

SCHUMANN HANLON
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RONALD H. SHALJIAN

rshaljian@shdlaw.com

*Member New Jersey and New York Bar

30 MONTGOMERY STREET, STE 990
JERSEY CITY, NJ 07302
(201) 451-1400 (PHONE)
(201) 432-3103 (FAX)

DATE: June 8, 2022

TO: Liz Opper, AICP
Santo Alampi, Esq.

FILE: LeFrak Companies – The Rampart
535 Monmouth Street, Jersey City, NJ
(Block 6902, Lot 27)

ISSUE: Where a height of a planned redevelopment in a redevelopment area is permitted under the provisions of a Redevelopment Plan, but disallowed under the general Zoning Ordinances, must the Redeveloper seek a variance or deviation from the Zoning Board or risk an action in lieu of prerogative writ?

ANSWER: Because a Redevelopment Plan constitutes superseding zoning rather than overlay within the Redevelopment Area, Zoning Ordinances of general application are effectively replaced by the provisions of the Redevelopment Plan, and may only be used to assist in interpretation of ambiguities. Therefore, if the Redevelopment Plan expressly permits higher construction than the general Zoning Ordinances, no or deviation variance is necessary as long as building height is within the limits specified by the Redevelopment Plan.

Dear Ms. Opper and Mr. Alampi:

Our office has prepared the following Memorandum to address the question raised by conflicting building height provisions under the general Zoning Ordinances of the City of Jersey City and the Jersey Avenue Tenth Street Redevelopment Plan (hereinafter referred to as the “Redevelopment Plan”). In the course of my analysis, I have reviewed the Redevelopment Plan, the New Jersey Local Redevelopment and Housing Law (N.J.S.A. § 40A:12A-1, et seq., hereinafter referred to as the “LRHL”), as well as published New Jersey decisions that address conflicts between general Zoning Ordinances and Redevelopment Plans. Although the question has not been addressed by the New Jersey Supreme Court, it is highly likely that the provisions of the Redevelopment Plan supersede the general Zoning Ordinances of Jersey City within the Jersey Avenue Tenth Street Redevelopment Area.

DISCUSSION

The planning and zoning power is a power delegated to municipal governing bodies by the State Legislature, pursuant to the Municipal Land Use Law. 388 Route 22 Teadington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 339 (2015). The Legislature delegated additional planning and zoning power to municipalities by enacting the LRHL, which authorizes the designation of blight zones and the adoption of a redevelopment plan to reverse deterioration in housing, commercial and industrial installations. See Britwood Urban Renewal, LLC v. City of Asbury Park, 376 N.J. Super. 552, 564 (App. Div. 2005). Where a Redevelopment Area is delineated and a Redevelopment Plan is passed, the Redevelopment Plan may constitute “overlay zoning” within the Redevelopment Area or may supersede the general zoning ordinances of the municipality. . N.J.S.A. § 40A:12A–7c.

In the former circumstance, the redevelopment plan will coexist with other general zoning regulations, Weeden v. City Council of City of Trenton, 391 N.J. Super 214, 225 (App. Div. 2007), but in the latter the redevelopment plan will control zoning throughout the redevelopment area. Therefore, there are two questions that must be answered determine whether a variance is necessary for the Rampart project: (I) Does the Jersey Avenue Tenth Street Redevelopment Plan supersede general zoning ordinances of Jersey City, and (II) what issues may arise from a conflict between the building height limitations of the Redevelopment Plan and generally-applicable zoning ordinances. These issues are addressed below.

I. THE JERSEY AVENUE TENTH STREET REDEVELOPMENT PLAN SUPERSEDES GENERALLY-APPLICABLE ZONING ORDINANCES

There is an important distinction between “overlay zoning” and re-zoning in the context of a redevelopment plan, which is highlighted by the Appellate Division’s discussion in Weeden v. City Council of City of Trenton, 391 N.J. Super. 214 (App. Div. 2007). In that case, the Panel had to determine whether a deviation from redevelopment plan provisions must be accomplished through the planning board by way of an amendment to the plan itself or by application for a use variance sought from the municipality’s zoning board of adjustment.

In the course of its analysis, the Panel explained that “‘overlay zoning’ refers to a situation in which a municipality leaves in place the existing zoning regulations applicable to an area, but superimposes an additional set of requirements.” Weeden, 391 N.J. Super. at 225. In this instance, the municipality had not amended its zoning district map to include the redevelopment area as required by N.J.S.A. § 40A:12A-7c, and therefore the new provisions of the redevelopment plan would co-exist alongside those of the general zoning ordinances. Weeden, 391 N.J. Super. at 225. Although this discussion of overlay zoning as compared to re-zoning made little difference in the outcome in Weeden, it is relevant to the issue contemplated by this Memorandum.

