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June 28, 2013

via FEDEX

John P. Inglesino, Esq.
Inglesino Pearlman Wyciskala & Taylor, LLC
600 Parsippany Road – Suite 204
Parsippany, New Jersey 07054-3715

**Re: Block 421, Lot 29 – Waterview Boulevard and US Route 46,
Parsippany-Troy Hills**

Dear Mr. Inglesino:

As you are aware, this office represents Citizens for Health, Safety & Welfare, Inc. d/b/a Don't Rezone Waterview ("CHSW"), a neighborhood organization that has recently expressed concern over an ordinance amendment proposed by a private developer – RD Realty, LLP ("RDR") – to permit the redevelopment of the above-referenced property (the "Property") for a mixed use development of retail and townhouses within a planned retail/commercial/residential overlay district (the "Ordinance"). It is our understanding that a version of the Ordinance may soon be introduced by the council (the "Council") of the Township of Parsippany-Troy Hills (the "Township"). Please accept the following on behalf of CHSW in opposition to any proposed adoption of the Ordinance.

Spot zoning is the "antithesis" of planned zoning, and is defined as "the use of the zoning power to benefit particular private interests rather than the collective interests of the community." Riya Finnegan LLC v. Tp. Council of the Tp. of So. Brunswick, 197 N.J. 184, 195 (2008). (internal quotation removed). The test to determine whether spot zoning exists is "whether the particular provision of the zoning ordinance is made with the purpose or effect of furthering a comprehensive scheme¹ or whether it is designed merely to relieve a lot or lots from the burden of general regulation." Palisades Props., Inc. v. Brunetti, 44 N.J. at 134 (holding that an ordinance amendment was invalid spot zoning after reviewing the practical effect of the amendment and the facts surrounding its adoption because the intent, motive, purpose and effect of the amendment were to benefit targeted properties because the other properties supposedly subject to the amendment could not practically benefit from it). If the zoning falls within the latter scheme, *e.g.* it is designed merely to relieve a lot or lots from the burden of general regulation, the ordinance is

¹ The Supreme Court in Kozesnik v. Montgomery Tp. defined "comprehensive plan" as follows: "it may be said for present purposes that 'plan' connotes an integrated product of a rational process and 'comprehensive' requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized by [the predecessor to the MLUL]." Kozesnik v. Montgomery Tp., 24 N.J. 154, 166 (N.J. 1957).

invalid because it is not “in accordance with a comprehensive plan,” but is, in effect, “a special exception or variance from the restrictive residential regulation, thereby circumventing the board of adjustment to which is committed ... the quasi-judicial duty of passing upon such matters[.]” Riya Finnegan, 197 N.J. at 195 (quoting Cresskill v. Bor. of Dumont, 15 N.J. 238, 249-50 (1954) (internal quotation removed)). Spot zoning is, essentially, an invalid attempt to grant a variance. Jennings v. Bor. Of Highlands, 418 N.J. Super. 405 (App. Div. 2011) (citing Cresskill, 15 N.J. at 251)).

The inquiry is to determine whether the ordinance advances the common good and welfare, or if it instead furthers purely private interests. Id. If either a comprehensive plan or a rational relation to one of the purposes of zoning is absent, the ordinance is void. Zaehring v. Long Beach Tp., Ocean Cty., 56 N.J. Super. 26, 33 (Law Div. 1959). Certainly it appears that the Ordinance as currently proposed (and the only “overlay” zone in all of Parsippany) is intended to further the purely private interests of RDR and not in accordance with a comprehensive plan or the “common good and welfare.”

The Route 46 corridor already serves as a regional retail center. We are not aware of the Council being presented with any type of economic report or analysis justifying the need for additional retail space or that the area has been underserved by existing retail uses. In fact, given the existing high vacancy rate for retail space in the region, it makes no sense to create an overlay zone to permit even more retail development. If the area is indeed saturated, then a new retail use is likely to weaken existing retail uses and hurt the viability of developing existing vacant or underutilized retail lots.

