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Opinion Letter – via e-mail

Mayor and Borough Council
47 Broad Street
Eatontown, NJ 07724

Re: Zoning Ordinance – Monmouth Mall

Dear Mayor and Council:

The Mayor and Council has requested that my office, as the attorney for the Borough of Eatontown, prepare an opinion letter concerning the status of the litigation involving the Monmouth Mall and the Council's options with regard to addressing the present zoning of the Monmouth Mall.

Background

The Borough of Eatontown has adopted Ordinances pursuant to N.J.S.A. 40:49-2 as allowed by law, including Land Use Ordinances in accordance with the Municipal Land Use Law (MLUL); N.J.S.A. 40:55D-1 to 163. The Borough's "Land Use" Ordinances are codified under Part 2, Chapter 89 of the Municipal Ordinances.

The Borough of Eatontown has a Planning Board, which is separate and distinct and independent from the governing body. N.J.S.A. 40:55D-20.

Pursuant to N.J.S.A. 40:55D-28a, the Planning Board has adopted a Master Plan as of July 23, 2007 and a Housing Element Ordinance, pursuant to N.J.S.A. 40:55D-28b(3) on December 22, 2008, a/k/a the "Housing Element and Fair Share Plan."

The Master Plan and "Master Plan Map" specifically identifies State Highway 35/36 Intersection, the "Monmouth Mall" as the "Commercial Focal Point." The Borough, often reviewed in terms of quadrants, identifies the southwesterly quadrant of the intersection as intended for non-residential use. Until 2016, all zoning for the Highway 35/36 Intersection has been consistent with commercial planning objectives set forth in the Master Plan, and the Monmouth Mall area has been identified as a "B-3 Business Zone." "Uses within the B-3 Zone shall be developed as part of a shopping center." (Section 89-44D)

On December 8, 2010, the Borough Council rezoned a portion of the aforementioned "B-3 Zone" to create a new "B-6 Zone." The Ordinance identifies certain "interchange improvements" to State Highway 35/36 and mentioned that the "New Zoning Standards" were consistent for a B-3 Zoned property.

On April 27, 2016, the Borough Council considered proposed Ordinance 3-2016. My reading of the minutes of the regular meetings concerning the proposed Ordinance indicate the purpose was to rezone some of the properties which had been zoned from "B-3" to "B-6" back on December 8, 2010. The Ordinance appeared to create a newly-created Mixed Use Regional Center Zone ("MURC Zone"). The "MURC" consisted of properties referred to as the "Monmouth Mall."

The new proposed Ordinance would provide new permitted uses both in retail and personal services, and recreation, but also residential development in mixed use buildings provided that the maximum number of market rate units permitted in the MURC Zone should be 800 units.

At a regular meeting of the Mayor and Council on April 27, 2016, which was held in a Borough School in anticipation of a large volume of residents, the Borough Council unanimously rejected the Ordinance.

On or about August 25, 2016, the Borough published a public notice of a new proposed Ordinance 10-2016, which referred to the intention to "Rezone certain lots to be established in Mixed Use Regional Center Zone".

The aforesaid public notice provided that the aforesaid Ordinance was introduced and passed on first reading by the Borough Council on August 10, 2016, and would be considered for final passage and adoption on September 14, 2016.

As required by State Statute, the new Ordinance was reviewed by the Planning Board for consistency with the Master Plan and found that the proposed Ordinance was "... not inconsistent with the Master Plan." The Planning Board made other additional comments, which are relevant to the pending litigation, but not to my opinion letter at this time.

The new proposed Ordinance, among other things, was different than the defeated Ordinance 3-2016 in that it specifically excluded as a permitted use public and private schools; churches and houses of worship and related facilities; eliminated the hotels and rooftop training facilities found in the original ordinance; changed some building heights and reduced the maximum number of residential dwelling units within the zone to 700. The new proposed Ordinance also referred to the need to include projected affordable housing obligations upon the developer and the need for a project schedule for phasing of residential units to commercial development; the latter of which is to be incorporated into a Developer's Agreement entered into with the Borough.

Ordinance 10-2016 was adopted by the Borough Council after public hearing at the regular meeting of September 14, 2016.

On October 27, 2016, Evelyn A. Guerra; Sara Breslow; Judith M. Bretzger and Barbara Denegar, collectively, filed a legal action in the Superior Court of New Jersey, Law Division, Monmouth County, New Jersey, challenging the adoption of Borough Ordinance 10-2016. The Eatontown Monmouth Mall, LLC intervened as a Defendant on December 15, 2016.

The Plaintiffs in the pending litigation allege, among other allegations, that Ordinance 10-2016 is invalid as it allegedly constitutes Spot Zoning; that the Ordinance is substantially inconsistent with the Master Plan; does not allegedly advance a Municipal Land Use Law purpose and finally, that the adoption of the Ordinance allegedly violated the Open Public Meetings Act and limited free speech and due process rights to the public access to the governing body.

