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October 19, 2022

Bradley Beach Land Use Board
701 Main Street
Bradley Beach, NJ 07720

Re: Ordinance 2022-12
Section 26 Consistency Determination

Dear Board Members:

Pursuant to NJAC 40:55D-26, The Borough of Bradley Beach, Monmouth County Ordinance 2022-12, An ordinance amending Chapter 258: "Hotels" and Chapter 450: "Zoning" of the Borough's Revised General Ordinances to prohibit hotels and motels within the Borough, is not consistent with the Borough's Master Plan.

In particular, Section 258-1, Conditions and Requirements of Ordinance 2022-12 is not consistent with the Overall Goal of the Master Plan to "Maintain consistency with the purposes of the Municipal Land Use Law (MLUL) as contained within NJAC.40:55D-2." As per NJAC.40:55D-17:

any interested party may appeal to the governing body any final decision of a board of adjustment approving an application for development pursuant to subsection d. of section 57 of P.L.1975, c.291 (C.40:55D-70), if so permitted by ordinance... The governing body may reverse, remand, or affirm with or without the imposition of conditions the final decision of the board of adjustment approving a variance pursuant to subsection d. of section 57 of P.L.1975, c.291 (C.40:55D-70). The review shall be made on the record made before the board of adjustment.

Section 60-38 of the Borough of Bradley Beach's revised General Ordinances gives the governing body the power to hear the appeal from any decision of the Zoning Board of Adjustment (or Land Use Board acting in the capacity of a Zoning Board), made in accordance with the provisions of N.J.S.A. 40:55D-17.

These sections of the MLUL and Borough's ordinances give the Governing Body the power to hear appeals of Zoning Board decisions approving a d variance. The Supreme Court in *Rickel Altern v. City of Linden*, 111 N.J. 192 (1888) stated that "by limiting review to only those applications that are granted, the governing body is involved solely in those decisions that might actually impair or significantly affect the masterplan or zoning ordinance, otherwise leaving intact the exercise of the board's discretion in denying the application. Id at 202"

By attaching conditions to the approval of a non-permitted use, the Governing Body is in effect taking away the exercise of the Board's discretion is approving or denying the use.

Additionally, the 2021 Economic Development Plan Element identified tourism as a growth industry in Bradley Beach and the Planning Board chose not to include the prohibition of hotels and motels as a recommendation of the Plan Element.

I would recommend that if the Governing Body would like attach conditions to the approval of hotels and motels within the Borough of Bradley Beach, they do so by making the use conditional, in which the assigning of conditions associated with the use would be appropriate.

Should you have any questions or require any clarification regarding this matter, please do not hesitate to contact our office.

Very truly yours,

LEON S. AVAKIAN, Inc.



Christine L. Bell, PP, AICP
Board Planner

cc: Jerry Freda, P.E., Board Engineer
Mark Kitrick, Esq., Board Attorney