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VIA EMAIL AND OVERNIGHT MAIL

Jonathan Rekstad, Esq.
Jersey City Historic Preservation Commission
1 Jackson Square
Jersey City, NJ 07305
201-547-5010

Re: 240 - 250 Newark Avenue HPO Opinion Memorandums

Dear Mr. Rekstad:

Please note that this office represents 240 Realty, LLC, the owners of the above referenced properties,. The purpose of this letter is to respond to two (2) separate memorandums issued on May 15, 2025 by the Historic Preservation Commission's staff and consultant on behalf of the owners of 240-250 Newark Avenue (Block 11111, Lots 1 and 2 on the Official Tax Map of the City of Jersey City).

Both 240 and 250 Newark Avenue were scheduled for "Demolition Review" by the Jersey City Historic Preservation Commission on June 16, 2025. The matter was adjourned based on the property owner's request until an undetermined date. Please allow this letter to serve both as an appearance on behalf of the owners as well as a formal request for the withdrawal of the referral of these properties by the Jersey City Zoning Officer to the Jersey City Historic Preservation.

We contend that Section 105-3 of the Jersey City Ordinance is ultra vires on its face. At present, Section 105-3 requires that "permits to demolish (in whole or in part) a building or structure or to reconstruct the façade **of any building or structure** shall require the prior approval of the Zoning Officer for compliance with the provisions of Chapter 345." [emphasis added]. The permit application is then referred to the Historic Preservation Officer who either determines that the demolition application can be forwarded to the Zoning Officer as a "prior approval" or "denies" the application and refers it to the Historic Preservation Commission along with a report "explaining the reasons for the denial." See Section 105-3.3 of the Jersey City Ordinance. The Historic Commission shall review the report and shall notify the Zoning Officer in 45 days of referral of the application whether the application can be approved as a "prior approval" or denied.

The review and approval process within Section 105-3 violates the findings of the Court in Joseph Berardo v. City of Jersey City, et. al. 476 N.J. Super. 341 (App. Div. 2023). In Berardo, Plaintiff appealed a Superior Court ruling upholding a challenge to a determination of significance.

Jersey City Ordinance' Chapter 105, prior to the adoption of Jersey City Ordinance 15-006, previously permitted any individual to request a determination of significance as to whether a building warranted preservation. The plaintiff in Berardo sought a determination prior to applying for a demolition permit. Id. at 346. In response, the Historic Preservation Officer issued a determination that concluded plaintiff's building likely would not be approved for demolition due to its historic, architectural, and cultural significance. Ibid. The initial determination of significance was appealed to the Zoning Board, which upheld the findings of the Historic Preservation Officer. Ibid. Plaintiff thereafter filed an action in lieu of prerogative writs wherein the Court held that the determination was not arbitrary and capricious affirming the findings of the Zoning Board. Id. at 351. On appeal before the Appellate Division, the court held that Jersey City Ordinance Sections 105-3, 105-4 and 105-7 are "ultra vires and inconsistent with objectives and procedures concerning historic preservation mandated by the MLUL....". Id. at 360.

The Court held that pursuant to N.J.S.A. 40:55D-107, the MLUL authorized a municipality to create a historic preservation commission. Id. at 347. Section 345-9(d) of the JC LDO describes the role of the City Historic Preservation Specialist and permits them to recommend to the historic preservation commission "buildings, objects, sites, structures and districts for nomination to the State and/or National Register of Historic Places" and "recommend to the City Council buildings, sites, structures and districts for Council resolution directing the [historic preservation commission] to review and comment for possible designation." Id. at 348; Section 345-9(D) JC LDO. The Court determined that neither the MLUL, nor any other authorizing Ordinance or Statute, permits a Historic Preservation Officer to "unilaterally grant or deny historic preservation designations that bind a zoning officer in determining whether a demolition permit shall issue." Id. at 854-855.

The MLUL does not authorize HPOs [Historic Preservation Officer(s)] to unilaterally grant or deny historic preservation designations that bind a zoning officer in determining whether a demolition permit shall issue; that advisory function belongs solely to the Commission, as detailed in the MLUL at N.J.S.A. 40:55D-111, and cannot be delegated to other entities or individuals. The Commission, in turn, may designate a site as historic only if it is voted upon a majority of the full governing body. "In order to effectuate the legislative intent to create statewide uniformity, [our courts] have generally held that the requirements established in the MLUL are to be applied strictly." Northgate Condo. Ass'n v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 137 (2013). "[M]unicipalities are not free to add to the statute's requirements where the Legislature has utilized mandatory language."

