IN THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

No. A-00434-22

AMACONN REALTY, INC.

Plaintiff/Respondent/Cross-Appellant

v.

RENT LEVELING BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO
Defendants/ Cross-Appeal Respondents/ Appellant

On appeal from the Superior Court of Hudson County, Civil Division Appeal from Orders of Judge Turula, HUD-L-3584-21 and Judge Costello, HUD-L-366-19

APPELLANT'S BRIEF IN SUPPORT OF DISMISSING AMACONN'S HARDSHIP APPLICATION

Re-submitted January 27, 2023

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Hearing Date	Presiding	Transcript Designation
September 27, 2017	Rent Leveling Board	1T
October 27, 2017	Rent Leveling Board	2T
December 13, 2017	Rent Leveling Board	3T
May 25, 2018	Judge Jablonski	4T
October 24, 2018	Rent Leveling Board	5T
November 28, 2018	Rent Leveling Board	6T
March 11, 2020	Rent Leveling Board	7T
April 14, 2021	Rent Leveling Board	8T
May 12, 2021	Rent Leveling Board	9T
June 9, 2021	Rent Leveling Board	10T
June 23, 2021	Rent Leveling Board	11T
August 11, 2021	Rent Leveling Board	12T
July 22, 2022	Judge Turula	13T
September 30, 2022	Judge Turula	14T

PRELIMINARY STATEMENT

The decisions below essentially repealed aspects of Hoboken's Rent Control Ordinance. If upheld, the precedent will nullify rent control in many other cities, as well. Hoboken's rent control ordinance limits local rent increases by delinking rents from the local rental market and linking rents to inflation instead. This stabilizes the market and prevents tenants from being displaced during gentrification. However, pursuant to the decisions below, rents in Hoboken must now be linked to a property's *value* as real property in the real estate market, thus undermining the entire mechanism by which rent control works (delinking it from the local market).

In 1991, Tenant Jeffrey Trupiano moved into the apartment building located at 703 Park Avenue in Hoboken. In 1993, Amaconn Realty purchased the building. The Hoboken Rent Control Ordinance, Tenant Protection Act, and Mr. Trupiano were all in place when Amaconn bought the building. At some point, Amaconn decided to "condo-ize" the building, which requires emptying the building of tenants and renovating the apartments to be sold off individually for a profit. Condo-izing became a typical form of real estate development in Hudson County as the area became a desirable place to live and a profitable place to develop properties. However, the rapid pace of development and redevelopment displaced existing city residents and destabilized housing

markets. This is such a notorious issue in Hudson County that the Supreme Court commented on it as early as 1986:

> [N]ew patterns of development in New Jersey have unleashed powerful market forces that have continued to create instability in the rental housing market. Particularly in the fast-growing areas along the Hudson River, so much advantage exists in the new commercial or condominium markets that owners are forcing out existing tenants. These speculative forces threaten the ability of a community to maintain a sound housing balance for its citizens.

Mayes v. Jackson Township Rent Leveling Board, 103 *N.J.* 362, 378 (1986). In response to these housing pressures the legislature passed the Tenant Protection Act, which allows qualifying tenants to stay in their apartments for up to 40 years as though they were still protected under the Anti-Eviction Act.

Amaconn converted the building in 2001. Mr. Trupiano remained in the building through construction, until Hoboken authorities made Amaconn relocate him from the construction zone. 3T16:21-23. When he returned, the other units had been renovated, but he testified that his unit was largely the same as it was prior. The record shows that the unit has been largely neglected with no preventative or routine maintenance, decades old appliances, and some repair requests, like a non-functional intercom, being ignored for years.

Amaconn's decision to purchase an apartment building and convert it to condominiums was profitable, though Mr. Metzger testified that he could not

remember how profitable and Amaconn's counsel objected to questioning in this vein. 1T42:4-43-17. Unit 11 is the only real property Amaconn still holds, but Amaconn has $755,562 in other assets, which Mr. Metzger testified is presumably profit from selling the other units. 1T145:29-147:3.

In 2017, Amaconn submitted a hardship application to the City of Hoboken claiming it cannot make expenses or a fair return. Hoboken's RCO defines a "fair return" as a return on equity equal to 6% above passbook rate. Equity is defined as the cash investment. The ordinance implicitly assumes that the "investment" is the same real property at the initial investment and at the time of the hardship application. However, here the apartment building no longer exists. Because the definition does not apply exactly, the landlord insisted that the Board must use a different definition of equity, one that includes the condominium's value. The Courts below agreed, and changed the definition to include value. However, this was error that severely undermines Hoboken Rent Control ordinance.

Amaconn has not been deprived of a fair return because Amaconn's investment was an apartment building, Amaconn transformed the nature of that investment when it converted the building into condominiums, and Amaconn made a fair return on its investment when it sold all of the condominiums except the one unit at issue in this litigation. The application should have been denied.

STANDARD OF REVIEW

The standard of review is *de novo* on issues of law and plain error on questions of fact. The question of whether it was arbitrary and capricious for the Board to incorporate value into its ordinance is one of law. The question of whether it was error for Judges Costello and Turula to find the Board arbitrary and capricious on the issue of management fees is one of law. There are several ordinances, laws, and statutes that are applicable on appeal.

Municipal Ordinances

A. Rent Control- General Applicability

Every "building or structure or trailer or land used as a trailer park, rented or offered for rent to one or more tenants or family units" is subject to rent control in Hoboken, with exceptions for motels, hotels, and dorms. §§115-3, 115-4, and 155-2 of Hoboken Rent Control Ordinance ("RCO") (DA29-30, DA25). Under Hoboken's Rent Control Ordinance, rents were delinked from the local real estate market and linked to the Consumer Price Index instead. §155-3 (DA29). Rents can be raised 25% over the last rent once every three years if the previous tenant left voluntarily (without duress, intimidation, or unreasonable pressure). §§155-31, 155-32 (DA32).

B. Hardship Applications

Hardship applications are governed by §155-14 of the Hoboken Code, which provides that

> In the event that a landlord cannot meet his operating expenses *or* does not make a fair return on his investment, he may appeal to the Rent Leveling and Stabilization Board for a hardship rental increase.

DA31 (emphasis added). The RCO instructs Board Members to consider specific factors when considering hardship applications. Specifically, the Board shall consider:

> (1) [The] level and quality of service rendered by the landlord in maintaining and operating the building.
> (2) The presence or absence or [sic] reasonably efficient and economical management.
> (3) Whether the landlord made a reasonably prudent investment in purchasing the property and arranging financing on said property…It is presumed that a prospective purchaser of real property in Hoboken shall be family with the terms of this chapter.
> (4) Whether the operating expenses are reasonably incurred and the income statement is accurate. Operating expenses shall not include depreciation…or capital expenditures…"

The Hoboken RCO defines "Fair Return" as:

> The percentage of return of equity in real property investment. The amount of return shall be measured by the net income before depreciation. A "fair return" on the equity investment in real property shall be considered 6% above the maximum passbook demand deposit savings account interest rate available in the City of Hoboken. The six-percent figure is provided to reflect the higher risk and lesser liquidity of real

> property investment in comparison to savings account investments.

The Hoboken RCO defines "Equity in Real Property Investment" as

> The actual cash contribution of the purchaser at the time of closing of title and any principal payments to outstanding mortgages.

DA27.

C. Capital Improvement Surcharges

The Hoboken Rent Control ordinance allows landlords to apply for rental increases based on upgrades to the building through a separate process from the hardship process. §155-14 (DA34). In that process the landlord must present evidence concerning the improvement, the cost, and its useful life. *Id.*

State Statues

A. The Anti-Eviction Act

The Anti-Eviction Act prohibits landlords from evicting tenants in apartment buildings with more than three units except for reasons specifically enumerated in the act. *N.J.S.A.* 2A:18-61.1. Under the Anti-Eviction Act, tenants who live in apartment buildings are protected from eviction, but if the owner converts the apartment building to condominiums, the tenants can be evicted. *N.J.S.A.* 2A:18-61.1(k) (stating that the removal of tenants for condominium conversion purposes is permitted, but will not apply to Tenants who receive and maintain protection under the Tenant Protection Act of 1992).

B. The Tenant Protection Act of 1992

In 1992, the legislature passed the Tenant Protection Act, declaring that "it is in the public interest to establish a tenant protection program specifically designed to provide protection to residential tenants, particularly the aged and disabled and those of low and moderate income, from eviction resulting from condominium or cooperative conversion." *N.J.S.A.* 2A:18-61.41. To accomplish this goal, the TPA provides that pre-conversion low-income tenants, senior citizens, and disabled persons can apply for protected tenant status, which prevents them from being evicted without cause for 40 years, so long as they remain qualified under the statute.

The TPA also protects low-income tenants from displacement by forbidding owners who convert their apartment buildings into condominiums from using costs incurred as a result of the conversion in hardship applications before rent leveling boards. *N.J.S.A.* 2A:18-61-52.

3. Case Law

There is no case law directly applicable. The most relevant precedential case is *Mayes v. Jackson Township Rent Leveling Board*, 103 *N.J.* 362, 378 (1986), in which the NJ Supreme Court held that a rent control ordinance that appears to be identical to Hoboken's is constitutional.

During the pendency of this matter, a similar case that took a less circuitous route was decided by the appellate division. It is an unpublished opinion. DA70. At issue in that case was a Jersey City ordinance that allows landlords to apply for a hardship increase "[i]n the event that a landlord cannot meet his or her mortgage payment or operating expenses or does not make a fair return on his or her investment." *Bishop Property Mgt. v. City of Jersey City Rent Leveling Board*, 2020 WL 6553789 at *1 (November 9, 2020) DA70 (emphasis added). The Jersey City Board Chair gave the landlord two choices: 1) present equity as the basis for a fair return by a suitable index for inflation since the date of purchase" *or* 2) base the hardship application on the landlord's inability make operating expenses." *Id.* at *3. The Board passed a resolution directing the landlord to resubmit its hardship application in line with this reasoning.

The landlords filed a complaint in lieu of prerogative writs challenging the board's decision to not use appraised value as a basis for the hardship application. *Id.* The trial court judge dismissed the landlord's complaint with prejudice. *Id.* The trial court judge found that if the board had *deviated* from its ordinance to use a value-based equity that *that* would have been arbitrary and capricious. *Id.* at *3.

The landlords appealed to the appellate division. The appellate division agreed with the trial court. It stated that the "plain language of the Code is unambiguous" with regard to its definition of equity. *Id.* at *5. The appellate division found that "[n]o provision of the Code states that the fair amount may be based on the appraised value of the property" and that the trial court "judge correctly concluded that the Board adhered to the Code as written" and that the "judge properly noted, if the Board accepted [the landlord's] method of calculating equity, it would have impermissibly and arbitrarily exceeded the scope of its authority." *Id.* at 5.

The appellate division did not make a finding or reach the issue of whether the rent was confiscatory under the plain language of the ordinance because that issue was not presented to it on the appeal. The appellate division stated that the path forward for the landlord was to file suit against the City of Jersey City for inverse condemnation and to challenge the Code itself if it felt that the ordinance, as written, was confiscatory. Id. at *6.

PROCEDURAL HISTORY

This matter was initiated in May 2017 when Amaconn submitted a hardship application for a rent increase to the Hoboken Rent Leveling Board. Over the last 5 years, the Board has held at least ten hearings on this matter, most running late into the night, and several running into the early morning. The

hardship application was initially heard over three evenings in 2017, on September 27th, October 25th, and December 13th. The Board passed a resolution granting the landlord a hardship increase of $563 per month. DA47. The tenant appealed to the Superior Court because the board failed to consider whether the expenses claimed by Amaconn were a result of the conversion, as required by the Tenant Protection Act. The Honorable Judge Jablonski agreed and remanded the matter back down to the Rent Leveling Board to reconsider the matter in accordance with the TPA. DA24; 4T.

A second round of hearings was conducted in 2018 on October 24 and November 28, 2018. Ultimately, the Board granted the landlord *all* the expenses from the condominium budget except $200, $5,552 out of a requested $5,572. The 2019 resolution granted Amaconn the following expenditures: Taxes $1,937.22, Condo Fee: $5,772.73, Insurance $634.00, Registration $25, Management $419.35. It provided for a return on equity of $1,059.19 per year and imposed a total monthly increase in the amount of $105.04. DA49-53.

The landlord appealed to the Superior Court. Judge Costello upheld the board's finding on taxes, but remanded back to the board to reconsider the garbage fee and the tax preparation fee (a total of $200 a year), the management fee, and equity, for which Judge Costello said the Board was arbitrary and

capricious by not including Amaconn's alleged capital improvements, market conditions, re-assessments, and inflation. DA20-22.

The Board held six meetings over a period from March 2020 to August 2021, a time prolonged by covid, to consider the issues in line with Judge Costello's instructions. This time, the Board gave the landlord $1,200 in management fees, $5,648.05 in condo fees, and an $800.31 annual return on equity. DA54-56.

The Landlord appealed to Judge Turula who held that the board had acted arbitrarily and capriciously and set the rent on the unit at $2,400 per month. Specifically, Judge Turula held that the Board was arbitrary and capricious in not counting the entire condominium fee, in particular a $123 for garbage removal, as an expense, was arbitrary and capricious in reducing the management fee, and was arbitrary and capricious in its determination of equity. Judge Turula held that Amaconn is entitled to an return on equity of $18,819.00, which was arrived at by adding in the landlord's claimed capital expenditures of $76,000 to the $47,000 attributed to Unit 11 when the building was bought and then increasing that amount for inflation for a "value" of $197,610. Then that number is averaged with the tax assessed value of the property, which is $404,600 for a "blended value" of $301,105. Judge Turula held that Amaconn

is entitled to a 6.25% return on that amount every year under Hoboken's rent control ordinance.

STATEMENT OF FACTS

Mr. Trupiano's tenancy and the creation of the misfit unit, 1993-2017

The events involved in this case began in 1990 when Jeffrey Trupiano moved into the apartment building located at 703 Park Avenue. 1T73:9-10. In 1993, Joseph Metzger, through his company Amaconn Realty ("Amaconn"), purchased the 11 unit apartment building for $525,000. 1T5:19. At the time Amaconn purchased the building both the Hoboken Rent Control Ordinance and the Tenant Protection Act of 1992 were already in place. Amaconn's sole owner through most of this litigation was Mr. Joseph Metzger, a real estate developer. 1T13:18-19.

In 2001, Amaconn filed the paperwork to convert the apartment building to a condominium building, and the individual apartments to condominiums. 1T20:5-6. Mr. Trupiano remained in the building through construction, until Hoboken authorities made Amaconn relocate him from the construction zone. 3T16:21-23. When he returned, the other units had been renovated, but he testified that his unit was largely the same as it was prior.

For the 16 years following the conversion, from 2001 through 2017, Mr. Trupiano continued to pay his rent on time. The relationship between Mr.

Trupiano as Tenant and Mr. Metzger as Landlord has been fraught and Mr. Trupiano feels that Mr. Metzger has been hostile to him since 1994. 5T72:1-12.

Unit 11 appears to be completely unique due to being unrenovated and rented to a long-time tenant, which has limited rent increases to be in line with inflation rather than the local real estate market. The landlord's expert testified that it was impossible to find even a single other unit like it in Hoboken. 1T54:22-25. (landlord's expert testifying that "[i]t's very difficult in Hoboken to estimate the market value of an un-renovated apartment. In my analysis and it's in my report, I did look for sales of un-renovated apartments. Finding none, I had no other choice but to value it as though [it were renovated]").

The Unit is also unique because it may not have a deed as it has never been sold. No deed for the unit was ever produced by Amaconn. The only deed Amaconn provided was for the building. DA57-59.

The Hardship Application filed in 2017 that is the subject of this litigation

Amaconn mostly ignored Mr. Trupiano until early 2017, when the unit began receiving unusual attention. First, the City of Hoboken came to inspect Mr. Trupiano's apartment and make sure it was up to code. The City found numerous health and safety code violations, so the apartment failed the first inspection. DA69. To get it up to code, Amaconn had to recalibrate and recoil

windows to be up to fire standards, install a carbon monoxide detector, replace a broken smoke alarm, repair the "very old" stove that sometimes worked and sometimes did not, repair the kitchen faucet, and fix a spring in a door. 1T79:11-28. The city also required new electrical outlets to be installed, a security chain to be placed on the door, and patching of the floor because it was a trip hazard. 5T59-62; 1T79:10-31. It took about two weeks for Amaconn to get the apartment up to Hoboken's safety code. 1T79:11-28.

The next month, Amaconn sent an appraiser to Mr. Trupiano's apartment. The appraiser entered Mr. Trupiano's apartment and took photos of it, but the reason why this stranger was taking pictures of his living space remained a mystery to Mr. Trupiano until May 2017, when he was served with Amaconn's request for a hardship increase in rent, including a hypothetical appraisal of the value of the unit if the landlord could manage to unencumber it of Mr. Trupiano. DA43-44.

Amaconn's application for a hardship increase demanded that Mr. Trupiano's rent be increased from $8,387.00 per year to $42,944 a year. DA40. The hardship increase Amaconn seeks on this unit is more than Mr. Trupiano's entire income. DA35. More than ten nights of hearings were held between September 2017 through June 2021 of 2022. Much time was spent discussing the minutiae of Amaconn's claimed expenses, especially the management fees,

condo fees, and purported constitutional right to $28,000 annual profit on the unit, based on Amaconn's equity.

FACTS CONCERNING MANAGEMENT OF THE UNIT

This unit is poorly maintained and functionally obsolete according to the landlord's own expert. 1T53:23-45 **(**Mr. Mucciolo testifying that the apartment "suffered from tremendous functional obsolescence in both design with regard to the railroad style rooms" as well as the gas heating); *See also* 1T68:14-17 (landlord's expert testifying that the unit is in poor condition and poorly maintained). The evidence shows that the unit needed significant repairs just to bring it up to code before Hoboken would issue a certificate of Substantial Compliance, which Amaconn needed to file the hardship application, and that the reason this work was done was so Amaconn could submit a hardship application. 5T47:23-48:2 (Ms. Metzger was asked what maintenance has been done on the unit, pointed to the 2017 inspection and testified that "yes" that this was the work done "so that the hardship application could be submitted").

Mr. Trupiano testified that he did not recall any preventative or routine maintenance being done on the apartment since the conversion. 5T62:4-16 **(**Mr. Trupiano testifying "I don't…I don't recall any work being done after it was condo-converted. If it was, it may have been something like –I don't know—a toilet being looked at maybe, yeah"); 1T80:1-5 (Mr. Trupiano testifying that

except for a water heater that had to be replaced, he has no recollection of Amaconn ever performing routine maintenance on the unit). The landlord's witness agreed that there is no maintenance schedule for the apartment. 5T47:18-20 (Maryanne Metzger[1] testifying that there is no preventative maintenance scheduled for the unit). Mr. Trupiano testified that Amaconn has responded to a handful of emergency situations, but that non-emergency requests went ignored. 5T71:1-9 **(**The landlord's counsel asked Mr. Trupiano if "Mr. Metzger ever outright sa[id] no" to him about anything. Mr. Trupiano responded that "I mean, I don't know if it was a no. I would—I would—I guess there were time when I didn't get a response, but under emergency circumstances and that type of thing, no").

The Board saw the managerial neglect play out in front of its own eyes. At the very first hearing on this matter in September 2017, Mr. Trupiano testified that his intercom had been broken for many years, despite him asking for it to be fixed. 1T78:1-10. Mr. Metzger, Amaconn's principal, was present at this hearing. At the November 2018 hearing, Mr. Trupiano again testified that the intercom "never got fixed." 5T62:10-11. At the 2018 hearings, the landlord's

[1] Maryanne Metzger is Mr. Metzger's daughter in law and Comptroller for Julip Properties. She testified on behalf of Julip and Amaconn, and also testified as to knowledge about how condominium association fees work, though in what capacity is not clear.

attorney questioned Mr. Trupiano on whether he has ever "in writing, request work to be done in your apartment, repair work to be done in your apartment, sir?" Mr. Trupiano replied that he had, "For the intercom." 5T66:22-67:9. Three years later on March 11, 2020 Mr. Trupiano testified that his intercom still had not been fixed. 7T131:12-13. Ms. Metzger was present at that hearing. The next year, in June 2021 Mr. Trupiano testified that his intercom *still* had not been fixed. 1OT77:4-10. This drew questioning from the Board and Amaconn claimed that the intercom was not its responsibility, it was the condominium association's responsibility. *Id.* at 112-113. Finally, the intercom was fixed on June 22, 2021, the day before the final hearing. It took ten years, sworn testimony, and criticism from a local government board.

Amaconn claims that it costs $150 per month to manage the unit. It claims it pays this money to Julip Properties, which is another company owned by Mr. Metzger. Julip and Amaconn share a common owner, telephone number, email address, and physical address. 1T29:26-30:3. The landlord's representative testified that management of the Unit involves passing on communications from the condominium association to the tenant, leases, city filings, emergencies, and handling complaints that come in from or about the unit. 5T47:11-17.

FACTS CONCERNING CONDOMINIUM FEES

On remand, Amaconn submitted two years of the condominium association's operating expense report. As to the condominium expenses, Ms. Metzger testified that the expenses were for: Building supplies, cleaning and garbage service, repairs, pest control, snow removal…property liability insurance and directors and officers insurance, flood insurance…licenses and permits, management fee, postage and delivery, tax preparation…*replacement reserve expense cost*…water, sewer, telephone, fire panel monitoring, and PSE&G. 5T24:1-13 (emphasis added).

In 2016, the year for which Amaconn provided the Board with financials, there was a special assessment of $72 a month included in the condominium fees. The evidence submitted by Amaconn shows that the special assessment was characterized as replacement reserves in the condominium budget. It is undisputed that at the time the Board was considering the application, in 2017, the special assessment was no longer in place. 3T57:4-9 (Maryanne Metzger testifying that the monthly condominium fees were $407.50, not $481, as presented in the application). The Board discussed the issue and one Board member made a motion to exclude the special assessment because it was (and is) no longer in place. The motion was discussed at length, and ultimately failed. 6T196:21-215. However, Judge Costello, in digesting the voluminous transcripts, apparently thought the motion had *passed* and commented on it in

her opinion. She said: "The special assessment discussion is the only discussion on the record where it seems that reason and logic prevailed. If a special assessment is charged on a one-time basis, and is not an annual, monthly regularly-occurring expense, it should not be passed on to the protected tenant. DA14.

The Board appeared to be confused on this point as well on remand. For example, at the first hearing of the second remand on March 11, 2020 one board member asked how much the condo fee was. Someone "four-hundred-and-nine dollars and 17 cents I believe" and another person agreed "yea, about $410." 7T116:1-9. The Board discussed it again at their next meeting, wondering if they should revisit it given Judge Costello's instruction. 8T20-24. This is the amount of the condo fee *without* the special assessment.

FACTS CONCERNING EQUITY

All three rounds of hearings were dominated by the landlord's attempt to persuade the Board to abandon its ordinance to adopt the landlord's "blended approach" to equity, which incorporated the unit's hypothetical value as an "unencumbered" and renovated two bedroom/two bathroom condominium, the equalized tax assessed value as a condominium, and a purported $76,000 in "capital improvements" attributed to the Unit when the owner renovated the rest of the building to get it up to condominium standards. DA43. The Board resisted

Amaconn's attempts to so wildly depart from their ordinance and passed a motion at the very first hearing stating "The Rent Leveling Board affirms the plain language of our current ordinance as to the definition of equity and rejects the approach that is being proposed by applicant's counsel." 1T88-90. Furthermore, the Board expressly rejected the idea that the purported $76,000 that went into work on the unit in 2001 should be added to the "equity" given its age and lack of documentation. 1T88:2-17.

The Board struggled to determine "equity" given the constraints of its ordinance and lack of relevant information from the landlord. The Board struggled to figure out how it could apply the purchase price of an entire building to a single unit given the fact that the landlord had not provided any information about the purchase of the building and how individual units may or may not have affected the overall price, including how the TPA and Mr. Trupiano's existing tenancy affected the value of the building. *See e.g.,* 5T23:15-21 **(**Board member stating, "[l]et me just say I don't think that these are all equal units…[w]e have one unit that was encumbered by a protected tenant, and ten units that could be freely renovated and sold for whatever they could possibly get…[s]o in my view, however we come up with a number, that is clearly a fact in evidence, and to me, I can't view it any other way, as it has an absolutely different value from the other ten." The Board's counsel summed up the discussion thusly: "It sounds

like what the board would like to know, is what was the relative value of this unit at time of purchase." 2T30:30-31. Indeed, even Mr. Metzger noted this difficulty stating, "if I were buying a building and it had one protected tenant and ten vacant units, I would say that the ten vacant units had more of a value than the unit that had the protected tenant." 3T33:7-9. Mr. Trupiano was not a protected tenant when the building was an apartment building because apartment buildings do not have protected tenants- all the tenants are protected under the Anti-Eviction Act. It was Amaconn's conversion of the building from an apartment building in to a condominium building that removed Mr. Trupiano from the protection of the Anti-eviction Act and triggered the TPA. The potential for him to become a protected tenant upon conversion was there when Amaconn purchased the building and was thus part of the market. No evidence concerning the relative value of Unit 11 compared to other units was presented at the first round of hearings, or thereafter, despite the Board's request. Instead, the landlord submitted evidence concerning the market value of the unit. Mr. Carl Mucciolo, an appraiser[2], was called by the landlord to "estimate the market value" of the unit "as if it was unencumbered." 1T59:4-7. Mr. Mucciolo fielded

[2] In the second round of hearings, Mr. Mucciolo again testified for the landlord, but this time as an expert in tax assessment. 6T55:20-56:3 **(**when asked about his prior testimony, Mr. Mucciolo responds "I'm not here as an appraiser tonight. I'm here as a tax assessor, as a certified tax assessor.").

questions from the Board concerning the unit and made clear that estimating a value on the unit is basically impossible and gave a range of values from zero to a hypothetical value of $655,500. 1T55 (Amaconn's expert testifying that none of the usual approaches to value a piece of real property work on this unit).

On the second appeal, Judge Costello held that the Board was arbitrary and capricious on the issue of equity and remanded with instructions that the Board incorporate inflation, capital improvements, and market conditions into its calculations. DA21-22. On remand, the Board continued its efforts to calculate equity on the unit. Thousands of pages of transcripts attest to the Board's effort, but to no avail. Judge Turula also held that the Board was arbitrary and capricious.

LEGAL ARGUMENT

I. AMACONN RECEIVED A FAIR RETURN ON ITS INVESTMENT

To prevent confiscatory takings, the Rent Leveling Board may grant a hardship increase if a landlord shows that it cannot meet expenses and/or is not receiving a fair rate of return on its "investment." Thus, a threshold question is "what was the investment." Here, it is undisputed that Amaconn's investment was in an entire apartment building, which it purchased for $525,000 in 1993, not this condominium unit.

The Investment was the Building

Mr. Metzger repeatedly testified that he viewed the investment as being the entire apartment building. 1T14:17-19. (When asked "and your original investment to this property was of the entire building, is that correct?" Mr. Metzger answered, "Correct."); 1T21:24-25 (When asked, "Did you invest in this unit or did you invest in the building as a whole?" Mr. Metzger answered "Invested in the building as a whole"). On the application, the owner is required to put the purchase price for the property on which it seeks a hardship. Amaconn put the purchase price for the entire building. DA38. The deed produced by Amaconn for the hardship application is for the building, not Unit 11. DA57-59. All the evidence shows that "the investment" was an 11 unit apartment building. That investment no longer exists. Amaconn made the choice to transform, partition, and monetize the apartment building for a substantial profit, of which up to $755,562 still remains in Amaconn's assets.

The Unit was not the investment

Unit 11 is not an "investment unit." Amaconn's expert testified that he could not find any comparable properties because "rarely does a rent controlled property sell to an investor." 1T63:13-14. This unit would be an imprudent rental investment unless bought at a discounted price, knowing that it has to be renovated and that it has a tenant in place.

Amaconn made a fair return on its investment

In *Mayes v. Jackson Township Rent Leveling Board*, 103 *N.J.* 362 (1986), the Supreme Court considered the constitutionality of two rent control ordinances that, like Hoboken's, used a "return-on-equity" standard and investment-based approach to determine fair return. The Court cited Kenneth Baar's *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 *Rutgers L. Rev.* 723 (1983) to describe the various methods that towns and cities could adopt to determine what constitutes a fair return. *Id.* at 367. Those methods include return on value, return on equity, return on gross rent, percentage net operating income, cash flow, and maintenance of net operating income. The Court cited Baar's analysis that "[t]here are substantial differences in the manner in which each of these formulas operates and in the landlords and tenants which they benefit." *Id.* Ultimately, the Court held that the ordinances using a return on equity and investment-based approach to fair return are constitutional because they protected landlords from consficatory takings through measures that the Hoboken RCO also contains, including: automatic inflationary increase for base rent, tax surcharges for increases in municipal property taxes, and hardship increases if a landlord cannot meet operating expenses or receive a fair return on investment, defined as six percent above available passbook interest rates in one of the challenged ordinances, which is the same way Hoboken defines a fair return on investment.

The City of Hoboken adopted a method of calculating rent control and hardship increases that the Supreme Court has recognized as constitutionally valid and the method adopted by the City should not be disregarded by the Board or the Courts, especially absent a finding that the current rent is confiscatory. While this particular fact pattern does not fit neatly within the definition of equity adopted by the City of Hoboken (because the investment was transformed), adding in inflation, capital improvements, and market value are in clear contradiction to the ordinance.