Even if a form of retail development is ultimately approved, Parsippany is powerless to select a specific retail tenant (either presently or in the future). Hence, the focus of the applicant in offering a Whole Foods market is not a guarantee that Whole Foods will in fact occupy the Property or will be the occupant after a period of years. Zoning policies should never be based on whether there is a current market for a particular use or user, since the real estate market changes over time.

Given that the Ordinance is presently proposed merely as an “overlay” zoning district while maintaining the underlying POD zone, the statements contained in the March 18, 2013 letter to the Council from counsel for RDR, Carl Bisgaier, Esq. (the “Bisgaier Letter”) to the effect that the development under the current POD zoning is “out of the question” and that the POD zone has “zoned the property into inutility” are completely ridiculous (especially considering the existing, thriving office uses surrounding the subject property). The Bisgaier Letter goes on to threaten that a municipal decision to rezone for exclusively residential use at a density of 20 units per acre (with a 20% affordable housing set-aside) would be supported by recent precedent, citing Homes of Hope v. Tp. Of Eastampton, 409 N.J. Super. 330 (App. Div. 2009) and the unreported decision of Estaugh Commons v. Bor. Of Haddonfield, L-2473-10 (Law Div. 2011). Of course, this threat – transparently intended to intimidate the Council and residents of Parsippany with threats

of retaliation so to secure a re-zoning to suit only the private developer's financial interests – is bereft of any factual or legal support.

As an initial matter, the Township has never indicated its desire to re-zone the Property for exclusively residential use. Further, the Township timely submitted a third round (“Third Round”) plan to the Council on Affordable Housing (“COAH”) which has been declared complete. The Housing Element and Fair Share Plan of the Township (within the Township’s Master Plan) states that the plan meets its affordable housing obligations through a variety of mechanisms, including excess and surplus credits for prior affordable housing development efforts that are no longer needed to help the community meet its affordable housing obligation and which may be applied to the Township’s third round needs, and for other purposes.

Parenthetically, pursuant N.J.A.C. 5:96-1.2, a municipality that has submitted a petition for certification to COAH remains subject to COAH’s jurisdiction unless, or until, substantive certification is denied or revoked. N.J.A.C. 5:96-3.8. The Township has filed a petition for substantive certification with COAH and therefore it is subject to COAH’s jurisdiction. The COAH process provides a full administrative mechanism for insuring compliance with, and prosecuting challenges to, a municipality’s affordable housing obligations. See N.J.A.C. 5:96 (Procedural Rules) and 5:97 (Substantive Rules) of COAH; N.J.A.C. 5:96-4.1 and 4.2. Pursuant to N.J.A.C. 5:96-1.2, exclusive jurisdiction of those issues that are raised (directly and indirectly) in the Bisgaier Letter would lie with COAH, not the court.

Regardless of any future Supreme Court ruling regarding Round Three obligations, COAH will have to adjust its regulations in response to any Supreme Court decision, take public comment, and most likely face further opposition to Round Three - stalling the entire process for years. Conversely, courts will be hesitant to grant zoning changes that impact affordable housing requirements until Round Three rules are clearly established and COAH rules on any issue within its exclusive jurisdiction. Certainly, there is no imminent “threat” of proposing an inclusionary development should RDR “not get its way”.

Furthermore, the cases cited in the Bisgaier Letter are easily distinguishable and do not apply to the facts of the current situation. Homes of Hope, Inc. involved a non-profit provider of affordable housing filing a variance application (no re-zoning was proposed) to build a residential development consisting only of eight affordable housing units. The property was located within a residential zone which permitted single-family dwellings but not multi-family dwellings. While the Court ruled that affordable housing may continue to be considered an “inherently beneficial” use so as to meet the positive criteria for a “D” use variance application even after a municipality meets its fair share obligation to provide affordable housing, it remanded the matter back to the municipal board to evaluate the application in light of the property’s inherently beneficial use status. While the Homes of Hope case involved a development that consisted entirely of affordable housing units, the Court therein never determined or even implied that a municipal

decision to re-zone a property for residential use with a 20% affordable housing set-aside would ever be judicially required or sustained.

