

**ECKERT SEAMANS CHERIN & MELLOTT, LLC**

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LUSHENG YA, ANAND SHANMUGAM,  
YU-HSING TU, ZHI WEI, and  
CHAKRAPANI DABBARA,

Plaintiffs,

v.

TOWNSHIP OF WEST WINDSOR,  
TOWNSHIP OF WEST WINDSOR  
PLANNING BOARD, and IV1 WINDSOR 8  
LOGISTICS CENTER LLC f/k/a JDN  
ENTERPRISES

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – MERCER COUNTY

Docket No.: MER-L-1603-22

Civil Action

**NOTICE IN SUPPORT OF  
DEFENDANT, IV1 WINDSOR 8  
LOGISTICS CENTER LLC’S  
MOTION TO PARTIALLY DISMISS  
PLAINTIFFS’ COMPLAINT  
PURSUANT TO RULE 4:6-2(e)**

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**To:** Robert F. Simon, Esq.  
Herold Law, P.A.  
25 Independence Boulevard  
Warren, New Jersey 07059  
*Attorney for Plaintiffs*

Gerald J. Muller, Esq.  
Law Offices of Gerald Muller, P.C.  
707 State Road, Suite 212  
Princeton, New Jersey 08540  
*Attorney for Defendants, Township of  
West Windsor Planning Board and  
Township of West Windsor*

**PLEASE TAKE NOTICE** that on Friday, December 2, 2022, at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for Defendant, IV1 Windsor 8 Logistics Center LLC, will apply to the Mercer County Superior Court, 175 South Broad Street,

Trenton, New Jersey 08608, for an Order granting its request to dismiss Counts I and II of Plaintiffs' Complaint pursuant to Rule 4:6-2(e);

Movant(s) shall rely upon all documents attached to its Motion and any oral argument if heard;

Pursuant to R. 1:6-2(d), the undersigned:

- Waives oral argument and consents to disposition on the papers;
- Requests oral argument;
- Requests oral argument only if opposition papers are timely filed or the Court is inclined to deny this application;

A proposed form of Order is attached.

**ECKERT SEAMANS CHERIN & MELLOTT,  
LLC**

*/s/ Frank J. Petrino*

BY: \_\_\_\_\_

FRANK J. PETRINO  
MICHAEL A. ALBERICO  
*Attorneys for Defendant, IVI Windsor 8  
Logistics Center LLC*

Date: October 27, 2022

**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the date set forth below this attorney filed the within Notice of Motion, Brief, Certification, Proposed Order, and Exhibits via eCourts, as follows:

Clerk of the Court  
Superior Court of New Jersey  
Law Division, Mercer County

and that copies of each of the Motion documents were served via eCourts upon all other counsel.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

*/s/ Frank J. Petrino*

BY: \_\_\_\_\_  
FRANK J. PETRINO, Esq.

Date: October 27, 2022



**ECKERT SEAMANS CHERIN & MELLOTT, LLC**

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SUPERIOR COURT OF NEW JERSEY  
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Docket No.: MER-L-1603-22

Civil Action

**ORDER**

**THIS MATTER** having been brought before the Court by Frank J. Petrino, Esquire, of Eckert Seamans Cherin & Mellott, LLC, counsel for Defendant, IV1 Windsor 9 Logistics Center LLC, and the Court having considered the moving papers, and oral argument if heard;

**IT IS ORDERED** on this \_\_\_\_\_ day of \_\_\_\_\_, 2022, that Defendant’s partial motion to dismiss Plaintiffs’ Complaint pursuant to Rule 4:6-2(e) is **GRANTED**:

**IT IS FURTHER ORDERED** that Counts I and II of Plaintiffs’ Complaint are dismissed **WITH PREJUDICE** and without costs;

**IT IS FURTHER ORDERED** that a copy of this Order will be deemed served upon all parties once uploaded to eCourts.

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, J.S.C.