The available evidence shows that aside from Unit 11, Amaconn holds $755,562 in other assets that Mr. Metzger testified is presumably profit from selling the other units. 1T40:29-42:3 (when queried what those assets were, Mr. Metzger stated, "we certainly made a profit from the condo-ing of the building, the other ten units. And I'm assuming that's where the money came from"); *see also* 5T45:7-13 (Amaconn's representative testifying that it is correct to say that Amaconn's sole real estate holding is Unit 11 of 703 Park Avenue and that Amaconn holds another $871,030 in assets). It is unknown whether Amaconn earned the 6% return on its initial investment in the apartment building when it converted the building to condominiums because Mr. Metzger refused to testify on this point and his attorney objected to the line of questioning. To the extent this is unsettled it is due to Amaconn's decision to withhold this information in

its application and subsequent hearings. Regardless, The available evidence tends to show that Amaconn made a fair return on its investment and now seeks to escape the regulatory structure that it agreed to when it decided to develop property in Hoboken.

The laws and circumstances that led to this situation were all in place when Amaconn purchased the apartment building in 1993. It was part and parcel of the regulatory structure that Amaconn decided to enter because it was profitable. Amaconn made a fair return on the investment, but even if it had not, the New Jersey Supreme Court has been clear that "rent levels may permissibly work hardships on landlords in atypical cases." *Troy Hills Vill. v. Twp. Council of Parsippany-Troy Hills Twp.,* 68 *N.J.* 604, 628–29 (1975). This is an atypical case. Amaconn invested in an entire building and converted it to condominiums, making a profit in the process. There was a known caveat to the investment-tenants that qualified for protection under the TPA could not be evicted without good cause for 40 years. Everyone else could be evicted on three years notice. That was the deal Amaconn made when it entered Hoboken to develop the real estate. Amaconn now seeks to get out of the deal early so it can escape the regulations to which it agreed. There is no taking here.

II. IT WAS ERROR TO DEPART FROM THE HOBOKEN ORDINANCE ON THE DEFINITION OF EQUITY

A. It was error to try to incorporate value into the Hoboken RCO

All parties agree, and Judge Costello concurred, that the RCO's definition of equity does not fit this fact pattern. Since this matters' inception, Amaconn lobbied the Board to go outside of its ordinance and use a value-based return on equity. In all, Amaconn presented at least four different values for equity, the board came to another three, and Judge Turula adopted a different value. Amaconn's expert gave values ranging from zero dollars to almost $622,500. DA64:11-12 (expert testifies that he could substantiate a zero value); DA43 ($622,500 appraised value). The landlord's expert testified that of the three methods available to evaluate real estate, "cost, direct sales, and income," none of them worked for this unit. 1T54:22-25.

To help it figure all this out for the third set of hearings, and under Judge Costello's order to take into account market value, assessed value, and inflation, the Board asked the landlord and tenant attorneys to provide comparables that could help inform the Board's thinking. Amaconn's attorney repeatedly argued that this was an impossible task stating "I don't know how we could do that. I really don't." 7T176:4-9. He explained the difficulty of such an enormous task: "how do we know what is protected what isn't protected, and you're asking for a database that we have—we don't have access to." 7T178:3-6. The Tenant tried to comply with the Board's request and provided documents that might have been comparables, but Amaconn's attorney objected to the Board looking at

those documents, arguing that to introduce these comparables, the low-income tenant would have to hire a licensed appraiser to testify to them. 8T184:6-10. The Board considered hiring an expert of its own, but concluded that the expense and practicalities of how they could hire someone made it infeasible. 9T172:19-187.Thus, no comparables were available to the Board.

A massive amount of time has been put toward trying to puzzle out how to calculate "equity" on this unit when the ordinance cannot, by its plain terms, apply. The matter was significantly complicated by the actions of the landlord in pushing the rent leveling board to go outside of its ordinance and link the rent to the unit's market value as a condominium. Forgotten in the details of hypothetical appraisals, equalized tax assessments, and a fruitless search for comparables, was the big picture, which is that this landlord invested in an apartment building and transformed that investment into condominiums, making a profit and fair return on its investment. It was always the case, even back in 1993 when Amaconn bought the building, that Amaconn's ability to convert its apartment building to a condominium building required compliance with the TPA and local rent control. In short, this was a regulated area, Amaconn was subject to the regulations, and Amaconn proceeded with its investment and condominium conversion under those regulations because it was profitable to do so.

After five years of trying, it is probably fair to say that Hoboken's rent leveling board would agree with the New Jersey Supreme Court in its assessment that "a value-based criterion for confiscation under rent control is practically unworkable." *Helmsley v. Borough of Ft. Lee*, 78 *N.J.* 200, 215 (1978). As the Supreme Court noted, the inherent unworkability of a value-based scheme is because it is circular. *Id.* at 213-215. Specifically, an apartment building's value as an investment comes from its income stream and since "rent control…limits the potential growth of that income stream (and also therefore the potential capital appreciation on resale)…the difference in future income will, of course, be reflected in the present value." Moreover, the Court noted, this same issue arises in using "assessed valuation" in rent-controlled properties. *Id.*

"Value" is not included in the Hoboken RCO, though Hoboken could have used a value-based approach if it wanted to do so. Because Hoboken did not adopt a value-based ordinance, it was arbitrary and capricious for the Board to depart from its ordinance in this way, and for the Court to order the Board to depart from its ordinance in this way.

B. <u>The landlord is protected from confiscation through inflation through automatic inflationary adjustments on the income from the property</u>

Amaconn's income is protected from inflation by automatic CPI increases on the *rent*. However, in addition to this, Amaconn claims that it is entitled to

a CPI adjustment on its initial cash investment for inflation and appreciation on the value of the unit as real property included in equity. However, it is a rare and valuable investment where a person receives the benefit of holding a real property asset, plus a 6% percentage return on the initial investment with the base adjusted for inflation, plus monthly income, also adjusted for inflation. It does not violate the constitution to deny Amaconn this unicorn investment it claims on a run-down and neglected legacy railroad style rental.

A. Capital Improvements cannot be included

The Hoboken Rent Control Ordinance has a method by which a landlord can apply for compensation for capital improvements, and it is not the hardship process. DA34. Landlords are explicitly prohibited from including monies invested in capital improvements in its application for a hardship increase. DA31 at A(4) (stating "operating expenses shall not include depreciation, amoritization of debt service or capital expenditures"). Moreover, there is significant dispute over what, if any, actual improvements were done to Mr. Trupiano's unit (a dispute that would have been more properly hashed out in a hearing for a rent surcharge for a capital improvement).

Amaconn claims it put $76,000 into the unit twenty years ago. Mr. Metzger testified that much work was done in the apartment, including adding central air, adding a second bedroom, adding a second bathroom, putting in a

"brand new" kitchen. 1T6:14-17. However, nearly all of this was contradicted by Mr. Trupiano's testimony and the landlord's own expert witness. 1T74:2-75:1 **(**Mr. Trupiano testifying that the walls were not all removed from his kitchen, that it was not gutted, that there is only one bedroom in the apartment, and that he does not have central air); 5T65:4-13 (Mr. Trupiano testifying that no carpeting was put in); 7T:85:6-9 ("Mr. Trupiano testifying that "Having been there for the entire construction of the..conversion of the condos where everything was gutted except my apartment, most of my apartment is exactly what it had been"); 7T:85:9 (Mr. Trupiano testifying that his apartment "largely looks the same that it did when I moved in."). 1T53:22-23 (landlord's expert testifying that the unit is a one bedroom with one bath).

Ultimately, the Board determined that the capital improvements were too long ago to add current value to the apartment and the RCO prohibits the Board from considering "capital improvements" in hardship applications anyway. 11T176:9-13 (Board member summing up consensus that capital expenditures were past useful life and did not contribute to equity).

III. IT WAS ERROR TO ALLOW CONDOMINIUM ASSOCIATION FEES TO BE COUNTED AS EXPENSES FOR PURPOSES OF THE HARDSHIP APPLICATION

A. The Condominium Association fees are duplicative and Mr. Trupiano's service has declined since the conversion

The record shows that after the conversion, Mr. Trupiano experienced a loss of services. 5T70:4-7 (stating that when the building was an apartment building, Mr. Trupiano had been able to approach the landlord's workmen if there was something that needed to be fixed). Mr. Trupiano further testified that he does not feel he can approach his landlord about repairs. 5T72:1-12 (Mr. Trupiano testifying:

> I've never felt that I had a comfortable relationship regarding asking services from Mr. Metzger. I believe I was given the impression that he—when he asked me to leave the first time, I guess, in 1994 or something like—it was shortly after they had purchased the building. I was approached with what I perceived as hostility, and I just—I never – I rarely felt comfortable asking for any service outside of—although I did feel a bit more comfortable with his workers because I'd see them more often, and they were—and they were, at least apparently, neutral, but no, I generally overall did not feel comfortable asking for services.

When the building was converted to a condominium, it went from a building managed by a single landlord to a building managed by an association, which added an additional layer of management to the unit. It added the cost of another layer of management, without adding services. Moreover, when the building converted to a condominium, it changed the relationship of Mr. Trupiano and Amaconn to the building. Whereas before the conversion Amaconn had control over the costs of running a building, with the

condominium association, Amaconn has virtually no power to control costs. 5T125:18-24 (Ms. Metzger testifying "[w]e have no control over this [condominium association] budget"). Moreover, adding a second layer of management allowed Amaconn to push issues onto the condominium association rather than fixing them as it would have undoubtedly had to do as landlord for the building. This was clearly on display with Amaconn's failure to deal with the broken intercom and attempt to push responsibility onto the condominium association.

Condo fees should not have been included at all if management fees were included. They are duplicative of the management fees Mr. Metzger's company, Amaconn, claimed to incur from Mr. Metzger's other company, Julip Properties. They added costs because instead of managing an entire building, two different organizations now manage the common areas of the building and the interior of Unit 11. Moreover, As Amaconn's counsel and witnesses explained, "economies of scale make it more expensive to manage a single unit, which means the increased cost to manage just this unit (as opposed to a building of apartments) cannot be passed on to Mr. Trupiano under the TPA. 5T111:16-22 (Ms. Metzger testifying that the more units that are managed, the less expensive it is per unit and Amaconn's counsel explaining this is called economies of scale).

B. It was error to include the special assessment

There has not been a special assessment on the unit since November 2016. It is not an ongoing expense of operating the unit, so should not have been passed on to Mr. Trupiano. Judge Costello held that "[t]he special assessment discussion is the only discussion on the record where it seems that reason and logic prevailed. If a special assessment is charged on a one-time basis, and is not an annual, monthly regularly-occurring expense, it should not be passed on to the protected tenant. DA14. In addition, the evidence shows that the special assessment was to replenish condominium association reserves, a cost that would not exist but for the conversion to condominiums. Indeed, the landlord testified that the budget included "replacement reserves." 5T24:5-13. As such, this cost should not have been passed on to Mr. Trupiano because doing so violated the TPA.

The Board appeared to be confused on this point as well on remand. For example, at the first hearing of the second remand on March 11, 2020 one board member asked how much the condo fee was. Someone suggested "four-hundred-and-nine dollars and 17 cents I believe" and another person agreed "yea, about $410." 8T20-24.

IV. IT WAS ERROR TO OVERTURN THE BOARD'S FINDINGS ON MAINTENANCE FEES

The Hoboken Rent Control Ordinance *requires* the Board to consider the presence or absence of efficient management in considering hardship applications. Here, there is ample evidence that the apartment has been totally neglected in Mr. Trupiano's testimony, Mr. Mucciolo's testimony, the landlord's admission that no routine maintenance is done for the unit, and the shocking neglect of the intercom, which the Board saw play out over five years.

The Board discussed the $1,800 management fee expense in great detail for all three rounds of hearings. In 2018, the matter was discussed thoroughly as reflected in pages 227-249 of the November 2018 Transcript. 6T227-249. The Board granted the Landlord a management fee equal to 5% of its operating income. In so doing, the Board articulated a number of rational bases for finding that the management fee should be a percentage of income rather than a flat rate, including board precedent (6T228:6-13) and independent research showing that the range was in the 5-12% (6T231:12-15).

The Board additionally set forth a multitude of reasons why it settled on 5% rather than a higher percentage. Board members were skeptical of the management fee because of the appearance of self-dealing, especially coupled with the evidence that the unit was neglected by the landlord. Members of the board expressed concerns about the murkiness between the two companies as well as doubts that the unit was efficiently managed. 6T241:3-6 (a board

member noting the "cloudiness" between the two companies); 6T242:24-25 (board member stating "I don't think that it is passing the test of being reasonably efficiently managed ... ").

The Board ultimately passed a motion granting the landlord 5% of the income in management fees. On remand, the Board felt constrained to grant at least $100 a month in maintenance fees due to Judge Costello's finding that they had been arbitrary and capricious before in suspecting Amaconn of self-dealing.

However, there *is* an appearance that Amaconn was padding expenses for the hardship application. Amaconn claims it paid $150 a month, or $1,800 a year, to "manage" the unit, for which the records shows very little work was done. Moreover, the evidence submitted to the Board shows that Amaconn did not actually pay Julip any of those monies in 2016. Indeed, the entire lump sum of $1,800 was not paid until February *2017*- right before Amaconn submitted its hardship application and claimed the $1,800 as an expense. 1T15:9-17:7. Moreover, there is significant evidence that Julip and Amaconn are functionally the same entity. In addition to sharing the same ownership, they also have the same physical address, telephone number, and email address. 1T29:26-1T30-3. The Board was rational.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an order denying Amaconn's request for a hardship increase.

Law Offices of Dana Wefer, LLC
Attorney for Appellant, Jeffrey Trupiano

BY: s/Dana Wefer

DANA WEFER, ESQ.

Dated: January 27, 2023

AMACONN REALTY, INC., Plaintiffs, vs. RENT LEVELING AND STABILIZATION BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-00434-22 On Appeal From: Superior Court of New Jersey Hudson County, Civil Division Docket No.: HUD-L-003854-21 Sat Below: Hon. Joseph A. Turula, P.J.Cv. CIVIL ACTION

BRIEF BY PLAINTIFF/RESPONDENT/CROSS-APPELLANT AMACONN REALTY, INC.

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Hearing Date	**Presiding**	**Transcript Designation**
September 30, 2022	Judge Turula	14T

PRELIMINARY STATEMENT

After several years of subsidizing the rent for Unit 11 (the "Unit") at 703 Park Avenue in Hoboken (the "Property") for the benefit of its tenant, Jeffrey Trupiano ("Trupiano"), and thus earning negative returns on that Unit, plaintiff//cross-appellant Amaconn Realty, Inc. ("Amaconn") filed a hardship application for a rent increase on May 22, 2017 with the Hoboken Rent Leveling Board (the "Board") under Section 155-14 of Hoboken's ordinance entitling it to a hardship rent increase "in the event that a landlord cannot meet his operating expense or does not make a fair return on his investment." Three times, the Board denied Amaconn a proper rent increase after multiple hearings each time. Three times, the Board's decision regarding the rent increase was appealed to the Superior Court. This action is the third such appeal to the Superior Court after the Board granted a negligible monthly rent increase of $154.99 to Trupiano's current monthly rent of $723.15. Notably, over a period exceeding twenty-five (25) years from 1993-2017, Trupiano's monthly rent increased $48.41—from $675 to $723.41.

Finally, more than five (5) years after Amaconn filed its application for a rent increase, the Honorable Joseph A. Turula, J.S.C. awarded Amaconn a monthly rent increase totaling $1,717.18 (the "Rent Increase"), rather than remand to the Board a third time after finding, like the prior two Judges, that the Board acted arbitrarily and

capriciously. The Board had disobeyed two prior remand orders from two other judges and demonstrated that it could not fairly decide Amaconn's application for a rent increase based upon the law and an uncontroverted record.

Trupiano now appeals the adjudicated Rent Increase—principally Amaconn's entitlement to a "fair return" on its equity in the Unit comprising the chief portion of the Rent Increase—and Amaconn cross-appeals from the Court's decision not to make the Rent Increase retroactive. Amaconn's entitlement to a "fair return" on its investment in the Unit is required by constitutional mandate and expressly set forth in the ordinance. While the Board's arbitrary and capricious rulings were numerous throughout the tortuous history of this matter spanning three sets of Board hearings and three ensuing Superior Court appeals now approaching six (6) years, Trupiano's appeal is limited to the following claimed errors:

(i) The Rent Increase improperly included a "fair return" to Amaconn on its equity in the Unit because Amaconn previously earned a return on the other 10 units that were sold in 2003 upon converting the Property to a condominium property;

(ii) Amaconn's equity in the Unit improperly included the purchase price of the Unit adjusted for inflation;

(iii) Amaconn's equity in the Unit improperly included the capital improvements to the Unit adjusted for inflation;

(iv) Amaconn's equity in the Unit was improperly based upon its appraised market value as a condominium;

(v) Amaconn's management fees were improperly included as expenses paid by Amaconn because such fees duplicated the condominium fees paid by Amaconn;

(vi) Amaconn's management fees should have been limited to a 5% percentage of the rent as granted by the Board; and

(vii) A one-time special assessment by Hoboken was improperly included in Amaconn's costs to calculate the Rent Increase.

As briefed below, the foregoing contentions fail both as a matter of both law and fact. Fundamentally, Trupiano seeks to maintain the Board's negligible rent increase ($154.99) to perpetuate Amaconn's subsidizing of the Unit and its mounting losses. While the circumstances may be unfortunate to Trupiano, the law simply does not require Amaconn to continue to bear losses. Indeed, the Board's ruling that Amaconn's equity in the Unit was merely $12,804.88 was preposterous (leading to this third Superior Court action). That artificially low equity value—plainly intended to benefit Trupiano and harm Amaconn—deprived Amaconn of any "fair return" as required constitutionally and under Hoboken's ordinance.

That Trupiano is protected by rent control is not disputed. But rent control protects not only tenants but also owners by giving them recourse if subsidizing tenants and being denied a fair return. Trupiano's one-sided conception of rent control fails. Rent control does not require Amaconn to continue to lose money every month—now more than 5 years since the filing of its hardship application.

STATEMENT OF FACTS

On December 23, 1993, Amaconn purchased the Property containing eleven (11) residential units for $525,000. DA 37; 1T:13-19. Trupiano was the tenant at the Unit consisting of approximately 1,000 square feet (1T:53:15, 13T:49:23-24) and paid monthly rent of $675 (3T:65:26; 4T:4:2; 13T:49:23). In 2002, all units and the common areas were substantially renovated. 3T:7:18, 1T:6:14-16, 1T:44:10-16, 5T:74:12-25. In 2003, ten years after purchasing the property, Amaconn converted the Property into a condominium property. 3T:7:19-23. Trupiano remained a tenant at the Unit, while all other units of the Property were sold.

Under §155-14A of Hoboken's Rent Control Ordinance (the "Ordinance"), a property owner is entitled to not only pay all its operating expenses, but to earn a reasonable rate of return (6.25%) on its equity in its investment. On July 19, 2017 Amaconn filed its application for a hardship rent increase for the Unit with the Board. Da 36.

Over a period exceeding twenty-five (25) years from 1993-2017, Trupiano's monthly rent increased from $675 to $723.41, or a mere $48.41. Da 36; 1T:33:25-34:1, 1T:47:27-48:1, 7T:89:20. Accordingly, the rent for the Unit is grossly under market, and Amaconn has lost money on the Unit for several years—and continues to do so. As set forth in Amaconn's application for a rent increase, and testified to by Amaconn, the total rent earned for the Unit in 2016 was $8,387.00. Da 38. However,

Amaconn's actual out of pocket carrying expenses that year were $14,506.00 resulting in a deficiency of $6,119.00. 1T:10:25-11:1; Da 38.

For several years, Amaconn has subsidized the Unit by an annual minimum of $6,000 and in some years even more. 1T:11:1-21. The Unit's current market value, whether appraised value or assessed value, far exceeds the value adopted by the Court to determine Amaconn's equity in the Unit to measure a "fair return".

Significantly, while Amaconn's application for a rent increase included an appraisal valuing the Unit's fair market value at $622,500, and Amaconn's expert testified regarding that appraisal (1T:59:19, 62:17), Amaconn did not use that appraised value in advancing to the Court the value of its equity in the Unit. Rather, Amaconn based its equity in the Unit upon the average of (i) the sums paid by Amaconn to both purchase and improve the Unit, adjusted for inflation from 1993-2017, which totaled $197,600 (10T:138:12-15); and (ii) Hoboken's unequalized assessment of the Unit in the amount of $404,600 (T1:8:24-9:3), which was based upon the replacement cost method (6T:21:21). Notably, applying Hoboken's equalization rate of 74.18% results in a fair market value of $545,483. But Amaconn did not posit that value, nor the $622,500 appraised value, as its equity in the Unit. Instead, Amaconn sought a significantly lesser number, $301,105, based upon the average of the Unit's purchase price/improvements, adjusted for inflation, and

Hoboken's unequalized assessment, neither of which reflected the higher values resulting from an appraisal or Hoboken's equalized assessment.

However, Trupiano falsely (and repeatedly) states that Amaconn's equity in the Unit was based upon its market value as a condominium. See Db1 (Incorrectly stating that "rents in Hoboken must now be linked to a property's *value* as real property in the real estate market"); Db28 (Incorrectly stating that landlord's actions "push[ed] the rent leveling board to go outside of its ordinance and link the rent to the unit's market value as a condominium"). Amaconn's equity in the Unit, $301,105, was not based upon the Unit's market value, much less its value as a condominium without a protected tenancy in place. Indeed, Amaconn's expert testified that both the $622,500 appraisal and Hoboken's unequalized assessment of the Unit reflected a substantial discount for the Unit being occupied by a protected tenant. 6T:20:9-21:13, 30:9-14, 33:20-24, 35:17-19, 40:17-22. Trupiano's continued assertion that Amaconn's equity was based upon the Unit's appraised fair market value is inaccurate.

Of further note, even if the Unit's appraised value was used to determine Amaconn's equity (it was not), Trupiano did not submit any competing appraisal from a licensed appraiser challenging Amaconn's appraisal. Trupiano also does not refute the specific sums adopted by the Court to determine Amaconn's equity in the Unit.

Moreover, Trupiano does not seek to defend the Board's equity assessment at $12,804 (based upon a formula created by the Board's Chairwoman), which equals a monthly increase of $66.68 per month. Da 54; 10T:172:10-25, 173:2-6; 11T:199:9, 225:3-5, 257:23, 244-259. That is not surprising because the formula created by the Chairperson was mystifying and not understood by Trupiano's attorney (and others). Rather, Trupiano argues that Amaconn's equity in the Unit is effectively zero because Amaconn profited in 2003 when selling the other units upon converting the Property into a condominium property.

Trupiano also misstates that Amaconn earned a $755,562 profit when selling the Property's other units upon the Property's conversion to a condominium property. See Db25. That sum was taken from Amaconn's 2016 tax return, filed with Amaconn's rent increase application. Pa 78. However, that tax return expressly stated that is the sum "due from affiliates" relating to other properties owned by Amaconn's affiliates. Da 67. It does not in any manner represent Amaconn's profit from the Property's other units sold in 2003.

Trupiano also contends that Amaconn's capital improvements to the Unit were improperly included in the calculation of Amaconn's equity in the Unit. Based upon the Certification of Joseph Metzger (Amaconn's owner, now deceased) submitted

with Amaconn's application to the Board for a hardship rent increase, as well as Amaconn's testimony before the Board, it is uncontroverted that Amaconn expended $76,900 in capital improvements to the Unit.[1] Pa 48; 1T:6:14-16, 44:10-16, 5T:74:12-25 (Joseph Metzger testifying regarding new walk-in closets, carpeting, bathroom, plumbing and electric lines). Further, Joseph Metzger's Certification (Pa 48) described the multiple improvements made to the Unit's kitchen, bathroom, living room and two bedrooms as well as electric/plumbing improvements and the installation of central air conditioning.[2]

Trupiano does not, nor can he, dispute the amounts totaling $76,900 expended by Amaconn for the improvements to the Unit. Indeed, Trupiano concedes that Amaconn did make various improvements to his Unit. See Db14; 1T:74:8 (Agreeing that new sink and kitchen cabinets were installed); 1T:78:11-12 (Agreeing that water heater was replaced); 5T:64:7-8 (Agreeing that he vacated the Unit so that it could be

[1] Mr. Metzger's Certification (as well as the other exhibits to Amaconn's application for a rent increase) were not included in Trupiano's Appendix. Amaconn's Appendix contains the relevant exhibits submitted by Amaconn with its application, including Mr. Metzger's Certification.

[2] Such improvements to the Unit included: kitchen (new stove, refrigerator, hot water heater, sink, windows and cabinets); bathroom (new sheetrock, tile floor, walls, electrical and bathroom fixtures); living room (new sheetrock, lighting fixture and windows, finished hardwood floors and painting); and bedrooms (new sheetrock, windows and lighting fixtures, refinished floors and painting). Pa 48.

renovated); 5T:64:14-16 (Agreeing that new bathroom was installed); 5T:64:17-20 (Agreeing that kitchen was improved); 5T:64:24-65:3 (Agreeing that new windows were installed); 5T:67 (Agreeing that renovation of the Unit and remainder of building occurred in 2001). Nowhere does Trupiano testify that no improvements were made to his Unit, despite repeatedly characterizing his Unit as "unrenovated" and "misfit" (while staying there for more than thirty (30) years at a monthly rent less than eight hundred dollars ($800)). Trupiano also testified that he did not have any real reason to report any repair/maintenance issues, except the intercom (5T:69:25-70:7), and that issues were addressed "most of the time" (5T:70:8-10), and there were no delays regarding "emergency situations and that type of thing" (5T:73:3-8). Trupiano did not demonstrate that Amaconn was unresponsive to any of his complaints regarding the Unit or that his complaints were ignored in any problematic manner.

Trupiano also ignores Amaconn's appraiser's testimony that the Unit was poorly maintained by Trupiano. 1T:68:16-17. Joseph Metzger also testified about the Unit's lack of cleanliness. 5T:5-16. The relevant parts of the three sets of hearings before the Board, resulting in two remands to the Board before the Court ultimately rejected a third remand and instead adjudicated the Rent Increase, are summarized below. The Board did not decide the rent increase based on facts in the record or the testimony of the parties.

As previously stated, Trupiano did not submit any competing value measuring Amaconn's equity in the Unit (instead he contends that Amaconn lacks equity in the Unit), nor did he present any evidence challenging the actual sums paid by Amaconn that supported its hardship application. Trupiano did not have to do so. The Board, acting as his advocate, abdicated its function as an independent, impartial, governmental decision-making body and ultimately permitted a rent increase that it knew Trupiano could afford and would continue to cause Amaconn to subsidize the Unit and lose thousands of dollars every year.

A. The First Set of Hearings Leading to the First Remand

The Board conducted its first set of hearings on September 27, 2017 (1T), October 5, 2017 (2T) and December 13, 2017 (3T). Amaconn's witnesses, Joseph Metzger and Mary Ann Metzger testified regarding the income and expenses for the Unit, as was documented in its hardship application.

In particular, Mr. Metzger testified that historically the Unit had cash losses every year. Specifically, he testified to a cash loss of $6,470 in 2009 (1T:11:4), $7,513 in 2010 (1T:11:6) and $7,384 in 2011 (1T:11:8). The tax return for the tax years 2014, 2015 and 2016 (included in Amaconn's application) reported cash losses for the Unit of $16,283 (Pa 55), $14,348 (Pa 65) and $16,490 (Pa 74), respectively. Mr. Metzger testified that Amaconn carried no debt on the building (1T:17-25).

At the September 27, 2017 hearing, Carl Mucciolo ("Mucciolo"), a licensed real estate appraiser having an MAI designation, testified that the Unit had a fair market value of $622,500 even with a protected tenant in place. 1T:59:19, 62:17. The Board found Amaconn's equity in the Unit to be the original purchase price for the Unit of $47,727 (the purchase price for the Property divided by 11 units, without accounting for the $1 million renovation work to the entire Property) and then illogically reduced that amount by almost 50% to $24,675. Da 46. Ultimately, the Board granted a monthly hardship increase of $563.43 raising the monthly rent to $1,137.84. Da 46.

Trupiano appealed under Docket No. HUD-L-000386-18. On May 28, 2018, the Honorable Jeffrey Jablonski, J.S.C. remanded the matter back to the Board (the "First Remand") because he could not determine the basis for the Board's rulings and whether the increase in operating costs was based upon services and amenities not previously provided to Trupiano and not simply due to the conversion of the Property to a condominium property (which cannot be assessed against Trupiano). In holding that the Board's actions were arbitrary and capricious, Judge Jablonski stated that:

- He had "never read a Transcript like this before. This Court's review of the proceedings of this matter were particularly difficult to follow. The lack of adherence to proper procedure and the continual cross talk and lack of attention by board members to others' opinions, attempted to be expressed. During the deliberations in particular, made it particularly difficult for this Court to follow." (4T:15:4-13)

- "The Court appreciates the time and purported effort that the Board took in considering the issues in this case. However, what is overwhelmingly apparent is that more time was consumed in modifying the numbers and without a basis to do so. Percentage reductions, modifications of existing numbers and divisions by half of expenses articulated without any additional support represents the arbitrariness for which this Court is critical." (4T:16:14-22)

- "It is clear that the Board was motivated by personal feelings rather than consideration of the merits of this matter." (4T:17:13-15)

B. The Second Set of Hearings Leading to the Second Remand

The Board conducted its second set of hearings on October 24, 2018 (5T) and November 28, 2018 (6T). On October 24, 2018, three Board members disclosed that they knew Trupiano but would not be influenced by their relationship with him. (5T:12). Mary Ann Metzger again testified regarding the income and expenses for the Unit. She stated that Julip Properties ("Julip Properties") was Amaconn's Managing Agent (5T:27:17), was billing Amaconn $150 monthly (5T:27:7), that an increase in condominium association fees was due to a change in Hoboken's Ordinance regarding the time when the garbage could be put on the street (6T:157:22-158:14, 108:15-20, 110:22-111:8), and that a tax return had to be filed for the Unit irrespective of whether or not it was an apartment or single condominium unit (5T:24:8, 129:24-130:1, 43:7-44:1). Ms. Metzger testified that these expenses were common expenses for a residential dwelling unit and had not changed because the Unit was a condominium (5T:37-22).