Oral argument was heard before the Honorable Lisa P. Thornton, A.J.S.C. in the summer of 2017, and the parties are awaiting Judge Thornton's written decision.

An applicant, referred to as "The Heights at Monmouth" submitted to the Borough a Site Plan Application for redesign of the Monmouth Mall in accordance with Ordinance 10-2016 on December 27, 2017, and the same was deemed complete by the Borough Administrative Officer, Erik Brachman, by letter of January 3, 2018; indicating further a hearing date scheduled for March 5, 2018, and the requirement for public notices to be completed no later than February 23, 2018.

Options in Addressing Ordinance and Litigation

Theoretically, the Borough Council through the normal process of adopting Ordinances could attempt to amend or rescind Ordinance 10-2016 at any time; however, the effect of such action, if actually adopted, is and was dependent upon the timing of the action.

Prior to December 27, 2017, the adoption of any amendment or rescission of the present Ordinance 10-2016 would be effective against any development of Monmouth Mall; subject of course to court action. However, the filing of a Site Plan Application by "The Heights at Monmouth" on December 27, 2017 changed the force and effect of any future amendment or rescission of the present Ordinance.

Prior to May 5, 2011, the Municipal Land Use Law had what was known as the "Time of the Decision Rule," which originally held that an application for Site Plan Approval or Development had to follow the local Ordinance or law in existence at the

time the Planning Board rendered its final decision with regard to the Site Plan Application. Under the "Time of the Decision Rule" governing bodies had the opportunity to consider the negative impact of an unanticipated development and react to it with an amended Ordinance designed to address that impact. Hence, municipalities could amend Zoning Ordinances during pending development applications, which ultimately affected the application.

On May 5, 2011, the "Time of the Decision Rule" was substantially changed and converted into the new "Time of Application Rule." The present legislation provides that an application for development be adjudged based upon the Ordinances in effect on the "date of the application," rather than the date of the decision of the Planning Board. This change has significant impact on developers' applications. It also has significant impact on the options available to municipalities.

First, the new Rule overrides substantial judicial precedent on the subject, so finding new case law is limited. Secondly, with regard to the question before this governing body, the new law prevents municipalities from amending Ordinances during the Development Application if the purpose is to change the impact on the Application.

In short, "Time of the Application Rule" means that even if the present Borough Council had introduced an amendment to the Zoning Ordinance on January 1, 2018; that amendment, if adopted, would not apply to the present pending Application or any other pending Application with regard to Monmouth Mall or any other location in the Borough of Eatontown. In regard to pending Applications, the law that existed on December 27, 2017, if valid and if held to be valid by the Court, is the applicable law.

Although it is not apparently relevant in the instant case, there may be some issues under the new law as to what is the definition of "submission" of an Application for Development. N.J.S.A. 40:55D-3 defines "Application for Development" as the Application form and all accompanying documents required by Ordinance for approval, the date of submission should be construed to be the date a complete Application is submitted. Otherwise, an applicant could make a totally inadequate submission simply to attempt to defeat a pending or contemplated Ordinance amendment.

Although not adequately addressed by case decision since May 5, 2011, while the determination of completeness is made after the initial submission, the date of submission of that Application would still appear to control. In the event the application is not complete, the date of submission of the document that makes the application complete should control. However, in this case, the Borough indicated that the application was complete as of January 3, 2018. That renders any discussion over completeness moot.

Please note further that I have reviewed no law that would prevent an applicant from filing an Application before the Court decision of Judge Thornton. No "Stay" was

applied for or issued with regard to the present applicant or any of the parties to the pending litigation; nor do I see authorization that would allow for such a "Stay."

Of course, the present Zoning Ordinance could be amended or rescinded for purposes of future Applications, but such adoption would not affect the present pending Application, and even with future Applications, the amendment or rescission would have to go through the normal process of introduction by the Borough Council, review by the Planning Board and a ruling concerning consistency with the Master Plan, and then second reading and adoption by the Borough Council. All of this under the best of circumstances would take at the very least a month.

The best option in addressing the present Zoning Ordinance with regard to "Monmouth Mall" is to allow the present pending litigation to be completed. Should Judge Thornton find that the Ordinance as adopted and presently being followed by the applicant with regard to the Mall is "void" either because the action was arbitrary and capricious by the Borough Council at the time it adopted the aforesaid Ordinance, or "void" due to OPRA violations or some due process violations, the Borough Council would then have an opportunity to revisit the Zoning Ordinance, which would, under most circumstances, affect any Applications concerning the Mall. There are some vested rights arguments that might be raised by a pending Application, but the case law generally supports eliminating the prior adopted ordinance which has been held "voided."