N.J.S.A. § 40A:12A–8c specifies when a redevelopment zone will supersede general zoning ordinances, and when it will constitute overlay zoning:

The redevelopment plan shall describe its relationship to pertinent municipal development regulations as defined in the “Municipal Land Use Law,” P.L.1975, c. 291 (C.40:55D-1 et seq.). The redevelopment plan shall supersede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area. When the redevelopment plan supersedes any provision of the development regulations, ***the ordinance adopting the redevelopment plan shall contain an explicit amendment to the zoning district map included in the zoning ordinance. The zoning district map as amended shall indicate the redevelopment area to which the redevelopment plan applies.*** Notwithstanding the provisions of the “Municipal Land Use Law,” P.L.1975, c. 291 (C.40:55D-1 et seq.) or of other law, no notice beyond that required for adoption of ordinances by the municipality shall be required for the hearing on or adoption of the redevelopment plan or subsequent amendments thereof.

[N.J.S.A. § 40A:12A–8c, emphasis added]

The Appellate Division has relied upon this provision of the LRHL to conclude that the site plan application procedures promulgated in a redevelopment plan superseded those established by general zoning ordinances and the Municipal Land Use Law. Jersey Urb. Renewal, LLC v. City of Asbury Park, 377 N.J. Super. 232, 235 (App. Div. 2005). In Jersey Urb. Renewal, the owner of a property located in a redevelopment zone filed an action in lieu of prerogative writ when the local planning board denied its site plan application as incomplete. 377 N.J. Super. at 234. The redevelopment plan specified that before the board could issue site plan approval, the owner must first obtain status as a subsequent developer, as well as secure approval from a technical review committee, the mayor and city council. Ibid. The owner contended that the

municipality had exceeded the authority granted by the legislature imposing jurisdictional requirements on planning board applications in excess of those required under the MLUL. The Panel reasoned that the redevelopment plan superseded general zoning ordinances in all respects as a form of overlay zoning:

The Plan delineates the standards applicable to all properties in the zone. It is, as such, the zoning ordinance for that part of Asbury Park. As we observed in *Hirth v. City of Hoboken*, 337 N.J.Super. 149, 164–65, 766 A.2d 803, 811 (App.Div.2001):

“When an area is found to be blighted, the adoption of a redevelopment plan is an independent municipal action which is governed by separate provisions of the Local Redevelopment Law. See Housing Auth. of City of Newark v. Ricciardi, 176 N.J. Super. 13, 21 (App.Div.1980). N.J.S.A. § 40A:12A–7a provides that a redevelopment plan must be “adopted by ordinance” and “shall include an outline for the planning, development, redevelopment, or rehabilitation of the project area[.]” The redevelopment plan must indicate “[p]roposed land uses” for “the project area [.]” N.J.S.A. 40A:12A–7a(2), which “supersede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area.” N.J.S.A. § 40A:12A–7c. Thus, one component of a redevelopment plan is the zoning or rezoning of the redevelopment area.”

The Plan itself states: “This document contains all the City zoning and development controls for the Waterfront Redevelopment Area.” The LRHL expressly so provides: “[t]he redevelopment plan shall super[s]ede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area.” N.J.S.A. 40A:12A–7c.

Because the redevelopment plan at issue specified that it “contains all the City zoning and development controls” within the applicable redevelopment area, it effectively re-zoned that portion of the City; the provisions of that plan superseded the procedural requirements otherwise set forth in the MLUL and general zoning ordinances of Hoboken. Further, as the MLUL requires the planning board to consider applications in accordance with the procedures established by local ordinance (see N.J.S.A. 40A:12A-13), the planning board would nonetheless be required to observe the procedures set forth in the redevelopment plan, which itself had been enacted by ordinance.

In the present case, it appears that the Jersey Avenue Tenth Street Redevelopment Plan does, in fact, meet the requirements for superseding zoning as established by N.J.S.A. § 40A:12A–8c. The Redevelopment Plan contains a zoning map designating the Redevelopment Area in which the

plan applies, a copy of which is attached hereto for reference. Further, the current land use map for the City of Jersey City identifies the boundaries of the Redevelopment Area.