On November 28, 2018, Mucciolo again testified that Hoboken's $404,600 assessed value for the Unit accounted for Trupiano's protected tenancy and that it was assessed at approximately 35% lower than the other units in the building. 6T:20:9-21:13; 30:9-14; 33:20-24; 35:17-19; 40:17-22, 44:18, 54:20-23.

The Board reduced Amaconn's allowance for real estate taxes from $6,275.00 to $1,937.22 on the basis that the increase in the Unit's taxes was because it was a condominium. Da 49. It also reduced the management fee paid by Amaconn to 5% of the actual rent collected which was $419.35 versus the yearly amount paid, $1,800. Da 51.

In analyzing Amaconn's equity in the Unit, the Board refused to consider inflation, the Consumer Price Index ("CPI") increase and market conditions between 1993 and 2017. The Board ruled that Amaconn's equity in the Unit was $24,675 and approved a total monthly rent increase of only $105.04. Da 51.

Amaconn appealed the Board's rulings to the Superior Court under Docket No. HUD-L-366-19. The Honorable Mary Costello, J.S.C. reversed and remanded the matter back to the Board (the "Second Remand"). Da 10. Although Judge Costello upheld the Board's reduction of taxes, she found, like Judge Jablonski, that the Board's other rulings were arbitrary and capricious.

The Court held that the Board did not properly consider whether Amaconn's tax preparation fee and garbage collection fee were solely due to the Property's conversion to a condominium or not. As to the Board's reduction of the management fee to 5%, the Court ruled:

> Amaconn presented testimony and records to support the fact that the management fee was actually incurred, actually paid, and in line with the marketplace rates. The Board resorted to an arbitrary rate of 5% of the income generated based on "board precedent" and "independent research." Counsel for the Board characterizes the 5% finding as something that was "settled on" and defends the figure by expressing the Board's apparent reticence to approve Amaconn paying fees to Julip Properties due to the common ownership. The fact remains that some entity has to provide management services and Julip's rates were proven to be typically $150 per month for other clients in the same market. The actual proofs submitted by Amaconn far outweighed the admittedly subjective compromise figure of 5%, which was the absolute low end of the range of 5%-12% suggested by the "independent research." This issue is remanded for further consideration and evaluation as the 5% allowance seems arbitrary and motivated by suspicion of, or animus for Amaconn. (Da 20).

The Court further ruled that the Board's calculation of Amaconn's equity in the Unit as $24,675 was arbitrary and capricious:

> …the Board began its analysis of this issue with their own rent control ordinance which states, in relevant part that equity is "[t]he actual cash contribution of the purchaser at the time of closing of title and any principal payments to outstanding mortgages." It is undisputed that the purchase price was $525,000.00. It is also undisputed that the entire building was renovated at a cost of approximately $1,000,000.00. There is no mortgage on the property. There was a reassessment which resulted

> in an assessed value of $404,600. The Trupiano unit appears to represent 10.76% of the entire building space. A strict reading of the ordinance then would limit the inquiry to the actual cash contribution by Amaconn. However, that cannot be the end of the inquiry inasmuch as the true value of an owner's equity is necessarily influenced by improvements to the property, market conditions, re-assessments and inflation. The ordinance allows for a rate of return of 6.25% after operating costs. These are the parameters within which the Board must determine the equity. In this instance the Board compared the Amaconn property to the one that the Board considered years ago. In the prior case, a protected tenant's unit was bought and sold, and the Board deduced that a property with a rent-protected tenant gains about 30% as much equity as one without. Board Member Fallick suggested that 30% would be a benchmark to use in determining the equity of any building with a protected tenancy as compared to one without. Unfortunately, this is the epitome of arbitrary. This reasoning ignores the uniqueness of the Amaconn property, the market and inflation fluctuations. Such a flat deduction is done in a vacuum without any nexus to the property itself, and without any comparison between the two properties in terms of modernization, etc. For this reason, this portion of the case is also remanded for further determination on the equity interest of Amaconn in the subject property. (Da 21-22).

C. The Third Set of Hearings Leading to the Court's Adjudicated Rent Increase

Based upon the Second Remand, a third set of hearings occurred on March 11, 2020 (7T), April 14, 2021 (8T), June 9, 2021 (10T), June 23, 2021 (11T) and August 11, 2021 (12T).

i. March 11, 2020 Hearing

Mary Ann Metzger testified regarding the increased cost for garbage collection due to Hoboken's ordinance that changed the time that garbage could be

placed on the street, which caused Amaconn to pay the condominium association an additional $123.95 per year. 7T:23:22-24:20; 26:6-9.

Ms. Metzger also testified that the $624.48 fee paid by Amaconn to an accountant for tax filing relating to the Unit was a normal expense, also unrelated to the conversion of the Property to a condominium property. 7T:24:21-26:9.

Ms. Metzger further testified regarding the $150 monthly management fee paid by Amaconn to Julip Properties to manage the Unit. 7T:28:1-30:4. She testified that Julip Properties manages over 1,000 units (7T:30:3), and that a $150 monthly fee per unit is normal (7T:30:1). She testified that other management companies in Hoboken charge monthly per unit fees ranging between $150-$200. 7T:29:14-20.

Ms. Metzger further testified regarding Amaconn's equity in the Unit. She reiterated that the Property comprising eleven (11) units was purchased in 1993 for $525,000 (7T:37:18-19). She stated that, to determine the Unit's equalized fair market value, the Unit's $404,600 assessed value would be divided by Hoboken's equalization ratio (7T:35:4-36:1), which equated to an equalized fair market value of $602,172 in 2017 (7T:36:5-6).

Ms. Metzger also testified about the impact of inflation on Amaconn's equity in the Unit. Applying the CPI to the purchase price of the Unit ($47,727) increased the value of the Unit from 1993 to 2001 to $68,480. 7T:37:13-38:5. She also testified

that, in 2002, Amaconn made $1 million of improvements to the Property, which affected all units and the common area, and that the capital improvements should also be added to Amaconn's equity in the Unit and adjusted for inflation 7T:38:8-38:24.

Consistent with the Second Remand, Amaconn's counsel requested the Board to consider inflation in determining Amaconn's equity in the Unit. 7T:52-58. Trupiano's counsel, however, contended that Amaconn's equity could only be based upon the cash paid at purchase plus the payments made on a mortgage (7T:77:17-78:2). Trupiano's counsel also ignored Amaconn's capital improvements to the Unit, which, as previously stated, Trupiano admitted were made. 7T:81:9-89:8.

Trupiano did not provide any testimony or rebuttal documents challenging any of Amaconn's proofs.

ii. April 14, 2021 Hearing

During the hearing, in response to concerns that a large hardship increase would displace Trupiano (8T:33:7-14), the Board's attorney stated that "there is going to be a hardship granted … It's just a matter of how much…" 8T:34:12-17.

The Board revisited whether the costs for tax preparation and garbage fees are allowable costs. 8T:137:2-139:10. Despite that the increased garbage fee was due to Hoboken changing the time that the garbage could be brought out to the street, the Board arbitrarily voted to exclude this $123 annual cost as an allowable cost.

(8T:144-152). Board members falsely stated that there was "no new service" (8T: 153:11-17, 154:2-4,) or amenity (8T:154:15), and the increased cost resulted from the Property converting to a condominium (8T:153:19-25, 154:2-4, 8-12; 14-16).

The Board approved the reinstatement of the $75.32 cost for tax preparation. 8T:174.

Once again, Trupiano did not provide any testimony or rebuttal documents challenging any of Amaconn's proofs.

iii. June 9, 2021 Hearing

The Board considered Amaconn's equity in the Unit (10T:132) and its prior determination that, although the prorated price of the Unit was $47,727 based upon the $525,000 purchase price of the Property divided by 11, the value of the Unit was less than the value of the other units and was reduced by 50%. 10T:133:4-12.

The capital improvements to the Unit totaled $76,900. 10T:137:13-25. Adjusting the prorated purchase price ($525,000/11) and improvements ($76,900) for inflation in accordance with the CPI would increase the equity of the Unit to $197,600. 10T:138:12-15, 141:6-15. Based upon those numbers alone without considering the Unit's value, the hardship increase would equal $2,156.00. 10T:142:19-25.

Amaconn also relied upon Hoboken's equalized assessment for the Unit at $603,880, which, upon applying the equalization ratio to its assessed value, is

$404,600. 10T:138:5-12, 139:11-21. The Board was also reminded that Mucciolo, Amaconn's expert (both a Certified Tax Assessor and MAI Appraiser) had previously testified that Hoboken's $404,600 assessment was reduced over 30% because of the tenant's protected status. 10T:139:2-8.

The Chairwoman then introduced her own analysis regarding Amaconn's equity in the Unit that was not based on any facts or testimony in the record. 10T:164. Using a bootstraps argument that the allowable tax payment of this property was only $1,937.22 (10T:168:18, 178:21,179:9) and that an identical unit across the hall paid taxes of $6,275 (the unit was assessed at $590,700) (10T:185:13-14)) (10T:182:13-14, 164:15-16, 166:18-19, 167:12-14, 168:16-19), she concluded that there was a 45.99% differential in value. The Chairwoman stated in her opinion the true value of the Unit would be $124,684.50 (10T:170:20, 175:23, 178:7) before inexplicably ascribing a 25% value to that value (10T:172:10-25, 182:25-184:3) and then further dividing that value by 41 to arrive at a value of $12,804.88. 10T:172:10-25, 173:2-6. No one understood the Chairwoman's analysis (10T:176:5-8), including Trupiano's counsel (10T:175:15-16) who on this Appeal has not made any effort to support it.

The Chairwoman conceded that she is not an appraiser (10T:180:14-181:5) and was making assumptions (without any facts in the record to support her analysis).

She stated that the equity should be 25% of a protected tenant without any basis for this statement. 10T:182:4-184:9. She then agreed that her math was wrong (10T:185:1-3) and that the value of the Unit is $126,437.50. 10T:185:2, 186:1-2.

The Board's attorney counseled the Board that equity in the Unit is not limited to the initial cash contribution but also affected by improvements, market conditions, reassessment and inflation. 10T:193:1-23, 194:14-195:1. The Chairwoman disregarded the $76,000 in improvements to the Unit (10T:207:9-18), and another Board member stated that the improvements should not be considered because they lost their "useful life" (10T:207:19-21).

Once again, Trupiano did not provide any testimony or rebuttal documents challenging any of Amaconn's proofs.

iv. June 23, 2021 Hearing

Lacking any facts in the record to support its position, the Board arbitrarily reduced the monthly management fee paid by Amaconn to Julip Properties from $150 to $100. 11T:46, 62-69; DA 54.

The Board then revisited the issue of Amaconn's equity in the Unit. One Board Member stated that, because Trupiano is a protected tenant, his Unit should not be considered valued at 1/11 of the entire Property (11T:103:15-104:4), thereby, ignoring that at the time of both the purchase and improvements, the Property had not yet been

converted into a condominium property which gave Trupiano the protected status he claims. The Chairwoman's methodology comparing taxes of the Unit to another unit to ascertain value did not begin to consider the equalization ratio. Fundamentally, the Chairwoman attempted to determine Amaconn's equity using her own unique formula not supported by any testimony or document in the record that would ensure a very low equity. 11T:126-143.

The Board's counsel again urged the Board to consider market conditions, renovations and inflation. 11T:143:23-144:10. But the Board did not do so. The Board expressed concern for the following: (i) any substantial rent increase would displace Trupiano (11T:146:1-2, 253:7-10); (ii) any substantial rent increase would raise rent above market value (11T:162:14-22, 170:21-171:1); and (iii) the Unit would not sell at the equity value sought by Amaconn (11T:163:21-24, 171:15-19, 199:17-20). The Board also stated that improvements to the Unit should not be considered because they were old and depreciated. 11T:154:24-156:5, 189:18-21. No evidence in the record permitted that conclusion.

The Board valued Amaconn's equity in the Unit at only $12,804.88. Da 54; 11T:199:9, 225:3-5, 257:23. The Board thus ignored the Second Remand Order requiring the Board to take inflation and market conditions into account. It also ignored its counsel's advice that the Tenant Protection Act has no bearing on the

the determination of equity. 11T:181:24-184:19.

Accordingly, the Board granted a hardship increase of only $154 per month (Da 54; 11T:279:7) based on Amaconn's equity in the Unit at $12,804.80. The Board backed into that equity number by creating what it believed was an acceptable rent increase. 11T:244-259. It disregarded the instructions in the Second Remand Order because it believed that the rent would be too high.

After the Board's decision on the rent increase, Amaconn's counsel asked the Board to make the increase retroactive to the date that Amaconn filed its application for a rent increase in 2017. The Board agreed to consider the issue of retroactivity and insert a beginning date for the rent increase in its resolution after receiving an opinion from its counsel. 11T:280:21-281:1, 281:25-282:5, 285:4-286:15. The Board advised the parties that it would rely upon its counsel's opinion, and that the parties should not submit any briefing on that issue. 11T:289:5-7, 291:8-22.

Once again, Trupiano did not provide any testimony or rebuttal documents challenging any of Amaconn's proofs.

v. August 11 2021 Hearing

The Board rejected a retroactive rent increase. It did so disingenuously on the basis that Amaconn had not briefed the issue. 12T:30:11-12, 32:7-15, 34:2.

At the prior hearing, the Board did not request, nor permit, briefing from the parties and in fact stated at the June 23, 2021 hearing that it would decide the issue based upon the Board's counsel's opinion. However, the Board's attorney advised the Board that it could reject any retroactive rent increase by "tak[ing] the lawyerly way out and not deal[ing] with it" as the issue was not property presented to the Board by Amaconn. 12T:25:18-21, 26:5-8, 30:5-10. The Board followed that invitation even though Amaconn was neither asked, nor permitted, to address the retroactivity of any rent increase.

Accordingly, the Board made the negligible rent increase effective September 1, 2022. 12T:37-38, 45:19-24. It ruled that Amaconn's equity in the Unit was $12,804.88, thereby entitling Amaconn to an annual return of only $800.31 on its equity. Da 54. That low return resulted in a total monthly rent increase of $154.99 to the existing rent of $723.41. Da 54

PROCEDURAL HISTORY OF THIS THIRD SUPERIOR COURT ACTION AND THE COURT'S ADJUDICATED RENT INCREASE

On September 13, 2021, Amaconn filed a Verified Complaint in Lieu of Prerogative Writ (Pa 5) seeking to abrogate the Board's grant of a hardship increase in the amount of $154.99. The Board answered on October 20, 2021. Pa 14.

On May 16, 2022, Amaconn filed a motion for summary judgment. Pa 15. Amaconn contended that the Board was arbitrary and capricious by (i) determining that Amaconn's equity in the Unit was merely $12,804.88; (ii) reducing the monthly management fee paid by Amaconn by one-third from $150 to $100; and (iii) excluding the additional cost of garbage collection paid by Amaconn in the monthly amount of $123.95 that resulted from Hoboken's ordinance changing the time that the garbage could be put on the street. The Board filed opposition to Amaconn's motion for summary judgment on June 16, 2022. Trupiano filed opposition to the motion on June 20, 2022 but without previously filing an answer. See Pa 14-15.

On July 22, 2022, Judge Turula, granting summary judgment in Amaconn's favor, held that he is now the "third judge" to rule that the Board was "arbitrary and capricious." 13T:15-18. Preliminarily, Judge Turula held that he could not consider any argument from Trupiano's counsel, because Trupiano had not filed an answer. 13T:34. Judge Turula permitted only the Board's counsel to argue against Amaconn's summary judgment motion.

Judge Turula ruled that the Board was arbitrary and capricious in the three ways advanced by Amaconn. First, the Court ruled that the Board improperly excluded the increased fee paid by Amaconn for garbage collection which has been assessed due to

a change in Hoboken's ordinance and not because of any conversion of the Property to a condominium. 13T:64:20-65:8. That ruling is not under appeal.

Second, Judge Turula held that the Board "arbitrarily slashed" the cost of Amaconn's monthly management fee by one-third ($150 to $100). 13T:65:9-10. Trupiano appeals that ruling in Point IV of his brief.

Third, as to the most consequential issue affecting the Rent Increase, Judge Turula held that the Board was arbitrary and capricious in determining that Amaconn's equity in the Unit was $12,804. It held that the Board did not comply with Judge Costello's Second Remand Order requiring the Board to consider inflation, improvements, assessments and market conditions. 13T:59:9-25; 65:11-24. It stated that "[c]learly, the Board did not look at historical facts with respect to inflation, tax assessments, market fluctuations to determine equity and created a fantasy magical formula of comparing assessments and using arbitrary unsupported numbers to reduce equity." 13T:59:21-25.

The Court reiterated that Amaconn is "entitled to earn a just and reasonable return on the property, unit 11, and they cannot be forced to subsidize Mr. Trupiano's expenses" and that it "has been confiscatory to force Amaconn to subsidize Trupiano …" 13T:63:2-5; 64:11-13.

The Court declined to remand the matter for a third time to the Board. 13T:8-9. Instead, the Court ruled that it would determine the exact amount of the Rent Increase based on additional briefing regarding the calculation of the Rent Increase. 13T:69:5-14. It also requested briefing on Amaconn's claims that the Rent Increase should be retroactive and for attorney's fees. On August 11, 2022, Amaconn filed a legal memorandum calculating the Rent Increase based upon the Court's rulings, requested that the Rent Increase be retroactive to August 1, 2019 (four years, not five years, from the filing of the hardship application on July 19, 2017, accounting for a one-year delay resulting from the Covid-19 pandemic) and sought legal fees/costs totaling $43,859.04. Pa 37.

On September 19, 2022, Trupiano filed a memorandum opposing Amaconn's calculation of the Rent Increase, and on September 29, 2022, the Board opposed Amaconn's claim for legal fees. See Pa 15.

On September 30, 2022, the Court entered an order increasing the monthly rent on the Unit from $154.99 previously approved by the Board to $1,717.18 as supported by Amaconn's August 11, 2022 memorandum. Da 7. Accordingly, monthly base rent was increased to $2,440.33. Most of that increase was based upon Amaconn's equity in the Unit totaling $301,105. Applying Hoboken's rate of return of 6.25% to $301, 105 created an annual return of $18,819.06 equaling $1,568.25 per month.

14T:24:8-16. That return starkly differed from the Board's assessment of Amaconn's equity at an artificially low amount of $12,804 equaling an annual increase of $800.25 or $66.68 per month.

The Court adopted Amaconn's equity calculation set forth in its August 11, 2022 memorandum (Pa 37) which averaged (i) the inflation-adjusted value of $197,610 of the Unit over a twenty-three (23) year period from the date that the Unit was first purchased in 1993 for a pro rata price of $47,727 to which capital improvements of $76,900 were added; and (ii) Hoboken's assessed value of the Unit at $404,600 which was based on replacement cost and reflected a thirty percent (30%) reduction due to the existence of a protected tenant, and without application of the equalization ratio. Thus, Amaconn's total equity in the Unit, as ruled by the Court, was $301,105. Amaconn did not seek to calculate its equity applying Hoboken's equalization ration of 74.18% to the Unit's assessed value, which would have increased the value of the Unit to $545,430. Nor did Amaconn seek to apply the appraised value of the Unit at $622,500, as testified to by Amaconn's valuation expert, Mucciolo, before the Board. The Unit's pro rata price of $47,727 was based upon the total purchase price for the Property divided by 11 units.

The Court denied Amaconn's claim for legal fees/costs on the ground that there was no legal basis to depart from the American Rule. 14T:24:4-5. It further denied

Amaconn's request for a retroactive rent increase. 14T:25:3-7. The Court blamed the Board for putting Trupiano in a position where any retroactive application of the rent increase would be too severe:

> But this problem arose, clearly to me, because the Board -- the Rent Leveling Board of Hoboken was attempting --- and I am not saying Mr. Trupiano had anything to do with it – but, perhaps, they were trying to help out a neighbor and to thwart the legitimate applications for rent increases. And it is the Board who cavalierly disregarded, one, the law, as found by Judge Jablonsky, Judge Costello and Judge Turula now, myself, that now puts this man in a predicament that he faces where he's probably unable to afford the rent… [14T:25:8-17]
>
> So shame on the Board and I actually do mean that. Because they have hurt not only the taxpayers because they had to pay the additional attorney's fees for three times in the Superior Court, but because they have … prejudiced Mr. Trupiano, through no fault of his own… [14T:25:20-24]

Trupiano then filed this Appeal, and Amaconn cross-appealed the Court's denial of its application for a retroactive rent increase.

ARGUMENT

I. AMACONN IS ENTITLED TO A RENT INCREASE THAT NOT ONLY PERMITS IT TO PAY ITS BILLS BUT ALSO MAKE A FAIR RETURN ON ITS INVESTMENT

Our Supreme Court has held, as a matter of constitutional mandate, "it is axiomatic that a rent control ordinance must permit an efficient landlord to realize a "just and reasonable return' on his property. Helmsley v. Borough of Fort Lee, 78 N.J. 200,

210 (1978) (quoting Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 568 (1975)); Mayes v. Jackson Township Rent Leveling Board, 102 N.J. 362, 367 (1986).

Accordingly, "absent…..states of emergency, landlords cannot be required to subsidize the housing needs of the tenants." Hutton Park Gardens, supra, 68 N.J. at 567. Forcing a landlord to subsidize tenants and therefore prohibiting it from "recouping funds to which he is rightfully entitled" imposes a burden that "would deprive an owner of property without due compensation" and is "confiscatory and unconstitutional". Property Owners Association of North Bergen v. North Bergen Tp., 74 N.J. 327, 336 (1977). An ordinance cannot indefinitely reduce a landlord's operating profit without being confiscatory. Mayes, supra,102 N.J. at 380. An ordinance defeats the purpose of rent control and is unconstitutional if it causes "steadily diminishing income". Mayes, supra, 102 N.J. at 381; see Helmsley, supra, 78 N.J. at 233 (Ordinance facially invalid when effect of ordinance projected diminishing income over a period of years without an adequate hardship-relief mechanism). "[A]lthough the Court sympathizes with those tenants who may be unable to afford higher rents, constitutionally it cannot compel particular landlords to subsidize tenants to their own detriment." Cromwell Associates v. Mayor and Council

of the City of Newark, 211 N.J. Super. 462, 471 (1985) (citing Property Owners Association of North Bergen, supra, 74 N.J. at 372).

Stating that a landlord must realize a 'just and reasonable return" on the property is "easy". Mayes, supra, 103 N.J. at 367. "Deciding what is a 'just and reasonable return" in a case can be difficult. Id. While that analysis may be nuanced, there can be no doubt that Trupiano seeks to deprive Amaconn a "just and reasonable return" on its property. Three judges found that the Board's determination of Amaconn's equity in the Unit and/or the Board's elimination or reduction of expenses paid by Amaconn were arbitrary and capricious. Indeed, the Board's most recent determination that Amaconn's equity in the Unit was $12,804.88 based upon an unsupported, illogical formula was preposterous and is not defended by Trupiano in this Appeal. That determination would perpetuate Amaconn's subsidization of the Unit, thereby defeating its constitutional entitlement to a "just and reasonable return" on the Unit.

Amaconn's testimony established its annual losses on the Unit for several years before its hardship application for a rent increase. 1T:11. Three judges properly rejected the Board's rulings that would continue Amaconn's losses by artificially and illogically decreasing Amaconn's equity in the Unit to a negligible amount and by

eliminating or reducing expenses paid by Amaconn in the normal course unrelated to the conversion of the Property into a condominium property. The outcome sought by Trupiano—to which the Board obliged—flouts the right of a landlord to receive a "just and reasonable return" on its property.

II. THE BOARD'S MONTHLY RENT INCREASE TOTALING $154.99 WAS ARBITRARY AND CAPRICIOUS

Although municipal decisions carry a presumption of validity, see Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (Law Div. 1998), aff'd, 328 N.J. Super. 343 (App. Div. 2000), arbitrary and capricious action is invalid and must be overturned. Worthington v. Fauver, 88 N.J. 183, 204 (1982). A challenger must show that the board engaged in "willful and unreasoning action, without consideration and in disregard of circumstances." Id. at 204 (quoting Bayshore Sewerage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd o.b., 131 N.J. Super. 37 (App. Div. 1974)). The "test is essentially one of rational basis." Id. "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of [its decision] are not supported by the record." Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 33 (2013). A "determination predicated on unsupported findings is the essence of arbitrary and capricious action." In re Boardwalk Regency Casino Corp., 180 N.J. Super. 324, 334 (App. Div., 1981), modified on other grounds, 90 N.J. 361 (1982). A reviewing Court must determine whether a board "followed statutory

guidelines and reasonably exercised its discretion." Medical Center at Princeton v. Tp. Of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199 (App. Div. 2001.

Here, the Board did not follow proper dictates under the law and the Ordinance and reasonably exercise its discretion. Abusing its discretion, its decisions were totally unsupported by the record. The Board contrived a minimal rent increase repugnant to law and the Ordinance. It destroyed Amaconn's equity in the Unit and unjustifiably reduced Amaconn's routine operating expenses, while Trupiano failed to provide any testimony or documents challenging Amaconn's equity calculation and expenses. The Board defied the instructions of two trial courts before a third judge issued a final ruling adjudicating the Rent Increase rather than remand to the Board for a third time and fourth set of hearings. Amaconn's application for a hardship rent increase was filed in 2017. Amaconn was forced to endure three sets of hearings spanning 5 years—only each time to be denied a proper rent increase that would support a "reasonable return". The Board transformed itself into Trupiano's advocate thus abdicating its powers as an impartial municipal decision-making body required to make decisions based only on the evidence before it.

A. Record Facts Demonstrating the Board's Arbitrary and Capricious Determination of Amaconn's Equity in the Unit

Amaconn purchased the Property in 1993 as an eleven-unit apartment building for $525,000.00. Da 37; 1T:13-19. The pro rata purchase price for the Unit was $47,727 ($525,000/11 units). The Unit occupies approximately 1,000 square feet, which is approximately 10% of the building. In 2002, Amaconn invested $1 million in the building for renovations to the apartments and common areas. 7T:38:8-38:24. The Unit specifically received $76,900.00 of capital improvements. 1T:6:14-16, 44:10-16, 5T:74:12-25 That sum, set forth in Mr. Metzger's Certification submitted with Amaconn's application, and supported by Amaconn's testimony, is undisputed.

Moreover, there is no basis in the record (or law) to dismiss the capital improvements to the Unit based upon their age, as the Board did. Capital improvements demonstrate real dollars invested by Amaconn in the Unit. Just as the purchase price for the Unit in 1993 is not nullified by age, neither are capital improvements. Both the purchase price, plus capital improvements, irrespective of their age, comprise Amaconn's equity in the Unit, adjusted for inflation.

Hoboken's assessment for the Unit in 2017 was $404,600.00, and application of the municipal equalization ratio of 74.18% resulted in an equalized fair market value of $545,483. The appraised market value of the Unit was $622,500, as set

forth in an appraisal submitted by Amaconn to the Board and testified to by Mucciolo, Amaconn's valuation expert. Notably, although ultimately the appraisal was not used by Amaconn to calculate its equity in the Unit, it demonstrates that Amaconn's equity in the Unit was substantially less than its appraised value.

Amaconn established that, in adjusting its $47,727 purchase price for the Unit and its $76,900 capital improvements to the Unit for inflation based upon the CPI over the period 1993-2017, the Unit's value is $197,600. No record facts support the Board's determination that Amaconn' equity in the Unit is only $12,804.88. As previously stated, the Board, through its chairwoman, contrived an irrational formula of comparing assessments and then using arbitrary unsupported numbers to further reduce equity—for the benefit of Trupiano. The Board's chairwoman compared assessments and tax payments without considering the equalization ratio and then arbitrarily determined that the Unit has a value of 25% of the other units before then further dividing that value by 41% to reach $12,804.88 of equity. See 10T:168-182.

The Board protected Trupiano, who was known to them, by fabricating a hardship increase based neither on record evidence nor the requirements of law, including its Ordinance. The Board contrived a rent increase acceptable to Trupiano by arbitrarily reducing Amaconn's equity to a negligible amount and disallowing routine expenses paid by Amaconn.

Trupiano's monthly rent increased from $675 to $723.41 over a 28-year period between 1993 and 2021 when the Board granted the $154.99 hardship increase that Trupiano seeks to defend. Da 36; 1T:33:25-34:1, 1T:47:27-48:1, 7T:89:20. The Board's ruling on Amaconn's equity in the Unit deprives Amaconn of any "fair return" and forces Amaconn to continue to subsidize the Unit and lose thousands of dollars every year for as long as rent control protects Trupiano.

B. Facts Demonstrating the Board's Arbitrary and Capricious Action in Reducing Amaconn's Management Fee

The Board arbitrarily reduced Amaconn's management fee from $150 to $100 per month. The uncontroverted testimony in the record establishes that management fee for units of this size range from $150-$200 per month. 7T:29:14-20. Amaconn paid $150 per month. 5T:27:7. For the Board to reduce the fee to $100 without any basis in the record to do so is arbitrary and capricious. Accordingly, the Trial Court properly increased Amaconn's monthly management fee to $150 per month.

Moreover, the Board's earlier action (before the Second Remand) in reducing Amaconn's management fee to 5% of the rent was likewise arbitrary and capricious. As held by Judge Costello, Amaconn presented testimony and records supporting that the management fee was actually incurred, actually paid, and consistent with the market rates. The Board's resort to an arbitrary rate of 5% of the rent based on unsupported "board precedent" and "independent research" was baseless.

Further, that Amaconn and Julip Properties may have common ownership is irrelevant. As held by Judge Costello, "some entity has to provide management services and Julip's rates were proven to be typically $150 per month for other clients in the same market." Da 20. There was no showing that Julip Properties did not provide the management services for the Unit, and that a monthly management fee paid by Amaconn (whether to Julip Properties or some other entity) is an unreasonable charge.

III. THAT AMCONN SOLD 10 OUT OF 11 UNITS IN THE BUILDING UPON CONVERTING IT TO A CONDOMINIUM PROPERTY DOES NOT BAR IT FROM EARNING A FAIR RETURN ON ITS INVESTMENT IN TRUPIANO'S UNSOLD UNIT.

