BLACKRIDGE REALTY, INC., Plaintiff/Appellant, v. CITY OF LONG BRANCH, 290 OCEAN, LLC, JAMES and CHRISTINE FUSCO, 286 OCEAN AVENUE LLC and OCEAN AVENUE 290 ASSOCIATES, LLC, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1400-23 On Appeal from: Superior Court Of New Jersey, Law Division, Monmouth County Docket No. MON-190-21-PW Sat Below: Hon. Linda Grasso Jones, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, BLACKRIDGE REALTY, INC.

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PRELIMINARY STATEMENT

Cases decided under the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 ("MLUL") *et seq*, prohibit municipalities from demanding and developers from paying contributions to defray the costs of municipal improvements unless (1) there is a nexus between the proposed project and the payment; and (2) the requirements of *N.J.S.A.* 40:55D-42 are met.

In this matter, Respondent, 290 Ocean, LLC ("290 Ocean"), made a $2,000,000 payment to the City of Long Branch in return for the City's agreement to amend its "Oceanfront-Broadway Redevelopment Plan." The Redevelopment Plan amendment is applicable to one property only, that of 290 Ocean LLC. In return for the $2,000,000 payment, Long Branch agreed to eliminate any density limitation on 290 Ocean's proposed luxury apartment building, as well as many other bulk restrictions that would have applied to 290 Ocean's property. These restrictions continue to constrain the development of every other property within the Oceanfront-Broadway Redevelopment area.

The trial Court found this payment to be authorized by the Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-l, *et seq* ("LRHL") concluding that the LRHL permits such payments because "a rational nexus existed between the payment and the **redevelopment plan**." (Emphasis

added). (Pa58). Therefore, one issue before this Court requires a determination of whether the LRHL delegates to a municipality the right to use its zoning power to extract such payments and, if so, how is the nexus between the payment and the development project to be evaluated.

The trial court erred for several reasons. First, the payment was not authorized by the LRHL. Second, insofar as the Court found a "nexus," between the $2,000,000 payment and the "redevelopment plan," it focused on the wrong relationship: the nexus between the payment and the plan is irrelevant. The focus must be on the nexus between the payment and the development project. Third, the summary judgment record was insufficient to find, as a matter of law, that a $2,000,000 payment to defray the costs of a new senior center in consideration for a "density bonus," had any nexus whatsoever to a non-age restricted luxury residential project. Fourth, Long Branch failed to adhere to the requirements of *N.J.S.A.* 40:55D-42 of the MLUL.

A second issue is whether or not the City of Long Branch could disregard provisions which precluded the City from making a change in a redevelopment plan without the written consent of "designated developers," which were included in City Ordinance § 345-98 and in the Oceanfront-Broadway Redevelopment Plan. The lower court wrongly concluded that the

City did not need the consent of other designated developers, such as Plaintiff, Blackridge Realty, Inc., because the latter's redevelopment project had been completed.

A third issue asks this Court to determine whether a change to the development criteria applicable to a single lot in a redevelopment area is, as a matter of law, immune from a spot zoning analysis. The Court wrongly determined that the spot zoning decision is one of law uninformed by any planning considerations.

PROCEDURAL HISTORY

A. The Parties and Their Properties

Plaintiff, Blackridge Realty Inc., is a New Jersey corporation and the owner of property known as 345 Ocean Boulevard in Long Branch, New Jersey (the "Blackridge Property"). (Pa938; Pa1121 to Pa1123). Plaintiff's property is the site of a multi-unit luxury apartment building constructed in accordance with the 1996 "City of Long Branch, New Jersey, Oceanfront-Broadway Redevelopment Plan." (Pa50 to Pa51). Plaintiff's property adjoins the property owned by Defendant, 290 Ocean, LLC. that is the subject of this appeal. (Pa939).

Defendant, 290 Ocean, LLC, is a New Jersey limited liability company and the designated redeveloper of property known as block 216, lots 11, 12 and 24 on the tax map of the City of Long Branch (the "Ocean Property"). (Pa49 to Pa50). 290 Ocean intends to develop its property in accordance with a recent amendment to the "Oceanfront-Broadway Redevelopment Plan" for a 109-unit luxury apartment building. (Pa50; Pa939).

B. The 1996 Oceanfront-Broadway Redevelopment Plan

In or about May 1996, the City of Long Branch concluded that certain areas in the City were areas-in-need-of-redevelopment as that term is defined in

N.J.S.A. 40A:12-5 of the "Local Redevelopment and Housing Law." To that end, the City, on May 14, 1996, enacted Ordinance # 15-96 adopting the "City of Long Branch, New Jersey Oceanfront- Broadway Redevelopment Plan" (the "Redevelopment Plan") and incorporated that Plan into the City Ordinances as § 345-82 et *seq.* (Pa567 to Pa570; Pa571 to Pa593). The Ocean Property and the Blackridge Property were designated as part of the Beachfront South Sector of the Redevelopment Area. (Pa571 to Pa593).

C. The Amendment to the 1996 Redevelopment Plan

In late 2020, the Long Branch City Council adopted Ordinance § 26-20, which amended the Oceanfront-Broadway Redevelopment Plan. (Pa671 to Pa673; hereafter the "Plan Amendment"). The Plan Amendment, was drafted to apply to a single parcel of land - the land owned by, Defendant, 290 Ocean, LLC. *Id.*

On December 9, 2020, the City Council adopted Resolution 243-20 appointing 290 Ocean, LLC as the redeveloper for the three lots subject to the plan amendment. (Pa709 to Pa711). That Resolution authorized the Mayor to execute a Redevelopment Agreement. *Id.* Pursuant to that Redevelopment Agreement, 290 Ocean, LLC was required to pay a $2,000,000 fee to the City, a $100,000 administrative fee, and, in addition, to be responsible for off-site improvements

caused by its project. (Pa713 to Pa745; Pa723 to Pa724).

D. The Pleadings

On January 15, 2021, Blackridge filed a Complaint in Lieu of Prerogative Writs challenging the Plan and, on January 22, 2021, it filed its First Amended Complaint in Lieu of Prerogative Writs. (Pa1 to Pa22). The Amended Complaint contained six counts. Count I contested the lawfulness of a $2,000,000 payment made by 290 Ocean in return for a "density bonus." Count II alleged that City of Long Branch Ordinance § 345-98 required that any amendment to a redevelopment plan after "the disposition of any land in the Redevelopment Area . . . must be consented to in writing by the designated developers," and that consent had not been obtained. Count III alleged, that upon amendment of the Plan, it was incumbent upon the City of Long Branch to determine whether the property at issue remained an area-in-need of redevelopment, and Count IV alleged a claim of spot zoning. The remaining counts are not relevant to this appeal.

The City of Long Branch and 290 Ocean LLC, filed Answers respectively on March 15 and 17, 2021. (Pa23 to Pa36; Pa37 to Pa47).

290 Ocean, LLC and the City of Long Branch filed motions for summary judgment on August 26, 2022 and Blackridge filed opposition on October 4, 2022.

(Pa52). The Court heard argument on December 16, 2022[1] and rendered its decision granting the Defendants' motions on December 22, 2023. (Pa48 to Pa93; 1T3:20-24).

On January 12, 2024, Plaintiff filed a Notice of Appeal. (Pa94 to Pa97).

STATEMENT OF FACTS

A. The $2,000,000 Payment Was Made In Return for Permitting Increased Density

1. The Original 1996 Redevelopment Plan and Design Guideline 6

The 1996 Redevelopment Plan (Pa135 to Pa170) contained a number of provisions designed to limit the bulk of buildings to be erected within the redevelopment area. (Pa144 to Pa145). As set forth in Ordinance § 345-84C, "density of development is a major factor in this plan. It is reflected in building bulk and height . . . requirements." (Pa978). According to that plan, the property of 290 Ocean LLC along with others in the redevelopment area, were subject to Design Guidelines Handbooks 1 and 6 adopted by the City Council (the "Design Guidelines"). (Pa980; Pa172 to Pa180). The Design Guidelines were described as the "standards governing redevelopment in the City of Long Branch." Ordinance § 345-101B. (Pa980).

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[1] "1T" refers to the transcript of the oral argument held on December 16, 2022.
"2T" refers to the transcript of the deposition of Nicholas Graviano dated May 2, 2022.
"3T" refers to the transcript of the deposition of George Jacobson dated July 21, 2022.

Design Guideline Handbook 6 sets forth the land use and design requirements in the Beach Front South Sector, the sector at issue in this matter, (Pa172 to Pa180), and this document became the initial Redevelopment Plan. (Pa174). That Design Guideline stated that its objective was to "reinforce the existing mid-rise residential pattern of 4-8 story structures that maximize views of the Atlantic Ocean." (Pa175). It required that all new construction "be fully compliant with the Beachfront South Design Guidelines Handbook 6." In pertinent part, it provided for a:

a. Maximum density of 30 dwelling units per acre;

b. Minimum distance between buildings of 40 feet;

c. Maximum building coverage of 35% of the tract area which could be increased to 50% upon satisfaction of certain conditions; and

d. Maximum building height of 80 feet.

(Pa176 to Pa178).

Plaintiff developed its property under this guideline.

2. The 2020 Redevelopment Plan Amendment

In 2020, the City amended the 1996 Redevelopment Plan. That Amendment applied to a single parcel of land - the land owned by, Defendant, 290 Ocean, LLC, "block 216, lots 11, 12 and 24." (Pa688). It proposed the following changes to the requirements set forth in the Redevelopment Plan:

a. Increased permissible building coverage to 50%;

b. Eliminated all density restrictions;

c. Increased maximum building height to 100 feet but excluded roof-top mechanical equipment and screening from the height measure; and

d. Added that the maximum allowable stories consisting of dwelling units was 8 stories, excluding any stories dedicated to parking, mechanical uses or rooftop amenities, i.e. 10 stories.

(Pa693).

3. The $2,000,000 Density Bonus Payment

The Plan Amendment made no provision for the $2,000,000 payment here in issue, nor did any Ordinance. It is undisputed that the principal public benefit derived from this payment is the funding of the construction of a senior center. (Pa17 to Pa118; Pa473). This fee payment was agreed to by 290 Ocean as part of its negotiation to be designated as the redeveloper. (Pa472). Based upon the factual record of the negotiations of the $2,000,000 fee which was before the Court, it is clear that this money was paid in return for eliminating the density requirement on behalf of the one property owner within the Redevelopment Area willing to make that payment - 290 Ocean, LLC. And even were there any doubt as to the purpose of the fee, that issue should not have been resolved on summary judgment.

Discovery has revealed ten versions of the Redevelopment Agreement. In several, the parties acknowledge the fact that the payment is a *quid pro quo* for a density bonus. However, as the negotiations proceeded, the language explaining the payment which was calculated at a price of $50,000 per extra unit was amended to conceal its purpose. By way of example, version 6 at article 5.1 of the 290 Ocean, LLC Redevelopment Agreement, is headed "Density Payment," and states that

> The parties agree . . . that under the prior version of the Redevelopment Plan, the Project qualified for a permissible density of _____ units. Under the Redevelopment Plan, however, the Project qualifies for a permissible total density of ___ units for the total area of redevelopment to be undertaken. **In consideration of this recognition** [increased density] and acknowledgement by the City and for additional community benefits, Redeveloper has agreed to make payment to the City in the amount of $2,000,000 ($40,000 X 50 Units)

(Pa1043; emphasis added).

Version 7 of the Redevelopment Agreement eliminated article 5.1 but added an article 4.4(a) requiring:

> A one-time fee in the amount of Two Million Dollars ($2,000,000) payable. The parties agree and acknowledge that the Project qualifies for a permissible total density of 109 units under the Redevelopment Plan. **In consideration thereof** and acknowledgement by the City and for additional community benefit Redeveloper has agreed to pay such fee to the City.

(Pa1040; emphasis added).

Version 10 added that the Redeveloper would also be responsible for off-site improvements (Pa323 at ¶ 5.1) and revised article 4.4(a) to omit any reference to density:

> A one-time fee (the "Redevelopment Fee") in the amount of Two Million Dollars ($2,000,000) payable . . .. The City agrees that the Redevelopment Fee shall benefit the City's redevelopment areas and shall serve as an additional community benefit to address any impacts in the City relating to the redevelopment.

(Pa322).

In between the various amendments, the City, in a December 2, 2020 email, explained that "we revised the Agreement a bit to beef up sections that have been, and will be, subject to particular scrutiny." (Pa990). In other words, to hide the density *quid pro quo*.

At that point in time, no one knew what impacts were to be caused by the 290 Ocean building; there was no application pending before the planning board; no one undertook to study the impacts; and no one undertook to determine if the $2,000,000 payment was proportional to those impacts.

In an effort to determine if Plaintiff misunderstood the City's thinking, Plaintiff noticed the deposition of a City designated corporate representative under *N.J. Court R.* 4:14-2(c). (Pa875 to Pa902). The City produced two

representatives, George Jackson, the City Administrator, and Nicholas Graviano, the City Planner and the Director of Planning. (Pa525 to Pa566).

In his deposition Mr. Jackson stated that:

- The developer asked for an increase in density as part of an amendment to the redevelopment plan. (Pa878; 3Tl0:17 to 3T12:19);
- The $2,000,000 payment was based on the desire to fund expansion of the senior center. (Pa879; 3T14:12 to 24);
- The amount of the payment was determined by the Mayor, not by planning professionals. (Pa879; 3T15:2 to 5);
- No analysis was done to justify the $2,000,000 payment. (Pa879; 3T16:8 to 21);
- There were no standards of any sort relevant to assessing the impacts of the 290 Ocean development. (Pa879; 3T16:22 to 3T17:19).
- There are no documents that explain how the amount of the contribution was determined. (Pa882; 3T27:4 to 10).
- The City had no knowledge of what impacts were intended to be addressed by the $2,000,000 payment. (Pa884; 3T35:4 to 9).

Mr. Graviano, the other deponent designated by the City as its corporate witness, was the sole planning official that could have been involved. (Pa 525 to Pa566). He conceded that he had no knowledge about the following topics:

- The intended use of the $2,000,000; the Planner testified, "I was not part of the process." (Pa544; 2T76:16 to 24).

- He had no knowledge as to how it was determined that 290 Ocean should contribute $2,000,000 or what the money was intended to be used for. (Pa546; 2T82:1 to 12)

- There was no standard to assess the extent of amenities to be provided by a developer. (Pa546; 2T83:18 to 2T84:1).

He did testify however that:

- The Plan Amendment no longer sought to achieve some of the goals of Design Guideline 6 – which were eliminated for "no specific reason." (Pa534; 2T36:8 to 2T37:23).

- There were no other new buildings with a density in excess of 30 units per acre in the redevelopment area. (Pa536; 2T45:12 to 16).

- No assessment was made to determine if the off-site impacts of the 290 Ocean project warranted the $2,000,000 assessment. (Pa544; 2T77:7 to 11)

(*Id.*) He acknowledged as well that this project was unique, and that no other developer paid a fee of this magnitude, although one had constructed a swimming pool for the City. (Pa544 to Pa545; 2T78:12 to 2T80:14).

B. Long Branch Was Required to Obtain the Approval of Blackridge as a Condition of Amending the Redevelopment Plan

By their very nature, redevelopment projects occur in challenging areas that, for a variety of reasons, offer unattractive development opportunities. Redevelopment designations allow municipalities to incentivize developers to develop in areas-in-need of development, rather than in areas where development is likely to be more profitable and less risky. One tool to incentivize

redevelopment is to assure those who assume the risks of the early projects that they will not see their investments diminished in the event that a redevelopment plan is later modified for the benefit of those who seek to build on the accomplishments of their predecessors who took the initial risks. In order to do so, a municipality may, as Long Branch did here, allow the early developers the right to approve changes in a redevelopment plan.

To accomplish this goal, Ordinance § 345-98 (Pa979) and the 1996 Redevelopment Plan allowed for amendments of the Redevelopment Plan provided that, if the plan is "amended after the disposition of **any** land in the Redevelopment Area, the modification must be consented to in writing by **designated developers**." (Pa156; emphasis added).

It is undisputed that Blackridge did not consent to any change in the redevelopment plan which removed density and other limitations from the 290 Ocean Property. The elimination of those requirements which bound others confers a financial advantage on the one competing developer who had not taken the same financial risks as Blackridge and other early developers. (Pa1106)

The Court determined that the City was not required to obtain Blackridge's consent because, in its view, Blackridge, having completed its

project, was "no longer a designated developer under the Redevelopment Plan." (Pa59 to Pa60). As discussed in Point II below, that conclusion is irreconcilable with the language of the Ordinance and the Redevelopment Plan. It is also incompatible with any conceivable goal intended to be achieved by the protection afforded to redevelopers by the approval requirement. (Pa1106).

This is so because, once an early redeveloper invests all of the funds needed to complete its project, it is at greater financial risk for the success of its project than at any earlier time. And were Blackridge, after construction, to have proposed a change incompatible with the Redevelopment Plan, the City would rightly have forbidden it. Blackridge remained a developer and there is no language in the Ordinance or the 1996 Redevelopment Plan, and no conceivable policy which is promoted by the Court's interpretation of those documents.

C. Facts Relevant to Spot Zoning

Plaintiffs submitted the expert report of a planner, Creigh Rahenkamp. (Pa948 to Pa975) in support of its spot zoning claim. Mr. Rahenkamp opined that the rezoning of the single parcel at issue was, for a variety of planning reasons, spot zoning. (Pa964 to Pa965). The Court refused to consider this opinion reasoning that, in the redevelopment context, "municipalities have a unique

toolkit," and that changes in accordance with a city's redevelopment power are not spot zoning. (Pa84 to Pa87 at Pa86). In the Court's view, the spot zoning assessment is one of law and an expert should not tell "the court what the law provides." (Pa86 to Pa87). Even to the extent that the expert report could be considered, the Court determined, it is "not bound by planner Rahenkamp's conclusions . . ." While Plaintiffs acknowledge that a Court is not bound by an expert's opinion, it was incumbent upon the Court, especially at the summary judgment stage, to explain why it chose to reject that opinion. Mr. Rahenkamp's opinion coupled with the fact that (1) the zoning change impacted one property; (2) the owner of that property paid $2,000,000 to the City to obtain that change; (3) planning officials were not part of the process; and (4) the City Planner could offer no reason to abandon the earlier zoning restrictions created a factual issue as to whether the City engaged in spot zoning.

ARGUMENT

POINT I

THE TWO MILLION DOLLAR PAYMENT WHICH THE CITY OF LONG BRANCH RECEIVED FROM 290 OCEAN, LLC IN CONSIDERATION FOR A DENSITY BONUS IS UNLAWFUL BECAUSE THERE IS NO NEXUS BETWEEN THAT PAYMENT AND ANY OFF-SITE IMPACTS CAUSED BY THE REDEVELOPMENT PROJECT, NOR WAS THERE COMPLIANCE WITH *N.J.S.A.* 40:55D-42
(Pa55 to Pa58)

A. Introduction

In this case, the City of Long Branch has received a $2,000,000 payment from its designated redeveloper, 290 Ocean, LLC, in return for the elimination of any density limitation and the relaxation of other requirements that had been included in the original redevelopment plan, and that were and remain applicable to every other developer within the redevelopment area. The $2,000,000 payment is to be used, all parties agree, for the construction of a new senior center, which the Court found was justified because "a rational nexus existed between the payment and the redevelopment plan." (Pa81). That was not however the basis for the arguments Defendants offered below to justify the payment and for this and other reasons, the Court erred.

