camiros

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To: **City of Trenton**
From: **Camiros**
Date: **July 13, 2023**
Re: **Legal Review: LDO Draft 2**

The following memorandum summarizes comments received on the second draft of the Land Development Ordinance (LDO) from George D. McGill, Esq., City of Trenton Planning Board Attorney. Staff and the Consultant have included responses to comments. The changes that are proposed to be made are intended to align the LDO with State requirements (MLUL).

ARTICLE 1

1.2 F. "Establishes" a Planning Board and a Zoning Board of Adjustment. The Boards are already established, this ordinance "provides" for the Boards. Point of clarity.
Language clarification – will make change

1.4 B. General Application. This says, "In their interpretation and application, the provisions of this Ordinance are held to be the minimum requirements for the promotion and protection of the public health, safety, and welfare." This implies that any deviation would be contrary to health safety and welfare which would be problematic in considering variance relief as to the negative criteria. Any deviation could be seen as an automatic finding of detriment to the public good. I recommend that you change "minimum" to "general". But it is not critical.
Language clarification – will make change

1.5 A.3 I think that this is important. If a use is permitted and it becomes conditional, it can be considered a conforming conditional use as long as it meets the conditions imposed. If it does not, it becomes a pre-existing nonconforming use in my opinion and subject to the protections of NJSA 40:55D-68. I recommend that you consider adding the wording "provided it meets the conditions imposed" at the end of the first sentence.
Language clarification – will make change

1.5 A.4. I am looking at the last phrase in the last sentence, "unless such conditions are required by the Ordinance for the permitted use". To me it seems superfluous because the ordinance is clear from the preceding statement that "Any subsequent alteration of that use must conform to any Ordinance requirements for such permitted use." Also uses are either permitted or conditional, and speaking of permitted uses with conditions is unnecessarily confusing. I see that 8.4 imposes standards for permitted uses. (I make additional comments at that section) but I think that the preceding sentence quoted above takes care of that situation. I recommend that you review and consider deleting the last phrase of this ordinance.
Language clarification – will make change

1.5 A.5 – should be referenced to Article 16. This needs to be done in a few places.
Typo – will make change

1.5 A.6 – I have an issue with this one. The first sentence is fine. However use variances run with the land in perpetuity. Once a use variance is granted, the use is essentially a permitted use. I do not like the wording that makes a use variance "null and void" when the use becomes permitted or made a conditional use. I do not have so much concern about the permitted use scenario. However the conditional use scenario is problematic because if the property/use does not meet all of the conditions imposed under the conditional use ordinance, and it loses the support of its variance approval because it is "null and void", it then becomes, in my opinion, a preexisting nonconforming use and the use is essentially tolerated but not permitted. I think that we would get a lot of push back

on that. The ordinance would essentially void a variance and relegate the property and owner to a less protected condition. That cannot be. It still enjoys the use variance status. I recommend taking a look at the second with an eye toward revision/elimination. If the owner wanted to do something contrary to a condition in the future, it is my opinion that he would need to seek relief. But let's parse that out in the future. We should not void a use variance by ordinance.
Alignment with MLUL – will make change

1.5B, C Should be Article 16
Reference correction – will make change

ARTICLE 2

Change of Use. "A change from one use classification in the Ordinance to another use classification or any use that differs substantially from the current use." This is vague and subjective. Ordinances cannot be that. The wording is likely more trouble than it is worth.
Language clarification – will make change

Community Residence. A group care facility, operated on a for-profit basis, in a residential dwelling for: 1) care of persons in need of personal services or assistance essential for activities of daily living; or 2) care of persons in transition or in need of supervision, including drug and alcohol rehabilitation (excluding medical detoxification). This may be confusing and problematic because the definition differs from the MLUL. I suggest that you review this in that light.
Alignment with MLUL – will make change
The MLUL definition states:

> *"Community residence for persons with developmental disabilities" means any community residential facility licensed pursuant to P.L.1977, c.448 (C.30:11B-1 et seq.) providing food, shelter, and personal guidance, under such supervision as required, to not more than 15 persons with developmental disabilities or with mental illnesses, who require assistance, temporarily or permanently, in order to live in the community, and shall include, but not be limited to: group homes, halfway houses, intermediate care facilities, supervised apartment living arrangements, and hostels. Such a residence shall not be considered a health care facility within the meaning of the "Health Care Facilities Planning Act," P.L.1971, c.136 (C.26:2H-1 et al.). In the case of such a community residence housing persons with mental illness, the residence shall have been approved for a purchase of service contract or an affiliation agreement pursuant to procedures as shall be established by regulation of the Division of Mental Health and Addiction Services in the Department of Human Services. As used in P.L.1978, c.159 (C.40:55D-66.1 et seq.), " person with a developmental disability" means a person with a developmental disability as defined in section 2 of P.L.1977, c.448 (C.30:11B-2), and " person with a mental illness" means a person with a mental illness as defined in section 2 of P.L.1987, c.116 (C.30:4-27.2), but shall not include a person who has been committed after having been found not guilty of a criminal offense by reason of insanity or having been found unfit to be tried on a criminal charge.*
> *N.J.S.A. § 40:55D-66.2 (LexisNexis, Lexis Advance through New Jersey 220th Second Annual Session, L. 2023, c. 37 and J.R. 6)*

ARTICLE 8

Conditional Uses

- 8.1 B 3 This is important because the standards that are enumerated are the type that courts have found to be not specific enough to be enforced. Conditional uses can be challenged on being nonspecific and subjective. NJSA 40:55D-67(a) states "A zoning ordinance may provide for conditional uses to be granted by the planning board according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and extent." In other words a person reading an ordinance must know what they can and cannot do. Our wording that speaks to what is "appropriate" , "compatible with adjacent properties", "in harmony with orderly development" is not permissible and unenforceable. See Cardinal Properties v. Westwood 227N.J.Super 284 (App. Div. 1988) and Cox, 2023, Chapter 25-1.1. Am I correct that these are the only standards that apply and that the designation as a conditional use is only as found in the table 8.1 matrix? If so, I recommend that the conditional use concept be revisited as to the uses marked as conditional and specific conditions be considered for each which could be listed at the bottom of the matrix. I understand that it's a bit of work, but it should not be too difficult.

- 8.4 Two things: (1) This section looks very much like a "Conditional Use" section though it is not identified as such. The Adult Use standards are very much what you would find in a conditional use ordinance, the permitted activities of a Community Garden are not so much like that and more define the nature of the use. You may get challenged on this but this is one of those grey areas. (2) To some extent the question arises as to how far can you go with required design? But again, grey area. I am ok with it, but it is bold.

- 13.6D.2 As I said in review of Article 8, the standards are not specific enough to pass a legal challenge.

Alignment with MLUL – will make change
This requires significant changes to the Use Table to comply with MLUL statutes. See the excerpt of the table below for changes.

ONLY CONDITIONAL USES WITHOUT ADDITIONAL USE STANDARDS ARE SHOWN IN THIS TABLE
CHANGES TO PROPOSED LDO DRAFT 2 ARE SHOWN BELOW TO COMPLY WITH NJ MLUL

