

1650 CORPORATE ROAD WEST,  
LLC,

Plaintiff-Appellant,

vs.

THE TOWNSHIP COMMITTEE OF  
THE TOWNSHIP OF LAKEWOOD,  
THE TOWNSHIP OF LAKEWOOD  
PLANNING BOARD, JOHN DOES 1-  
100 (A FICTITIOUS NAME FOR  
PERSONS PRESENTLY UNKNOWN)  
AND XYZ, INC., 1-100 (A  
FICTITIOUS NAME FOR A  
BUSINESS ENTITY PRESENTLY  
UNKNOWN)

Defendants-Respondents

: SUPERIOR COURT OF NEW  
: JERSEY LAW DIVISION:  
: OCEAN COUNTY

: DOCKET NO: A-4035-23

: ON APPEAL FROM THE FINAL  
: ORDER ENTERED BY THE  
: SUPERIOR COURT OF NEW  
: JERSEY, LAW DIVISION, CIVIL  
: PART, OCEAN COUNTY

(OCN-L-203-23)

CIVIL ACTION

: SAT BELOW: HON. FRANCIS  
: R. HODGSON, JR., A.J.S.C.

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**BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, 1650 CORPORATE ROAD WEST, LLC**

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Dated December 16, 2024

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Order Denying Motion for Reconsideration dated November 17, 2023

Order Granting Defendant Lakewood Township Committee Partial Summary Judgment dated January 19, 2024

Order Denying Extension of Time for Filing of Document dated January 19, 2024

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Transcript 4T – (Oral Decision Denying Motion for Reconsideration dated November 17, 2023, by the Honorable Francis R. Hodgson, Jr., P.J.Ch.P.)

Transcript 5T – (Oral Decision Granting Defendant Lakewood Township Committee Partial Summary Judgement dated January 19, 2024, by the Honorable Francis R. Hodgson, Jr., P.J.Ch.P., and the Order Denying Extension of Time for Filing of Document dated January 19, 2024, by the Honorable Francis R. Hodgson, Jr., P.J.Ch.P.)

**Statement of Facts/Procedural History<sup>1</sup>**

On October 19, 2022, the Committee posted their agenda for their regular meeting of October 20, 2022 (**Pa0155a**) that Ordinance 2022-046 (“Ordinance”) was scheduled for a First Reading at said meeting. Item (E)3 on the agenda stated as follows:

2022-046 An Ordinance of the Township of Lakewood, County of Ocean, State of New Jersey, Amending and Supplementing Article IX (“Zoning Districts and Regulations”) Section 18-906 of the Unified Development Ordinance of the Revised General Ordinances of the Township of Lakewood

The Ordinance itself was posted under the “meeting materials” on a separate page of the website. (**Pa0160a**) The Ordinance read, in relevant part:

**18-906 I. Public and Private Schools.**

In all zones where schools are permitted uses, catering facilities and banquet halls shall be allowed as accessory uses in the school buildings, provided the following parking requirements are met:

Where the section of the school utilized for catering and banquet functions is 800 square feet to 1,999 square feet, 0.75 parking spaces shall be required for every 100 square feet of area utilized for catering and banquet uses, and if the section of the school utilized for catering and banquet functions is 2,000 square feet of greater, then 1.0 parking spaces shall be required for every 100 square feet.

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<sup>1</sup> The Procedural History and Facts are inextricably linked and are therefore presented together.

On October 20, 2022, Plaintiff, through counsel, sent a letter to the Committee detailing some preliminary objections to the Ordinance (“First Reading Objection”).

**(Pa0166a)**

At the October 20, 2022 hearing, Plaintiff, as well as numerous members of the public, attended to voice their objection to the Ordinance. The October 20, 2022 hearing was only held virtually, with the only options for access being the Cisco WebEx conferencing software, or an audio only telephonic call-in number. Plaintiff’s counsel was unable to access the meeting via the Cisco WebEx video software, and instead, had to call in telephonically.

Plaintiff’s counsel briefly stated the objections contained within the First Reading Objection. Dennis Kermis, a member of the public, also expressed his objection to “Simcha Halls” being permitted in schools, noting the unmanageable traffic which already exists. In response to Mr. Kermis’ concerns, according to the Meeting Minutes, “Mayor Coles explained this is for future applications.”

**(Pa0170a)**

The Committee then moved on to the comments which were e-mailed in by members of the public. Mayor Coles refused to read each comment in its entirety on the record, and instead directed that they be posted online and forwarded to the Board.

Shaya Stern stated that the parking requirement should be much higher, suggesting “1 space per patron of the banquet hall capacity,” as is required for banquet halls within hotels in the Cedarbridge Redevelopment Zone and that the industrial park should be excluded from the list of permitted zones. **(Pa0186a)**

Adam Bergstein objected to the Ordinance, stating that 1 space per 100 square feet of banquet hall space is inadequate. **(Pa0187a)** He noted that banquet halls within religious establishments already use this ratio and as a result, “The neighbors and simcha attendees suffer greatly from these traffic nightmares.” Bergstein commented that the ratio of 1 space per every 1 attendee who can be accommodated by the facility, as is the case for hotel banquet halls, and asked that the rationale for using a lower parking requirement than hotel banquet halls require. According to the Meeting Minutes, the Committee neglected to answer this inquiry. **(Pa0170a)**

Shmiel Feldman stated that the proposed parking requirements would only “make things worse”. **(Pa0188a)** Feldman suggested a ratio of 1 space per person of banquet hall capacity, as is the case for banquet halls within hotels. Feldman further noted that the Ordinance will require notice to all affected property owners and asked how the Committee planned on meeting this requirement. As per the Meeting Minutes, the Committee failed to answer Feldman’s inquiry. **(Pa0170a)**

Eve Teichman stated that it needs “way more parking”. **(Pa0189a)** Simcha Steinberg inquired as to how the Committee arrived at the parking ratio. **(Pa0191a)**

As per the Meeting Minutes, the Committee did not answer this inquiry. Steinberg noted that he used to live near a banquet hall and that illegal parking and blocked driveways were a regular problem. Steinberg also recommended a parking ratio of one space per patron of the banquet hall capacity, as with hotel banquet halls.

Mordechai Schwartz stated that the Ordinance, “may be causing more harm than good by permitting banquet halls but creating parking nightmares.” Schwartz also urged the Committee to use the one space per patron of the banquet hall capacity ratio found within hotel banquet halls. **(Pa0192a)**

Shloimy Weiss noted that the parking ratio was, “wholly inadequate,” and recommended that the Committee use the hotel banquet hall ratio of one space per each person of banquet hall capacity. Weiss noted that the Ordinance is unclear as to whether the proposed parking is independent from or overlapping with the required school parking. Finally, Weiss stated that the Ordinance should not apply to banquet halls within the Industrial Park. **(Pa0193a)**

Shloimy Spira commented that the parking ratio is insufficient. **(Pa0194a)** Further, Spira commented that if the Ordinance passes, “neighbors will be forced to suffer from crazy congestion with no right to object.” Interestingly, Spira’s comments were not contained within the Meeting Minutes. **(Pa0170a)** Abraham Birnbaum, stated that the inadequate parking, and the drastic increase in banquet halls that would result from this Ordinance would cause life threatening danger due

to the “impossibly congested roads”. (Pa1095a) Dvorah Waldman stated that the proposed parking requirement was only nominal. (Pa0197a) Waldman suggested that the parking ration should be at least one space for every two attendees.

After briefly skimming through the comments, the Committee took a vote to adopt the Ordinance at the First Reading. The Committee adopted the Ordinance and referred it to the Board for a consistency review pursuant to N.J.S.A. 40:55D-62(a).

Notice of the Ordinance’s introduction was published on October 26, 2022. (Pa0199a) The Notice listed the Ordinance by title and directed the public to the Township’s website to view a full copy of the Ordinance. The Notice stated that the Ordinance would be considered for final passage by the Committee on December 8, 2022 via Cisco WebEx. The Notice did not contain a link to the meeting, nor did it contain the information for logging in to the meeting. The Notice indicated that the public could e-mail either from 48 hours to 6 hours prior to the meeting, or during the meeting itself.

On November 15, 2022, Plaintiff’s counsel sent a letter to the Committee and Patrick Donnelly (“Donnelly”), the Municipal Manager, notifying them that the October 20, 2022 First Reading’s virtual forum, as well as the lack of clear instructions of how to access the virtual hearing, caused difficulties connecting to said meeting. (Pa0201a) The letter further requested that the Committee provide clear instructions for logging on to the December 8, 2022 hearing, and also notified

the Committee that Plaintiff would be presenting expert testimony and exhibits. Plaintiff received no response from the Committee or Donnelly.

The Board's consistency review was scheduled for November 15, 2022. The Agenda for the consistency review did not contain any reference to the Ordinance specifically, nor did it contain any description of what the Ordinance proposed to do. Rather, the agenda simply listed, "Ordinance for Review." (Pa0203a)

At the outset of the meeting, Board Attorney, John Jackson ("Jackson") provided the Board with an overview of what must be determined<sup>2</sup>. Jackson further speculated that the Committee was either trying to make "a legislative determination that catering facilities and banquet halls are allowed as an accessory use [to schools] to take away that question," (1T: p5, ln 3-6) or trying to "provide some guidance in determining the appropriate number of parking spaces by ordinance for catering halls when they are a part of a school." (1T: p6, ln 2-6) He then stated that the question of what the Committee's intent was, "would be what the Board would have to determine<sup>3</sup>." (1T: p6, ln 5-7)

Jackson then stated that the "second part of the question is whether this is consistent with the Master Plan." (1T: p6, ln 8-10) Jackson presented two paragraphs that he selected from the Master Plan's *mission statement*, as opposed

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<sup>2</sup> The Transcript of the Lakewood Planning Board Meeting on November 15, 2022 has been submitted as 1T

<sup>3</sup> As will be explained below, this is an inaccurate statement of the Board's statutory duty.

to the land use or housing elements, and stated, “So perhaps you could view this as consistent, because by taking away the ambiguity... it provides sufficient educational, recreational, and community facilities to meet future needs.” (1T: p7, ln 4-10) Jackson did not offer any opinions regarding what in the Master Plan may suggest the Ordinance is inconsistent with its Land Use element nor did he offer any explanation of how a wedding is associated with a school.

The Board then opened the meeting to the public. At no time did the Board address the public comments which were sent by e-mail to the Committee, which had supposedly been forwarded to the Board.

Plaintiff was represented by Robert C. Shea, Esq (“Shea”). Professional Planner Gordon Gemma (“Gemma”) was then sworn in to testify on behalf of Plaintiff.

Gemma testified as follows:

I remember I was back here when you went through the Master Plan. You spent a lot of time doing that. It's an important document to guide your town. So, that's something that you should really consider. Because one of the sections of the statute you've got to consider, and that's section NJ 55D-62A, and that says that an ordinance, quote, shall be drawn with a reasonable consideration to the character of each district and its particular suitability for particular uses and to encourage the most appropriate use of land, end quote. So, you've got to look at the particular suitability of each zone and does this ordinance effectuate the particular suitability. That's a statutory standard you've got to consider. (1T: p23, ln 10-25)

Gemma then testified:

And according to Section 18-906A of your land use, a school can be setback 20 feet from a buffer requirement from a nearby residential use or district and 10 feet from a nearby nonresidential use or district. And that's interesting. You didn't use the word lot line. You used the word use. So, you can have a school on somebody's property line and if the house is 20 feet away, that can be a banquet facility 20 feet away from somebody's house, because the setbacks for banquet facility are the same setbacks for schools. And when you look at consistency, you've got to say, these are two distinct uses. Not many schools that I'm aware of go on until all hours of the night and have festivities and catering. **(1T: p25, ln 6-25)**

Gemma then proceeded to address the Master Plan, stating:

Page eight, the Land Use Strategies, the ones that the Master Plan, the statute says you've got to find consistency with the land use element. It says, create a balanced and compatible arrangement of residential businesses and industrial land uses and minimize land use conflicts. Does this minimize land use conflicts? You have to ask that question.

Now, the banquet -- now, by the way, my favorite in the land use section is to discourage deviations from established land use patterns that would permit incompatible and/or conflicting land uses being developed adjacent to one another. The language speaks for itself. That is your land use strategy and your Master Plan that you adopted. Does this achieve that goal or is it contrary to the very intent of that goal? **(1T: p26, ln 1 – p27, ln 15)**

Gemma also noted that the Master Plan specifically addresses banquet halls within houses of worship, which should “be designated as a distinct use and as a designated conditional use with specific standards addressing adequate lot area, sufficient off-street parking, adequate setbacks, buffers, and other requirements,” **(1T: p27, ln 23 – p28, ln 1)** whereas, it does not even consider them within schools. Gemma testified that the proposed Ordinance takes only parking into consideration.

Gemma testified:

This Board's narrowly defined under Section 64 of the land use, is it consistent or is it inconsistent. And in my opinion it is inconsistent because of those standards and those goals that you have and because you said specifically, if you're going to do this, look at the whole picture, because, otherwise, what happens is everybody who has a school, regardless of how big the lot is, how small the lot is, regardless whether you have a buffer or no buffer, it comes in front of this Board and says I've got a permitted use, you can't deny me, it's permitted. (1T: p30, ln 1-15)

Board Planner, Mr. Magno, then stated that he had not been asked to do a review of the Ordinance and its consistency with the Master Plan. Chairman Rennert then stated, "I don't think its consistent, to just say across the board that banquet halls are permitted." (1T: p31, ln 17-19) Jackson recommended that the Board ask the Board Planner to give a report and recommendation. Board Member B. Stern asked whether a 100,000 square foot banquet hall would count as an accessory use to a 10,000 square foot school. (1T: p34, ln 17-20) Jackson responded that the Board would need to determine that on a case-by-case basis and, "develop doctrine as you [the Board] went along." (1T: p34, ln 20-24)

The Board then asked that Gemma draft a report outlining his analysis of the Ordinance and submit it to the Board. (1T: p40, ln 8-11) The Board decided to form an ad hoc committee to review the matter. Shea indicated that Gemma would provide his report, and also requested that the Board provide a copy of any memorandum prepared by Mr. Magno.

On November 22, 2022, Plaintiff sent a letter to Morris and Jackson containing Gemma's report. (Pa2031a and Pa0234) The letter also asked that Plaintiff be provided with a copy of any consistency evaluation prepared by Mr. Magno.

Gemma's report emphasized several sections from the land use element of the Master Plan:

- Create a balanced and compatible arrangement of residential, business and industrial land uses and **minimize land use conflicts.**
- **Preserve and protect existing viable residential neighborhoods** and encourage upgrading of residential neighborhoods as appropriate.
- **Discourage deviations from established land use patterns that would permit incompatible and/or conflicting land uses being developed adjacent to one another.**

Gemma's report pointed out that the Master Plan specifically states:

There has been an ongoing issue of encroachment of incompatible uses in the Lakewood Industrial Park. **Development of certain non-industrial uses that generate a high volume of traffic should be discouraged** in order to: mitigate the potential for land use conflicts; and, ensure adequate and suitable space for industrial development within the township and, therewith, promote the overall economic development of the township. (*emphasis added*)

Gemma's report stated that banquet halls are one such use that generates a high volume of traffic and as such is specifically inconsistent with that above language of the Master Plan.

On November 23, 2022, Morris submitted an internal memorandum to the Board stating that she has "reviewed proposed Ordinance 2022-046." (Pa0234)

Despite being neither a professional planner nor a professional engineer, Morris made the determination that, “Historically the Board has considered banquet facilities to be an accessory use to schools, synagogues, and hotels, and has approved various applications as such.” She also made an inaccurate conclusion in her report that banquet halls, while permitted in hotels, are not listed in UDO as a “permitted accessory use.” (same is found within the definition of a “hotel” under UDO § 18-200) In an e-mail, Morris confirmed that no Board Professional was composing a report and that she was relying on “personal experience.” (Pa0247a)

The agenda for the November 29, 2022 Board meeting once again simply listed “ordinance for review.” (Pa0250a) At the outset of the hearing, Chairman Neiman made the following comments<sup>4</sup>:

This is just, they're asking us for our recommendation to look to see if we feel that these parking spaces that they require are suffice. (2T: p4, ln 15-21)

The Board Chairman did not mention the Board’s obligation to render a decision regarding the consistency with the Master Plan per N.J.S.A. 40:55D-62, but rather, entered a conversation about the ideal parking ratio.

Terrence Vogt, the Board Engineer, (“Vogt”) then stated:

Chairman, just one other point, I think Yair had mentioned this, was to make sure that it was understood that **these were additional spaces above and beyond what would be required for the principal use** and

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<sup>4</sup> The Transcript for the Lakewood Planning Board Meeting on November 29, 2022 was submitted as 2T

that the principal use parking spaces would have to be free for purposes of use of the accessory. (2T: p7, ln 16-22)

Board Member Flancbaum then stated:

**we should come up with a better parking ratio to ensure that all the parking for these types of affairs can be onsite**, so it's safe and there's enough room for people to come and go... And what happens is, you get the overflow of cars onto side streets. Whether or not it's legal to park on the street, which usually it is, you know, it's just, it's just bad, you know, if you have cars up and down residential blocks, it's tough to get through, it's not safe. (2T: p10, ln 3-21)

Chairman Neiman then suggested a parking ratio of one space for every 40 square feet. Board Member Raitzik then inquired as to the parking ration for hotel banquet halls in the Cedar Bridge zone. (2T: p17, ln 15-19) Shea informed them that the ratio is “one space per every one seat of the seating load count” of banquet hall occupancy as per Ordinance 2021-24.

Vogt commented that he supports the idea of using gross floor area for the parking requirement. (2T: p24, ln 5-11)

Board Member Flancbaum agreed, stating:

The only way I would do it is if it was gross floor area, the whole thing, the hallway, the proposed rooms that you see on the plan, **half the time we don't see plans anyway**, the whole floor area. (2T: p27, ln 8-12)

Shea then pointed out to the Board that the hotel banquet hall standard was adopted only one year ago, in 2021, and that a deviation without any justification now appears to be arbitrary. The hearing was then opened to the public.

Abraham Barenbaum commented that in general, there are too many banquet halls, and it is a mistake to try to institute more. He further commented that the Ordinance, “looks like a deliberate attempt by people with skin in the game, special interests, whatever you want to call them, to ruin the lives of the Lakewood taxpayers at the expense, because they want to make a little bit more money.” (2T: p37, ln 19-24) In response to a comment by another member of the public regarding the Industrial Park, Chairman Neiman stated:

...why is it fair to all the people in industrial park who paid a lot for their office space, warehouses, or whatever to have all these cars in front? It doesn't. It doesn't work. (2T: p41, ln 15-18)

Jackson then reviewed some notes from the discussions, stating:

I just heard **one per 40**. I heard **not in residential areas**. I heard some people say okay in residential areas. You had discussions with the **count, all areas**, like ballroom areas or square footage or building size. You asked to **give an allowance for a school** use, for example, if there's a school, do you double count the parking or do you give less than the total. You talked about **grandfathering**. You said you don't want **no parking in front of residential communities and on street parking could not count towards the parking count**. Those are just some of the notes I jotted down. (2T: p44, ln 16 – p45, ln3)

Per the transcript, no one had discussed “grandfathering.” The Board then turned abruptly to the question of the Ordinance’s consistency with the Master Plan. The Board did not address Gemma’s testimony or his expert analysis. Nor did the Board enter into any analysis regarding the Master Plan and the ordinance’s consistency relating to the same.

The Chairman then said, “I have on the table here one for every 45 square feet.” Jackson then intervened, saying, “Can I rephrase that in the form of a motion that I believe would be consistent with what you said?” (2T: p55, ln 2-5) Jackson then offered his motion as follows:

Be it resolved the Board agrees that an ordinance regulating banquet halls as an accessory use to schools is consistent with the Master Plan. The Board urges the following amendments, one space to 45 square feet. All assembly areas would be, must be included in the ratio. No on street parking within 100 feet. The higher number needed would control due to nonconflicting parking demands. If the lot is used for other reasons, such as parking and buses, it cannot be counted towards parking. No banquet halls are allowed as an accessory use in residential zones. (2T: p55, ln 7-19)

Board Member Flancabaum commented:

if the banquet facility is proposed to be 5,000 square feet, right, but the kitchen is 500 square feet, I don't want the parking ratios to be based on 4,500 square feet. I still want it to be a parking ratio based on 5,000 square feet. (2T: p57, ln 16-21)

Jackson stated he added another sentence accordingly. The Board then voted on Jackson’s motion with only Board Member Raitzik voting “no”.

On December 7, 2022, just one day prior to the Second Reading, the Committee posted the Ordinance, which now contained substantial revisions (“Amended Ordinance”). (Pa0254a) The Amended Ordinance read:

#### **18-906 I. Public and Private Schools**

In all **non-residential** zones where schools are permitted uses (Section 18-903) and the Oak Street Core Neighborhood Overlay Zone-1

(Section 18-902M), catering facilities and banquet halls **shall continue to be allowed** as accessory uses in the school buildings, provided the following parking requirements are met:

For the section of the school utilized for catering and banquet functions (to be known as the Banquet Hall space, but **not including bathrooms, food prep rooms, and facilities not associated with the Banquet Hall function, such as guest preparation rooms, etc.**) 1.0 parking space shall be required **for every 50 square feet thereof**. (*Emphasis added to reflect modifications*)

No planner report, Board Resolution, or any document containing the Board's comments and findings was present in the online materials for the December 8, 2022 hearing.

On December 7, 2022, Plaintiff's counsel e-mailed Morris to request a copy of any "resolution, report, or other documents containing the findings and recommendations of the Board." (Pa0261a) Morris responded that the Board Attorney communicated directly with the Township Attorney, and that the document may be available by OPRA request. She indicated that "no resolution was adopted." (Pa0260a)

On December 7, 2022, Plaintiff submitted an objection letter to the Committee ("Second Reading Objection"). (Pa0264a) The Second Reading Objection opposed the virtual forum for the December 8, 2022 hearing on the grounds that same is prohibited by the Open Public Meetings Act absent a public health emergency or state of emergency. The Second Reading Objection also:

- Requested that the Committee be *voir dire*d for conflicts prior to the vote.
- Argued that the Amended Ordinance is inconsistent with the Master Plan.
- Argued that the Public Notice was deficient.
- Set forth an overview of Plaintiffs substantive objections to the Amended Ordinance.
- Once again requested that the link and log in information for the hearing be provided.