The grant of summary judgment on this issue, like all other determinations made by a trial court on a summary judgment motion, are reviewed *de novo* with "no special deference to the legal determinations of the trial court." *Temploy Fuedte De Vida Corp v. National Union First Ins. Co of Pittsburgh*, 224 N.J. 189, 198 (2016)

B. The Court Erroneously Granted Summary Judgment on an Argument Not Advanced In the Defendants' Moving Papers and Wrongly Focused on the Nexus Between the Payment and the Redevelopment Plan

In its brief in support of its motion for summary judgment, 290 Ocean did not argue that there was a nexus between the $2,000,000 payment and the redevelopment plan or with the construction of its apartment complex. Rather, it argued that such payments were permitted by the LRHL, irrespective of the absence of any nexus, based upon the statutory authority of the redevelopment agency to "negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity. (Pa123 to Pa130). Such payments, 290 Ocean maintained, are lawful "regardless of whether the $2 million or the City's use of such funds has any nexus or relationship with the redevelopment itself." (Pa126; see also Pa127). In the 60 paragraphs of its Statement of Material Undisputed Facts, 290 Ocean does not include a single assertion that there was a nexus between its project and the $2,000,000 payment. (Pa108 to Pa119).

The City also argued that there was no need to establish a nexus between the $2,000,000 payment and the 290 Ocean project:

> A. The Clear And Unambiguous Language Of *N.J.S.A.* 40A:12A-8(f) Establishes That The City Was Authorized To Collect The Redevelopment Payment And To Do So Without Establishing A Rational Nexus Between The Use Of The Redevelopment Payment And A Specific Redevelopment Project.
>
> B. The Purpose Of The LRHL And The Broad Powers It Ascribes To The Municipalities To Effectuate Redevelopment Further Provides Support To The Conclusion That N.J.S.A. 40A:12A-8(f) Authorizes A Municipality To Negotiate Redevelopment Payments Without Establishing A Nexus Between The Payment And A Specific Development Project.

The City's Statement of Material Undisputed Facts does not assert a nexus between the 290 Ocean project and the $2,000,000 payment. (Pa462 to Pa476). The Defendants only argued in reply that the payment helped fulfill goals of the Redevelopment Plan, not that there was a nexus.

In its opinion, the Court upheld the $2,000,000 payment on the ground that

> [T]he Senior Center Project furthers the objectives and terms of the Redevelopment Plan. The Redevelopment Payment was used by Long Branch to effectuate and defray costs of improvements in the area, and thus a rational nexus existed between the payment and the redevelopment plan.

(Pa58).

This finding is erroneous for several reasons. First, neither movant argued that there was such a nexus in their opening briefs; they argued that the LRHL delegated authority to the City to collect the $2,000,000 fee irrespective of the absence of any nexus.

It is one thing to argue that a municipal act is authorized by a statute, as Defendants did here insofar as they argued that there is no nexus requirement in the LRHL. It is something different to find, as the Court did here, that there is a "nexus" between the senior center and the plan. The term "nexus" requires a logical interconnection between two events. *See e.g. 181 Inc. v. Salem County Planning Board*, 133 N.J. Super. 350 (L. Div. 1975) *aff'd* in pertinent part and *rev'd* in part 140 N.J. Super. 247 (App. Div. 1976) where the Court invalidated a planning board's requirement for a land dedication which, although possibly authorized by statute, had no nexus to the project for which the approval was given:

> The word "nexus" is derived from the Latin "*nectere*" meaning "to bind" and signifies a connection or a connected group or series. *Id.* In the framework of this case, a rational *nexus* means an interconnection between two events, direct and substantial in nature and clearly and logically linked together. It signifies a connection more definitely and clearly established than a "reasonable connection." It cannot be used to portray an indirect, remote or vague relationship.

Id. at 357 to 58. *Accord County of Ocean v. Zekaria Realty, Inc.*, 271 N.J. Super. 280 (App. Div. 1994).

Here, the lower court conflated Defendants' argument, which claimed it had been delegated the authority to collect the $2,000,000 payment with a much different inquiry: whether there was a "rational, . . . direct and substantial" interconnection between the redevelopment plan and the payment, *181 Inc, supra,* which was an argument which Defendants did not advance.

Second, there was nothing in the record to assess whether the payment bore any relationship to the redevelopment plan or project, let alone evidence sufficient to demonstrate a direct and substantial relationship as our Courts have required. The burden was on Defendants to make such a connection and believing none was necessary, they failed to do so. Nor could they, for the senior center was not mentioned in the 2020 Plan amendment; the $2,000,000 payment was not mentioned in the 2020 Plan Amendment; and a center of this nature is not even a permitted use within the redevelopment area. (Pa290).

Third, the nexus test, as employed in New Jersey case law, does not focus on the relationship between a payment and a "redevelopment plan," it focuses on the nexus between a payment and a "project." Were the Court's focus on the plan correct, then any payment which was consistent with a redevelopment plan, a master plan, or a zoning ordinance that funded a public improvement would be lawful. However, as this Court determined in *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J. Super 124 (App. Div.

1988), even a laudable purpose cannot excuse an improper payment.

C. The Court's Nexus Finding is Incompatible with the MLUL

Even were the Court to have focused on the proper test, there was nothing in the record to demonstrate compliance with *N.J.S.A.* 40:55D-42 of the MLUL, which is a prerequisite to all such assessments. The MLUL contains a carefully crafted statutory procedure under which payments from developers for offsite improvements may be made. *N.J.S.A.* 40:55D-42 requires that, as a condition of allowing a payment for off-site improvements, a governing body must "adopt regulations," the exaction must be "reasonable and necessary," the funds must be used for limited purposes specified in that statutory section, and the exaction must be "necessitated or required" by improvements to be built by the developer. In addition, the Ordinance must "establish fair and reasonable standards to determine the proportionate or pro-rata amount of the cost of such facilities."

Defendants did not argue that they have satisfied a single one of these requirements. As set forth in the accompanying Statement of Facts, at pp. 11 to 12, the record demonstrated that there was no compliance with the MLUL and Defendants made no contrary assertion. As a result, the exaction is unlawful under *N.J.S.A.* 40:55D-42. *See e.g. Township of Marlboro v. Planning Board of Twp.*

of Holmdel, 279 N.J. Super. 638 (App. Div.), certif. den., 141 N.J. 98 (1995); *Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. Of Adjustment, supra*, 397 N.J. Super. 335, 363-64 (App. Div. 2008); *see also New Jersey Builders Asso. v. Bernards Township,* 108 N.J. 223, 237-38 (1987).

D. The $2,000,000 Payment is Not Permitted Under the LRHL in the Absence of a Nexus

1. *N.J.S.A.* 40A:12A-8 Does Not Authorize the $2,000,000 Payment

Defendants did argue – but the Court did not seem to find – that the $2,000,000 payment was authorized by *N.J.S.A.* 40A:12A-8, a provision of the LRHL. Based upon the language of *N.J.S.A.* 40A:12A-8, well settled principles of statutory construction, the purpose of the nexus test, and case law which limits a municipality's authority to extract such contributions, Defendants erred.

N.J.S.A. 40A:12A-8 provides in part that

> Upon the adoption of a redevelopment plan . . ., the municipality or redevelopment entity . . . may proceed with the clearance, replanning, development and redevelopment of the area designated in that plan. In order to carry out and effectuate the purposes of this act and the terms of the redevelopment plan, the municipality or designated redevelopment entity may:
>
> * * *
>
> f. Arrange or contract with public agencies or redevelopers for the planning, replanning, construction, or undertaking of any project or redevelopment work, or any part thereof; **negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity,** including where

> applicable the costs incurred in conjunction with bonds, notes or other obligations issued by the redevelopment entity, and to secure payment of such revenue; as part of any such arrangement or contract, provide for extension of credit, or making of loans, to redevelopers to finance any project or redevelopment work for the furnishing of **property or services in connection with the redevelopment area.** Emphasis added).

The language of this section does not support Defendants' contention that the LRHL allows exactions independent of those authorized by the MLUL. First, the introductory paragraph of *N.J.S.A.* 40A:12A-8 extends powers of a redevelopment agency to be used "in order to carry out and effectuate the purposes of this act **and** the terms of the redevelopment plan." (emphasis added). Use of funds paid by a developer to erect a new senior center has nothing to do with the "purposes of the" LRHL, which is to address deteriorated structures and areas. *N.J.S.A.* 40A:12A-2. Since the senior center is not mentioned in the "redevelopment plan," and is not even a permitted use in the plan (Pa290), the payment of these funds does not advance the purposes of the plan.

Second, the "property and services" of the senior center are not provided "in connection with the redevelopment area." There is nothing in the record indicating that the senior center was proposed in a redevelopment area.

Third, *N.J.S.A.* 40A:12A-8(f) only allows revenues paid by a redeveloper to be used to

> defray the costs of the redevelopment entity including where applicable the costs incurred in conjunction with bonds, notes or other obligations issued by the redevelopment entity, and to secure payment of such revenues.

The use of funds to erect a new senior center is an investment; it is not a "cost of the redevelopment entity."

For these reasons, each in itself sufficient to render the $2,000,000 payment unlawful, *N.J.S.A.* 40A:12A-8(f) does not authorize the $2,000,000 payment approved by the Court.

2. Under Traditional Rules of Statutory Construction, N.J.S.A. 40A:12A-8 Should Be Construed in *Pari Materia* With the MLUL

While the LRHL affords latitude to a municipality in making land use decisions, it does not pre-empt other aspects of the MLUL. *See Weeden v. City Council of the City of Trenton*, 391 N.J. Super. 214, 228 (App. Div.), *cert. den.* 192 N.J. 73 (2007) in which this Court ruled that the LRHL and the MLUL "deal with the same subjects of zoning and land development" and should be construed "in *pari materia.*" Referring to both statutes, this Court reasoned that:

> Construing the two statutes together, we perceive no tension between the purpose of adopting a redevelopment plan and the function of the zoning board to grant use variances from the redevelopment plan, as an overlay upon the existing zoning. In *Britwood Urban Renewal, LLC v. City of Asbury Park*, 376 N.J. Super. 552, 567, 871 A.2d 129 (App. Div. 2005), we rejected an argument that *N.J.S.A.* 40A:12A-7c was evidence that the LRHL superseded the MLUL, observing that, with one exception not relevant here, "no provision of the LRHL specifies that it supersedes the MLUL."

Id at 228-29.

The lower Court below did not address *Weeden* but sought to distinguish *Britwood Urban Renewal, LLC v. City of Asbury Park,* 376 N.J. Super. 552 (App. Div. 2005) on which Plaintiff relied. In that case, this Court framed the issue as follows:

> This appeal arises in the context of the on-going efforts to redevelop the waterfront in the City of Asbury Park. As such, it raises numerous issues of first impression. More specifically, in this appeal we consider the relationship between the provisions of the Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-1 to -49 (LRHL), and the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 to -163 (MLUL), as those provisions affect the City's authority to require contributions toward the cost of off-site infrastructure improvements. * * *

Id at 555.

There, the plaintiff's property was designated as an area in need of redevelopment under the LRHL. The Redevelopment Agreement provided that the redeveloper was responsible for the "costs of all reasonable infrastructure

repairs or improvements within the Redevelopment Area," whether or not those improvements were associated with the property to be developed. *Id.* at 558. The City Council, as the "Redevelopment Agency," had adopted a resolution requiring the plaintiff to contribute to the cost of off-site infrastructure improvements which it also incorporated into an Ordinance. That Ordinance did not, however, include "a specific methodology for the calculation of off-site infrastructure contributions." *Id.* at 561.

Plaintiff, who was not a redeveloper, filed an action challenging the resolution and the ordinance as unauthorized by the Municipal Land Use Law. The trial court granted the City's motion for summary judgment and plaintiff appealed. This Court reversed.

The Court first ruled first that the City's Resolution was not applicable to the plaintiff because it was not a redeveloper. This Court then announced a second basis for its decision finding that the LRHL **did not** independently authorize such an assessment:

> **Second, we disagree both with the Law Division judge's view that the LRHL supersedes the MLUL and with his holding that the MLUL independently authorized the City to impose off-site infrastructure costs on plaintiff.** As to the former, the language of the LRHL itself instructs us. The LRHL specifically incorporates the applicable provisions of the MLUL as follows:

> All applications for development or redevelopment of a portion of a redevelopment area shall be submitted to the municipal planning board for its review and approval in accordance with the requirements for review and approval of subdivisions and site plans as set forth by ordinance adopted pursuant to the [MLUL].
>
> [*N.J.S.A.* 40A:12A-13.]
>
> **This provision of the LRHL makes plain that the MLUL is not superseded by the LRHL** but that the MLUL independently governs review and approval of site plan applications. (Emphasis added).

Id. at 566-67. Continuing, the Court found no basis in the record to warrant the assessment for "off-site infrastructure costs," and thus found the assessment unlawful.

This Court then turned to a third ground for its decision, finding that the requirement for a contribution for off-site improvements usurped the planning board's authority. The second and third rationales of this Court's decision are inconsistent with the lower Court's ruling here. *See also* Cox & Koenig, *New Jersey Zoning & Land Use Administration* at § 11-10.1 (2024) which reaches the same conclusion:

> The LRHC specifically provides in *N.J.S.A.* 40A:12A-13 that "[a]ll applications for development to the municipal planning board for its review and approval [shall be] in accordance with the requirements . . . the MLUL"

Referring to *Britwood*, Cox continues:

> The court additionally found that there was no basis to impose costs because the MLUL requires an analysis of "circulation and comprehensive utility services plans." Pursuant to *N.J.S.A.* 40:55D-28 no such plans or analysis were undertaken in connection wither with the resolution dealing with plaintiff's property or the city's resolution.

Id. at p. 170.

Two unreported decisions also reject the trial Court's conclusion. In *SB Bldg. Assoc., L.P. v. Planning Board,* Docket No. A-0200-14Tl, 2017 N.J. Super. Unpub. LEXIS 36, (App. Div. Jan. 6, 2017), certif. den. 230 N.J. 424 (2017). (Pa992 TO Pa1000), the redevelopment agency made an argument much like that of Defendants below in an effort to support an off-tract improvement without satisfying the requirements of *N.J.S.A.* 40:55D-12. Rejecting this argument, this Court reasoned that

> The MLUL is a carefully constructed and comprehensive framework governing the powers of municipalities relating to land use and development. [M]unicipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions.

Id. at *12-13. Continuing, the Court wrote, "The MLUL is also the paramount authority in the context of redevelopment." *Id.* at *13. Thus,

> [t]he MLUL's authority to impose contributions requires a planning board to make certain findings, and for that reason an ordinance may not delegate that authority to the governing body or a

> redevelopment agency because "when the MLUL establishes criteria for a specific situation or confers authority on a specific entity, a municipality is not free to chart its own course."

Id.

In conclusion, the Court found that:

> A planning board cannot remedy defects in the ordinance by resorting to a requirement that impact fees be paid through a developer's agreement between the applicant and the municipal authority, even if the applicant consents. A planning board lacks authority under *N.J.S.A.* 40:55D-42 not only to require pro-rata contributions for off-tract improvements outside the scope of MLUL or based upon a defective ordinance, but also to accept a developer's voluntary contribution to such off-tract improvements.

Id. at 24. A developer's contribution cannot - even when there is a nexus between the redevelopment project and the use of the funds - and even with consent, "be established through negotiation." *Id. See also Hoboken Holdings, L.P. v. City of Hoboken et al*, Docket No. HUD-L-4580-18 (N.J. Sup. Ct. Law Div., Mar. 26, 2019). (Pa922 to Pa933).[2]

E. Even if the LRHL Authorized A Payment Not Permitted by the MLUL, Such Payments are Unlawful in the Absence of an Ordinance and Standards Governing Those Payments

Even where there is uncertainty as to whether *N.J.S.A.* 40:12A-8 separately authorizes exactions in a land use context, the failure to adopt an

[2] Appellant certifies that the only decision of which Appellant is aware that is inconsistent with these cases is *Genon Rema, LLC, and NRG Energy, Inc. v. South Amboy Redevelopment Agency, et al*, Docket No. MID-L-390-13, 2015 WL 10986475 (N.J. Super. Ct. Law Div., May 18, 2015).

ordinance with standards and procedures renders such exactions unlawful because they are virtually unreviewable and vulnerable to abuse. *West Park Ave., Inc. v. Ocean*, 48 N.J. 132 (1966) (payment for school costs are illegal without ordinance); *Longridge Builders, Inc. v. Planning Bd. of Princeton,* 52 N.J. 348, 350 (1968) (exaction in the absence of ordinance standards is prone to abuse); *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Bd. of Adjustment*, *supra*, 397 N.J. Super. at 358-59 (financial contribution for off-tract improvements must be authorized "by statute and implemented by municipal ordinance"); and *Nunziato v. Planning Bd. of Borough of Edgewater, supra.,* 225 N.J. Super. 124.

In *Nunziato,* the Edgewater Planning Board and the developer of a high-rise apartment building had agreed that the latter would make a payment of $203,000 to the town's Affordable Housing Fund. The Planning Board then granted site plan approval for the construction of a high-rise condominium project. On appeal, this Court held that the actions of the Planning Board were arbitrary, capricious and unreasonable. The Court explained that "[t]he intolerable spectacle of a Planning Board haggling with an applicant over money too strongly suggests that variances are up for sale." *Id.* at 134. That is, the possibility of abuse makes the payment unlawful.

Appellant recognizes the *Longridge*, *Nunziato* and other cases involve payments agreed to at the planning board level in connection with the MLUL. However, the concerns expressed by this Court and the Supreme Court about paying for approvals under an unreviewable assessment regime apply with equal force in the redevelopment context.

For all of the reasons discussed above, the $2,000,000 exaction in return of a density bonus is unauthorized and unlawful.

POINT II

LONG BRANCH CITY ORDINANCE § 345-98 LAWFULLY REQUIRES THE CONSENT OF ALL REDEVELOPERS WITHIN THE REDEVELOPMENT AREA BEFORE THE REDEVELOPMENT PLAN CAN BE AMENDED (Pa59 to Pa61)

A. Section 345-98 Appropriately Requires the Consent of All Designated Developers Within the Redevelopment Plan Area

The premise of the Redevelopment Law is that certain areas within a municipality are unlikely to be developed under generally applicable zoning ordinances:

> There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amenable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort.

N.J.S.A. 40A:12A-2(a). In order to encourage investors to undertake financially risky projects in blighted areas, the Redevelopment Law allows for the promulgation of land use standards which supersede criteria in zoning ordinances.

Long Branch City Ordinance § 345-98 (Pa979) is one such provision insofar as it assures developers stability in the terms of a redevelopment plan.

That Ordinance limits the ability to amend a redevelopment plan:

> The Redevelopment Plan may be amended from time to time by the City Council of the City of Long Branch, provided that, if amended after the **disposition of any land** in the Redevelopment Area, the modification must be consented to in writing by designated **developers.** * * * (Emphasis added).

This provision was also part of the 1996 Redevelopment Plan. (Pa156).

Provisions of this nature encourage developers to invest in blighted areas rather than in more profitable less risky projects outside of those areas. And, as Plaintiff's planner opined, they provide protection to redevelopers concerned about modifications that might degrade the redevelopment standards or afford competing developers more advantageous development opportunities. (Pa967 to Pa968).

Such provisions are typical of other types of municipal actions inasmuch as municipalities routinely enter into agreements to circumscribe future action to achieve public goals. They do so when purchasing property, when undertaking to condemn property, when entering into developer's agreements and leases, when granting development approvals, and when settling litigation. No case law suggests that those agreements are unlawful.

Here, by providing assurance to redevelopers, Long Branch afforded them protection for their risky investments under a stable zoning regime,

thereby encouraging private investment in blighted areas and fulfilling the principal goal of the LRHL.

