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To: River Edge Joint Planning Board (the "Board")
Re: Analysis of the Constitutionality of River Edge's Prohibition on Billboards

Question Presented:

Does River Edge's zoning ordinance §416-44.A(1) placing a blanket prohibition on "Billboards" (A sign which directs attention to a business, commodity, service, entertainment or attraction conducted, sold or offered elsewhere than upon the lot on which such sign is located.) in the municipality violate the First Amendment?

Short Answer: NO

INITIAL Analysis

IAAT Services LLC ("Applicant") has applied (the "Application") to install a freestanding 60-foot high, two-faced static billboard at 41 Grand Avenue (the "Property"). The Property is designated as Lot 4 in Block 1405 and is currently developed with an office building. Pursuant to River Edge's zoning ordinances §416-44.A(1), billboards are prohibited within the Borough.

In anticipation of this issue and at my direction, the Applicant, through counsel, submitted a letter analyzing the constitutional issues raised by §416-44.A(1). The letter, from Steven Sinisi, Esq., dated May 21, 2025, cites caselaw in support of the proposition that the ordinance violates the First Amendment's protection of freedom of speech. In response, the owner of 335 Johnson Avenue (Block 1405, Lot 3) Dark Star Development, LLC, ("Dark Star") submitted a letter from counsel, Charles Sarlo, Esq., dated June 7, 2025, taking the position that this Board is precluded from declaring the ordinance unconstitutional because questions of law are reserved for courts. In a memorandum dated May 22, 2025, and a letter dated May 28, 2025, the Board Planner and Board Engineer,

respectively, concurred with the Applicant's counsel that the prohibition is unconstitutional and hence unenforceable.

We have reviewed the letters and offer the following analysis for your consideration:

Two of the cases cited by Applicant are worthy of close examination:

1. E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, goes beyond what is necessary to support the Applicant's position by providing precedent for striking down an ordinance *less restrictive* than the one currently before this Board. There, the challenged ordinance prohibited *digital* billboards. E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 562 (2016). Despite this more specific version of a billboard prohibition, the New Jersey Supreme Court held that the ordinance violated the free speech provision of the Constitution. Id. at 585. While the ordinance was content neutral and supported by the substantial government interests of aesthetics and motorist safety, id. at 582-583, the court held that the prohibition was not narrowly tailored to these interests based on the scant factual support presented by the township connecting the prohibition to such interests. Id. at 585.

In River Edge, the ordinance in question does not prohibit a specific type of billboard such as digital billboards but *all* billboards. This is a problem. In fact, §416-44.A(1) is merely one word: "Billboards." Considering that the state supreme court has ruled that a prohibition on digital billboards is not narrowly tailored, it's unlikely that a court would find a broader prohibition on all billboards to be sufficiently tailored to pass First Amendment scrutiny. On the other hand, the township's shortcoming in E & J Equities was a lack of evidence, and so perhaps if River Edge could provide substantial testimony and documentation on the importance of the ordinance for this municipality, it could satisfy such scrutiny. However, given the Time of Application Rule, N.J.S.A. 40:55D-10.5, the record in this regard would be limited to the current ordinance.

2. Applicant's citation to Bell v. Stafford Twp., another New Jersey Supreme Court case, represents an example of an ordinance prohibiting *all* billboards like the one at issue here. Bell v. Stafford Twp., 110 N.J. 384, 541 A.2d 692 (1988). There, the court found that the township failed to present evidence of even a legitimate governmental interest and accordingly struck down the prohibition as violative of the First Amendment. Id. at 397-398.

On the other hand, the caselaw cited by Dark Star in support of the proposition that this Board does not have the authority to declare §416-44.A(1) unconstitutional is unmoving. The cited section of Messer v. Burlington Tp. concerned the validity of rezoning provisions. Messer v.