At the December 8, 2022 hearing, Mayor Coles opened the hearing to the public, but imposed an arbitrary time constraint of four (4) minutes on any comment from the public. (3T:p9, ln 3-8)<sup>5</sup> Shea commented that the alleged Board report that the Committee is relying on was never made available to the public.

Shea further stated:

In addition to that, words such as etcetera are being used in the new ordinance. God knows what that means. Certainly ambiguous, to say the least, and certainly something that a member of the public or individual, really for that matter, trying to interpret this ordinance is almost impossible to define. (3T: p11, ln 20-25)

Shea placed objection to the virtual hearing format on the record. Shea then started to address the issue of conflict of interest, when he was interrupted by the Committee secretary, who notified him that four minutes had elapsed. Shea began to explain that he had more to place on the record for his client's objection, when Donnelly, without prompting, said, "No, you're good" and muted Shea's microphone.

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<sup>5</sup> The Transcript of the Lakewood Committee Meeting on December 8, 2022 was submitted as 3T

Secare, unprompted, then advised the Committee:

So, he's already told us this afternoon, he told Mr. Hensel and I, that **he's going to sue the town on this ordinance** and I think it should be noted that his letter will be incorporated into the record. He's got a court reporter here as well, **so when he sues us that will be taken into account.** (3T: p14, ln 7-13)

Secare's commentary was neither truthful, nor seemed to have any discernable relevance to the matter at hand.

Mordechai Schwartz objected to the parking ratio that the Committee selected and suggested that the ration of one space for each patron of banquet hall capacity be used, as with hotel banquet halls. (3T: p14, ln 14-25) Gabrielle Goldman asked if the Amended Ordinance would grandfather in existing banquet halls within schools without the need to return to the Board. Amazingly, Mayor Coles had no clear answer, stating, "I guess that would depend on whether or not they've been to the Board already to get that approval as an accessory use." (3T: p17, ln 4-7) Adam Bergstein stated that there is not enough parking required.

Gemma then presented planning testimony on behalf of Plaintiff, again constrained to the arbitrary four minute time limitation. He stated:

One, at one period of time you applied it to all the zones that had a school. **Now it's all the nonresidential zones**, as well as the Oak Street Overlay Zone. It's changed in the amount of areas where it can be permitted. Two, **the ratio of parking is different** and that's substantial. And, three, utmost important one, **unlike the original application, this contains a retroactive provision** indicating that schools shall continue to be allowed to have catering and banquet facilities.

That's a substantial change and in my opinion as a professional planner requires reintroduction (3T: p21, ln 5 – p22, ln 5)

Gemma further stated that the Committee had failed to provide personal notice to the property owners of the affected zones, that the Amended Ordinance was not drawn with reasonable specificity to the character of each district, as required by N.J.S.A. 40:55D-62(a), and that the Amended Ordinance had not distinguished a difference between the requirements for a school and those of the banquet hall.

In the very next sentence following Gemma's testimony, Mayor Coles closed the public hearing and called for a motion and a second to approve the Amended Ordinance. Committeeman Lichtenstein moved to adopt the Amended Ordinance, with Committeeman Miller seconding it. The Amended Ordinance was then adopted.

Following the December 8, 2022 hearing, Plaintiff obtained the "Board report" via OPRA request (PA0264a) The "Board report" was in fact an e-mail from Jackson to Hensel, in which Jackson purported to present the Board's findings. Jackson stated that the Board finds the Ordinance consistent with the Master Plan, and recommends, in relevant part, the following:

The Board believes that it is salutary that the Committee is codifying that banquet halls are an accessory use to schools in Lakewood. The Board has, for many years, viewed banquet halls as an accessory to schools, and has also requested that the governing body provide additional standards to guide the board while considering these types of accessory use applications. **The Board wants to emphasize that an**

**amendment to the zoning ordinance imposing conditions and standards associated with the accessory use of banquet halls must not disturb existing schools with banquet halls and that their use must be permitted to continue to be lawful as "grandfathered**

**The Board was concerned with banquet halls being present in strictly residential zones and recommends that the committee adopt criteria and specific overlay areas that would allow and exclude banquet halls in specifically identified neighborhoods.** The board discussed that consideration should be given to adopt further regulations that would assure appropriate buffering to protect residential homes from light, noise, activity and the like associated with banquet halls.

**Banquet halls should be permitted in the M-1 Zone.**

**In summary, the board believes that this ordinance is consistent with the master plan because it begins to regulate a common accessory use that currently has no tailored associated standards to guide the Board. (Pa0266-0267)**

*(emphasis added to show departure from the record of what was discussed and voted on at the Board. See 1T and 2T)*

This e-mail was not made available to the public with the materials for the December 8, 2022 hearing. On December 14, 2022, Notice was published of the Amended Ordinance's passage. **(Pa0282a)** A copy of the Amended Ordinance was provided to the County Board.

On January 15, 2023, Plaintiff filed a Verified Complaint and Order to Show Cause. **(Pa0075a)** The Plaintiff's request for temporary restraints of the Amended Ordinance was denied after a hearing on March 3, 2023 **(Pa0005a)** .

Following the passage of the Amended Ordinance, Plaintiff discovered further information. The Board voted on their 2022 calendar at the November 23, 2021 public meeting. **(Pa0424a)** The annual notice for same was published in two newspapers on December 4 and December 7 of 2021. **(Pa0437a)** The Board held their 2022 re-organization hearing on January 4, 2022. **(Pa0440a)** At the January 4, 2022 hearing, the Board did not vote on or re-adopt the 2022 calendar. The annual notice was never re-published within seven days of the January 4, 2022 re-organization hearing.

The Committee held their 2022 re-organization on January 3, 2022. **(Pa0447a)** The resulting annual notice was published only in the Star Ledger on January 5, 2022. **(Pa0460a)** Neither the October 20, 2022 meeting nor the December 8, 2022 meeting were noticed as special meetings.

Following this discovery, Plaintiff made a Motion to file an Amended Complaint to add two Counts regarding the failure of the Board and Committee to adequately notice the public of any of the hearing held with respect to the Ordinance or Amended Ordinance. The court granted same on June 30, 2023. **(Pa0009a)**

On August 18, 2023, Plaintiff filed a Motion for Summary Judgement on Counts One, Four, Five, Six, Eight, Sixteen, and Seventeen of the Amended Complaint. The Committee filed a Cross-Motion for Summary Judgement on the same Counts. On October 17, 2023, the Court signed an Order and issued a decision

dismissing Counts One, Four, Five, Six, Eight, and Sixteen of Plaintiff's Amended Complaint. (**Pa0012a and Pa0011a**) The Counts relevant to this Motion were as follows:

- COUNT FOUR: The Public Notice for the Second Reading was Deficient under N.J.S.A. 40:55D-63, N.J.S.A. 40:49-2, and N.J.S.A. 40:49-2.1 Due to Substantial Revisions to the Ordinance;
- COUNT FIVE: The Committee Violated the County Board Notice Provision on N.J.S.A. 40:55D-15(b) and N.J.S.A. 40:55D-16.
- COUNT SIX: The Committee Failed to Provide Personal Notice Pursuant to N.J.S.A. 40:55D-62.1
- COUNT SEVENTEEN: The Committee Violated N.J.S.A. 10:4-8 and 10:4-18, thus Rendering the October 20, 2022 and December 8, 2022 Hearings Ultra Vires

Of the above, Counts 4-6 were dismissed, while Count Seventeen was neither dismissed, nor was summary judgement granted in favor of Plaintiff. In its decision dated October 17, 2023, the Court explained its reasoning in detail. (**Pa0021a**)

Count Seventeen, was found to contain questions of fact precluding the granting of summary judgement for either side. Specifically, the crux of the matter came down to the Committee's annual notices for the 2022 term which are required by N.J.S.A. 10:4-18 to be sent to two newspapers within seven (7) days of the annual re-organization meeting in order for any of the Committee's meetings to be considered "regular meetings" and therefore require no further notice. While the Township Clerk certified in the Committee's response brief that she sent the annual notices to two newspapers as required, the annual notice was only ever published in the Star Ledger. Further, no proof of mailing was attached to the Clerk's

Certification. Given the factual discrepancy between the unsupported certification and the fact that a second annual notice was never published, the Court found that it could not grant summary judgment for either party.

Count Four was dismissed due to the Court's finding that there were no substantial revisions to Ordinance 2022-46 as introduced ("Ordinance") and Ordinance 2022-46 as adopted ("Amended Ordinance"). The Court noted, "The Board, in reviewing the Ordinance referred to the use being historically viewed by them as an accessory use."

Count Five was dismissed for the logical extension that if no substantial revision took place, then re-notice to the County Board was not required. Count Six was dismissed because the Court found "the Ordinance's recognition that banquet facilities are accessory uses to schools [does not] fundamentally alter the industrial zoning districts affected by the Ordinance."

It should be further noted that following the denial of the summary judgement motions, Plaintiff submitted an OPRA request on October 19, 2023, seeking the mailing receipts for the 2022 Committee annual notice. **(Pa1023a)** Plaintiff further transmitted a letter to the Committee's counsel also seeking said documents. While counsel for the Committee failed to answer Plaintiff's correspondence, the results of Plaintiff's OPRA request were received, confirming Plaintiff's position, that the

Committee's 2022 annual notice was only sent for publication to the Star Ledger. **(Pa0966a-0967a and Pa0973a-0974a)**

On October 30, 2023, the Court held a Pre-trial Conference with respect to the remaining issues, such as the alleged conflict of interest of one of the Committeemen and the question of the Amended Ordinance's consistency with the Master Plan. At the Pre-trial Conference, Plaintiff's counsel requested limited discovery as follows: 1) the deposition of the Committeeman who had the alleged conflict of interest, 2) the production of the mailing proofs for the Committee's 2022 annual notice, 3) the introduction of expert testimony regarding the planning aspects of the remaining Counts such as the Amended Ordinance's consistency with the Master Plan, and the interpretation of what uses were previously permitted under the Lakewood Unified Development Ordinance ("UDO"). The Court denied each of these requests.

On November 1, 2023, Plaintiff filed a Motion for Reconsideration of the Court's October 17, 2023 Order and for an Expansion of the record to include the requests made at the Pre-trial Conference. The Court denied the Motion in its entirety on November 17, 2023. **(Pa0015a)**<sup>6</sup> Finally, On November 16, 2023, the Committee filed a Motion for Partial Summary Judgement as to Count Seventeen of Plaintiff's Complaint. The Court granted same on January 19, 2024. **(Pa0017a)**<sup>7</sup>

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<sup>6</sup> A Transcript of the Court's oral decision of November 17, 2023 was submitted as 4T

<sup>7</sup> A Transcript of the Court's oral decision of January 19, 2023 was submitted as 5T

The parties then appeared before the Court for trial on May 21, 2024. Following the trial, the Court entered an Order for Final Judgment in favor of Defendants on July 9, 2024, accompanied by a written opinion. (Pa0020a and Pa0045a)

### Legal Argument

I. The Board Violated N.J.S.A. 10:4-18 During the Reorganization for the 2022 Term, and as such, had no Authority to Conduct the November 15 and November 29, 2022 Hearings and to Render their Consistency Determination (Pa0011a)

N.J.S.A. 10:4-18 mandates:

At least once each year, within 7 days following the annual organization or reorganization meeting of a public body, or if there be no such organization or reorganization meeting in the year, then by not later than January 10 of such year, every public body shall post and maintain posted throughout the year in the place described in subsection 3. d. (1), mail to the newspapers described in subsection 3. d. (2), submit to the persons described in subsection 3. d. (3), for the purpose of public inspection a schedule of the regular meetings of the public body to be held during the succeeding year.

The Board voted on their 2022 calendar at the November 23, 2021 public meeting. (Pa0424a) The annual notice for same was published in two newspapers on December 4 and December 7 of 2021. (Pa0437a) The Board held their 2022 re-organization hearing on January 4, 2022. (Pa0440a) At the January 4, 2022 hearing, the Board did not vote on or re-adopt the 2022 calendar. The annual notice was never re-published within seven days of the January 4, 2022 re-organization hearing, as

required by the above statute.

"Annual Notice" must meet all of the requirements of the "adequate notice" standard under N.J.S.A. 10:4-8(d), which states that Zoning and Boards must: 1) prominently post in at least one public place reserved for such announcements, 2) transmit to two newspapers in time for publication 48-hours in advance of the meeting, 3) file with appropriate Municipal or County Clerk or the Secretary of State if the public body has statewide authority, and 4) mail to any person upon request. "Failure to provide notice deprives a municipal Board of jurisdiction and renders null any subsequent action." Shakoor Supermarkets, Inc v. Old Bridge Twp. Board, 420 N.J. Super. 193, 201 (App.Div.2011). Furthermore, a plain reading of the OPMA reveals that "any government action shall- be declared void" if it was taken to comply with the statutes. Polillo v. Deane, 74 N.J. 562, 578 (1977).

Based on the above, the failure of the Board to properly adopt their annual notice, thereby providing the statutory "adequate notice" to the public, strips them of jurisdiction to conduct official business and renders their determinations *ultra vires*. As such, the trial Court erred in denying Plaintiff summary judgement on this count.

**II. The Committee Violated N.J.S.A. 10:4-8 and 10:4-18, thus Rendering the October 20, 2022 and December 8, 2022 Hearings Ultra Vires (Pa0011a)**

As noted above, N.J.S.A. 10:4-18 mandates that a public body must publish an annual notice of all public meetings for the coming year in two (2) official

newspapers within seven (7) days of their annual re-organization meeting. Under N.J.S.A. 10:4-8, in relevant part:

“Adequate notice” means **written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting**, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) **mailed, telephoned, telegraphed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices** because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body ...  
**Where annual notice or revisions thereof in compliance with [N.J.S.A 10:4-18] set forth the location of any meeting, no further notice shall be required for such meeting.**

In other words, all meetings which are not contained within the annual notice must be noticed as special meetings, with said notices published in two (2) official newspapers at least 48-hours prior to the meeting.

The Committee held their 2022 re-organization on January 3, 2022. (Pa447a) The resulting annual notice was published only in the Star Ledger on January 5, 2022. (Pa046a) Neither the October 20, 2022 meeting nor the December 8, 2022 meeting were noticed as special meetings. As such the Committee had no authority to take any action at either meeting.

The Committee published their annual notice in the Star Ledger on January 5, 2022. Not only was no other annual notice ever published, but, as per the results of Plaintiff's OPRA request, the annual notice was never sent to another newspaper for publication. As such, none of the meetings held by the Committee in the 2022 term can be considered "regular meetings." Therefore, pursuant to N.J.S.A. 10:4-8, all meetings must be noticed according to the 48-hour notice standard. Plaintiff's OPRA request confirmed that the notice was only sent to the Star Ledger (**Pa0973a-0974a**)

Therefore, for the reasons stated above in Point I, the Committee failed to give the public adequate notice of either meeting. As such, under Polillo, the Court must declare said action, with respect to the Ordinance and Amended Ordinance, void.

**III. The Public Notice for the Second Reading was Deficient under N.J.S.A. 40:55D-63, N.J.S.A. 40:49-2, and N.J.S.A. 40:49-2.1 Due to the Substantial Revisions to the Ordinance (Pa0011a)**

Any nonconformity with the statutory notice provisions when adopting an ordinance renders the resulting action a nullity. Rockaway Shoprite v. Linden, 424 N.J. Super. 337, 352 (App. Div. 2011) As per N.J.S.A. 40:49-2, an ordinance may not be adopted at its second reading if an amendment has been adopted that substantially alters the substance of the ordinance. Instead, it must be re-noticed to the public before the governing body can hold an adoption hearing. N.J.S.A. 40:55D-63 states, in relevant part:

Notice of the hearing on an amendment to the zoning ordinance

proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the Board pursuant to section 76 of P.L.1975, c.291 (C.40:55D-89), shall be given prior to adoption in accordance with the provisions of section 2 of P.L.1995, c.249 (C.40:55D-62.1).

N.J.S.A. 40:49-2.1 further states, in relevant part:

**If any amendment be adopted to any such proposed ordinance substantially altering the substance of the proposed ordinance, there shall be caused to be published a notice of the title of the ordinance, the introduction and time and place that the amended ordinance will be further considered and a summary of the objectives or provisions of the amendment or amendments, which notice shall be published at least 2 days prior to the time so fixed therefor in accordance with subsection c. of R.S. 40:49-2.**

The court in LaRue v. East Brunswick, 68 N.J. Super. 435, 451 (App. Div. 1961) observed:

The obvious design of the legislation is to insure that the public will be apprised of the proposed ordinance (or amendment) prior to its final passage in order that objections may be fully and freely raised and, if persuasive, honored.

The Ordinance differs from the Amended Ordinance as adopted:

(Original)

In all zones **where schools are permitted uses**, catering facilities and banquet halls **shall be allowed** as accessory uses in the school buildings, provided the following parking requirements are met:

Where the section of the school utilized for catering and banquet functions is 800 square feet to 1,999 square feet, 0.75 parking spaces shall

be required for every 100 square feet of area utilized for **catering and banquet uses**, and if the section of the school utilized for catering and banquet functions is 2,000 square feet or greater, then 1.0 parking spaces shall be required **for every 100 square feet**.

(Adopted)

In all **non-residential zones** where schools are permitted uses (Section 18-903) and the Oak Street Core Neighborhood Overlay Zone-1 (Section 18-902M), catering facilities and banquet halls **shall continue to be allowed** as accessory uses in the school buildings, provided the following parking requirements are met:

For the section of the school utilized for catering and banquet functions (to be known as the Banquet Hall space, but **not including bathrooms, food prep rooms, and facilities not associated with the Banquet Hall function, such as guest preparation rooms, etc.**) 1.0 parking space shall be required for every **50 square feet thereof**.

As noted by Gemma, there are several significant differences between the Ordinance and the Amended Ordinance. Firstly, the Amended Ordinance applies to a significantly different number of zones than the original version. Originally, the Ordinance applied to all zones where schools are permitted, including residential zones. The Amended Ordinance only affects the non-residential zoning districts. Second, as the Court can see, the Amended Ordinance contains a retroactivity provision. The original iteration made banquet halls permitted accessory uses to schools. Conversely, the Amended Ordinance states that same “shall continue to be allowed as accessory uses in the school buildings.”

Third, under the Amended Ordinance, the areas not counted for the parking calculation include, “bathrooms, food prep rooms, and facilities not associated with the Banquet Hall function, such as guest preparation rooms, **etc.**” As per Websters English Dictionary, “etc.” or “etcetera”, means “a number of unspecified additional persons or things,” “unspecified additional items,” or, “and others, especially of the same kind.” By any one of these definitions, there is no definiteness whatsoever to what areas count for the purpose of the parking calculation.

The court in Wollen v. Borough of Fort Lee set forth the standard for amendment substantially, stating that “[t]he words are to be assessed in the context of the provision of which they are a part and the basic policy of the statute. ‘Substance’ in the statutory intendment has reference to the essential elements of the

legislative act and the public policy of acts In pari materia.” Wollen v. Borough of Fort Lee, 27 N.J. 408, 420 (1958).

In the case at hand, the Ordinance and Amended Ordinance do not accomplish the same thing. The Ordinance, by its plain language, which is the standard by which it must be analyzed under In re Closing of Jamesburg High School, made banquet halls and catering facilities an accessory use to schools. The Amended Ordinance, however, does not list them as a permitted accessory use, but rather, states they, “shall continue” to be permitted. The difference is clear that the latter verbiage constitutes a retroactive change in the zoning classification, whereas the former constitutes a prospective one. As a result, these are two very different ordinances.

The change to the parking ratio to include several, undefined exceptions for the purposes of calculating same is further evidence that essential elements of the Ordinance and the Amended Ordinance do not match. The Ordinance sets a rigid, albeit imperfect and hastily drawn up, standard by which parking is to be calculated. The Amended Ordinance instead renders the parking nearly impossible to calculate. As noted above, almost every part of the subject building can be argued to fall under one of the open ended and indefinite excluded areas.

**IV. The Committee Violated the County Board Notice Provision of N.J.S.A. 40:55D-15(b) (Pa0011a)**

Courts have ruled that strict compliance with all statutory notice requirements. As such, any nonconformity renders the resulting action a nullity. Rockaway

Shoprite v. Linden, 424 N.J. Super. 337, 352 (App. Div. 2011). N.J.S.A. 40:55D-15(b) requires notice be sent to the County Board of any “adoption, revision, or amendment” of a development regulation.

As admitted by the Township Clerk in Paragraph 23 her certification dated February 3, 2023, the Township sent the Ordinance to the Ocean County Board on October 28, 2023. The version that was sent was the original Ordinance as passed at the First Reading, **not** the Amended Ordinance that actually was the subject of the adoption hearing.

As has been explained, the Amended Ordinance did in fact contain several significant revisions from its initial iteration. Since Rockaway Shoprite mandates strict compliance with all notice provisions when adopting ordinances, the Court must find that all action taken by the Committee to adopt the Amended Ordinance at the December 8, 2023 is null and void.

**V. The Committee Violated N.J.S.A. 40:55D-62.1 by Failing to Provide Personal Notice of the December 8, 2022 Hearing Because the Amended Ordinance Constitutes a Zoning Classification Change (Pa0011a)**

The Amended Ordinance reclassifies all non-residential zones to allow a banquet hall a permitted accessory use to a school. Pursuant to N.J.S.A. 40:55D-62.1 notice should be given,

owners of all real property as shown on the current tax duplicates, located, **in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district**, and located, in the case of a boundary change, in the

State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.