B. The Lower Court Erred

The lower Court ruled that Appellant ceased to be a redeveloper once its project was constructed. (Pa50; PA60 to Pa61). That ruling is incompatible with the policy which the Ordinance seeks to achieve insofar as it ignores the fact that, after having invested funds in a completed project, a redeveloper has more at risk than at any time prior to completion. The lower Court's interpretation of the Ordinance fulfills no legitimate end and, in fact, undermines the incentive of redevelopers to build projects in challenging environments.

In addition, the Court's ruling ignores the language of the Ordinance. Section 345-98 provides that if a redevelopment plan is amended after disposition of "any land in the Redevelopment Area," any modification must be consented to by "designated developers." (Pa979). This Ordinance applies, by its terms to Blackridge.

In the undertaking to construe a statue or ordinance, every word must be afforded its plain meaning. *Dempsey v. Mastropasqua,* 242 N.J. Super. 234, 238 (1990). To ascertain the plain meaning of an ordinance or statute,

courts look to the common usage, *id,* as well as dictionary definitions. *Macysyn v. Hensler,* 329 N.J. Super. 476, 485 (App. Div. 2000). And, when construing legislation, no word may be presumed to be superfluous. *Sanchez v. Fitness Factory Edgewater LLC,* 242 N.J. 252 (2020).

These principles undermine the Court's ruling. First, the use of the phrase **after** the "disposition of **any** land" and the plural **"developers"** indicates that the Ordinance is to be construed to extend protection to all "designated developers." There will never be more than one developer for a project, so the use of the plural, "developers," must encompass all developers of "any land" within the redevelopment area, not just the one developer who is benefitted by a change. It would be improper to read the word "any" out of the Ordinance, and to replace the plural, "developers," with the phrase "current developers."

Second, the Court's ruling makes no sense. For were it correct, the Ordinance would be superfluous because, as a party to a redevelopment agreement, a currently designated redeveloper could always refuse to consent to an amendment to its redevelopment agreement. Moreover, even though Blackridge and others may have completed the construction of their projects, any change they might propose would still be governed by the redevelopment

plan: clearly they remain "designated developers."

Finally, as the Plaintiff's Planner, Mr. Rahenkamp concludes, such commitments are not uncommon:

> It is common practice for any changes to the planned development approval or to its design guidelines to be subjected to a mandatory process of internal approvals by the participating developers to ensure that the developers in the project can collectively maintain the value of their separate investments. In redevelopment the need for such protections can be even stronger. To induce the first developer to participate where risks are high and outcomes are uncertain, offering long term participation in decision-making to protect that early, fledgling investment from future changes that could be damaging is appropriate public policy.

(Pa969).

The Court's ruling might make sense if Blackridge had sold its property because a buyer would not be a "designated developer" and would have no expectation of protection.

In summary, § 345-98 and the 1996 Redevelopment Agreement lawfully require approval of all "designated developers" when a change to a redevelopment plan is to be made. Those requirements cannot be rendered a nullity by a subsequent redevelopment agreement with a second developer that is not approved by other redevelopers within the redevelopment area.

POINT III

THE REDEVELOPMENT PLAN AMENDMENT, INSOFAR AS IT ELIMINATES ANY DENSITY REQUIREMENT AND RELIEVES 290 OCEAN OF RESTRICTIONS APPLICABLE TO EVERY OTHER PROPERTY IN THE REDEVELOPMENT AREA, IS SPOT ZONING (Pa61 to Pa64)

The changes incorporated in the Redevelopment Plan apply to a single property in the redevelopment area, that of 290 Ocean, LLC. The plan amendment, among other things (1) eliminated any density limitation only for 290 Ocean, LLC; (2) increased the permissible height allowed only for 290 Ocean; (3) increased allowable coverage only for 290 Ocean; and (4) eliminated protection from building shadowing for every developer other than 290 Ocean, LLC. (Compare Pa515 to Pa523 (Design Guideline 6) to Pa291 (2020 Plan Amendment)). In the absence of these changes, 290 Ocean, LLC would have been required to obtain a use variance for density, *N.J.S.A.* 40:55D-70(d)(5), and a use variance due to excessive height, *N.J.S.A.* 40:55D-70(d)(6).

As the City planner testified at his deposition, there was no planning reason to abandon the limitations in Design Guideline Handbook 6. (Pa534; T36:8 to T37:23). In return for these changes, 290 Ocean offered to pay $2,000,000 to the City of Long Branch to fund a senior center that has no nexus whatsoever to

the proposed project and was not a permitted use in the redevelopment area. Viewed in the light most favorable to the non-moving party, *Brill v. The Guardian Life Insurance Company of America*, 142 N.J. 520 (1995), these facts, coupled with the opinion of Plaintiff's expert, created a factual dispute as to whether the redevelopment plan amendment is spot zoning, as Plaintiff's planning expert has opined. (Pa963 to Pa965).

A. There is No Reason to Immunize a Land Use Decision With Regard to Property Within a Redevelopment Area From a Spot Zoning Analysis

The lower Court rejected Plaintiff's argument on several grounds. First, it found that the creation of distinct land uses in accordance with a redevelopment plan adopted pursuant to the LRHL cannot constitute unlawful spot zoning. (Pa61 to Pa64). That is not, however, what the Plaintiff argued. Plaintiff recognizes that the Legislature contemplated that land in a redevelopment area may be subject to different use restrictions than land outside of a redevelopment area. Plaintiff also recognizes that parcels of land within a redevelopment area, like parcels of land within a zoning district created under the MLUL, may be treated differently than other parcels within that redevelopment area -- provided there is a justification for such disparate treatment.

What Plaintiff contended, however, is that while disparate treatment among parcels within a redevelopment area may be warranted, there must be a justification to

do so based upon planning principles, and none were in the summary judgment record. Given the purposes which underlie the spot zoning assessment required in New Jersey land use case law, there is no reason to immunize property within a redevelopment area from a spot zoning analysis.

> Spot zoning is
>
> the use of the zoning power to benefit particular private interests rather than the collective interests of the community.

Gallo v. Mayor and Tp. Council of Lawrence Tp., 328 N.J. Super. 117 (App. Div. 2000). The test, our Supreme Court has written is

> whether the zoning change in question is made with the purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is "designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it." (internal citation omitted).

Cresskill v. Dumont, 15 N.J. 238 (1954).

The need to undertake a spot zoning analysis derives from limitations on the police power and constitutional considerations. That is, the means to regulate land which a municipality selects "must bear a reasonable and substantial relationship" to promoting the common good and treating "all property in like circumstances . . . alike." *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 122 (1955).

While the nature of the spot zoning analysis may differ under the LRHL from what it is under the MLUL, there is no justification, given the purpose and goals of the spot zoning jurisprudence, to immunize zoning designations under the LRHL from such an analysis.

Several courts to have considered the issue in the context of a redevelopment plan have in fact required a spot zoning analysis. *See e.g. Kanter v. Passaic*, 107 N.J. Super. 556 (L. Div. 1969):

> However, we still must consider plaintiff's assertion that even if the amendment to the redevelopment plan was properly adopted as regards procedure, it must still fail because it constitutes "spot zoning."

See also St. Paul's Missionary Baptist Church v. City of Vineland, No. A-4945-06T3, 2008 N.J. Super. Unpub. LEXIS 839, at *9 (App. Div. July 15, 2008) (Pa1009 to Pa1011)[3] remanding a matter involving a redevelopment plan amendment for a spot zoning analysis

The lower Court here also found that because the plan amendment did not "add a new permitted use . . . to the underlying zone," the change did not warrant a spot zoning assessment. However, a change in density can, this Court ruled in *Gallo*, trigger a spot zoning analysis. *See also East Mill Associates v.*

[3] Appellant certifies that it is aware of no unreported decision contrary to this Court's ruling in *St. Paul's Missionary* or *Agazzi*.

Township Council of Tp. Of East Brunswick, 241 N.J. Super. 403 (App. Div. 1990) (reverse spot zoning). A change in a height limitation may also trigger a spot zoning analysis. *See e.g. Agazzi v. Governing Body of the Borough of Red Bank,* No. A-4199-13T4, 2016 N.J. Super. Unpub. LEXIS 65, at *20 (App. Div. Jan. 13, 2016). (Pa1001 to Pa1007).

Therefore, Plaintiff was entitled to advance a spot zoning argument.

B. The Court Erred When It Declined to Consider Plaintiff's Expert Testimony

In addition, the lower court rejected the planning report submitted by Plaintiff's expert, and erroneously ruled that a spot zoning assessment is one of law.

Given the nature of the spot zoning analysis, it is incumbent upon a court to a least consider expert testimony if it is offered. Assessing a spot zoning challenge, the Supreme Court in *Riya Finnegan LLC v. Township Council of Tp. of South Brunswick*, 197 N.J. 184, 197 (2008) struck down a local ordinance as spot zoning on several grounds, among them the failure to consider expert testimony:

> It is not merely that the planning board or the municipality's governing body acted without hearing from expert planners or consultants that makes this ordinance defective.

More recently, this Court reached the same conclusion:

> The Law Division's determination to deny Jennings an expert planner and dismiss her claim of spot zoning ran afoul of giving a litigant a

> fair opportunity to prove the elements of the cause of action. Because spot zoning claims are particularly fact-sensitive, we differ with the Law Division's view that the issue could be resolved as a matter of law. * * * Since a spot zoning claim is essentially a challenge to the reasonableness of an ordinance, "an evidentiary hearing must be held to afford both the party challenging the ordinance and the municipality an opportunity to present expert testimony relevant to a determination of its validity."

Jennings v. Borough of Highlands, 418 N.J. Super. 405, 426-427 (App. Div. 2011).

Continuing this Court wrote:

> For these reasons, we view Jennings' spot zoning claim to have been improvidently dismissed. *Id.* at 427.

The trial Court here erred when it chose to disregard Appellant's planner's opinion on summary judgment.

C. The Evidence Viewed in a Light Most Favorable to Plaintiff Reveals that the Elimination of the Density Limitation and the Increase in Allowable Height Constitutes Spot Zoning

Spot zoning is antithetical to the goal of treating like properties alike. See *e.g. Katobimar Realty Co. v. Webster*, 29 N.J. at 123:

> It is fundamental in zoning policy that all property in like circumstances be treated alike. The use restraints must be general and uniform in the particular district. * * * The genius of the constitutional and statutory zoning process is the regulation of land and buildings by districts according to the nature and extent of their use; and it goes without saying that arbitrary deviation from the general rule is forbidden, on constitutional principle as well as the policy of the statute. Undue discrimination in

> treatment and classification vitiates the regulation. The constitutional uniformity and equality requires that classification rest on real and not feigned differences, such as make for a distinction having some relevance to the purpose for which the classification is made, *i.e.,* zoning by districts 'in accordance with a comprehensive plan' that takes into account the 'nature and extent' of the use of land and buildings within the district, the statutory considerations to be served by zoning, the 'character of the district and its peculiar suitability for particular uses,' 'with a view of conserving the value of property and encouraging the most appropriate use of land throughout the municipality.' (Citations omitted).

Insofar as the 2020 redevelopment plan amendment applied to a single piece of property and afforded one property owner with advantages not available to others, without any planning justification, it can be spot zoning. As Mr. Rahenkamp opined in his report:

> Focusing on the site itself, a change from 59 units in a mid-rise building following the same bulk standards as its neighbors to 109 units in a high-rise that is taller and bulkier than its neighbors does nothing to advance additional public goals in the context of redevelopment or the neighborhood itself. The change in the intensity of permitted development is for the benefit of one developer without any expression of further public benefit, other than the payment of a fee, which is the very definition of spot zoning.

(Pa965; see also discussion at Pa963 to Pa965). Thus, as Mr. Rahenkamp noted, "a conforming building to the original plan would meet all of the redevelopment goals." (Pa965). Nowhere in this record was there any

indication that a denser, taller building, which shadows its neighbors is a desired component of the redevelopment plan. And there is simply nothing in this record to allow the Court to conclude that increased density and height advance any public purpose. Therefore, Plaintiff advanced a credible spot zoning claim.

This is not to say that the Court could not reject the opinion of Plaintiff's expert, but it could not do so without explaining its decision. *Reich v. Fort Lee Zoning Bd. of Adjustment*, 414 N.J. Super 483, 504-525 (App. Div. 2010). For this additional reason, the Court erred.

CONCLUSION

For the reasons set forth above, the determination of the trial court, granting summary judgment to Defendants, should be reversed.

Respectfully submitted,

SZAFERMAN, LAKIND,
BLUMSTEIN & BLADER, P.C.

s/Arnold C. Lakind
Arnold C. Lakind, Esquire

Dated: April 15, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1400-23

BLACKRIDGE REALTY, INC., Plaintiff/Appellant, v. CITY OF LONG BRANCH, 290 OCEAN, LLC, JAMES and CHRISTINE FUSCO, 286 OCEAN AVENUE, LLC and OCEAN AVENUE 290 ASSOCIATES, LLC, Defendants/Respondents.	Civil Action **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSY, LAW DIVISION, MONMOUTH COUNTY** **DOCKET NO.: MON-L-190-21** **SAT BELOW: HONORABLE LINDA GRASSO JONES, J.S.C.**

APPELLATE BRIEF ON BEHALF OF DEFENDANT/RESPONDENT 290 OCEAN, LLC

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On the Brief

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PRELIMINARY STATEMENT

Plaintiff Blackridge Realty, Inc. ("*Plaintiff*") or ("*Blackridge*"), motivated by its desire to exclude a competitor and maintain an economic advantage in the Beachfront South Sector of the Redevelopment Area, and upset that defendant City of Long Branch (the "*City*") has allowed defendant 290 Ocean, LLC ("*290 Ocean*") to build a slightly taller building with more units than Plaintiff, has filed an "*everything but the kitchen sink*" complaint challenging the City's adoption of amendments to the Oceanfront-Broadway Redevelopment Plan (the "*Amended Redevelopment Plan*") and in entering into a redevelopment agreement with 290 Ocean (the "*Redevelopment Agreement*"). The trial court evaluated the numerous arguments asserted by Plaintiff and correctly found that none of them has any merit and entered summary judgment in favor of 290 Ocean and the City. The Appellate Division, applying a *de novo* standard of review, while granting substantial deference to the City's actions, should affirm in all respects.

Blackridge's primary argument is that the Redevelopment Agreement required 290 Ocean to pay a redevelopment fee in the amount of $2 million, which Blackridge equates to an unlawful "bribe." Yet under the plain and unambiguous language of the Local Redevelopment and Housing Law ("*LRHL*"), N.J.S.A. 40A:12A-1 et seq., as interpreted by well-regarded jurists

in this state, the City was statutorily authorized to "negotiate and collect" such revenue. There are no conditions imposed under the LRHL which limit such revenue only to the recovery of those costs which the municipality will incur as a direct and proximate result of the redevelopment, so long as the fee was negotiated and collected in order to effectuate the purpose of the LRHL and the Amended Redevelopment Plan. Because the fee enabled the redevelopment of the last remaining undeveloped parcel in the Beachfront South Sector of the Redevelopment Area, the fee accomplished this goal.

Next, Blackridge's assertion that it possesses perpetual veto power over any future amendments to the Redevelopment Plan only serves to underscore the fact that Blackridge is motivated solely by its own economic interests. Plaintiff, as well as its expert, speculates that the purpose of the "written consent" provision was to ensure that the first developer can maintain the value of its initially risky investment. Plaintiff seeks to undermine the very purpose of the LRHL —the redevelopment of blighted areas—simply to protect its investment. Plaintiff's argument is not only premised on wild speculation, but contrary to the fundamental purpose of the LRHL.

Lastly, Blackridge's assertion that the adoption of the amendments to the Redevelopment Plan constitutes "spot zoning" is equally without merit. Under the well-settled law described herein, when a municipality such as the City

adopts a Redevelopment Plan which relaxes density and building requirements in accordance with its statutory authority to address blighted areas under the LRHL, such conduct does not equate to "spot zoning." The fact that the Redevelopment Agreement may be more favorable than the City's redevelopment agreement with Blackridge in terms of density and building height does not render the agreement invalid or unlawful.

When granting substantial deference to the City's actions as required, this court, like the trial court, should conclude that the City's adoption of the Amendment Redevelopment Plan and entry into the Redevelopment Agreement was not unlawful and affirm the entry of summary judgment in favor of 290 Ocean and the City in all respects.

COUNTERSTATEMENT OF FACTS

I. Oceanfront-Broadway Redevelopment Plan

In May 1996, the City Council of the City of Long Branch (the "*Council*") concluded that certain areas in the City were areas in need of redevelopment under the LRHL. Pa135. On May 14, 1996, the City adopted the Oceanfront—Broadway Redevelopment Plan (the "*Redevelopment Plan*") in order to achieve the redevelopment of an underdeveloped segment of the oceanfront and underutilized commercial area west, north and sought of the intersection of Broadway and Ocean Boulevard. Pa139.

The property known as block 216, lots 11, 12 and 24 (formerly lots 13 and 24) on the City's tax map (the "*290 Ocean Property*") was designated as part of the Beachfront South Sector of the Redevelopment Area under the Redevelopment Plan. Pa140; Pa159. The Redevelopment Plan provided that the objective for the Beachfront South Sector was "to continue the mid-rise residential pattern of 4-to-8-story structures that maximize views to the Atlantic." Pa144.

The Redevelopment Plan further described the "development/design requirements" for the Beachfront South Sector. Pa144-145. Design Guidelines Handbook 6, applicable to the Beachfront South Sector, set forth the

requirements regarding density, building coverage, building lines, bulk and height. Pa172.

Section 15 of the Redevelopment Plan, entitled "*Procedures for Changing Redevelopment Plan*," provided:

> The Redevelopment Plan may be amended from time to time by the City Council of the City of Long Branch, provided that, if amended after the disposition of any land in the Redevelopment Area, the modification must be consented to in writing by designated developers. Any amendments to the Redevelopment Plan shall be reviewed by the Planning Board of the City of Long Branch. After such review, the Planning Board shall make recommendations to the City Council, which may adopt the changes by ordinance. Such ordinance shall specify the relationship of the proposed changes or amendments to the City Master Plan and the goals and objectives of the Redevelopment Plan. [Pa156].

Nicholas Graviano, P.P., AICP ("*Graviano*"), who testified as a representative of the City under R. 4:14-2(c), interpreted Section 15 to mean that "any designated redeveloper of a specific piece of property must be notified before the plan is amended," and that if a redeveloper owns a piece of property not subject to the amendment, its consent would be unnecessary. Pa184-185.

II. Amendment of the Oceanfront—Broadway Redevelopment Plan

On October 14, 2020, the Council conducted a meeting at which it introduced for first reading Ordinance No. 23-20, which was to approve amendments to the Redevelopment Plan. Pa187. Ordinance No. 23-20 provided that 290 Ocean had proposed a plan for the redevelopment of the 290 Ocean

Property, including a residential project (the "*Project*"). Pa191. Ordinance No. 23-20 further provided that the Project would require amendments to the Redevelopment Plan, particularly the Design Guidelines. Ibid.

In accordance with N.J.S.A. 40A:12A-7(f), during a public hearing held on October 20, 2020, the Planning Board evaluated whether the proposed amendments were consistent with the City's Master Plan. Pa191-192. During the hearing, Graviano, planning director for the City, explained that one of the major changes was that the amended plan increased the building's maximum height to 100 feet "which is in keeping with the established building height of the South Beach project as well as the (indiscernible) project and other high-rise multi-family buildings in the redevelopment areas" and that the height was "consistent with the established development pattern." Pa224. Graviano also explained that the amended plan "remov[es] the maximum density requirements" and "added a minimum lot size to prevent further subdivision of a parcel." Pa225. During the public comment portion, Graviano stated that while the amended plan removes the maximum density requirement, the conditionally designated redeveloper had submitted a concept plan containing 109 units. Pa226. In addition to the express limit of 109 units, density would instead be controlled by height and parking requirements, as well as the overall size of the building.