As for the unpublished Estough Commons case, it has no precedential value. Pursuant to New Jersey Court Rule 1:36-3, no unpublished opinion shall constitute precedent or be binding upon any court. Accordingly, any attempt to rely on this law division opinion in Estrough Commons v. Borough of Haddonfield is entirely misplaced. Even if it were to have been a reported decision, the Court therein held that an “inherently beneficial” use for purposes of a use variance application under N.J.S.A. 40:55D-70(d) should also apply to inclusionary projects, even in municipalities that have received third round substantive certification from COAH for a housing plan that did not include the proposed inclusionary project. In light of its holding, the Court remanded the matter back to the board for further consideration of the use variance application (specifically, whether the applicant satisfied the negative criteria for the requested variance relief). Again, this case only addresses the “positive criteria” for a use variance application - and not either a municipal decision to re-zone for a residential use with an inclusionary component or whether a 500 unit residential project on the Property could possibly demonstrate that it would not be substantially detrimental to the surrounding neighborhood or the Master Plan and zoning ordinance.

The Council should not be frightened into making decisions based upon idle threats of retaliation by a private developer who does not have the future well-being of Parsippany or its residents in mind (to our knowledge, RDR has never developed a property exclusively for multi-unit residential development). Even if such threats were real (which they are not), any final disposition of issues affecting affordable housing requirements by COAH and/or via the judicial process certainly does not appear to be imminent. The Council must ignore RDR’s inclusionary development threat in determining whether or not to create the proposed overlay zone.

CHSW contends that the Ordinance is blatantly improper and ill-conceived. Without going through each and every provision and sub-part of the latest draft of the Ordinance in our possession (dated as of March 14, 2013), some of its more obvious flaws include the following:

1. Lack of Appropriate Buffer from Surrounding Uses.
 - A. Compromising Buffer Previously Established by Council.

As to proposed Section 430-331(F), the existing POD Zone provides at Section 430-155(H) “a buffer width averaging 200 feet, with a minimum width of 150 feet shall be required along all frontage and any boundary of the tract which coincides with a residential zone boundary, except where such boundary coincides with a state or United States highway. To the extent feasible, the buffer area shall be designed to coincide with the area of the site located between the 360 foot contour elevation and the adjacent residential zoning boundary.” CHSW strongly opposes any proposal to reduce the buffer requirement

along Intervale Road from an average of 200 feet as it exists in the underlying zoning for the Property. The Ordinance must maintain the originally approved 200 foot buffer average (with a minimum of 150 feet) in the underlying zone as per the prior commitment to the community in relationship to the Property.

B. Impact of Buffer Reduction

The presently-required 200 foot average distance assures that new commercial development will not be seen at the top of the existing slope and prevents any re-grading (and associated removal of trees and vegetation) of any areas within the designated buffer (note that the proposed “buffer” requirement only prescribes building and parking setbacks). The Ordinance appears to allow the developer to re-grade any buffer area with the installation of numerous retaining walls. The buffer area that is presently wooded must be preserved and not converted to grass or otherwise disturbed.

Any buffer reduction will adversely and dramatically affect residents living in the area adjacent to the Property (with an increase in noise, light pollution, environmental disturbance and aesthetic damage) while compromising the Doremus Ridge located along that buffer. These concerns are shared by the governing body of the Borough of Mountain Lakes (see the April 10, 2013 letter from Mayor Happer of the Borough of Mountain Lakes to the Township). Proper land use planning dictates that intensification of development (going from office to retail use) should result in increased, not diluted protections. This 200 foot average buffer requirement (with a minimum buffer of 150 feet) is consistent with the Land Use Plan element of the Parsippany-Troy Hills Master Plan, where a policy was established many years ago to require an increase in the minimum buffer width in the area in question from 50 feet to 150 feet.

