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**MEMORANDUM**

**TO: Supervisor Pool and Members of the  
Town Board of the Town of New Castle**

**FROM: Keane & Beane, P.C.**

**RE: Permissive Referendum Based Upon  
Municipal Home Rule Law § 24(2)(a)**

**DATE: November 2, 2020**

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**Summary**

During the October 27, 2020 public hearing on the Draft Generic Environmental Impact Statement for the proposed Form-Based Code (“FBC”), the Town Board received a public comment asking whether the adoption of the FBC would be subject to a permissive referendum based upon Municipal Home Rule Law § 24(2)(a). That provision states that “a local law shall be subject to referendum on petition if it ... [d]ispenses with a provision of law requiring a public notice or hearing as a condition precedent to official action.”

By this Memorandum, we answer that question in the negative. Under the current Town Zoning Code, insofar as applicable to this question, a public hearing is required in connection with granting special use permits and site development plan approvals. *See* Town Code § 60-430(B) and § 60-440(C), respectively. The proposed FBC would not dispense with these either of these public hearing requirements. Rather, the proposed FBC would amend the zoning regulations within certain existing districts within the Chappaqua business hamlet, namely, the B-R (Retail Business), B-RP (Retail Business and Parking), BD (Designed Business), and I-P (Planned Industrial) Districts.

In the event the zoning regulations within these districts were modified through enactment of the FBC, the properties within these districts would no longer require site plan review to obtain approval for certain types of development. However, that change would result from a zoning use amendment, and not the elimination of the public hearing requirement set forth in Town Code § 60-440(C). Accordingly, the FBC would not “dispense with” any public hearing requirement within the meaning of Municipal Home Rule Law § 24(2)(a).

### Discussion

New York Town Law § 274-a, which governs site plan approvals, does not mandate a public hearing in connection with site plan applications, but instead allows municipalities to determine by local law whether to require them. In the Town of New Castle, a public hearing is required in connection with site development plan approvals pursuant to Town Code § 60-440(C). Under Town Law § 274-b(6), public hearings are required in connection with special use permits. *See also* Town Code § 60-430(B).

The proposed FBC would not dispense with these public hearing requirements. Instead, the current draft of the FBC would amend the zoning regulations within the following zoning districts in the Chappaqua business hamlet: the B-R (Retail Business), B-RP (Retail Business and Parking), BD (Designed Business), and I-P (Planned Industrial) Districts. Under the proposed FBC, the uses and structures permitted as of right within these zoning districts would be modified, and site development applications for such uses and structures would follow a 3-step review process: 1) Concept Review, 2) Schematic Review, and 3) Design Development Review. Prior to Schematic Review, applicants would be required to provide notice to abutting property owners of their application, including but not limited to a project description and elevations. A public hearing would not be required.

Under New York law, the Town may amend its zoning regulations in this manner pursuant to Town Law § 264, and such amendments may not be enacted pursuant to a permissive referendum. *See Elkind v. City of New Rochelle*, 5 N.Y.2d 836 (1958). By its terms, the FBC would not legislatively “dispense with” the public hearing requirement for site plan approvals set forth in Town Code § 60-440(C). Section 60-440(C) would remain unchanged under the FBC, and therefore Municipal Home Rule Law § 24(2)(a) is inapplicable.

With respect to special use permits, public hearings would still be required under the FBC for projects with the Chappaqua business hamlet pursuant to Town Code § 60-430(B).

### Conclusion

Because the proposed FBC would not eliminate any provision of the Town Zoning Code that requires a public hearing in connection with a land use approval, the permissive referendum requirement set forth in Municipal Home Rule Law § 24(2)(a) is inoperative.