Graviano concluded that the amendments were "definitely consistent with the Master Plan in that this redevelopment area was designed for buildings eight stories of a residential use," and "[t]hat's what we're going to be establishing with this document." Pa225; see also Pa227 ("[T]his is a project that's in keeping with the goal and intent to provide multi-family residential buildings within that portion of the municipality as well as to have eight stories of residential dwellings which this building will have."). Graviano further concluded that the amendments were consistent with "the Monmouth County Master Plan which identifies this as a redevelopment area as well as the State development and redevelopment plan which has this parcel within the Metropolitan planning area. And the main purpose of the Metropolitan planning area is to promote the redevelopment and revitalization of more densely populated areas. So this is certainly a plan that helps advance those goals and objectives of the State plan." Pa225. The Planning Board unanimously voted, 7-0, that the amendment to the redevelopment plan was substantially consistent with the Master Plan. Pa227-228.

Thereafter, the Council conducted a meeting on October 28, 2020, during which it carried the public hearing on the second reading of Ordinance No. 23-20 to November 12, 2020, on the basis that there were technical amendments made to the amended redevelopment plan. Pa230-233.

On November 10, 2020, the Planning Board conducted a public meeting during which the Planning Board conducted the exact same review it previously conducted during the meeting on October 20, 2020. Pa235. The Planning Board once again unanimously voted that the amendment to the redevelopment plan was substantially consistent with the Master Plan. Pa242-243.

On November 12, 2020, the Council conducted a public meeting to consider the second reading of Ordinance No. 23-20. Pa246. During the public meeting, Graviano testified that "[t]he main focus of [the amendment] is to provide multi-family residential building in keeping with the established redevelopment plan." Pa249. The Council heard comments from members of the public, and ultimately voted 2-2, with Councilman Dangler abstaining, meaning that Ordinance No. 23-20 was not adopted. Pa254.

On November 24, 2020, the Council held a meeting at which it introduced for first reading Ordinance No. 26-20. Pa257. Ordinance No. 26-20 was identical to Ordinance No. 23-20. Pa270; compare Pa191. At the beginning of the meeting, the Council's attorney explained that "[t]here was a number of things that were said at the time of the public hearing and at the time of the introduction of this ordinance that were not accurate and I – or were misleading and I wanted to – after the meeting I spoke to many of the Council people and once I kind of laid out what the appropriate facts were with regard to this

ordinance it was the Council's determination and the Council President's determination to put it back on for introduction." Pa259. Counsel clarified that "[d]espite comments that were made this is not an ordinance for unlimited density," since the "bulk and building volumes and square footage calculations' would limit the number of units, and that "[t]he actual number of units proposed is 109 units." Ibid. Counsel further clarified that "[t]he building is essentially the same height as surrounding units" with a deviation of five feet. Ibid. Ordinance No. 26-20 was passed upon first reading at the November 24, 2020 meeting. Pa261.

On December 9, 2020, the Council conducted a meeting and second reading of Ordinance No. 26-20. Pa273.[1] Following public comment, the City Council unanimously approved the adoption of Ordinance No. 26-20. Pa283.

The Amendment to the Oceanfront-Broadway Redevelopment Plan, Beachfront South Sector for Block 216, Lots 11, 12 & 24 stated that "Block 216, Lots 11, 12 & 24 are [the] last remaining undeveloped parcels in the portion of the Beachfront South Redevelopment area between Pavilion Avenue and North Bath Avenue." Pa289. The Amended Redevelopment Plan set forth the area, bulk and off-street parking standards applicable to the 290 Ocean Property.

[1] The cover of the transcript of the December 9, 2020 meeting erroneously refers to the date of the meeting as "November 12, 2020."

Pa291. Specifically, the Amended Redevelopment Plan provided that there would not be any maximum density limit and that the maximum building height would be 100 feet (excluding roof-top mechanical equipment and screening). Ibid. The Amended Redevelopment Plan further provided that "[a]ll projects shall be subject to all required fees from the City of Long Branch unless otherwise waived or amended by the City Council in the redeveloper's agreement." Pa294.

The Amended Redevelopment Plan also described its relationship to the Master Plan and other county and state plans. Pa296. Specifically, the Amended Redevelopment Plan provides:

> The Plan Area is designated as part of the Beachfront South Redevelopment Area on the Land Use Map of the 2010 Master Plan. The Master Plan, at that time did not recommend any specific changes to that area.
>
> Design Guidelines Handbook #6 indicates that the objective of the plan is to continue and reinforce the existing residential pattern of 4 to 8 story structures that maximize the views of the ocean. Consequently, this plan is consistent with both the 2010 Master Plan and the Beachfront South Redevelopment Plan.
>
> Furthermore, the proposed plan amendment advances the following objectives of the 2010 Master Plan:
>
> - Maintain existing residential neighborhoods as attractive, high quality areas and ensure that renovations and new construction are compatible with existing neighborhood character.
>
> - Maintain a balanced stock of quality housing that provides housing options for all generations, incomes, and lifestyles. [Ibid.].

III. 290 Ocean Is Designated as Redeveloper

On October 14, 2020, the Council adopted Resolution 199-20 which designated 290 Ocean as a conditional redeveloper of the 290 Ocean Property pending the negotiation and execution of a more comprehensive redevelopment agreement. Pa299.

On December 9, 2020, the Council adopted Resolution 243-20 which designated 290 Ocean as the redeveloper of the 290 Ocean Property and authorized the execution of the Redevelopment Agreement which had been negotiated between the City and 290 Ocean. Pa307.

IV. The Redevelopment Agreement

On December 14, 2020, the City and 290 Ocean entered into a Redevelopment Agreement which set forth the parties' respective rights, responsibilities and obligations with respect to the redevelopment of the 290 Ocean Property and the Project. Pa348.

In pertinent part, Section 4.4(a) of the Redevelopment Agreement provided:

> Redevelopment Fee. Redeveloper shall pay Redevelopment Fee to the City, consisting of the following:
>
> (i) a one-time "Administrative Fee" as established by City Ordinance in the amount of One Hundred Thousand Dollars ($100,000), payable upon the execution of this Agreement.

> (ii) a one-time fee (the "Redevelopment Fee") in the amount of Two Million Dollars ($2,000,000), payable upon the earlier of: (A) Redeveloper's closing on the acquisition of the Property or (B) January 31, 2021. The City agrees that the Redevelopment Fee shall benefit the City's redevelopment areas and shall serve as an additional community benefit to address any impacts in the City relating to the redevelopment.

[Pa358-359].

Additionally, Section 5.1 of the Redevelopment Agreement provided that 290 Ocean "shall be responsible for any off-site improvements required as a condition to the Governmental Approvals, as permitted under the MLUL." Pa360.

On December 15, 2020, 290 Ocean wired the $2,000,000 payment to the City. Pa387. The $2,000,000 payment served to facilitate the City's implementation of redevelopment, defray the costs of the redevelopment entity, and to benefit the City's redevelopment areas, including the expanded use of the Long Branch Senior Center as a result of redevelopment in the City's redevelopment areas. Pa398-399.

PROCEDURAL HISTORY

On January 22, 2021, Blackridge filed a First Amended Complaint in Lieu of Prerogative Writs ("*FAC*"). Pa1. In Count I of the FAC, Blackridge alleged that the provision in the Redevelopment Agreement requiring a $2,000,000 payment is unlawful for the following reasons: (a) it is *ultra vires*; (b) there are no standards to determine the amount of the $2,000,000 fee in any ordinance; (c) the fee is unrelated to the impact of the development of the 290 Ocean Property on the City; (d) the fee has no relationship to the "costs of the redevelopment entity" as those terms are used in N.J.S.A. 40A:12A-8(f); and (e) the fee is not authorized by the LRHL. Pa10-12.

In Count II of the FAC, Blackridge alleged that because Blackridge, as a "designated developer" of "any land in the Redevelopment Area," did not provide its written consent to the amendment of the Redevelopment Plan, the amendment to the Redevelopment Plan is unlawful. Pa12-13.

In Count III of the FAC, Blackridge alleged that the City failed to determine whether the 290 Ocean Property remained within an area in need of redevelopment, and that as a result of such failure, all resolutions and ordinances intended to secure the redevelopment of the 290 Ocean Property are unlawful. Pa13-15.

In Count IV of the FAC, Blackridge alleged that the amended Redevelopment Plan constitutes "spot zoning" insofar as it extended significant benefits to the owner of the 290 Ocean Property, unavailable to others. Pa15-16.

In Count V of the FAC, Blackridge alleged that the City violated N.J.S.A. 40:55D-7(d) when it adopted the amendment to the Redevelopment Plan. Pa16-17.

Lastly, in Count VI of the FAC, Blackridge alleged that the record in this matter does not contain "an identification of any provisions in the proposed redevelopment plan which are inconsistent with the plan" as required by N.J.S.A. 40A:12A-7(e). Pa18-19.

Blackridge requested the entry of judgment finding the amendment to the Redevelopment Plan, the Resolution approving the amendment to the Redevelopment Plan, Ordinance No. 26-20, Resolution 199-20 appointing 290 Ocean as the conditional redeveloper and any related Ordinance or Resolution intended to secure the redevelopment of the 290 Ocean Property to be unlawful. Ibid.

On August 26, 2022, 290 Ocean and the City filed respective motions for summary judgment seeking the dismissal of the FAC in its entirety with prejudice. Pa106; Pa460.

The trial court heard oral argument of the motion on December 16, 2022. 1T. At the outset of the argument, the motion judge observed that "generally all of the facts that were stated in the statement of undisputed material facts by both movants, by both 290 Ocean and the City of Long Branch were admitted." 1T6-3 to 1T6-6. Following argument by counsel, the trial court indicated that it would issue a decision in writing. 1T50-18 to 1T50-24.

The court entered Orders on December 22, 2023 (the "*Summary Judgment Orders*"), granting 290 Ocean's and the City's respective motions for summary judgment and dismissing the FAC as against 290 Ocean and the City with prejudice. Pa71; Pa48.

The trial court issued a written decision in connection with the Summary Judgment Orders. Pa50.

With regard to Count I of the FAC and Plaintiff's contention that the $2 million redevelopment fee was unlawful, the trial court recited the parties' respective arguments and observed that the LRHL was enacted to "promote the advancement of community interests through programs of redevelopment, rehabilitation and incentives to the expansion and improvement of commercial, industrial, residential and civic facilities." Pa57. The trial court found that the redevelopment payment was used by the City to effectuate and defray costs of

improvement in the area and furthered the objectives and terms of the Redevelopment Plan. Pa58.

With regard to Count II of the FAC and Plaintiff's contention that its consent was required in order to amend the Redevelopment Plan, the trial court concluded that Plaintiff was no longer a designated developer under the Redevelopment Plan at the time of the amendment because Plaintiff had long since completed its project. Pa59.

With regard to Count III of the FAC and Plaintiff's contention that the City was required to determine that the 290 Ocean Property remained an area of need redevelopment, the trial court held that the City "was under no obligation to reconsider the status of the 290 Ocean Property merely because time had passed since the original inception of the Redevelopment Plan." Pa61. Additionally, the trial court found that no factual information was presented by Plaintiff to demonstrate that the nature or character of the property had changed and was thus no longer in need of redevelopment. Ibid.

With regard to Count IV of the FAC and Plaintiff's contention that the Amended Redevelopment Plan constituted impermissible spot zoning, the trial court found that the question of whether the amendments to the Redevelopment Plan constituted spot zoning was a determination to be made by the court, based upon applicable New Jersey law and the undisputed material facts, and that the

court was not bound by Plaintiff's proffered expert's conclusions as to whether the amendments constitute spot zoning. Pa63-64. The trial court concluded that the amendments did not add a new permitted use or conditional use to the underlying zone and were not aimed at promoting the private interests of 290 Ocean, but rather at the overall goal of redevelopment and effectuating the master plan, and therefore did not constitute spot zoning. Pa64.

With regard to Count V of the FAC and Plaintiff's contention that the Amended Redevelopment Plan was inconsistent with the City's Master Plan, the trial court found that Graviano, the City's planner, detailed how the amendments were consistent with the Master Plan, including the fact that "the height limitation increase maintains existing residential neighborhoods as attractive high-quality areas compatible with existing neighborhood character and maintain a balanced stock of quality housing for all generations, income, and lifestyles." Pa67.

Lastly, with regard to VII of the FAC and Plaintiff's contention that the Planning Board failed to prepare a report which identified those provisions of Amended Redevelopment Plan which are inconsistent with the City's Master Plan, the trial court found that "[a]s the redevelopment plan was not inconsistent with the Master Plan, there would be no need for a provision of a report by the planning board including 'an identification of any provisions in the proposed

redevelopment plan which are inconsistent with the plan and recommendations concerning these inconsistencies…'" Pa68-69.

Plaintiff filed a notice of appeal of the Summary Judgment Orders on January 10, 2024, and an amended notice of appeal on January 12, 2024. Pa94. In its brief, Plaintiff asserts arguments only with regard to the dismissal of Count I of the FAC (the $2 million redevelopment fee), Count II of the FAC (whether Blackridge's consent to the Amended Redevelopment Plan was required) and Count IV of the FAC (spot zoning). 290 Ocean hereby opposes Plaintiff's appeal and respectfully requests that the Summary Judgment Orders be affirmed in their entirety for the reasons set forth herein.

STANDARD OF REVIEW

The Appellate Division employs the same standard that governs the trial courts in reviewing summary judgment orders. Prudential Property & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to summary judgment as a matter of law." R. 4:46-2(c). To avoid summary judgment, the non-movant must clearly establish an issue of material fact. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). To

do so, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or as otherwise provided in the court rule, must set forth specific facts showing that there is a genuine issue for trial. R. 4:46-5(a); see also Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276, 279-80 (App. Div. 2017); Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015).

The role of the motion judge is to determine whether there exists a genuine issue of material fact by considering whether the evidence presented, viewed in the light most favorable to the non-moving party, is sufficient to permit a rational factfinder to resolve the dispute in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252 (1986).

In addition, the Appellate Division must apply a highly deferential standard when performing a *de novo* review and application of the governing law to the undisputed material facts regarding the City's adoption of the Amended Redevelopment Plan and entry into the Redevelopment Agreement.

"Municipal actions enjoy a presumption of validity." Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998); see also Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990) (recognizing that "[a] presumption of validity and constitutionality

attends every legislative decision"). Therefore, "a challenge to the validity of a municipal ordinance or action" faces a "heavy burden" of overcoming that presumption. Bryant, supra, 309 N.J. Super. at 610.

Consistent with the presumption of validity, courts can overturn municipal actions only if they are "arbitrary, capricious or unreasonable." Bryant, supra, 309 N.J. Super. at 610. A hallmark of this standard is the principle that a court should not disturb a considered legislative judgment because the "court would have done differently":

> It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative intent. **It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of expert testimony adduced at a trial is at variance with the local legislative judgment**. If the latter is at least debatable it is to be sustained.

[Bow & Arrow Manor, Inc. v. Town of W. Orange, 63 N.J. 335, 343 (1973) (emphasis added)].

In Downtown Residents, supra, 242 N.J. Super. at 338, the court found that "all the municipality needed to secure summary judgment" in connection with a challenged redevelopment plan "was a showing of some reasonable basis for its legislative action." Stated differently, a court should "giv[e] due deference to the local legislative judgment in the matter" and affirm when "[t]he

legislative judgment could reasonably go either way." Bow & Arrow, supra, 63 N.J. at 345.

The findings of the municipal body are critical to a determination of whether the body has acted arbitrarily, capriciously or unreasonably. "A determination predicated on unsupported findings is the essence of arbitrary or capricious action." Bryant, supra, 309 N.J. Super. at 610; see also Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 333 (App. Div. 2010) (noting that "findings underlying the municipal governing body's redevelopment decision, including any regarding the plan's consistency or inconsistency with the master plan, must be adequately supported by the record, lest the resulting plan adoption be arbitrary or capricious").

When Plaintiff's arguments are viewed through the lens of this presumption of validity, the Appellate Division should find that Plaintiff's legal and factual challenges to the City's adoption of the Amended Redevelopment Plan and entry into the Redevelopment Agreement are without merit and affirm the Summary Judgment Orders accordingly.

LEGAL ARGUMENT

POINT I

THE $2 MILLION REDEVELOPMENT FEE IS LAWFUL UNDER THE LRHL BECAUSE THE

CITY WAS STATUTORILY AUTHORIZED TO NEGOTIATE AND COLLECT REVENUE FROM 290 OCEAN AND THE PROVISIONS OF THE MLUL GOVERNING A PLANNING BOARD'S ABILITY TO EXACT OFF-TRACT CONTRIBUTIONS ARE INAPPLICABLE

Plaintiff's primary argument in support of its claim that the Amended Redevelopment Plan and Redevelopment Agreement should be nullified is that the $2 million fee that was paid by 290 Ocean to the City was unlawful. Plaintiff's argument is contrary to the plain language of the LRHL and is not supported by the readily distinguishable cases relied upon by Plaintiff.

A. The Plain Language of the LRHL Authorized the City to Negotiate and Collect the $2 Million Redevelopment Fee

The LRHL was enacted to correct and ameliorate deteriorating real estate conditions through the concerted effort of responsible public bodies. N.J.S.A. 40A:12A-2. The importance of the redevelopment powers under the LRHL has been recognized as "a valuable tool for municipalities faced with economic deterioration in their communities." Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365 (2007).

In enacting the LRHL, the Legislature addressed and consolidated the multiple statutory enabling mechanisms for redevelopment and rehabilitation of "commercial, industrial, residential and civic facilities" into a single procedural framework. See N.J.S.A. 40A:12A-2 ("It is the intent of this act to codify,

simplify and concentrate prior enactments relative to local redevelopment and housing, to the end that the legal mechanisms for such improvement may be more efficiently employed."). It is axiomatic that the LRHL draws its authority from and is governed exclusively by the Constitution's Blighted Areas Clause. Gallenthin, supra, 91 N.J. at 357 ("Pursuant to that authorization [from the Blighted Areas Clause], the Legislature enacted the [LRHL], which empowers municipalities to designate property as 'in need of redevelopment' ...").

The LRHL provides that a municipality shall have the power "to make and execute contracts and other instruments necessary and convenient to the exercise of the powers of the agency or authority." N.J.S.A. 40A:12A-22(a). It further provides that redevelopment agreements, among other things, "shall contain ... any other covenants, provisions and continuing controls as may be deemed necessary to effectuate the purposes of this act." N.J.S.A. 40A:12A-9(a). Because the execution of a redevelopment agreement is essentially the creation of a public/private partnership, there is no express limitation or restriction on the terms of a redevelopment agreement, other than those proscribed in N.J.S.A. 40A:12A-9. Like any joint venture, it is up to the parties' sole discretion to determine the capital investments at the outset and allocation of profits that are anticipated. However, in the case of a public entity, there is the implied restriction that any benefit sought by the public entity must be for a valid public

purpose. See, e.g., Riggs v. Long Beach Twp., 109 N.J. 601, 612 (1988); Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 561 (1975); Twp. of Readington v. Solberg Aviation Corp., 409 N.J. Super. 282, 319 (App. Div. 2009).