Trupiano challenges Amaconn's right to a rent increase premised upon a "fair return" on its equity in the Unit by contending that Amaconn has no equity in the Unit (not even the $12,804.88 equity value held by the Board). Trupiano argues that Amaconn (i) is limited to its "return" in 2003 when, ten (10) years after purchasing the 11-unit Property, it converted the Property to a condominium property and sold every unit except the subject Unit; and (ii) must continue to suffer financial losses until Trupiano's protected tenancy ends (which may last another twenty (20) years during a protected forty (40) year period). These arguments, in nullifying any "fair return", turn both law and logic upside down. Trupiano ignores that his Unit was part

of an 11-unit building that Amaconn purchased in 1993 and was necessarily part of its then investment entitling Amaconn to a specific return on the Unit.

Preliminarily, that Amaconn's right to convert the Property into a condominium property was subject to Trupiano's protected status under the Tenant Protection Act (the "Act") does not bar a hardship application for a rent increase for that Unit. The Act enables Trupiano to remain a tenant in the Unit, but it does not immunize him from a hardship application for a rent increase during that period. The Act does not in any way thwart a landlord's right to earn a "fair return" under the Ordinance, provided the rent increase is not based upon increased fees from converting to a condominium.

The Act states in relevant part:

> In the case of a municipality subject to the provisions of this act that has a rent control ordinance in effect, a rent increase for a qualified tenant with a protected tenancy status…shall not exceed the increase authorized by the ordinance for rent-controlled units. Increased costs that are solely the result of a conversion, including but not limited to any increase in financing or carrying costs, and do not add services or amenities not previously provided shall not be used as a basis for an increase in a fair-return or hardship hearing before a municipal rent board or any appeal from such a determination. [N.J.S.A. 2A:18-61.52b.]

Thus, the Act does not preempt a rent control ordinance, and specifically a hardship application for increased rent seeking a "fair return", among other things. To the contrary, it defers to a rent control ordinance, provided that a hardship application is not based upon costs solely attributable to the conversion of the property to a condominium. It nowhere bars a hardship application for increased rent, nor the displacement of a qualified tenant who cannot pay the increased rent. In short, it does not, require a landlord to subsidize a qualified tenant's rent for a 40-year period and lose money every year—the outcome sought by Trupiano.

Trupiano contends that the Ordinance permitting a rent increase no longer applied once the Property was converted to a condominium property 10 years after Amaconn's purchase. That is foolish. Trupiano cannot exploit the conversion by claiming that the conversion defeats Amaconn's rights as landlord under a rent control ordinance. The Act merely preserved Trupiano's status as a protected tenant when the Property was converted to a condominium—and nothing more. It does not defeat a landlord's right to seek a rent increase under a rent control ordinance.

Further, in asserting that the Unit cannot be the subject of a rent increase based upon a "fair return", Trupiano speciously defines Amazon's "investment" as the Property minus his Unit. But the Property comprised 11 units, including his Unit, and Amaconn is entitled to a return on the entire Property. In 1993, when Amaconn purchased the

Property, it invested in the Property's 11 units, not any lesser number of units that several years later, if converted to a condominium, may entitle a tenant to protected status under the Act. Plainly, a purchaser, when investing in property, seeks a return on each of the units of the entire property, not just some of them. Amaconn invested in an 11-unit, not 10-unit, building. Trupiano's contention that the subject of the "investment" for measuring a "fair return" is the building of 10 units, and not all 11 units, is contrived and misguided. It is illogical for Trupiano to assert that his Unit is excepted as an "investment unit" (Db23). All units make up the value of a specific property.

As correctly held by Judge Turula, that Amaconn previously realized a return on 10 units that were sold upon the conversion of the Property to a condominium property is irrelevant. See 13T:65:18-20 ("Despite the defendant's argument the plaintiff made money on the other units, which is irrelevant. We are talking about this particular unit.") It does not negate that Amaconn did not realize any return on the sale of the unsold Unit.

Likewise, Trupiano's assertion that the "investment no longer exists" (Db23) is untenable. Conversion of property to a condominium does not destroy an "investment" in all units of that property. Even if the nature of the ownership of the property changes, the Property comprised of 11 units has always been an "investment"

whether in 1993 when the Property was purchased or in 2003 when the Property was converted to a condominium.[3] Amaconn obtained a return on 10 units upon selling them. That did not destroy its investment in the unsold Unit. Amaconn is entitled to a return on the Unit not sold upon the conversion—instead of continuing to suffer losses every year on the Unit. As held by Judge Turula, Amaconn's return relating to the 10 other units is irrelevant. Its prior sale of 10 units does not render Unit 11 any less an investment in real property that bars a "fair return" on that Unit to the owner.

Indeed, the folly of Trupiano's argument reveals itself if more than one unit was tenant-protected and not sold upon the conversion. Suppose, for example, 6 of 11 units ended up being tenant-protected and not sold. Does that mean that Amaconn's return is limited to only the 5 units that were sold, despite that the Property has 11 units? Amaconn's investment in the entire 11-unit Property does not vanish simply because the Property was converted into a condominium property, with certain units being sold.

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[3] The Property purchased in 1993 was an apartment building. That investment pre-dated (by several years) the conversion of the Property to a condominium property in 2003. Trupiano's focus regarding the purchase price of his Unit at the time of conversion (and the value of his Unit relative to the other units) is improper. All 11 units of the Property purchased by Amaconn were apartments, not condominium units, at the time of purchase.

That Amaconn made a return on 10 units is a non sequitur. It does not negate that it is also entitled to a "fair return" on the unsold Unit.

Amaconn is hardly seeking to "get out of the deal early so it can escape the regulations to which it agreed." (Db26). Pursuant to the Ordinance, Amaconn merely seeks to obtain a "fair return" relating to its ownership of the Unit—rather than continue to subsidize it and suffer mounting losses. In short, Trupiano cannot claim a protected tenancy for his Unit while also asserting that the Unit is excepted from a rent increase for a "fair return" simply due to the prior sale of other units in 2003. Trupiano cannot selectively cherry-pick. If he invokes protection under rent control laws, his Unit is not immune from a rent increase under those same laws. The proverb "you can't have your cake and eat it too" resonates here.

IV. ADJUSTMENTS FOR INFLATION WERE PROPERLY INCLUDED IN THE UNIT'S EQUITY FOR THE PURPOSE OF DETERMINING A FAIR RETURN ON THE UNIT.

Section 155-14 entitled "Appeal by landlord for a hardship rental increase" permits a landlord to apply for a rental increase:

> A. In the event that a landlord cannot meet his operating expense or does not make a fair return on his investment, he may appeal to the Rent Leveling and Stabilization Board for a hardship rental increase….

Section 155-1 provides the following definitions:

> EQUITY IN REAL PROPERTY INVESTMENT – The actual cash contribution of the purchaser at the time of closing of title and any principal payments to outstanding mortgages.
>
> FAIR RETURN – The percentage of return of equity in real property investment. The amount of return shall be measured by the net income before depreciation. A "fair" return on the equity investment in real property shall be considered to be 6% above the maximum passbook demand deposit savings account interest rates available in the City of Hoboken. The six-percent figure is provided to reflect the higher risk and lesser liquidity of real property investment in comparison to savings account investments.

While the Ordinance is silent as to whether an adjustment for inflation can be added to the calculation of a landlord's equity, this State's Supreme Court has mandated such an adjustment to ensure a "fair return" to the owner that avoids a confiscatory result to the owner. In Mayes, supra, the Supreme Court upheld the validity of two rent control ordinances adopted by Weehawken and Jackson Township entitling the owner to a "fair return" on its investment that were similar to Hoboken's Ordinance.

At issue in that case was Weehawken's ordinance that permitted a hardship increase if the "landlord cannot (a) meet operating expenses or (b) make a fair return on investment. The Weehawken ordinance defines a fair return on investment as up

to six percent above available passbook interest rates applied essentially to the owner's cash investment in the property." 103 N.J. at 366. A "fair return" means "the percentage of return on equity in a real property investment." Equity is determined by the "actual purchase price minus any and all existing liens on the property."

Also at issue in that case was Jackson Township's ordinance applicable to mobile-home rentals which permitted "hardship increases whenever rental and other income from operation of the park is insufficient to provide for interest payments on mortgages, reasonable and necessary expenses incurred in connection with the operation of the mobile home park" and "a return on the owner's actual balance of such investment in the mobile home park in an amount not to exceed seven and one-half percent." The ordinance did not define "actual balance of such investment," but the Board interpreted it "to mean the owner's actual cash investment in the park after deducting that portion of the owner's investment which has been financed through mortgages." 103 N.J. at 366.

Both ordinances (like Hoboken's Ordinance) used the return-on-equity standard. 103 N.J. at 367. Under both ordinances, allowable rent covers operating expenses, mortgage interest payments and a percentage of cash investment. The Supreme Court upheld the facial constitutionality of both ordinances using a return-on-equity standard, provided, however, that the "return on investment was not limited

to initial or cash investment and the original investment could be equated with current dollar values so as to assure a fair return." 103 N.J. at 368 (citing Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App.3d 280, 289, 195 Cal.Rptr. 825, 831 (Ct.App. 1983)). The Supreme Court endorsed a California Supreme Court decision stating that the constitutionality of the return-on-equity standard is dependent upon those who administer it to avoid confiscatory results and that "no formula may indefinitely freeze the dollar amount of a landlord's profits without eventually causing confiscatory results." 103 N.J. at 370 (citation omitted).

As for Jackson's ordinance, the Supreme Court held that that ordinance, as applied, was constitutional because the trial court "adjust[ed] the investment base of the operator to reflect the owner's actual cash investment updated for inflation." 103 N.J. at 371. The Court adopted the trial court's holding that the ordinance would be confiscatory "to the extent that it did not adjust the owner's investment for inflation." It emphasized that "it was precisely this ability to adjust that original investment for inflation that enabled the ordinance to survive the facial challenge." 103 N.J. at 372 (citing Cotali, supra, 148 Cal. App.3d at 288-90, 195 Cal.Rptr. at 831-32). Thus, Jackson's ordinance was constitutional only because, as applied, the owner's investment for the purpose of determining a return-on-equity was updated for

inflation, and a cap of 7 ½ percent return on an owner's adjusted investment is not confiscatory.[4]

The principles enunciated by the New Jersey Supreme Court mandating inflationary adjustments to an owner's equity are consistent with the holdings in two unreported decisions. In Rosato v. City of Jersey City Rent Leveling Board, W-010254-89 (Pa 17), the Jersey City Rent Leveling Board ruled in 1989 that the owner's equity in the property was limited to $17,601.00 based upon the owner's purchase of the property in 1958 for $17,600 and transfer of the property to a family member for $1 in 1984. The Board rejected the owner's argument that the owner's equity had to be adjusted for inflation given the passage of time from the original purchase in 1958. On appeal to the Superior Court, the Honorable Dorothea O'C. Wefing, J.S.C. (before she was elevated to the Appellate Division, and then the Supreme Court), held that:

> The Jersey City Rent Leveling Ordinance provides, as it must, that owners must receive a fair return on their equity or their investment in the property. That a landlord receive a just and reasonable return on his investment is a matter of constitutional mandate …
>
> It flies in the face of logic and fairness to conclude that an owner's equity in a building for purposes of computing a fair return under a rent control ordinance is restricted to the original purchase price together with any

[4] As for Weehawken's ordinance, no challenge was made with respect to updating the investment for inflation. The Court determined that the record did not support a confiscatory effect.

> capital improvements that may have been made. Such an approach ignores the appreciation which occurs over time and inures to the owner's equity. (emphasis added)

Judge Wefing cited the unreported Appellate Division case of Saltzman vs. West New York, App. Div. A-05782-84T1 (Decided March 30, 1987) (Pa 21) which also required a Board to adjust an owner's equity for inflation to ensure a "fair return". In that case, the ordinance at issue permitted a rent increase if the owner was not earning a "fair return" on its "equity in the real property investment" and "equity" was defined as the "actual purchase price minus any and all existing liens on the property plus any [mortgage payments]." That Court, citing Mayes, held that the Board must adjust for inflation if necessary to enable a "just and reasonable return":

> What is required is that the rent control ordinance be written in such a way that the rent control board is afforded sufficient flexibility so that it may increase the landlord's original investment base to adjust for inflation if doing so is necessary to assure the landlord a just and reasonable return on the property.

It is clear that the silence of Hoboken's Ordinance regarding whether an inflationary adjustment to an owner's equity is permitted does not bar such an adjustment. Contrariwise, such an adjustment is required as a matter of law if necessary to ensure a "just and reasonable return". Indeed, neither Jackson's ordinance (at issue in Mayes) nor West New York's ordinance (at issue in Saltzman)

expressly permitted inflationary adjustments. It is fundamental, however, that an inflationary adjustment to an owner's equity is required to avoid depriving the owner of a "just and reasonable" return on the property. That is the case here. The owner purchased the Property containing 11 units, including the subject Unit, in 1993 for $525,000. Judge Turula properly adjusted the pro rata purchase price of the Unit equal to $47,727 ($525,000/11 units) for inflation based upon the CPI. Limiting the owner's equity to the initial $47,727 purchase price from 1993 without any adjustment for inflation defies the reality of the value of that investment (in today's dollars) and artificially lowers the owner's equity preventing any "reasonable return".

Moreover, that the Ordinance permits an automatic inflationary increase on rent does not bar a separate "fair return" premised upon an inflationary adjustment to the owner's equity. An automatic CPI increase to rent is not the same and does not substitute for a fair return relating to an owner's equity. Indeed, in Mayes, the two ordinances considered by the Supreme Court permitted automatic inflationary increases, tax surcharges for tax increases and a hardship increase. Despite the automatic inflationary increase to rent, the Supreme Court still held that an owner is entitled to a "fair return" after an inflationary adjustment to the owner's equity. Plainly, an automatic inflationary increase to rent may not preserve a fair return. The owner's right to apply for a rental increase premised upon a fair return in an entirely

separate right based upon an analysis specific to the determination of a "fair return".

V. CAPITAL IMPROVEMENTS WERE PROPERLY INCLUDED IN THE UNIT'S EQUITY FOR THE PURPOSE OF DETERMINING A FAIR RETURN ON THE UNIT.

Judge Turula correctly included $76,900 in capital improvements to the Unit in determining the Unit's equity. By contending that capital improvements cannot be part of an owner's equity, Trupiano proffers an artificially low equity.

However, notwithstanding Trupiano's contrary contention, the Ordinance does not, as a matter of law, bar the inclusion of capital improvements in the owner's equity to ensure an owner's "reasonable return". Rather, the Ordinance merely states that a capital improvement is not an operating expense. See 155-14(A(4) ("Operating expenses shall not include depreciation, amortization of debt service or capital expenditures …"). Amaconn did not include its capital improvement in its operating expense, just separately in its calculation of equity for determining a "fair return".

Disregarding capital improvements for calculating an owner's equity makes no sense. A capital improvement is ordinarily understood to be part of an owner's investment and resulting equity. The only proper way to calculate an owner's equity for the purpose of ensuring a "fair return" to the owner is to include its entire cash investment that would include capital improvements. Indeed, it would be inimical to a "fair return" to exclude a capital improvement in assessing a "fair return". Just as

the Supreme Court held that inflationary adjustments are necessary to determine a "fair return" and avoid a confiscatory result (even if (i) not stated in the definition of "equity" in an ordinance; and (ii) a CPI adjustment to rent is allowed), the same applies for capital improvements. That an ordinance permits both a CPI adjustment to rent and a capital improvement surcharge does not bar an inflationary adjustment or inclusion of a capital improvement in the owner's "equity" to ensure a "fair return" under a hardship application for a rent increase.

As stated by this State's Supreme Court, "we have insisted that the only true test of the validity of an ordinance will be in its application in particular cases." Mayes, supra, 103 N.J. at 377. "The ultimate question will always remain whether the ordinance, as applied, has a confiscatory effect upon the property." Id. at 377. As previously stated, the Supreme Court upheld the validity of Jackson's ordinance because "it was precisely this ability to adjust that original investment for inflation that enabled the ordinance to survive the facial challenge." Id. at 372. Whether an inflationary adjustment, or the inclusion of a capital improvement, to an owner's equity, this same fundamental principle applies. As a matter of law, denying the cost of a capital improvement to an owner's equity to deprive an owner of a "fair return" on its total cash investment is impermissible.

VI. AMACONN'S EQUITY IN THE UNIT WAS NOT BASED UPON ITS APPRAISED MARKET VALUE AS A CONDOMINIUM.

Trupiano falsely states that Amaconn's equity in the Unit was based upon its market value as a condominium. See Db1 (Incorrectly stating that "rents in Hoboken must now be linked to a property's *value* as real property in the real estate market"); Db28 (Incorrectly stating that landlord's actions "push[ed] the rent leveling board to go outside of its ordinance and link the rent to the unit's market value as a condominium"). As previously stated, the calculation of Amaconn's equity was based upon the average of (i) the $47,727 purchase price of the Unit, combined with $76,900 in capital improvements to the Unit, adjusted for inflation over a twenty-four (24) year period (1993-2017); and (ii) Hoboken's unequalized assessment of the Unit. It was not at all based upon any appraised market value of the Unit, as erroneously stated by Trupiano, although Amaconn presented an unrebutted appraisal to the Board that the Unit, accounting for Trupiano's protected status, had an appraised value of $622,500. Although not used to calculate Amaconn's equity, the appraisal underscored that Amaconn's equity was substantially less than the appraised value.

Accordingly, any reliance by Trupiano upon the unreported decision of Bishop Property Management v. City of Jersey City Rent Leveling Board, 2020 WL 6553789 (App. Div. November 9, 2020) to bar a rent increase based upon a "fair return" of

Amaconn's equity in the Unit is misplaced. The Appellate Division there merely held that Jersey City's ordinance did not allow owner's equity to be calculated based upon the property's appraised market value. Here, the Unit's appraised value ($622,500) was not used to determine the owner's equity. Moreover, Hoboken's assessment of the Unit, as testified to by Mucciolo, was based on the replacement "cost" method, and such assessment was reduced thirty percent (30%) due to Trupiano's protected tenancy based upon Mucciolo's review of the property record card for the Unit and information from Hoboken's assessor. 6T:20:9-21:13; 30:9-14; 33:20-24; 35:17-19; 40:17-22, 44:18, 54:20-23.

Notwithstanding Trupiano's contrary statements, Hoboken's assessment was not based upon the Unit being a condominium with no protected tenancy. Further, in 2016, Hoboken's equalization ratio was 74.18%, equating to an adjusted value of $545,430 for the Unit.

Ultimately, Amaconn did not calculate its equity in the Unit based upon either Hoboken's equalized assessment ($545,430), nor the Unit's appraised value ($622,500), and the Court did not adopt either. It is simply false that Amaconn's equity in the Unit is "linked" to its appraised value as a condominium. The Unit's appraised value was not used to calculate a rent increase based upon a "fair return".

What remains true is that the "method" used by the Board to determine Amaconn's equity in the Unit as $12,804.88 was preposterous. As previously stated, the Board (through its chairperson) adopted a completely irrational formula to arrive at an equity value of $12,804.88. That formula, ostensibly contrived to continue rent for Trupiano with a negligible increase and deprive Amaconn of any "fair return" on its equity, was indefensible (and has not been defended by Trupiano).

VII. AMACONN'S MANAGEMENT FEES WERE PROPERLY INCLUDED IN DETERMINING THE RENT INCREASE AND ARE SEPARATE FROM THE CONDOMINIUM FEES PAID BY AMACONN.

Trupiano argues, for the first time in this Appeal, that the condominium fees paid by Amaconn for the Unit are duplicative of Amaconn's management fees charged to him, and thus cannot be used to determine any rent increase. See Db32-33 ("Condo fees should not have been included at all if management fees were included"). However, because Trupiano did not previously raise that argument at the trial level, it cannot be considered for the first time in this Appeal. See State v. Robinson, 200 N.J. 1, 20 (2009) ("[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Even if not procedurally barred, Trupiano's argument is unsupported by the record. Trupiano does not state what specific condominium fees paid by Amaconn were "duplicative" of Amaconn's management fees based upon an "additional layer of management" (Db32). Trupiano does not cite any record evidence that any of the cost(s) charged by the condominium association and management company were the same. Indeed, fundamentally, the condominium association manages the common areas of the Property, and Amaconn's management company manages the interior of Unit 11. 5T:127:2-6, 127:16-128:3, 129:13-130:1, 130:9-17. Amaconn's fees covering the Property's common areas and its fees covering the management of the Unit's interior are distinct and not "duplicative". No record evidence to the contrary exists.

It does not make any sense to contend that condominium fees should be excluded when Amaconn, as the Unit's owner, is responsible for paying its pro rata share of such fees. A condominium fee is a hard cost paid by Amaconn. This is akin to the illogical argument by the Board that the increased fee charged by the condominium association for the removal of garbage should not be an allowable cost to Amaconn. Judge Turula held that this increased cost resulted from Hoboken's ordinance changing the time that the garbage could be brought to the street, and that whether the owner was a condominium association or not, the cost would still be

incurred and passed on to the condominium owner or tenant. The Court held that the additional expense was outside Amaconn's control, and that Amaconn, as the Unit's owner, was required to pay it.

Plainly, Amaconn (and its managing company) and the management company hired by the condominium association are not "one in the same" but have different roles and responsibilities. No legitimate reason exists to exclude the costs paid by Amaconn to the condominium association, nor the costs paid to Amaconn's management company relating to the Unit's interior.

VIII. A SPECIAL ASSESSMENT BY THE CONDOMINIUM ASSOCIATION WAS NOT INCLUDED IN AMACONN'S EXPENSES

Trupiano's statement that a special assessment in 2016 by the condominium association was included as an allowable expense is erroneous. No support exists for that conclusion, and Amaconn's costs, as testified to by Mary Ann Metzger, omitted any special assessment. 3T:57:4-11, 58:1-59:10.

IX. THE TRIAL COURT ERRED IN NOT MAKING THE RENT INCREASE RETROACTIVE TO AUGUST 1, 2019

Section §155-14A of the Ordinance provides that "[i]t shall be within the discretion of the Board to fix the effective date of any approved rental increase to be at any reasonable time as determined by the Board." Amaconn filed its hardship application on July 19, 2017. During five years of hearings finally concluding on

August 11, 2021, Amaconn and its counsel appeared over a dozen times before the Board either in person or by Zoom. A vast majority of the meetings ran past midnight and were drawn out because of the Board's obstructive conduct. Ultimately, two remands later, and three sets of hearings later, the Court entered the Rent Increase on September 30, 2022, more than five (5) years after the hardship application was filed.

Absent the retroactivity of the Rent Increase, Amaconn confronts continued losses from 2017-2022. Notably, the Board utilized Zoom and conducted hearings during the pandemic. Amaconn sought a retroactive Rent Increase to August 1, 2019, which gave the Board the benefit of the doubt for a one-year delay caused by Covid-19.

After Amaconn filed its application on July 19, 2017, the first Board hearing did not occur until September 27, 2017, followed by hearings on October 25, 2017 and December 13, 2017. Trupiano appealed the Board's decision, and on May 25, 2018, Judge Jablonski found the Board's action arbitrary and capricious and motivated by personal feelings toward Trupiano.

The First Remand hearing occurred 6 months later on October 24, 2018, followed by a second set of hearings on November 28, 2018 and January 9, 2018, the latter date being when the Board decided Amaconn's application. Amaconn appealed the Board's decision to the Superior Court.

On November 20, 2019, Judge Costello issued a scathing decision remanding the case for a second time to the Board due to its arbitrary and capricious rulings, particularly as to the Board's determination of Amaconn's equity in the Unit. The Board did not schedule a third set of hearings until March 20, 2020, four months after Judge Costello's ruling. The Board then scheduled its next hearing on April 14, 2021, eleven months later. Hearings followed on June 9, 2021, June 23, 2021, and August 11, 2021, four years and one month from the filing date of the application.

The Board heard testimony that Amaconn had been subsidizing the Unit for several years, but that did not matter in determining a rent increase of only $154.99. In any event, towards the conclusion of the penultimate hearing on June 23, 2021, Amaconn's counsel asked the Board to consider retroactivity. 12T:279:12-13, 281:25-282:2. The Board Chairwoman asked the Board's attorney to prepare an opinion and stated that the Board would be governed by its attorney's advice. 11T:289:5-7, 291:8-22.

At the August 11, 2021 hearing, the Board's attorney advised the Board that retroactivity in hardship cases is legally permissible. However, the Board refused to consider a retroactive increase on the false basis that Amaconn had not briefed the issue. 12T:30:11-12, 32:7-15, 34:2. At the prior hearing, the Board did not request, nor permit, briefing from the parties and in fact stated at the June 23, 2021 hearing

that it would decide the issue based upon the Board's counsel's opinion. However, the Board's attorney advised the Board that it could reject any retroactive rent increase by "tak[ing] the lawyerly way out and not deal[ing] with it" as the issue was not property presented to the Board by Amaconn. 12T:25:18-21, 26:5-8, 30:5-10. The Board did so even though Amaconn was neither asked, nor permitted, to address the retroactivity of any rent increase.

Judge Turula criticized the Board's attorney for advising the Board that it need not "not deal with" the issue of retroactivity because it was not addressed by the parties after the Board advised it would rely upon its attorney's advice. 13T:32-33. The Judge was "surprised by [the lawyer's] comments" and stated it was wrong for the Board to take the "bait of the lawyer who said, here we can the lawyerly things and get out of it." 13T:32:19-33:4.

The issue of retroactivity is not new to cases involving rent increases. Retroactive increases are warranted where a hardship application is delayed through no fault of the applicant. Heyert v. Taddese, 431 N.J. Super. 388, 433 (App. Div. 2013); Orange Taxpayers Council v. Orange, 83 N.J. 246, 259 (1980) (Making hardship rent increase retroactive "to the date an apartment was certified to be in compliance with the property codes adequately compensated owners for 'regulator

lag'"); Silverman v. Rent Leveling Bd. of Cliffside Park, 277 N.J. Super. 524, 533 (App. Div. 1994), certify. denied, 139 N.J. 443 (1995) ("Hardship rent increase should have been made retroactive to the date of the application in light of the municipality's undue delay in processing it"). Conversely, retroactive application should not be granted to a party who is a wrongdoer or otherwise has unclean hands. Borough of Princeton v. Bd. of Chosen Freeholders of Mercer County, 169 N.J. 135, 158 (2001).

Here, that there were three sets of hearings before the Board was not Amaconn's fault. Three times, the Board was arbitrary and capricious in not complying with the law and Ordinance. Amaconn should not be penalized by being forced to suffer losses from 2017-2022 until Judge Turula adjudicated the Rent Increase rather than remand for a third time and cause Amaconn to suffer further undue delay.

Rent control ordinances cannot be confiscatory as applied. Brunetti v. Borough of New Milford, 68 N.J. 576, 595 (1979). Nor can a landlord be forced to subsidize its tenant's housing needs. Troy Hills Village v. Township Council of Parsippany-Troy Hills Tp., 68 N.J. 604, 620 (1975). Not granting a retroactivity increase forces Amaconn to subsidize the Unit during the totally unnecessary five- year period that it took for Amaconn to obtain a proper rent increase.

Moreover, Trupiano has been on notice of a rent increase since Amaconn filed its application in 2017. For five years, Trupiano has been the beneficiary of the Board's failure to carry out its role as a neutral, impartial, decision-making body that decides applications based upon facts in the record and law. Amaconn should be made whole by not suffering the consequences from the Board's derelictions of its responsibilities.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Rent Increase totaling $1,717.18 be affirmed in all respects and be made retroactive to August 1, 2019.

Respectfully Submitted,
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By: /s *Owen Lipnick*
OWEN LIPNICK

Dated: April 3, 2023

AMACONN REALTY, INC, Plaintiff/Respondent/Cross Appellant, v. THE RENT LEVELING AND STABILIZATION BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO, Defendants/Cross Appeal Respondents/Appellant.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A- 00434-22 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY Docket No. Below: HUD-L-3584-21 Sat Below: HON. JOSEPH TURULA, J.S.C.

RESPONDENT RENT LEVELING BOARD OF THE CITY OF HOBOKEN'S BRIEF IN OPPOSITION TO APPEAL

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PRELIMINARY STATEMENT

This matter involves a series of Rent Leveling & Stabilization Board determinations within the City of Hoboken. In the trial court's decision dated September 30, 2022, the court found that the decision made by the Rent Leveling & Stabilization Board of the City of Hoboken (referred to as the "Board") regarding a hardship application was arbitrary, capricious, and unreasonable. Instead of remanding the matter back to the Board for additional proceedings, the trial court imposed its own decision on the involved parties by determining the rent for the subject premises. Defendant/Appellant Jeffry Trupiano ("Trupiano") appeals this determination and Plaintiff/Respondent/Cross Appellant Amaconn Realty, Inc. ("Amaconn") cross appeals with regard to Defendant/Respondent, the Rent Leveling & Stabilization Board of the City of Hoboken's (the "Board") decision on Amaconn Realty, Inc.'s hardship application. DA 3-8.

At the core, this case revolves around equity in the face of rising levels of gentrification along the Hudson River in New Jersey. Mr. Trupiano, a tenant who is protected by a low-income housing regulation, the Tenant Protection Act, has sought to keep his monthly rent at an affordable level since the early 1990s so that he may avoid relocating out of the area. Amaconn, his landlord, submitted a hardship application with the Board with the aim of increasing Mr.

Trupiano's monthly rent to achieve a fair return on their investment as defined by the Hoboken Rent Control Ordinance. In its application, Amaconn cited to rising costs such as property taxes and condominium association fees, which are also associated with the gentrification phenomenon, as the reason behind the need to increase Mr. Trupiano's monthly rent. The Board, meanwhile, has been placed in the increasingly unenviable position of balancing the competing interests of both parties to achieve an equitable and just result. Through its laborious efforts over the years, the Board respectfully submits that it has achieved equity in this case in rendering all of its decisions in a difficult situation and has not acted in an arbitrary and capricious manner. As such, the Board respectfully requests that this Court reverse the determination of the trial court.[1]

PROCEDURAL HISTORY

This matter began in 2017 with Amaconn's initial Hardship Application, submitted to the Board pursuant to §155-14 of the Hoboken Code.

