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AUGUSTA HOLDINGS, LLC, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">v.</div> TOWNSHIP OF LAKEWOOD and the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF LAKEWOOD, <div style="text-align: right;">Defendants.</div>	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY Docket No. <div style="text-align: center;">COMPLAINT IN LIEU OF PREROGATIVE WRITS</div>
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Plaintiff, Augusta Holdings, LLC, a limited liability company of the State of New Jersey, having a principal office at 418 Clifton Avenue, Suite 205, Lakewood, NJ 08701, by way of Complaint in Lieu of Prerogative Writs, alleges and says:

COUNT I

1. Defendant, Township of Lakewood (“Lakewood” or “Township”), is a Municipal Corporation of the State of New Jersey with offices located at 231 Third Street, Lakewood, New Jersey 08701.

2. Defendant, Township Committee of the Township of Lakewood (“Committee”), constitutes the duly elected governing body of the Township of Lakewood, with offices located at 231 Third Street, Lakewood, New Jersey 08701.

3. Lakewood, through its Township Committee, is empowered to regulate the use and development of real property within its boundaries pursuant to the grant of authority from the State of New Jersey as set forth in the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163 (the “MLUL”).

4. On December 7, 2017, the Township adopted Ordinance No. 2017-51, amending and supplementing Chapter XVIII, entitled “Unified Development Ordinance”, of the Revised General Ordinances of the Township of Lakewood, purportedly to implement the Lakewood Township Master Plan.

5. Plaintiff owns in excess of 100 acres of real property located in the Township’s R-40 Residential zoning district (the “Property”). Ordinance No. 2017-51 does not change the zoning district in which the Property is located.

6. Prior to the adoption of Ordinance No. 2017-51, the Unified Development Ordinance (“UDO”) allowed residential development in the R-40 zone at a maximum density of 4.5 units per gross acre on tracts of at least 100 contiguous acres as a permitted conditional use provided that the units were occupied by a person of at least 55 years of age or the spouse, adult child or caregiver of a resident 55 years or older, described in the Ordinance as an “Adult Community.” Ordinance No. 2017-51 retains this permitted conditional use and density.

7. Section 30 of Ordinance 2017-51 adds a new Section 18-1021 to the UDO. Section 18-1021 allows residential development in the R-40 Residential Zone on tracts of at least 100 contiguous acres without an age restriction as a permitted conditional use, but at a reduced density of a maximum of 3.6 units per gross acre, referred to in the Ordinance as a “Planned Unit Development” (“PUD”)

8. Ordinance 2017-51 provides that Section 18-1021 shall not become effective until “the future adoption of the Amended Zoning Map as specified in Section 18-901(b)2.” See Section 18-1021.A.1

9. Section 3 of Ordinance 2017-51 repealed and replaced Section 18-901(b) of the UDO. Section 18-901(b) as so amended by Section 3 of Ordinance 2017-51, states:

1. The boundaries of these zoning districts are established on a map entitled “Zoning Map of the Township of Lakewood – 2017”, dated December 7, 2017, which accompanies this chapter and is incorporated herein.

a. Amendments to the Zoning Map:

(1) Reserved for future use.

2. The map entitled “Amended Zoning Map of the Township of Lakewood – 2017” and dated December 7, 2017 shall be adopted and replace the Zoning Map referred to above upon the completion of roadway improvements so as to the minimize traffic congestion as recommended in the 2017 Lakewood Township Master Plan, and more specifically set forth in the introductory ‘WHEREAS’ clauses herein.

10. The Property is located in the R-40 district on both the Zoning Map adopted by Section 18-901(b)1 and the Amended Zoning Map to be adopted in the future pursuant to Section 18-901(b)2.