Under the LRHL, "[i]n order to carry out and effectuate the purposes of [the LRHL] and the terms of the redevelopment plan," a municipality is statutorily permitted to:

> Arrange or contract with public agencies or redevelopers for the planning, replanning, construction, or undertaking of any project or redevelopment work, or any part thereof; ***negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity***, including where applicable the costs incurred in conjunction with bonds, notes or other obligations issued by the redevelopment entity, and to secure payment of such revenue; as part of any such arrangement or contract, provide for extension of credit, or making of loans, to redevelopers to finance any project or redevelopment work, or upon a finding that the project or redevelopment work would not be undertaken but for the provision of financial assistance, or would not be undertaken in its intended scope without the provision of financial assistance, provide as part of an arrangement or contract for capital grants to redevelopers; and arrange or contract with public agencies or redevelopers for the opening, grading or closing of streets, roads, roadways, alleys, or other places or for the furnishing of facilities or for the acquisition by such agency of property options or property rights or for the furnishing of property or services in connection with a redevelopment area.
>
> [N.J.S.A. 40A:12A-8(f) (emphasis added)].

The first step in interpreting this statute is to look "to the plain language of the statute[,]" and "ascribe to the statutory language its ordinary meaning[.]"

D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007). The court's "goal in the interpretation of a statute is always to determine the Legislature's intent." Ibid. "Where a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." O'Connell v. State, 171 N.J. 484, 488 (2002). When a statute's plain language lends to only one interpretation, a court should not consider "extrinsic interpretative aids." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)).

Here, the LRHL is clear and unambiguous on its face: a municipality can "negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity." There are no conditions imposed under the LRHL which limit the recoverable "costs of the redevelopment entity" only to those costs which the municipality will incur as a direct and proximate result of the redevelopment. There are no conditions imposed under the LRHL which require that the "costs of the redevelopment entity" be directly related to the redevelopment project. So long as the fee was negotiated and collected by the City in order to effectuate the purposes of the LRHL and the Amended Redevelopment Plan, the fee is lawful.

Indeed, courts have interpreted this section of the LHRL and concluded that a municipality has the authority to negotiate the payment of fees without demonstrating any direct nexus between the redevelopment and the fee.

In Genon Rema, LLC v. South Amboy Redevelopment Agency, Docket No. MID-L-390-13, 2015 WL 10986475 (N.J. Super. Ct. Law Div. May 18, 2015), Judge Wolfson squarely addressed this issue. Pa439. In that case, the plaintiff redeveloper sought to void its redevelopment agreement with the South Amboy Redevelopment Agency ("*SARA*") on the grounds that the $300,000 "Upfront Redevelopment Payment" required under the agreement was unlawful. Conversely, SARA sought to enforce such provision. Since there were no material facts in dispute, Judge Wolfson resolved the legal question as the validity of the $300,000 payment by way of summary judgment.

Specifically, Judge Wolfson was called upon to adjudicate, as a matter of first impression, whether the "rational nexus" cost requirements regulating municipal exactions and developer contributions under § 42 of the Municipal Land Use Law ("*MLUL*"), N.J.S.A. 40:55D-42, and Divan Builders v. Planning Bd. of Wayne, 66 N.J. 582, 600 (1975), are applicable to any of the redeveloper agreement's bargained-for contributions and/or payments. Genon, supra, 2015 WL 10986475, at *1, Pa439-440. The court held that the "rational nexus" requirement "neither applies to, nor controls enforcement of, a redevelopment

agreement entered into voluntarily and as the result of arms' length negotiations between a municipality (or its redevelopment agency) and its properly designated redeveloper." Id. at *2, Pa440. The court further held that the LRHL "does not limit said entities to defraying costs on a 'per project' basis, but rather permits said entities to defray *all costs* of the agency, past and present, in performing its statutory functions and in carrying out its authorized purposes." Ibid.

Judge Wolfson observed that unlike the MLUL, whose nexus and *pro rata* proportionality requirement served as "the Legislature's check on a municipality's planning power," the LRHL "imbues municipalities with broad power to facilitate and encourage the redevelopment of blighted and unproductive areas, as evinced by both the statutory language and the policies promoted therein." Id. at *9, Pa445. Referring to the statutory authority to "***negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment agency***" under N.J.S.A. 40A:12A-8(f), Judge Wolfson explained:

> Had the Legislature intended to impose the "rational nexus" requirement upon municipalities and/or redevelopment agencies in the redevelopment context, it certainly would not have expressly permitted these entities to ***negotiate*** revenue, but rather would have used the same or similar language as it did within the MLUL when it codified that requirement some forty (40) years ago. Section 42 of the MLUL provides that if the governing body seeks contribution from a developer, it must "adopt regulations [which are] based on

circulation and comprehensive utility service plans ... and shall establish reasonable standards to determine the proportionate or pro-rata amount of the cost of such facilities that shall be borne by each developer or owner within a related and common area, which standards shall not be altered subsequent to preliminary approval." N.J.S.A. 40:55D-42. The amount imposed on the developer or applicant for certain conditions or improvements is, by definition, non-negotiable, because it must be equivalent (or as close as possible) to the cost created by the benefit conferred. This specific, formula-like mandate is unequivocally distinct from the flexible and unrestricted language of the LRHL, which was adopted seventeen years after the rational nexus principle was amended into the MLUL.

Furthermore, the LRHL promotes very different policies than the MLUL, and does so in an entirely different context. Becoming a designated "redeveloper" is both an affirmative and a voluntary undertaking. There is no like threat of "compulsion" as might well permeate zoning or planning board proceedings on a development application under the MLUL. The redevelopment opportunity is made available "to a specific entrepreneur, not to the land itself or even to its current owners." Peter A. Buschbaum & Robert S. Goldsmith, *Cities and Towns Are No Longer Just Gatekeepers*, 163 N.J.L.J. 914 (2001). A redeveloper's agreement does not equate to, and is fundamentally different from, a developer's agreement. Performance under a redevelopment agreement is *not tethered* to the actual realization or completion of a particular redevelopment project, whereas a developer's agreement is dependent upon, and typically a condition of, a particular project's approval and construction.

Redevelopment agreements are uniquely crafted to help implement and facilitate the clear historical and legislative intent of rehabilitating those areas that have fallen into contagious disrepair – a condition which the Legislature "presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general." 62-64 Main Street, LLC v. Mayor and Council of City of Hackensack, 221 N.J. 129, 151 n. 5 (2015). They set forth time frames for completion of various steps; they

> incorporate financing considerations; and they outline the specific methods and procedures by which the ultimate goal of rehabilitation can be realized. The plain language of the LRHL amply demonstrates the Legislature's intent to delegate broad power to municipalities to contract with designated redevelopers without the constraints of any nexus requirement. To view a developer's agreement through the same lens as a developer's agreement would be both illogical and inconsistent with the Legislature's clearly expressed intent. It is thus patently clear that there exists no nexus or other constitutional limitation which would infringe upon, or otherwise fetter the Legislature's deliberate delegation of such expansion power. See State v. Profaci, 56 N.J. 346, 349 (1970) (addressing various substantive attacks on the LRHL); and see Gallenthin, supra, 191 N.J. at 359-60 (citing State v. Miller, 170 N.J. 417, 433 (2002) ("Even through a statute may be open to a construction which would render it unconstitutional or permits its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation.").
>
> [Ibid. (emphasis in original), Pa445].

Judge Wolfson also addressed the same argument raised by Plaintiff, namely that the bargained-for payment must be specifically related to the costs of the redevelopment entity as incurred in connection with the specific project. Judge Wolfson rejected such argument, observing that "[t]he LRHL expressly permits the governing body to 'negotiate and collect revenue from a redeveloper to defray the costs ***of the redevelopment entity***, including where applicable, the costs incurred in conjunction with bonds, notes or other obligations issued by the redevelopment entity, and to security payment of such revenue' (N.J.S.A. 40A:12A-8(f)), pointed language that removes any doubt about whether

governing bodies are limited or restricted in any way in allocating or defraying their costs, or the time period during which they can do so." Id. at *11, Pa446. "Limiting a redevelopment entity to defraying its costs in the manner suggested by [the redeveloper] would substantially impede these entities from fulfilling their primary and salutary purpose of rejuvenating all areas in need of redevelopment throughout the municipality." Ibid., Pa446. See also Gillette Enters. v. Borough of Sayreville, No. A-5838-10T1, 2012 N.J. Super. Unpub. LEXIS 1181 (N.J. Super. Ct. App. Div. May 29, 2012) (holding that redevelopment agency was authorized under N.J.S.A. 40A:12A-8(f) to require payment of annual redevelopment fee of $10,000 by redeveloper).

In this case, the City was statutorily authorized under N.J.S.A. 40A:12A-8(f) to negotiate the payment of a $2,000,000 fee to defray its costs. As explained in Genon, the plain language of the LRHL amply demonstrates the Legislature's intent to delegate broad power to the City to contract with designated redevelopers such as 290 Ocean without the constraints of any nexus requirement. There is no requirement that the $2,000,000 payment be related to the specific impacts of the redevelopment of the 290 Ocean Property. Nor is there any requirement that the $2,000,000 be used to defray the specific costs incurred by the City in connection with the redevelopment of the 290 Ocean Property. Under the LRHL, the City had the broad authority to negotiate the

inclusion of a payment obligation to defray any costs of the City, no matter how or when those costs were incurred. The $2,000,000 payment obligation is therefore lawful, and the Count I of the FAC should be dismissed with prejudice.

Plaintiff argues that Section 8(f) does not authorize the $2 million redevelopment fee for three reasons. Pb24. Each of Plaintiff's arguments is without merit.

First, according to Plaintiff, the "introductory paragraph" of Section 8 of the LRHL requires that any redevelopment must advance the purpose of the redevelopment plan. Pb24. As quoted above, Section 8(f) authorizes the City to "negotiate and collect revenue" from 290 Ocean "[i]n order to carry out and effectuate the purposes of [the LRHL] and the terms of the redevelopment plan." N.J.S.A. 40A:12A-8(f). In this case, the City negotiated and collected the $2 million redevelopment fee from 290 Ocean in order to effectuate the purpose of the LRHL as well as the terms of the Amended Redevelopment Plan. In this case, it is the actual development of the 290 Property itself which effectuates the purpose of the LRHL and the Amended Redevelopment Plan. The City negotiated and collected the $2 million fee as a contractual consideration to enable 290 Ocean to redevelop the 290 Ocean Property in accordance with the terms of the Amended Redevelopment Plan. In other words, but for the payment of the $2 million fee by 290 Ocean to the City, the 290 Ocean Property would

not have been redeveloped, and the purposes of the LRHL as well as the Amended Redevelopment Plan would not have been effectuated. Clearly, the $2 million payment advanced the purpose of the Amended Redevelopment Plan; without it, the 290 Ocean Property would not have been redeveloped.

Additionally, although there is no statutory requirement that the revenue negotiated and collected by the City be used in any specific manner, the $2 million fee was used to improve and renovate the senior center located immediately adjacent to the 290 Ocean Property. The construction of the senior center therefore effectuates the purposes of the LRHL by improving facilities within the City. See N.J.S.A. 40A:12A-2 (the LRHL was enacted to "promote the advancement of community interest through programs of redevelopment, rehabilitation and incentives to the expansion and improvement of commercial, industrial, residential and civic facilities").

Second, according to Plaintiff, the "property and services" of the senior center are not provided "in connection with the redevelopment area," and therefore the payment is unlawful. Pb24. In making this argument, Plaintiff cites the wrong subsection of N.J.S.A. 40A:12A-8(f). As stated throughout, under N.J.S.A. 40A:12A-8(f), the City was authorized to "negotiate and collective revenue from a redeveloper to defray the costs of the redevelopment entity." Separately, under a different subsection of N.J.S.A. 40A:12-8(f), the

City was also authorized to "arrange or contract with public agencies or redeveloper for the opening, grading or closing of streets, roads, roadways, alleys, or other places or for the furnishing of facilities or for the acquisition by such agency of property options or property rights or *for the furnishing of property or services in connection with a redevelopment area*." (emphasis added). That latter provision is entirely inapplicable to this case.

Third, Plaintiff argues that the $2 million used by the City to construct the senior center is not a "cost of the redevelopment entity" but is rather an "investment" by the City. Pb25. Plaintiff's argument in this regard is purely semantic. The City incurred at least $2 million in costs to construct the senior center. Whether the payment of such construction costs is considered a capital investment for accounting purposes does not change the fact that the City incurred those costs to construct the senior center. Because the $2 million was negotiated and collected by the City to defray its costs incurred in connection with the senior center, the payment was lawful under the plain language of the LRHL.

B. The MLUL's Provisions Which Govern a Planning Board's Ability to Require Off-Tract Contributions Are Inapplicable to the City's Statutory Right to Negotiate and Collect the $2 Million Redevelopment Fee Under the LRHL

Implicitly recognizing that the plain language of the LRHL authorized the $2 million redevelopment fee, Plaintiff next argues that a completely different

statute, the MLUL, prohibits such payment. In support of this argument, Plaintiff relies on readily distinguishable cases that further support 290 Ocean's assertion that the City was permitted to "***negotiate***" and "***collect***" the $2 million redevelopment fee from 290 Ocean. Plaintiff's reliance on cases that address a planning board's inability to require contributions for off-tract improvements is an "*apples to oranges*" comparison that is without merit.

Plaintiff principally relies upon the Appellate Division's decision in Britwood Urban Renewal, LLC v. City of Asbury Park, 376 N.J. Super. 552 (App. Div. 2005), in support of its argument that the $2 million redevelopment fee runs afoul of the MLUL. Pb26-28. Not only is that case readily distinguishable from the case at bar, but it confirms that a municipality may indeed *negotiate* for the payment of a fee by a redeveloper in a redevelopment agreement.

In Britwood, the City of Asbury Park and Asbury Partners entered into an amended redevelopment agreement which provided that Asbury Partners was responsible for "the construction of infrastructure improvements," which would be paid by fees assessed to subsequent developers and adopted an ordinance approving the agreement. Id. at 558-59. A month earlier, the plaintiff purchased the subject property which was located within the redevelopment area. Id. at 559. The plaintiff—who was not a redeveloper and who had not entered into

any redevelopment agreement with Asbury Park—submitted an application for preliminary and final site plan approval to the Planning Board. Ibid. During the hearing, the Planning Board concluded that it did not have the authority to condition the approval of the plaintiff's application on payment of off-site infrastructure contributions. Id. at 560.

Thereafter, the City Council adopted a resolution which granted the plaintiff "subsequent redeveloper" status and required the plaintiff to contribute to the cost of off-site infrastructure improvements. Ibid. The City Council also adopted an ordinance which set general parameters to apply to contributions to off-site infrastructure costs. Ibid. Once again, however, unlike the circumstances of this matter, the City of Asbury Park never entered into a redevelopment agreement with the plaintiff.

The plaintiff then filed an action in lieu of prerogative writs, attacking the validity of the resolution and ordinance to the extent they required the plaintiff to contribute to off-site infrastructure costs. Id. at 562. The trial court dismissed the plaintiff's complaint, but the Appellate Division reversed. Id. at 562-63. However, the Appellate Division did not hold that the City was prohibited from negotiating the payment of any fee from a redeveloper. In fact, the Appellate Division said the exact opposite. The Appellate Division recognized that the City's ability to impose such payment obligations flowed from its ability to

negotiate and enter into a ***contract*** with a redeveloper—which is precisely what the City did with 290 Ocean in this case.

In Britwood, the Appellate Division observed that under the LRHL, the municipality may "negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity." Id. at 564. Yet the Appellate Division held that "[b]ecause there is no contract or proposed contract between plaintiff and the City ... plaintiff is not a redeveloper." Id. at 565. "[T]he absence of a contract between plaintiff and either the City or Asbury Partners is fatal to the effort to impose a contribution toward off-site infrastructure improvement costs on plaintiff." Id. at 566. The Appellate Division found that in the absence of such contract, the MLUL did not independently authorize the City to impose off-site infrastructure costs on the plaintiff. Id. a 566-67. The Appellate Division concluded that "our review of the record and the relevant statutes compels us to conclude that the LRHL did not permit the City to impose off-site infrastructure contributions on plaintiff ***because plaintiff was not a party to a contract and therefore was not a redeveloper***..." Id. at 570 (emphasis added).

The Britwood holding is readily distinguishable from this case since 290 Ocean is a party to a contract with the City and is a redeveloper. The Appellate Division in Britwood expressly recognized that the LRHL contains a "specific authorization" that "permits the redevelopment entity to collect funds from a

redeveloper." Id. at 565 (citing N.J.S.A. 40A:12A-8(f)). That "specific authorization" enabled the City to collect funds from 290 Ocean—including the $2 million payment. The Britwood case supports 290 Ocean's argument in this regard.

Similarly, the unreported decision in SB Bldg. Assocs., L.P. v. Planning Bd., Docket No. A-0200-14T1, 2017 N.J. Super. Unpub. LEXIS 36, 2017 WL 84719 (N.J. Super. Ct. App. Div. Jan. 6, 2017), relied upon Plaintiff at Pb29, is equally unavailing. In SB Bldg. Assocs., the Ford Avenue Redevelopment Agency selected Boraie Development, LLC ("*Boraie*") as the redeveloper of the subject property and entered into a redevelopment agreement in 2004. Id. at *4. Thereafter, Boraie submitted an application to the Planning Board of Milltown for preliminary and final major site plan and subdivision approval. Ibid. Before a decision was reached on that application, the plaintiffs filed an action in lieu of prerogative writs, in which the court found that the costs of improving the infrastructure may be borne by Boraie "upon the proviso that Milltown and [Boraie] enter into a reimbursement agreement whereby Milltown is to reimburse [Boraie] a pro[-]rata share of costs which are not directly related to the redevelopment project." Id. at *5. Thereafter, the Agency and Boraie amended the redevelopment agreement to provide that Boraie was responsible for its pro rata share of the infrastructure improvement costs which "shall be

determined in connection with its site plan application..." Id. at *6-7. The Planning Board approved Boraie's second application and required Boraie to enter into a developer's agreement that was to require it to make "[p]ayment of [its] fair share contributions for off-tract improvements to the Borough's infrastructure..." Id. at *9.

The plaintiffs filed a complaint seeking to invalidate the "developer's agreement" provision of the Planning Board's resolution of approval, arguing that as a matter of law, the Board's condition for payment of contributions to off-tract improvements was illegal. Id. at *10. The court concluded that the "developer's agreement" provision was ultra vires because the imposition of a requirement for a contribution to off-tract electrical improvements was not authorized under the MLUL. Id. at *12. In reaching this conclusion, the court focused on a planning board's authority to require contributions to off-tract improvements under the MLUL—***an issue which is entirely irrelevant to the case at bar***. The court stated that "[t]he intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale." Id. at *25 (quoting Nunziato v. Planning Bd. of Edgewater Borough, 25 N.J. Super. 124, 131 (App. Div. 1988)). The court found that the Planning Board's resolution violated the MLUL. Id. at *27.

This case has nothing to do with whether a planning board may require contributions to off-tract improvements or the MLUL's provisions which govern a planning board's ability to impose such obligations. Significantly, the court in SB Bldg. Assocs. did not even *cite* N.J.S.A. 40A:12A-8(f), let alone substantively address a municipality's ability to negotiate and collect funds from a redeveloper. The SB Bldg. Assocs. case is simply inapplicable to this case.

Similarly, the court in Hoboken Land Building, L.P. et al. v. City of Hoboken et al., Docket No. MID-4580-18, relied upon by Plaintiff at Pb30, did not even *cite* N.J.S.A. 40A:12A-8(f), let alone substantively address a municipality's ability to negotiate and collect funds from a redeveloper. In his opinion denying the City of Hoboken's motion to dismiss the plaintiff's complaint, Judge D'Elia focused on the MLUL's limitations on the imposition of off-tract contributions. Unlike Judge Wolfson in Genon, Judge D'Elia did not, in any way, shape or form, address a municipality's statutory power to negotiate and collect a fee under the plain language of N.J.S.A. 40A:12A-8(f), which is the issue before the court in this case.

