily incidental to the school use." Notably, the ordinance includes "wedding halls, simcha halls, or other such facilities" as permitted accessory uses, on the condition that they have sufficient parking. The ordinance then leaves the determination of the amount of parking required to the Planning Board pursuant to paragraph 5(b).

The ordinance then goes on to contradict paragraph 5(b)'s statement, and states, I paragraph 6, that parking for wedding halls and simcha halls "or other such facilities utilized as accessory uses to schools" will follow the requirements of UDO § 18-906 I(1)(a). There are two issues with this as well. First of all, UDO § 18-906-I(1)(a) specifically prohibits simcha halls in residential zones, which, comprise the entirety of the school overlay zone. Second, the ordinance does not define what is means by "other such facilities." It therefore appears that a school in the overlay zone, despite existing in a residential district, can operate any use which is similar to a wedding hall if they have an arbitrary number of parking spaces as determined by the Planning Board. It should be further noted that simcha halls do not have their own bulk standard requirements, nor are they specifically included within the bulk standards required of a school.

With the conflicting bulk standards for dormitories, and conflicting parking requirements for simcha halls, as well as the lack of bulk standards for simcha halls, the Planning Board does not have any standards to apply when reviewing applications for same. As such, there appears to be an impermissible delegation of the zoning powers, which are statutorily vested with the governing body. PRB Enterprises, Inc. v. South Brunswick Planning Bd., 105 N.J. 1 (1987). The planning board's role, conversely, is primarily advisory, and while it can review site plans and make recommendations, it does not have the authority to make zoning decisions. Id. It is well settled that absent statutory authorization, the powers delegated to municipalities and boards under the Municipal Land Use Law ("MLUL") cannot be delegated to another body or official. Dillner and Fisher Co., Inc. v. Architectural Review Bd. Of Stone Harbor, 246, N.J. Super. 362 (1990) The Committee therefore cannot adopt Ordinance 2024-41 without running afoul of the above cited law.

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Moreover, wedding halls/simcha halls also do not have any bulk standards associated with them in either the proposed School Overlay Zone or the underlying zoning. As such, this too is an improper delegation of zoning authority to the Planning Board pursuant to the above referenced case law.

Ordinance 2024-41 further contains confusing information regarding the acreage requirements. In Paragraph 6, it says that bulk standards for schools with housing (not including dormitories) “shall require a total of 3 acres within the Overlay Zone.” The bulk standards following this sentence, however, go on to discuss dormitories. Paragraph 10 similarly states that it applies to “residential development associated with school use, on lots with three (3) acre minimum developed for schools...” It continues that the density will be based on “total acreage.” Finally, Paragraph 11 requires a lot size of 3 acres for “residential development within the School Overlay Zone.”

It is unclear whether these are three separate requirements, or the same requirement repeated three times. Paragraph 6 seems to mandate that a school with housing have a lot size of at least 3 acres. However, it uses the word “total”. As such, it is unclear if the 3-acre limit applies to an individual lot upon which a school and housing are being built, or to a swath of lots that add up to 3 acres, even if one of those lots is only one or two acres. This brings up the further question as to what lots would count toward this total and what the rationale for same is. Finally, it brings up the issue of how the lot area effects the required bulk requirements such as setbacks, buffers, building height, and building coverage if housing is placed on a lot that has less than 3 acres.

Paragraph 10, on the other hand, seems to require that it applies to residential developments associated with schools, where the school use occupies at least 3 acres. This again leaves no clear requirements for the housing component and no definitive lot size for it, nor does it define what it means by “total acreage.” This particularly contrasts with Paragraph 11, which seems to contemplate that all residential development within the School Overlay Zone requires a lot size of 3 acres.

The ambiguity and seemingly contradictory language above leave the Planning Board with no definitive requirements to apply when reviewing and approving applications made in this zone. As explained above, a zoning ordinance may not delegate zoning authority to the Planning Board. It is further worthwhile to note that there is no clear lot size requirement listed for the stand-alone dormitory use.

Ordinance 2024-41’s prohibition on any new approvals, including Planning Board approvals, for any development in the overlay zone until various improvements, such as

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sewer and water, and a minimum of three egress roadways are constructed. As the Committee is likely aware, N.J.S.A. 40:55D-90 prohibits moratoriums on development.

In fact, a recent case, Augusta Holdings, LLC v. Township of Lakewood, 2021 WL 1961136 dealt with a similar ordinance. The ordinance in that case changed the densities of the R-40 Zone. However, the changes did not go into effect until various roadway improvements had been completed. The ordinance did not establish a timeframe for completion of these improvements. As such, the ordinance was struck down by the trial court. The decision was then upheld by the appellate court.

Finally, on the map provided with Ordinance 2024-41, there does not appear to be any discernable pattern as to why some lots are included and others aren't. The Overlay Zone itself is irregularly shaped and appears to run straight through various neighborhoods. There is no explanation for the bizarre shape, especially in light of the underlying zoning not allowing for dormitories or wedding/simcha halls. This is only made more unusual by the fact that various parcels located directly adjacent to the school overlay zone are in fact owned by schools, begging the question as to why they were not included, yet many residential properties were.

Based upon the above, it is our position that the Committee cannot adopt either Ordinance. We would request that this letter be made a part of the record for the Committee.

Naturally if you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Vincent J. DelRiccio
VINCENT J. DELRICCIO

VJD/kjn
Enclosures

EXHIBIT A



Municipal Planning Board
212 Fourth Street
Lakewood, NJ 08701
amorris@lakewoodnj.gov

December 3, 2024
L-24-013

Mayor & Township Committee
231 Third Street
Lakewood, NJ 08701

Re: Ordinance 2024-041 – Regarding a school overlay zone
Ordinance 2024-040 – Regarding recapturing the cost of improvements

Dear Committeemen:

At the Planning Board meeting of November 26, 2024, the Planning Board reviewed and discussed the above-referenced Ordinances. The Board found them in conformance with the Master Plan with 7 affirmative votes, conditioned upon revisions being made to address the following items:

- Clarify that neither a CO nor a TCO can be issued prior to sewer and water infrastructure being installed in the zone.
- Provide parking standards for simcha halls and daycares.
- Clarify the bulk standards that apply to dormitories.
- Clarify the permitted density for residential development.
- Clarify the bulk standards for residential development, including providing a maximum height for duplexes and single-family dwellings.

The Board did not provide comments pertaining to the recapture Ordinance but appreciate the provision of same for their information.

Should you have any questions, please contact the office at (732) 364-2500 extension 5238.

Sincerely,

Ally Morris
Planning Board Administrator

cc: Lauren Kirkman, Township Clerk
Harold Hensel, Esquire