Furthermore, just like the redevelopment plan discussed in Jersey Urb. Renewal, the Redevelopment Plan at issue here expresses that it should be treated as superseding general zoning regulations. Paragraph H under Heading IX of the Redevelopment Plan, entitled “General Provisions,” state the following:

The provisions of this plan specifying the redevelopment of the project area and the requirements and restrictions with respect thereto shall be in effect for a period of forty (40) years from the original date of approval of this plan by the Jersey City Municipal Council, provided however that any development or redevelopment projects that are commenced and/or completed within said forty (40) year period *shall be deemed to comply with all applicable laws, as long as they comply with the provisions of this Redevelopment Plan.*

[Redevelopment Plan, §IX, ¶H, emphasis added]

Because the Redevelopment Plan specifies that all redevelopment that complies with the provisions of the Plan shall be deemed to comply with other applicable laws, the clear intendment of the Redevelopment Plan is to supersede general zoning ordinances that would otherwise apply within the Redevelopment Area.

Having established that the Redevelopment Plan supersedes the City’s zoning ordinances of general application, the remaining question is to what extent those general ordinances may impact the interpretation of the redevelopment plan.

II. THE ZONING ORDINANCES OF GENERAL APPLICATION ARE MERELY INSTRUCTIVE TO THE INTERPRETATION OF THE REDEVELOPMENT PLAN, AND UNLIKELY TO POSE ANY ISSUE FOR THE RAMPART PROJECT

Courts have previously addressed the issue of disagreement between the overlay zoning provisions of a redevelopment plan and the general zoning ordinances applicable throughout a municipality, and found that superseding zoning set forth in a Redevelopment Plan will govern. For example, in First Montclair Partner, L.P. v. Herod Redevelopment I, L.L.C., the Appellate Division determined that a site plan for a seven-story structure was properly approved according to the terms of a redevelopment plan even though the proposed building, which had a subterranean

parking garage, would have been considered an eight-story structure based upon the definition of “maximum building height” as set forth in the general zoning ordinances. 381 N.J. Super. 298 (App. Div. 2005).

In First Montclair, the applicable redevelopment plan provided a seven-story height restriction, but did not expressly define the term “maximum building height.” However, a local zoning ordinance specifically defined that term as follows:

Where the maximum height is specified by number of stories and by feet, buildings shall comply with both of these height limits. Where parking is contained either within or underneath a building, parking levels even if below grade shall be counted as stories for the purposes of determining maximum building height.

[First Montclair, 381 N.J. Super. at 301]

The reviewing Panel reasoned that the definition set forth in the general zoning ordinance was instructive when interpreting the redevelopment plan, but did not control. Id. at 302. Instead, the Panel determined that the controlling issue was what the definition that the local planning board ascribed to the term “story” when reviewing the site plan application. Ibid. The Panel found that the redevelopment plan’s seven-story height restriction could reasonably be construed to apply only to stories built above ground-level, and that the planning board “did not view the subterranean floor as a ‘story.’” Id. at 302-303. Because the board was “entitled to adopt a contrary view of what constitutes a ‘story’ than that expressed in other local regulations,” the Panel ruled that the planning board’s determination was entitled to deference. Id. at 303.

In the present case, it is unlikely that conflicting height restrictions in the City’s general zoning ordinances will pose an impediment to site plan approval, as the Jersey Avenue Tenth Street Redevelopment Plan specifies height limitations in terms of vertical measurements. The height limitation discussed in First Montclair is distinguishable from that in the Jersey Avenue Tenth Street Redevelopment Plan because it set forth a limitation in terms of “stories.” That measurement was subject to differing interpretations, in part because the general zoning ordinances set forth a definition contrary to that evidently employed by the planning board. In contrast, the Jersey Avenue Tenth Street Redevelopment Plan specifies building height limits in terms of vertical feet, set forth in tables. It is highly unlikely that a measurement in terms of feet could be interpreted as

anything other than a fixed height measured from ground level, or as in this case from the embankment retaining wall.

CONCLUSION

The Rampart project is subject to zoning requirements set forth in the Jersey Avenue Tenth Street Redevelopment Plan, and not the City's zoning ordinances of general application. Because the Redevelopment Plan includes an amended zoning map and expresses that its provisions supersede other zoning regulations, it is treated as superseding rather than overlay zoning pursuant to the LRHL.

It is submitted that the Rampart as designed and under the particular circumstances and surrounding topography of this site, does not trigger a height deviation or variance from the Redevelopment Plan. It should also be noted that this is the third building constructed by the applicant, or its related entities, that has measured the height of the building in accordance with the Redevelopment Plan and no height variance was triggered in any of those previous instances.