Plaintiff candidly acknowledges that it "recognizes the [Longridge Builders, Inc. v. Planning Bd. of Princeton, 52 N.J. 348 (1968)], Nunziato and other cases involve payments agreed to at the planning board level in connection with the MLUL," but argues that "the concerns expressed by this Court and the

Supreme Court about paying for approvals under an unreviewable assessment regime apply with equal force in the redevelopment context." Pb32 (emphasis added). Plaintiff's argument is an "*apples to oranges*" comparison between the negotiation of a redevelopment agreement between a redeveloper and the redevelopment entity and the application for land use approvals before a planning board. These are entirely separate and distinct events, governed by separate and distinct statutes, serving separate aims. 290 Ocean did not "pay for any approvals" through the payment of the $2 million redevelopment fee to the City. 290 Ocean was still required to submit a site plan application to the Planning Board (it did) and satisfy the City's ordinances in order to obtain site plan approval (it did). The $2 million fee had nothing whatsoever to do with the site plan approval process, and in no way constituted a "payment for approval" which would justify application of the rationale described in the distinguishable decisions above.

POINT II

PLAINTIFF'S CONSENT WAS NOT REQUIRED IN ORDER FOR THE CITY TO AMEND THE REDEVELOPMENT PLAN AND ALLOW THE REDEVELOPMENT OF THE 290 OCEAN PROPERTY

Next, Plaintiff argues that it possessed blanket veto authority in perpetuity to prevent any further development in the Redevelopment Area by any other

redeveloper. Plaintiff's self-serving argument is not only factually and legally without merit but reveals Plaintiff's true motivation to stifle economic competition through baseless litigation.

There is no statutory provision in the LRHL which requires a municipality to obtain the written consent of other designated redevelopers of other properties located within the redevelopment area prior to any amendment of the redevelopment plan. The power to amend a redevelopment plan lies solely with the governing body, subject to the report of the planning board. See N.J.S.A. 40A:12A-7.

In this case, the Redevelopment Plan is consistent with the LRHL with regard to any future amendment. Section 15 of the Redevelopment Plan, entitled "*Procedures for Changing Redevelopment Plan*," provided:

> The Redevelopment Plan may be amended from time to time by the City Council of the City of Long Branch, provided that, if amended after the disposition of any land in the Redevelopment Area, the modification must be consented to in writing by designated developers. Any amendments to the Redevelopment Plan shall be reviewed by the Planning Board of the City of Long Branch. After such review, the Planning Board shall make recommendations to the City Council, which may adopt the changes by ordinance. Such ordinance shall specify the relationship of the proposed changes or amendments to the City Master Plan and the goals and objectives of the Redevelopment Plan. [Pa156].

The reference to the written consent by "designated developers" applies to the developer who is being designated by the City to redevelop the subject

property for which the amendment applies, i.e., 290 Ocean. Graviano interpreted Section 15 to mean that "any designated redeveloper of a specific piece of property must be notified before the plan is amended," and that if a redeveloper owns a piece of property not subject to the amendment, its consent would be unnecessary. Pa184-185.

Granting a previously designated redeveloper of a different property that does not fall within the purview of the amended redevelopment plan a and which has long since completed the construction of its own redevelopment blanket veto authority over an amendment to a redevelopment plan would be ultra vires. "[A] municipality is a creature of the Legislature, and as such is a government of enumerated powers which can act only by delegated authority." Inganamort v. Borough of Fort Lee, 72 N.J. 412, 417 (1977) (citing Giannone v. Carlin, 20 N.J. 511, 517 (1956)). "Any exercise of a delegated power by a municipality in a manner not consistent with the purview of the governing statute is capricious and ultra vires of the delegated powers." Giannone, supra, 20 N.J. at 517; accord Kress v. La Villa, 335 N.J. Super. 400, 410 (App. Div. 2000). Here, had the City granted a previously designated redeveloper of a different property not impacted by the proposed amendment to the Redevelopment Plan blanket veto authority over that proposed amendment, such action would be contrary to the LRHL.

In its brief, Plaintiff speculates that the consent provision of the Amended Redevelopment Plan was meant to "encourage developers to invest in blighted areas rather than in more profitable less risky projects outside of those areas." Pb34. Yet there is nothing in the record to support Plaintiff's conjecture that it was granted perpetual veto power over any amendment to the Redevelopment Plan as an incentive to invest in the redevelopment area or to disallow "competing developers more advantageous development opportunities." Ibid. Plaintiff's speculation in this regard is a self-serving, yet unsupportable, interpretation of the Redevelopment Plan.

From a practical perspective, Plaintiff's assertion that the consent of each and every developer of any property within the redevelopment area must be obtained is illogical. What happens if a developer no longer exists? What happens if the City cannot contact the appropriate agent of the prior developer? The redevelopment of the 290 Ocean Property would be at the mercy of individuals or entities that may be defunct or unavailable or that—as Plaintiff candidly admits—would always put their economic interests ahead of the public's interest in redeveloping blighted areas.

Plaintiff cannot rely on its planning expert, J. Creigh Rahenkamp, PP ("*Rahenkamp*"), as the basis of its position regarding the meaning of the "consent to amendment" provision in the Redevelopment Plan. Pb37. Without

citation to any factual evidence or legal authority of any kind, Rahenkamp simply offers his subjective opinion that the City offered Plaintiff "long term participation in decision-making to protect that early, fledgling investment from future changes" to the Redevelopment Plan. Pb37 (citing Pa969). Such unsupported assertion is an improper net opinion. An expert's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere "net opinion." State v. Townsend, 186 N.J. 473, 494-95 (2006); Matter of Yaccarino, 117 N.J. 175, 196 (1989). Rahenkamp does not identify any evidence in the record regarding the purpose and intent of the "consent to amendment" provision, and certainly does not identify any evidence to suggest that the intent was to give protection to the initial developers in the redevelopment area.

POINT III

THE CITY'S ADOPTION OF THE AMENDED REDEVELOPMENT PLAN DOES NOT CONSTITUTE IMPERMISSIBLE SPOT ZONING

Lastly, Plaintiff's argument that the City's adoption of the Amended Redevelopment Plan constitutes impermissible spot zoning is without merit.

" 'Spot zoning' is the use of the zoning power to benefit particular private interests rather than the collective interests of the community." Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township, 80 N.J. 6, 18 (1976). The burden of proving that a zoning ordinance is illegal spot zoning lies

with plaintiffs. Id. at 19. Moreover, "[a]n ordinance enacted to advance the general welfare by means of a comprehensive plan is unobjectionable even if the ordinance was initially proposed by private parties and these parties are in fact its ultimate beneficiaries." Id. at 18.

When a municipality such as the City adopts a Redevelopment Plan which relaxes density and building requirements in accordance with its statutory authority to address blighted areas under the LRHL, such conduct does not equate to "spot zoning."

In Kanter v. Passaic, 107 N.J. Super. 556 (Law Div. 1969), the subject property was included within an area of the redevelopment plan known as "Urban Renewal Plan for the Downtown Passaic Project, No. N.JR.-71" after being determined to be a "blighted area" under the LRHL's predecessor statute. The City of Passaic approved the plan, which provided that it may be amended from time to time by resolution of the Board of Commissioners of the City of Passaic and the Passaic Redevelopment Agency. Id. at 559-560. The Board of Commissioners adopted a resolution that provided that an office building not in excess of 18,000 square feet may be erected on the site in question and that "no on-site parking shall be required." Id. at 560. Under the zoning ordinance applicable to the property prior to the adoption of the resolution, there was a

requirement that one on-site parking space be provided for every 400 square feet of gross floor area for an office use in excess of 10,000 square feet. Id. at 559.

Like Plaintiff here, the plaintiffs challenged the adoption of the resolution on the ground that it constituted "spot zoning." Id. at 560. The court observed that "[i]t does not appear [] that the treatment accorded the property in question would be invalid as spot zoning unless special circumstances pertain by reason of the property being a part of an area found to constitute a blighted area and designated as a redevelopment area under proceedings pursuant to N.J.S.A. 40:55C-1 et seq." Id. at 562. The court described the purposes of the Redevelopment Agencies Law – the LRHL's predecessor statute – which, like the LRHL, was intended to promote public welfare by the creation of redevelopment agencies for the purpose of acquiring and replanning blighted areas. Id. at 563. The court further observed that municipalities were statutorily empowered to "do any and all things necessary to aid and cooperate in the planning and undertaking of a redevelopment project."[2] Ibid. The court found that the municipality's actions in amending its own zoning ordinance must be

[2] Like its predecessor, the LRHL expressly authorized the City to "[p]lan or replan, zone or rezone any land within the jurisdiction of that public body, make exceptions from development regulations and ordinances, and change its map." N.J.S.A. 40A:12A-39.

read within the context of N.J.S.A. 40:55C-1 et seq. as to property within an area that has been declared as blighted and designated a redevelopment area. Id. at 564.

The court found that when viewed within the redevelopment context, the City's action was valid in light of all of the circumstances. Id. at 564. The court favorably quoted the Supreme Court's decision in Wilson v. City of Long Branch, 27 N.J. 360, 370 (1958):

> Community redevelopment is a modern facet of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and resurgence of healthy growth. It provides the means of removing the decadent effect of slums and blight on neighboring property values, of opening up new areas for residence and industry. In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly. As a result at least 38 states now have remedial legislation similar to that of New Jersey. [Id. at 564].

Given the City's statutory powers to effectuate redevelopment—including through the rezoning of the properties within the blighted area—the court granted the defendants' motion for summary judgment. Id. at 565; see also Meredith v. Mayor & Borough Council of Somerdale & Lidl United States Operations, Docket No. A-1933-20, 2022 N.J. Super. Unpub. LEXIS 971 (N.J. Super. Ct. App. Div. June 3, 2022) (affirming trial court's finding that ordinance did not constitute impermissible spot zoning to benefit developer's private

interest rather than the collective interest of the community where Borough had determined that a grocery store was a desired component of the redevelopment plan) (Pa451).

Here, while 290 Ocean benefitted from the zoning changes to the maximum density and height requirements, those changes were made in accordance with the City's statutory power to further the redevelopment of a blighted area. The changes were adopted to promote development on a vacant parcel in a redevelopment area as part of a comprehensive plan to advance the general welfare of the community. To find that such actions equate to "spot zoning" would effectively eliminate a municipality's statutory power to rezone areas in need of redevelopment granted under the LRHL.

Plaintiff's contention that the trial court "erred when it declined to consider Plaintiff's expert testimony" on the question of spot zoning is without merit. Pb42. In pertinent part, the trial court stated:

> Blackridge has provided a report by J. Creigh Rahenkamp, a professional planner, in which Rahenkamp provides the opinion that the redevelopment plan amendments challenged by Blackridge constitute spot zoning. **The court has reviewed Rahenkamp's opinion**, but the determination of whether the amendments to the redevelopment plan constitute spot zoning is essentially a determination to be made by the court, based upon applicable New Jersey law and the facts presented here. The material facts relevant to the spot zoning determination are essentially undisputed.
>
> An expert's opinion that the adoption of the redevelopment plan amendments constitute spot zoning is essentially telling the court what

> the law provides, which is not the usual role of an expert witness. **To the extent that the planner Rahenkamp has provided the court with an analysis of what the facts show, with reference to spot zoning, the court has considered the report submitted**, but it is noted that the court is not bound by planner Rahenkamp's conclusions on the question of whether the adoption of the amendment to the redevelopment plan constitutes spot zoning. [Pa63-64 (emphasis added)].

Plaintiff's submission of the Rahenkamp report, in and of itself, was insufficient to defeat summary judgment. "A party cannot defeat a motion for summary judgment merely by submitting an expert report in his or her favor." Brill, supra, 142 N.J. at 544 (citing Ziemba v. Riverview Medical Center, 275 N.J. Super. 293, 302 (App. Div. 1994)). "In order for such a report to have any bearing on the appropriateness of summary judgment, it must create a genuine issue of material fact." Ibid.

Here, the trial court correctly determined that the Rahenkamp report did not create an issue of material fact precluding the grant of summary judgment as to Plaintiff's spot zoning claim. The facts regarding the amendments to the Redevelopment Plan were undisputed. The trial court could independently conclude that while the building will have an increased density—but certainly not unlimited as suggested by Plaintiff, since the density of the units is inherently a function of numerous other bulk standards—and be taller, it will still be a mid-rise apartment building, a desired component of the original Redevelopment Plan. Thus, the purpose of the Redevelopment Plan will be effectuated, and a blighted area will be

redeveloped. The public at large—and not just 290 Ocean—will benefit as a result. The Rahenkamp report did not present any facts which precluded the trial court from reaching this conclusion.

CONCLUSION

For the reasons set forth above, the Appellate Division should affirm the entry of the Summary Judgment Orders in all respects.

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Attorneys for Defendant/Respondent,
290 Ocean, LLC

By: */s Matthew N. Fiorovanti*_____
MATTHEW N. FIOROVANTI

Dated: June 17, 2024

BLACKRIDGE REALTY, INC., Plaintiff-Appellant v. CITY OF LONG BRANCH, 290 OCEAN, LLC, JAMES AND CHRISTINE FUSCO, 286 OCEAN AVENUE LLC, AND OCEAN AVENUE 290 ASSOCIATES, LLC, Defendants-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No.: A-1400-23 Superior Court Docket No.: MON-190-21-PW Sat Below: Hon. Linda Grasso Jones, J.S.C. On appeal from the Order entered on April 19, 2024, by the Honorable Linda Grasso Jones, J.S.C. dismissing Plaintiff-Appellant's First Amended Complaint against Defendant-Respondent City of Long Branch and Defendant-Respondent 290 Ocean, LLC

BRIEF IN OPPOSITION TO APPEAL ON BEHALF OF DEFENDANT-RESPONDENT CITY OF LONG BRANCH

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RULE 2:6-1(a)(1) STATEMENT OF ALL ITEMS SUBMITTED TO THE TRIAL COURT ON THE SUMMARY JUDGMENT MOTIONS FILED ON AUGUST 26, 2022

ITEMS SUBMITTED: **APPENDIX PAGE:**

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Submission by 290 Ocean, LLC:

VOLUME II

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Response Submission by Blackridge Realty, Inc.:

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Reply Submission by 290 Ocean, LLC:

*Per Rule 2:6-1(a)(2), briefs submitted to the trial court on the Motion for Summary Judgment are not included in the appendix.

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Blackridge Realty, Inc. ("Plaintiff") is a former redeveloper in the City of Long Branch. After redeveloping its own oceanfront property on Ocean Boulevard, Plaintiff looked to the court to prevent the redevelopment of an adjacent oceanfront parcel by Defendant, 290 Ocean, LLC ("290 Ocean").

In its Appeal, Plaintiff jettisons all but three arguments rejected by the lower court. As to Count I, Plaintiff contests the lower court's finding that a $2 million fee (the "Redevelopment Payment") negotiated by Defendant, City of Long Branch (the "City") was a valid exercise of the City's authority under the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 et seq.

Plaintiff is incorrect on the law that such a negotiated fee is valid only if a rational nexus exists between the redevelopment payment and the particular improvements constructed by the remitting redeveloper. The lower court was correct to reject this argument and, instead, evaluate the relationship of the Redevelopment Payment and whether it served the broader Redevelopment Plan. Ibid. As argued by the City below, and recognized by the lower court, the Redevelopment Payment is valid provided it (i) defrays the costs of the redevelopment entity and (ii) carries out and effectuates the purposes of the LRHL and a redevelopment plan.

Here, the record established without either rebuttal or doubt that the $2 million dollar Redevelopment Payment defrayed the costs of the City's $7.5 million dollar renovation and expansion of the City's Senior Citizen Center at 77 Second Avenue, and that said project served the LRHL and the objectives and goals memorialized in the Redevelopment Plan. The Court correctly identified and applied these conditions to find that the negotiated revenues were valid under the LRHL.

As to Count II and IV, the only remaining dismissed Counts for which the instant Appeal was filed, Plaintiff shifts its aim from the City's Redevelopment Agreement. Instead, at Count II, Plaintiff asserts that the City could not amend the Oceanfront-Broadway Redevelopment Plan (the "Redevelopment Plan") without first obtaining Plaintiff's blessing by way of written consent. However, the lower court was correct to conclude that Plaintiff was no longer a redeveloper and to reject the argument that Plaintiff had veto power over any amendments.

Nonetheless, Plaintiff again asserts on appeal that, essentially, it holds carte blanche veto authority over any amendment of the Redevelopment Plan *ad infinitum.* However, this argument has no basis in statute or the language of the Redevelopment Plan. Plaintiff's argument flies in the fact of the LRHL's design and, moreover, the very design of the Redevelopment Plan. Indeed, the plan was designed to guide redevelopment over decades. It covered a vast area of approximately 17.25 acres comprising various sectors and scores of properties. Id. The lower court was correct

to reject Plaintiff's attempt to hold veto power over any amendments after it had completed the redevelopment of its own parcel.

Plaintiff's remaining point on appeal as to Count IV is equally unavailing. The lower court correctly assessed the record presented and rejected Plaintiff's argument that the City's adoption of amendments modifying site-specific regulations for the development of the 290 Ocean Boulevard property constituted illegal spot zoning. As a matter of law, Plaintiff's spot zoning argument fails.

Spot zoning concerns revisions to a parcel's zoning to benefit an owner for a use incompatible with surrounding uses and not for the purpose or effect of furthering the comprehensive zoning plan. As argued below, the concept of spot zoning is not a cognizable theory to evaluate the use of a municipality's redevelopment toolkit. The LRHL provides unique mechanisms to craft land uses and building requirements for particular parcels. The application of zoning standards to a single or set of parcels is fundamental to redevelopment and reflects the fine tuning of a redevelopment vision that the LRHL makes possible. The lower court's dismissal of Count IV is supported by the record and by case law.

It is respectfully submitted that Plaintiff has failed to establish any error in the lower court's grant of Summary Judgment and, thus, Defendant City of Long Branch requests that the dismissal below be rightly affirmed.

PROCEDURAL HISTORY

On January 15, 2021, Plaintiff-Appellant Blackridge Realty, Inc. ("Plaintiff" or "Blackridge") filed Complaint in Lieu of Prerogative Writs, which was amended on January 22, 2021 by way of a First Amended Complaint in Lieu of Prerogative Writs consisting of six counts (the "First Amended Complaint" or "FAC"). (Pa1 to Pa22)[1].

Count I of the FAC alleged that the provision in a Redevelopment Agreement between Defendant, City of Long Branch ("Defendant City" or "City") and Defendant, 290 Ocean, LLC ("Defendant 290 Ocean" or "290 Ocean") negotiating a $2,000,000 redevelopment payment by 290 Ocean (the "Redevelopment Payment") is unlawful for five reasons: (a) it is *ultra vires*; (b) there are no standards to determine the amount of the $2,000,000 fee in any ordinance; (c) the fee is unrelated to the impact of the development of Defendant 290 Ocean's property on the City; (d) the fee has no relationship to the "costs of the redevelopment entity" as those terms are used in N.J.S.A. 40A:12A-8(f); and (e) the fee is not authorized by the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1, et seq. Id. (Pa10 to Pa12).

Count II of the FAC alleged that because Plaintiff did not provide its written

[1] The following abbreviations are used in this brief:
"Pa" refers to the Amended Appendix filed by Plaintiff-Appellant on May 17, 2024.
"Pb" refers to the Brief filed by Plaintiff-Appellant on April 19, 2024.

consent as a "designated developer" to amend the Oceanfront-Broadway Redevelopment Plan (the "Plan Amendments") in connection with 290 Ocean's property, the amendments are unlawful. Id. (Pa12 to Pa13).