11. The relevant provision in the ‘WHEREAS’ clauses of Ordinance 2017-51 states:

WHEREAS in furtherance of the 2017 Lakewood Township Master Plan’s recommendation that certain specific changes in zoning *that would result in an increase in density* in the area of the Township located south of Central Avenue, south of Cedarbridge Avenue, west of New Hampshire, north of Route 70, to the borders of Jackson Township and Toms River Township, and not including the non-contiguous cluster ordinance, are intended to be enacted by the Township Committee only when traffic improvements fees have been established through the township and all the following road segments as specified on page 38 of the 2017 Lakewood Township Master Plan have been sufficiently widened or dualized to minimize

congestion to ensure that Cross Street, US Route 9, Pine Street, James Street, Prospect Street (Ocean County Route No. 628), and Massachusetts Avenue (Ocean County route No. 637) are improved such that they operate at a minimum of “C” in terms of the level of service they provide along the entire roadway as determined by the Township Engineer and as defined by the Institute of Transportation Engineers. Such analysis shall evaluate the total traffic buildout including potential basement apartments. These Amendments shall not become effective until such time as an Amended Zoning Ordinance Map is adopted as a supplement to the zoning Ordinance Map enacted herewith pursuant to this Ordinance, with said map to be prepared and adopted pursuant to Section 3(2) of this Ordinance only upon the completion of roadway improvements so as to minimize traffic congestion as set forth above. [Emphasis supplied]

12. The Land Use Element of the Township’s 2017 Master Plan contains an identical provision.

13. “Density” is defined in the UDO as “The permitted number of dwelling units per gross acre of land on a particular tract.” Section 18-200.B.

14. “Density” is defined in the Municipal Land Use Law as “the permitted number of dwelling units per gross area of land that is the subject of an application for development . . .” N.J.S.A. 40:55D-4.

15. The permitted density of a PUD on a tract of 100 acres or more under the provisions of Section 18-1021 adopted by Ordinance 2017-51 is less than the permitted density of an Adult Community on a tract of 100 acres or more permitted in the R-40 Zone prior to the adoption of Ordinance 2017-51 and as still permitted subsequent to the adoption of Ordinance 2017-51.

16. Because the PUD provision of Ordinance 2017-51 reduces density from that which was allowed and remains allowed on tracts of at least 100 contiguous acres in the R-40 Zone, the provision in Ordinance 2017-51 purporting to delay of the effective date of Section 18-

1021 does not further the stated purpose of delaying certain specific changes in zoning that would result in an increase in the density of the area.

17. Because the PUD provision of Ordinance 2017-51 reduces density from that which was allowed and remains allowed on tracts of at least 100 contiguous acres in the R-40 Zone, the provision in Ordinance 2017-51 purporting to delay of the effective date of Section 18-1021 is arbitrary, capricious and unreasonable, and does not serve a legitimate purpose of zoning and planning.

18. Section 34 of Ordinance 2017-51 states:

If any section, subsection, paragraph, sentence or any part thereof is judged unconstitutional or invalid, such judgment shall not effect, impair or invalidate the remainder of this Ordinance not directly involved in the controversy in which such judgment shall have been rendered.

19. By virtue of the aforesaid, the provision in Section 18-1021 of the UDO that purports to delay the effective date of Section 18-1021 is invalid and must be severed from the Ordinance.

COUNT II

20. Plaintiff repeats all prior allegations.

21. Pursuant to the MLUL, a municipality's authority to condition development approvals on infrastructure improvements that are not located on the property in question or the closest half of the abutting street or right-of-way is limited to requiring the developer to pay its pro-rata share of the cost of providing certain off-tract improvements required by the development.

22. N.J.S.A. 40:55D-42 states:

Contribution for off-tract water, sewer, drainage, and street improvements. The governing body may by ordinance adopt

regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located off-tract but necessitated or required by construction or improvements within such subdivision or development. Such regulations shall be based on circulation and comprehensive utility service plans pursuant to subsections 19b.(4) and 19b.(5) of this act [N.J.S.A. 40:55D-28.b(4) and (5)], respectively, and shall establish fair and reasonable standards to determine the proportionate or pro-rata amount of the cost of such facilities that shall be borne by each developer or owner within a related and common area, which standards shall not be altered subsequent to preliminary approval.

23. The “WHEREAS” provision of Ordinance 2017-51 quoted above purports to delay zone changes that would increase density until after construction of road improvements required by the increased density.