Burlington Tp., 172 N.J. Super. 479, 487 (Law Div. 1980). The relevant provision specified that the planning and zoning boards were to reach conclusions of law in evaluating applications for rezoning, and in Messer the court found that the only such conclusion to be reached in these applications was whether the current zoning was unconstitutional as applied to the given applicant. Id. It was this aspect of the ordinance that the court invalidated based on the quotation Dark Star cited regarding constitutional questions strictly being a province of the court. Id. This is easily distinguishable from the case at hand. Whereas in Messer the township had explicitly reserved for its land use boards the authority to determine constitutional questions, in this case the Board is faced with a claim that a specific ordinance is unconstitutional. *It is the Board Attorney's opinion that it is not the function of this Board to enforce facially unconstitutional law.* While it is true that constitutional questions are best suited for courts, if precedent has already dictated that ordinances such as §416-44.A(1) violate the First Amendment, then there is no constitutional question to decide; the Board would simply be faced with an unconstitutional law.

Dark Star also cites Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), aff'd 24 N.J. 326 (1957). This case is from over sixty years ago and the section cited concerned the standard of review for courts reviewing land use board decisions: administrative decisions are reviewed under the arbitrary and capricious standard whereas conclusions of law are not given deference because they are better suited for courts. Id. at 96. This has no bearing on the issue at hand since the Application is not in front of a court. Also, it worth noting that this case pre-dates the Municipal Land Use Law.

Where billboard restrictions have been upheld, the ordinance in question did not completely exclude billboards from the municipality. In an unpublished decision (in a case I was involved with in 2006), Outdoor v. Upper Saddle River Bd. of Adjustment, the zoning ordinance prohibiting billboards was amended to rendering billboards a conditional use in the highway retail and commercial district on Route 17. Outdoor v. Upper Saddle River Bd. of Adjustment, No. A-1991-05T5, 2006 WL 3153145 (N.J. Super. Ct. App. Div. Nov. 6, 2006) at 1. After the plaintiff's application for a conditional use variance was denied, we filed a complaint challenging the constitutionality of the ordinance. Id. In upholding the denial, the appellate court contrasted the case with Bell by pointing out that the ordinance was not a blanket prohibition but instead a regulation related to legitimate government purposes. Id. The Upper Saddle River case also pre-dates the Time of Application Rule and Upper Saddle River changed the subject ordinance during the course of the litigation, something that the MLUL now expressly prohibits.

Yet even these tailored restrictions are not always immune to constitutional challenges. The case that has most thoroughly examined and

applied E & J Equities appears to be Garden State Outdoor, LLC v. Egg Harbor Twp., No. A-2830-23, 2025 WL 1638848 (N.J. Super. Ct. App. Div. June 10, 2025). In that case, the municipality permitted billboards conditioned on various restrictions such as distance from an intersection. Id. at 2. When the plaintiff challenged this distance restriction's constitutionality, the trial court upheld the ordinance. Id. at 3. Relying on the section of the ordinance specifying the purpose of the restrictions, the trial court found that the distance requirement advanced the interests of traffic safety and open space and accordingly granted summary judgment to the defendant township. Id. But on appeal, the appellate court found that the township's sole reliance on the purpose section of the ordinance was not enough to satisfy E & J Equities' evidence requirement so as to warrant summary judgment. Id. at 6. Once again, the fact that this relatively tailored version of a billboard restriction, supported by purpose language from the ordinance, was not adequate (in and of itself) to survive a constitutional challenge raises serious doubts that River Edge's ordinance in this case would survive such a challenge.

An analysis of how a court would review such a challenge may be helpful for the Board. The caselaw discussed above supports the Applicant's contention that the relevant test here is the "time, place, and manner" standard which asks whether the regulation (1) is content-neutral, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication. E & J Equities 226 N.J. at 582. River Edge would likely have no issue demonstrating the content-neutral nature of §416-44.A(1), which regulates a manner of speech, not its content. The municipality could present testimony and documentation regarding the ordinance's purpose of promoting aesthetics and traffic safety, the most cited government interests for billboard regulation. It could similarly provide evidence of alternate channels of communication for the content the Applicant here seeks to include on the proposed billboard such as "signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising." Garden State Outdoor at 3 (citing Interstate Outdoor Advertising, L.P. v. Zoning Board of Mount Laurel, 706 F.3d 527, 535 (3d. Cir. 2013)). But as alluded to throughout this memorandum, the Borough will have significant difficulty demonstrating that the restriction is sufficiently narrowly tailored to the aforementioned interests. We once again emphasize that §416-44.A(1) is a one word, blanket prohibition. While River Edge is not required to adopt the *least* restrictive means possible to achieve the goals of billboard regulation, the precedent analyzed above, striking blanket prohibitions, and even well-tailored restrictions, indicates that a court would likely find that the ordinance here is more restrictive than necessary and violates freedom of speech guarantees.