2. Promotion of “Big Box” Development.

A. No Studies Performed on Need/Impact

CHSW is strenuously opposed to any “big box” retail development. No study, analysis, or renderings has been provided to determine the need for or viability of retail development or the extent of any associated visual or aesthetic impact upon a full build-out of retail commercial buildings in conjunction with Sections 430-327(A) and 430-331 of the Ordinance. The purpose or effect of the minimum-maximum square footage requirement for one tenant in Section 430-327(A) of the Ordinance is also entirely unclear. In contrast, limiting any retail development to 40,000 square feet of space (combined with alternate land uses such as residential, medical office, or a continuing care residential community) would encourage the development of space for local goods and services to benefit the surrounding area - and not generate traffic generated by retail “brands” that otherwise would not be travelling on the local roads. The existing POD zoning and its bulk standards

(including but not limited to a building coverage limit of 12.5% and an impervious coverage limit of 45% within the subject aquifer's most efficient recharge area) should remain on an exclusive basis and not be compromised.

B. Adverse Traffic Impacts

As per the enclosed June 19, 2013 letter from CHSW's traffic consultants, Dolan & Dean Consulting Engineers LLC (and made a part hereof), the Parsippany ordinance states in relevant part that traffic impact studies are necessary to evaluate the appropriateness of the site development within the context of the public street system and to identify any necessary public infrastructure improvements needed to accommodate the traffic demands generated by the proposed use. The overall purpose of requiring a traffic impact study is directly related to any proposed re-zoning of a site. In this case, the proposed developer will not be able to comply with the ordinance requirements for level of service since any project permitted as of right by the Ordinance will overwhelm the surrounding roadway infrastructure. The roadway system cannot adequately accommodate the additional traffic increases, which are almost 250 additional traffic movements during the PM peak hour and more than 550 additional traffic movements on Saturday, each as compared to the existing zoning. The overall feasibility of the project is questioned as there are significant level of service violations that exceed the criteria outlined in the State Highway Access Management Code (N.J.A.C. 16:47 et seq.) that relays the allowable degradation of operating conditions arising from a specific development. There also will be significant vehicular delay increases at the intersection of Waterview Boulevard and Route 46. For certain intersection movements, comparing the "no build" projection (*i.e.*, without any site development), certain delays are projected to increase from 53 seconds to more than 26 minutes under the "build" conditions (*i.e.*, that include the site development). Other movements show projected delays between seven and 15 minutes, all of which violate the standards allowed under the DOT Access Code. The feasibility of providing a suitable infrastructure to accommodate the traffic is certainly called into question, particularly at what essentially is the primary entry and exit to the proposed development. The proposed re-zoning would allow retail development to greatly exceed the available capacity of the surrounding roadway system.

3. Access to/from Intervale Road

As to proposed Section 430-332(A) of the Ordinance, we concur with the April 10, 2013 letter from Mayor Happer of the Borough of Mountain Lakes to the Township in that there should be no access to or from Intervale Road, including any emergency egress/ingress. As to Mountain Lakes' interest in this matter as set forth in the aforementioned April 10, 2013 correspondence, a municipality is not entitled to the presumption of validity upon the adoption of a zoning ordinance where, as here, a dispute arises between two municipalities as to the validity of zoning of contiguous lands. Bor. Of

John P. Inglesino, Esq.
Inglesino Pearlman Wyciskala & Taylor, LLC
Page 7
June 28, 2013

Allendale v. Tp. Committee of Mahwah, 169 N.J. Super. 34, 37-38 (Law Div. 1979), aff'd sub nom. Allendale v. Mahwah Tp. Committee, 177 N.J. Super. 230 (App. Div. 1981) (not addressing the presumption of validity). The Court in Bor. of Allendale explained that the presumption is not relevant in such a case because N.J.S.A. 40:55D-1 et seq., "Municipal Land Use Law" (2012) ("MLUL"), mandates a regional approach to determining the validity of zoning ordinances affecting contiguous municipal borders. Id. at 38. Even the Parsippany Master Plan recognizes that Township development should not be detrimental to neighboring municipalities such as Mountain Lakes.