24. Because a developer can only be required to pay the pro rata share of road improvements required by its own development, and cannot be required to pay for road improvements required by other development, delaying zoning changes that increase density until after construction of road improvements needed to support that increased density would create a “Catch-22”, by prohibiting the Township from requiring developers to pay for the road improvements required by the increased density.

25. The provisions of Ordinance 2017-51 that purport to delay the effective date of amendments to the UDO, and in particular the effective date of Section 18-1021 of the UDO, until completion of future improvements to public roads and streets serve no legitimate planning or zoning purposes and are arbitrary, capricious and unreasonable.

26. The provisions of Ordinance 2017-51 that purport to delay the effective date of Section 18-1021 of the UDO until completion of future improvements to public roads and streets are ultra vires the MLUL.

27. The provisions of Ordinance 2017-51 that purport to delay the effective date of amendments to the UDO, and in particular the effective date of Section 18-1021 of the UDO, until completion of future improvements to public streets must be severed from Ordinance 2017-51.

WHEREFORE, Plaintiff demands judgment as follows:

- (a) Severing and striking subsection A.1 from Section 18-1021 of the UDO as adopted by Ordinance #2017-51;
- (b) Adjudging and declaring that Section 18-1021 of the UDO, with subsection A.1 severed and stricken, is in full force and effect;
- (c) Adjudging and declaring any and all provisions of Ordinance 2017-51 that purport to delay the effective date of amendments to the UDO, and in particular the effective date of Section 18-1021, pending future completion of road improvements are arbitrary, capricious, ultra vires, void, unlawful and unenforceable under the MLUL;
- (d) For attorneys' fees and costs of suit; and
- (e) For such other relief as the court deems just and proper.

COUNT III

28. Plaintiff repeats all prior allegations.

29. Under the MLUL, a municipality is without authority to condition the effective date of its zoning ordinances on implementation of future off-tract road improvements. Rather, a municipality's authority is limited to conditioning a development approval on the developer paying the pro rata costs of off-tract road improvements required by that development.

30. The provisions of Ordinance 2017-51 that purport to delay the effective date of Section 18-1021 of the UDO until completion of future improvements to public roads and streets are ultra vires the MLUL.

31. The provisions of Ordinance 2017-51 that purport to delay the effective date of amendments to the UDO, and in particular the effective date of Section 18-1021 of the UDO, until completion of future improvements to public streets must be severed from Ordinance 2017-51.

WHEREFORE, Plaintiff demands judgment as follows:

- (a) Severing and striking subsection A.1 from Section 18-1021 of the UDO as adopted by Ordinance #2017-51;
- (b) Adjudging and declaring that Section 18-1021 of the UDO, with subsection A.1 severed and stricken, is in full force and effect;
- (c) Adjudging and declaring any and all provisions of Ordinance 2017-51 that purport to delay the effective date of amendments to the UDO, and in particular the effective date of Section 18-1021, pending future completion of road improvements are arbitrary, capricious, ultra vires, void, unlawful and unenforceable under the MLUL;
- (d) For attorneys' fees and costs of suit; and
- (e) For such other relief as the court deems just and proper.

CERTIFICATION

Pursuant to R. 4:5-1, I hereby certify that the subject matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding, and that no such other action or arbitration proceeding is contemplated. I further certify that there is no other party that should be joined in this action pursuant to R. 4:28 or that is subject to joinder pursuant to R.

4:29-1(b). I certify that confidential personal identifiers have been redacted from documents now submitted to the court and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

CERTIFICATION PURSUANT TO R. 4:69-4

I hereby certify that all necessary transcripts of the public hearing before the governing body in this matter have been ordered.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:5-1(c), Paul H. Schneider, Esq. is hereby designated as trial counsel in this action.

GIORDANO, HALLERAN & CIESLA
A Professional Corporation
Attorneys for Plaintiff, Augusta Holdings, LLC

By: 

PAUL H. SCHNEIDER, ESQ.

Dated: January 22, 2018

Docs #3034110-v2