PRINCIPAL USE	RL-1	RL-2	RL-3	RM-1	RM-2	RH-1	RH-2	C-MS	C-CC	C-MX	MU-T	DT	R-MX	I-L	I-G	I-MU	TOD	INST	OS-R	USE STANDARD
Alternative Correctional Facility																		~~C~~P		Change to P
Amusement Facility - Indoor								~~C~~P	P	P	P	P	P			P	P			Change to P
Amusement Facility - Outdoor										~~C~~P	~~C~~P		P			P				Change to P
Animal Shelter														P		C				Modify to include standards from 8.3.B for Animal Care
Body Modification Establishment								P~~C~~	P	P	P	P	P			P	P			Change to P
Community Center					P~~C~~	P ~~C~~	P ~~C~~	P	P	P	P	P	P			P	P	P	P	Change to P
Drug Treatment Clinic																		P~~C~~		Change to P
Heavy Retail, Rental, and Service										~~C~~	P			P		P~~C~~				Change to P in IMU Delete from CMX
Industrial – Light														P	P	P	~~C~~			Delete in TOD Roebling Complex would be in TOD but light industrial would be part of TOD Redevelopment Area Plan
PRINCIPAL USE	**RL-1**	**RL-2**	**RL-3**	**RM-1**	**RM-2**	**RH-1**	**RH-2**	**C-MS**	**C-CC**	**C-MX**	**MU-T**	**DT**	**R-MX**	**I-L**	**I-G**	**I-MU**	**TOD**	**INST**	**OS-R**	**USE STANDARD**
Medical/Dental Office/Clinic	C	C	C	C	C	P	P	P	P	P	P	P	P			P	P	P		Add standards in residential to limit size (5,000sf max.) to keep small scale
Movie Studio														P		P	P~~C~~			Change to P
Needle Exchange Facility																		P~~C~~		Change to P
Nightclub								C	C	C	C	C	C			C				Add standards regarding noise, loitering and security; requirement for Security Plan
Parking Lot (Principal Use)									C	C	C			P	P	C				Add reference to LDO standards for parking facilities
Parking Structure (Principal Use)									P	P	P	C	C	P	P	P	C			Add reference to LDO standards for parking facilities

PRINCIPAL USE	RL-1	RL-2	RL-3	RM-1	RM-2	RH-1	RH-2	C-MS	C-CC	C-MX	MU-T	DT	R-MX	I-L	I-G	I-MU	TOD	INST	OS-R	USE STANDARD
Place of Worship	P~~C~~	P ~~C~~	P ~~C~~	P~~C~~	P~~C~~	P ~~C~~	P ~~C~~		P~~C~~	P~~C~~	P~~C~~	P~~C~~	P~~C~~			P~~C~~		P		Change to P
Private Recreation Club	~~C~~	~~C~~	~~C~~	C	C	C	C		C	C	P	C	C			P	C	P		Delete in RL Districts Modify to include standards from current draft Social Club regulations
Public Works Facility											~~C~~P			P	P	P				Change to P
Research and Development										P~~C~~	P~~C~~	P~~C~~	P~~C~~	P	P	P	P	P		Change to P
Retail Goods Establishment					P	P	P	P	P	P	P	P	P	P~~C~~		P	P			Change to P
Retail Sales of Alcohol								P~~C~~	P	P	P	P	P			P	P			Change to P

8.4 Should the term “special use” be “conditional use”?
Typo – will make change

8.4 DD. What you can do and not do is largely controlled by FCC (See Order FCC 18-133). Should DD 1(g) say “fail” or “fall”. DD 6 uses the term “special use”. Is it to mean “conditional use”? I do not have an issue with the ordinance but be mindful that the FCC requirements will ultimately control.
Typo – will make change

8.5A Temporary uses; We need to tighten up the time and remove the discretionary/subjective nature of the issuance of a permit. Standards such “adequacy of parcel size” (Food Trucks) are legally insufficient. It is the same issue here as with the conditional uses. Standards must be clear and objective.
Per response from the attorney, two items require refinement – we will clarify the timeframe for farmer’s markets, and for food trucks we will limit the permit to 30 days validity at one time and allow for renewal

ARTICLE 13

~~13.1 C. This seems to indicate that Conditional use with a C variance goes to Division of Planning but then a C variance with a conditional use goes to Zoning officer. It seems contradictory. Division of Planning bound for the Planning Board is correct.~~
No change – reflects current procedures

~~Have you given any thought to having all applications made to the Department of Planning? I know that there is a staffing issue at the moment but once that resolves, I think that the submission process should be uniform. I think that Ray in conjunction with planning could make the determination as zoning officer as to what Board, but applications, in my opinion, should be made to the same place.~~
No change – reflects current procedures