Failure to comply with the personal notice requirement renders an amendment invalid. Robert James Pacilli Homes, LLC v. Woolwich Twp., 394 N.J. Super. 319, 333 (App. Div. 2007). In the context of land use and regulation, classification is typically synonymous with the broad general uses permitted in a designated area, such as residential, commercial, retail and industrial, and extends to sub-categories within those general categories, such as single-family residential, highway commercial, and neighborhood retail. Generally, the sub-categories of uses are distinguished by the intensity of the permitted use. Id. at 419.

Any changes to those general categories or sub-categories listed above have the potential to substantially alter the character of the zoning district. Id. The Court in Pacilli found that an ordinance constitutes a classification change when it “dramatically altered the intensity of the residential use within each zone and promised to affect the character of the future development”.

Further, in Mahwah Realty v. Township of Mahwah, 430 N.J. Super. 247, 253-255 (App. Div. 2013), the court found that an ordinance allowing health and fitness centers in the industrial zoning districts had the capacity to fundamentally alter the districts’ character by effectuating a change in classification of permissible uses. The court analyzed the existing permitted uses of the two industrial zones affected by the ordinance. The court then concluded that “health clubs and wellness centers are not

of an ‘industrial stripe.’” Mahwah at 255. As such, the court concluded that the ordinance represented a fundamental alteration in the classification of permitted uses in these zones.

The situation here is nearly identical to Mahwah. Banquet halls are not currently permitted within the M-1 Zone, and require use variances to operate, according to Township Engineer Terrence Vogt (**Pa0817a and Pa0821a**). Furthermore, pursuant to Lakewood Unified Development Ordinance (UDO) § 18-903(m) (**Pa0848a**):

**All uses in the industrial zone are prohibited other than those uses specified as permitted uses** or as may be granted by special permit pursuant to the conditions and requirements heretofore set forth concerning permitted uses and special permits in the industrial zone. (*emphasis added*)

Banquet halls are not specified among the permitted uses within the M-1 Zone. As such, it is indisputable prior to the Ordinance’s adoption, by the clear language of UDO §18-903(m), banquet halls were prohibited within the M-1 Zone. It is impermissible for a Court to look beyond the language of a statute or ordinance to extrinsic sources when same is clear and unambiguous on its face. In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980); Jen Elec. Inc. v. County of Essex, 197 N.J. 627, 641 (2009). UDO § 18-903(m) is one such clear and unambiguous ordinance. Therefore, the Court is bound by its language and may not consider what the Committee wishes UDO § 18-903(m) said, whether or not the

Board has been violating UDO § 18-903(m) or anything else aside from UDO §18-903(m)'s prohibition on any use aside from those it specifically lists.

The Amended Ordinance introduces a new permitted use into **all non-residential zones** including the industrial zones. The accessory use will indisputably intensify what was previously only a school use. A use that only operated during weekdays now can extend its operation into the night, with higher traffic from patrons, music, and alcohol as part of a typical event. The Master Plan delves into the issue and states:

There has been an ongoing issue of encroachment of incompatible uses in the Lakewood Industrial Park. **Development of certain non-industrial uses that generate a high volume of traffic should be discouraged** in order to mitigate the potential for land use conflicts; and, therewith, promote the overall economic development of the township. (Pa0560a)

When addressing the similar use to the one at issue, banquet halls/catering facilities within houses of worship, the Master Plan Land Use Element states:

Houses of worship with a catering/banquet facility or hall as an accessory use should be designated as a distinct use from houses of worship and designated as a conditional use in zones determined appropriate for such use. Standards addressing adequate lot area, sufficient off-street parking, adequate setbacks, buffers and any other requirements deemed appropriate by the governing body should be required for this conditional use. (Pa0573a)

As further noted in the Master Plan, as of 2017, schools constituted roughly 10% of the Industrial Park and were already negatively impacting the surrounding

businesses. Specifically, on page 316 of the Master Plan, it states:

Industrial Park buildings now converted to school use, we have reached a point where **the issue is less that of a reduced tax revenue, but more that of potential negative impact to surrounding businesses.** Many of the companies resident in our park utilize heavy trucking and potentially dangerous industrial products and processes. The proximity of small children presents a challenge and threaten to drive companies out and/or discourage new companies from buying or leasing space in our park. (Pa852)

The Amended Ordinance would intensify that use and can potentially have all existing school, making up 10% of the Industrial Park, begin renting out their gymnasiums and auditoriums for any number of undefined events. By the clear dictates of the statute and case law, personal notice is required for a zoning change such as this. Banquet halls are not “of an industrial stripe.” As such, this Ordinance, like the one in Mahwah constitutes a fundamental alteration to the existing uses of the Industrial Park, which necessitates the personal notice requirement. The Committee has admitted that no personal notice was given regarding the Ordinance.

The case law is clear that the injection of a non-industrial use into an Industrial Zone qualifies as a change in zoning classification. N.J.S.A. 40:55D-62.1 mandates that personal notice be given to all property owners in the subject district and all property owners within 200 feet of the boundaries of said district when such an ordinance is considered. As such, the trial Court erred in upholding the Amended Ordinance.

**VI. The Board Failed to Provide the Public with Adequate Notice of the November 15, 2022 and November 29, 2022 Review Hearings in Violation N.J.S.A. 10:4-9 (Pa0011a)**

While the Board is not required to have a full public hearing regarding an ordinance's consistency with the master plan, all deliberations regarding the review must be in compliance with the Open Public Meetings Act ("OPMA"). Cox & Koenig *New Jersey Zoning & Land Use Administration* § 10-2.2 (2022) N.J.S.A. 10:4-9 states "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." Adequate notice is defined in N.J.S.A. 10:4-8 requires, "**written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting**"

Based upon the definition of "adequate notice," a public body must provide the agenda for a public meeting to the extent that it is known. The reason for this is simple, and can be found in the Legislative Findings and Declarations section of the Open Public Meetings Act ("OPMA") under N.J.S.A. 10:4-7:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies

at which any business affecting the public is discussed or acted upon in any way

Without adequate advanced notice of what a public body is discussing, the public is stripped of its rights under OPMA. The Board, a public body within the meaning of OPMA, held hearings on November 15 and 29 of 2022 for the purpose of performing a consistency review of the Ordinance pursuant to N.J.S.A. 40:55D-26. The Ordinance's number, description, and titles were all known to the Board, as was the full text of the Ordinance.

Despite the Board's full knowledge of the ordinance, they were about to review, they neglected to place it on either agenda with any meaningful specificity for a member of the public to know what they would be discussing. Specifically, both agendas simply stated, "ordinance for review." (**Pa0223a and Pa0250a**)

The court in McGovern v. Rutgers had much to say regarding the spirit, purpose, and history of OPMA and its relation to adequately informing the public. The court also stated, "[t]he Legislature included in OPMA a clear statement of New Jersey's public policy 'to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way.' McGovern v. Rutgers, 211 N.J. 94, 99, (2012) (quoting *N.J.S.A.* 10:4-7).

Any interested member of the public reading the Board's agenda could not possibly have the adequate prior notice required under OPMA given the inexcusably vague agenda regarding the Ordinance review. It should be noted that nearly every other item on the agendas, including the "Approval of Minutes," stated with specificity what minutes were being approved.

Due to the Board's failure to publish any further details on the Ordinance in both agenda, despite having full knowledge of those details, the public was not adequately noticed with respect to the Ordinance consistency review. This stands as a clear violation of OPMA, and as such renders the review voidable. The Court therefore erred in upholding the Amended Ordinance.

**VII: The Township had no Authority Under OPMA to Hold a Virtual Hearing on October 20, 2022 and December 8, 2022 (Pa0011a)**

The Public Policy which constructed the Open Public Meetings Act ("OPMA") (as dictated by Governor Byrne during committee meetings) stated, "The [OPMA] makes explicit the legislative intent to ensure the public's right to be present at public meetings and to witness government in action." Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 570 (2018) (citing N.J.S.A. 10:4-7). The statute is "liberally construed in favor of openness." Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 233 (App. Div. 2009)

Additionally, the Appellate Division in 2015 rendered a decision in which

technology cannot supplant the strict legislative intent of the OPMA. In Opderbeck v. Midland Park Bd. of Educ., 442 N.J. Super. 40, 120 (App. Div. 2015), the Court ruled that “We conclude our analysis by noting that **changes in the law often do not occur parallel with technological or scientific advancements... [and] the OPMA remains firmly rooted in 1975.**” Due to both Governor’s Byrne’s Public Policy of Strict Intent, and Opderbeck’s ruling that the OPMA does not advance with technological developments, it is clear that OPRA does not permit virtual hearings.

Both the First and Second Readings were held at virtual meetings via the Cisco Web-Ex conferencing software. While it is true that virtual hearings were temporarily permissible under both A4881/S3744, which were signed into law on September 24, 2021 (**PA0284a**) and N.J.A.C. 5:39-1 et. seq. (**Pa0286a**), neither of these authorities apply here.

A4881/S3744 suspended all appeals of Land Use hearing based on the holding of a virtual hearing. However, the law contains specific language limiting its scope. Specifically, it states that it will only be effective:

...during a period declared, in response to the COVID-19 pandemic, pursuant to the laws of this State as **a state of emergency, public health emergency, or both, or for a reasonable period of time following cessation of a declared emergency**, if so provided by executive order.

Similarly, N.J.A.C. 5:39-1 sets for the regulations governing virtual public meetings, and also limits its own applicability as follows:

...a local public body may hold a remote public meeting to conduct

public business *during a declared emergency if the emergency reasonably prevents a local public body from safely conducting public business at a physical location with members of the public present.*

The Public Health Emergency brought on by COVID-19 came to an end on March 4, 2022, with the signing of Governor Murphy’s Executive Order 292. (PA0294a) Furthermore, the various restrictions on public gatherings and mandates regarding masks had all been lifted. As such, there is currently no “emergency” that “reasonably prevents a local public body from safely conducting public business” with “the public present.” Thus, the limited situations in which N.J.A.C. 5:39-1 allows for a virtual hearing do not apply here.

Furthermore, the bar on appeals under A4881/S3744 only applies during an emergency or for “a reasonable period” thereafter. It had been over nine months since the end of the Public Health Emergency that the Amended Ordinance was passed at the Committee’s virtual hearing. Therefore, A4881/S3744 does not apply here. As a result, OPMA alone governs the forum for the December 8, 2022 meeting.

In fact, Bill S2603 was reported to the New Jersey Senate on May 18, 2023 for a Second Reading. (Pa0911a) The bill, which was introduced on May 12, 2022, would “enable public bodies to conduct meetings by electronic means.” (Pa0914a) The Senate Review Committee submitted its review of Bill S2603 on May 18, 2023, along with amendments to same. The Review Committee made the following finding:

Under the current law, remote meetings, voting, and public comment are only permitted during a state of emergency, public health emergency, or state of local disaster emergency. This bill removes that restriction. Under the bill, as amended, any meeting conducted by means of communication or other electronic equipment must be open to the public in a manner consistent with N.J.S.A. 10:4-12 (**Pa0918a**)

As the Court can see, OPMA, does not permit virtual hearings to take place, outside of the limited exceptions discussed above, and in echoed in the Senate Committee Review. As a result, the October 20, 2022 hearing and the December 8, 2022 hearing were both held in violation of OPMA and are, as such voidable as a matter of law. N.J.S.A. 10:4-15.

**Point VIII: Plaintiff was Entitled to a Reconsideration of the Grant of Summary Judgement of Counts Four, Five, and Six (Pa0015a)**

While Plaintiff maintains that there was sufficient evidence to support the grant of summary judgement to Plaintiff on each of these counts, the factual record does not exist to support the Committee's arguments as to their entitlement to same.

Summary Judgement can only be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issues of material fact challenged and that the moving party is entitled to summary judgement as a matter of law." R. 4:46-2. The role of the motion judge is to determine whether there exists a genuine issue of material fact by considering whether the evidence presented, viewed in the light most favorable

to the non-moving party, is sufficient to permit a rational fact finder to resolve the dispute in favor of the non-moving party. Brill v. Guardian of Life Ins. Co. of America, 142 N.J. 520, 529 (1995)

The Court's decision in granting the Committee's Motion for Summary Judgement made several factual determinations which are disputed by the Plaintiff, and on which no testimony has been heard nor proofs provided by either the Board or Committee. The Court's decision on Counts Four and Five center around the finding that the Ordinance was not substantially revised into the Amended Ordinance since the Board claims that banquet halls were always a permitted accessory use to schools.

The Board submitted no testimony to substantiate that claim, nor did they, in this case, have the power, under the MLUL to make it. N.J.S.A. 40:55D-70(b) reserves the power to hear applications to interpret a zoning ordinance to the Zoning Board of Adjustment, not to the Board. No such application for interpretation took place here. As such, the Board's interpretation of the uses permitted in the non-residential zones of Lakewood, under UDO §18-903, must, by law, be guided by the rules of statutory interpretation. Atlantic Container, Inc. v. Township of Eagleswood Planning Bd., 321 N.J. Super. 261 (App. Div. 1999); In re Ordinance 04-75, 192 N.J. 446, 469 (2007).

When the language of the ordinance is “clear and unambiguous” on its face, a Court need not look beyond the literal dictates of the words to divine the legislative intent. One may not presume the legislative body “... intended something other than what it expressed by its plain language.” In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980). The Supreme Court has stated that “the intent of the drafters is to be found in the plain language of the [enactment] and if the language is clear, then the interpretative process will end without resort to extrinsic sources.” Jen Elec. Inc. v. County of Essex, 197 N.J. 627, 641 (2009). In other words, the Board is bound to interpret UDO as it is written, not as it desires to.

The clear language of UDO § 18-903 (m) states that any use that is not expressly permitted in the M-1 Zone is prohibited. **(Pa0852)** Furthermore, the express language of the Ordinance, prior to its amendment, stated that “In all zones where schools are permitted uses, catering facilities and banquet halls shall be allowed as accessory uses in school buildings.” **(Pa0161)** To argue that banquet halls were always permitted accessory uses to schools would be to ignore the clear language of the existing UDO, to disregard the Ordinance’s original language, and to assign interpretive powers to the Board which they simply do not have.

Moreover, it is critical to note that there were no affidavits or planner reports submitted to the Court from the Board that would allow the Court to make such a finding as a matter of law. In order to come to the conclusion that UDO § 18-903

always permitted banquet halls as accessory uses to schools, the Court required expert analysis of the UDO and the MLUL as applied to that question.

The same argument applies to Count Six, in addition to another factual issue which exists which precludes the granting of Summary Judgement to the Committee. Specifically, there is a factual issue inherent in the Court's finding that "the Ordinance's recognition that banquet facilities are accessory uses to schools [does not] fundamentally alter the industrial zoning districts affected by the Ordinance." No testimony had been taken regarding what the character of the industrial district is, what it previously was, or how the Amended Ordinance impacts it. In fact, the Court, in making its factual finding that the zone will not be impacted, again relied on the idea that "the Board recognized that it has historically found banquet facilities to be an accessory use to a school" (Pa0042). As noted above, the Board does not have the authority to deviate from UDO's clear prohibition of uses that are not expressly permitted within the M-1 Zone, nor has any testimony been provided for the Court to rely on to support the alleged finding by the Board.

Due to the above factual issues, the Court should not have granted summary judgement to the Committee on Counts Four, Five, and Six. Further testimony was required in order to resolve this factual discrepancy.

**Point IX: The Record Should be Expanded to Allow for Limited Discovery and Expert Testimony (Pa0015a)**

According to R. 69-4, in actions in Lieu of Prerogative Writs,

**...The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order.** At least five days in advance of the conference, each party shall submit to the managing judge a statement of factual and legal issues and an exhibit list.

The official Comment for the Rule goes on to state:

The rule provides that in actions in lieu of prerogative writs, **the discovery, if any**, and the time for its completion are to be determined at the case management conference and memorialized in the case management order. Because the 450-day discovery period afforded by R. 4:24-1(a) to Track IV cases is normally inappropriate in in lieu of prerogative writ actions, **this provision of the rule leaves the issue to the court for determination on a case by case basis.** Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1 on R. 4:69-4 (2022). *Emphasis added*

This law is succinctly summed up by William M. Cox. § 40:4-.4 of *New Jersey*

*Zoning and Land Use Administration* states, in relevant part:

**Quite often it happens that where an applicant has been turned down and takes an appeal to the Superior Court he will raise other issues in his complaint, which is quite proper under the Rules of Court.**

As to the appeal portion of the case, therefore, taking deposition of individual board members as to why they voted as they did or for any other purpose directly related to the appeal is not permissible...

**...If, however, the appellant in addition to appealing the denial by the board, alleges the existence, for example, of conflict of interest which tainted the board's decision, this is an entirely separate question and board members may be deposed with respect to the existence of any conflicts.** Cox & Koenig. *New Jersey Zoning and Land Use Administration*. § 40-4.4 (2022) *emphasis added*

While it is true that in an Action in Lieu of Prerogative Writs challenging the decision making of a municipal agency is based only on the record below, with limited exceptions as discussed above, the same is not true of actions relating to ordinance adoptions. According to Cox, since there is no evidential record created for the adoption of an ordinance, an action challenging same must proceed in the same manner as other civil litigations, with opportunities for discovery, pretrial motions and a trial. See Hirth v. City of Hoboken, 337 N.J. Super. 149, 165-166 (App. Div. 2001), citing So. Burlington City. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 292 (1983); *New Jersey Land Use Administration* § 40-3.1

As the Court can see, Plaintiff's motion was a simple request for limited discovery on an issue which is properly joined to the prerogative writ Complaint for the specific question of whether or not Committeeman Miller had a disqualifying conflict of interest that prevented him from voting on the Ordinance's introduction or the Amended Ordinance's adoption. The denial of the deposition severely prejudice's Plaintiff as there is no way of ascertaining the degree to which the Committeeman's family is involved in the administration of schools which benefit from the Amended Ordinance.

It should be noted that the trial Court in fact found that no conflict existed specifically because there was insufficient evidence of same. It was inequitable and prejudicial to Plaintiff to be denied the ability to fully gather evidence of its properly

joined claim based upon a misinterpretation of the prerogative writ Court Rules, only to be dismissed at trial for not have said evidence.

Based upon the above, it is Plaintiff's position that it was entitled to the very minor amount of discovery it has requested. The Appellate Court should find critical error on the part of the trial court for denying Plaintiff's request.

**Point X. The Amended Ordinance is Arbitrary, Capricious, Unreasonable, and not Substantially Consistent with the Master Plan (Pa0020a)**

In order to invalidate an ordinance on substantive grounds, one must show that the ordinance is arbitrary, capricious, unreasonable, or plainly contrary to the fundamental principles of zoning or the zoning statute. Riggs v. Long Beach Tp., 109 N.J. 601 (1988) The statutes governing the adoption of land use ordinances, N.J.S.A. 40:55D-62(a), requires them to:

either be **substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements**; provided that **the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance**; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c.291 (C.40:55D-90).

The statute continues:

**The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.**

Where an ordinance amends zoning requirements in a way that is inconsistent with the Master Plan, it is invalid unless the inconsistency is acknowledged and the ordinance is accompanied by a resolution setting forth the reasons for the inconsistency, as called for by N.J.S.A. 40:55D-62(a). Riya Finnegan v. S Brunswick Tp., 197 N.J. 184, 192 (2008). Courts have defined the inconsistency needed to invalidate an ordinance as, “substantially or materially undermine[s] or distort[s] the basic provisions of the Master Plan.” Manalapan Realty v. Township Committee, 140 N.J. 366, 383 (1995). Furthermore, even where a Board has deemed an ordinance to be consistent with a master plan, the ordinance is non-the-less invalid where the facts are clear that the ordinance is in conflict with the Master Plan. Willoughby v. Board, 326 N.J. Super. 158 (App. Div. 1999) (*Willoughby II*). The Amended Ordinance in this case, falls squarely into the category of ordinance that clearly undermine the basic provisions of the Master Plan.

The Land Use Element of the Master Plan contains the following description of the M-1 Zone, where Plaintiff’s property is located: **(Pa0555a)**

The purpose of the M-1 (Industrial) Zone is to facilitate the **development of uses of an industrial nature**, such as: bulk storage; manufacturing or assembly facilities; warehouses; public utility uses; airports; office buildings; hotels and motels; health and human services; restaurants; laboratories; uses affiliated with the operations of the

United States Postal Service; and similar uses. In addition, the M-1 (Industrial) Zone provides for the development of quasi-public and private educational facilities.

The Master Plan goes on to state on page 22 under “Land Use Issues” that one of the considerations of the Land Use Element, which was prepared in 2017, was to “protect the Lakewood Industrial Park from the encroachment of incompatible uses.” (Pa0557a) The Master Plan then delves into the issue even more specifically and states:

There has been an ongoing issue of encroachment of incompatible uses in the Lakewood Industrial Park. **Development of certain non-industrial uses that generate a high volume of traffic should be discouraged** in order to: mitigate the potential for land use conflicts; and, therewith, promote the overall economic development of the township. (Pa0559a)

When addressing the similar use to the one at issue, banquet halls/catering facilities within houses of worship, the Master Plan Land Use Element states:

Houses of worship with a catering/banquet facility or hall as an accessory use should be designated as a distinct use from houses of worship and designated as a conditional use in zones determined appropriate for such use. Standards addressing adequate lot area, sufficient off-street parking, adequate setbacks, buffers and any other requirements deemed appropriate by the governing body should be required for this conditional use. (Pa0572a)

Like schools, houses of worship function differently from banquet facilities. Accordingly, the Master Plan is clear that to permit such different uses on the same property, any Ordinance should contain standards for such items as parking, adequate setbacks, buffers and other requirements that may be appropriate. The

Amended Ordinance only suggests a different parking standard and is silent as to all other requirements, and is therefore inconsistent with the Master Plan.