The next question is: what follows if §416-44.A(1) is in fact unconstitutional? Of course, the Borough is always entitled to amend the

ordinance, but that will offer no protection in this case due to the Time of Application Rule, N.J.S.A. 40:55D-10.5. As the court in Bell stated after their holding that the ordinance there was unconstitutional: "[t]his does not mean that [the township] is incapacitated from enacting an ordinance seeking to further a proper governmental objective and suitably restricted to meet that objective and satisfy the constitutional imperatives…in light of the problems peculiar to that municipality." Bell 110 N.J. at 398.

Having determined that the blanket prohibition on billboards is not constitutional, the Board must entirely turn its attention away from the Use Variance (N.J.S.A. 40:55D-70(d)(1)) issue and focus on the bulk variances. These are set forth in the Thomas Behrens (Board Planner) review letter of May 22, 2025, at page 4.

- Minimum Front Yard: 30' required, 10.78' proposed to billboard
- Minimum Side Yard (one/both): 15'/35' required, billboard at 10'/37.86' proposed
- Minimum Rear Yard: 20' required, 17.86' proposed
- Lot Coverage: 80% permitted, 95.4% existing, 95.55% proposed
- Maximum Building Height: 35' permitted, proposed is 60', a variance under N.J.S.A. 40:55D-70(d)(6).

As noted in Mr. Behrens' report, the Applicant still must comply with all requirements and be granted variances before the proposed billboard could be approved. The Property is located in the C-2 Commercial Office Zone.

CONCLUSION

Ultimately, §416-44.A(1) - placing a blanket prohibition on billboards - violates First Amendment protections of free speech. If the Borough wishes to amend the ordinance it should commence this process promptly, but it will not retroactively apply to this matter.

The Board must consider the evidence presented in favor, and against, the grant of the bulk variances under the criteria set forth in the MLUL and as summarized in Mr. Behrens' report of May 22, 2025.

The height variance will require 5 of the 7 sitting members to be approved. The bulk variances under N.J.S.A. 40:55D-70(c)(1)&(2) will

require a majority. The council member and mayor/designee may not participate in this Application in light of the "D" variance.

We also have attached copies of the legal decisions mentioned herein for your review should any members be so interested.

UPDATED ANALYSIS

Since drafting the above memo additional research has revealed: City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 76, 142 S. Ct. 1464, 1475, 212 L. Ed. 2d 418 (2022). Austin's billboard prohibition is very similar to River Edge's ordinance. The Court stated:

> During the time period relevant to this dispute, the City's sign code defined the term "off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25-10-3(11) (2016).

City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 66, 142 S. Ct. 1464, 1469, 212 L. Ed. 2d 418 (2022)

> In this case, enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by

> religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: **A given sign is treated **1473 differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. Reed does not require the application of strict scrutiny to this kind of location-based regulation**. Cf. *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (sustaining ***72** an ordinance that prohibited "only picketing focused on, and taking place in front of, a particular residence" as content neutral).
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> And
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> It is the dissent that would upend settled understandings of the law. Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.

City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 76, 142 S. Ct. 1464, 1475, 212 L. Ed. 2d 418 (2022)

River Edge - 416-4 Definitions **BILLBOARD**
A sign which directs attention to a business, commodity, service, entertainment or attraction conducted, sold or offered elsewhere than upon the lot on which such sign is located.

River Edge - 416-44.A(1), billboards are prohibited within the Borough.

UPDATED CONLCUSION

Because the ordinance is similar to that approved in the 2022 case City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, it is my opinion that it will survive judicial scrutiny and is not invalid under federal law.

Very truly yours,

Marc E. Leibman, Esq.
Conflict Counsel to River Edge Joint Planning Board