Ibid. [emphasis added].

Section 105-3 appears, on its face, to be an attempt to implement the procedures within N.J.S.A. 40:55D-111. N.J.S.A. 40:55D-111 permits the referral of applications for issues of permits to the historic preservation commission for a written report on the application. By allowing the HPO to refer applications to the Zoning Officer as a "prior approval" without referral to the historic preservation commission is violative of the procedure found within N.J.S.A. 40:55D-111. In effect, the City has replaced the violative procedure the Court vitiated in Berardo with a similar ultra vires procedure.

Further, Section 105-3 permits broader powers of review to the historic preservation commission than are permitted under the MLUL. Municipalities are empowered to "place their local imprint on historic site and district selection" by exercising their power pursuant to the MLUL:

...all historic sites and historic districts designated in the zoning ordinance shall be based on identifications in the historic preservation plan element of the master plan. Until July 1, 1994, any such designation may be based on identifications in the historic preservation plan element, the land use plan element or community facilities plan element of the master plan. The governing body may, at any time, adopt, by affirmative vote of a majority of its authorized membership, a zoning ordinance designating one or more historic sites or historic districts that are not based on identifications in the historic preservation plan element, the land use plan element or community facilities plan element, provided the reasons for the action of the governing body are set forth in a resolution and recorded in the minutes of the governing body.

Ibid. [emphasis added].

The historic preservation commission is tasked with the responsibility to “prepare a survey of historic sites of the municipality pursuant to criteria identified in the survey report.” N.J.S.A. 40:55D-109.a. The historic preservation commission then may “[m]ake recommendations to the planning board on the historic preservation plan element of the master plan and on the implications for preservation of historic sites of any other master plan elements.” The Planning Board is then entitled to incorporate those recommendations into the master plan as part of their powers. See N.J.S.A. 40:55D-25.a.1 and 40:55D-28.b.10. The MLUL makes it clear that if a property or properties is not identified within the historic preservation plan element then the governing body is the only other party empowered to designate historic sites or historic districts by way of Ordinance.

If a property is designated as a historic site or a property in a historic district, then, and only then, can the historic preservation commission render recommendation to the administrative officer (Zoning Officer) or the Planning Board as it relates to a demolition permit application:

If the zoning ordinance designates and regulates historic sites or districts pursuant to subsection i. of section 52 of P.L.1975, c.291 (C.40:55D-65), the governing body shall by ordinance provide for referral of applications for issuance of permits **pertaining to historic sites or property in historic districts** to the historic preservation commission for a written report on the application of the zoning ordinance provisions concerning historic preservation to any of those aspects of the change proposed, which aspects were not determined by approval of an application for development by a municipal agency pursuant to the “Municipal Land Use Law,” P.L.1975, c.291 (C.40:55D-1 et seq.).

N.J.S.A. 40:55D-111 [emphasis added].

Neither 240 or 250 Newark Avenue are found within the City's Historic Element of the Master Plan nor any other historic survey adopted by the Planning Board or the City Council. Accordingly, the process within N.J.S.A. 40:55D-111 is inapplicable and there is no basis for referral by the Zoning Officer. The broad powers for review Section 105-3 for “any building or structure” exceed the scope of the powers granted to the City under the MLUL. As the court found in Northgate, the statewide uniformity in process is the purpose of strict application of the processes in the MLUL. The City's process promulgated in Section 105-3 of the City's Ordinance

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violates fundamental property rights and due process by failing to provide property owners and purchasers with prior warning of the historic status of a property. It creates a backdoor process outside of the parameters of the MLUL for properties to be declared historic without review by the planning board or by ordinance of the governing body. Instead, property owners are forced to gamble with post hoc determination of the historic preservation commission. This provides no fair warning and in the instant case, prevents the owner from utilizing their property in the manner in which they see fit.

Accordingly, Section 105-3 of the Jersey City Ordinance is ultra vires and the referral of the demolition permit to the Jersey City Historic Commission for review is beyond the scope of the City's powers within the MLUL.

Please contact the undersigned with any questions.

Very truly yours,

Thomas P. Leane

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cc: Brittany Murray, Esq.
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TPL Client