The Master Plan further incorporates a letter from the Executive Director of the Lakewood Industrial Commission dated April 7, 2017. The letter raises concerns about the “impact of non-commercial uses in Industrial parks, most significantly schools.” (Pa080a) The letter states:

With some 10% of Industrial Park buildings now converted to school use, we have reached a point where **the issue is less that of a reduced tax revenue, but more that of potential negative impact to surrounding businesses.** Many of the companies resident in our park utilize heavy trucking and potentially dangerous industrial products and processes. The proximity of small children presents a challenge and threaten to drive companies out and/or discourage new companies from buying or leasing space in our park. (Pa080a)

As the Court can see, the Land Use Element of the Master Plan specifically advises against the inclusion of “non-industrial uses that generate a high volume of traffic” in the Industrial Park, wherein Plaintiff’s property is located. Furthermore, the Master Plan specifically acknowledges that the expansion of school uses constitute a negative impact on the surrounding businesses, as well as a danger to the health and safety of small children due to the heavy trucking and potentially dangerous industrial product and processes which serve as the main use contemplated by the Master Plan in this zone.

In Mahwah Realty Associates, 420 N.J. Super. 341 (App. Div. 2011), a zoning ordinance which would include health and fitness centers as conditional uses in the Industrial Park of Mahwah was recognized to have a substantial lack of consistency with the master plan. In the follow-up case, Mahwah Realty v. Township of Mahwah, 430 N.J. Super. 247 (App. Div. 2013), the court discussed that “health clubs and wellness centers are not of an ‘industrial stripe.’” Mahwah at 255. It should be noted that in the 2013 case, the governing body recognized that the inclusion of such a use into the industrial park was inconsistent with the master plan.

As per the unrefuted testimony of Gemma, as contained within his Planner’s Report, dated November 22, 2022, the Land Use Planning principles as contained on pages 8 and 9 of the Master Plan include “Creating a balanced and compatible arrangement of residential, business and industrial land uses and minimizing land use conflicts,” and “Discourage deviations from established land use patterns that would permit incompatible and/or conflicting land uses being developed adjacent to one and other.” (**Pa0234a**)

Under N.J.S.A. 40:55D-62(a), as set forth above, all ordinances must be “drawn with reasonable consideration to the character of each district and its particular suitability for a particular use...” As pointed out by Gemma’s testimony at the December 8, 2022 adoption hearing, the Amended Ordinance treats all non-residential zones alike, which is in direct contrast to the MLUL’s requirement of

particular suitability. Gemma highlighted further conflicts between the Amended Ordinance and Lakewood's own existing ordinances using the following example:

Right now, public and private schools have setbacks of 10 feet, 10 foot buffer. You now have a banquet, a very separate use, having the same buffer. That's two separate uses having now being classified almost the same way. From a zoning and planning perspective, that's not appropriate. And, again, it doesn't give the Board the opportunity to look at things such as noise, trash, number of people attending, loading, unloading of a banquet versus a school, the same setbacks and bulk requirements are treated the same. (3T: p21, ln 2-12)

As the Court can see, the Amended Ordinance is clearly inconsistent with the Master Plan's stated objectives and land use strategies, as well as with the Land Use Element of the Master Plan. The Amended Ordinance further does not comply with the fundamental principles of zoning. The Committee failed to recognize said inconsistency and adopt a statement of reasons as to why they were adopting the Amended Ordinance despite same. As such, the Amended Ordinance violates N.J.S.A. 40:55D-62(a) and the above cited case law. As such, the trial Court should have declared the Amended Ordinance to be invalid and void.

**Point XI. Neither the Board nor the Committee Reviewed the Ordinance/Amended Ordinance for Consistency or Inconsistency with the Master Plan (Pa020a)**

Under N.J.S.A. 40:55D-26:

Prior to the adoption of a development regulation, revision, or amendment thereto, the Board shall make and transmit to the governing body, within 35 days after referral, a report including **identification of any provisions in the proposed development regulation, revision or**

**amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies** and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the Board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation.

The Board is **not** statutorily empowered to amend an ordinance. The Board's sole statutory authority is to review the ordinance as written, identify any parts of it that are inconsistent with the Master Plan, and make recommendations regarding those portions that are inconsistent. Any failure of proper analysis or absence of recognition as to whether an ordinance is consistent or inconsistent with the Master Plan invalidates the process and the ordinance. Nouhan v. Board of Adjustment of the City of Clifton, 392 N.J. Super. 283, 290 (App. Div. 2007):

As set forth above, it is the Land Use and Housing Elements of the Master Plan that an Ordinance must be consistent with. The critical element here is the Land Use Element. Pursuant to N.J.S.A. 40:55D-28(b)(2), the Land Use Element shall specifically detail:

The existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes...

In the instant case, the Board did not at any time address the Land Use Element of the Master Plan and the standards contained therein. In fact, at the outset of the

November 15, 2022 Board meeting, Jackson presented two paragraphs that he selected from the Master Plan's *mission statement*. Furthermore, the Board, at no time found that allowing banquet halls as an accessory use to schools is consistent with the Master Plan. Rather, that "an amendment to the zoning ordinance imposing conditions and standards associated with the accessory use of banquet halls" is consistent with the Master Plan. This is a critical difference. Naturally imposing a parking requirement for a given use is consistent with any master plan, however, that does not speak to whether or not the given use itself is consistent with same.

In fact, Mr. Magno, denied being asked to submit a report (**1T: p31, ln 19-20**) It should be noted that despite Jackson's recommendation that the Board ask Mr. Magno for a report as to the Ordinance's consistency with the Master Plan, **no** such report was ever provided. Instead, Morris, who, contrary to the trial Court's opinion, is **not** a member of the *ad hoc* committee set up by the Board, submitted an internal memorandum to the Board on November 23, 2022 in which she determined that banquet halls have always been accessory uses to schools. Aside from Morris' admission that she was relying only on "experience," this position is entirely illogical. Naturally if banquet halls were always permitted accessory uses to schools, then they would be permitted in all zones where schools are permitted. The Amended Ordinance however, states that they are permitted only in non-residential zones. As such, one cannot simultaneously hold the opinion that accessory banquet halls were

always permitted in schools and that the Amended Ordinance, limiting said use to the non-residential zones, does not constitute a zoning classification change. Since the trial Court already determined that no zoning classification change took place, there can be no argument by the Board here that banquet halls were always permitted accessory uses to schools. The positions are mutually exclusive.

As explained in detail in the Statement of Facts, at the November 29, 2022 Board meeting, the Board failed to even address its statutory responsibility to identify any inconsistencies between the Ordinance and the Master Plan. Instead, the Board took the position that the Committee is “asking us [The Board] for our recommendation to look to see if we feel that these parking spaces that they require are suffice.” (2T: p4, ln 15) The Board did not address Gemma’s expert testimony or report, did not review any reports from its own professionals, and did not discuss the consistency or inconsistency of banquet halls as accessory uses to schools with the Master Plan.

It is clear that no true consistency evaluation took place. As such, it is impossible for the Committee to have relied on the Board’s determinations. Since the Committee made no independent finding of consistency with the Master Plan, the Amended Ordinance must be deemed to be inconsistent with the Master Plan and in violation of N.J.S.A. 40:55D-62.

**Point XI (a) If the Court Finds that the Board did Perform a  
Consistency Review, same was Arbitrary, Capricious, and Unreasonable  
(Pa0020a)**

The determinations of a Board may be overturned if the Court finds that they were arbitrary and capricious or unreasonable. Dunbar Homes, Inc. v. Zoning Bd. 233 N.J. 546, 558 (2018); Grabowsky v. Tp. Of Montclair, 221 N.J. 536, 551 (2015); Price v. Himeji, LLC, 214 N.J. 263, 284 (2018). The “arbitrary and capricious standard is simply a finding of error. Anastasio v. Planning Bd. Of Tp. Of West Orange, N.J. Super. 499, 522 (App. Div.), certif. den. 107 N.J. 46 (1986) It is analogous to the substantial evidence standard. See Cell v. Zoning Bd. Of Adjustment, 172 N.J. 75, 89 (2002), citing Rowatti v. Gonchar, 101 N.J. 46, 51-52(1985)

As discussed above, the Board did not hear expert testimony from anyone aside from Gemma, who determined unequivocally that the Ordinance is inconsistent with the Master Plan. The Board, despite the recommendations of their attorney, did not even request their own professionals to submit a report regarding the issue. The only other document relied upon by the Board was the memorandum from Morris that determined, without any justification, that banquet halls were already accessory uses to schools. Clearly, the Board’s decision to disregard the only expert testimony given and reach an alleged conclusion that the Ordinance was consistent with the Master Plan is arbitrary on its face. However, as set forth in the

statement of facts, the Committee did rely on the “consistency evaluation” by the Board as contained in Jackson’s e-mail dated December 1, 2022. (Pa0279a) In the e-mail, Jackson stated the following:

The Board believes that it is salutary that the Committee is codifying that banquet halls are an accessory use to schools in Lakewood. The Board has, for many years, viewed banquet halls as an accessory to schools, and has also requested that the governing body provide additional standards to guide the board while considering these types of accessory use applications. **The Board wants to emphasize that an amendment to the zoning ordinance imposing conditions and standards associated with the accessory use of banquet halls must not disturb existing schools with banquet halls and that their use must be permitted to continue to be lawful as “grandfathered”**

**The Board was concerned with banquet halls being present in strictly residential zones and recommends that the committee adopt criteria and specific overlay areas that would allow and exclude banquet halls in specifically identified neighborhoods.** The board discussed that consideration should be given to adopt further regulations that would assure appropriate buffering to protect residential homes from light, noise, activity and the like associated with banquet halls.

**Banquet halls should be permitted in the M-1 Zone.**

**In summary, the board believes that this ordinance is consistent with the master plan because it begins to regulate a common accessory use that currently has no tailored associated standards to guide the Board.**

*(emphasis added to all sections to show departure from the record of what was actually discussed at the Board. See 1T and 2T)*

Jackson’s e-mail was not made available to the public and was a vast departure from the comments that the Board made on November 15, 2022 and November 29,

2022. As such, the Committee’s reliance upon said “determination” is impermissible as it was not the opinion of the Board.

The Board did not at any time discuss the idea of “grandfathering” existing schools. In fact, the idea of the Ordinance applying to existing schools was specifically dispelled by Mayor Coles at the October 20, 2022 Committee meeting. Specifically, the minutes of the meeting states, ““Mayor Coles explained this [the Ordinance] is for future applications.” (Pa0170a) Furthermore, the Board did not ever state that banquet halls should be permitted in the M-1 zone. They further did not state that the ordinance “regulates a common accessory use that currently has no tailored associated standards to guide the Board.” Each of the foregoing were the invention of Jackson, not the determinations of the Board.

Throughout the November 29, 2022 Board meeting, the Board discussed the parking ratio and how they thought it should be calculated. Specifically, Vogt indicated that any parking spaces required for the banquet hall use should be “additional spaces above and beyond what would be required for the principal use.” (2T: p7, ln 16-22) Vogt further commented that the gross floor area of the building should be used to determine the parking requirement. (2T: p24, ln 5-11) Board Member Y. Stern Stern voiced his concern with applicants attempting to exclude areas from the gross floor area in order to reduce the number of spaces they need to provide, stating:

I'm quite concerned, quite honestly, that what will end up happening is somehow that gets dropped and it's just a ballroom and we have a real issue on our hands, but if it is full GFA of the floor, I'm less concerned for that number. (2T: p27, ln 3-7)

Board Member Flancbaum agreed, stating:

The only way I would do it is if it was gross floor area, the whole thing, the hallway, the proposed rooms that you see on the plan, **half the time we don't see plans anyway**, the whole floor area. The whole floor area. (2T: p27, ln 8-12)

Board Member Flancbaum later clarified:

if the banquet facility is proposed to be 5,000 square feet, right, but the kitchen is 500 square feet, I don't want the parking ratios to be based on 4,500 square feet. I still want it to be a parking ratio based on 5,000 square feet. (2T: p57, ln 16-21)

As the court can see, the Board actually echoed Gemma's concerns about the Ordinance not containing specific enough criteria for the Board to consider, like the Master Plan requires of a banquet facility within a house of worship. The reason for these concerns is obvious, the Board must have guidance as to what criteria they must apply when hearing applications. N.J.S.A. 40:55D-70(b) reserves the power to hear applications to interpret a zoning ordinance to the Zoning Board of Adjustment, not to the Board. As such, the Board's interpretation of the ordinances of Lakewood, under the UDO, must, by law, be guided by the rules of statutory interpretation. Atlantic Container, Inc. v. Township of Eagleswood Planning Bd., 321 N.J. Super. 261 (App. Div. 1999); In re Ordinance 04-75, 192 N.J. 446, 469

(2007). Under the aforementioned cases, the intent of a zoning ordinance must be found within the plain language used. In other words, the Board is bound to interpret UDO as it is written, not as it desires to.

Due to this principle, the Board, under the Amended Ordinance, is only permitted to look at compliance with the parking criteria when approving an application for a banquet hall accessory to a school. The Amended Ordinance contains no provisions for bulk requirements, drainage, lighting, setbacks, or anything aside from parking. Therefore, pursuant to the above cited case law, those considerations are not within the Board's purview, as Board Member Flancbaum alluded to in his above quote.

Despite these concerns, the Amended Ordinance, as adopted, actually contained a specific exemption from "bathrooms, food prep rooms, and facilities not associated with the Banquet Hall functions, such as guest preparation rooms, etc." counting toward the parking calculation. The reason why this concern from the Board did not appear in the final Amended Ordinance is self-evident: Jackson did not include it in his "report" to the Committee.

Jackson's "report" failed to convey the Board's primary concern that the full gross floor area be used in the parking calculation, including the hallways, kitchen,

and all proposed rooms appearing on the plans. Instead, Jackson's "report" only contained the following regarding parking:

The most significant issue with accessory banquet uses is parking. The Board discussed possible different alternatives to define the criteria from which parking ratios could be calculated. The board discussed methods that would create a ratio that would be based upon the gross square footage of the building, a net square footage of the building, seating counts, occupancy counts, the net area of the banquet hall itself, etc. Each of the methods had advantages and pitfalls. (Pa0279a)

Interestingly, the oral Motion, proposed by Jackson on the record, that the Board actually voted on read as follows:

Be it resolved the Board agrees that an ordinance regulating banquet halls as an accessory use to schools is consistent with the Master Plan. The Board urges the following amendments, one space to 45 square feet. All assembly areas would be, must be included in the ratio. No on street parking within 100 feet. The higher number needed would control due to nonconflicting parking demands. If the lot is used for other reasons, such as parking and buses, it cannot be counted towards parking. No banquet halls are allowed as an accessory use in residential zones. (2T: p55, ln 7-19)

As the Court can see, the section of Jackson's report discussing parking does not convey the Board's firm belief that the entirety of the floor area should be utilized in the calculation. In fact, almost nothing from the oral motion voted on by the Board was accurately reflected in the final "report". The "report" that the Committee relied upon was no report by the Board at all, but rather, a memorandum written by Jackson, expressing his own analysis, not the Board's.

Although the Board's determination of consistency is entitled to "deference", where the facts are clear that the amendment is in conflict with the Master Plan by the Governing Body, a court is entitled to set aside an ordinance adoption predicated on such consistency, as explained in the above discussion of Willoughby, at 163-165 (App. Div. 1999). Here, the facts are clear that not only is the Amended Ordinance inconsistent with the Master Plan, but neither the Board nor the Committee ever performed a consistency review at all and that any conclusion the Board did reach was arbitrary, capricious, and unreasonable.

**Point XII. The Committee's Procedure at the December 8, 2022 Hearing was Arbitrary, Capricious, Unreasonable, and Prejudiced Plaintiff's Right to be Heard (Pa0020a)**

Deviation from any of the statutory procedural requirements of ordinance adoption will result in an ordinance being deemed invalid. Riggs v. Long Beach Tp., 109 N.J. at 611-612; Med. Ctr. v. Princeton tp. Zoning, 343 N.J. Super. 177, 213-214 (App. Div. 2001) Under N.J.S.A. 40:49-2,

At the time and place so stated in such publication, or at any time and place to which the meeting for the further consideration of the ordinance shall from time to time be adjourned, **all persons interested shall be given an opportunity to be heard concerning the ordinance. The opportunity to be heard shall include the right to ask pertinent questions concerning the ordinance by any resident of the municipality or any other person affected by the ordinance.** Final passage thereof shall be at least 10 days after the first reading.

In analyzing the question of whether a governing bodies' prohibition on the public's ability to record their meetings, the court in Tarus v. Borough of Pine Hill,

189 N.J. 497, 516 (2007) indicated that while “public bodies may impose reasonable guidelines” to ensure that there is minimal disruption to the meeting, those rules cannot be “too arbitrary and capricious” or “too restrictive and unreasonable.” The Tarus court further found that governing bodies actions could not be premised on an animus against the plaintiff, and that actions premised on same would be deemed arbitrary and unreasonable. Id. at 518. The court was quoted as saying, “Arbitrary rules that curb the openness of a public meeting are barricades against effective democracy.” Similarly, Shakoor Supermarket v. Old Bridge Board, 420 N.J. Super. 193, 204-205 (App. Div. 2011), certif. denied, 208 N.J. 598 (2011), holds that the same requirement applies to land use boards.

Despite being well aware that Plaintiff had retained counsel, as well as experts to oppose the adoption of the Amended Ordinance, the Committee refused to allow Plaintiff’s professionals to present Plaintiff’s case. Instead, both Shea and Gemma, on behalf of Plaintiff, were limited to four-minutes each in which to present their case. This time limitation, under the circumstances, was wholly unreasonable for Plaintiffs to properly present their objections.

As set forth in the Statement of Facts, Donnelly muted Shea’s microphone in a clear attempt to stifle further objection to the adoption of the Amended Ordinance. Furthermore, immediately upon Shea’s microphone being muted, Secare specifically attempted to taint the position of the Board against Plaintiff by falsely

claiming that Shea had threatened to sue the town and that somehow the presence of a court reporter should count against Plaintiff's position. Further, since Donnelly muted Shea's microphone, there was no opportunity to even refute Secare's improper and malicious characterizations of Plaintiff's very legitimate concerns regarding the Amended Ordinance.

In imposing an unreasonable 4-minute time limitation on Plaintiff's attorney's and planner's presentation of their case, and actually muting the microphone of an objecting attorney, the Committee violated the dictates of N.J.S.A. 40:49-2. It is evident that the Committee imposed arbitrary rules specifically designed to limit Plaintiff's ability to be heard or to refute the false accusations levied against them by Secare, evidencing the animus that the Tarus court spoke of. As such, the Court should find that the Committee violated N.J.S.A. 40:49-2.

**Point XIII. Committeeman Miller had a Disqualifying Conflict of Interest Pursuant to N.J.S.A. 40A:9-22.5(d) (Pa0020a)**

The Local Government Ethics Law, the common law, and any local rules and regulations governing conflicts or ethics all apply when determining the existence of a conflict. New Jersey Zoning and Land Use Administration, William M. Cox at 5-1.1 (Gann 2019). The Local Government Ethics law, N.J.S.A. 40A:9-22.1 to 22.5 governing conflicts of interest bars a local government official from acting where they have "personal involvement that might reasonably be expected to impair his

objectivity or independence of judgment. Miller is indeed a “local government officer” and is subject to the restrictions of N.J.S.A. 40A:9-22.5(d) The word “interest” refers to any connection between the Plaintiff and a member of the board which is not remote or speculative. See Cox at 5.13

Under the common law, the public is entitled to have its representatives perform their duties free from any personal or pecuniary interests that might affect their judgment. Wyzkowski v. Rizas, 132 N.J. 509, 522-23 (1993). The question is whether there is *potential for conflict*, **not** whether the conflicting interest *actually influenced* the action. Id. at 523. Actual proof of dishonesty need not be shown. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (127 A.2d 190 (App. Div. 1956). An actual conflict of interest need not decisive factor, nor is “whether the public servant succumbs to the temptation,” but rather whether there is a potential for conflict.” Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960) (citing Aldom, at 502). The decision as to whether a particular interest is sufficient to disqualify is a factual one and the “question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Wyzykowski, at 523, quoting Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958).

Shortly before the hearing on the adoption of the Amended Ordinance, Plaintiff learned that Menashe Miller’s sons currently do, or recently did, attend

Yeshiva Toras Ahron at 500 Summer Avenue, which operates a popular banquet facility. They also learned that Mr. Miller's mother holds a significant position within the administration at Beis Faiga girls' school at 350 Courtney Road, which has the oldest banquet hall in town. Beis Faiga also owns a boys' school called The Lakewood Cheder at 725 or 750 Vassar Avenue in the industrial park. As such, it would appear that Mr. Miller and/or his family members could personally benefit from the addition of banquet halls as a permitted accessory use to a school.

The question of conflict by reason of personal involvement is not a bright line rule, but rather, hinges upon the circumstances of the situation. Because the "appearance of a conflict" is central, Randolph v. Brigantine Planning Bd., 405 N.J. Super. 215, 226 (App. Div. 2009), one commentator phrased the standard as follows: "Would an impartial and concerned citizen, intelligent and apprised of all the facts in the situation, feel that there was the potential for non-objectivity on the part of the officeholder making a decision?" Michael A. Pane, Jr., New Jersey Practice Series, Vol. 34 Local Government Law, §9.4 (2007).

In this case, the Amended Ordinance allows for an accessory use banquet hall inside of any school located in a non-residential district. Such as use brings a clear economic benefit to a school, as they are now permitted to open a commercial facility with virtually no restrictions on the types of events that can be held therein. No matter which way the Amended Ordinance is read, it either allows all schools to now

open banquet halls or grants retroactive approval to the schools that already had banquet halls. Either way, the schools benefit greatly.

There can be no serious argument that Mr. Miller's children and mother do not qualify as "someone closely tied to the official such as an employee or family member." As explained above, both his children, as students, and his mother, as a high-level administrator, serve to benefit from their school being able to open or continue operation of a commercial facility. As set forth in Wyzkowski, whether or not Mr. Miller's vote to adopt the Amended Ordinance was actually influenced by the benefit to his family is immaterial. What matters is that the potential for that benefit to influence his vote exists. As such, this Court should deem Mr. Miller to have a disqualifying conflict of interest and as declare the entire vote to adopt the Amended Ordinance void.