Very Truly Yours,

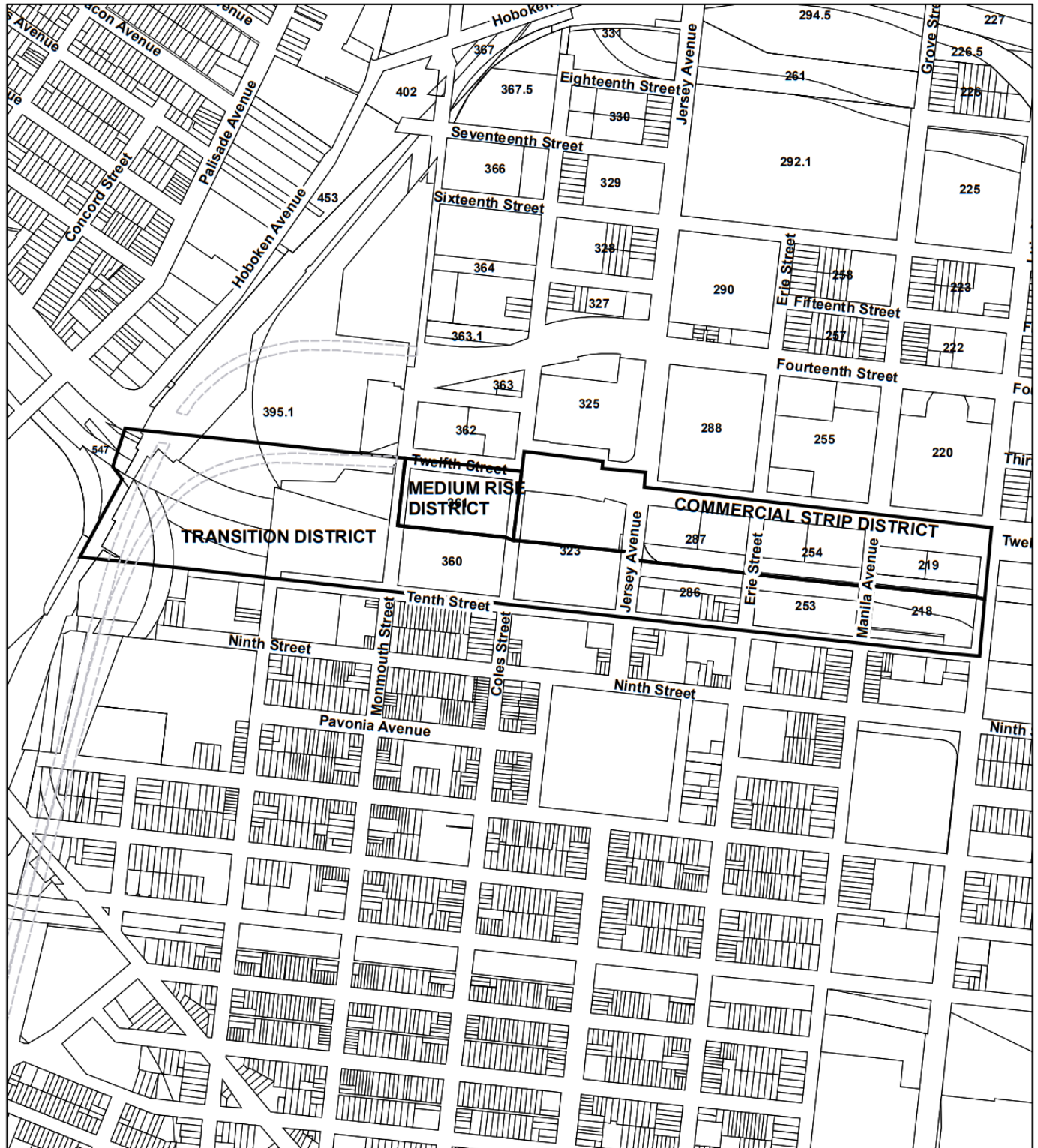
SCHUMANN HANLON MARGULIES, LLC

/s/ **Ronald Shaljian, Esq.**

Ronald Shaljian, Esq.

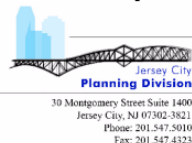
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Zoning Map Amendment from the Jersey Avenue Tenth Street Redevelopment Plan




Jersey Avenue Tenth Street Redevelopment Plan Land Use District Map

February 13, 2007



Legend

 Redevelopment Plan

1 inch equals 500 feet

0 250 500 1,000 1,500 2,000 Feet