The Board held three separate hearings from September through December 2017 regarding Amaconn's hardship increase application. See 3T at 5:1-3. On December 13, 2017, the Board granted Amaconn's application and increased Trupiano's rent. See id. at 5:14-16. Trupiano appealed the Board's

[1] In the alternative the Board seeks a reversal of the trial court's decision setting a specific rent since procedurally the matter should have been remanded to the Board for further proceedings.

decision with the Superior Court of New Jersey, Law Division before Hon. Jeffrey Jablonski, J.S.C., under docket no. HUD-L-000386-18.

The court agreed with Trupiano and found that the Board acted arbitrarily, capriciously, and unreasonably. See id. at 14:24-25, 15:1-3. The court remanded the matter back to the Board. The Board reconsidered the matter pursuant to the instructions of Judge Jablonski on October 24, 2018 and November 28, 2018. After conducting the October & November 2018 hearings, the Board passed a resolution granting a hardship rent increase to Amaconn. DA-83. A few months later, Amaconn appealed the Board's determinations, asserting that the hardship increase of $105.04 per month was arbitrary. DA-9.

On November 20, 2019, the Hon. Mary Costello, J.S.C. found that the Board's determination regarding the unit's tax liability was not arbitrary or capricious, but well-reasoned and supported by the testimony of Amaconn's witness and caselaw. Id. Judge Costello upheld the Board's decision in part, and remanded in part. Id. The issues for the Board's reconsideration were garbage collection & tax preparation fees, the management fee, and the impact of property improvements, market conditions, re-assessments, and inflation on Amaconn's equity in Trupiano's unit. DA-20-22.

Due to the prolonged impact of the COVID-19 pandemic, the Board conducted six meetings spanning from March 2020 to August 2021. DA- 89.

These meetings were held to address the matters outlined in Judge Costello's instructions. This time, the Board awarded Amaconn $1,200 in management fees, $5,648.05 in condo fees, and an $800.31 annual return on equity, as opposed to the $419.35 in management fees, $5,772.73 in condo fees, and an $1,059.19 annual return on equity awarded previously. Id. Thereafter, on September 13, 2021, Amaconn appealed the Board's decision to the Hon. Joseph Turula, J.S.C.

On September 20, 2022, Judge Turula held that the board had acted arbitrarily and capriciously and set the rent on the unit at $2,400 per month. Mr. Trupiano appealed Judge Turula's decision to this Court. DA-8. In its Notice of Appeal, Amaconn cross-appealed the same Order.

COUNTERSTATEMENT OF FACTS

Defendant/Appellant Jeffrey Trupiano ("Mr. Trupiano") has resided as a tenant in Unit 11 at 703 Park Avenue, Hoboken, New Jersey (the "Unit" or "Mr. Trupiano's Unit"), a property subject to the Hoboken Rent Control Ordinance ("Ordinance"), since approximately 1990-91.1T73:9-10. In 1993, Plaintiff/Respondent Amaconn Realty Inc. ("Amaconn"), owned by Joseph Metzger ("Metzger"), purchased 703 Park Avenue, an eleven-unit building in Hoboken, New Jersey, for $525,000. 1T5:19. Beginning in 2001, the units in the building were converted into condominiums. 1T20:5-6.

Unit 11, the apartment occupied by Mr. Trupiano, stands out as unique within the building. It has not undergone renovation and has remained occupied by a long-term tenant, resulting in rent increases that align with inflation rather than the local real estate market. Moreover, the uniqueness of Unit 11 extends to the absence of a deed, as Amaconn has never produced one for that specific unit. The only deed provided by Amaconn was for the entire building. DA-93.

Until early 2017, Amaconn had minimal interaction with Mr. Trupiano's unit. However, the City of Hoboken conducted an inspection, revealing multiple health and safety violations that caused the apartment to fail. DA-69. Amaconn had to address various issues, including window recalibration, carbon monoxide detector installation, smoke alarm replacement, stove repair, kitchen faucet fixing, and door spring repair, in order to bring the unit up to code. Id. The city also mandated the installation of new electrical outlets, a security chain, and floor patching. Amaconn took around two weeks to rectify these issues and comply with Hoboken's safety standards. Id.

The following month, an appraiser sent by Amaconn entered Mr. Trupiano's apartment and took photographs, leaving Mr. Trupiano puzzled about the purpose until May 2017. On May 22, 2017, Amaconn filed a hardship increase application with the Board pursuant to Section 155-14 of the Rent Control Ordinance ("RCO"). DA- 43-44.

The Board held three separate hearings from September through December 2017 regarding Amaconn's hardship increase application. See 3T, at 5:1-3.

A. September 27, 2017 Meeting.

At the first meeting on September 27, 2017, Joseph Metzger ("Mr. Metzger"), the owner of Amaconn, testified that in 1993 he purchased 703 Park Avenue, an eleven-unit building in Hoboken, New Jersey for $525,000. See 1T, at 6:8-10. After completing major renovations on the building and converting the units into condominiums, he sold ten of the eleven units and the only remaining unit that Amaconn presently owns in the building is the unit where Mr. Trupiano currently resides. Id. at 6:14. Mr. Metzger testified that he receives an annual gross rental income from Trupiano's unit in the amount of $8,387. Id. at 6:26. Specifically, Trupiano pays a monthly base rent of $574.41 and a tax surcharge of $149, collectively equaling $723.41 per month. Id. at 109:23. Mr. Metzger testified that his 2016 operating expenses for the unit include: (1) $6,275 in property taxes; (2) $5,722 in condominium fees, which includes water and sewerage; (3) $634 in insurance payments; (4) $1800 in management fee payments to Julip Properties Inc. ("Julip"); and (5) $25 in annual registration fees to the Hoboken Rent Leveling and Stabilization Office. Id. at 105:3-9.

Collectively, Amaconn's operating expenses in 2016 were $14,506. Id. Mr. Metzger subtracted his gross annual income from his operating expenses and determined that he operated at a loss of $6,119 in 2016. Id. In support of these calculations, Amaconn provided copies of several documents to Mr. Trupiano and the Board, including: (1) Amaconn's hardship application; (2) the deed for 703 Park Avenue; (3) the code compliance certificate; (4) property tax bills; (5) insurance invoices; (6) property management invoices; and (7) copies of check from Amaconn to the management company. Id.

The discussion then transitioned to a calculation of equity. Id. at 87. Initially, Amaconn's counsel proposed a novel method for determining equity, which the Board unanimously declined to adopt by way of motion. Id. Instead, the Board chose to utilize the traditional definition of equity in real property, which pursuant to Section 155-1 of the Ordinance is "[t]he actual cash contribution of the purchaser at the time of closing of title and any principal payments to outstanding mortgages." Id. After the purchase price is ascertained, that number must be multiplied by 6.25% to determine the equity that will be applied to the property. Recognizing that the Board was not going to accept his novel approach, Amaconn's counsel implored the Board to take the original purchase price of the building ($525,000) and to divide that by the number of units in the building (eleven). Id. at 8:5-20-22. Amaconn's counsel made this

recommendation because there was no mortgage on the property, and since Amaconn purchased all eleven units together, the only applicable purchase price is $525,000.[2] Id. at 17. He then asked the Board to add to the calculation $76,990 for renovations that he completed on the unit, which the Board refused to do since it found the $76,990 should be handled as a capital improvement. Id. at 44:3-6.

As an alternative, Amaconn argued that, at the very least, the equity should be $47,727 multiplied by 6.25%. Id. at 112:25-26. However, some of the Board members took issue with the calculation. Specifically, Board Chairman Michael Lenz ("Mr. Lenz") put on the record that he believed that $47,727 was too high as a share of the value because he did not believe that 1/11th of the purchase price was attributable to a unit with a long- time tenant. Id. at 101:21-32. He further stated that half of the $47,727 was a reasonable number in the absence of any other information. Id. He suggested that equity be set at $47,727 divided in half but he proposed that other Board members comment and weigh his suggested approach. Id.

Instead of deciding this issue the Board discussed expenses. Specifically, Trupiano's counsel expressed that she was concerned with the charge of management fees since Mr. Metzger also owned the management company,

[2] $525,000 divided by eleven equals $47,727.

Julip Properties. Id. at 55:4-6. In addition, Trupiano's counsel took issue with the $5,772 condo maintenance fee check because there were no bills submitted by the condo association to the landlord to demonstrate that the amount charged by the association was actually expended. Id. at 61:4-25. The Board adjourned the meeting until October 26, 2017.

B. October 26, 2017 Meeting.

At the October 26, 2017 hearing, the Board spent a substantial amount of time deliberating the question of equity. See 2T. Notably, several Board members thought that Trupiano's unit had less value than other units because he is a protected tenant under the Tenant Protection Act ("TPA") and the Ordinance. See id. Trupiano's counsel argued that the actual value of Trupiano's unit should be zero. Id. However, the Board determined, upon the advice of counsel, that if the value of the unit was determined to be zero because of the Ordinance, then the Ordinance would be confiscatory and would violate State law. Id. at 14:1-6. The Board did not, however, make a final determination regarding equity at the October 26, 2017 meeting.

Once again, Trupiano's counsel disputed the management fees on the grounds that Amaconn did not provide a detailed breakdown of these fees. Id. at 41:22-26. Additionally, for the first time, Trupiano's counsel argued that the

condominium fees should not be passed along to Trupiano because he is a protected tenant under the TPA. The TPA sets forth in pertinent part:

> In the case of a municipality subject to the provisions of this act that has a rent control ordinance in effect, a rent increase for a qualified tenant with a protected tenancy status . . . shall not exceed the increase authorized by the ordinance for rent-controlled units. Increased costs that are solely the result of a conversion, including but not limited to any increase in financing or carrying costs, and do not add services or amenities not previously provided shall not be used as a basis for an increase in a fair-return or hardship hearing before a municipal rent board or on any appeal from such determination.

N.J.S.A. 2A:18-61.52(b) (emphasis added).

In reply, Amaconn's counsel noted that condominium fees were costs that were passed onto all unit owners for common building items such as water and sewerage, building insurance, maintenance to the building and snow removal. Amaconn's counsel explained that these fees are not costs that result from a condo conversion but instead are necessary building operating expenses. Id. at 16:1-12. The Board accepted this argument. Without making any final determinations, the Board adjourned the meeting until December 13, 2017.

C. December 13, 2017, Meeting.

At the December 13, 2017, hearing, the Board determined, after reviewing relevant documents, that the square footage of Trupiano's unit was 9.4% of the square footage of the entire building. See 3T, at 22:1-3. The board divided

$525,000 by 9.4% and concluded that it would use $49,353 to determine equity. Id. at 37:12-16. The Board then agreed that they would divide the $49,353 figure by two (in favor of Trupiano) and multiply that number by .0625%, which equals equity of $1,542.18. Id. at 63:4-6.

The Board then moved on to a discussion regarding expenses. The Board contemplated different options regarding the monetary amount that should be imposed on Trupiano for management fees. One Board member suggested that the management fee should be 5% of the actual yearly rent that is paid. However, the Board ultimately voted to amend the management fee by reducing the $1800 per year to $900. Id. at 96:14-17.

Ultimately, the Board approved Amaconn's hardship application utilizing the following calculation:

1.	Taxes:	$6,275
	Condo Fees:	$5,772
	Insurance:	$634
	Management Fees:	$900
	Registration:	$25
	Expenses Total:	**$13,606**

PLUS (+) Equity

2.	Equity:	$1,542.18
	Equity + Expenses =	**$15,141.18**
3.	Income:	$8,387
	Expenses – Income =	**$6,761 (Deficit)**
4.	Monthly Deficit:	$563.43

Base Rent:	$574.41
New Base Rent:	$1,137.84

D. Before the Hon. Jeffrey Jablonski, J.S.C. in 2018.

Trupiano appealed the Board's decision with the Superior Court of New Jersey, Law Division before the Hon. Jeffrey Jablonski, J.S.C., under docket no. HUD-L-000386-18. Trupiano argued that the Board acted arbitrarily and capriciously by ignoring his status as a protected tenant. See 4T, at 3:1-4. He further argued that he did not receive any new services or amenities as a result of Amaconn's condominium fees and that the Board disregarded its own ordinance by failing to discuss the quality of services rendered by the landlord in maintaining and operating the unit. See id. at 6:12-19.

The court agreed with Trupiano and found that the Board acted arbitrarily, capriciously, and unreasonably. See id. at 14:24-25, 15:1-3. The court remanded the matter back to the Board and specifically ordered that the Board engage in:

> . . . further consideration and proper fact finding. And for a proper assessment of the consideration of the increase in light of the statute that will control in a tenancy classified and acknowledged is protected. Specifically, an analysis as to how those costs which are to be passed on to the tenant represent services or amenities no previously provided, will be specifically considered and addressed on the record. That's the decision of the Court . . .

[See id. at 21:10-19.]

E. Remand to the Board 2018.

The Board reconsidered this matter on October 24, 2018 and November 28, 2018. During the October 24, 2018 hearing, Amaconn relied on the hardship application from May 22, 2017. See 5T, at 15:10-13. Thus, the costs, expenses and relief Amaconn sought did not change. See id. However, the Board carefully considered whether each operating expense in Amaconn's application was a cost that was passed on to Trupiano because of his unit's condominium conversion. In support of their consideration, Board heard testimony from the same persons that had testified during the 2017 hearings.

Amaconn relied heavily on the testimony of MaryAnn Metzger who testified that she is the bookkeeper and "financial person in the office" who put together the majority of the documents in the hardship application. See id. at 18:17-24. Metzger testified that the gross annual income from Trupiano's apartment was $8,387.00, the property taxes for 2016 were $6,275.00, and the annual condominium fees for this particular unit were $5,772.00. See id. at 19:13-20:4. Metzger further testified that the real estate taxes for the subject property paid to the City of Hoboken for this unit alone were $6,275.00 and that the City's Assessor assessed the property at $404,600.00 Id. at 25:17-26:8.

Metzger further testified that there was no mortgage encumbering the

property and that Amaconn paid $634.00 per year for the insurance for Trupiano's unit. See id. at 26:1-18. She stated that Amaconn pays Julip Properties $150 per month, or $1,800.00 per year, for management of the unit. See id. at 26:23-27:7. Notably, Metzger testified that Joseph Metzger owns Julip and Amaconn, works as the property manager for Julip, and is on the Julip payroll. See id. at35:5-21; 36:20-37:4.

Trupiano testified that he was a protected tenant and that he applied for that status when the building was converted into a condominium. See id. at 56:8-23. According to Trupiano, no amenities or special services were added after his unit's conversion to a condominium. See id. at 56:24-57:3. In addition, Mr. Trupiano testified as to the quality of services rendered by the landlord in maintaining and operating the unit. See id. at 57:9-63:10.

After conducting the October & November 2018 hearings, the Board made the following determinations: (1) the real estate tax expense should be reduced from $6,275.00 to $1,937.22; (2) the condominium fee should be reduced from $5,772.00 to $5,572.73; and (3) the management fee should be a percentage of income rather than a flat rate as Amaconn sought. See 6T, at 79:1-8; 216:8-10; 220:2-4; 222:11; 228:6-13. On January 9, 2019, the Board passed a resolution granting a hardship rent increase of $105.04. DA-83.

F. Before the Hon. Mary Costello, J.S.C. in 2019.

A few months later, Amaconn appealed the Board's determinations, asserting that the hardship increase of $105.04 per month was arbitrary. DA-13. Specifically, Amaconn challenged the reduction of the property tax expense, condominium fee, and management fee on their hardship increase application. Id. Amaconn further challenged the Board's determination of their equity in Trupiano's unit and accused the Board of ignoring the testimony of their witnesses regarding the value of 703 Park Ave. Id.

On November 20, 2019, the court found that the Board's determination regarding the unit's tax liability was not arbitrary or capricious, but well-reasoned and supported by the testimony of Amaconn's witness and caselaw. Id. at 9-10. However, the court also found that the Board did not consider whether "static operating costs" such as garbage collection fees and tax preparation fees should be included in condominium fees in Amaconn's operating expenses. Id. at 5. The court further held that the Board arbitrarily decided to reduce the management fee to 5% of monthly rent. Id. at 11.

Finally, the court below addressed the Board's determination of Amaconn's equity. Id. at 12. The Board considered Amaconn's cash contribution into Trupiano's unit, but did not address property improvements, market conditions, re-assessments, and inflation, all factors the Board must

contemplate in deciding Amaconn's equity. Id. Judge Costello then remanded this matter to the Board for a third set of hearings.

G. Remand to the Board March 2020- August 2021.

The Board reheard this matter a third time via five lengthy hearings from March 2020 to August 2021. Unlike the second set of hearings in October and November 2018, the Board did not have to re-consider Amaconn's tax liability for Trupiano's unit. See 8T at 22:16-19, 24-25; 23:18-19. The issues for the Board's reconsideration were garbage collection & tax preparation fees, the management fee, and the impact of property improvements, market conditions, re-assessments, and inflation on Amaconn's equity in Trupiano's unit.

Metzger testified that the City of Hoboken changed the time garbage could be placed out on the curb for pick-up, and in turn, Amaconn had to employ additional laborers to take out the garbage during certain hours. See 7T at 23:23-25; 24:1- 13. The garbage collection fee for the unit is $123.95. See id. at 24:13. Metzger further testified that the increased fee would have been incurred notwithstanding the conversion of the unit to a condominium. See id. at 24:15-20. The Board deliberated and concluded that the garbage collection fee was a result of the unit's conversion to a condominium. See 8T at 139-154. In reaching that conclusion, the Board drew from their personal and professional experiences, see id. at 141-42. The Board agreed that Amaconn would still be

responsible for putting out the garbage on the curb regardless of whether the unit is a condominium. See id. at 144:6-12; 147:6-17. Most importantly, each Board member provided an explanation for their decision. See id. at 153-54. Therefore, the Board affirmed its decision not to include garbage collection fees in Amaconn's condominium fees for Trupiano's unit.

Next, the Board considered whether to include tax preparation fees in Amaconn's condominium fees. Metzger testified that Amaconn would hire a Certified Public Accountant ("CPA") to file its tax returns, even if the conversion to condominiums had not occurred. See 7T at 25:4-13. The Board reviewed the minutes from their November 28, 2018 meeting to ascertain the tax preparation fee to the Unit. See 8T at 157:6-18. Next, they confirmed that their numerical figure remained accurate. See id. at 161:11-24. The following step was to discuss and debate whether the numerical figure is supported by a rationale basis and the applicable caselaw. See id. at 165:16-24. The Board agreed that it is a recurring expense and not due to the unit's conversion into a condominium. See id. at 171-72.

Turning to Amaconn's management fee for Trupiano's unit, the Board reviewed past testimony on comparable management companies and the respective fees they charge. See 11T at 46. Next, they examined the quality of the service, pursuant to the instructions from the trial court, and in particular,

issues with Trupiano's intercom and the delay in fixing same. See id. at 49-52. The Board additionally discussed the state of the unit's smoke and carbon monoxide detectors and Trupiano testified that they are rarely inspected. See id. at 55-59. The Board considered all aspects of quality management and concluded that Trupiano's unit has either required or utilized less management than other tenant- occupied units. See id. at 61-62. Therefore, for those reasons, the Board opted to reduce the management fee from $150 to $100. See id. at 62-63. Once again, each Board member explained the rationale for their decision. See id. at 67-69. Every member of the Board agreed that inadequate services should not be ascribed a high management fee, and the $100 figure falls within the range the court established as a reasonable amount given comparable rates of other management companies in Hoboken. See id. at 69.

Lastly, the Board turned to the issue of Amaconn's equity in Trupiano's unit. The Board first acknowledged the importance of Trupiano's status as a protected tenant. See id. at 76:13-16. Next, Chairwoman Fallick posed an equally important question about tracing Amaconn's equity in Trupiano's unit. See id. at 77. Chairwoman Fallick opened the floor to Amaconn's counsel to explain his client's suggested approach for calculating equity. See id. at 78-94. Chairwoman Fallick then summarized her understanding of Trupiano's position and gave his attorney the opportunity to correct any misstatements.

See id. at 94-96, 98. The Board subsequently began its deliberations on the matter. See id. at 98. Board member Brennan observed that dividing the purchase price by eleven simply does not account for the fact that Trupiano's unit is different than the other ten units in 703 Park Ave. See id. at 103-104. Fallick further observed that the record shows that the renovations that went into Trupiano's unit are far less extensive than the other ten units, thereby identifying two differences between Trupiano's unit and the other units. See id. at 105. Rosso, another Board member, added that Amaconn's expert appraiser even admitted that he could not appraise Trupiano's unit because it is an encumbered property with no comparable units. See id. at 106-107. Since Amaconn's equity calculations begin by dividing the purchase price by eleven, the Board rejected his final numerical value for equity.

Consequently, Fallick devised a formula that crafts a ratio based on the property tax liability for Trupiano's unit compared to that of another unit at 703 Park Ave. with the same or similar square footage. See id. at 110. The ratio is 1,937.22/7,843 = .2469 or 25%. See id. at 113. Next, Fallick posits that since there are ten units that are condominiums, and one unit that is not a condominium, Amaconn's traceable equity requires dividing the purchase price by the 'whole' numerical denominator. See id. at 135. This is achieved by taking 25%, which is ¼, inverting the fraction and multiplying it by ten,

which is the total number of condominium units in 703 Park Ave. Id. Next, add forty to the sole non-condominium unit, and the result, forty-one serves as the denominator. Id. Fallick then divides the purchase price of $525,000 by forty-one to obtain $12,804.88, which is Amaconn's equity in Trupiano's unit when purchased. Id. The rationale is that the number "41" considers the two different types of units in 703 Park Ave. Id.

The Board discussed how property improvements, inflation, and market conditions factor into this formula. See id. at 150-170. The Board agreed that market conditions do not factor into the formula because, as Amaconn's expert testified, Trupiano's unit is unmarketable in its present condition due to the tenant protection status. See id. at 155. The Board deliberated extensively on the difficulty of quantifying market forces such as inflation and reassessments when a certified appraiser is unable to do same. See id. at 172-76. They spent an equal length of time discussing how to ensure they are following Judge Costello's instructions and considering market conditions such as inflation and reassessments. See id. at 176-200, 209-12. They took some relief in knowing that Fallick's formula reflects the black letter of the Ordinance. See id. at 205.

Ultimately, they concluded that Fallick's formula makes the most conceptual sense and voted to adopt same as Amaconn's equity in Trupiano's unit. See id. at 225, 257.

The Board utilized the following calculations in deciding Amaconn's hardship application:

1. Taxes: $1,937.22
Condo Fees: $5,648.05
Insurance: $634
Management Fees: $1200
Registration: $25
Expenses Total: **$9,444.27**

2. Equity: $12,804.88
Equity + Expenses: $(12,804.88 x .0625) +$9,444.27 = **$10,244.58**

3. Income: $8,387
(Equity + Expenses) – Income: **$1,857.58** (Deficit)

4. Monthly Deficit: $154.79
Base Rent: $574.41
New Base Rent: $729.20

5. New Rent = Base Rent + Surcharge = $729.2 + $149 = **$878.20**

H. Before the Hon. Joseph Turula, J.S.C. in 2021

Thereafter, on September 13, 2021, Amaconn appealed the Board's decision to the Hon. Joseph Turula, J.S.C. seeking (1) a determination that the Rent Control Board acted arbitrarily, capriciously, and unreasonably in determining its hardship rent increase application and (2) that the Court determine the proper rent increase amount for Amaconn's hardship rent application. DA-1.

Judge Turula who held that the board had acted arbitrarily and capriciously and set the rent on the unit at $2,400 per month. DA-8. Specifically, Judge Turula held that the Board was arbitrary and capricious in not counting the entire condominium fee, in particular a $123 for garbage removal, as an expense, was arbitrary and capricious in reducing the management fee, and was arbitrary and capricious in its determination of equity. See id. Judge Turula held that Amaconn is entitled to an return on equity of $18,819.00, which was arrived at by adding in the landlord's claimed capital expenditures of $76,000 to the $47,000 attributed to Unit 11 when the building was bought and then increasing that amount for inflation for a "value" of $197,610. See 13T. Then that number is averaged with the tax assessed value of the property, which is $404,600 for a "blended value" of $301,105. Id. Lastly, Judge Turula held that Amaconn is entitled to a 6.25% return on that amount every year under Hoboken's rent control ordinance. Id.

STANDARD OF REVIEW

The standard of review is *de novo* on issues of law and plain error on questions of fact. Here, the trial court in its September 30, 2021, decision found that the Board's actions were arbitrary, capricious and unreasonable but instead of remanding the matter to the Board for further proceedings imposed its own rent calculation.

Ultimately, the determination of whether the incorporation of value into the ordinance by the Board was arbitrary and capricious poses a legal question.

The decision of the trial court to impose its own rent calculation rather than to show deference and remand the matter back before the Board also poses legal question. Our Supreme Court noted in Kramer, *infra*:

> [P]ublic bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved….

Kramer v. Board of Adjustment, 45 N.J. 268, 296-297 (1965) (emphasis added) (internal citations omitted).

Therefore, as both issues involve legal questions, the standard of review is *de novo*.

LEGAL ARGUMENT

I. THE BOARD HAS ACTED PROPERLY IN ALL OF ITS HEARINGS AND DETERMINATIONS AND DID NOT ACT ARBITRARY CAPRICIOUSLY OR UNREASONABLY.

The Board respectfully asserts that in each of the three sets of remand hearings, it acted rationally and with due regard to the considerations outlined in the Hoboken Rent Control Ordinance ("RCO") despite this matter's prior remands by the trial courts.

The Board's jurisdiction, duties, and rights are derived from the RCO. See DA53-65. Pursuant to Section 155-18 and 155-19 of the RCO, the Board is "authorized to issue orders relating to the powers and functions of the Rent Leveling and Stabilization Board," and the Board has "all powers necessary and appropriate to carry out and execute the purpose of [the RCO]" including holding hearings, adjudicating applications, issuing subpoenas for the production of information and documents, and requiring "the production of books, records, tax returns, balance sheets, profit and loss statements and such other records as the Board may require and deem necessary for its determination." §155-19(c), (f), and (g). In addition, the RCO also grants the Board with the authority to exercise "equitable authority to depart from the strict interpretation of the provisions [of the RCO] where fairness requires equitable intervention." See §155-19. Finally, the Board also has the power to "supply

information and assistance to landlords and tenants to help them comply with the provisions of this chapter." §155-19 (b).

"Arbitrary and Capricious" actions by administrative bodies require a finding of "willful and unreasoning action, without consideration and in disregard of their circumstances." Bayshore, supra, 122 N.J. Super. at 189. As explained in BayshoreE,n "[w]here there is room for two opinions, action is not arbitrary where it is exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Id. see also Circus Liquors. Inc. v. Governing Body of Middletown Tp., 199 NJ. 1, 9-10 (2009) ("[e]ven if [the] court may have reached a different result had it been the initial decision maker, the court may not reverse an agency's determination absent a clear showing that the agency was arbitrary, capricious, or unreasonable.").

In New Jersey "[T]he law presumes that boards of adjustment and municipal governing bodies will act fairly and with proper motives and for valid reasons." Kramer v. Bd. of Adjustment, Sea Girt, 45 NJ 268, 296 (1965). For that reason, "the determination of a local rent control board is presumptively valid, and the burden is on the party challenging the board to prove otherwise by showing that the board's action was arbitrary, capricious or unreasonable.

Liberty Terrace, LLC v. Rent Leveling Bd. of Twp. of N Bergen, 2011 N.J. Super. Unpub. LEXIS 970, 8 (App. Div. Apr. 18, 2011).

Further, Agency decisions are entitled to "substantial deference." See In re Hermann, 192 N.J. 19, 28 (2007). In reviewing a decision of an administrative agency, this Court must "defer to an agency's expertise and superior knowledge of a particular field." Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 NJ. 294, 301 (2011) (quoting Greenwood v. State Police Training Ctr., 127 NJ. 500, 513 (1992)). The Superior Court is bound to uphold an agency's decision unless there is a clear showing that it is arbitrary or capricious. Id. The judgment of a municipal body may not be substituted for a trial court's determination unless the body's determination was arbitrary, capricious, or unreasonable. See Bayshore Sewing Co. v. Dept. of Env., 122 NJ. Super. 184,200 (Ch. Div.), affd, 131 N.J. Super. 37 (App. Div. 1973).

As outlined above, each time the trial court remanded Amaconn's hardship application to the Board, the Board scrupulously adhered to the instructions of the court. The Board took great care to ensure that the appropriate factors, as outlined by both the RCO and the opinions of the courts below, were considered at length over the course of ten lengthy meetings. During each of the ten meetings, the parties were afforded the opportunity to present evidence, and each party exercised the opportunity. To find, therefore, that the Board

members, some of whom went to great lengths to devise formulas for use in the weighing of the important evidence, acted in a "willful and unreasoning [manner], without consideration and in disregard of their circumstances" would flout the record. For that reason, the Board respectfully requests that the Court reverse all decisions holding that the Board has acted arbitrarily and capriciously but most specifically in the September 30, 2022 trial court decision in which it set the rent at $2,400 per month without remanding the matter back to the Board for further determinations

II. THE TENANT PROTECTION ACT ("TPA") GUIDED THE BOARD'S DECISION AND WAS THE FOUNDATION BEHIND IT'S ACTIONS.

To understand the decisions of the Board, it is imperative to appreciate that the Board was tasked with ensuring compliance with the TPA. At the heart of Amaconn's dissatisfaction with the Board's determinations lies a misunderstanding of the TPA and the Board's duty to abide by it. When viewed through that lens, the process the Board engaged in, and the decisions it made, are unquestionably valid, fair, and proper.