\_\_\_\_\_ Opposed      \_\_\_\_\_ Unopposed

**ECKERT SEAMANS CHERIN & MELLOTT, LLC**

Frank J. Petrino, Esq. (Attorney I.D. #282491972)

Michael A. Alberico, Esq. (Attorney I.D. #157282015)

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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – MERCER COUNTY

Docket No.: MER-L-1603-22

Civil Action

**ATTORNEY CERTIFICATION IN  
SUPPORT OF DEFENDANT, IV1  
WINDSOR 8 LOGISTICS CENTER  
LLC’S MOTION TO PARTIALLY  
DISMISS PLAINTIFFS’ COMPLAINT  
PURSUANT TO RULE 4:6-2(e)**

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I, Frank J. Petrino, Esquire, being of full age and familiar with the facts of the case certifies as follows:

1. I am an attorney in the State of New Jersey with the Law Firm of Eckert Seamans Cherin & Mellot, LLC, counsel for Defendant, IV1 Windsor 8 Logistics Center LLC (“IV1”).
2. I make this Certification in support of IV1’s motion for partial dismissal of Plaintiffs’ Complaint pursuant to Rule 4:6-2(e).
3. I am fully familiar with the facts of the case as one of the handling attorneys on the matter.
4. The Exhibits A-L attached to the Brief in support of this motion are true and accurate copies.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

*/s/ Frank J. Petrino*  
BY: \_\_\_\_\_  
FRANK J. PETRINO, ESQ.

Date: October 27, 2022





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## **PRELIMINARY STATEMENT**

Defendant, IV1 Windsor 8 Logistics Center LLC (“IV1” or “Defendant”), files this motion to dismiss Counts I and II of Plaintiffs, Lusheng Yan, Anand Shanmugam, Yu-Hsing Tu, Zhi Wei, and Chakrapani Dabbara’s (“Plaintiffs”) Complaint in Lieu of Prerogative Writs (“Complaint”) for failure to state a claim pursuant to Rule 4:6-2(e). Plaintiffs’ Complaint challenges Co-Defendant, Township of West Winder Planning Board’s (“Board”) passage of Ordinance 2020-24, which added warehousing as an additional industrial use in the ROM-3 Zone. IV1 subsequently filed a Planning Board Application (“Application”) to develop warehouses on IV1’s property located at 399 Princeton-Highstown Road in the Township of West Windsor.

Ordinance 2020-24 implemented the 2020 West Windsor Amended Master Plan Land Use Element’s recommendation that expanded the permitted, non-residential use in ROM-3 Zone to include warehouses. Ordinance 2020-24 underwent all the necessary procedural steps prior to its adoption by Co-Defendant, the Township of West Winder’s (“West Windsor”) Township Counsel on December 14, 2020. West Windsor’s Mayor then approved Ordinance 2020-24 on December 15, 2020, and it went into effect on January 7, 2021.

Count I of the Complaint argues the passage of Ordinance 2020-24 was arbitrary, capricious, unreasonable, contrary to law, ultra vires, invalid, and therefore, should be voided. Count II argues Ordinance 2020-24 amounts to illegal spot zoning and should be invalidated. Notwithstanding the claims’ lack of merit, Plaintiffs’ challenge to Ordinance 2020-24 is almost two (2) years out-of-time. Plaintiffs had forty-five (45) days from the date the Township Counsel published Notice of adoption of Ordinance 2020-24 to bring their challenge. See Rule 4:69-6. Plaintiffs failed to file their suit within that timeframe, but instead, waited approximately two (2) years or stated differently, six hundred and thirty-five days (635), before filing their Complaint.

As such, any cause of action to void or invalidate Ordinance 2020-24 is out-of-time and must be dismissed. Defendant now moves under Rule 4:6-2 to dismiss with prejudice Plaintiffs' Counts I and II of the Complaint.

**STATEMENT OF FACTS**

1. Plaintiffs filed their Complaint on September 15, 2022, asserting Three Counts against IV1, the Board, and West Windsor. (See a true and correct copy of the Complaint Without Exhibits, attached as Exhibit A).

2. The Complaint challenges inter alia the Board's approval of IV1's Application requesting "Preliminary and Final Site Plan approval with variance and waiver relief" to develop a warehouse on the IV1's property located at 399 Princeton-Hightown Road, Township of West Windsor, County of Mercer, New Jersey, designated Block 22, Lot 5, on the Township's tax map. (See Exhibit A ¶1).

3. The Complaint's Counts I and II argue the passage of Ordinance 2020-24 was improper and illegal. (See Exhibit A PP.8; 10).