**Point XIV. The Amended Ordinance Creates a Conditional Use that Violates N.J.S.A. 40:55D-67 (Pa0020a)**

The Amended Ordinance has now created a vague and ambiguous conditional use which lacks any form of specificity. The Amended Ordinance amends § 18-906(I), which governs public and private schools. The Amended Ordinance reads:

**18-906 I. Public and Private Schools**

In all non-residential zones where schools are permitted uses (Section 18-903) and the Oak Street Core Neighborhood Overlay Zone-1 (Section 18-902M), catering facilities and banquet halls shall continue

to be allowed as accessory uses in the school buildings, **provided the following parking requirements are met:...**

The parking requirements contained in the Amended Ordinance are specific conditions to the accessory use of a school banquet hall. In all but name, the effect of the ordinance creates a permitted use with conditions, which constitutes a “conditional use.”

Pursuant to N.J.S.A. 40:55D-67, a conditional use ordinance requires definite standards and specifications. The Amended Ordinance contains a non-exhaustive list of areas within a school which do not count toward the parking calculation, ending with the word “etc.” The Amended Ordinance does not state whether this is in addition to the parking requirements for the school as a separate use. Nor does it specify whether school spaces can be counted for purposes of satisfying parking calculations for that of a banquet hall. Based on this vague and ambiguous language, and the use of the word “etc.”, there is no way for a developer to know what areas should, and should not be, counted for the purposes of satisfying the parking requirements within a Non-residential Zone.

The Amended Ordinance specifies that the parking criteria is to be governed by the square footage of, “the area of the school utilized for catering and banquet functions.” However, there is no definition for what “catering and banquet functions” are. Without a proper definition, there is no objectively measurable way to quantify any areas that contain “catering and banquet functions.”

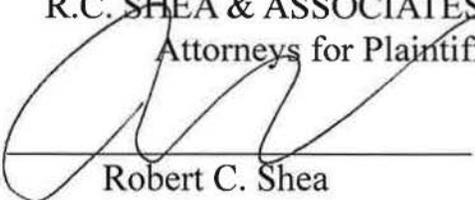
The Court in Meszaros v. Planning Bd. of the City of South Amboy, 371 N.J. Super. 134, 149 (App. Div. 2004) determined that a conditional use without specific conditions, or one with conditions that are too vague, is void *ab initio*. In other words, if a conditional use does not have definite and specific standards, a Township Board cannot hear the application, as said Board no longer has jurisdiction to do so. Jackson Holdings v. Jackson Twp. Planning Bd., 414 N.J. Super. 342 (App. Div. 2010).

As such, due to the Amended Ordinance's lack of specificity, and the vague verbiage contained therein, it stands in violation of N.J.S.A. 40:55D-67. As a result, pursuant to Meszaros, the Court must declare it void.

**CONCLUSION**

For the foregoing reasons, the Court should find that the trial Court erred in upholding the Amended Ordinance and should overturn the trial Court's decision.

Dated: December 16, 2024

R.C. SHEA & ASSOCIATES  
Attorneys for Plaintiff  
  
Robert C. Shea



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Transcript 2T- (Lakewood Planning Board Meeting on November 29, 2022)

**PRELIMINARY STATEMENT**

Please accept this brief on behalf of the defendant/respondent, Lakewood Township Planning Board. For the reasons set forth in the following legal brief, this respondent respectfully submits that the Court should affirm the lower court's ruling finding that the actions of the Planning Board fully comported with the Municipal Land Use Law.

This litigation stems from plaintiff/appellant's objections to the Township of Lakewood Planning Board's and the Township of Lakewood Committee's processes in adopting Ordinance 2023-046, which permits banquet halls as an accessory use to schools in specific zones in the Township. When it comes to the Lakewood Township Planning Board's participation in this litigation, the fundamental flaw in plaintiff/appellant's argument is its failure to recognize that, while the Board has the statutory authority to perform the consistency review and render a written report to the council detailing the findings of said review, the report does not constitute a resolution or other formal opinion of the Planning Board that can be appealed and as such, the Planning Board should not even be a party to this matter. To the extent that appealing the informal planning board consistency review process and the form and substance of the memorandum generated by the Board during the same is appropriate, the actions of the Planning Board in conducting their

consistency review fully complied with the provisions of the Municipal Land Use Law.

**STATEMENT OF FACTS/PROCEDURAL HISTORY**

On October 20, 2022, the Lakewood Township Committee adopted Ordinance 2022-046 at the First Reading and referred it to the Planning Board for a consistency review pursuant to N.J.S.A. 40:55D-62(a). (Pa0155a) The Planning Board scheduled a consistency review on November 15, 2022, and said review was posted on the Planning Board’s agenda. (Pa0223a) The agenda for this meeting listed “Ordinance for Review”. (Pa0223a) During the consistency review, the Planning Board attorney, John Jackson Esq., provided legal counsel to the Board by summarizing the Board’s role in reviewing the proposed legislation. (T1:p3, ln 1-19) Mr. Jackson reminded the Board that the role of the Board was to determine whether the ordinance is consistent with the Master Plan. (T1:p6 ln 8-10) Mr. Jackson explained the procedural process to the Board as follows:

“The process gives the Planning Board an allotted period to respond. If the Planning Board does not respond, then the governing body can go forward without any input from the Planning Board. The decision of the Planning Board is not binding upon the governing body.” (T1:p3, ln 10-15)

Mr. Jackson made it very clear that, while his role was to counsel the Board, whether the ordinance is consistent with the Master Plan was not for him to decide; rather, he simply offered as the Board's counsel to point out some statements made within the Master Plan and then the Board would have to determine whether the ordinance "fits" or not. (T1:p8, 1-5)

During the November 15, 2022 consistency review, the Board discussed the question of the ordinance's consistency with the Master Plan. The Board opened the meeting to the public, at which time plaintiff/appellant's attorney objected to the consistency of the ordinance and provided the Board with legal argument as to why, in his opinion, the ordinance was not consistent with the Master Plan. Plaintiff/appellant's attorney presented the planning testimony of Gordon Gemma, who opined that the ordinance is not consistent with the Lakewood Township Master Plan. (T1:p29, ln 1-5) The Board heard testimony from Mr. Gemma as to the eleven goals and objectives on pages eight and nine of the land use element of the Master Plan. (T1:p38, ln 12-18) The Board ultimately decided to reconvene on the matter after the board planner had an opportunity to meet with a subcommittee of the planning board. (T1:p46, ln 10-15) The subcommittee discussed the land use element of the Master Plan during that meeting, which is evident in the internal memorandum that was sent to the

Planning Board on November 23, 2022, (Pa0241a) and in excerpts from the board discussions during the public hearing in the matter.

On November 22, 2022, plaintiff/appellant sent a letter to Ally Morris, Planning Board Secretary, and John Jackson, Planning Board Attorney, containing Mr. Gemma's report. (Pa0231a and Pa0234). On November 23, 2022, in her capacity as administrator of the Board, Ms. Morris submitted an internal memorandum to the Planning Board which contained the subcommittee's findings. (Pa0241a).

The Board considered the ordinance again at its November 29, 2022 meeting. The agenda listed "ordinance for review". (Pa0250a) At this meeting, the Board, again, opened the meeting to public comment and, again, discussed the question of the ordinance's consistency with the Master Plan. During this meeting, Chairman Neiman recounted that some of the discussion points during the subcommittee meeting included off street parking, how many parking spaces are necessary for the school versus the catering hall, and other constraints on parking. These subjects go directly to the Land Use element's emphasis on addressing traffic congestion. (T2:p7, ln. 1-25) Board Member Flancbaum spoke about his position that the parking ratio should be reconsidered to try to strike the balance between quality of life and a community need, particularly in light of the current tendency to have over congestion of cars parked on the side streets,

which goes directly to the Land Use element of accommodating the town's growing population and addressing traffic congestion. (T2:p10, ln 3-25). The Board ultimately conducted deliberations and directly considered the consistency or inconsistency with the Master Plan (T2:p48-T2:p54, ln 25) and voted that the ordinance was consistent with the Master Plan. (T2:p55, ln 7-19)

The Board attorney, John Jackson, sent a memorandum to township attorney Harold Hensel advising of the Board's consistency review conclusions under cover of December 1, 2022. (Pa0277a) The memorandum was sent to Mr. Hensel 42 days after the matter was referred to the Planning Board for review. No formal resolution was adopted concerning the Board's consistency review finding, as no such requirement exists in the Municipal Land Use Law.

On January 15, 2023, plaintiff/appellant filed a Complaint and Order to Show Cause in the law division citing several alleged violations of the Open Public Meetings Act on the part of the Planning Board and also on the part of the Township council. The court denied the request for temporary restraints on March 3, 2023. (Pa0005a)

During the pendency of the underlying litigation, plaintiff/appellant filed a motion to amend the complaint on May 4, 2023, seeking to add two new counts, one of which was a count against the Planning Board alleging that the Board did not properly adopt their 2022 calendar pursuant to the Open Public

Meeting Act which in turn rendered its authority to consider the ordinance at issue at the November 15, 2022 and the November 29, 2022 public hearings invalid. The Court granted the plaintiff/appellant the latitude to amend the order via court order dated June 30, 2023. (Pa0009a) Plaintiff/appellant thereafter filed a motion for summary judgment as to counts one, four, five, six, eight, sixteen, and seventeen. Counts eight and sixteen pertained to the Planning Board, and the Board filed opposition to the same, as well as a cross motion for summary judgment as to count sixteen. The defendant/respondent Lakewood township council also filed a cross motion for summary judgment as to counts One, Four, Five, Six, and Seventeen of the Amended Complaint. The Court ultimately ordered that summary judgment was granted in favor of Defendant Board and counts eight and sixteen of the Amended Complaint were dismissed with prejudice, and further ordered that Counts One, Four, Five, and Six of the Amended Complaint were dismissed with prejudice and that Count Seventeen was dismissed without prejudice. (Pa0011a; Pa0012a, Pa0014a) The Court denied plaintiff/appellant's motion for summary judgment.

On November 1, 2023, plaintiff/appellant submitted a motion for reconsideration of the Court's determination as to plaintiff/appellant's motion for summary judgment and argued that the record should be expanded to allow for limited discovery and expert testimony. Notably, plaintiff/appellant did not

request reconsideration of the Court's decision to dismiss counts eight and sixteen pertaining to the planning board. The Court denied the motion in its entirety on November 17, 2023. (Pa0015a) On November 16, 2023, the defendant/respondent Lakewood Council filed a motion for partial summary judgment as to Count Seventeen and the Court granted same on January 19, 2024. (Pa0017a)

A trial ultimately took place in this matter on May 21, 2024 wherein the Court ruled in favor of Defendants on the remaining counts (count two, count three, count seven, count nine, count ten, count ten (B), count eleven, count twelve, count thirteen, count fourteen, and count fifteen). A written opinion and Order for Final Judgment were issued on July 8, 2024 and July 9, 2024, respectively. (Pa0045a, Pa0020a) As to the allegations lodged against the Planning Board, the Court found that plaintiff "demands formality by the Board in its review and in reporting back to the Committee where none is required." (Pa0062a) The Court explained that planning boards are not required to adopt a resolution authorizing the Board's attorney to draft a memorializing resolution, and that these are administrative acts not requiring deliberation and therefore no formal action is required. (Pa0062a) The Court went on to comment that, in its view, the Board actually went above and beyond what it was required to do in a consistency review setting when it conducted a public hearing with public

comment on the matter. (Pa0063a) The Court further concluded that it was not inappropriate for the Board to consider the memorandum prepared by the Board secretary in her role as a member of the subcommittee that convened on the matter. (Pa0068a). The Court ultimately concluded that in the Court's view, the form and substance of the Board's report complied with the provisions of the Municipal Land Use Law, that the e-mail to the Committee satisfied the report requirement of the statute, and that there was no defect in the Board's overall process and/or reporting procedure to the council.

Respondent, Lakewood Township Planning Board hereby responds to the allegations raised by plaintiff/appellant in its legal brief as follows. The Board responds to only those allegations lodged against the Board, as the Committee will respond in due course to the allegations lodged against the Committee.

## **LEGAL ARGUMENT**

### **1. STANDARD OF REVIEW**

When reviewing the decision of a trial court that has reviewed a municipal action, the Appellate Division is bound by the same standards as was the trial court. Fred McDowell, Inc. v. Bd. of Adjustment of Township of Wall, 334 N.J. Super. 201, 212 App. Div. 2000); Charlie Brown of Chatham, Inc. v. Bd. of Adjustment of Township of Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985); Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of

Adjustment, 433 N.J. Super. 247, 252 (App. Div. 2013). The appellate court “defer[s] to a municipal board’s factual findings as long as they have an adequate basis in the record.” Ibid.

A strong presumption of validity attaches to a municipal body’s actions which cannot be overturned unless found to be arbitrary, capricious, or unreasonable. Pressler and Veniero, Current N.J. Court Rules, Comment 5.4 on Rule 4:6-9 (Gann, 2013). New Jersey courts have consistently held that actions of municipal boards are presumed valid and will not be interfered with unless the local agency action is determined to be arbitrary, capricious, or unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992); New Jersey Shore Builders Ass’n v. Township of Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974), cert. denied, 65 N.J. 292 (1974). A court accords due deference to the local agency’s broad discretion in planning and zoning matters and only reverses a local agency decision if it finds the decision to be arbitrary, capricious, or unreasonable. Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 296 (1965); Nunziato v. Planning Board, 225 N.J. Super. 124, 133 (App. Div. 1988).

In reviewing a decision of a local planning board, the Court’s power is tightly circumscribed. New Brunswick Cellular Tel. Co. v. Old Bridge Planning Bd., 270 N.J. Super. 122, 134, 636 A.2d 588 (Law Div. 1993). Board

decisions, when factually grounded, are cloaked with a presumption of validity, which presumption attaches to both the acts and the motives of its members. Pullen v. So. Plainfield Planning Bd., 291 N.J. Super. 303, 312, 677 A.2d 278 (Law Div. 1995), aff'd, 291 N.J. Super. 1, 6, 676 A.2d 1095 (App. Div. 1996). So long as there is substantial evidence to support it, the court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of a board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by a board. Pullen, supra, 291 N.J. Super. at 312, 677 A.2d 278, aff'd, 291 N.J. Super. 1 at 6, 676 A.2d 1095; New Brunswick Cellular Tel. Co., supra, 270 N.J. Super. at 134, 636 A.2d 588.

Furthermore, it is well-settled law that local officials, because of their familiarity with their community's characteristics and interests, be allowed wide latitude in the exercise of their delegated discretion. Kramer v. Board of Adj., Sea Girt, supra, 45 N.J. at 296; Hawrylo v. Board of Adj., Harding Twp., 249 N.J. Super. 568, 579 (App. Div. 1991); Pullen, supra, 91 N.J. Super. 6, 7. Because variances tend to impair sound zoning, a court should give "greater deference to variance denials than to grants of variances." Medical Ctr. At Princeton v. Tp. Of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199, 778 A.2d 492 (App. Div. 2001).

**2. THE BOARD DID NOT VIOLATE N.J.S.A. 10:4-18 DURING THE REORGANIZATION FOR THE 2022 TERM AND AS SUCH HAD AUTHORITY TO CONDUCT THE NOVEMBER 15, 2022 AND NOVEMBER 29, 2022 HEARINGS AND TO RENDER ITS CONSISTENCY DETERMINATION**

Plaintiff contends that the Board violated the notice provisions of N.J.S.A. 10:4-18 during its re-organization process for the 2022 term and that as such, the Board did not have the jurisdiction to conduct official business at any point during the 2022 year which thus renders their determination as to the consistency review *ultra vires*. Plaintiff/appellant lodged this secondary complaint via an amended answer in the underlying litigation, after failing to garner any support from the Court as to its original theory of alleged liability on the part of the Board during the initial order to show cause hearing.

The purpose of the New Jersey Open Public Meetings Act (OPMA) is to ensure transparency and accountability in government by requiring that public meetings of certain government bodies be open to the public. The purpose of the law is to give citizens access to the decision-making processes of public officials, fostering greater public awareness and participation in governmental affairs.

The Board voted on their 2022 calendar at the November 23, 2021 public meeting (Pa0424a) and published the annual notice for same in two newspapers on December 4 and December 7 of 2021. (Pa0437a). The Board still provided

the citizens of Lakewood adequate time to prepare and engage in the decision-making process of the Board by publishing the notice in November of 2021 rather than in January of 2022. In fact, by publishing the yearly meeting dates in advance of January 2022, arguably, the Board provided the public with even more time to plan their participation in the meetings than was required. The actions on the part of the Board demonstrate consistency with the spirit of the law, and is consistent with the intent of the law, which is that the Board publish the meeting dates within a certain number of days after the re-organization to allow adequate notice to members of the public. Thus, the Board did in fact provide “adequate notice” as contemplated under the statute and plaintiff’s argument is without merit.

Moreover, while this argument lodged by plaintiff/appellant is a wonderful academic exercise, it has nothing to do with whether the ordinance at issue should be invalidated. Even if it is the case that the Planning Board failed to properly re-organize and notice for the November 15, 2022 and November 29, 2022 hearings, despite having published the schedule of 2022 hearing dates in two newspapers and also having published the schedule in several different places on the Township website, the failure of the Planning Board to transmit its report within the 35 day period articulated in N.J.S.A. 10:4-18 relieves the governing body from the requirements of that subsection in regard to the

proposed ordinance. In other words, in this instance, the governing body did not even have to consider the report.

**3. THE BOARD PROVIDED THE PUBLIC WITH ADEQUATE NOTICE OF THE NOVEMBER 15, 2022 AND NOVEMBER 29, 2022 REVIEW HEARINGS**

Following the Committee's referral to the Planning Board, the Board scheduled a consistency review hearing on November 15, 2022 where the Ordinance review agenda item was posted on the Board's agenda. Plaintiff/appellant contends that the agenda that was posted for the meeting was not specific enough in identifying the ordinance that was going to be reviewed.

First, there is no requirement that the Board conduct a public hearing on the ordinance under review in the first place. See New Jersey Zoning & Land Use Administration, Cox (current edition) Section 10-2.1, page 104 ("Clearly, the statute does not require such a hearing, nor does it require that the matter be open to public comment . . . all deliberations by the board must, of course, be in public . . . ") Thus, the Board should not be held as strictly to the standards of the Open Public Meetings Act as plaintiff/appellant would have the court believe, since the informal review process for an ordinance does not even require that a public meeting be held.

Notwithstanding the aforementioned, the Board did provide adequate notice of the ordinance in the posted agenda for the November 15, 2022 and the

November 29, 2022 hearings. As pointed out by plaintiff/appellant, the Board listed “ordinance for review” in its public agenda. The plain meaning of “ordinance” refers to a proposed or existing regulation, and its inclusion in the agenda signals that the Board will be examining such a measure. This language fulfills the requirement to reasonably apprise the public of the meeting’s subject matter. Moreover, however, the plaintiff/appellant fails to recognize that no formal action was being taken by the planning board regarding this ordinance and further that the planning board technically did not even have to conduct a public hearing on the ordinance under review, and certainly did not have to entertain public comment. As such, any argument that the public was not adequately informed of the planning board’s informal consistency review is misplaced.

**4. THE BOARD PROPERLY REVIEWED THE  
ORDINANCE/AMENDED ORDINANCE FOR CONSISTENCY OR  
INCONSISTENCY WITH THE MASTER PLAN**

Plaintiff argues that the Board did not properly review the ordinance/amended ordinance for consistency or inconsistency with the Master Plan and that therefore, the entire process, and the ordinance, is invalidated. Plaintiff/appellant more specifically argues that the Board failed to address the Land Use Element of the Master Plan during the consistency review, that the Board failed to identify any inconsistencies between the Ordinance and the

Master Plan, that the Board failed to address Gemma's expert testimony and/or report, and that the Board did not discuss the consistency or inconsistency of banquet halls as accessory uses to schools with the Master Plan.

This defendant/respondent reiterates the legal standard which is that a strong presumption of validity attaches to a municipal body's actions which cannot be overturned unless found to be arbitrary, capricious, or unreasonable. Pressler and Veniero, Current N.J. Court Rules, Comment 5.4 on Rule 4:6-9 (Gann, 2013). New Jersey courts have consistently held that actions of municipal boards are presumed valid and will not be interfered with unless the local agency action is determined to be arbitrary, capricious, or unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992); New Jersey Shore Builders Ass'n v. Township of Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974), cert. denied, 65 N.J. 292 (1974).

The Board's course of action in reviewing the Ordinance/Amended Ordinance for consistency or inconsistency with the Master Plan was not arbitrary, capricious, or unreasonable and was completed in accord with the law. Upon receipt of the referral from the township committee, the Board promptly scheduled a consistency review on November 15, 2022 and included the review as an agenda item in its official agenda. As can be gleaned from the transcript of the November 15, 2022 hearing, the Board spent substantial time discussing

the ordinance, considered comments from members of the public, and afforded ample opportunity for Mr. Shea to make his legal arguments. The Board also considered the testimony of the plaintiff's expert planner, Mr. Gemma. The Board dedicated not one, but two meeting dates to the consistency review and ultimately reached a determination that the ordinance was consistent with the Master Plan.