Count IV of the FAC alleges that the Plan Amendment constitutes illegal spot zoning insofar as it extended significant benefits to the owner of the 290 Ocean Property unavailable to others. Id. (Pa15 to Pa16).

The lower court's dismissal of Counts III, V, and VI were not appealed by Plaintiff and, thus, not relevant to this appeal.

On March 15, 2021, Defendant City filed its Answer to the FAC and on March 17, 2021, Defendant 290 Ocean filed its own respective Answer to the FAC. (Pa23 to Pa36; Pa37 to Pa47).

On August 26, 2022, Defendant 290 Ocean and the Defendant City filed respective motions for summary judgment on October 4, 2022, and Blackridge filed opposition. (Pa52). The lower court heard argument on December 16, 2022 and rendered its decision granting the Defendants' motions on December 23, 2023.[2] (Pa48 to Pa93; IT3:20-24).

[2] "1T" refers to the transcript of the oral argument held on December 16, 2022.
"2T" refers to the transcript of the deposition of Nicholas Graviano dated May 2, 2022.
"3T" refers to the transcript of the deposition of George Jackson dated July 21, 2022.
"4T" refers to the transcript of the October 20, 2020 meeting of the City of Long Branch Planning Board.
"5T" refers to the transcript of the November 10, 2020 meeting of the City of Long Branch Planning Board.
"6T" refers to the transcript of the November 12, 2020 meeting of the City Council.

STATEMENT OF FACTS

A. Oceanfront-Broadway Redevelopment Plan

In May 1996, the City Council of the City of Long Branch (the "Council") concluded that certain areas in the City were areas in need of redevelopment under the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 et seq. (Pa514 to Pa523). On May 14, 1996, the City of Long Branch (the "City") adopted the Oceanfront—Broadway Redevelopment Plan (the "Redevelopment Plan") in order to achieve the redevelopment of an underdeveloped segment of the oceanfront and underutilized commercial areas. Ibid. The property known as Block 216, Lots 11, 12 and 24 (formerly Lots 13 and 24) on the City's tax map (the "290 Ocean Property") was designated as part of the Beachfront South Sector of the Redevelopment Area under the Redevelopment Plan. Ibid.

The Redevelopment Plan provided that the objective for the Beachfront South Sector was "to continue the mid-rise residential pattern of 4-to-8-story structures that maximize views to the Atlantic." Ibid. The Redevelopment Plan also described the "development/design requirements" for the Beachfront South Sector. Ibid. The Redevelopment Plan provided that "[f]urther detail and enumeration of the specific objectives outlined hereunder will be included in the Design Guidelines Handbook being prepared by the City." Ibid.

Design Guidelines Handbook 6, which was applicable to the Beachfront South Sector, provided the requirements regarding density, building coverage, building lines, bulk and height. (Pa514 to Pa523). Section 15 of the Redevelopment Plan, entitled "Procedures for Changing Redevelopment Plan," set forth provisions concerning amendments of the Redevelopment Plan:

> The Redevelopment Plan may be amended from time to time by the City Council of the City of Long Branch, provided that, if amended after the disposition of any land in the Redevelopment Area, the modification must be consented to in writing by designated developers. […]

(Pa590).

In deposition testimony, Nicholas Graviano, the City's Planner, who testified as a representative of the City under R. 4:14-2(c), interpreted Section 15 to mean that "any designated redeveloper of a specific piece of property must be notified before the plan is amended," and that if a redeveloper owns a piece of property not subject to the amendment, consent by that redeveloper would be unnecessary. See (Pa532; 2T29:5-30:12). On May 14, 1996, the Redevelopment Plan was adopted by Ordinance No. 15-96. (Pa567 to Pa591).

B. Amendment of the Oceanfront—Broadway Redevelopment Plan

On October 14, 2020, the City Council conducted a meeting at which it introduced for first reading Ordinance No. 23-20, which was to approve amendments to the Redevelopment Plan. (Pa592 to Pa605). The Ordinance identified that

Defendant 290 Ocean had proposed a plan for the redevelopment of the 290 Ocean Property, including a residential project (the "Project"). Ibid. It also identified that the Project would require amendments to the Redevelopment Plan, particularly the Design Guidelines. Ibid. Further, the Ordinance identified that Mr. Graviano had prepared amendments to the Redevelopment Plan and the Design Guidelines providing for multi-family residential uses and associated accessory and amenity use, along with bulk standards associated therewith. Ibid.

Ordinance No. 23-20 recognized that the Mayor and Council had referred the proposed amendments to the City's Planning Board for its review and comment in accordance with N.J.S.A. 40A:12A-7 of the Redevelopment Law and that the Planning Board found and concluded that the proposed amendments ***were consistent*** with the City's Master Plan. Ibid. Indeed, in accordance with N.J.S.A. 40A:12A-7(f), the Planning Board evaluated whether the proposed amendments were consistent with the City's Master Plan. The Planning Board held a public hearing on October 20, 2020, at which it reviewed and determined whether the proposed amendments were "substantially consistent with the Master Plan." (Pa625 to Pa626; 4T36:10-37:21).

At the October 20, 2020 hearing, Nicholas Graviano, planning director for the City, described the proposed amendment redevelopment plan, highlighting modifications to the bulk standards in the proposed amendment. (Pa625 to Pa626;

4T37:25-39:14). Mr. Graviano explained that one of the more substantive of the changes was that the amended plan increased the building's maximum height to 100 feet "which is in keeping with the established building height of the South Beach project as well as the (indiscernible) project and other high-rise multi-family buildings in the redevelopment areas" and that the height was "consistent with the established development pattern." (Pa626; 4T39:12-22).

In deposition testimony, Mr. Graviano further explained how a change in height could be in keeping with the established building heights, noting that deviations can still be appropriate and harmonize as growth occurs over time:

> A. … [D]ensity numbers are variable. You know, it changes in context. It changes as the time progresses. As I said, in 2009, the City Council and Planning Board felt that 30 units an acre was appropriate.
> Q. What changes have occurred in the – this redevelopment area that would warrant a greater maximum density than 30 dwelling units per acre?
> A. The redevelopment area was developed with multistory buildings in the stretch of redevelopment area.

(Pa536; 2T44:4-17).

At the October 20, 2020 hearing, Mr. Graviano also explained that the amended plan "remov[es] the maximum density requirements" and "added a minimum lot size to prevent further subdivision of a parcel." (Pa627; 4T40:6-9). During the public comment portion, Mr. Graviano stated that while the amended plan

removes the maximum density requirement, the conditionally designated redeveloper had submitted a concept plan containing 109 units. (Pa628; 4T42:9-17).

Mr. Graviano concluded that the amendments were "definitely consistent with the Master Plan in that this redevelopment area was designed for buildings eight stories of a residential use," and "[t]hat's what we're going to be establishing with this document." (Pa627; 4T41:3-7). Further, he explained, "[T]his is a project that's in keeping with the goal and intent to provide multi-family residential buildings within that portion of the municipality as well as to have eight stories of residential dwellings which this building will have. So it was determined that this proposal is definitely consistent with the Master Plan." (Pa629; 4T44:12-19).

Mr. Graviano further concluded that the amendments were consistent with "the Monmouth County Master Plan which identifies this as a redevelopment area as well as the State development and redevelopment plan which has this parcel within the Metropolitan planning area. And the main purpose of the Metropolitan planning area is to promote the redevelopment and revitalization of more densely populated areas. So this is certainly a plan that helps advance those goals and objectives of the State plan." (Pa627; 4T41:8-17).

After the City Council approved the amendments, it conducted a meeting on October 28, 2020 for a second reading of the Ordinance. (Pa229-234). Thereafter, the Council carried the public hearing on the second reading of Ordinance No. 23-

20 to November 12, 2020 as technical revisions were required. Ibid. At that meeting, Mr. Graviano testified that the amendment "is specifically for Block 216, Lots 11, 12, and 24," and that "[t]he main focus of [the amendment] is to provide multi-family residential building in keeping with the established redevelopment plan." (Pa651; 6T6:14-18).

On November 24, 2020, the City Council conducted another meeting at which it introduced for first reading Ordinance No. 26-20. (Pa269 to Pa271). Ordinance No. 26-20 was identical to Ordinance No. 23-20. (Pa269 to Pa271; Pa190 to Pa203). It provided that Defendant 290 Ocean had proposed a plan for the redevelopment of the 290 Ocean Property, including a residential project (the "Project"). Ibid. Further, Ordinance No. 26-20 identified that the Project would require amendments to the Redevelopment Plan, particularly the Design Guidelines. Ibid.

Ordinance No. 26-20 also provided that Nicholas A. Graviano, P.P. AICP, the City's Planner, had prepared amendments to the Redevelopment Plan and the Design Guidelines that provide for multi-family residential uses and associated accessory and amenity use, along with bulk standards associated therewith. Ibid. Ordinance No. 26-20 recognized that the Mayor and Council had referred the proposed amendments to the City's Planning Board for its review and comment in accordance with N.J.S.A. 40A:12A-7 of the Redevelopment Law and that the Planning Board found and concluded that the proposed amendments ***were consistent*** with the City's Master

Plan. Ibid. Ordinance No. 26-20 was passed upon first reading at the November 24, 2020 meeting. Ibid.

On December 9, 2020, the City Council conducted a meeting and second reading of Ordinance No. 26-20. (Pa272 to Pa284).[3] Following public comment, the City Council unanimously approved the adoption of Ordinance No. 26-20. Ibid.

The Language of the Plan Amendment

The Amendment to the Oceanfront-Broadway Redevelopment Plan, Beachfront South Sector for Block 216, Lots 11, 12 & 24 (the "Plan Amendment") indicated that "Block 216, Lots 11, 12 & 24 are [the] last remaining undeveloped parcels in the portion of the Beachfront South Redevelopment area between Pavilion Avenue and North Bath Avenue." (Pa285 to Pa297).

The Amendment set forth the area, bulk and off-street parking standards applicable to the 290 Ocean Property. (Pa291). Specifically, the Amendment provided that there would not be any maximum density limit and that the maximum building height would be 100 feet (excluding roof-top mechanical equipment and screening). Ibid. The Amendment further provided that "[a]ll projects shall be subject to all required fees from the City of Long Branch unless otherwise waived or amended by

[3] The transcript provided by Plaintiff's Counsel incorrectly identifies the date of the transcribed City Council hearing as "November 12, 2020" whereas the date of the hearing and second reading of Ordinance No. 26-20 was in fact December 12, 2020. See T6:3-8 (Identifying reading of Ordinance No. 26-20 to be the second reading).

the City Council in the redeveloper's agreement." (Pa294).

The Amendment also described its relationship to the Master Plan and other county and state plans. (Pa296). Specifically, the Amendment provided:

> The Plan Area is designated as part of the Beachfront South Redevelopment Area on the Land Use Map of the 2010 Master Plan. The Master Plan, at that time did not recommend any specific changes to that area.
>
> Design Guidelines Handbook #6 indicates that the objective of the plan is to continue and reinforce the existing residential pattern of 4 to 8 story structures that maximize the views of the ocean. Consequently, this plan is consistent with both the 2010 Master Plan and the Beachfront South Redevelopment Plan.
>
> Furthermore, the proposed plan amendment advances the following objectives of the 2010 Master Plan:
>
> - Maintain existing residential neighborhoods as attractive, high quality areas and ensure that renovations and new construction are compatible with existing neighborhood character.
>
> - Maintain a balanced stock of quality housing that provides housing options for all generations, incomes, and lifestyles.

Ibid.

C. 290 Ocean Is Designated as Redeveloper

On October 14, 2020, the Council adopted Resolution 199-20 which designated 290 Ocean as a conditional redeveloper of the 290 Ocean Property pending the negotiation and execution of a more comprehensive redevelopment agreement.

(Pa298 to Pa305). On December 9, 2020, the Council adopted Resolution 243-20 which designated 290 Ocean as the redeveloper of the 290 Ocean Property and authorized the execution of the Redevelopment Agreement which had been negotiated between the City and 290 Ocean. (Pa306 to Pa346).

D. The 290 Ocean Redevelopment Agreement and Redevelopment Payment

On December 14, 2020, the City and 290 Ocean entered into a Redevelopment Agreement which set forth the parties' respective rights, responsibilities and obligations with respect to the redevelopment of the 290 Ocean Property and the Project. (Pa347 to Pa385). In pertinent part, Section 4.4(a) of the Redevelopment Agreement provided:

> Redevelopment Fee. Redeveloper shall pay Redevelopment Fee to the City, consisting of the following:
>
> (i) a one-time "Administrative Fee" as established by City Ordinance in the amount of One Hundred Thousand Dollars ($100,000), payable upon the execution of this Agreement.
> (ii) a one-time fee (the "Redevelopment Fee") in the amount of Two Million Dollars ($2,000,000), payable upon the earlier of: (A) Redeveloper's closing on the acquisition of the Property or (B) January 31, 2021. The City agrees that the Redevelopment Fee shall benefit the City's redevelopment areas and shall serve as an additional community benefit to address any impacts in the City relating to the redevelopment.

Ibid. Additionally, Section 5.1 of the Redevelopment Agreement provided that 290 Ocean "shall be responsible for any off-site improvements required as a condition to the Governmental Approvals, as permitted under the MLUL." Ibid.

On December 15, 2020, 290 Ocean wired the $2,000,000 payment to the City. (Pa386). The $2,000,000 payment served to facilitate the City's implementation of redevelopment, defray the costs of the redevelopment entity, and to benefit the City's redevelopment areas, including the expanded use of the Long Branch Senior Citizen Center because of redevelopment in the City's redevelopment areas. (Pa398 to Pa399).

In deposition testimony, the City's Business Administrator, George Jackson, explained that the negotiation and discussion of the Redevelopment Payment proceeded the designation of 290 Ocean LLC as Redeveloper:

> Q. Now at some point, there was an agreement by 290 Ocea, LLC to make a $2 million payment to the City. Is that correct?
> A. Yes.
> Q. And was that discussed prior to the designation of 290 Ocean, LLC as the redeveloper?
> A. It was part of the discussion and negotiation of the project.
> Q. Okay. The question I asked though, was that discussed before 290 Ocean Ave., LLC was designated – excuse me, 290 Ocean, LLC was designated as the redeveloper?
> A. Yes.

(Pa878; 3T12:22 – 13:9).

Further, Mr. Jackson explained that the Redevelopment Payment was requested as a contribution to the community for a community improvement amenity and that the Redevelopment Payment was indeed devoted to the expansion and redevelopment of the City's Senior Citizen Center:

> Q. Okay. What was the basis for a request for a $2 million contribution?
> A. For a contribution to the community for a community improvement amenity, something to benefit the community of Long Branch.
> Q. And what was the community amenity that the $2 million was to be used for?
> A. It's being used for the expansion and redevelopment of our senior center.

(Pa879; 3T14:12-20).

Pursuant to Ordinance No. 20-21, enacted on August 25, 2021, the City Council authorized the appropriation of the $2,000,000 Redevelopment Payment from the City's Developer Contributions Trust Fund for the purpose of the improvements, renovation, and expansion of the Senior Citizen Center located at Block 287.01, Lots 18.01 and 22.02, commonly referred to as 77 Second Avenue, Long Branch, New Jersey, which improvements include, but are not limited to, (i) the construction of a new multipurpose/activities room and other rooms dedicating to programs, (ii) modifications to the existing floor plan, and (iii) upgrades to all exterior and interior finishes. (Pa903 to Pa906).

Pursuant to Ordinance No. 16-22, enacted on August 10, 2022, the City Council authorized the appropriation of $5,500,000 to pay for the costs of capital improvements, renovations, and upgrades to the Senior Citizen Center. (Pa906 to Pa908).

E. Dismissal of Plaintiff's First Amended Complaint

Following the close of discovery, Defendants filed respective Motions for Summary Judgment on December 4, 2022, oral argument for which was heard by the Honorable Linda Grasso Jones, J.S.C. on December 16, 2022. (Pa48 to Pa93). Following argument, the lower court announced it would reserve and issue a written opinion, which it did on December 16, 2022. (Pa71 to Pa93). Therein, the motion judge dismissed the First Amended Complaint in full with prejudice. Ibid.

As to Count I, the lower court rejected Plaintiff's argument that a rational nexus was required to exist between the Redevelopment Payment and the 290 Ocean Project. (Pa80 to Pa81). Instead, the lower court evaluated the relationship of the Redevelopment Payment and its use in connection with the broader Redevelopment Plan. Ibid. As argued by Defendants, the Redevelopment Payment is valid provided it (i) defrays the costs of the redevelopment entity and (ii) carries out and effectuates the purposes of the LRHL and a redevelopment plan. Ibid. Ultimately, the lower court determined that both conditions were satisfied:

> Senior Center project ***furthers the objectives and terms of the Redevelopment Plan***. The Redevelopment Payment

> was used by Long Branch ***to effectuate and defray costs of improvement in the area***[.]

(Pa81) (emphasis added).

As to Count II, the lower court rejected Plaintiff's argument that it retained the ability to reject future amendments to the Redevelopment Plan even after completion of its own neighboring redevelopment project and loss of its designation as a "redeveloper." (Pa82). In dismissing Count II, the Court reasoned:

> ***Blackridge was no longer a designated developer under the Redevelopment Plan.*** No authority has been provided to the court that would permit the court to conclude that Blackridge would continue to have the power to contest amendments to the Redevelopment Plan after Blackridge's project was completed and Blackridge had no further involvement in the Redevelopment Plan, and the court finds that summary judgment must be granted[.]

(Pa83) (emphasis added).

As to Count IV, the lower court rejected Plaintiff's argument that the Plan Amendment constitutes illegal spot zoning insofar of extending benefits to Defendant 290 Ocean unavailable to others. (Pa87). The lower court "considered the report submitted" by Plaintiff's expert but did not accord substantial weight to Rahenkamp's conclusions. Ibid. In dismissing Count IV, the lower court reasoned that the Plan Amendment modified existing regulations rather than add a new permitted use or conditional use to the underlying zone and, moreover, promoted the

overall goals of redevelopment and effectuation of the master plan rather than promote the private interests of Defendant 290 Ocean. Ibid.

An Amended Notice of Appeal was thereafter filed by Plaintiff on January 12, 2024. (Pa94 to Pa97).

APPELLATE STANDARD OF REVIEW

The within matter involves the appeal of a grant of Summary Judgment by Plaintiff-Appellant Blackridge Realty, Inc. The appeal of a ruling on Summary Judgment is reviewed de novo. Davis v. Brickman Landscaping, 219 N.J. 395, 405 (2014). Thus, the appellate court applies the same standard which governed the trial court and no deference is given to the trial court's interpretation of the law. Id. (internal citations omitted). That standard compels the grant of summary judgment,

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016).

The New Jersey Supreme Court has encouraged trial courts not to refrain from granting summary judgment when proper circumstances present themselves. Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 541 (1995). As R. 4:46-5 provides, the non-moving party "may not rest upon the mere allegations

or denials of the pleadings but must… set forth specific facts showing that there is a genuine issue for trial."

LEGAL ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN FINDING THAT THE REDEVELOPMENT PAYMENT WAS VALID BECAUSE THE PAYMENT SATISFIED THE TWO CONDITIONS SET FORTH AT N.J.S.A. 40A:12A-8(f) FOR ACCEPTANCE OF A NEGOTIATED PAYMENT BY A REDEVELOPER. (Pa55 to Pa58).

Contrary to Plaintiff's arguments on appeal, the lower court properly assessed the evidentiary record and was correct to dismiss Count I of the First Amended Complaint. In its Order and Decision, the lower court correctly identified the two conditions provided by the LRHL for the acceptance of a negotiated payment by a redeveloper. The lower court was correct that a negotiated payment must defray the costs of the redevelopment entity and, moreover, carry out and effectuate the purposes of the LRHL and a redevelopment plan. The lower court also correctly identified from the record that the Redevelopment Payment satisfied these two conditions.