4. West Windsor amended its Land Use Element of the Master Plan in February 2020. (See a true and correct copy of the Master Plan as Amended Land Use Element, attached as Exhibit B).

5. The Amended Land Use Element of the Master Plan recommended that the permitted uses in the ROM-3 (Research, Office, and Manufacturing) Zone include warehousing. (See Exhibit B P.59).

6. Ordinance 2020-24 implemented the Amended Land Use Element of the Master Plan, by adding warehouses as a permitted use in the ROM-3 Zone. (See a true and correct copy of Ordinance 2020-24, attached as Exhibit C P.2-3).

7. Ordinance 2020-24 was first introduced at the Township Council meeting on November 30, 2020. (See a true and correct copy of Minutes from November 30, 2020, attached as Exhibit D).

8. On December 4, 2020, West Windsor published in the Princeton Packet that notice of the introduction of Ordinance 2020-24 to modify the provisions of the ROM-3 Zone occurred at the November 30, 2020 Township Council meeting and the public hearing to consider objection of the Ordinance would be held on December 14, 2020, at 7:00 p.m. at the West Windsor Senior Center, 271 Clarksville Road, West Windsor Township, New Jersey 08550. (See a true and correct copy of Huber Affidavit, attached as Exhibit E).

9. In the interim, the Council referred Ordinance 2020-24 to the Board for review. The Board on December 9, 2020, found Ordinance 2020-24 consistent with the amended Land Use Element of the Master Plan. (See a true and correct copy of Gerald Muller's Email to Gay Huber, attached as Exhibit F).

10. West Windsor forwarded certified notices of the Amended Land Use Element of the Master Plan to East Windsor Township, Lawrence Township, Princeton Township, Township of Hamilton, Robbinsville, Township, and Trenton in January 2020. (See a true and correct copy of Return Certified Mail Receipts, attached as Exhibit G).

11. Ordinance 2020-24 was subject to a public comment period at the Township Counsel meeting on December 14, 2020. After opening and closing the public comment period on the Ordinance, the Township Counsel adopted Ordinance 2020-24 in a 5-0 vote. (See a true and correct copy of the December 14, 2020 Transcript, attached as Exhibit H P.3; P.5).

12. The Mayor approved Ordinance 2020-24 on December 15, 2020, and it went into effect on January 7, 2021. (See a true and correct copy of Record Vote with Mayor Signature, attached as Exhibit I).

13. On December 18, 2020, West Windsor published in the Princeton Packet notice that Ordinance 2020-24 was approved after Second and Final reading at the Township Council



meeting on December 14, 2020, signed by the Mayor on December 15, 2020, and will become effective on January 7, 2021. (See a true and correct copy of Huber Affidavit, attached as Exhibit J).

14. West Windsor also forwarded to Ms. Leslie R. Floyd, Director of the Mercer County Planning Department on December 15, 2020, Ordinance 2020-24 with a cover letter explaining the Ordinance's recent approval and effective date of January 7, 2021. (See a true and correct copy of Huber Letter, attached as Exhibit K).

15. The Mayor's seat was up for election on November 2, 2020. The topic of warehouse development was the focus in the election. Details appeared well before the summer of 2020 up until the election regarding the warehousing, and a comprehensive article addressing the issue was published on October 1, 2020. (See a true and correct copy of October 1, 2020 News Paper Article Regarding Election and Warehousing, attached as Exhibit L).

16. Count I of the Complaint argues:

- a. Prior to the adoption of Ordinance 2020-24, notices were not properly sent pursuant to N.J.S.A. 4:55D-62.1 to affected property owners within 200 feet of the affected property area. (See Exhibit A ¶30).
- b. The public notices for the first and second readings on Ordinance 2020-24 were vague. (See Exhibit A ¶31).
- c. Ordinance 2020-24 improperly allowed warehousing in the ROM-3 Zone. (See Exhibit A ¶¶32; 36; 37).
- d. Consideration of West Windsor's Affordable Housing obligations as justification to amend the ROM-3 Zone through the adoption of 2020-24 was improper. (See Exhibit A ¶33).