Contrary to plaintiff's contention, the Board addressed the Land Use Element of the Master Plan during the consistency review, it identified any inconsistencies between the ordinance and the Master Plan, and discussed the consistency or inconsistency of banquet halls as accessory uses to schools with the Master Plan. At the initial consistency review hearing, the Board heard testimony from Mr. Gemma as to the eleven goals and objectives on pages eight and nine of the Land Use Element. (T1:pg 38, ln 12-18) After listening to the lengthy testimony provided by Mr. Gemma, the Board decided to form an ad hoc committee to discuss the matter further prior to the next consistency review meeting. (T1:pg 31, ln. 19-23) A subcommittee of the Board, which included Ms. Morris in her capacity as Board administrator (T2:pg 3, ln 8-12) met with the Board planner to discuss what the ordinance was proposing and what the Board's concerns might include. The Board discussed the Land Use Element at that meeting. Chairman Neiman recounted during the second consistency hearing that some

of the discussion points included whether off-street parking should be allowed, how many parking spaces are necessary for the school versus the catering hall, and other constraints on parking. (T2:p6, ln 1-14) These subjects go directly to the Land Use element's emphasis on addressing traffic congestion. (T2:p 7, ln 1-25) Other discussion points included whether to exclude residential areas from the ordinance; whether parking spots should be utilized for other ancillary services such as school buses and storage; and square footage of the parking ratio. (T2, p 7, ln. 1-11) These discussion points go directly to the Land Use Element's emphasis on "the extent and intensity of development of land to be used . . . for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes." (See N.J.S.A. 40:55D-28(b)(2) The Board spent time discussing the memorandum prepared by Ms. Morris and focused in particular on examples of requirements for banquet halls in different zones. (T2, p. 17, ln 5-12; p. 21, ln 13-20; p22, ln 13-19) Mr. Flancbaum spoke at the second review hearing about how he feels that the parking ratio should be reconsidered to try to strike the balance between quality of life and a community need, particularly in light of the current tendency to have over congestion of cars parked on the side streets, which goes directly to the Land Use element of accommodating the town's growing population and addressing traffic congestion and also represents an identification of an

inconsistency between the ordinance and the Master Plan in this board member's opinion. (T2:p10, ln 3-25) Board Member Stern brought up the subject of inconsistency of banquet halls as accessory uses to schools with the Master Plan in residential zones. (T2:pg12, ln 1-15) The Board spent a substantial amount of time discussing the parking ratio which Board members clearly felt was important in determining whether the ordinance is consistent with the Master Plan and goes directly to the intensity of development of land for commercial purposes, which is part of the Land Use Element. Although Mr. Vogt, the Board engineer, did not write a written memorandum to the Board outlining his opinions, he took part in the ad hoc committee meeting, and he also opined at length at the second consistency hearing as to his opinions regarding the parking ratio. (T2, pg 24) The Board conducted deliberations and directly considered the ordinance's consistency or inconsistency with the Master Plan. (T2, p48- T2:p 54, ln 25) The Board attorney ultimately offered a resolution, the same was modified during further discussion among the Board members, and the resolution was ultimately passed by a majority in favor of finding that the ordinance was consistent. (T2, p58-59)

Plaintiff points out that some members voiced concerns about certain aspects of the ordinance, particularly concerning the parking ratio, and that therefore the "Board's firm belief" that the whole floor area should be utilized in the

calculation was not contained in the memorandum to the Committee. First, this wasn't the Board's "firm belief". In fact, during deliberations and the motion, the Board indicated that it felt the Committee should alternatively consider basing the parking count on the gross square footage of the proposed banquet facility. (T2: pg 58, ln 10-16). Moreover, while various board members voiced their opinions and participated in the decision-making process, comments of individual board members do not provide the basis for review by a court; rather, the agency's written determination adopted as its official action is the touchstone for judicial review. New York SMSA, L.P. v. Bd. Of Adjustment of Tp. Of Weehawken, 370 N.J. Super. 319 (App. Div. 2004)

Plaintiff contends that the Board "disregarded" Gemma's expert testimony which rendered its conclusion that the ordinance was consistent with the Master Plan arbitrary on its face. Plaintiff further contends that since Mr. Magno did not provide a report to the Board on the subject of the consistency review, the Board's review was arbitrary, capricious and unreasonable because the Board "disregarded the only expert testimony given". First, the Board is free to accept or reject the opinions of experts who testify before the Board. Allen v. Hopewell Twp. Zoning Bd. of Adjustment, 227 N.J. Super. 574, 581 (App. Div. 1988). Further, nowhere is it mandated in N.J.S.A. 40:55D-26(a), or in any case law or other statute on point for that matter, that the Board planner must present a report

to the planning board during the pendency of an ordinance consistency review. While Vogt did not provide a written report, he was present at both consistency hearings, and at the ad hoc committee meeting. He provided his opinions on various concerns voiced by board members at the consistency review hearing and thus plaintiff/appellant's argument that the Board did not hear expert testimony from "anyone aside from Gemma" is false and without merit. The Board's own engineer's expert testimony was provided at the consistency review hearing and said testimony was considered by the Board. Finally, the Board also considered the report of Morris, who, contrary to plaintiff/appellant's assertion, was a member of the ad hoc committee, and this report included a summarization of what was discussed during the ad hoc committee meeting which included Vogt as a member.

Plaintiff makes a red herring argument that the e-mailed report of the board attorney was a "vast departure" from the comments that the Board made at the consistency review hearings in an attempt to invalidate the Board's process. The Board's reporting process was in compliance with the applicable statute. The Board was required to report to the committee its conclusion as to whether the ordinance was consistent, make recommendations regarding inconsistencies, if there were any, and address any other matters that the Board deemed appropriate. Regarding Mr. Jackson's memorandum to the council, the same was

an accurate reflection of the Board's overall conclusions. Mr. Jackson summarized that the Board found the ordinance consistent with the Master Plan; that the Board has, for many years, viewed banquet halls as an accessory to schools, and noted that the Board emphasized that any amendment to the zoning ordinance imposing conditions and standards associated with the accessory use of banquet halls must not disturb existing schools with banquet halls and that their use must be permitted to continue as lawful. He further went on to state that the most significant issue with accessory banquet uses is parking, which was clearly a significant item discussed at length throughout the two consistency review hearings. Mr. Jackson also noted that the Board recommended that the committee adopt criteria that would allow and exclude banquet halls in specifically identified neighborhoods; this was also a discussion item during the course of the two hearings. (T2, p. 17, ln 5-12; p. 21, ln 13-20; p22, ln 13-19). Plaintiff/appellant takes issues with Mr. Jackson's usage of the word "grandfathered" and submits that the Board did not discuss the concept of grandfathering, but they most certainly did during their discussions regarding the current parking ratios for sites that already had existing banquet halls. (T2, pg. 12-18)

Furthermore, this respondent reiterates that while the memorandum sent by Mr. Jackson to the committee does not constitute a formal resolution of the

Board, to the extent that the memorandum is the written opinion of the Board as penned by the Board attorney, the board attorney is more familiar with the legal and procedural requirements governing planning board resolutions than the individual board members are. During deliberations and board discussions, board members expressed their opinions and discussed the issues in general terms. Mr. Jackson, in his role as Board attorney, took the board's intentions and ensured that they were articulated clearly and coherently in the memorandum that was ultimately sent to the council.

### **CONCLUSION**

For all of the foregoing reasons, this respondent respectfully submits that the Court should affirm the lower court's ruling finding that the actions of the Planning Board fully comported with the Municipal Land Use Law.

Respectfully submitted,

s/ Jilian McLeer

s/ John Jackson

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**1650 CORPORATE ROAD WEST,  
JERSEY  
LLC**  
Plaintiff/Appellant

SUPERIOR COURT OF NEW  
**APPELLATE DIVISION**  
DOCKET NOS: A-4035-23

v.

**THE TOWNSHIP COMMITTEE OF;  
COURT  
THE TOWNSHIP OF LAKEWOOD,  
THE TOWNSHIP OF LAKEWOOD  
PLANNING BOARD, JOHN DOES 1-  
100 (A FICTITIOUS NAME FOR  
PERSONS PRESENTLY UNKNOWN)  
Jr.  
AND XYZ, INC. 1-100 (A FICTITIOUS  
NAME FOR A BUSINESS ENTITY  
PRESENTLY UNKNOWN)**

ON APPEAL FROM SUPERIOR  
**LAW DIVISION, DOCKET NO:**  
OCN-L-203-23

**Sat Below:**  
**The Honorable Francis L. Hodgson,**

**A.J.S.C.**

Defendants/Respondents

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**BRIEF AND APPENDIX OF RESPONDENT, TOWNSHIP COMMITTEE OF  
THE TOWNSHIP OF LAKEWOOD**

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On the brief.

Dated: January 15, 2024

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## PRELIMINARY STATEMENT

The Township of Lakewood is unique in Ocean County. The town has experienced explosive development, with its population grew by 45.6% from 2010 – 2020 and continues at a rate of almost 2% annually. This growth is mostly due to the large Orthodox Jewish population. Development in Lakewood looks different than in surrounding towns, with an increased demand for private schools.

When not in use for schooling, school places of assembly have historically been used for banquet purposes. The use became so prevalent that, in Lakewood, it has come to be accepted as a customary accessory use to a school. In recognition of that practice, the Township Committee of the Township of Lakewood introduced an ordinance permitting banquet halls as an accessory to schools in certain zones when schools are not in use.

Appellant is a non-school use in an industrial zone and objected to the ordinance on a variety of procedural grounds, and in general disagreement with the use. The Trial Court exhaustively reviewed each of appellant's claims and determined that the ordinance was adopted in compliance with the Open Public Meetings Act, and the MLUL. It is valid, and within the legislative ambit of the Township Committee. An ordinance is not invalid simply because some residents disagree with it.

**STATEMENT OF FACTS & PROCEDURAL HISTORY<sup>1</sup>**

The Township Clerk of the Township of Lakewood transmitted the Annual Notice of 2022 Meeting dates to both the Star Ledger and the Asbury Park Press. (Ra1) The Notice was published by the Star Ledger on January 5, 2022. (Ra1) The October 20, 2022 and December 8, 2022 meetings were both contained within this notice. (Ra1)

On October 20, 2022 the Township Committee of the Township of Lakewood introduced Ordinance 2022-046 and referred the ordinance to the Planning Board for their review and recommendations. (Pa0174a) The Planning Board considered Ordinance 2022-046 at their meetings held on November 15, 2022 (Pa0223a) and November 29, 2022 (Pa0250a). The Planning Board report was forwarded by its Counsel to the Township Attorney on December 1, 2022. (Pa0260a) The ordinance was adopted following second reading on December 8, 2022. (Pa0282a)

The ordinance permits catering facilities and banquet halls as accessory uses to schools in all non-residential zones where schools are permitted under the Land Use Code.

In all non-residential zones where schools are permitted uses, and the Oak Street Core Neighborhood Overlay zone-1, catering facilities and banquet halls shall be allowed as

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<sup>1</sup> The Statement of Facts and Procedural History and inextricably linked and are therefore combined.

accessory uses in the school buildings, provided the following parking requirements are met:

Where the section of the school utilized for catering and banquet functions (to be known as the Banquet Hall space, but not including bathrooms, food prep rooms, and facilities not associated with the Banquet Hall function, such as guest preparation rooms, etc.) 1.0 parking spaces shall be required for every 50 square feet. (Pa160a)

On January 15, 2023, appellant filed a Verified Complaint and Order to Show Cause (Pa0075a). The request for temporary restraints was denied after a hearing on March 3, 2023. Plaintiff's complaint was amended following a motion to amend on June 30, 2023 (Pa0009a)

On August 18, 2023, Appellant filed a Motion for Summary Judgment on Counts One, Four, Five, Six, Eight, Sixteen, and Seventeen of the Amended Complaint. The Township filed a cross-motion for summary judgment on the same counts. Following oral argument Counts one, four, five, six, eight and sixteen were granted. The appellant filed a Motion for Reconsideration of the October 17, 2023 order granting Summary Judgment, which was denied in its entirety on November 17, 2023 (Pz0015a). The Township filed a Motion for Partial Summary Judgment to dismiss Count Seventeen which was granted on January 19, 2024 (Pa0017a)

A trial was held on May 21, 2024. By order dated July 9, 2024, the Court dismissed the complaint. (Pa0020a)

**POINT 1**  
**THE 2022 NOTICE OF ANNUAL MEETINGS**  
**COMPLIED WITH OPMA AND THE CHALLENGE**  
**TO THE NOTICE WAS FILED OUT OF TIME**  
**UNDER R. 4:69-6.**

The Lakewood Township Committee complied with the requirements of the Open Public Meetings Act (“OPMA”) regarding the notice of both the October 20, 2022 and December 8, 2022 meetings.

OPMA defines “adequate notice” at N.J.S.A. 10:4-8 as follows:

d. “Adequate notice” means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegraphed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body’s geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body’s geographic boundaries are extensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other

public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act<sup>1</sup> set forth the location of any meeting, no further notice shall be required for such meeting.

OPMA also requires pursuant to N.J.S.A. 10:4-18, within 7 days following the annual organization or reorganization meeting of a public body, that every public body shall post and maintain posted throughout the year and shall mail to the newspapers described in above, a schedule of the regular meetings of the public body to be held during the succeeding year.

Regarding the annual notice requirement, the Township Clerk transmitted the 2022 meeting dates to both the Star Ledger and the Asbury Park Press. (Ra1)

OPMA requires “written advance notice... to the extent known” of the agenda of every regular, special or rescheduled hearing to be mailed to the two newspapers described in N.J.S.A. 10:4-8. Actual publication of notice is not required for compliance with this provision of the Open Public Meetings Act, requiring at least 48 hours advance notice to be given to at least two newspapers. All that was required is transmittal of notice to the appropriate newspapers at least 48 hours prior to the meeting. Worts v. Mayor and Council of Upper Tp., 176 N.J. Super. 78 (Ch.1980).

Both the December 8, 2022 hearing and the October 20, 2022 hearing were included in the Annual Notice of 2022 Hearing Dates for the Township

Committee. The agendas for both meetings were mailed to both papers at least 48 hours in advance of the meetings. The annual notice was published in the Star Ledger on January 5, 2022. The Township has complied with the requirements of OPMA.

Furthermore, Count Seventeen of plaintiff's Amended Complaint was barred by the Statute of Limitations pursuant to R. 4:69-6(a) and was properly dismissed. According to R. 4:69-6(a), "no action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed." Any challenge to a deficiency in the publication of the annual notice was required to have been filed 45 days from January 10, 2022, or, by February 24, 2022. The amended complaint including this claim was filed 497 days out of time.

The forty-five-day rule is aimed at those who "slumber on their rights." Schack v. Trimble, 28 N.J. 40, 49 (1958). The two principal purposes underlying this limitation are an attempt to provide repose for municipalities in connection with their zoning determinations, and to prevent the effectiveness of municipal zoning action until such time as those who are affected by it have been informed. County Chevrolet Inc. v. North Brunswick Tp. Planning Bd. 190 N.J. Super. 376, 380 (App Div. 1983). The forty-five-day rule may be relaxed pursuant to R. 4:69-6I "where it is manifest that the interest of justice so requires."

However, enlargement of this time limitation is not routinely given because of the importance of stability and finality to public actions. County of Ocean v. Zekaria Realty, 271 N.J. Super. 280 (App. Div.) *cert. denied*, 513 U.S. 1000 (1994).

New Jersey courts have over time recognized certain types of cases that qualified for an enlargement of the time limitation to advance the interests of justice. In Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975), the New Jersey Supreme Court outlined three types of cases that qualify for the exemption: those that involve substantial and novel constitutional questions; informal or *ex parte* determinations made by administrative officials and important public rather than private interests which require adjudication or clarification. The Supreme Court has held that when a case falls within one of these categories, a trial court may grant even a “very substantial enlargement of the time in order to afford affected parties an opportunity to challenge the alleged unlawful governmental action.” Willoughby v. Planning Bd. Of Deptford, 309 N.J. Super. 266, 276 (App. Div. 1997).

The permissible reasons to enlarge the forty-five-day time limitation are not limited those outlined by the Brunetti court. An enlargement of time for bringing a prerogative writ in the interests of justice may be permitted under circumstances that do not fall within the Brunetti exemptions, but the particular

factual scenario qualifies for an “interests of justice” exemption. Adams v. Delmonte, 309 N.J. Super. 572, 580-82 (App. Div. 1998). Whenever an application is made for such enlargement, a court must weigh the public and private interests that favor the enlargement against the “important policy of repose expressed in the forty-five-day rule.” Borough of Princeton v. Bd. Of Chosen Freeholders of Mercer Cty., 169 N.J. 135, 152-53 (2001). In Adams, the plaintiff was allowed to file a challenge nine months after the zoning board determination because the full scope of the defendant’s septic operation had not been disclosed until his site plan application to the planning board. Similarly, a unique factual scenario was presented in Cohen v. Throft, 368 N.J. Super. 338 (App. Div. 2004) where plaintiff was entitled to a three-day extension due to a double publishing of the notice of approval.

This appeal alleges a purely technical violation of OPMA. Plaintiff is not alleging that the public meeting took place without plaintiff’s knowledge and was prejudiced in some way. Plaintiff and plaintiff’s representatives attended the October and December meetings and clearly had notice that they were taking place. It is a purely technical procedural argument and does not merit the enlargement of the statute of limitations more by than elevenfold.

## POINT 2

**THE REVISIONS TO THE ORDINANCE WERE NOT SUBSTANTIAL, NEW NOTICE WAS NOT REQUIRED UNDER R. 4:49-2.**

The subject ordinance was revised following comment by the Planning Board. The revisions are as follows:

Introduced:

In all zones where schools are permitted uses, catering facilities and banquet halls shall be allowed as accessory uses in the school buildings, provided the following parking requirements are met:

Where the section of the school utilized for catering and banquet functions is 800 square feet to 1,999 square feet, 0.75 parking spaces shall be required for every 100 square feet of area utilized for catering and banquet uses, and if the section of the school utilized for catering and banquet functions is 2,000 square feet or greater, then 1.0 parking spaces shall be required for every 100 square feet.

Adopted:

In all **non-residential** zones where schools are permitted uses, **and the Oak Street Core Neighborhood Overlay zone-1**, catering facilities and banquet halls shall be allowed as accessory uses in the school buildings, provided the following parking requirements are met:

Where the section of the school utilized for catering and banquet functions (to be known as the Banquet Hall space, but **not including bathrooms, food prep rooms, and facilities not associated with the Banquet Hall function, such as guest preparation rooms, etc.**) 1.0 parking spaces shall be required for every **50** square feet.

“It is not every amendment that is required to be republished as ordained by N.J.S.A. 40:49-2, but only such as substantially alter the substance of the

ordinance.” Manning v. Borough of Paramus, 37 N.J. Super. 574, (App. Div. 1955). The inquiry involves a mixed question of law and fact. The words of the amendment are to be assessed in the context of the provision of which they are a part and the basic policy of the legislative enactment. ‘Substance’ in the statutory intendment has reference to the essential elements of the legislative act and the public policy of acts *In pari materia*. Wollen v. Fort Lee, 27 N.J. 408, 420, (1958). Gilman v. Newark, 73 N.J. Super. 562, 598–99 (Law Div. 1962).

To demonstrate a “substantial revision” appellant must establish that the amendments were of such legally consequential materiality, in their contributive relation to the substantive body of the ordinance, that their inclusion therein ought to be regarded as a change which essentially altered the manifest objective intent and materiality of the ordinance. Manning v. Borough of Paramus, *supra*, 37 N.J. Super. at p. 581. The plaintiffs must further be aggrieved by the changes. Wollen v. Fort Lee, *supra*, 27 N.J. at 420. Without demonstration of same, the ordinance is therefore validly adopted. Gilman v. Newark, 73 N.J. Super. 562, 598–99 (Law Div. 1962),

An amendment to rent leveling ordinance which reduced the effective period of the ordinance from three years to one year, did not constitute such a “substantial alteration” of the ordinance as to warrant its invalidation.

Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, (L.1972), *cert. granted* 62 N.J. 186, *affirmed* 62 N.J. 521.

Similar to the revised language at issue here, revision between first and second reading to zoning ordinance reducing area of district restricted to one-family residence use and creating multi-story apartment district which “merely” provided for establishment of a “buffer” zone 50 feet wide for entrance ways and landscaping, usable in part for off street parking and garages did not substantially alter substance of ordinance requiring republication. Wollen v. Borough of Fort Lee, 27 N.J. 408 (1958).

Where deletion of part of zoning ordinance opened rather than closed door upon particular and individualized property uses in specified areas, and its proposed effect was an additional gratuity and not an enlarged restraint, and also deletion from the ordinance did not materially change the manifest objective intent and materiality of ordinance, such alteration did not necessitate a republication and rehearing thereon as required by this section in event of an amendment. Manning v. Borough of Paramus, 37 N.J. Super. 574 (App. Div.1955).

The amendments in question did not constitute substantial changes altering the substance of the ordinance. Their proposed effects were in the form of additional gratuities rather than additional burdens. Furthermore, Appellants

were not aggrieved by the revision. The amendments reduced the number of zones to which the change applied, from all zones to only non-residential zones. The revision also clarified catering facilities and banquet halls that met the parking requirements would continue to be allowed as accessory uses.

Examination of the revised language shows only that the ordinance was less burdensome (i.e.. accessory banquet halls permitted in fewer zones –and all residential zones removed.) The other revisions simply clarified what constitutes Banquet Hall space for parking calculation and set forth the Committee’s understanding that catering facilities and banquet halls had previously been permitted accessory uses.

**POINT 3**  
**ADDITIONAL NOTICE TO THE COUNTY**  
**PLANNING BOARD WAS NOT REQUIRED**  
**BECAUSE THE ORDINANCE DID NOT REQUIRE**  
**RE-INTRODUCTION**

The Township of Lakewood complied with the notification of the County Planning Board as required by N.J.S.A. 40:55D-15(b) which requires notice by personal service , certified mail, or e-mail with confirmation that the e-mail was delivered, shall be made to the county planning board of (1) all hearings on the adoption, revision or amendment of any development regulation at least 10 days prior to the date of the hearing. (Certification of Municipal Clerk, ¶ 4.)

N.J.S.A. 40:55D-16 requires filing of a copy of an ordinance with the County Planning Board following adoption. This was also done. (Certification of Municipal Clerk, ¶ 5).

As no substantive changes were made to the ordinance, additional notification to the Ocean County Planning Board was not required and the Township complied with the notification requirements of the MLUL.

**POINT 4**  
**NOTICE UNDER N.J.S.A. 40:55D-62.1 WAS NOT**  
**REQUIRED BECAUSE THE ORDINANCE DID NOT**  
**CHANGE THE CLASSIFICATION OR BOUNDARY**  
**OF A ZONING DISTRICT**

N.J.S.A. 40:55D-62.1 requires enhanced notice of an amendment of a notice that proposes a change in classification or boundaries of a zoning district. Enhanced notice includes personal notice to all property owners within 200 feet in all directions of the boundaries of the district in the event of a classification change. The term “classification” is undefined in the MLUL.