The TPA is a tenant protection program specifically designed to provide protection to residential tenants, particularly the aged and disabled and those of low and moderate income, from eviction resulting from condominium or cooperative conversion. N.J.S.A. 2A:18-61.41. Condominium conversion

requires emptying the building of tenants and renovating the apartments to be sold off individually for a profit. At the time of the inception of the TPA, the legislature cited the need to increase the supply of affordable housing in the state, and to protect residential tenants in recognition of the high costs, both financial and social, to the public of displacement from affordable housing and of homelessness. Id. Any person who: (1) applied for protected tenancy status; (2) has occupied the premises as his principal residence for at least for at least 12 consecutive months next preceding the date of application; and (3) has an annual income that does not at the time of application exceed the maximum qualifying income as determined by statute (in this case of a household of one person, $31,400), is protected by the TPA. See N.J.S.A. 2A:18-61.42.

The pertinent question here is, what impact, if any, does the TPA have on a landlord's hardship application after a rent-controlled apartment is converted into a condominium? Tenants are given some protection against unfair rent increases for the entire time they remain in the apartment, including during any hardship applications. The TPA provides in pertinent part:

> In the case of a municipality subject to the provisions of this act that has a rent control ordinance in effect, a rent increase for a qualified tenant with a protected tenancy status shall not exceed the increase authorized by the ordinance for rent-controlled units. Increased costs that are solely the result of a conversion, including but not limited to any increase in financing or

> carrying costs, and do not add services or amenities not previously provided shall not be used as a basis for an increase in a fair-return or hardship hearing before a municipal rent board or on any appeal from such determination.

N.J.S.A. 2A:18-61.52(b)

Essentially, while tenants continue to be covered by rent control, as a result of N.J.S.A. 2A:18-61.52(b), landlords are not allowed to include in a hardship application any costs that result from a conversion of the building to a condominium or cooperative.

Our courts have held that a tax increase resulting from an assessment increase attributable to a conversion, is a conversion cost within the meaning of the statute and, thus, may not be passed on to the tenant, even though the applicable rent control ordinance permits a tax increase pass-through. Litt v. Rutherford Rent Bd., 196 N.J. Super. 456 (Law. Div. 1984); B.H. Associates v. Brunder, 185 N.J. Super. 403, 449 (Law. Div. 1982); and Schwam v. Cedar Grove Twp., 9 N.J. Tax 406, 414 (1987), aff'd sub nom. Schwam v. Twp. of Cedar Grove Twp., 228 N.J. Super. 522 (App. Div. 1988).

In Litt, the Court held that "Clearly the Legislature went to great lengths to [e]nsure that all tenants who enjoyed such [protected] status prior to conversion would not have their tenancies. . . altered because of conversion.

[A] pass-through to protected tenants of a tax increase resulting from a conversion would defeat that purpose." Litt v. Rutherford Rent Bd., 196 N.J. Super. 456 466-467 (Law. Div. 1984). The Legislature's intent was to "preserve the status quo of [pre-conversion] tenants. Therefore, although the word tax may not be included as a cost in the language of the statute, to exclude it as a cost would defeat the very purpose of the legislation." Id.

Likewise, the Court's holding in Brudner is also instructive. There the Court held that:

> The tenant, having had no voice in the decision to convert, and his tenancy protected by the laws of the State of New Jersey, must not be forced to bear the expense incurred as a result of the decision to convert the property, which decision in no way enhanced the value of his tenancy. In holding that the tax increase generated by the conversion may not be passed on to the tenant, the court is following the mandates of the Legislature, the Appellate Division and the Department of Community Affairs in maintaining the tenant's status quo, i.e. continuing the tenancy unaffected by the conversion from the rental market. To hold otherwise would abrogate and make meaningless the protections afforded by our Legislature and would violate the stated policy to protect pre-existing tenancies from "any adverse impact resulting from the conversion."

B. H. Associates v. Brudner, 185 N.J. Super. 403, 409 (Dist. Ct. 1982).

These tax assessment cases demonstrate the proper inquiry and process the Board was required to undertake in the case at bar. These cases, and the

Court's reasoning therein, demonstrate that costs that alter a tenant's status quo or alter a tenancy without providing a service or amenity cannot be passed through to a tenant.

Accordingly, in light of the relevant case law and the opinion of this Court, the Board was tasked with undertaking an in-depth review of all Amaconn's claimed expenses (i.e., taxes, condo fees, insurance, management fees, water and sewerage, etc.) to determine whether the costs are the result of the condominium conversion that took place in 2003. Each individual expense was to be scrutinized. The landlord had the burden of providing the Board with sufficient documentation showing the genesis of the expenses and showing that the expenses are not solely the result of a condominium conversion, pursuant to the TPA. See N.J.S.A. 2A:18-61.52(b). For example, it would not be enough for a landlord to provide a numerical value for condominium or management fees. Instead, the landlord must show what the condominium fees include. The Board must then also determine whether each itemized cost resulting from a conversion added services or amenities not previously provided. If they did not, then the cost may not be passed to the tenant. For each claimed expense a landlord seeks reimbursement for, the Board must analyze each cost as follows:

- Taxes: As previously mentioned, if property taxes go up because of a condominium conversion, then the landlord cannot use the new tax assessment

in support of his hardship application. If the Board determines that the property taxes went up as the result of a conversion, then the Board must instead apply the assessment that was in effect prior to the conversion.

- Condo Fees: On its face, the plain meaning of the term "condominium fees" suggests that they are solely the result of a condominium conversion and, therefore, a landlord would not be able to rely on them in a hardship application. However, that may not be the case. Condominium fees may potentially include water and sewerage charges or other charges, which may be passed onto a rent-controlled tenant under the RCO. Therefore, to make a proper determination regarding condominium fees, as Judge Jablonski held, a landlord seeking a hardship application must provide a detailed breakdown of said condominium fees. DA-26. This analysis is fact sensitive as certain fees may be appropriate while others may not be. What is imperative is that a detailed breakdown of fees be provided to the Board and that the Board engage in a substantive discussion on this issue which results in a well-reasoned decision.

- Insurance: The Board must determine whether the insurance charges would have been passed along to the tenant and if so, the Board must also determine whether the insurance payments went up as result of the condominium conversion (same analysis as taxes).

- Management Fees: Management fees, like condominium fees must be broken down in intricate detail. A landlord must clearly show the genesis of the expenses and that the expenses are not the result of a conversion. The Board should be careful to prevent a landlord from providing duplicate expenses (i.e., claiming payment for water and sewerage or maintenance in both condominium fees and management fees).

Pursuant to the Rent Control Ordinance, after determining whether the expenses are solely the result of a condominium conversion, the Board must consider: (1) the quality of service rendered by the landlord in maintaining and operating the unit; (2) whether the operating expenses were reasonably incurred; and (3) the presence or absence of reasonably efficient and economic management. DA-62.

Here, the Board engaged in this exact process. As further detailed below, the Board's actions were the antithesis to arbitrary, capricious and unreasonable but were properly rendered after a consideration of the totality of the information and circumstances before it.

III. THE BOARD ACTED RATIONALLY, PRUDENTLY, AND REASONABLY.

In light of the TPA, the Board's powers and duties, and the instructions of the trial courts below, all arguments made on appeal that the Board acted

arbitrarily and capriciously prove meritless. The record demonstrates that the Board did exactly what it needed to do, and that each decision was well-supported, well-reasoned and well-documented.

A. The Board properly excluded portions of the Condominium fee.

After engaging in a thorough review of every item that comprised the condominium fee, the Board chose to eliminate only two fees, for a total reduction of $200.00. See 8T, at 152-172. Amaconn's assertion that "if there was ever any opportunity to reduce the Landlord's expenses, the Board seized that opportunity for the benefit of the Tenant," is baseless and unsupported by the record. Id. at 229:2-11.

A review of the April 14, 2021, Board meeting transcript demonstrates that approximately 130 pages of the transcript consists of the Board analyzing Amaconn's claimed condominium fee. See 8T. The Board engaged in a line-by-line analysis of the condominium fee. Id. at 138-54. The Board chose to remove $75 from the condominium fee for the condominium board's tax preparation cost since the Board found that this cost stemmed directly from the conversion. Id. at 157:5-14 to 158:18 (Board member Fallick summarizing the Board's reason for striking this fee because "The reason was because those fees are directly attributable to the condo conversion. So, they didn't exist before. And it's

directly attributable. That's the reason why originally brought it up and [the Chairman] has brought it to be a motion ... [t]here's definitely no additional amenity or service")); see also id. at 138:1-139:11; 159:10-14.) Ms. Metzger testified that this cost was attributable to the condominium association's taxes, which obviously only exists because the unit was converted into condominiums. Id. at 100:17-25. Thus, the Board's decision to remove this $75 fee was reasonable, fair, based on the record, supported, and in line with the TPA.

Likewise, the Board's decision to remove a $123.00 fee from the condominium fee for cleaning and garbage pickup was also proper. The Board found that based on the testimony presented, this fee was not a reasonable operating expense that would have existed before conversion. Id. at 149:24-150:6 (Board member Schott finding that he has an issue with the garbage fee because it was something that exists by virtue of the conversion.)) The Board engaged in a lengthy discussion with regards to this fee, with some members believing it should be removed and others thinking it should remain. Id. at 149:24-159:6. This deliberative process is the opposite of arbitrary and capricious. The Board also took note of the fact that the 2016 budget had a garbage fee that was nearly double the cost as what was listed in the 2014 budget. No adequate reason was provided to explain this increase in the fee. The Board reasoned that Mr. Trupiano would not be paying this high a fee if he

was in a rented apartment instead of a condominium, that the service provided did not justify the fee, and that it was not efficient management to charge an extra $200.00. Id. at 149:24-150-6; 151:19-22; 152:4-5; 169:2-5; 172:5-173-14; 174:3-9. Notably, the Board actually allowed the fee but chose to reduce it to a number between the amount claimed in the 2014 budget, and the amount claimed in the 2016 budget, which was a reasonable decision under the circumstances. Id. at 153:23-154:13; 174:3-6.

Accordingly, the Board reduced the condominium fee by $200 after lengthy deliberation and analysis. The Board articulated its reasons for this reduction as noted above. Clearly, the Board did not act with "willful and unreasoning action, without consideration and in disregard of their circumstances." Bayshore, supra, 122 N.J. Super. at 189. Therefore, the Board's decision must stand.

B. The Board properly reduced Amaconn's taxes.

Likewise, the Board properly reduced Amaconn's taxes to $1,937.22. As set forth above, our courts have held that a tax increase attributable to a conversion, is a conversion cost within the meaning of the TPA and, thus, may not be passed on to the tenant, even though the applicable rent control ordinance permits a tax increase pass-through. Litt v. Rutherford Rent Bd., 196 N.J. Super. 456 (Law. Div. 1984); B.H. Associates v. Brunder, 185 N.J. Super. 403, 449

(Law. Div. 1982); and Schwam v. Cedar Grove Twp., 9 N.J. Tax 406, 414 (1987), aff'd sub nom. Schwam v. Twp. of Cedar Grove Twp., 228 N.J. Super. 522 (App. Div. 1988). One of the Board's chief concerns was determining whether Amaconn sought to pass along increased taxes to Mr. Trupiano as a result of the condominium conversion in contravention to the TPA. To answer this question, the Board needed to identify taxes assessed on the unit before the unit was converted to a condominium, and taxes assessed on the unit after it was converted to a condominium. Amaconn failed to provide any insight whatsoever on this question.

Although Amaconn retained an expert to opine on this issue, the expert's testimony proved useless. Thus, Amaconn was unable to demonstrate whether or not taxes associated with this unit increased due to the conversion. To answer this question and in preparation for the hearing, the Chair of the Board took it upon herself to do his own research, meet with the City tax assessor, and present a possible way of determining whether any prohibited tax increase was being passed to the tenant, and if so, how much prior to the 2017 hearings. The Chair prepared a document setting forth her calculations, her reasoning, and her conclusion that Amaconn could not rely on property taxes of $6,275.00 for his hardship application. See 3T at 104:3-14.

Board members have the right to look beyond the record put before them by the parties and are allowed to do independent research. Our courts have held that members of certain boards can do their own research such as conduct site inspections in furtherance of making decisions. In Kempner v. Edison Twp., 54 N.J. Super. 408 (App. Div. 1959), the Appellate Division explicitly stated that a Board of Adjustment may rely upon its own independent inspection so long as the Board then discloses the facts it learned at the inspection. See Id. at 416. This principle has been endorsed and validated by the Appellate Division various times. See Giordano v. City Commission of the City of Newark, 2 N.J. 585, 67 A.2d 454, 455. (1949) (holding that "We approve of the practice, where practical, of a board of adjustment making an inspection of the site and the neighborhood generally.")

In Stolz v. Ellenstein, 7 N.J. 291 (1951), city commissioners visited a property to conduct a personal inspection where they obtained first-hand knowledge of existing conditions. Id. at 296. The Supreme Court of New Jersey, in discussing the right of these commissioners to conduct independent inspections stated that, "such first-hand knowledge is invaluable in the determination of zoning cases but the knowledge thus gained cannot be made the basis, in whole or in part, for the award of a variance or a change in a zoning ordinance unless there appears in the record the facts respecting the physical

situation disclosed by the inspection." Id. at 297. These cases demonstrate that board members and other agency officials are allowed, indeed even encouraged, to perform independent research where doing so would lead them to make a proper determination of an issue so long as whatever information is learned from the independent research is placed on the record. See Baghdikian v. Board of Adjustment of Borough of Ramsey, 247 N.J. Super. 45, 50 (App. Div. 1991); see also Osario v. West New York Rent Control Board, 410 N.J. Super. 437, 442 (App. Div. 2009). Notably, a case Amaconn relies upon, Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268 (1965), makes clear that board members are capable of conducting their own research and relying on facts outside of the record the parties present to them. In Kramer, the Supreme Court of New Jersey stated that,

> The Board, however, is not obligated to function in a vacuum. Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (157 A.2d 524) (App.Div.1960), certif. denied, 32 N.J. 347 (160 A.2d 845) (1960). Thus, the rule requiring that personal knowledge of Board members be set forth in the record applies only where the knowledge thus gained is made the Basis for the award of the variance. Giordano v. City Commission of City of Newark, 2 N.J. 585 (67 A.2d 454) (1949); Stolz v. Ellenstein, 7 N.J. 291 (81 A.2d 476) (1951). Cf. Kochen v. Consolidated Pol., etc., Pension Fund Comm., 71 N.J. Super. 463, 472 (177 A.2d 304) (App.Div.1962).

Id. at 284.

Here, The Chair indicated, on the record, that he received the information he relied on directly from the tax assessor and that the calculations contained in the documents the Chair prepared derived from the tax assessor. (Id. at 105:1-105:12.) The Chair presented the results of his research and his analysis as received from the tax assessor regarding whether the taxes increased on the unit as a result of the condominium conversion. The Chair's proposed method of calculation was placed on the record and the Board and parties were given an opportunity to agree or disagree with his reasoning and his conclusion that only 30% of the property tax claimed by Amaconn, or $1,937.22, should be considered as an expense in the operation of the unit since that is the only amount that could be charged to the tenant in light of the TPA. (Id. at 69:1-80:10.) Notably, the Board did not blindly accept the Chair's conclusion or reasoning but instead engaged in lengthy deliberations on this issue, questioning the Chair's calculations and reasoning. (Id. at 81:5-87:4.) Ultimately, the Board endorsed the Chair's method and his conclusion, and voted to approve a tax figure of $1,937.22. (Id. at 87:5-88:10.) Therefore, the Chair complied with the requirement that his basis for reaching his conclusions be placed on the record. Furthermore, as set forth above, pursuant to the RCO, the Board has broad power to engage in fact-finding in order to rule on an application before it. The Chair's actions in this case were within the bounds of that power and in furtherance of

the Board's responsibility to conduct adequate fact-finding. The Board's actions were anything but arbitrary, capricious and unreasonable. The Board engaged in this process in order to ensure compliance with Judge Jablonski's opinion and the TPA. The Board's ultimate conclusion on taxes was made after lengthy deliberations and the Board's reasons were articulated on the record. As such, the Board's determinations were sound and appropriate.

C. The Board properly reduced Amaconn's management fee.

The Board properly chose to grant Amaconn a 5% management fee based on the operating income. The record is replete with the Board's rationale for granting a 5% management fee rather than the $1800.00 fee Amaconn sought. The Board did not reach this figure arbitrarily, capriciously or unreasonably—instead, the Board made its determination based on market data and a review of the record and testimony.

The Board based its decision, in part, on the fact that Amaconn was engaged in self-dealing by virtue of the fact that Mr. Metzger owned both Amaconn and the management company, making the $1,800.00 fee unreasonable. See 7T at 229:3-6; 232:19-21; 241:22-23. In addition, the Board reached its decision after establishing that it had dealt with a similar management fee in the past where they granted a fee of 10%. Id. at 229:3-13.

Moreover, the Board confirmed, through external sources, that the going rate for management fees are anywhere from 5-10%. Id. at 230:14-233:17. The Board again engaged in lengthy deliberations on this issue, analyzing the fee and discussing the fairest way to determine and calculate the fee. Id. at 229:13-249:19. In fact, the Board actually voted on granting a 10% management fee, but that vote failed. Id. at 244:17-246:23. Thereafter, the Board voted on granting a 5% management fee. In support of this figure one Board member found that:

> I would just say in support of a robust record that I think, in this case, you know five percent is on the lower range of the acceptable norm. I think that given the murkiness as to if there were any duplicative services potentially rendered between the condo association versus this (indiscernible) management and how that might have been parsed out and the difficulties involved in pining down exactly what that might have been in the previous section that we deliberated on, I think it's cleaner to evaluate this at a lower range -- on the lower range of the acceptable range . So, I think five percent is supportable as, suggested by my colleague.

Id. at 247:13-25.

Furthermore, the Board reached its decision by analyzing the level and quality of service rendered by the landlord in maintaining and operating the unit and whether Amaconn managed the property in a reasonably efficient and economical manner as required by the RCO. Ultimately, Board members found

that the level of service was lacking and that the property was not being efficiently managed. (Id. at 47:18-20; 62:4-14.) The decision to grant a 5% management fee was not arbitrary, capricious or unreasonable.

D. The Board properly determined the equity in the property.

In analyzing the equity in the property, Amaconn failed to set forth a figure that was rooted in reasonableness. First, Amaconn's expert was unable to opine as to what the equity should be. Second, Amaconn's request of equity in the amount of $404,600.00 is meritless since Amaconn fails to consider the fact that he did not purchase this particulate unit for $525,000.00, but instead purchased the entire building for that amount and that this unit only represents 10.76% of the building. As the Board found, any reasonable equity calculation must take the latter into consideration. Accordingly, arriving at a correct equity figure required the Board to determine equity in this particular unit, not the building as a whole which Amaconn's calculations improperly attempt to establish. This is precisely what the Board did. (Id. at 256:1-257:9.) Indeed, the Board specifically addressed the fact that Amaconn's method of calculating equity was in contravention to the RCO and the Board' past-practice. The following colloquy between the Chair and Board attorney demonstrates the Board's reasoning and why it rejected Amaconn's method of calculating equity:

BOARD ATTORNEY: I want to suggest to the Board that it articulate for the record why it's starting this analysis with the $525,000 number and, then, multiplying that by the percentage of the unit as opposed to the $455,013 number that was presented in the application.

CHAIRMAN MASTROPASQUA: Because

BOARD ATTORNEY: Just -- just articulate it.

CHAIRMAN MASTROPASQUA: Okay. The $525,000 what was the purchase price in 1993.

BOARD ATTORNEY: Uh-huh

CHAIRMAN MASTROPASQUA: Okay? So, what he's -- what he submitted -- what usually

MS. FALLICK: It was (indiscernible) here you go.

CHAIRMAN MASTROPASQUA: What are you -- okay. He's using the equity of 455,013. We don't figure out the equity that he—how he figures it out.

BOARD ATTORNEY: Why?

CHAIRMAN MASTROPASQUA: because he – I think he uses the – the market value that he stated. -- the market value that he stated.

BOARD ATTORNEY: Uh-huh.

CHAIRMAN MASTROPASQUA: And we don't use the market value. We use the purchase price.

MS. FALLICK: The actual dollar amount.

CHAIRMAN MASTROPASQUA: -- of -- that -- when they bought it as 525, okay? And the only reason that I – I'm recommending the change is – on the percentage of equity *is* because when they filed the --the documentation on

> conversion, the portion of the total -- the 525 or the value of the property is .1072. That's why I'm using the 525 and that's -- and I usually use the -- that the purchase price on all hardship applications when if it affects the whole unit or if they come in for a specific apartment unit which they haven't come in in a long while. We use the purchase price on other hardship application when we had to figure out what the equity was on condos. I am following precedent.

Id. at 260:15-262:1.

Ultimately, after a failed vote, the Board chose to reduce the amount suggested by the Chair by 30%. This reduction was based on past-practice of the Board. Specifically, Board Member Fallick proposed the reduction based on a previous case involving a protected tenant where the Board reduced an equity figure by 30%. (Id. at 250:14-251:7.) Board Member Fallick persuaded her fellow board members and her method of calculating equity was voted on and adopted. The Board engaged in a deliberative process in reaching its conclusion. (Id. at 250:1-273:14.) The Board considered the testimony and argument of Amaconn but found it unconvincing and at odds with the Board's method of calculating equity as set forth in the RCO and as dealt with in the past. (Id.) In light of the record, it is absurd for Amaconn to argue that this decision was reached arbitrarily, capriciously, or unreasonably. As explained above, "[w]here there is room for two opinions, action is not arbitrary where it is exercised honestly and upon due consideration, even though it may be believed that an

erroneous conclusion has been reached." Bayshore, supra, 122 N.J. Super. at 189.

E. Amaconn has made a fair return on its investment.

Amaconn's assertion that it has failed to make a fair return rings hollow in light of the facts in this case. Amaconn conveniently ignores the fact that he purchased the entire building for $525,000.00 and then sold ten out of eleven units individually. It defies reason and common sense to suggest that he has failed to make money after converting the building into condominium units and selling each unit, especially given the fact that this property is located in the City of Hoboken. Mr. Metzger has refused to state how much money he earned after converting the building to condominium's, but two facts are telling. First, Amaconn has recognized that it made a profit on selling the units in the building. See 1T at 41:25-42:3. Second, the corporate tax return shows that the entity has assets totaling $870,000.00 and the only asset it owns is Mr. Trupiano's unit. See id. at 44:2-45:12. This demonstrates that Amaconn has realized a return on his investment.

In addition, while a landlord is certainly able to make a fair return on his investment, the RCO is clear that "it is not the intention of this chapter to permit a hardship rental increase when the landlord has not made a reasonably prudent investment." §155-14(3). In determining whether the Board should grant a

hardship rental increase, the RCO is also clear that the Board is to consider whether the landlord has made a reasonably prudent investment. Here, Amaconn assumed the risk of purchasing the property knowing that it was subject to rent control and that the tenant was a protected tenant under the TPA. The RCO states that "it is presumed that a prospective purchaser of real property in Hoboken shall be familiar with the terms of this chapter." Id. To the extent Amaconn feels like he has not earned as large a return as he anticipated because unit 11 is occupied by Mr. Trupiano, the Board is not the proper forum to remedy that grievance. Accordingly, Amaconn's assertion that it has failed to realize a just and reasonable return is without merit.

IV. THE RENT CONTROL BOARD'S DETERMINATION OF THE APPROPRIATE CALCULATION OF AMACONN'S HARDSHIP RENT INCREASE WAS REASONABLE UNDER THE CIRCUMSTANCES.

The Board respectfully submits that its position on the appropriate calculation of Amaconn's hardship rent increase application remains the same as it did during the final rounds of the meetings on this matter, which took place from March 2020 to August 2021. As such, the Board is unable to revise its position at this time and defers to the Court and the Parties' suggestions for same.

As articulated in prior submissions, the Board attempted to carefully consider the voluminous factual record developed between May 2017 and June

2021 in reaching its determination on Amaconn's hardship rent increase application in August 2021. While the Board certainly appreciates the parties' requests for a rent increase calculation, the Board respectfully waives submitting a position at this stage since it contends that it did not act arbitrarily, unreasonably, or capriciously in its consideration of Amaconn's application to date. Therefore, it must rest on the determinations made in August of 2021.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court reverse the trial court's decision for imposing its own determination on the merits of the issues presented to the Board and affirm the Board's determinations.

LITE DEPALMA GREENBERG & AFANADOR, LLC

Dated:
June 7, 2023

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IN THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

No. A-00434-22

AMACONN REALTY, INC.

Plaintiff/Respondent/Cross-Appellant

v.

RENT LEVELING BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO
Defendants/ Cross-Appeal Respondents/ Appellant

On appeal from the Superior Court of Hudson County, Civil Division Appeal from Orders of Judge Turula and Judge Costello

APPELLANT'S REPLY BRIEF IN SUPPORT OF REVERSAL

Submitted July 20, 2023

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ARGUMENT

I. DISPUTED FACTS AND ASSERTIONS OF LAW

Amaconn's opposition depends in large part on factual assertions that are directly contradicted by the evidence and/or legal assertions that are directly contracted by the plain language of the governing law. These issues are addressed in turn below.

A. The Unit's tax assessment could not be based on "replacement cost" because New Jersey law requires that real property be assessed according to value

Part VI of Amaconn's brief focuses on an argument that Mr. Trupiano did not make. Mr. Trupiano does not argue, or believe, that the calculation of equity by Judge Turula included the unit's appraised value. Mr. Trupiano's argument is that it was improper to include the assessed value in the calculation of equity because assessed value is, under NJ law, a reflection of market value and Hoboken's Rent Control Ordinance does not allow any form of value to be included in the definition of equity. As in *Bishop*, it is arbitrary and capricious to add value to the definition of equity in the Hoboken RCO.

Amaconn also depends heavily on its assertion that the assessed value of the Unit is based on replacement cost and not value. *See* Amaconn's brief at page 51; *see also* at pg. 5 ("Hoboken's unequalized assessment of the Unit in the amount of $404,500…which was based upon the replacement cost method…"). To support its

claim, Amaconn points to the testimony of its expert, Carl Muccinolo, who served as both an expert in tax assessment and also appraisal and who testified that this Unit was assessed by the City of Hoboken using the "replacement cost method." 6T21. Mr. Muccinolo testified that this was reflected on the tax record, however, the tax record was not provided to the Board or entered into evidence because Amaconn's counsel never provided the documents to Mr. Trupiano's counsel in advance of the meeting, as required by the rules. Consequently, Mr. Trupiano's counsel was not able to prepare a cross-examination based on the documents. 6T16:4-17:15 (Ms. Wefer objects "We were not given these documents in advance of today" and "I haven't been able to prepare a cross-examination based on any documents"). The Board's solution to this was to let Mr. Muccinolo testify as to the contents of the documents without providing the Board or opposing counsel with the documents. 6T17.

It turns out that opportunity to prepare was important because Mr. Muccinolo's testimony was wrong. New Jersey state law requires that all real property be assessed according to its value. *N.J.S.A.* 54:4-2.23 states:

> All real property subject to assessment and taxation for local use shall be assessed according to the same standard of value, which shall be the true value of such real property and the assessment shall be expressed in terms of the taxable value of such property, which taxable values shall be that percent of true value as shall be established by each county board of taxation as the level of taxable value to be applied uniformly throughout the county.

The incorrect assertion that the Unit was assessed based on replacement cost causes Amaconn's arguments (and its expert) to be transparently inconsistent and contradictory. For example, on the one hand Amaconn asserts that the assessed value of the Unit was based on "cost" and then in the next clause of the same sentence asserts that the assessment accounted for the fact that the unit had a rent-controlled protected Tenant. Amaconn's brief at pg. 51. Both of these things cannot be true. A tenant does not affect the cost to replace a unit. Moreover, Amaconn argued extensively at every hearing that the property's assessed value should be equalized, which only makes sense under a value-based assessment. There would be nothing to equalize, or standard against which to equalize, in a cost-based approach.

B. The "undisputed" capital expenditures

It is false that the capital expenditures are undisputed. As relayed in Mr. Trupiano's opening brief, the only documentary evidence presented by Amaconn concerning the expenditures was a certification from Mr. Metzger dated 2017, purporting to relay how much Amaconn spent on the Unit fourteen years earlier when the building was renovated for the conversion to condominiums. DA44-45. Amaconn supplied no receipts, invoices, or any other documentary evidence and much of the expenditures were directly controverted by both Mr. Trupiano and Amaconn's own expert. 1T74:2- 75:1 (Mr. Trupiano testifying that the walls were not all removed from his kitchen, that it was not gutted, that there is only one

bedroom in the apartment, and that he does not have central air); 5T65:4-13 (Mr. Trupiano testifying that no carpeting was put in); 1T53:22-23 (landlord's expert testifying that the unit is a one bedroom with one bath). The board properly excluded the capital expenditures.

C. The special assessment was absolutely included in the condo fees granted to Amaconn and Amaconn knows this

The Board had multiple conversations about the fact that the $5772 condominium fee amount included a $72 per month special assessment that ended in 2016 before Amaconn filed its hardship application. 3T81:18-82-7. Amaconn was well aware of this. *See* 5t:102:6-7 (Ms. Metzger testifying "currently there is no special assessment"). Board members recognized that there was a disconnect between Judge Costello's opinion and what they had actually done. 8T20-25 (board member bringing error to rest of Board's attention). However, their Board counseled them that since they were not ordered to change it to what the Judge mistakenly thought it was, they need not reconsider it. The Board took that advice. 8T:20-25.

Moreover, Amaconn knows that the current expense of $481 per month includes $72 for a special assessment that stopped existing before it even filed its application. This is a matter of simple math. Amaconn asked for $5772 a year for condominium fees. The Board removed approximately $200 a year, $123 for garbage pick up from the condominium budge and $75 for tax preparation for the condominium budget. The Board granted the entire remaining amount, including the

$864 per year for the special assessment. If it had not, then the total condo fees granted when it went up to Judge Costello would have been approximately $4708, not $5572. *See* 7T:112:15-113:3 (board counsel explaining to Board that in 2018 it had granted $5,572 in condo fees and that "the applicant is asking you to reinsert approximately $200, okay to make the condo fee $5,772" and Amaconn's counsel agreeing).