- e. Adoption of Ordinance 2020-24 was inconsistent with the concept plan and Land Use and Housing Elements of the Master Plan. (See Exhibit A ¶¶34; 38; 39).
  - f. Ordinance 2020-24 violated N.J.S.A. 40:55D-62 for failing to be consistent or designed to effectuate a comprehensive plan for development of land within the municipality. (See Exhibit A ¶41)
  - g. Ordinance 2020-24 failed to take into consideration the most appropriate use of the land. (See Exhibit A ¶42).
  - h. And ultimately, the adoption of Ordinance 2020-24 was “arbitrary, capricious, unreasonable, contrary to law, ultra vires, invalid, and should be voided.” (See Exhibit A ¶43).
17. Count I also blanketly states “an enlargement of time” to challenge Ordinance 2020-24 is required in the interest of justice because “substantial and novel constitutional questions raised that affect due process, and an important public interest raised” requires adjudication and clarification. (See Exhibit A ¶44).
18. Count II argues Ordinance 2020-24 constitutes illegal spot zoning as the ROM-3 Zone is comprised of only one (1) lot. (See Exhibit A ¶46).
19. The Complaint seeks to invalidate Ordinance 2020-24 and enjoin IV1 from developing on the property. (See Exhibit A).
20. The time for Defendant to interpose a responsive pleading to Plaintiffs’ Complaint has not yet run at the time of this motion’s filing.

## LEGAL STANDARD

Rule 4:6-2 states:

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses . . . may at the option of the pleader be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted[.]

On a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e), all well-pled "allegations of the Complaint are accepted as true and the matter is to be resolved based upon the pleadings themselves." Holmin v. TRW, Inc., 330 N.J. Super. 30, 32 (App. Div. 2000), aff'd, 167 N.J. 205 (2001). Moreover, the court can evaluate documents referenced in the complaint and matters of public record when deciding the motion. Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015). "Under the relevant standard of Rule 4:6-2(e), the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." N.J. Sports Prods., Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 178 (Law Div. 2007) (internal citations omitted).

The test to determine whether a court should grant a motion to dismiss under Rule 4:6-2(e) is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). However, "a pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rosen v. Cont'l Airlines, Inc., 430 N.J. Super. 97, 101 (App. Div. 2013) (emphasis added). Specifically, the motion "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [Plaintiff's] claim must be apparent from the [C]omplaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

"If, on a motion to dismiss based on [R. 4:6-2(e)], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion." R. 4:6-2. Summary Judgment shall be granted

if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

"[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995) (internal citation omitted). The "non-moving party cannot defeat summary judgment by pointing to any fact in dispute." Id. at 529 (emphasis in original). Therefore, if the non-moving party only relies upon "facts that are of an insubstantial nature," summary judgment will be granted for the moving party. Ibid. (internal citation omitted).

### **LEGAL ANALYSIS**

#### **PLAINTIFFS' CHALLENGE TO ORDINANCE 2020-24 IS OUT-OF-TIME**

Rule 4:69-6 states in pertinent part:

- (a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

(b) Particular Actions. No action in lieu of prerogative writs shall be commenced

\* \* \*

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality[.]

[(Emphasis added).]

The purpose underlying Rule 4:69-6 is to “give an essential measure of repose to actions taken against public bodies.” Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton, 370 N.J. Super. 429, 446 (App. Div. 2004) (internal citation omitted).

All of Plaintiffs’ claims in Counts I and II regarding the passage of Ordinance 2020-24 must be dismissed, not only for lack of merit, but because Plaintiffs brought their challenge after the timeframe required by the Court Rules. Here, Ordinance 2020-24 was adopted on December 14, 2020, following the time for notice of objection, and published on December 18, 2020. The forty-five-(45) day period to challenge the ordinance expired on February 1, 2021 . Plaintiffs try to resuscitate their out-of-time claims by arguing the “interest of justice” requires an enlargement of time to challenge because the Ordinance implicates “substantial and novel constitutional questions” and “public interest.” See Rule 4:69-6(c) (stating the “court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires”).

The enlargement of time is not routinely granted. See Tri-State Ship Repair & Drydock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2002) (holding Rule 4:69-6 is “aimed at those who slumber on their rights”) (citations omitted). “The longer a party waits to

mount its challenge, the less it may be entitled to an enlargement.” Id. at 224. New Jersey recognizes three categories for when an enlargement of time is granted: “(1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification.” Brunetti v. New Milford, 68 N.J. 576, 586 (1975).