Classification refers to the use permitted in a zoning district, such as residential, commercial or industrial, as well as sub-categories within the broader uses, such as single-family residential and high-density residential, highway commercial and neighborhood commercial, and highway retail and neighborhood retail. A change in any of these broad categories and sub-categories has the capacity to fundamentally alter the character of a zoning

district. Robert James Pacilli Homes, L.L.C. v. Twp. of Woolwich, 394 N.J. Super. 319, 329–33 (App. Div. 2007). Under certain circumstances, changes to the density, bulk and height standards and conditions applicable to designated uses may constitute a classification change. In Toll Brothers, Inc. v. West Windsor Township, 312 N.J. Super. 540, 551 (App. Div.), *certif. denied*, 157 N.J. 543 (1998), the Township amended its ordinance to decrease the allowable density in certain residential districts by increasing minimum lot size.

The type of notice to be provided on the occasion of a proposed amendment to a zoning ordinance should focus on the substantive effect of the amendment. Pacilli Homes, supra.

A classification change is one which “has the capacity to fundamentally alter the character of a zoning district.” Mahwah Realty Assoc., Inc. v. Twp. of Mahwah, 430 N.J. Super. 247 (App Div. 2013). Changes in classification are synonymous with broad general uses permitted in a designated area. Id.

The changed effected by this ordinance do not fundamentally alter the character of the affected zoning districts, the ordinance permits a new accessory use to what uses that are currently permitted in the affected zones. Furthermore, it is a use that has traditionally been interpreted as an accessory use to schools in Lakewood Township for years. An accessory use is one that is customary,

incidental and subordinate to a principal use or structure. Wyzykowski v. Rizas, 132 N.J. 509, 519-521 (1993). Although a zoning ordinance may list of define specific accessory uses and structures, when it does not an inquiry is performed to determine whether, under the circumstances, a specific use or structure may be considered an appropriate accessory. Over time in Lakewood Township, it became apparent that banquet and dining halls were customary and incidental uses to schools, and the ordinance was amended to codify this historical practice.

The ordinance does not fundamentally alter the uses permitted in each district nor does it alter the bulk requirements of any of the zones. The non-residential zones remain non-residential, and schools which traditionally have assembly space may be able to accommodate additional uses for that space. The heightened notice provisions in N.J.S.A. 40:55D-62.1 are not implicated where there is no substantive impact on the zone.

**POINT 5**  
**VIRTUAL MEETINGS ARE AUTHORIZED UNDER**  
**THE OPEN PUBLIC MEETINGS ACT**

The Open Public Meetings Act itself defines a meeting as follows:

b. “Meeting” means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2)

attended by or open to all the members of three or more similar public bodies at a convention or similar gathering. N.J.S.A. 10:4-8 (emphasis added)

Plaintiff focuses entirely on expiration of the virtual meeting provisions put in place during the Covid-19 state of emergency. However, as the Appellate Division recognized in a pre-pandemic unreported decision, the Open Public Meetings Act itself allows for telephonic meetings, and effective action may be taken at such meetings. “As to the propriety of the Board's action, we discern no procedural irregularities or legal infirmities. The Board holds the discretion to provide notice to the public of its decision to conduct a special telephonic meeting. It held the meeting, during which the public had an opportunity to present positions. At the close of discussion, the Executive Director presented the noticed resolution for adoption, which was moved, seconded and approved by a majority of the members present who constituted a quorum. See N.J.S.A. 27:25–4(e) (providing NJT acts through the voting members of its Board, which may act through motions or resolutions).” In Matter of Princeton Branch Ry. Station, No. A-6009-12T1, 2015 WL 10097382, at 6 (App. Div. 2016).

The Open Public Meetings Act definition permit meetings held, “by means of communication equipment.” The expiration of the procedural requirements established by regulations and executive order put in place in response to the pandemic and concurrent state of emergency does not alter the

pre-existing statutory language validating the holding of Open Public Meetings by communication equipment as established by statute and confirmed by the Appellate Division.

Interpretation of a statute should be first by its plain language. When the language is clear and unambiguous, and subject to only one interpretation, the court must infer the Legislature's intent from the statute's plain meaning. In re Plan for the Abolition of Council on Affordable Hous., *supra*, 214 N.J. 444, 467 (2013). Only in the event that the statutory language is ambiguous may the court look at extrinsic evidence such as legislative history, judicial interpretation, and rules of statutory construction. Id. at 468. A court may also consider extrinsic evidence if “a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language.” DiProspero v. Penn, 183 N.J. 477, 493.

The language of N.J.S.A. 10:4-8 is clear. It specifically defines a meeting as a gathering that is either corporeal or “by means of communication equipment.” Given the clear unambiguous language of the statute, it is unnecessary to analyze the statutory history or other extrinsic evidence of legislative intent, or apply other dictates of statutory interpretation. Respectfully, the court should interpret OPMA as written, and not as interpreted by the Senate State Government, Wagering, Tourism & Historic Preservation Committee.

Exhibit II is neither case law or indicia of legislative intent. Accordingly, the Plaintiff cannot demonstrate a violation of the Open Public Meetings Act due to meetings being held virtually.

**POINT 6**  
**APPELLANT FAILED TO JUSTIFY**  
**RECONSIDERATION UNDER R. 4:49-2**

Pursuant to R. 4:49-2, reconsideration of an order or judgment “is a matter within the sound discretion of the Court, to be exercised in the interest of justice”. D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. 1990). Such relief should be granted sparingly.

A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by a notice of appeal.

Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

D’Atria, 242 N.J. Super. at 401.

Therefore, to justify reconsideration, a movant must initially establish that the Court’s Order was arbitrary, capricious or unreasonable. Id. See also Hunt v. Virtua Health, Inc., 2017 N.J. Super. Unpub. LEXIS 1772 (App. Div. 2017). Only if the movant clears that hurdle can it move on to proving that the Court’s decision had a palpably incorrect or irrational basis, or that the Court failed to consider probative, competent evidence. Id. See D’Atria, 242 N.J. Super. at 401. The Court’s review of the arguments on such a motion should be “sensitive and scrupulous.” Id. at 402. See also Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(reconsideration denied where movant failed to offer proof of evidence ignored or relevant court decisions disregarded).

In its motion, appellant failed to identify the “controlling decisions” which “the Court has overlooked or as to which it has erred”. State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). It also failed to identify “probative, competent evidence” that the Court ignored. Fusco v. Board of Educ. City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). Reconsideration is only an option “if a litigant wishes to bring new or additional information to the court’s attention which it could not have provided on the first application ...” D’Atria, 242 N.J. Super. at 401. The basis for a reconsideration motion is what information was before the court in the first instance. Id.

Instead of citing law overlooked or evidence presented but ignored, Appellant asked the Court to re-apply the Summary Judgment standard set forth in Brill v. Guardian of Life Ins. Co. of America, 142 N.J. 520 (1995), arguing that there was in fact a genuine issue of material fact with regard to Counts Four and Five which concerned whether the ordinance was substantially revised between first and second readings. Appellant repeated the exact same arguments from its original motion concerning the amendments to the ordinance and the Planning Board's consideration of its consistency with the Master Plan. Similarly with regard to Count 6, appellant argued that the existence of factual issues precluded the determination to issue Summary Judgment.

With regard to Count Seventeen which concerned publication of the annual notice of meetings, the only new "evidence" submitted was correspondence from the Lakewood Township Clerk from 2022. Not only was the correspondence not probative or reasonable evidence of insufficient publication, it also could not be considered on a motion for reconsideration because it could have been provided in the initial papers. Reconsideration is only an option "if a litigant wishes to bring new or additional information to the court's attention which it could not have provided on the first application ..."  
D'Atria, 242 N.J. Super. at 401. The basis for a reconsideration motion is what information was before the court in the first instance. Id.

The Court declined to reconsider its opinion on the basis that the Appellant failed to submit any new evidence or argument that would justify such extraordinary relief.

**POINT 7**  
**APPELLANT FAILED TO JUSTIFY ENTITLEMENT**  
**TO THE EXPANSION OF THE RECORD BEYOND**  
**THE FACTUAL RECORD BELOW**

Unlike reconsideration motions to alter or amend final judgments and final orders, which are governed by R. 4:49-2, a motion for reconsideration of an interlocutory order such as was the Court's Case Management Order, is governed by the “far more liberal approach” set forth in Rule 4:42-2. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Rule 4:42-2 “declares that interlocutory orders ‘shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.’” Ibid. (quoting R. 4:42-2).

Nevertheless, appellant failed to demonstrate the Court wrongfully denied its application to for expanded discovery. The Court has rightfully determined that this case can and should be decided based upon the factual record below. Review of the Planning Board’s determination of consistency of the proposed ordinance with the Master Plan should be based upon the record before the Planning Board at the time of its consideration.

Additionally, the determination of the existence of a conflict of interest is a legal question that does not require depositions. The question of whether the fact that a member of the governing body's family holds an administrative position in a school with a banquet hall constitutes a disqualifying conflict of interest on a vote to permit banquet halls as accessory uses in certain zones is a legal inquiry that should be determined by the court without the need for depositions.

**POINT 8**  
**ORDINANCE 2022-46 IS NOT ARBITRARY,**  
**CAPRICIOUS OR UNREASONABLE**

Municipal ordinances are presumptively valid. Brown v. City of Newark, 113 N.J. 565, 571 (1989). One who challenges an ordinance has the burden of proving that it is arbitrary, capricious, or unreasonable. Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564–65 (1975); Vineland Constr. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230, 256 (App. Div.2007), appeal dismissed as moot, 195 N.J. 513 (2008). The presumption that an ordinance is reasonable “can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest.” *Ibid.*

When analyzing the validity of an ordinance, the court must examine the entire ordinance, keeping in mind its objectives in the light of the surrounding circumstances. Gilman v. City of Newark, 73 N.J. Super. 562, 593–94 (Law. Div. 1962)

In Gilman, the court concluded that adequate and specific norms and standards had been set up to guide the administrative officers of the city in granting licenses for the operation of rooming houses. The ordinance was so specific that it left very little discretion to the officers primarily charged with the issuance of licenses. The word ‘reasonable’ is the standard to be used. It is difficult to see how a more detailed standard could be used, since there would be no way of knowing in advance what the violations would be.

The presumption of validity is overcome only by a demonstration that the ordinance is “clearly arbitrary, capricious or unreasonable, or plainly contrary to the fundamental principles of zoning or the [zoning] statute.” Riggs v. Tp. of Long Beach, 109 N.J. 601, 611 (1988). Where zoning ordinances are concerned, it has frequently been held that what best furthers public welfare is a matter primarily for determination of the legislative body concerned, and under this principle, ordinances which designate residential districts and exclude trailer parks and like enterprises therefrom have often been upheld as valid exercises of

the police power. Pierro v. Baxendale, 20 N.J. 17, 22–23 (1955) (internal citations omitted).

Even in instances where the reasonableness of a particular zoning ordinance is debatable, or where there are conflicting opinions as to the desirability of the restrictions it imposes or the suitability for residential purposes of property so designated thereby, it is not the function of the courts to interfere with the legislative discretion on such issues. Id.

Lakewood Township is unique in Ocean County. Lakewood has a greater need for zoning that permits places of worship, schools and banquet halls in a variety of zones than other municipalities.

Lakewood’s Master Plan recognizes the large number of private, parochial and secondary schools as well as special education facilities, with private school enrollment far exceeding that of the public schools. The purpose of the M-1 zone is to “facilitate the development of uses of an industrial nature such as bulk storage; manufacturing or assembly facilities; office buildings; hotels and motels; health and human services; restaurants and... quasi-public and private educational facilities.” (Pa0569a)

The ordinance does not permit a new use wholly inconsistent with what is already permitted in non-residential zones, specifically the Industrial Zone. It permits an accessory use to an established principal use, a school. The ordinance

does not sanction the ills cited by plaintiff: volume of visitors, increased traffic or running children in any new zones. It permits an accessory use in zones where these issues already exist, on properties where these issues already exist. While banquet facilities may not be “of an industrial stripe”, the same could be said for schools. However, it was the legislative determination of the governing body to include schools as a permitted use in these zones. Allowing the school buildings to also be used as a banquet or catering facility permits another compatible use to what is already existing. Moreover, the parking standard is not the only bulk standard applicable to these uses, the principal school use is already subject to the bulk requirements of the specific zone. The accessory use of each school will be limited by the space utilized for the banquet use and the existing bounds of the property.

In Lakewood, catering and banquet facilities have over time been recognized as a customary and incidental use to schools. This ordinance codifies that principle. Appellant disagrees with the suitability of the industrial zone for these permitted accessory uses; however plaintiff’s displeasure is not dispositive on the issue of whether the ordinance is valid. The ordinance is anything but arbitrary or capricious, rather it is a direct legislative response to the unique, growing needs of Lakewood Township.

**POINT 9**

**THE GOVERNING BODY IS ENTITLED TO RELY  
ON THE PLANNING BOARD'S DETERMINATION  
OF CONSISTENCY WITH THE MASTER PLAN  
UNDER N.J.S.A. 40:55D-26**

N.J.S.A. 40:55D-26 requires the Planning Board to report to a governing body concerning identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation.

The statute does not proscribe a form for the Planning Board's recommendations, and the trial court found that the emailed report satisfied the transmission requirement.

The MLUL requires that zoning ordinances be substantially consistent with the Land Use Plan Element and the Housing Plan Element of the Master Plan, or designed to effectuate such plan element. N.J.S.A. 40:55D-62a. However, the New Jersey Supreme Court has held that some inconsistency is permissible provided that the amendment does not "substantially or materially undermine or distort the basic provisions and objectives of the Master Plan."

Manalapan Realty v. Township Committee, 140 N.J. 366, 386 (1995). Moreover, a determination of consistency is accorded deference and “great weight.” Id. At 383.

Plaintiff cites to the Land Use Element of the Master Plan discussion of banquet halls as accessory uses to houses of worship for its argument that the ordinance permitting banquet facilities as accessory uses to schools. Plaintiff is mostly concerned about the M-1 District, however that district is not solely limited to Industrial uses. The purpose of the M-1 zone is to “facilitate the development of uses of an industrial nature such as bulk storage; manufacturing or assembly facilities; office buildings; hotels and motels; health and human services; restaurants and... quasi-public and private educational facilities.”

The ordinance does not permit a new use wholly inconsistent with what is already permitted in non-residential zones, specifically the Industrial Zone. It permits an accessory use to an established principal use, a school. The ordinance does not sanction the ills cited by plaintiff: volume of visitors, increased traffic or running children in any new zones. It permits an accessory use in zones where these issues already exist, on properties where these issues already exist. While banquet facilities may not be “of an industrial stripe”, the same could be said for schools. However, it was the legislative determination of the governing body to include schools as a permitted use in these zones. Allowing the school buildings

to also be used as a banquet or catering facility permits another compatible use to what is already existing. Moreover, the parking standard is not the only bulk standard applicable to these uses, the principal school use is already subject to the bulk requirements of the specific zone. The accessory use of each school will be limited by the space utilized for the banquet use and the existing bounds of the property.

The recommendation of the Planning Board specifically found that the ordinance is consistent with the Master Plan, therefore the governing body has complied with the statutory requirements. Moreover, despite plaintiff's insistence to the contrary, N.J.S.A. 40:55D-26 does not require a "planning report." It requires a report from the Planning Board, which was delivered by the Planning Board Attorney. The MLUL similarly does not require a Board to obtain expert reports to support a consistency review of a land use ordinance, or to refute a report retained by an objector.

The Committee satisfied its statutory obligation for the adoption of the ordinance following the finding of consistency by the Planning Board. At the December 8, 2023 meeting the Mayor discussed the Board's findings, and the subsequent revision of the ordinance to include the recommendations of the Board. The Mayor discussed the Board's suggestions which included recognizing the accessory use only in nonresidential zones and in residential

zones which had an overlay for schools; the recommendations as to parking requirements and the implications those requirements would have throughout the zone. (Cite transcript)

Appellant failed to demonstrate that the addition of banquet halls and catering facilities as accessory uses to schools in nonresidential zones substantially or materially undermines the basic provisions and objectives of the Master Plan.” It is clear that the Board, in transmitting its comments concerning the ordinance, fulfilled its statutory obligations for a consistency review, and that the Committee considered the recommendations and the finding of consistency, revised and adopted the ordinance.

**POINT 10**  
**PUBLIC COMMENT MAY BE SUBJECT TO**  
**UNIFORM TIME-BASED RESTRICTIONS BY THE**  
**GOVERNING BODY**

The Open Public Meetings Act explicitly permits a public body to limit public comment at a meeting. N.J.S.A. 10:4–12 provides that all meetings of public bodies shall be open to the public at all times, but:

[N]othing in this act shall be construed to limit the discretion of a public body to permit, prohibit, or regulate the active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal, governing body or board of education, the length of the portion to be determined by the municipal, governing body or board of education, for public comment

on any governmental or school district issue that a member of the public field may be of concern to the residence of the municipality or school district.

Public bodies are granted discretion in the manner of conduct of their meetings. Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 570 (2018). The rule simply regulates the amount of time that each member of the public has to address the Township Committee.

What OPMA does not guarantee is the right of a citizen to convert a public comment session into a mini-court hearing, complete with expert reports and testimony. The public is permitted to comment on ordinances but not to present a case. A Township Committee meeting is not a quasi-judicial hearing.

The Township Committee of the Township of Lakewood uniformly applies a four-minute time limitation for public comment, this applies evenly to members of the public, attorneys and planners. The time-based restriction did not limit the content of the communication, only the amount of time each speaker received, and the time limit was uniformly and consistently applied to each member of the public.

**POINT 11  
COMMITTEEMAN MILLER WAS NOT  
DISQUALIFIED FROM VOTING ON THE  
ORDINANCE**

Elected and appointed officials are subject to the provisions of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq.; subparagraph (d) of N.J.S.A. 40A:9-22.5 states:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial personal involvement that might reasonably be expected to impair his objectivity or independence of judgment; ...

It is not only the actual existence of a conflict that will overturn or void actions of a public official, but the appearance of conflict as well. Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215 (App. Div. 2009). “Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thus, it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself from acting on a matter of public interest.” Thompson v. City of Atlantic City, 190 N.J. 359 (2007). The appearance of impropriety must be “more than a fanciful possibility. It must have some reasonable basis.” Higgins v. Advisory Comm. on Prof’l Ethics of the Supreme Court of N.J., 73 N.J. 123, 129 (1977).

Appellant claims that Commiteeman Miller was prohibited from voting on the ordinance because of a disqualifying conflict. The claim was multifaceted.

First, that the Committeeman's sons did at some point, either at the time of the adoption of the ordinance or previously, attend Yeshiva Toras Ahron, which operates a banquet facility. The second claim was that the Committeeman's mother holds a "significant position" in the administration at Beis Faiga girls' school, which has the oldest banquet hall in town, and thirdly that Beis Faiga also owns a boys school called the Lakewood Cheder which would potentially benefit from the adoption of the ordinance.

These claims do not survive any logical or legal scrutiny. If a school already has a banquet hall, it is unclear how this ordinance would benefit them.

Plaintiff offers no suggestion that Committeeman Miller's mother is dependent upon him and dwells in the same residence. In an unpublished Appellate Division decision arising from a Mayor's appointment of his brother-in-law as Borough Attorney and his daughter to various Borough positions, the Court overturned the determination of the Local Finance Board, finding thusly:

The Board asserts before us that Horvath "had an indirect financial interest and a direct personal interest by virtue of his relationship with his brother-in-law and his daughter," which could be said "to impair his objectivity and independence of judgment." *See N.J.S.A. 40A:9-22.5(d)*. Horvath's brother-in-law was paid, and hence the claim of "financial involvement" as to him, as well as "personal interest" as to both.<sup>2</sup>

However, *N.J.S.A. 40A:9-22.5(d)* relates to "members" of the official's "immediate family," and *N.J.S.A. 40A:9-22.3(i)* defines "member of immediate family" as "the spouse or dependent child of a local government officer or

employee residing in the same household.”<sup>3</sup> Neither the brother-in-law nor an emancipated adult child living outside the official's home is a “member of [his] immediate family.” The undisputed testimony is that she was married, living outside petitioner's home for eleven years, and was not a “dependent for tax purposes.” Horvath v. Loc. Fin. Bd., No. A-2748-04T3, 2005 WL 3991941, at \*4 (App. Div. May 11, 2006).

In order for public officials affiliated with a church or other organization to be disqualified from voting on such an application, the organization's interest in that issue must be imputed to those officials.

\*\*\*\*\*

Consistent with the fact-specific analysis used in conflict-of-interest questions, we decline to adopt a bright-line rule under which the interest of a church or other organization is automatically imputed to all of its members. Although the interests of a church or similar organization in a particular community will ordinarily be imputed to its members who are public officials, there may be circumstances in which automatic imputation of an organization's interests to its members may be unwarranted and unjust. An individual's “membership” in an organization does not necessarily denote active involvement in the group or awareness of the positions it takes in a legal dispute. The question of whether an organization's interest extends to all of its members should be determined on a case-by-case basis. See Grabowsky v. Twp. of Montclair, 221 N.J. 536, 561 (2015).

The conflicts asserted by appellant are too speculative to constitute a disqualifying conflict of interest. It is unknown whether the schools would benefit from the ordinance, and whether any benefit would thereby pass onto Committeeman Miller’s mother. The trial court noted that, particularly in Lakewood Township, there are numerous schools and it is likely that many

citizens would have a connection to a school and if every member of a government with some connection to a school were rendered disqualified, the ability to govern would be severely if not entirely handicapped. (Pa0054a)

**POINT 12**  
**ORDINANCE 2022-46 IS NOT A CONDITIONAL**  
**USE ORDINANCE**

A conditional use is one that is permitted in a particular zoning district “only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefore by the Planning Board.” N.J.S.A. 40:55D-3. The conditional use is a legislative recognition that certain types of uses are not suitable in every location within the particular zoning district. Medical Center at Princeton v. Township of Princeton Zoning Bd. of Adj., 343 N.J. Super. 177 (App. Div. 2001); Omnipoint Communication Inc v. Bd. of Adj. of Tp. of Bedminster, 337 N.J. Super. 398 (App. Div. 2001).