The evidence shows that there has not been a special assessment in at least 7 years and that it was lifted even before Amaconn filed its hardship application. It is not an ongoing expense and Judge Costello was correct that it should be excluded. Moreover, the special assessment for "replacement reserve" and thus solely related to the conversion to condominium and therefore prohibited under the TPA. 5T24:12-13.

D. Capital Improvements are barred from being included in "equity" because they are excluded from the definition

Amaconn argues that capital improvements may be included in the definition of equity, but this is wrong because equity is defined as "[t]he actual cash contribution of the purchaser at the time of closing of title and any principal payments to outstanding mortgages." DA26. Because the capital improvements were not part of the cash contribution at the closing of title, they are necessarily excluded. Neither Amaconn nor the Board have the authority to add things to the definition in the ordinance.

E. The appraisal was hypothetical, but Amaconn does not reveal this in its brief

Amaconn initiated its hardship application on the basis of a *hypothetical* appraisal. 1T54:4-4-7 (testimony of Mr. Mucciolo stating "it was my responsibility to appraise it as if it was unencumbered"); 1T58:9-12 (Mr. Mucciolo stating "I estimated the market value of the property as though renovated and brought up to the standards that are consistent with the other 10 units in the building. Meaning that the kitchen was moved to the center, creating two bedrooms like the other units and two baths"). The appraisal evaluated the unit as though it were "unencumbered" of Mr. Trupiano, renovated, and with an additional bedroom. Not only does Amaconn fail to reveal this material information, it misrepresents the report to this Court. On page 11 of its brief, Amaconn states that Mr. Mucciolo testified that the appraised value was $622,500 "even with a protected tenant." *See also* brief at pg. 50 (representing that the appraisal "account[ed] for Trupiano's protected status"). This is in direct contravention to the plain language of the appraisal and Mr. Mucciolo's actual testimony.

F. There is no evidence that the rent is under market

Amaconn asserts that the rent for the Unit is "grossly under market," but there is no evidence concerning what the rental market value would be for Mr. Trupiano's unit. The unit was frozen in time, pursuant to Amaconn's actions and inactions. The

appliances are old, including a stove original to the apartment[1], the apartment design and layout is functionally obsolete, and the apartment is poorly maintained with no preventative maintenance at all for the last 30 years. 5T47:18-20 (Maryanne Metzger testifying that there is no preventative maintenance for the unit). There is no evidence on the record at all that the rent being paid on this unit is under market or what rent the market would bear for this Unit.

II. AMACONN MISUNDERSTAND'S TRUPIANO'S ARGUMENT CONCERNING EQUITY

Mr. Trupiano's argument is not that Amaconn is "barred" from filing for a hardship application. Nor does Mr. Trupiano argue that the "investment" in real property was destroyed. Rather, Mr. Trupiano argues that the investment was transformed and as part of that transformation, Amaconn changed the manner in which it would receive its return on investment from income generated from the rent roll of 11 apartments to 11 condominiums, the value of which lay in being sold, not rented. The remaining rental Unit was part of the deal. The fact that the unit has remained unrenovated and neglected for the past several decades was Amaconn's choice.

In arguing its point concerning equity, Amaconn raises (and knocks down) a strawman that inadvertently highlights one manner in which the Tenant Protection

[1] 7T83:21

Act achieves its public policy goal of preventing displacement of low-income tenants. Amaconn queries, if six of the eleven units "ended up" being protected tenants whether it would be in the same position with those units, thus implying that because such an outcome would be absurd with regard to six units, that it must also be so for one unit. However, Amaconn misses a central function of the interaction between the TPA and rent control in allowing local governments to guide real estate development within their borders. If Amaconn had six tenants file for protected tenant status, it may not have converted the building. It was profitable to convert the building with Mr. Trupiano in it, so Amaconn did.

Along these same lines, Amaconn argues that Mr. Trupiano's point concerning whether this Unit's value was lower relative to the value of other units when the apartment building was purchased is "improper." However, it is a fact that Mr. Trupiano was in place, the TPA was in place, and the local rent control law were all in place at the time that Amaconn purchased the building and when Amaconn converted it to condominiums. The fact that some units had tenants in place that could trigger the Tenant Protection Act and that some did not implies that not all units were equal in value even at the time of purchase. The ones with the potential protected tenants may have been worth less.

III. AMACONN'S UNCLEAN HANDS AND BAD FAITH

From the inception of the hardship application, where it claimed an equity based on its own made up calculation based on a hypothetical appraisal in which the Tenant has been hypothetically displaced, Amaconn has consistently been a significant contributing factor to the issues that arose as this matter meandered its way through the courts and Rent Leveling Board.

For example, the basis for Judge Jablonski's remand after the first set of hearings was caused in large part by the Board's confusion over Mr. Trupiano's protected tenant status. It is therefore notable that Amaconn's counsel was responsible for much of this confusion. Amaconn's attorney wrongly advised the Board as to the protections conferred by the Tenant Protection Act, seemingly tried to hide from the Board that Mr. Trupiano was a protected tenant, and implied that a Board Member may have done something unethical by even *knowing* the Mr. Trupiano was a protected tenant. This exchange took place between Amaconn's counsel and a Board Member at the very first hearing:

> Board Member: "The piece that I don't understand, and I admit that I don't understand, is that this gentleman is a protected tenant. Am I correct?"
>
> Someone: "Yes."
>
> Mr. Pojanowski: "How do we know that? It's not in the record."
>
> Board Member: "I don't know that."

> Mr. Pojanowski "Then why did you say…How did you happen to say that? Know that?
>
> Board Member: "Because I saw the phrase or read the phrase some place in this-
>
> Mr. Pojanowski: "It's not in there. There's nothing in there about being a protected tenant, ma'am."
>
> Board Member: "I have-"
>
> Mr. Pojanowski: "Unless somebody spoke to you outside of the hearing."
>
> Board member: "No."

1T98:24-99:5. If Amaconn's attorney had not acted in this manner, the Board may have considered these factors in its initial consideration of the matter, as Mr. Trupiano's counsel requested, and it would not have had to be remanded the first time.

On appeal, Amaconn has tempered its demands and attempts to rewrite the past five years. On page 27 of its brief, Amaconn represents:

> Amaconn did not seek to calucate its equity applying Hoboken's equalization ratio of 74.18% to the Unit's assessed value…nor did Amaconn seek to apply the appraised value of the Unit at $622,500."

However, in reality, Ammacon did exactly this for five years. The Board's confusion is directly due to Amaconn's lobbying for the Board to deviate from its ordinance, particularly in calculating equity. Amaconn advocated for the Board to

take value into account at every single hearing in this matter in every proposed equity calculation it put before the Board. As late as 2020, the landlord was still introducing new (to the Board) appraisals to make new arguments about value. 7T:40 (introducing a 2001 pre-conversion appraisal of the building for the first time).

Amaconn should not be rewarded for this lobbying of a government agency to violate the ordinance by which it is bound with a retroactive increase. Nor should the Tenant be punished as he has been dragged through nearly 50 hours of hearings, many of which were dominated by the landlord seeking to confuse a local municipal board about its own ordinance so that he could be displaced and Amaconn could escape the downside of its business decision.

Law Offices of Dana Wefer, LLC
Attorney for Defendant, Albert French

BY: s/Dana Wefer

DANA WEFER, ESQ.

Dated: July 20, 2023

AMACONN REALTY, INC., Plaintiffs, vs. RENT LEVELING AND STABILIZATION BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-00434-22 On Appeal From: Superior Court of New Jersey Hudson County, Civil Division Docket No.: HUD-L-003854-21 Sat Below: Hon. Joseph A. Turula, P.J.Cv. CIVIL ACTION

REPLY BRIEF BY PLAINTIFF/CROSS-APPELLANT AMACONN REALTY, INC.

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PRELIMINARY STATEMENT

Plaintiff/Cross-Appellant/Respondent Amaconn Realty, Inc. ("Amaconn") submits this brief in reply to the briefs filed by Appellant Jeffrey Trupiano ("Trupiano") and Respondent Rent Leveling and Stabilization Board of the City of Hoboken (the "Board").

REPLY TO TRUPIANO'S BRIEF

Preliminarily, Trupiano does not address the specific arguments raised in Amaconn's Cross-Appeal of the Trial Court's Order rejecting a retroactive rent increase.

First, Trupiano makes much ado about whether Hoboken's tax assessment of the Unit at $404,500 was based upon replacement cost or not. He does not challenge the assessment as invalid, and no evidence exists in the record that he ever challenged the assessment. The $404,500 tax assessment is undisputed, and as previously briefed, was based upon replacement cost as chosen by Hoboken and discounted because of a protected tenant. 6T:20:9-21:21; 30:9-14; 33:20-24; 35:17-19; 40:17-22, 44:18, 54:20-23.

Second, Trupiano seeks to lessen the import of Amaconn's capital improvements to the Unit. But Trupiano merely asserts that the improvements were not as substantial as apparently desired, not that the Unit did not receive $76,900 of

improvements as substantiated by Joseph Metzger in his certification submitted with Amaconn's application (Pa 48) and his testimony (1T:6:14-16, 44:10-16, 5T:74:12-25) whom Trupiano did not cross-examine. This renovation was never hundreds of thousands of dollars, but that does not mean it did not total $76,900. See Amaconn's brief, pages 7-9 (specifying the improvements to the Unit, including new windows, new bathroom, new kitchen sink, new kitchen cabinets, improvement of kitchen and replacement of water heater, all of which Trupiano agreed were completed). Trupiano does not argue that improvements were not made, only that they were not to any great extent.

It is improper for Trupiano, after failing to cross-examine Mr. Metzger, to now intimate in his Appeal that the improvements did not total $76,900. Speculation is not evidential, proper argument. Moreover, if the Unit was so "unrenovated, neglected and misfit" (using Trupiano's repeated terms), why did Trupiano remain at the Unit for several decades (and still seeks to remain)?

Notwithstanding Trupiano's contrary contention, the Board improperly excluded Amaconn's capital improvements in determining Amaconn's equity in the Unit. As previously stated in Amaconn's brief, page 33, there is no basis in the record or law to disregard the capital improvements to the Unit based upon their age, as the Board did. Capital improvements constitute real dollars invested by Amaconn in the

Unit. Just as the purchase price for the Unit in 1993 is not nullified by age, neither are capital improvements. Both the purchase price, plus capital improvements, irrespective of their age, comprise Amaconn's equity in the Unit, adjusted for inflation.

Fundamentally, as previously stated in Amaconn's brief, an ordinance must be sensibly applied to enable an owner to realize a "just and reasonable return" as constitutionally mandated. To reiterate, as stated by the Supreme Court, "we have insisted that the only true test of the validity of an ordinance will be in its application in particular cases." Mayes v. Jackson Tp. Rent Leveling Board, 103 N.J. 362, 377 (1986). "The ultimate question will always remain whether the ordinance, as applied, has a confiscatory effect upon the property." 103 N.J. at 377.

In Mayes, the Supreme Court ruled that an inflationary adjustment was necessary to ensure a "just and reasonable return" and not a confiscatory outcome, despite that Jackson's ordinance did not include any inflationary adjustment in its definition of equity. The Court stated that the "return on investment [cannot be] limited to initial or cash investment and the original investment [must] be equated with current dollar values so as to assure a fair return." 103 N.J. at 368. It held that Jackson's ordinance, as applied, was constitutional because the trial court properly "adjust[ed] the investment base of the operator to reflect the owner's actual cash

investment updated for inflation." 103 N.J. at 371. Adopting the trial court's holding that the ordinance would be confiscatory "to the extent that it did not adjust the owner's investment for inflation," the Supreme Court upheld the validity of Jackson's ordinance, because "it was precisely this ability to adjust that original investment for inflation that enabled the ordinance to survive the facial challenge." 103 N.J. at 372.

Whether an inflationary adjustment, or the inclusion of a capital improvement, to an owner's equity, this same fundamental principle resonates. Disregarding capital improvements for calculating the owner's investment in the Unit is not only illogical, it turns upside down an owner's constitutional right to a "just and reasonable return". A capital improvement is part of an owner's investment and resulting equity (otherwise, the owner would lack incentive to make a capital improvement). The only proper way to calculate an owner's equity for ensuring a "fair return" to the owner is to include the owner's entire cash investment that would necessarily include capital improvements. As a matter of law, denying the cost of a capital improvement to deprive an owner of a "fair return" on the owner's total cash investment is constitutionally impermissible.

That Hoboken's ordinance does not expressly include capital improvements as part of the owner's actual investment in property does not bar its inclusion in determining an owner's equity. As in Mayes, the ordinance must be sensibly

interpreted to permit a "fair return" on the owner's actual investment consistent with constitutional jurisprudence.

Nex, as the special assessment that was part of the condominium fee ended after 2016, Amaconn concedes that it should not be included in its costs if the Board granted it as an allowable cost.

Next, Trupiano repeats that Amaconn is not entitled to a rent increase based upon a return on its equity because its investment was "transformed' when the Property was converted to a condominium whereby 10 of the Property's units (not Trupiano's) were sold. That argument's corollary is that Amaconn must continue to lose money every year on the Unit until Trupiano's protected 40-year tenancy ends. Neither law nor logic dictate such an outcome. The Unit was not sold; it is still owned by Amaconn; and the law does not compel Amaconn to be "stuck" with the Unit, losing money every year potentially up to 40 years simply because the Property's other units were sold. That Amaconn sold the other units in the Property does not entitle Trupiano to the good fortune of an artificially low rent in which Amaconn loses money every year. Judge Turula correctly rejected Trupiano's argument as irrelevant. See 13T:65:18-20 ("Despite the defendant's argument the plaintiff made money on the other units, which is irrelevant. We are talking about this particular unit.")

Trupiano's further statement (page 17 of his reply brief) that "[t]he fact that the unit has remained unrenovated and neglected for the past several decades was Amaconn's choice" is ironic. Not only is it false that the Unit was not improved, Trupiano remains critical about the Unit's condition, complaining it was insufficiently improved at a monthly rent from $675 to $723.41, while also stating that capital improvements are disallowed to be accounted for in the owner's equity for ensuring a "fair return". Trupiano's apparent premise is that Amaconn should have invested more dollars to improve the Unit—but without any right to recover those costs under a rent increase application.

Trupiano next repeats that the Unit's pro rata purchase price, $47,727 (525,000/11) in 1993 was improperly adopted because the Unit may not have been "equal in value" to the other units. Trupiano continues to speculate that, in 1993, Trupiano's Unit "may have been worth less" (page 8) because it was occupied by a protected tenant under the Tenant Protection Act who would be protected 10 years later if the Property was converted to a condominium. However, Trupiano did not present any evidence to the Board that the Unit's pro rata purchase price in 1993 was somehow unfair or that a different price should have been adopted. Only in this Appeal does Trupiano speculate that price was unfair without even relying upon any competing price. Indeed, Trupiano's position has been that Amaconn is not entitled

to any rent increase at all based upon a return-on-equity. If Amaconn is entitled to a rent increase based upon a return-on-equity, Trupiano should not now be heard to complain that the purchase price is incorrect when it never advanced an alternative price.

Trupiano's final argument that Amaconn acted to confuse the Board regarding Trupiano's protected status is inexplicable. The fact of Trupiano's protected status was always known to the Board—indeed, if that was untrue, Amaconn would not have had to apply for a hardship rent increase under Hoboken's rent control ordinance. The parties have disputed the ramifications of Trupiano's protected status regarding a hardship rent increase, but the fact of his protected status has been a given.

REPLY TO BOARD'S BRIEF

Preliminarily, despite not having appealed, the Board, as respondent, improperly seeks to reverse the Rent Increase Order that is the subject of Trupiano's appeal. Further, the Board raises several arguments not made by Trupiano without even addressing Amaconn's Cross-Appeal rejecting a retroactive rent increase.

On September 13, 2021, Amaconn filed a Verified Complaint in Lieu of Prerogative Writ against the Board and Trupiano (Amaconn's tenant), seeking to abrogate the Board's grant of a monthly rent hardship increase totaling a mere $154.99. Following its summary judgment decision on July 22, 2022 in Amaconn's

favor, the Trial Court entered an order on September 30, 2022 raising the monthly rent increase from $154.99 to $1,717.18 (the "Rent Increase Order"), thereby making monthly rent $2,440.33. On October 10, 2022, Trupiano commenced this appeal by filing a notice of appeal seeking a reversal of the Rent Increase Order. On October 24, 2022, Amaconn filed a cross-appeal limited to the Trial Court's denial of its request to make the Rent Increase Order retroactive.

The Board did not file any appeal relating to any aspect of the Rent Increase Order. The Board is not an appellant. Indeed, the Board's case information statement states that it is a respondent.

The Board's brief provides an extended recitation of the history of this matter and lengthy discussion of the general legal standards governing Board decisions. Only in the latter part of its brief does the Board seek to justify certain exclusions or reductions from its $154.99 monthly rent hardship increase. However, the Board often raises arguments not made by Trupiano (or Amaconn) which are not at issue in this Appeal. The Board's arguments are addressed in turn.

First, the Board contends that it properly excluded a $75 cost for tax preparation in Amaconn's allowable costs. But it took no such action in its final decision. At the April 14, 2021 hearing, the Board reinstated the $75.32 cost for tax preparation.

8T:174. That amount is not disputed by Trupiano as an allowable cost. It is not an issue in this Appeal.

Next, the Board contends that it properly removed a $123 fee for garbage collection. The Honorable Joseph A. Turula, in sustaining that fee, held that the fee's increase to $123 was due to a change in Hoboken's Ordinance restricting the time that the garbage can be brought out to the street which affected any building and was not because the property was converted into a condominium. Judge Turula ruled:

> On the issue of garbage, the Board's position that the garbage increase was a result of the building's conversion to condominium form of ownership is incorrect.
>
> The change in fees was a city-wide ordinance.
>
> As I said earlier, any multi-dwelling building would have to change the way that they placed waste on the street, which would increase costs. So if this building was never converted the time that the garbage would go out would be the same. You would have to change it. It would be the same if it was a condo or a whole family and eight units. The garbage would have to be changed when it would go out and that would make a cost. [13T:64:20-65:8]

In any event, the $123 fee for garbage collection is not challenged by Trupiano as an allowable cost in this Appeal. It is not an issue in this Appeal.

Next, the Board contends in five pages that it properly reduced the taxes paid by Amaconn to $1,937.22 as an allowable cost. But that amount was neither disputed by Trupiano nor Amaconn. It is not an issue in this Appeal.

Next, the Board argues that it properly reduced the management fee paid by Amaconn to 5% of its operating income. However, Trupiano did not seek to validate that reduction in his Appeal. Rather, Trupiano merely argued (improperly for the first time in this Appeal) that the condominium fees paid by Amaconn are "duplicative" of Amaconn's management fees charged to him without stating how such fees were duplicative and which ones. See Db33 ("Condo fees should not have been included at all if management fees were included. They are duplicative of the management fees Mr. Metzger's company, Amaconn, claimed to incur from Mr. Metzger's other company, Julip Properties.") Amaconn addressed that argument in pages 52-54 of its prior brief. Trupiano does not seek to validate the Board's reduction of the management fee to 5% of income (instead asserting that it is entirely improper because it is duplicative). It is not an issue in this Appeal.

In any event, as previously stated in Amaconn's initial brief, first Judge Mary Costello and then Judge Turula held that the reduction of the management fee paid by Amaconn was improper. Judge Costello specifically rejected the Board's reduction to 5% of operating income:

> Amaconn presented testimony and records to support the fact that the management fee was actually incurred, actually paid, and in line with the marketplace rates. The Board resorted to an arbitrary rate of 5% of the income generated based on "board precedent" and "independent research." Counsel for the Board characterizes the 5% finding as something that was "settled on" and defends the figure by expressing the

> Board's apparent reticence to approve Amaconn paying fees to Julip Properties due to the common ownership. The fact remains that some entity has to provide management services and Julip's rates were proven to be typically $150 per month for other clients in the same market. The actual proofs submitted by Amaconn far outweighed the admittedly subjective compromise figure of 5%, which was the absolute low end of the range of 5%-12% suggested by the "independent research." This issue is remanded for further consideration and evaluation as the 5% allowance seems arbitrary and motivated by suspicion of, or animus for Amaconn. (Da 20).

Then, after reducing the management fee paid by Amaconn from $150 to $100, Judge Turula held that the Board "arbitrarily slashed the cost by a third." 13T:65:9-10. The uncontroverted testimony in the record established that the management fee for units of this size range from $150-$200 per month. 7T:29:14-20. Amaconn paid $150 per month. 5T:27:7. It was arbitrary and capricious for the Board to reduce the fee to $100.

Further, common ownership of Amaconn and Julip Properties is irrelevant. As held by Judge Costello, "some entity has to provide management services and Julip's rates were proven to be typically $150 per month for other clients in the same market." Da 20. There was no showing that Julip Properties did not provide the management services for the Unit, and that the monthly management fee paid by Amaconn (whether to Julip Properties or some other management company) is unreasonable and improper self-dealing as baldly argued by the Board.

Next, the Board argues that it properly determined Amaconn's equity in the Unit. It inexplicably and inaccurately asserts that Amaconn's equity calculation was based on the entire building and not the specific Unit. See the Board's brief, page 43 ("Accordingly, arriving at a correct equity figure required the Board to determine equity in this particular unit, not the building as a whole which Amaconn's calculations improperly attempt to establish."). Even more confounding, the Board recites a colloquy by the Board on November 28, 2018 (before the Second Remand by Judge Costello) to apparently support that the Board used the purchase price as the starting point of its analysis.

Amaconn's starting point for the return-on-equity component of the Rent Increase Order was the pro-rated purchase price of the Unit, $47,727 (the purchase price of the building divided by 11 units), to which capital improvements of $76,900 were added, both of which were adjusted for inflation to total $197,610. It is incorrect that Amaconn's equity calculation adopted by the Trial Court did not use the Unit's purchase price. Amaconn did not advance a $404,600 purchase price. Rather, that amount is the unequalized assessed value of the Unit. The equity adopted by the Trial Court averaged $197,600 and $404,600 (and not any "hypothetical" appraisal as argued by Trupiano which is irrelevant to the ultimate determination of equity).

Conversely, the Board's calculation of equity at $12,804 (absurdly less than even the Unit's pro-rated purchase price) was incomprehensible and remains so despite the Board in its brief attempting to explain how the Board arrived at that number. Moreover, the Board's argument on page 45 of its brief that it merely reduced the equity by 30% relates to its earlier calculation of equity before the Second Remand. It was not the equity that the Board ultimately determined, $12,804, which prompted Amaconn's operative (and second) complaint to the Superior Court. Judge Turula did not adjudge the propriety of a 30% discount—it was not before him. Rather, he rejected the Board's equity amount of $12,804 as baseless, and unsurprisingly Trupiano does not seek to justify that amount in his Appeal.

Next, the Board, echoing Trupiano, argues that Amaconn already earned a sufficient return when the entire Property was converted to a condominium—and thus Amaconn cannot complain that it must continue to suffer yearly financial losses by subsidizing the Unit for the entirety of Trupiano's 40-year protected tenancy. Like Trupiano, the Board cites Amaconn's 2016 tax return, filed as part of Amaconn's application for a rent increase, to establish that Amaconn realized a return on its investment. Like Trupiano, the Board ignores Amaconn's net real estate rental loss totaling $16,490 in 2016 (as well as its prior losses in 2015 and 2014 as shown in those years' returns submitted with Amaconn's application). PA 073.

Instead, the Board erroneously concludes that Amaconn's total assets of $870,000 as listed in its 2016 return derives from the conversion of the Property in 2003. However, as stated in the return, that sum is principally based upon the sum "due from affiliates" relating to other properties for $755,562. PA 074. It does not in any manner represent Amaconn's profit from the sale of the Property's other units in 2003 as Trupiano has also mistakenly contended.

Lastly, the Board's assertion on page 47 that "Amaconn assumed the risk of purchasing the property knowing that it was subject to rent control and that the tenant was a protected tenant under the TPA" is misguided. Amaconn purchased the Property in 1993, and Trupiano applied for protected tenancy status in connection with Amaconn's conversion of the Property several years later. Moreover, no landlord assumes the risk of being deprived a "just and reasonable return" under the law. Amaconn merely sought to effectuate its entitlement to a hardship rent increase given Trupiano's protected status. This is not Amaconn seeking to earn as "large" a return as possible as improperly suggested by the Board; rather Amaconn merely seeks to exercise its constitutional right to a "just and reasonable" return on a rent-controlled unit.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Rent Increase totaling $1,717.18 be affirmed in all respects and be made retroactive to August 1, 2019.

Respectfully Submitted,
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By: /s *Owen Lipnick*
OWEN LIPNICK

Dated: August 3, 2023

AMACONN REALTY, INC. **V.** **RENT LEVELING BOARD OF THE CITY OF HOBOKEN AND JEFFREY TRUPIANO**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-00434-22 Civil Action Sat below: Hon. Joseph A. Turula

AMICI CURIAE BRIEF AND APPENDIX OF FAIR SHARE HOUSING CENTER, NJ APPLESEED, NJ TENANTS ORGANIZATION AND HOBOKEN FAIR HOUSING ASSOCIATION IN SUPPORT OF THE APPELLANT

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AMICI STATEMENT OF INTEREST

FAIR SHARE HOUSING CENTER ("FSHC") is a non-profit organization that represents the interests of lower-income New Jerseyans by advocating for affordable housing and racially- and economically integrated communities, particularly through enforcement of the Mount Laurel doctrine. FSHC has been doing this work since 1975 and was founded by advocates who helped secure the Supreme Court's canonical decision in S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I).

To this day, FSHC remains the only organization dedicated to representing the interests of lower-income New Jerseyans in Mount Laurel cases. FSHC is widely recognized as a leading expert on the Mount Laurel doctrine and has been designated by the New Jersey Supreme Court as a key interested party in Mount Laurel declaratory judgment proceedings. See In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 23 (2015) (Mount Laurel IV). FSHC has also frequently taken an active role in advocating for other mechanisms for creating and preserving affordable housing across the state, including development fee ordinances, inclusionary zoning, and rent control.

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER ("NJA") is an independent public interest law center created and run by attorneys, which participates in a range of litigation and advocacy activities

aimed at confronting some of the most pressing and complex problems that threaten vulnerable communities and individuals in the state, and providing a legal voice to those who might otherwise not be heard.

NEW JERSEY TENANTS ORGANIZATION ("NJTO") is one of the largest statewide tenant membership organizations in the United States with over 30,000 tenant members since its founding in 1969. NJTO has worked for over 50 years to secure legislative protections for the rights of vulnerable tenants and for affordable housing.

HOBOKEN FAIR HOUSING ASSOCIATION ("HFHA")) is a nonprofit organization based in Hoboken, NJ that works to maintain the strongest possible rent protections in Hoboken through active involvement and monitoring of Hoboken's city government and exposing inequities as they arrive. HFHA organized a GoFundMe page in July 2022 to assist Jeffrey Trupiano with the extreme cost burden of the additional $1,717 monthly rental increase awarded by Judge Turula. Without this support Mr. Trupiano would be unable to cover the rent. At this time, the GoFundMe account funds will only last for 1-2 more months.

If permitted to appear as *amici*, FSHC, NJA, NJTO, HFHA can assist the court in understanding the legal context in which this appeal arises and the impacts the case is likely to have on low- and moderate-income residents in

Hoboken and the state. Our application is timely, and our participation will assist the court in the resolution of key issues of public importance, without unduly prejudicing any party to the case.

PRELIMINARY STATEMENT

FSHC, NJA, NJTO and HFHA respectfully submit this brief in support of its motion to participate as *amici curiae* and in support of the appeal filed by the Appellant, Mr. Jeffrey Trupiano. This case concerns the fundamental protections of rent control for tenants in New Jersey and necessary limitations on hardship rental increases at a time when affordable housing in the state is critically scarce. It also raises substantial questions about how New Jersey rent control boards should ensure that hardship rent increases do not undermine the affordability of rent controlled units, especially in the context of condo-converted buildings.

The hardship increase granted by the lower court exceeds the amount of rent that any landlord could secure for a 5th floor unrenovated walk-up apartment in the City of Hoboken. Should the increase be upheld, it would result in the displacement of a low-income tenant who qualified for and continues to be protected by the Tenant Protection Act of 1992. Currently, the only thing allowing Jeffrey Trupiano to remain in his home is his dwindling GoFundMe account that was organized by the HFHA.

Meanwhile, the landlord, Amaconn Realty, Inc., has already made a substantial return on their investment through the purchase and subsequent condominium conversion of the eleven-unit building in which the Appellant resides. For more than two decades, as owner of the building, Amaconn largely ignored Mr. Trupiano, providing little, if any, maintenance, services, or improvements to his dwelling unit. The company now has nonetheless been granted a rent increase by the court that is hundreds of dollars more than what the legal rent would have been had the building never gone through the conversion process.

Amaconn justified their rent increase request by presenting a formula of their own creation for determining a hardship, which the lower court largely adopted. This method, which the City's Rent Leveling and Stabilization Board was not required by Hoboken's rent control law to follow, incorporated various unsupported assertions about Mr. Trupiano's dwelling unit, namely— that the market value of the unit could be approximated based on a non-rent-controlled, fully renovated, and upgraded 2-bedroom, 2-bath condominium of similar size to the Appellant's unit; and the Appellant's unit had received $76,000 in capital improvements (none of which were documented), nor did that speculative value include any consideration for depreciation over a twenty-year time period. These calculations, which were nothing more than unsupported

assertions or assumptions, ultimately derived from the unit's status as a condominium, and should not have been considered given the protections embedded in the Tenant Protection Act of 1992. As a result of the court's failure to consider the policy and provisions of such Act, Amaconn received a rent increase that it could not have received had the Appellant's building not been converted to condominiums. Despite the growing popularity of condominium conversions around the state, they cannot be a pathway for circumventing rent control protections. This court must reject any hardship rent increase that would achieve such an outcome.