Despite Plaintiffs’ Complaint containing key phrases necessary to obtain an enlargement of time to challenge Ordinance 2020-24, Plaintiffs fail to carry their burden. Plaintiffs’ arguments that Ordinance 2020-24 implicates constitutional issues and the public interest amount to bald assertions as they are unsupported by any facts or legal analysis. Plaintiffs cannot now, approximately six hundred and thirty-five (635) days after the ordinance was passed, challenge its validity. As Tri-State expertly explained, the longer a party waits to challenge the ordinance, the less it is entitled to an enlargement. Plaintiffs slept on their rights to challenge and only after the process was completed did they seek to contest the Ordinance. Even after Plaintiffs received in March 2022, very detailed notice of the scope of IV1’s development application and based on ROM-3 zoning, they still did not challenge the Ordinance. Because Plaintiffs failed to present any credible evidence for the enlargement of time to contest Ordinance 2020-24, Counts I and II must be dismissed as out-of-time.

#### **WEST WINDSOR PROVIDED PROPER NOTICE FOR THE ADOPTION OF ORDINANCE 2020-24**

The procedure for the passage of ordinances is as follows:

- a. Every ordinance after being introduced and having passed a first reading, which first reading may be by title, shall be published in its entirety or by title or by title and summary at least once in a newspaper published and circulated in the municipality, if there be one, and if not, in a newspaper printed in the county and circulating in the municipality, together with a notice of the introduction

thereof, the time and place when and where it will be further considered for final passage, a clear and concise statement prepared by the clerk of the governing body setting forth the purpose of the ordinance, and the time and place when and where a copy of the ordinance can be obtained without cost by any member of the general public who wants a copy of the ordinance. If there be only one such publication the same shall be at least one week prior to the time fixed for further consideration for final passage. If there be more than one publication, the first shall be at least one week prior to the time fixed for further consideration for final passage.

b. At the time and place so stated in such publication, or at any time and place to which the meeting for the further consideration of the ordinance shall from time to time be adjourned, all persons interested shall be given an opportunity to be heard concerning the ordinance. The opportunity to be heard shall include the right to ask pertinent questions concerning the ordinance by any resident of the municipality or any other person affected by the ordinance. Final passage thereof shall be at least 10 days after the first reading.

c. Upon the opening of the hearing, the ordinance shall be given a second reading, which reading may be by title, and thereafter, it may be passed with or without amendments, or rejected. Prior to the said second reading, a copy of the ordinance shall be posted on the bulletin board or other place upon which public notices are customarily posted in the principal municipal building of the municipality, and copies of the ordinance shall be made available to members of the general public of the municipality who shall request such copies. If any amendment be adopted, substantially altering the substance of the ordinance, the ordinance as so amended shall not be finally adopted until at least one week thereafter, and the ordinance as amended shall be read at a meeting of the governing body, which reading may be by title, and shall be published in its entirety or by title or by title and summary, together with a notice of the introduction, the time and place when and where a copy of the amended ordinance can be obtained without any cost by any member of the general public who desires a copy, a clear and concise statement prepared by the clerk of the governing body setting forth the purpose of the ordinance, and the time and place when and where the amended ordinance will be further considered for final passage, at least two days prior to the time so fixed. At the time and place so fixed, or at any other meeting to which the further consideration of the amended ordinance may be adjourned, the governing body may proceed to pass the ordinance, as amended, or again amend it in the same manner.

d. Upon passage, every ordinance, or the title, or the title and a summary, together with a notice of the date of passage or approval, or both, shall be published at least once in a newspaper circulating in the municipality, if there be one, and if not, in a newspaper printed in the county and circulating in the municipality. No other notice or procedure with respect to the introduction or passage of any ordinance shall be required.

[N.J.S.A. 40:49-2.]