Conditional Use Ordinances are zoning ordinances which provide for a particular use to be granted by the planning board “according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and

extent.” N.J.S.A. 40:55D-67(a). The conditions in the ordinance must be objective; they cannot be susceptible to subjective interpretation by the planning board. While specific standards are required for the benefit of the applicant, they are necessary also to guide the board in making determinations. Value Oil v. Town of Irvington, 152 N.J. Super. 354 (Law Div. 1977). It is impermissible for a governing body to delegate its zoning power to the municipal planning board by authorizing the board to approve conditional uses without providing “clear and ascertainable standards to guide the exercise of the Board's discretion.” PRB Enterprises, Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 9 (1987).

The statutory mandate of specificity and definiteness in a conditional use ordinance is interpreted as a requirement for specific, particular and objective conditions an applicant must satisfy in order to establish a conditional use. Lincoln Heights Ass’n v. Township of Cranford Planning Bd., 314 N.J. Super. 366, (Law Div 1998) *aff’d* 321 N.J. Super. 355, *certif. denied*, 162 N.J. 131(1999).

The lack of certain specifications and standards renders a conditional use ordinance deficient. Loscalzo v. Pini, 228 N.J. Super. 291 (App. Div. 1988) *certif. denied*. 118 N.J. 216 (1989). The mere designation of a particular use as a conditional use without specific conditions is void. A planning board has no authority to review an application under an ordinance without specific

conditions. Meszaros v. Planning Bd. of the City of South Amboy, 371 N.J. Super. 134, 140 (App. Div. 2004).

Additionally, a planning board has no authority to waive or alter a specific conditional use standard. Wawa Food Market v. Planning Bd. of the Borough of Ship Bottom, 227 N.J. Super. 29, 34-38, *certif. denied*. 114 N.J. 299 (1988). Relief from application of the standards may only be had in the form of a use variance from the zoning board of adjustment. A conditional notice that fails to delineate with specificity the criteria necessary to obtain a permit is akin to a criminal statute which fails to delineate which activity it proscribes, thereby failing to give notice of the type of action which constitutes an offense. Value Oil, *supra* 152 N.J. Super. at 367-368.

This ordinance is not a conditional use ordinance at N.J.S.A. 40:55D-67(a). Rather, the ordinance designates a specific accessory use for schools in nonresidential zones together with a parking requirement standard. The parking requirement is a bulk standard, relief of which would be cognizable under N.J.S.A. 40:55D-70(c).

### **CONCLUSION**

For the reasons set forth above, it is respectfully requested that the appeal be dismissed. The Court below ruled that the Township Complied with the

Notice and public comment provisions with OPRA, the ordinance was validly procedurally adopted and valid.

Respectfully Submitted,

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1650 CORPORATE ROAD WEST,  
LLC,

Plaintiff-Appellant,

vs.

THE TOWNSHIP COMMITTEE OF  
THE TOWNSHIP OF LAKEWOOD,  
THE TOWNSHIP OF LAKEWOOD  
PLANNING BOARD, JOHN DOES 1-  
100 (A FICTITIOUS NAME FOR  
PERSONS PRESENTLY UNKNOWN)  
AND XYZ, INC., 1-100 (A  
FICTITIOUS NAME FOR A  
BUSINESS ENTITY PRESENTLY  
UNKNOWN)

Defendants-Respondents

:  
: SUPERIOR COURT OF NEW  
: JERSEY LAW DIVISION:  
: OCEAN COUNTY  
:  
: DOCKET NO: A-4035-23  
:  
: ON APPEAL FROM THE FINAL  
: ORDER ENTERED BY THE  
: SUPERIOR COURT OF NEW  
: JERSEY, LAW DIVISION, CIVIL  
: PART, OCEAN COUNTY  
  
(OCN-L-203-23)  
  
CIVIL ACTION  
  
: SAT BELOW: HON. FRANCIS  
: R. HODGSON, JR., A.J.S.C.

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REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, 1650 CORPORATE ROAD WEST, LLC

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Dated February 10, 2025

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### **Preliminary Statement**

Plaintiff will rely on its arguments as contained within its affirmative brief and will only address Defendants' arguments to the extent same warrant a specific response not already set forth previously.

### **Reply to Statement of Facts/Procedural History**

#### **Planning Board**

Plaintiff's Appellate Brief, previously submitted, contains an accurate recitation of the procedural history and statement of facts with references to the appendix record. The Board's Statement of Facts/Procedural History, albeit making different emphasis or inferences, essentially confirms the relevant facts and a further recitation is not required.

#### **Committee**

The Committee begins its recitation with a factually inaccurate statement, that the 2022 Annual Notice of its meeting dates was sent to both the Star Ledger and the Asbury Park Press. The statement is supported by a citation to Ra1, which is a certification from the municipal clerk, which itself does not cite to any documentary proof that said notice was sent to both newspapers. The claim is also in direct contradiction to Plaintiff's Appendix, which contains documentary proof of its claims. Specifically, Pa046a shows that the notice was published in the Star Ledger,

not the Asbury Park Press and Pa0952a-0954a shows that it was only ever sent to the Star Ledger and was not even sent to the Asbury Park Press.

### **Legal Argument**

#### **I. The Planning Board's Review was Arbitrary, Capricious, and Unreasonable**

The determination of a planning board is not entitled to deference from the court if it is arbitrary, capricious, or unreasonable. Manalapan Builders Alliance, Inc. v. Township Committee, 256 N.J. Super. 295, 304 (App. Div. 1992) The arbitrary, capricious, and unreasonable standard is simply a standard which reflects a finding of error, analogous to the substantial evidence standard. Anastasio v. Planning Board of Tp. Of West Orange, 209 N.J. Super. 499, 522 (App. Div.), certif. den. 107 N.J. 46 (1986); *see* Cell v. Zoning Bd. Of Adjustment, 172 N.J. at 89, citing Rowatti v. Gonchar, 101 N.J. 46, 51-52 (1985) The Board here made several determinations against the weight of the evidence presented before it.

Although a board is not bound to accept expert testimony, “its determination must be made on a rational and reasonable basis.” Reich v. Fort Lee Zoning Bd., 414 N.J. Super. 483, 504-505 (App. Div. 2010) Courts have further held that expert testimony should be granted more weight than that of a lay person. New York SMSA v. Weehawken Bd. Of Adj., N.J. Super. 319, 338 (App. Div. 2004). Furthermore, in the New York SMSA case, the court was quoted as saying:

Moreover, the board made no finding that [the applicant's expert] testimony was unbelievable, incompetent, or conflicting. While a board may reject expert testimony, it may not do so unreasonably, based only upon bare allegations or unsubstantiated beliefs." *Accord Cohen v. Borough of Rumson*, 396 N.J. Super. 608, 617-618, 621 (App. Div. 2007)

Despite arguing the point in their brief, the Board made no finding whatsoever that Gemma's testimony that the Ordinance was inconsistent with the master plan, was erroneous or unbelievable. The Board further had no expert testimony at all that indicated that the Ordinance *was* consistent with the master plan. The instant case is not one where there were opinions rendered on both sides. Rather, the expert testimony of Gemma was unrefuted. Contrary to the Board's representations in their brief, the record is clear that the Board ultimately chose not to ask its own professionals engineer or planners to render a report on the matter of the Ordinance's consistency with the master plan, despite discussing the provision of same at the November 15, 2022 Planning Board Meeting. As such, Gemma is the only expert who assessed the issue.

The Board, as expressed at length in Plaintiff's brief, did not conduct a review of the Ordinance with respect to its consistency with the Land Use Element of the Master Plan. Notably, the Board, in its brief, claims that it "identified any inconsistencies between the ordinance and the Master Plan." (BB21<sup>1</sup>) Interestingly,

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<sup>1</sup> As the Planning Board is one of two defendants, "BB" shall designate a citation to the Board's Brief.

this is not accompanied by any citation to the record, whether in a transcript or a document. The reason is simple, the Board conducted no such review. Furthermore, if the Board did, as it claims, identify sections which were not consistent with the Master Plan, then the Board and Committee should have declared the Ordinance inconsistent with the Master Plan and should have adopted it with the proper procedures for adopting such an ordinance. The Planning Board cannot now have it both ways. Either they identified inconsistencies, or it did not, and in either case, the adoption of the Ordinance was improper.

The Board then goes on to argue that, while members of the Board voiced opinions during deliberations that are contrary to the final determination:

comments of individual board members do not provide the basis for review by a court; rather, the agency's written determination adopted in its official action is the touchstone for judicial review. New York SMSA, L.P. v. Bd. Of Adjustment of Tp. Of Weehawken, 370 N.J. Super. 319 (App. Div. 2004) (BB24)

While the Board accurately recites the written law, therein lies the problem at hand: there was no written determination adopted in the Board's official action. On December 7, 2022, Plaintiff's counsel e-mailed Morris to request a copy of any "resolution, report, or other documents containing the findings and recommendations of the Board." (Pa0261a) Morris responded that the Board Attorney communicated directly with the Township Attorney, and that the document

may be available by OPRA request. She indicated that “no resolution was adopted.”

**(Pa0260a)**

Furthermore, the only document submitted to the Committee was an e-mail from Jackson which purported to be the review of the Board. It should be noted that the Board never took official action to vote on this document. As such, the Board’s reliance on the New York SMSA case to shield it from scrutiny is misplaced. In order to determine whether a consistency evaluation took place and what its result was, we must look to the comments of the Board Members and contrast them with the on-record motion, and the e-mail that Jackson sent to the Committee. This has largely already been done in Plaintiff’s brief, but it is worth repeating that the motion the Board voted on stated:

Be it resolved the Board agrees that an ordinance regulating banquet halls as an accessory use to schools is consistent with the Master Plan. The Board urges the following amendments, one space to 45 square feet. All assembly areas would be, must be included in the ratio. No on street parking within 100 feet. The higher number needed would control due to nonconflicting parking demands. If the lot is used for other reasons, such as parking and buses, it cannot be counted towards parking. No banquet halls are allowed as an accessory use in residential zones. **(2T: p55, ln 7-19)**

While Jackson’s e-mail stated:

The Planning Board believes that it is salutary that the Committee is codifying that banquet halls are an accessory use to schools in Lakewood. The Planning Board has, for many years, viewed banquet halls as an accessory to schools, and has also requested that the

governing body provide additional standards to guide the board while considering these types of accessory use applications. **The Board wants to emphasize that an amendment to the zoning ordinance imposing conditions and standards associated with the accessory use of banquet halls must not disturb existing schools with banquet halls and that their use must be permitted to continue to be lawful as “grandfathered”**

**The Board was concerned with banquet halls being present in strictly residential zones and recommends that the committee adopt criteria and specific overlay areas that would allow and exclude banquet halls in specifically identified neighborhoods.** The board discussed that consideration should be given to adopt further regulations that would assure appropriate buffering to protect residential homes from light, noise, activity and the like associated with banquet halls.

**Banquet halls should be permitted in the M-1 Zone.**

**In summary, the board believes that this ordinance is consistent with the master plan because it begins to regulate a common accessory use that currently has no tailored associated standards to guide the Planning Board.**

*(emphasis added to all sections to show departure from the record of what was actually voted on and/or discussed at the Planning Board. See 1T and 2T)*

While a full analysis was already performed in Plaintiff’s initial brief, it is clear that the Board’s motion and the purported “consistency review” from Jackson do not reflect the same determinations. Further, as already set forth in Plaintiff’s brief, a review of the record, including the citations to the portions the Board relies upon, shows that the Board never discussed many of the items within Jackson’s e-mail. Furthermore, since the “report” transmitted to the Committee does not

accurately reflect the findings of the Board, the Committee should not be permitted to rely upon it to shield itself from its obligation to make its own finding of consistency or inconsistency.

As a result of the foregoing, the Court should find the Board's determination was arbitrary, capricious, and unreasonable.

**II. The Board did not Provide Adequate Notice of the November 15 and 29, 2022 Review Hearings.**

While this matter has been thoroughly briefed, Plaintiff must respond to a few arguments advanced by the Board in relation to the meetings' compliance with the Open Public Meetings Act ("OPMA"). Firstly, the Board argues that it should be exempt from OPMA since ordinance review's do not require a public hearing. While a full public hearing is not required, "all deliberations by the board must, of course, be in public..." New Jersey Zoning and Land Use Administration, Cox and Koenig § 10-2.1. Since they are required to be at a public meeting, OPMA applies.

Under OPMA, 'adequate notice' means "written advance notice of at least 48 hours, **giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting**" N.J.S.A. 10:4-8. The agendas at issue did not contain any reference to the title or subject matter of the ordinance which the Board was reviewing. Rather, they only stated "ordinance for review."

This ambiguity would potentially deter anyone interested in the Ordinance at issue here from attending the hearing, even if just to see the deliberations.

The Board was well aware what ordinance they were reviewing and what its effect would be. As such, under N.J.S.A. 10:4-8, the Board should have placed the identifying language on the agenda alerting the public to what ordinance they were reviewing. Since they did not, they violated OPMA's requirement that the public be adequately noticed of the agenda, "to the extent known."

**III. Plaintiff filed a Timely Challenge to the Committee's Failure to Provide Adequate Notice of the December 8, 2022 Adoption Hearing**

This matter was fully briefed in Plaintiff's initial brief. However, Plaintiff's must respond to the Committee's baseless assertion that a) Plaintiff's complaint was untimely, and b) the Committee sent notices of their annual meeting dates pursuant to OPMA to two newspapers.

N.J.S.A. 10:4-9 requires that adequate notice of 48-hours for all public meetings must be sent two newspapers, unless, same is present within their annual notice, pursuant to N.J.S.A. 10:4-8. Annual notice under N.J.S.A. 10:4-8 must also be sent to two newspapers.

The Committee asserts that the 2022 annual notice was sent to two newspapers, the Star Ledger and the Asbury Park Press. In support of this assertion, they cite to a certification of the Clerk, which claims, without evidence, that she sent

said annual notice to both newspapers. As set forth above, in response to the statement of facts, Plaintiff has provided evidence that the 2022 Annual Notice was only sent to the Star Ledger. Furthermore, the 2022 Annual Notice was published in the Star Ledger, but was never at any point published in the Asbury Park Press.

As a result, the October 20, 2022, and December 8, 2022 meeting must have had notice of same sent to two newspapers for publication of a 48-hour notice of said hearings in order to satisfy the adequate notice requirement. It is undisputed that no such 48-hour notice was ever sent or published. "If formal business is conducted at a meeting other than one clearly designated for such formal business in the annual notice, the action is subject to being voided under the Act." Lakewood Citizens v. Tp Committee, 306 N.J. Super. 500, 306 N.J (1997). As such, the adoption and introduction of the Ordinance/Amended Ordinance is voidable as a matter of law.

The Complaint was filed on January 25, 2023, which is within 45 days of December 14, 2022. The Complaint was then amended to include Count Seventeen on July 6, 2023, after Plaintiff was forced to file a motion for same. R. 4:9-3 states, in relevant part:

**Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading;**

Count Seventeen arises from the introduction and adoption of the Ordinance and Amended Ordinance, as does the rest of the Complaint. As such, based upon the clear reading of R. 4:9-3, Count Seventeen and any other Counts brought in the Amended Complaint, relate back to the date of the initial complaint. In other words, Count Seventeen is considered to have been brought on January 25, 2023.

The Committee does not discuss R. 4:9-3 whatsoever, nor does the Committee address the standard in N.J.S.A. 10:4-15. Instead, the Committee advances an argument based upon R. 4:69-6(a) which states, “no action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed.” According to the Committee, this means that Plaintiff’s claim should have been brought on February 24, 2022, eight and ten months before the Committee even committed the OPMA violations at issue.

The 45-day time limitation for an OPMA claim begins “when action sought to be voided has been made public.” N.J.S.A. 10:4-15(a); Dolente v. Borough of Pine Hill, 313 N.J. Super. 410 (App. Div. 1998). In this case, the limitation would run out 45-days from December 8, 2022. The Complaint was filed within that time, and by R. 4:9-3, so was Count Seventeen, though it came from a later Amendment.

As such, the Committee’s arguments hold no weight whatsoever. The Committee did not provide adequate notice of the October 20, 2022, or December 8,

2022 meetings, Plaintiff brought a timely challenge, and the trial Court should have declared the introduction and adoption of the Ordinance and Amended Ordinance void.

**IV. The Amended Ordinance was Substantially Changed from the Ordinance as Introduced.**

The Committee admits that the Amended Ordinance, unlike the Ordinance 1) applies to only non-residential zones, 2) contains a 1 space per 50 square foot parking standard, and 3) excludes an undefined and indefinite host of rooms from the square footage for the parking calculation. While conveniently not called out by the Committee, the Amended Ordinance also applies retroactively as it states that banquet halls “shall continue to be allowed<sup>2</sup>.”

The Committee argues that the Amended Ordinance is less burdensome, as it applies to fewer zones, and as such, under Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, (L.1972), *cert. granted* 62 N.J. 186, *affirmed* 62 N.J. 521, there is no substantial revision. This is not the case. In fact, in removing affected zones, the Committee has allowed for a higher concentration of banquet halls in the affected zones, where they would have been more spread out throughout the various zones in the Township under the Ordinance as introduced. It should be pointed out that Plaintiff’s property is in a non-residential zone, where the Amended Ordinance

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<sup>2</sup> The Committee states that banquet halls “shall be allowed” not “shall continue to be allowed”.

applies. As such, the Plaintiff's property and all nonresidential zones even more acutely affected by the Amended Ordinance than they initially were. This clearly satisfies the requirement that a plaintiff must be further aggrieved by the modifications to an ordinance at issue. Wollen v. Fort Lee, 27 N.J. 408, 420 (1958).

Furthermore, the Amended Ordinance applies retroactively and attempts to make it appear as though every school with a banquet hall in a non-residential zone has *always* been allowed to use the property as a banquet hall. While some non-residential zones, such as within hotels in the Highway Business Zone and Cedarbridge Redevelopment Zone, allow for a banquet hall use, others, such as the Industrial Zone do not. Furthermore, up until the adoption of the Amended Ordinance, banquet halls were not listed as permitted uses within schools in any of Lakewood's Zones. As such, the language of the Amended Ordinance constitutes a substantial change from its introduced form; one that affects the ordinances governing every single nonresidential zone.

As a result of these changes, re-notification to the public was required under N.J.S.A. 4:49-2, as was further notice to the County under N.J.S.A. 40:55D-15.

**V. The Amended Ordinance Constitutes a Classification Change to the M-1 Zone and Requires Personal Notice Under N.J.S.A. 40:55D-62.1**

Plaintiff relies on its affirmative arguments as set forth in the Appellate Brief and will only briefly respond to the Committee's arguments. Specifically, the

Committee argues that banquet halls have always been interpreted as accessory uses to schools and as such, there is no classification change to any zones and personal notice was not required. This is a logical impossibility.

If banquet halls were not permitted as accessory uses to schools, then the Amended Ordinance's introduction of them into non-residential zones, including the M-1 Industrial Zone, where Plaintiff's property is located constitutes a classification change to the M-1 Zone. The court in Mahwah Realty v. Township of Mahwah, 430 N.J. Super. 247, 253-255 (App. Div. 2013), has already determined that the addition of uses which are not of "an industrial stripe" into an industrial zone constitutes a classification requiring personal notice. The Committee has not argued, nor could they argue that banquet halls are of "an industrial stripe." Therefore, personal notice is required.

Conversely, if the Committee is correct that banquet halls have always been permitted as accessory uses to schools, then the Amended Ordinance, in limiting them to non-residential zones only, has made banquet halls on-permitted uses within schools in residential zones. As such, the Amended Ordinance would constitute a classification change to the residential zones, again triggering the requirement for personal notice.

As such, under any scenario, personal notice under N.J.S.A. 40:55D-62.1 was required, either to owners of property within the non-residential zones, specifically the M-1 Zone, or to all property owners within residential zones where schools are permitted.

## **VI. The Committee's Time Limitation was Arbitrary**

The Committee argues that it has an unrestricted ability to control the conduct of its meetings and the public's participation. This is inaccurate. Under Tarus v. Borough of Pine Hill, 189 N.J. 497, 516 (2007), any guidelines or rules governing the public's participation in a hearing must be reasonable and cannot be "too restrictive".

The Committee here argues that it uniformly applies a four-minute time limitation to every hearing, and that its one-size-fits-all approach to its time limitation, on its face protects them from an allegation of unreasonableness. Naturally, different ordinances invoke a different breadth of issues. As such, a blanket time limitation applied to every issue, no matter how complex, is the very definition of arbitrary and can in no way be considered reasonable.

Here, as the court can see, the Amended ordinance brought up a myriad of procedural and substantive issues which should have been considered at a public hearing. Rather than allow this to happen, the Committee applied an unreasonable 4-minute limitation on Plaintiff's counsel and planner, despite being aware of the

scope of the issues and then muted Plaintiff's attorney in the middle of his argument. The Committee here clearly used both the hearing's virtual format as a weapon to silence a member of the public from voicing detailed opposition to an ordinance that the Committee, for one reason or another, was determined to pass.

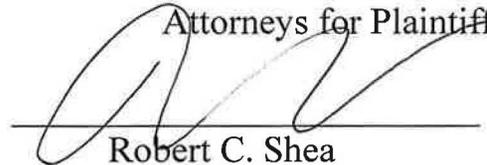
As such, the Court should find that the 4-minute time limitation and the silencing of Plaintiff's opposition was arbitrary and unreasonable under the circumstances.

### **Conclusion**

For the foregoing reasons, and those as contained within Plaintiff's affirmative brief, which are herein relied upon, the Court should overturn the trial court's decision.

Dated: February 10, 2025

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