As the Council is aware, the POD zone expressly prohibits access onto Intervale Road. No just reason exists to alter this restriction. Emergency access may be accomplished to the proposed residential units via an alternate access from adjoining property owned by the same owner of the Property and established via easements.

For the foregoing reasons, as well as others that may be articulated at any public hearing conducted in connection with the Ordinance, we respectfully request that the Ordinance not be introduced or adopted by the Township. We further reserve our right to amend or supplement the above at any time.

Thank you for your consideration.

Very truly yours,



Robert F. Simon

Enclosure
RFS/tac

cc: See attached list:

John P. Inglesino, Esq.
Inglesino Pearlman Wyciskala & Taylor, LLC
Page 8
June 28, 2013

Citizens For Health, Safety & Welfare, Inc.

Township of Parsippany-Troy Hills Mayor James R. Barberio
Township of Parsippany-Troy Hills Council Members
Peggy Mader, Planning Board Secretary, Parsippany-Troy Hills Planning Board

Borough of Mountain Lakes Mayor Dan Happer
Borough of Mountain Lakes Council Members

Edward J. Sneikus, Jr., LA, PP, LLA, ASLA / Burgis Associates, Inc.

Peter G. Steck, Community Planning Consultant

Gordon E. Meth, Senior Associates and Director / The RBA Group

Gary W. Dean, P.E., P.P. / Dolan & Dean Consulting Engineers, LLC

Carl S. Bisgaier, Esq. / Bisgaier Hoff LLC

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June 19, 2013

Robert F. Simon, Esq.
Herold Law
25 Independence Boulevard
Warren, NJ 07059-6747

RE: Waterview Rezoning Review
Block 421, Lot 29
Parsippany-Troy Hills, Morris County

Dear Mr. Simon:

This correspondence is forwarded to summarize various email correspondence pertaining to the above-noted review of the Traffic Impact Study prepared for the rezoning request (aka, Waterview) at the intersections of US Route 46 with Waterview Boulevard and Intervale Road in the Township of Parsippany-Troy Hills, Morris County. Specifically, we have reviewed the Traffic Impact Study and technical appendices prepared by John Meyer Consulting (JMC) dated October 25, 2012.

Unlike many communities, Parsippany-Troy Hills has a specific Ordinance regulating the preparation of traffic studies including a requirement to meet level of service criteria for development projects. Under Section E of the Ordinance (appended to this letter) it is noted that certain lane groups must be maintained at Level of Service "D" with all other lane groups maintained at Level of Service "C." At instances where the pre-existing (i.e., "no-build" conditions) do not meet those levels of service, then the measured delay (in seconds) at that LOS may not be degraded. The Ordinance also permits increases in delay as long as the LOS does not change.

Under Ordinance Section E2, for those locations not meeting the required level of service standards, the Traffic Impact Study must provide a conceptual improvement plan to mitigate the violative traffic impacts of the particular application. The Ordinance provides a "fair share" cost contribution mechanism to allocate future costs toward those improvements.

As identified in the JMC report, there are numerous locations that violate the Ordinance level of service standards and therefore cannot credibly meet the conclusions stated in this study that:

"the peak site volumes can be accommodated without a significant impact to the study area."

In particular, we note LOS violations as identified on Tables 3 and 4 of the JMC report. In Table 3 for the PM Peak conditions, at Waterview Boulevard and Route 46, the northbound left-turn movement delay significantly increases from 53 seconds at Level of Service "D" to 1,565 seconds (approximately 26 minutes) at Level of Service "F."