Stated more succinctly,

Once the planning board adopts a master plan, the municipality may then enact a conforming zoning ordinance. See N.J.S.A. 40:55D-62.<sup>1</sup>a. When adopting a zoning ordinance, the governing body introduces the ordinance on first reading, N.J.S.A. 40:49-2.a; publishes a notice of a public hearing, N.J.S.A. 40:49-2.b; submits the ordinance to the planning board for review, N.J.S.A. 40:55D-26.a, -64; and considers the ordinance for adoption after a second reading, N.J.S.A. 40:49-2.c. In a borough such as Point Pleasant, after the mayor signs the ordinance in accordance with N.J.S.A. 40A:60-5.d, the governing body must file the ordinance with the county planning board. N.J.S.A. 40:55D-16.

[Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant, 137 N.J. 136, 142 (1994).]

Taking this checklist in seriatim, West Windsor:

1. Sent Notice to the surrounding municipalities regarding the changes in the Amended Land Use Element of the Master Plan in January 2020;
2. Introduced Ordinance 2020-24 on first reading at the November 30, 2020 Township Counsel meeting;
3. Published notice in the Princeton Packet on December 4, 2020, declaring that a public hearing on Ordinance 2020-24 to modify the provisions of the ROM-3 Industrial Tract would take place at the Township Council meeting on December 14, 2020;

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<sup>1</sup> N.J.S.A. 40:55D-62, the Power to zone, states in pertinent part “[t]he governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements.”



4. Submitted Ordinance 2020-24 to the Board, and the Board on December 9, 2020, found Ordinance 2020-24 was consistent with the Amended Land Use Element of the Master Plan;

5. Allowed an opportunity for public comment on Ordinance 2020-24 at the December 14, 2020 Township Council meeting, and after closing the public hearing on the Ordinance, the Township Counsel adopted Ordinance 2020-24 in a 5-0 vote.

6. The West Windsor Mayor approved Ordinance 2020-24 on December 15, 2020.

7. On December 18, 2020, published in the Princeton Packet notice that Ordinance 2020-24 was approved and that it would take effect on January 7, 2021.

8. On December 15, 2020, forwarded Ordinance 2020-24 to the Director of the Mercer County Planning Department for filing.

Plaintiffs argue this process was inadequate and that notice by certified mail was also required to be given to all interested landowners pursuant to N.J.S.A. 40:55D-62.1. This statute states in pertinent part:

Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board pursuant to section 76 of P.L.1975, c.291 (C.40:55D-89), shall be given at least 10 days prior to the hearing by the municipal clerk to the owners of all real property as shown on the current tax duplicates, located, in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.

[N.J.S.A. 40:55D-62.1 (emphasis added).]

Plaintiffs are mistaken that this statute applies to the subject matter and not N.J.S.A. 40:55D-62. Under N.J.S.A. 40:55D-62.1, Notice to individual owners is only necessary when the ordinance changes the “classification or boundaries” of a zoning district—and is not done after a Planning Board completes a general periodic review. Ordinance 2020-24 does not change the boundaries—this is undisputed—of the ROM-3 Zone nor does it change the classification.

New Jersey defines “classification” in the land use context as “synonymous with the broad general uses permitted in a designated area, such as residential, commercial, and neighborhood retail.” Robert James Pacilli Homes, L.L.C. v. Township of Woolwich, 394 N.J. Super. 319, 330 (App. Div. 2007). The Pacilli court further explained “the type of notice to be provided on the occasion of a proposed amendment to a zoning ordinance should focus on the substantive effect of the amendment rather than the appellation given to the zone.” Id. at 332. Stated differently, “the test is not the number of changes but the substance of the changes.” Id. at 333.

Ordinance 2020-24 did not change the classification of the ROM-3 Zone, for example, by converting it from industrial to residential. The Ordinance merely expanded the types of industrial uses allowed in the Zone from research, office, and limited manufacturing to include warehousing; it did not expand the Zone to allow for retail space. As such, no individual notice was required under N.J.S.A. 40:55D-62.1. Ordinance 2020-24 was adopted as consistent with the most recent Amended Land Use Element of the Master Plan, as confirmed by the Board on December 9, 2020. Ordinance 2020-24 incorporated the Amended Use Element’s recommendation to include warehousing in the ROM-3 Zone. This is not the type of change or process that entitled Plaintiffs to personal notice.

### **CONCLUSION**

For the reasons stated above, Counts I and II of Plaintiffs’ Complaint must be dismissed with prejudice.

Respectfully submitted,

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Dated: October 27, 2022