FACTUAL AND LEGAL BACKGROUND

This matter concerns Hoboken, New Jersey's rent control ordinance ("RCO") and the City's Rent Leveling and Stabilization Board's ("The Board") proper application of the ordinance's hardship rent increase provision. In general, rent control ordinances must balance the dual interests of maintaining affordable rents for tenants while providing landlords with both enough rental income to cover their operating expenses and enough return on their real estate investment to incentivize their continued participation and investment in the rental market. To achieve these ends, rent control ordinances in New Jersey set limits on annual rent increases and provide landlords with a hardship rent

increase pathway through which they can apply for further increases due to extenuating circumstances.

Accordingly, Hoboken's RCO provides that, "In the event that a landlord cannot meet his operating expenses or does not make a fair return on his investment, he may appeal to the Rent Leveling and Stabilization Board for a hardship rental increase." Hoboken, N.J., Code § 155-14(A) (2018). The ordinance specifies that, "Fair return on the equity investment in real property shall be considered to be 6% above the maximum passbook demand deposit savings account interest rate available in the City of Hoboken." Hoboken, N.J., Code § 155-1 (2018). In addition, the ordinance further provides various factors that the Board shall consider in such an application including:

> "Whether the landlord made a reasonably prudent investment in purchasing the property and arranging financing on said property. In considering this factor, the Board may consider the purchase price, the fair market value of the property and the existing rentals at the time of the purchase to determine, if the debt servicing expenses are excessive. The Board may also consider the amount of cash invested in the property in relation to said fair market value and purchase price, the interest rate of the mortgage and whether the mortgage instrument was arrived at and executed in an arms-length transaction." Hoboken, N.J., Code § 155-14(A)(3) (2018).

In 2017, the owner of the property located at 703 Park Avenue, #11 in Hoboken, NJ, Amaconn Realty ("Amaconn"), applied for a hardship rent increase for that rent-controlled unit. Unit #11 has been continuously occupied

by the Appellant, Mr. Jeffrey Trupiano, since 1990. Amaconn originally purchased the entire eleven-unit multifamily building at 703 Park Avenue in 1993. In 2001, Amaconn converted the entire building and its eleven units to condominiums, and subsequently sold ten vacant units for a profit.[1] The parties agree that Mr. Trupiano is a protected tenant under the Tenant Protection Act of 1992 and is therefore protected from eviction without good cause for as long as he lives there and meets the income requirements.[2] Amaconn has raised no issue in this matter concerning any cause for terminating Mr. Trupiano's tenancy.

Since 2017, this matter has been extensively litigated by the parties via prerogative actions against the Rent Leveling Board in Superior Court. FSHC, NJA, NJTO and HFHA became involved following the court's most recent decision in 2022 by Judge Turula, in which the court found that the Board was arbitrary and capricious in its determination of Amaconn's hardship rent increase, and awarded Amaconn with a new monthly rent increase of $1,717 for

[1] Mr. Trupiano has represented, and Amaconn does not appear to contest, that his unit does not have its own deed, and therefore it does not seem to be a separate condominium unit like the other units in the building.

[2] Briefs submitted by the parties mention that Mr. Trupiano is protected from eviction without cause for forty years, but that is incorrect. As a qualified tenant in Hudson County (a qualified county under N.J.A.C. 5:24-3.2(b)) his protected tenancy is for as long as he lives in the unit and meets the income requirements of the Tenant Protection Act of 1992. The erroneous 40-year number refers to the Senior Citizens and Disabled Protected Tenancy Act. At the time of the conversion, Mr. Trupiano was neither a senior nor a disabled tenant.

a total rent of about $2,400.[3] Two-thirds of the rent increase, or $1,568.25 per month, provides Amaconn with a return on its alleged equity investment and is in addition to the minimum rent needed for Amaconn to meet its operating expenses for the unit. According to Mr. Trupiano's brief in the appeal, his annual income is less than $43,000 per year. As noted above, his only means of paying the rent increase ordered by the lower court is a GoFundMe account that will only last for 1-2 more months. Steinhagen Cert., ¶4.

The primary issue that is of concern to the *amici* is how the trial court ordered the Board to calculate Amaconn's fair and reasonable return on its equity investment. Over the course of this litigation, Amaconn, the Board, and Mr. Trupiano have argued for three different approaches to calculating return on equity, which are outlined below. Only the approach adopted by Amaconn and the lower court would raise the rent to unaffordable levels for Mr. Trupiano.

First, Amaconn has argued, and Judge Turula most recently substantially agreed in 2022, that a fair and reasonable return on its equity should incorporate an approximation of the dollar value of Mr. Trupiano's unit using Hoboken's

[3] Mr. Trupiano's brief in this appeal has represented that the new rent is $2,400 per month, while Amaconn's brief has represented that it is $2,440.33.

tax assessment of the unit plus $76,000 of alleged capital improvements. In application, Amaconn's rent will grow along with the value of Mr. Trupiano's unit as if it were a non-rent-controlled condominium unit with a market value that increases in proportion to the City's speculative real estate market. This method of calculating equity is the primary driver of the substantial rent increase, imposed by the court herein, which if implemented would displace a protected tenant who will no longer be able to afford his apartment.

Second, before Judge Turula's recent decision, the Hoboken Rent Leveling and Stabilization Board chose a different method of calculating Amaconn's return on equity. They effectively employed a compromise approach that would have awarded Amaconn with a hardship rent increase moderated by the inherently lower market value of a rent-controlled unit relative to an unencumbered unit, Amaconn's investment in the property at 703 Park as a whole and its subsequent equity return on ten of the building's eleven units, and the overall need to maintain some level of affordability for Mr. Trupiano.

The Board also found guidance in a previous decision on this same case by Judge Costello in which the court upheld the Board's decision to lower the property tax liability attributable to the hardship application from $6,275.00 to $1,937.22, an amount that roughly represents a 70% reduction. (See June 23, 2021 Hoboken Rent Stabilization Board Meeting Transcript, 1T134:2-6). The

Board also noted that this reduced liability represented 25% of the renovated and unencumbered unit directly across the hall from Mr. Trupiano's unit. By using the real (meaning actual) numbers made available to the Board, it was able to calculate a realistic applicable dollar amount to include for equity in the hardship calculation.

Third, Mr. Trupiano has taken the further position that the Board should not consider the value of his unit at all in determining his rent. Rather, he argues the Board should only calculate return on equity using Amaconn's prorated purchase investment in his unit, guaranteed them an annual return equivalent to what it would be if those funds had originally been invested in a savings account and adjusted as needed for inflation.

Either the Board's or Mr. Trupiano's above approaches to calculating rent hardship increases for a rent regulated unit in building that otherwise had been converted from rental units to owner-occupied condominium units is sustainable state law. In contrast, the method used by the lower court not only violates the Tenant Protection Act of 1992 as we will further detail, but by raising the rent to such a high level, it frustrates one of the primary goals of rent control—creating and preserving affordable housing.

ARGUMENT

I. THE HARDSHIP RENT INCREASE REQUESTED BY AMACONN AND ORDERED BY THE LOWER COURT IS IN DIRECT CONFLICT WITH THE PURPOSES OF RENT CONTROL AND THE TENANT PROTECTION ACT OF 1992 AND IS INCONSISTENT WITH EXISTING LAW.

The hardship rental increase authorized by the trial court would result in a monthly rent for Mr. Trupiano that would be unaffordable for him and any low- or moderate-income resident in the City of Hoboken.[4] It is a certainty that he will be displaced from his rent-controlled unit as a result. This is precisely what rent control in New Jersey and the City of Hoboken was established to prevent. Moreover, the Tenant Protection Act of 1992 specifically protects tenants like Mr. Trupiano from having to assume the costs of condominium conversation through increased rent, especially when the rent increase effectively amounts to eviction. Regardless of whether this court finds that the Hoboken RCO guarantees landlords a value-based return on equity, the Board was not required to follow Amaconn's methodology for calculating a hardship rent increase. The *amici* support two alternative approaches to calculating return

[4] See *2023 AFFORDABLE HOUSING REGIONAL INCOME LIMITS BY HOUSEHOLD SIZE*, AFFORDABLE HOUSING PROFESSIONALS OF NEW JERSEY (AHPNJ), https://ahpnj.org/member_docs/Income_Limits_2023.pdf (last updated May 26, 2023). The monthly rent of approximately $2,400 ordered by the lower court would equal more than two-thirds of Mr. Trupiano's total monthly income.

on equity advanced by the Board and Mr. Trupiano respectively and ask the court to consider, as both the Board and Mr. Trupiano did, Amaconn's actual hardship, not that based on an assumed increase in value due simply to a change in status of the entire building; that is, the company's hardship must be evaluated in the context of its lucrative investment in the overall property at 703 Park.

A. Hardship Rent Increases Must Strike a Balance Between the Interests of Landlords and Tenants.

The New Jersey Supreme Court has long recognized rent control as a powerful and important means by which municipalities can respond to a critical need for affordable housing. See Inganamort v. Fort Lee, 62 N.J. 521, 527 (1973). It is used throughout the state, and like other affordable housing mechanisms such as inclusionary zoning, it serves a key anti-displacement function in places where market rents are no longer affordable to a substantial portion of the local population.

These objectives must be balanced against the right of an "efficient landlord to realize a 'just and reasonable return' on his property. Helmsley v. Fort Lee, 78 N.J. 200, 210 (1978) (quoting Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 568 (1975)). The New Jersey Supreme Court has generally held that hardship increase formulas cannot, "indefinitely freeze the dollar amount of a landlord's profits 'without eventually causing confiscatory results.' Mayes v. Jackson Twp. Rent Leveling Bd., 103 N.J. 362, 370 (1986).

However, this right of a "just and reasonable return" is also not without its limits. "[It] must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit… [a] just and reasonable return is one which is generally commensurate with returns on investments in other enterprises having corresponding risks." Troy Hills Vill. v. Twp. Council of Parsippany-Troy Hills, 68 N.J. 604, 629 (1975). However, there may be certain "atypical cases" where rent levels may still, "drive inefficient operators out of the market and may preclude persons who have paid inflated purchase prices for buildings from recovering a fair return." Id. at 628. In essence, rent increases on rent-controlled units cannot be, "so high as to defeat the purposes of rent control nor permit landlords to demand of tenants more than the fair value of the property and services which are provided." Id. at 629.

Amaconn's requested hardship increase does not achieve the above required balance. On the contrary, since it would raise Mr. Trupiano's rent to the point of being completely unaffordable to low- and moderate-income residents in the region, it would ultimately defeat the purposes of rent control in general and specifically Hoboken's RCO—i.e., the maintenance of affordable housing in the City.

B. The Hardship Increase Request by Amaconn and Ordered by the Lower Court Would Violate the Tenant Protection Act of 1992, Which Was Specifically Designed to Provide Protection to Residential Tenants, Particularly Those of Low and Moderate Income from Eviction Resulting from Condominium and Cooperative Conversions.

The hardship increase, and particularly the return on equity calculation approach adopted by the lower court and Amaconn also violates the Tenant Protection Act of 1992 ("TPA"). The TPA was enacted to prevent condominium conversions from destroying affordable housing and evicting vulnerable tenants. The NJ Legislature specifically noted in its amendments to the TPA in 2000 that the earlier TPA "had yet to adequately preserve the supply of affordable housing in certain municipalities in which condominium and cooperative conversions have been especially common." N.J.S.A. 2A:18-61.41(f). It declared that "In the public interest of preserving affordable housing…qualified municipalities may prohibit the conversion of affordable rental housing units." N.J.S.A. 2A:18-61.41(g)

In the context of hardship rent increase applications, the TPA provides that:

> "Increased costs *that are solely the result of a conversion*, including but not limited to any increase in financing or carrying costs, and do not add services or amenities not previously provided shall not be used as a basis for an increase in a fair return or hardship hearing before a municipal rent board or on any appeal from such a determination." N.J.S.A. 2A:18-61.52(b). (Emphasis added)

Amaconn's return on equity approach, which the lower court largely adopted, effectively aims to achieve a return on the value of the Mr. Trupiano's dwelling unit as a condominium, not as a rental unit encumbered by rent control protections. Amaconn assumes that the value of Mr. Trupiano's unit has increased because of its conversion and tries to recoup this rise in value through a significant rent increase. Under the TPA, this is not allowed.

Both the Board and Mr. Trupiano have offered return on equity approaches that would be compliant with the TPA's protections, and which the *amici* support. Although the Board's approach would still incorporate an estimation of the value of Mr. Trupiano's dwelling unit, the value would be discounted significantly due to its rent-controlled status, and Amaconn would be entitled to a lower return and resulting rent. This rent would ultimately be affordable to Mr. Trupiano, and therefore the Board's approach would ultimately still follow the legislative intent of the TPA that condominium conversions cannot destroy affordable housing.

Under Mr. Trupiano's return on equity approach, any hardship increase would not incorporate any market valuation of his dwelling unit post-condo conversion. The conversion of his unit in and of itself would therefore have no detrimental effect on his rent at all. This would clearly comply with the letter of the TPA's section 61.52(b), as well as the TPA's overall affordability objectives.

It is also more consistent with a reading of Hoboken's rent control law that contemplates a return on actual investment (i.e., equity) not an assumed increase in value simply due to conversion.

C. Regardless of Whether the Hoboken RCO Guarantees Landlords a Value-Based Return on Equity, the Board Was Not Required to Follow Amaconn's Methodology for Calculating a Hardship Rent Increase.

Hoboken's rent control ordinance does not guarantee landlords a return on equity investment based on the dollar market value of the rent-controlled unit, nor does it explicitly identify a particular method for calculating equity. Amaconn has argued that they are entitled to a rent increase based largely on an annual return on equity derived from Mr. Trupiano's unit's tax assessed value. There is no reason grounded in law to conclude that the Board was required to follow such an approach.

The NJ Supreme Court has long been skeptical of the accuracy of attempts to measure a landlord's just and reasonable return on investment using an approximated current value of the rent-controlled unit. In Troy Hills, it noted that "[t]hree methods are conventionally used for valuing real property: depreciated replacement cost, market value based on sales of comparable properties, and capitalized income…[though] [n]one of these methods is wholly suitable to the problem of determining value." Troy Hills, 68 N.J. at 625-26. The Court instructed that it was important to consider their limitations, and noted

there could be other valuation methods, such as "assessed valuation or original cost depreciated." Id. at 626.

Three years later in Helmsley, after referencing the various value-based criteria for calculating a just and reasonable return on investment in Troy Hills, the Court ultimately upheld an ordinance that allowed rent adjustments tied to inflation but contained no value-based criteria for determining just and reasonable return at all. In justifying its decision, the Court reasoned that, "a value-based criterion for confiscation under rent control is practically unworkable." Helmsley 78 N.J.at 215. It pointed to the inherent circularity of determining a fair rent based on property value when property value is typically at least partially based on rent. Id. at 213-215. Ultimately it found inflation adjustments were sufficient to prevent a confiscatory result. Id. at 217.

Although the *amici* do not take a position on whether the Hoboken RCO is a value-based ordinance (though there is strong evidence that Hoboken's RCO is not a value-based ordinance and instead bases hardship increases on actual cash investment and/or mortgage interest along with operating expenses, such as insurance, taxes etc.), either Mr. Trupiano or the Board's approaches to calculating a hardship rent increase would be viable alternatives to Amaconn's.

If this court accepts the arguments of Mr. Trupiano that the Hoboken RCO is not a value-based ordinance, then the Board should not have considered the

value of his apartment at all, including its assessed value for tax purposes, and, for sure, Amaconn's requested methodology for calculating the rent increase should be wholly rejected. Such interpretation is supported by the language of the RCO and would withstand any facial challenge (though no party has made one to date). Indeed, such a reading of the RCO would be nearly identical to the Helmsley ordinance. It also guarantees landlords rent adjustments tied to inflation that would allow them to meet their operating expenses and receive a fair return on their initial investment.

If this court finds that the Hoboken RCO return on equity provision is value-based or partially value-based, the above case law also reflects the considerable latitude afforded to municipalities and rent control boards to create methodologies for calculating fair rent increases that ensure the maintenance of housing affordability. There is no case law or text in the Hoboken RCO that commits the Board to calculate return on equity using the specific methodology requested by Amaconn. Moreover, if the RCO uses a value-based return on equity formula, there would be reason due to Mr. Trupiano's protected tenancy status to find that the Board's action, which sought to estimate a return on equity that also preserved an affordable rent, was clearly rational, well-reasoned, and consistent with the broader aims of the Tenant Protection Act of 1992.

In contrast, Amaconn's methodology for calculating return on equity depends almost entirely on an estimation of Mr. Trupiano's unit's market value, despite the difficulties and inaccuracies in doing so for a rent-controlled unit. Not only has the NJ Supreme Court made clear that such an approach is disfavored, but this court should also view Amaconn's process with particular skepticism since it would have such a destructive effect on affordability and undermine the purpose of rent control, especially in the context of a unit located in a building that has undergone conversion to condominium ownership.

D. The Court Should Consider Amaconn's Hardship in the Context of the Larger Investment in 703 Park Avenue.

Amaconn has already realized the bulk of its return on its initial investment in the building at 703 Park Avenue through the conversion of the building to condominium units and its sale of over 90% of the former rental units for profit. This broader context cannot be ignored.

The Hoboken RCO gives the Board considerable discretion in weighing a hardship increase to consider factors including: "Whether the landlord made a reasonably prudent investment in purchasing the property [,] …the purchase price [,] … [as well as] the amount of cash invested in the property in relation to… fair market value." Hoboken, N.J., Code § 155-14(A)(3) (2018)

Overall, Amaconn's investment in 703 Park Avenue has been extremely lucrative for the company. However, when viewing Mr. Trupiano's unit in

isolation, as Amaconn has asked the Board and this court to do, the unit could not reasonably be considered a prudent investment, as the only way to render it as profitable as the other condo units would be to increase its rent so much, it would no longer be affordable to its long term, *protected* tenant.

The length of time from purchase – 1993, when all 11 units were occupied, until 2001 when Mr. Trupiano was the only remaining tenant also strongly implies that the investment was made in the first place for the sole purpose of converting the building to condominiums. It appears that the landlord attempted to wait until the building was fully vacant prior to undertaking conversion by warehousing 10 rental units in direct violation of Hoboken's anti-warehousing laws over the 8-year period from purchase to conversion. (Aa 44).

Accordingly, we would ask the court to consider what would have been a realistic purchase price for this building at the time of the purchase if there was no intent to convert. A prudent investment would require a determination by the Hoboken Rent Leveling Officer of what the legal rents on the 11 units actually were at the time of purchase. No such determination was requested by Amaconn. (Absent from record referred to at 7T 151: 23-25 to 152: 1-3). However, Mr. Trupiano's rent was substantially reduced around the time of conversion and a letter from the Hoboken Rent Leveling Officer in the property file indicates that there had been a determination of a rental overcharge. (7T 150: 10-25 to 7T 151:

1-16) Any investor making a prudent investment in a rental property in a rent-controlled municipality would assuredly get a determination on what the legal rents were and, thus, a realistic understanding of what the income generated from the property would be before making an offer to purchase. Having access to the actual legal rents and an expense statement just prior to the sale would have been the only way that the Board could determine the actual value at the time of purchase based on the income capitalization method – i.e., the standard method used for rental buildings. Such figure is the one that should have been the actual purchase price and would have been the best indicator of whether the price Amaconn actually paid represented a prudent investment. This information was not provided to the Board (absent from the record) and presumably does not exist as it was not relevant to a purchaser who was buying the rental building for the purpose of conversion. Even in an overheated real estate market (where the State moved forward with legislation that protected tenants specifically in Hudson County, just like Mr. Trupiano, due to ongoing speculative conversion and displacement), it stands to reason that the actual purchase price, were it purchased for rental purposes, would have been extremely low. Taking into account the much lower taxes previously approved by Judge Costello and what would have been a much lower equity return attributable to an investment that did not contemplate condo conversion, it is likely that the landlord would not be

entitled to any increase at all. While that may sound shocking, it is a fact that any "hardship" claimed at this time is due solely to the fact that the unit is being operated as a condominium. There would be no hardship if the unit was still being operated as a part of an 11-unit rental building with lower taxes and no monthly HOA fees; and that is exactly the standard that the Tenant Protection Act of 1992 essentially contemplates.

Although The Board did not use this method, they did try to find an approach that would be more generous to the owner while not destroying the affordability of the unit and Mr. Trupiano's statutory protection. It was essentially a compromise, and though one could argue that it was too generous to the landlord, it is sustainable under Hoboken's RCO (which permits consideration of all operating expenses including taxes and HOA fees) and the Tenant Protection Act.

II. THE ROLE OF RENT CONTROL IN PRESERVING AFFORDABLE RENTS IN HOBOKEN IS PARTICULARLY IMPORTANT AS FEW OTHER AFFORDABLE HOUSING OPTIONS EXIST FOR LOW- AND MODERATE-INCOME TENANTS.

Like many municipalities in the New Jersey, Hoboken has a critical lack of affordable housing options for low- and moderate-income residents. According to census date from 2017-2021, Hoboken had a median gross rent of

$2,479 per month.[5] Today, the median rent is likely closer to $4,000.[6] In 2023, the upper limit for moderate income single person households in NJ, like Mr. Trupiano's, was $67,431.[7] According to the U.S. Department of Housing and Urban Development, households are considered cost burdened when they spend more than 30% of their income on rent, mortgage and other housing needs.[8]

Based on the above data, no moderate-income household in Hoboken, much less a low-income household like Mr. Trupiano's, would be able to afford an apartment with a monthly rent equal to the area median rent or above without being severely cost-burdened. Assuming rents have increased in Hoboken since the last Census data was published, market rate apartments are virtually unattainable for low-income households. This reality highlights the necessity of rent control and other affordable housing mechanisms. For tenants like Mr.

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[5] *Quick Facts-Hoboken City, New Jersey*, UNITED STATE CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/hobokencitynewjersey/HSG860221#HSG860221 (last visited Aug. 24, 2023).

[6] *Hoboken NJ Rental Market*, Zillow Rental Manager, https://www.zillow.com/rental-manager/market-trends/hoboken-nj/ (last visited Aug. 24, 2023).

[7] *Supra*, note 4.

[8] *2023 Housing Plan Element and Fair Share Plan*, City of Hoboken 22 (2023), https://assets-global.website-files.com/58407e2ebca0e34c30a2d39c/642489e6bc8a95f6a02b5c0c_23.02.08%20Final_Hoboken%20Housing%20Element%20and%20Fair%20Share%20Plan.updatedfrom%20PB.pdf.

Trupiano, there is simply not a readily available and viable alternative to his current apartment in which he has now lived now for over thirty years.

CONCLUSION

For the reasons discussed above, FSHC, NJA, NJTO and HFHA respectfully request that the court grant the motion for leave to participate as *amici* and grant Appellant, Mr. Jeffrey Trupiano's request to reverse the decision below, and reject Amaconn's requested hardship rent increase.

Respectfully Resubmitted,

Dated: August 24, 2023

FAIR SHARE HOUSING CENTER

/s/ William Fairhurst
William S. Fairhurst, Esq.

NJ APPLESEED PUB. INTEREST
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September 15, 2023

Via Electronic Filing

Superior Court of New Jersey, Appellate Division
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625
Attention: Sara Felicia, Case Manager

RE: Amaconn Realty, Inc. v. Hoboken Rent Leveling Board and Jeffrey Trupiano
(Docket No. A-00434-22)
Plaintiff's opposition to Defendant's Motion to Stay Trial Court's Order

Dear Honorable Judges of the Appellate Division:

On behalf of plaintiff/respondent/cross-appellant Amaconn Realty, Inc. ("Plaintiff"), please accept this letter, in lieu of a more formal brief, seeking leave to file the within substantive opposition to the *Amici Curiae* brief filed by the Fair Share Housing Center, New Jersey Appleseed Public Interest Law Center, New Jersey Tenants Organization and Hoboken Fair Housing Association (collectively, "Amicus"). Plaintiff did not oppose the motion to appear by Amicus under R. 1:13-9(a) as its motion was timely filed on August 3, 2023, the day that Plaintiff's reply brief was filed and due. The Order, filed on August 21, 2023, granting the motion for Amicus to appear did not provide for Plaintiff's filing of any responsive brief.

Accordingly, Plaintiff seeks this Court's leave to file the within response to the brief filed by Amicus on August 24, 2023. Plaintiff seeks to correct certain inaccurate statements advanced by Amicus that underlie its flawed position.

Fundamentally, Amicus contends that the Trial Court's Order increasing the rent obligation of defendant, Jeffrey Trupiano ("Defendant") by $1,717.18 (the "Rent Increase Order") is based upon an increase in Plaintiff's equity in Defendant's unit (the "Unit") resulting from the conversion of the Unit to a condominium. See, e.g., page 15 ("Amaconn's return on equity approach, which the lower court largely adopted, effectively aims to achieve a return on the value of Mr. Trupiano' dwelling unit as a condominium, not as a rental unit encumbered by rent control protections"); page 5 ("Amaconn received a rent increase that it could not have received had the Appellant's building not been converted to condominiums"). That premise is false. Like Defendant, Amicus erroneously asserts that Plaintiff's equity in Defendant's Unit was based upon the Unit's market value as a condominium.

Plaintiff's equity in the Unit was determined by the inflation-adjusted purchase price and capital improvements attributable to the Unit, and the Unit's unequalized assessed value based upon the Unit's replacement cost (6T:21:21) with an approximate thirty-five percent (35%) discount due to Defendant's protected tenancy. 6T:20:9-22:2; 30:9-14; 31:6-11; 33:20-24; 35:17-19; 40:17-22; 44:18; 54:20-23. Specifically, the Rent Increase set by the Court was not impacted by the conversion of the Unit to a condominium but was based on the average of (i) the Unit's purchase price equal to $47,727 ($525,000 divided by 11 units), adjusted for inflation since 1993 (the purchase year) (7T:37:13-38:5) and capital improvements in 2002 totaling $76,900 for the Unit, adjusted for inflation since 2002 (Pa 48; 1T:6:14-16; 44:10-16: 5T:74:12-

25; 10T:138:12-15); and (ii), Hoboken's assessment of the Unit based only upon replacement cost, without the equalization ratio being applied, less approximately thirty-five percent (35%) due to the existence of a protected tenant in the Unit. 6T:20:9-22:2; 21:21; 30:9-14; 31:6-11; 33:20-24; 35:17-19; 40:17-22; 44:18; 54:20-23. Thus, notwithstanding the contrary contentions by Amicus (and Defendant), Plaintiff's equity in the Unit did not derive from its market value based upon its value as a condominium.[1]

Not only does Amicus misstate Amaconn's equity in the Unit as derived from the Unit's value as a condominium, Amicus baldly concludes that Amaconn's "hardship" is "due solely to the fact that the unit is being operated as a condominium" and that "no hardship" would otherwise exist with lower taxes and no HOA fees. See page 21. This is utter speculation without any support in the record. First, the Board substantially reduced Amaconn's taxes in determining Amaconn's operating expenses, and the record does not support that the HOA expense was more than the expense for the Unit if it had not been converted.[2] Moreover, Amicus ignores that Amaconn is not only entitled to sufficient rent to meet its operating expenses, but also a "fair return" on its equity in the Unit. Much of the rent increase adjudicated by the Trial Court provides Amaconn with a "fair return" on its equity in the Unit.

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[1] Ironically, Amicus cites Troy Hills Vill. v. Twp. Council of Parsippany-Troy Hills, 68 N.J. 604 (1979), in which the Supreme Court stated that the conventional methods of valuing property may be of limited use for determining an owner's just and reasonable return on its property and suggested other valuation methods, such as "assessed valuation or original cost depreciated." 68 N.J. at 626. The Unit's assessed valuation is precisely a major component of Plaintiff's equity that was adopted by the Trial Court.

[2] Defendant only argues in this Appeal that Amaconn's management fees and a special assessment should not have been excluded in Amaconn's operating expenses.

Amicus also speculates that the $47,72 purchase price attributable to the Unit in 1993 was dependent upon conversion to a condominium (which occurred ten (10) years later in 2003), and that price was too high, and, but for a conversion to a condominium, was not a "prudent" investment. See page 20 ("Accordingly, we would ask the court to consider what would have been a realistic purchase price for this building at the time of the purchase if there was no intent to convert."); page 21 ("[I]t stands to reason that the actual purchase price, were it purchased for rental purposes, would have been extremely low."). Such speculation is patently improper—particularly for an appellate argument that can only be based upon the record below. What's more, Defendant did not even challenge the methodology for determining the $47,727 purchase price attributable to his Unit at the trial court level.[3] It is inappropriate for Amicus to seek to introduce a factual issue not argued by Defendant below, particularly when its role is limited to assisting in the determination of a legal issue. R. 1:13-9(a). Moreover, the conversion to a condominium occurred in 2003, ten (10) years after Amaconn's purchase of the building. No facts in the record support that the $47,727 purchase price was somehow inflated and was based upon a conversion to a condominium that would occur 10 years later, as improperly speculated by both Amicus and Defendant.[4]

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[3] Only in this Appeal does Defendant first speculate that, in 1993, his Unit "may have been worth less" (Db 8), because of his occupation of the Unit. However, Defendant did not present any evidence to the Hoboken Rent Leveling Board that the Unit's pro rata purchase price of $47,727 was somehow unfair or that a different price should have been adopted. See Amaconn's reply brief, filed on August 3, 2023, page 6.

[4] Amicus, repeating Defendant, also improperly states that the capital improvements totaling $76,900 to the Unit were not supported. Amaconn addressed that false contention in its August 3, 2023 reply brief, pages 1-2. Moreover, Defendant merely argued that the improvements were not to any great extent, not that improvements were not made.

Thank you for your consideration.

Respectfully submitted,

s/ *Owen Lipnick*

OWEN LIPNICK