Similarly, the southbound left turn movement increases from 81.5 seconds to 434.3 seconds, the southbound right through movements degrade from 39.7 seconds at Level of Service "D" to 95.8 seconds at Level of Service "F" and the overall intersection degrades from Level of Service "B" with 18.2 seconds to 119.03 seconds of delay at Level of Service "F."

At Route 202 and Route 46, the eastbound through movement is calculated to operate in the "no-build" conditions of 34.5 seconds at Level of Service "C," however degrades with the site traffic to Level of Service "D" at 36.8 seconds. This degradation violates the Ordinance requirements and fails to provide mitigation as prescribed by the Ordinance.

At US Route 46 and Smith Road, a delay increase is noted for the northbound right-turn movement with an increase from 95.1 seconds to 96.7 seconds at Level of Service "F" which requires mitigation per the Ordinance. A similar violation is noted for the northbound through right movements as well as the composite movements which also show an increase in delay at Level of Service "D" which is not allowed under the Ordinance.

Finally at Waterview Boulevard and Route 202, the eastbound left through movement is shown to operate at Level of Service "D" with 44.9 seconds under the "no-build" condition and increases to 56.2 seconds at Level of Service "E" conditions, which again violate the Township Ordinance.

During the Saturday peak hour, there are also a number of level of service violations that generally occur at the same locations as during the PM Peak hour with the primary violations occurring at Waterview Boulevard and Route 46, Route 202 and Route 46.

Because the Township has enacted specific level of service and delay degradation standards, such must be considered within the context of the rezoning and cannot be deferred to a site plan application when the use will then be permitted.

Unless a mitigation plan can be developed to appropriately address each of these violations, then the studies submitted by the applicant clearly show that the project will have a detrimental impact on traffic operating conditions and cannot be adequately accommodated within the available infrastructure system.

The combination of these factors shows that the size and density of the proposed uses are not compatible with the roadway system. The projected traffic is significantly in excess of the volumes otherwise anticipated under the current zoning.

RBA Engineering Review

On November 28, 2012, the Planning Board's reviewing engineer (The RBA Group) issued a review letter to the Board with a number of comments pertaining to the proposal. Some of these comments pertain to fundamental traffic issues that if not successfully addressed would make the project infeasible. Aside from the noted LOS violations, the RBA report also notes the following:

"The concept plan depicts a traffic signal at the proposed driveway.Due to the proximity to Route 46, said signal will need to be reviewed by the New Jersey Department of Transportation. A Manual on Uniform Traffic Control Devices warrants analysis will also be required."

If DOT does not approve the signal due to the likelihood of queuing (e.g., vehicular stacking) onto Route, then the driveway cannot safely and efficiently operate. Until this specific issue can be addressed with certainty by NJDOT (through a Concept Review of Access application), it would be premature for the Board to consider the viability of the project.

Finally, RBA compares the traffic from a possible development yield under the current zoning with the proposed uses.

Trip Generation Comparison

Zoning Condition	Land Use	Morning Peak Hour			Evening Peak Hour			Saturday Peak Hour		
		In	Out	Total	In	Out	Total	In	Out	Total
Current	259,00 SF Office	361	50	411	63	306	369	61	52	113
Proposed	190K retail + 72DU	220	185	405	308	301	609	376	291	667
	Difference	-141	135	-6	245	-5	240	315	239	554

As noted, the proposed zoning will yield nearly 250 additional traffic movements during the critical PM Peak hour (when there are deficient LOS operations) and more than 550 additional traffic movements on Saturday – which would have the greatest impact on the abutting residential properties, as the current zoning would yield very little weekend traffic.

I hope that this information is helpful in your continued discussions with the Township. Please contact me should you have any questions or comments with the enclosed.

Very truly yours,

DOLAN & DEAN
CONSULTING ENGINEERS, LLC

Gary W. Dean, P.E., P.P.

GWD/lrc

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