~~13.4A6 I recommend that we use the word “subdivision” rather than “Plat” . The former is the more recognizable term used in the MLUL and land use practice and the latter is more of a technical term used for the document recorded with the County Clerk on major subdivisions. In other words, an applicant understands subdivision approval and does not normally speak in terms of “plat approval” generally.~~
No change (confirmed with attorney)

13.4C.3 What is “posted notice”? It is my opinion that a municipality cannot require or impose notice requirements not required by the Statute. I recommend that this be removed.
Alignment with MLUL – will remove

13.4 C. Person/entities to be noticed.
This section left out public utilities registered with the City as per NJSA 40:55D-12.1 (a) and military facility commanders as per 40:55D-12.4.
Alignment with MLUL – will change

~~13.4D These entities should be noticed with all applications requiring notice. As stated above, NJSA 40:55D-12.1(a) requires such notice where the entities have registered with the City. I do not know of any reason to require this type of notice only for site plan and subdivision, and in fact it will lead to notice being deficient in many, if not all, other applications.~~
No change (confirmed with attorney)

13.7D.4 Take this out. Failure to act within 120 days may, but rarely ever does, result in an automatic approval unless a Court finds that the Board acted in bad faith. THERE IS NO NEED TO GRANT APPROVAL BY OUR OWN ORDINANCE. These are variances from our new LDO. It could be a disaster. Everywhere this automatic approval wording exists, it should be removed.
Alignment with MLUL – will make change

13.8E. 3
I am having difficulty wrapping my head around how this works. The variance expires after 2 years if the use is abandoned for 12 months. Does that mean if another use is employed on the lot, the variance is gone after 12 months of such use?
Correction – will make change

13.8 F.1 Pursuant to NJSA 40:55D-17, only appeals of a grant of use variance may go to the Council. But that is so only if permitted by ordinance. I recommend that all appeals go to the Superior Court. If you eliminate the right to go to Council, you can eliminate paragraphs 2-9.
Alignment with MLUL – will make change
Please note this is a change from the current LDO. Per recommendation, appeals of use variances would go to Court in the new LDO, rather than Council.

13.9F.2.a.iii As above, there is no need to grant automatic approval in ordinance. (I note the D variance does not have the wording, only C variance.
Alignment with MLUL – will make change

13.9F.2c. MLUL grants an applicant three years on a preliminary approval. I am not sure what is expected by the requiring of additional plans within 60 days. Does this mean that plans showing revisions or conditions at preliminary approval must be supplied within 60 days? I am good with that. Any substantive change would require an amended site plan application.
13.10F.2.c I have the same question regarding 60 days as above at 13.9F.2c
Clarification – will make change

13.9F.4b "Consistency with the Master Plan" is inappropriate. The Master Plan is not an ordinance. The applicant must follow State Statutes and City Ordinances and checklists. Presumably, City Ordinances will comply with the Master Plan, but if they conflict, an applicant follows the Statutes and Ordinances, not the Master Plan.
Alignment with MLUL – will make change

13.9F.4 I recommend that you reference the checklists that accompany this ordinance for site plan. (I think that you may have an open space at 4.b!)
Clarification – will make change

13.10F.1a The approval is just "Minor Subdivision approval". It is one step, but it is not preliminary. See NJSA 40:55D-47.
Correction – will make change

13.10F.2.a.1 I recommend that we remove automatic approval wording.
Alignment with MLUL – will make change

13.10F.2.b This section is missing.
Typo – will make change

13.11 I am having an issue as to what is meant by a "zoning determination". When do people have to submit to a zoning determination? Does this mean submission for zoning permit under Section 13.13? Or is it intended to place the burden of interpreting the ordinance on the Zoning Officer? That is not his job if so. Usually an application for a zoning permit is made when a building permit is made. The Zoning Officer grants or denies the zoning permit. He is trained that If he doubts something – he is to deny. NJSA 40:55D-72 provides for an appeal process if the applicant disagrees– it goes to the Zoning Board of Adjustment for consideration pursuant to NJSA 40:55D-70(a). The Zoning Officer sends his file to the ZBA and the ZBA hears the appeal. Zoning Officers should be exercising very little discretion. It meets or it doesn't. The Board does not make a final decision either. It is all appealable. There is a provision for an "interpretation" under NJSA 40:55D-70(b) but this is done by application to the ZBA directly. The zoning officer would not have the authority to issue an "interpretation".
Alignment with MLUL – will need to eliminate this provision