Actions with regard to Pending Application

Absent a Court decision, there are a number of actions that may or may not occur with regard to the application before the Planning Board. The Planning Board's authority in reviewing an application for Site Plan Approval is limited to determining whether the Development Plan conforms with the Zoning Ordinance and the applicable provisions of the Site Plan Ordinance. Pizzo Martin Group v. Township of Randolph, 137 N.J. 216, 228-229 (1994). The object of the Site Plan review is to assure that the site will be used in accordance with the regulations of the Site Plan Ordinance or Zoning Ordinance. These statutory provisions allowing for and limiting such review all relate to "on-site" considerations, and since the Use, when a Site Plan is being considered by a Planning Board is always a permitted Use, in most cases the Board must grant Site Plan Approval and where appropriate, waivers or exceptions from Ordinance provisions.

Therefore, denial of a Site Plan would be considered a drastic action, and one which would have to find authorization in Statute. Shim v. Washington Township Planning Board, 298 N.J. Super. 395, 411 (App. Div. 1997). "For example, if it appeared that no adequate water supply existed for the particular tract, a Site Plan could be denied on that basis. Or, where an addition is proposed to be constructed to an existing hospital in such a way that it would make it impossible for the fire department to reach the upper floors with its aerial ladder trucks, this obviously infringes upon public safety and would

likewise also support a denial.” See New Jersey Zoning and Land Use Administration, William M. Cox, Section 15-10. See also, Holy Name Hospital v. Planning Board of the Township of Teaneck, App. Div. Docket No. A-67-86T8; decided May 6, 1987; reported in full in 11 Municipal Law Review, No. 4 December 4, 1989. In fact, fire safety is always a factor which may always be considered by a municipal agency in a Site Plan Application. “Fire Safety and the Community Planning Process” by Moskowitz and Drollinger. See New Jersey Planning Officials, Planning and Information Report, Volume XXII, No. 3 (Fall, 1989).

Aside from denial of a Site Plan based on unusual circumstances such as those set forth above, it is well established that if a Site Plan lacks the specificity required by the Ordinance, or the applicant fails or refuses to provide information pertinent to the Plan, the Plan may be denied on that basis. In Morris County Fair Housing v. Boonton Township, 228 N.J. Super. 635 (Law Div. 1988).

On the other hand, where all of the relevant testimony indicated that an applicant’s proposed drainage plan was sufficient, but contingent on the acquisition of an easement, failure to obtain the easement was not grounds for rejecting the application. Goodfellows v. Washington Planning Board, 345 N.J. Super. 109, 116-117 (App. Div. 2001). The Court in Goodfellows observed that the correct approach would be to approve the application but to make it contingent on obtaining the easement.

Case decisions have also denied applications where Site Plan Applications did not properly address ingress and egress where proposed plans created an unsafe and inefficient vehicle circulation. Lionel’s Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 268-269 (Law Div. 1978).

Moreover, obviously an application could be denied if certain procedural actions were not taken by the applicant, such as proper notice to property owners as required by Ordinance. Brower Development v. Planning Board, 255 N.J. Super. 262 (App. Div. 1992).

Therefore, the Planning Board does have some leeway to require compliance with the Ordinance and to address certain concerns of the Planning Board. The Borough Council’s involvement is limited to preparation of the Developer’s Agreement once the Planning Board has acted upon the application. Other than the Council Appointee to the Planning Board and the Mayor, who is automatically a member of the Planning Board, it is inappropriate for the governing body to involve itself with regard to the Planning Board proceedings on a pending application.

Although the Developer’s Agreement is generally a formalization of the Planning Board’s approval and conditions of approval, the Borough Council, upon approval of the

application through its right to approve a Developer's Agreement may address issues allowed by Ordinance and Statute not directly addressed by the Planning Board.

The last option, which I would like to discourage the governing body from taking at the outset is a moratorium against any development. Municipal moratoria are generally disfavored by the law as a means of either controlling land use or the nature of occupancy. Repair Master v. Borough of Paulsboro, 352 N.J. Super. 1, 13 (App. Div. 2002).

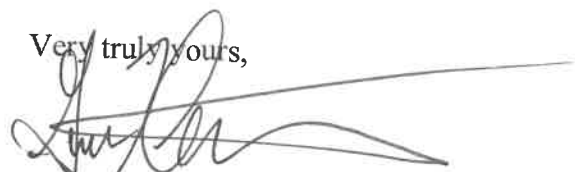
N.J.S.A. 40:55D-90 specifically prohibits a moratorium on development in order to prepare a Master Plan and develop regulations. I myself was involved as the attorney for Howell Township in an attempted moratorium back in 1989 based on water issues, and arguably clear imminent danger to the health of the inhabitants of the municipality, which was denied by the Court upon challenge. See New Jersey Shore Builders Association v. Mayor, 234 N.J. Super. 619 (Law Div. 1989). Therefore, a moratorium is an extreme action which is unlikely to have any positive effect.

Based on the circumstances and facts presented to me, as well as a review of 3 boxes of files on the Mall and Zoning Ordinance, this is the conclusion of my research concerning possible options in addressing the present Zoning Ordinance with regard to Monmouth Mall.

It is my recommendation that the governing body waits until Judge Thornton renders her decision and act accordingly.

If there should be any questions, please do not hesitate to contact me.

Very truly yours,



Gene J. Anthony, Esq.

GJA:ja
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