13.12A . I am not fond of the "checks and balance" wording. Nobody needs to be "checked". It's just the system. The Zoning Officer does not exercise discretion. If you disagree with him, you can appeal him.
Language clarification – will make change

13.15A This leads off by saying "should be unlawful". I think that it should say that it is unlawful.
Language clarification – will make change

ARTICLE 16

16.1A. What does "so long as it remains otherwise legal" convey? Compliant with LDO, not criminal?
Language clarification – will make change

16.1B – I believe better wording would be “The burden of establishing the lawful existence of a nonconformity …” in the first sentence.
Language clarification – will make change

Add at the end add “Any person wishing to object to the issuance of any certificate issued pursuant to NJSA 40:55D-68 attesting to the existence of a nonconforming use prior to the adoption of the ordinance which rendered the use nonconforming may make an appeal to the Zoning Board of Adjustment and shall have the initial burden of establishing a prima facia showing supporting the contention that the certificate was issued in error.
Alignment with MLUL – will make change

16.1 C. “Unlawful Any use, structure, lot, site element, or sign established or constructed in violation of this Ordinance prior to the effective date of the Ordinance is not regarded as lawfully nonconforming and is not entitled to any of these rights.”

I think that what you mean to say is that any use, structure etc… constructed in violation of any prior ordinance is not regarded as lawfully conforming under the new ordinance if it remains in violation thereof. If legal under the prior, it is a nonconforming under the new if contrary to the new ordinance. If constructed in violation of the prior ordinance, it remains unlawful if in violation of the new ordinance.

Language clarification – will make change

~~16.1D. This is unnecessary – It’s an “all laws apply” clause which is unnecessary. Does not hurt but it is unnecessary.~~
No change

16.2 D. Destruction: I recommend that you limit this to only destruction “in part”. NJSA 40:55D-68 does not provide for, and Courts do not allow, rebuilding totally destroyed nonconforming uses for any reason so the “in whole” wording does not meet the statute. “Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.” Cases wrestle with what it means. They say “something less than total” may be restored. It has struck down the use of percentages, or cost, and the law leaves it to case by case and zoning officer judgment. But any ordinance that routinely allows the restoration of a totally destroyed nonconforming use is unlawful and is contrary to the idea of bringing nonconforming structures and uses into conformity as quickly as possible. I recommend that this be brought into conformity with the statute and case law. A recitation of the relevant part of the statute would suffice.
Alignment with MLUL – will make change

16.3 D This suffers the same legal frailties as that at 16.2D. If a nonconforming building burns to the ground or is otherwise totally destroyed, it is gone and may not be rebuilt except upon the issuance of variance relief. A building partially destroyed by fire may be rebuilt as it was even if all of the nonconforming aspects are gone, provided the loss is not total.
Alignment with MLUL – will make change

16.4 A. reads “A nonconforming lot of record may be used for use allowed within the zoning district. When applicable, the use must be that associated with the smallest permissible lot size in the district.
I do not understand this one. There are large lots that are nonconforming lots as to width or another reason to which this would make little sense. Also when does “When applicable” apply. A use precluded by size is a conditional use in my opinion.
Language clarification – will make change

16.4 B Are area and width the only requirements that can make a lot nonconforming?
Language clarification – will make change

16.5 B.2.c You are placing a lot of judgment into (and pressure on) the Zoning Officer. It is more legally sound to require an appearance before the ZBA. Zoning Officers have to operate by the words “to doubt is to deny” The ZO would likely have doubts. The ZO and City will be open to accusations of favoritism if he is less than absolutely consistent, which will always be open for debate. My recommendation is to make it a requirement and let the ZO send them to the Board if noncompliant.
Alignment with MLUL – will make change