The LRHL explicitly authorizes various actions that a "municipality or designated redevelopment entity" may pursue in order to effectuate a development

plan. N.J.S.A. 40A:12A-8. Accordingly, a municipality is statutorily permitted to "negotiate and collect revenue from a redeveloper ***to defray the costs of the redevelopment entity***." N.J.S.A. 40A:12A-8(f) (emphasis added). Contrary to Plaintiff's assertions, the Legislature did not require a "rational nexus" between a negotiated redevelopment payment and the particular redevelopment project from which the redevelopment payment originates. Rather, the LRHL authorizes a municipality to collect negotiated payments provided they "carry out and effectuate the purposes of [the LRHL] and the terms of the redevelopment plan." N.J.S.A. 40A:12A-8. The intent of the Legislature is clear.

A. The Lower Court Correctly Identified That, As A Matter Of Law, The City Is Authorized To Collect Redevelopment Payments That Defray Costs And Carry Out And Effectuate A Redevelopment Plan. (Pa55 to Pa58).

Although the lower court utilized the terminology, "rational nexus," in the concluding paragraph of its analysis of Count I to describe the required showing between the negotiated Redevelopment Payment and the Redevelopment Plan, the lower court correctly identified the two relevant conditions contained in the LRHL for evaluation. (Pa80 to Pa81). Further, the lower court was correct not to assess the relationship between the Redevelopment Payment and the 290 Ocean Project from which it originated but, rather, the relationship between the Redevelopment Payment and the City's Redevelopment Plan:

> Unlike in Britwood, in which the court determined that the court could not defray costs from a non-redeveloper, in the present matter 290 Ocean is a redeveloper. Moreover, the Senior Center project ***furthers the objectives and terms of the Redevelopment Plan***. The Redevelopment Payment was used by Long Branch ***to effectuate and defray costs of improvement in the area***[.]

Ibid. (emphasis added).

Plaintiff is incorrect that the "Court did not seem to find – that the $2,000,000.00 payment was authorized by N.J.S.A. 40A:12A-8." (Pb23). In fact, after acknowledging Defendants' argument that the two conditions from the LRHL are the determinative conditions guiding the validity of a redevelopment payment, the lower court directly applied them in its assessment of the Redevelopment Payment.

The LRHL imposes no conditions that require that the "costs of the redevelopment entity" defrayed by a negotiated redeveloper payment be related to that remitting redeveloper's redevelopment project. N.J.S.A. 40A:12A-8(f). The clear and unambiguous language of N.J.S.A. 40A:12A-8(f) requires no rational nexus between the payment made and a particular redevelopment project and its costs.

i. N.J.S.A. 40A:12A-8(f) Authorized The City To Collect The Redeveloper Payment And To Do So Without Establishing A Nexus Between The Redeveloper Payment And 290 Ocean's Project. (Pa55 to Pa58).

When interpreting a statute, a court should give first consideration "to the plain language of the statute" and "ascribe to the statutory language its ordinary meaning. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007). The court's "goal in the interpretation of a statute is always to determine the Legislature's intent." Ibid.; see also State v. Miller, 170 N.J. 417, 433 (2002) ("Even though a statute may be open to a construction which would render it unconstitutional or permits its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation.").

However, where a statute is clear and ambiguous on its face and admits only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." O'Connell v. State, 171 N.J. 484, 488 (2002). When a statute's plain language lends to only one interpretation, a court should not consider "extrinsic interpretative aids." DiProspero v. Penn, 183 N.J. 477, 494 (2005) (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)). The language of N.J.S.A. 40A:12A-8(f) permitting the collection of negotiated payments is in fact clear on its face. It admits only one interpretation. The LRHL authorizes a municipality or its designated redevelopment agency to negotiate the collection of a redevelopment payment provided the payment is connected to the costs of the municipality of

redevelopment entity.[4] The LRHL does not qualify that relevant redevelopment costs must be part and parcel of a specific redevelopment project. The lower court was correct to rely upon the plain language of N.J.S.A. 40A:12A-8(f) and to find that the Redevelopment Payment could be collected without establishing a nexus between the impact of the 290 Ocean Property and the use of the Redevelopment Payment. (Pa080 to Pa081).

ii. The Purpose Of The LRHL And The Broad Powers It Ascribes To Municipalities To Effectuate Redevelopment Supports The Negotiation And Collection Of The Redevelopment Fee Without Establishing A Nexus Between The Use Of The Redeveloper Payment And A Specific Redevelopment Project.

Although the Legislature could have incorporated into the LRHL the rational nexus requirement that governs off-tract infrastructure fees in the non-redevelopment context, the Legislature did not do so. See N.J.S.A. 40A:12A-8(f). However, this is not to say that the LRHL is silent on whether a connection must exist between negotiated revenues and municipal redevelopment. As the lower court recognized, Defendants did not argue otherwise. (Pa079 to Pa080). The standard is simply not as narrow as Plaintiff wishes. Before enumerating the various authorized

[4] Pursuant to N.J.S.A. 40A:12A-11, a municipality may elect to create a redevelopment agency to effectuate a redevelopment plan. However, to the extent this is optional, where a municipality does not choose to do so, the municipality acts in place of a redevelopment agency to effectuate the redevelopment plan. See N.J.S.A. 40A:12A-8 (using "municipality" and "redevelopment entity" interchangeably. It follows that a municipality's redevelopment costs are one and the same with the "costs ***of the redevelopment entity***." (emphasis added))

actions a municipality may take, N.J.S.A. 40A:12A-8 conditions that any authorized action must "carry out and effectuate the purposes of [the LRHL] and the terms of the redevelopment plan." Id.

By the very language of the LRHL, the power to negotiate and collect revenue needs to be connected to a redevelopment plan itself and is not limited to a single redevelopment project. Id. This approach makes sense and accords with the purpose of the LRHL to empower municipalities to facilitate and promote the rebuilding of New Jersey communities. Indeed, a redevelopment plan is not constrained to a single project but, rather, may encapsulate various parcels and be carried out by various projects. See N.J.S.A. 40A:12A-7, -8.

In fact, there is nothing unusual about contribution payments collected in relation to a larger redevelopment area rather a single project. Notably, in Plaintiff's very own Redevelopment Agreement presented to the City Council in 2016, Plaintiff agreed to make its own redevelopment contribution to the City benefiting the Beachfront South Redevelopment Sector. (Pa1120 to Pa1134) (emphasis added).

The argument that a rational nexus must exist where a redevelopment payment has in fact already been extensively analyzed by our trial courts and rejected in a thorough opinion by the trial court in Genon Rema, LLC v. South Amboy Redevelopment Agency, Docket No. MID-L-390-13, 2015 WL 10986574 (N.J. Super. Ct. Law Div. May 18, 2015).

Although unpublished, South Amboy presents a well-reasoned analysis of the LRHL and collection of negotiated redevelopment payments. In that case, the plaintiff redeveloper sought to void a redevelopment agreement with the South Amboy Redevelopment Agency on the grounds that a negotiated redevelopment payment was in fact unlawful. Id. at *3. The legal question at issue in South Amboy was the very same question presented to the lower court in the instant litigation, namely whether a municipality or designated redevelopment entity may negotiate with and collect revenue from a redeveloper so as to defray all of the Redevelopment's Costs, whether specific to a project or not. Id. at *7.

The court considered the language of the LRHL, assessed its purpose and intent, and concluded that a municipality is not limited to collecting payments that defray the costs that are part and parcel of a particular redevelopment project. Id. In reaching this decision, the court found that the "rational nexus" cost requirements regulating municipal extractions and developer contributions under §42 of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-42, and Divan Builders v. Planning Bd. of Wayne, 66 N.J. 582, 600 (1975), is not applicable in the redevelopment context and considering the LRHL's authorization.

The court recognized that the rational nexus and *pro rata* proportionality requirement provided by the MLUL in the non-redevelopment context served as "the Legislature's check on a municipality's planning power." South Amboy at *9. The

court contrasted this intent with the LRHL's intent in the redevelopment context to imbue "municipalities with broad power to facilitate and encourage the redevelopment of blighted and unproductive areas, as evidenced by both the statutory language and the policies promoted therein." Id.

The court distinguished the "formula like mandate" for seeking contributions from developers under the MLUL and the "flexible and unrestricted language of the LRHL" to negotiate and collect revenue from a redeveloper, noting that the MLUL long preceded the LRHL and that the Legislature could have elected to incorporate the strictures of the MLUL:

> ***Had the Legislature intended to impose the "rational nexus" requirement upon municipalities and/or redevelopment agencies in the redevelopment context, it certainly would not have expressly permitted these entities to negotiate revenue, but rather would have used the same or similar language as it did within the MLUL when it codified that requirement some forty (40) years ago***. Section 42 of the MLUL provides that if the governing body seeks contribution from a developer, it must "adopt regulations [which are] based on circulation and comprehensive utility service plans ... and shall establish reasonable standards to determine the proportionate or pro-rata amount of the cost of such facilities that shall be borne by each developer or owner within a related and common area, which standards shall not be altered subsequent to preliminary approval." N.J.S.A. 40:55D-42. The amount imposed on the developer or applicant for certain conditions or improvements is, by definition, non-negotiable, because it must be equivalent (or as close as possible) to the cost created by the benefit conferred. ***This specific, formula-***

> ***like mandate is unequivocally distinct from the flexible and unrestricted language of the LRHL, which was adopted seventeen years after the rational nexus principle was amended into the MLUL***.

Id. at *7. (emphasis added). The court continued by explaining that the power to negotiate reflects the voluntary nature of the redevelopment context, which is distinguishable from the non-redevelopment context in which Developer's Agreements are utilized:

> ***Furthermore, the LRHL promotes very different policies than the MLUL, and does so in an entirely different context.*** Becoming a designated "redeveloper" is both an affirmative and a voluntary undertaking. There is no like threat of "compulsion" as might well permeate zoning or planning board proceedings on a development application under the MLUL. ***The redevelopment opportunity is made available "to a specific entrepreneur, not to the land itself or even to its current owners."*** Peter A. Buschbaum & Robert S. Goldsmith, *Cities and Towns Are No Longer Just Gatekeepers*, 163 N.J.L.J. 914 (2001). A redeveloper's agreement does not equate to, and is fundamentally different from, a developer's agreement. Performance under a redevelopment agreement is not tethered to the actual realization or completion of a particular redevelopment project, whereas a developer's agreement is dependent upon, and typically a condition of, a particular project's approval and construction.

Id. (emphasis added). Ultimately, the court recognized that the absence of the rational nexus requirements is not an oversight and flaw in the LRHL but, rather, a logical mechanism to empower municipalities as the Legislature intended to carry out the purpose of redevelopment:

> Redevelopment agreements are uniquely crafted to help implement and facilitate the clear historical and legislative intent of rehabilitating those areas that have fallen into contagious disrepair – a condition which the Legislature "presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general." 62-64 Main Street, LLC v. Mayor and Council of City of Hackensack, 221 N.J. 129, 151 n. 5 (2015). They set forth time frames for completion of various steps; they incorporate financing considerations; and they outline the specific methods and procedures by which the ultimate goal of rehabilitation can be realized. ***The plain language of the LRHL amply demonstrates the Legislature's intent to delegate broad power to municipalities to contract with designated redevelopers without the constraints of any nexus requirement.*** To view a developer's agreement through the same lens as a developer's agreement would be both illogical and inconsistent with the Legislature's clearly expressed intent. ***It is thus patently clear that there exists no nexus or other constitutional limitation which would infringe upon, or otherwise fetter the Legislature's deliberate delegation of such expansion power.*** See State v. Profaci, 56 N.J. 346, 349 (1970) (addressing various substantive attacks on the LRHL); and see Gallenthin, supra, 191 N.J. at 359-60 (citing State v. Miller, 170 N.J. 417, 433 (2002) ("Even through a statute may be open to a construction which would render it unconstitutional or permits its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation.").

Id. (emphasis added).

Plaintiff cites various cases in the instant appeal to argue that the LRHL's explicit authorization to negotiate revenue to defray costs must be read in *mari*

materia with the MLUL's treatment of off-site infrastructure fee. (Pb25-30). However, the various cases cited by Plaintiff in the instant appeal pluck various quotes and present glosses on cases without context. Ibid. However, Plaintiff misreads the applicable case law. None of these cases are availing to Plaintiff.

In Britwood Urban Renewal, LLC v. City of Asbury Park, 376 N.J. Super. 552 (App. Div. 2005), the court acknowledges that the authority to negotiate revenue from redevelopers to defray costs arises from the LRHL and is a distinct authority than the authority in the ***non-redevelopment context*** arising from the MLUL to negotiate off-tract infrastructure costs. There, the Appellate Division recognized the distinct authority in the redevelopment context to defray costs pursuant to N.J.S.A. 40A:12A-8(f). The court reasoned that Asbury Park could not require Britwood to pay contributions towards off-tract infrastructure costs built by Asbury's selected redeveloper because Britwood was ***not in fact a redeveloper***. Id. at 564-565. The court states very clearly that the authority to negotiate revenues to defray costs is a distinct power in the redevelopment context arising from the LRHL:

> ***As part of that statutory scheme, and in order "to carry out and effectuate the purposes of this act and the terms of the redevelopment plan," the municipality or its designated redevelopment entity may "negotiate and collect revenue from a redeveloper to defray the costs of the redevelopment entity." N.J.S.A. 40A:12A-8f.***
>
> Significant to this appeal, however, is the fact that the sums may be collected only from a redeveloper […]

Id. at 564 (emphasis added). The court went on to find that there was simply no authority to impose off-site contributions from Britwood considering its status as a non-redeveloper. The ability, though, to collect such funds in the redevelopment context was woven throughout the Court's conclusion:

> However, ***apart from the specific authorization in the LRHL*** that permits the redevelopment entity to collect funds from a redeveloper, see N.J.S.A. 40A:12A-8f, the LRHL does not permit the public body to require contributions to off-site infrastructure costs.
>
> In particular, ***the City lacked authority under the LRHL to impose off-site contributions on this plaintiff because of the statutory definition limiting imposition of off-site contributions to redevelopers***. Because there is no contract or proposed contract between plaintiff and the City, or even between plaintiff and Asbury Partners, to perform any redevelopment, rehabilitation, or other work, plaintiff is not a redeveloper.

Id. 565–66 (emphasis added).

Here, the lower court recognized that, unlike in Britwood, Defendant 290 Ocean was in fact a redeveloper. (Pa80). Plaintiff attempts to marshal Britwood nonetheless by plucking out of context the court's additional, straightforward finding that the LRHL "coordinates" and does not supersede the MLUL. This specific finding was made in the context of whether a governing body could employ the LRHL to ***impose*** off-site infrastructure fees on a non-redeveloper and trump the authority of a planning board to determine off-site infrastructure fee contributions

by said non-redevelopers. Id. 566-567.

Plaintiff seeks to conclude from this analysis that the court rejected the assessment of costs even upon redevelopers unless they were assessed in conformity with the MLUL's strictures. However, this is not what the court in Britwood concludes. The court rejected the use of the LRHL to foreclose the jurisdiction of planning boards over the imposition of off-site infrastructure costs on developers not engaged in redevelopment. The lower court's decision in the instant litigation does not contradict any of the findings made by the court in Britwood. The decision accords with the findings in Britwood that funds can be collected from redevelopers pursuant to the "the specific authorization in the LRHL." Id. 565. Moreover, the costs of the Senior Center, to which the Redevelopment Payment was dedicated, are not the type of off-tract improvements governed by N.J.S.A. 40:55D-42, which concerns "reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located off-tract but necessitated or required by construction or improvements within such subdivision or development." Id.

The remaining cases relied upon by Plaintiff in its Appeal provide Plaintiff no life-raft. Plaintiff attempts to equate the facts before the lower court in this case to those reviewed in the unreported decision, SB Bldg. Assocs., L.P. v. Planning Bd., 2017 N.J. Super. Unpub. LEXIS 36, at *14-16 (App. Div. Jan. 6, 2017). However,

the case in SB Bldg. did not address a scenario where a redevelopment entity negotiated a redevelopment payment pursuant to its authority to negotiate and collect revenue pursuant to N.J.S.A. 40A:12A-8.

Rather, the Agency left the question of off-site infrastructure contribution payments to the Planning Board as part of the redeveloper's site plan application. Id. at 6-7. The Planning Board in turn did not undertake any calculation. Id. The court found that the Planning Board lacked the statutory authority to ignore its obligation to calculate off-site infrastructure fees pursuant to pro-rata calculations. Ibid. Further, it was restricted to only imposing fees as part of a site plan that was within the scope of the limited scope of improvements that a planning board is authorized to assess pursuant to the MLUL. Id. at *15-16. These improvements included water, sewer, drainage, and street improvements only. Ibid.

This is the inapposite to the instant matter, which the lower court correctly recognized concerned the negotiation of revenues not by the City's land use boards, but, rather, the City acting within its capacity as the designated Redevelopment Agency prior to any land use application submission. (Pa79 to Pa81).

Plaintiff is also mistaken in its attempt to rely upon Weeden v. City Council of the City of Trenton, 319 N.J. Super. 214, 228 (App. Div.), *cert. den.* 192 N.J. 73 (2007), which Plaintiff relies upon for the general proposition that the LRHL does not supersede the MLUL. Weeden did not concern the scope of a redevelopment

agency's authority to negotiate and collect revenue pursuant to its specific statutory authority at N.J.S.A. 40A:12A-8. As the court recognized in Weeden, "the LRHL does not supersede the MLUL with respect to the function of the planning board; both statutes provide that planning boards will review site plan applications under N.J.S.A. 40A:12A-13 and N.J.S.A. 40:55D-25a(2)." However, no tension between the LRHL and MLUL existed in the instant matter as the defrayed costs for which the Redevelopment Fee was collected did not even fall within the scope of off-site infrastructure fees that a planning board was permitted to evaluate within its own jurisdiction as part of site plan review. See N.J.S.A. 40:55D-42.

Plaintiff is also mistaken in its attempted reliance upon the unpublished case, Hoboken Land Building, L.P., and Hoboken Holdings, L.P. v. City of Hoboken, et. Al., Docket No. HUD-L-4580-18 (N.J. Super. Ct. Law. Div. March 26, 2019). The set of facts at issue in the underlying matter were simply not the ones at issue in Hoboken Land. The decision in that case turned not upon a finding that a redevelopment entity cannot collect revenues to defray costs but, rather, the court's finding that ***no relationship*** existed between the payments collected from a redeveloper and the City's areas in need or rehabilitation or a project in that area. The Court was emphatic that the LRHL does not authorize payments "for any expenses or public improvements that have ***no relationship*** to ***an area in need of rehabilitation or*** a project in that area." Id. at *7 (emphasis added).

Here, though, the Senior Center project certainly furthers the objectives and terms of the Redevelopment Plan. See, infra, at Point II(b). Thus, unlike in Hoboken, a connection between the Redevelopment Payment and the Redevelopment Area and Redevelopment Plan ***did exist***. The City could invoke its authority to collect revenues pursuant to N.J.S.A. 40A:12A-8(f), an authority that the court in Hoboken Land never considers, acknowledges, or in any way mentions. As the Redevelopment Payment was collected to further a community improvement amenity, specifically the Senior Center, N.J.S.A. 40A:12A-8(f) is applicable, whereas it was simply irrelevant to consider in Hoboken Land.

Finally, Plaintiff is just as misguided in its use of the case Nunziato v. Planning Bd. of Edgewater, 225 N.J. Super. 124 (App. Div. 1988), as well as its progeny. There, the court found that a planning board approval conditioned on a payment contribution was arbitrary and capricious as the condition was not set forth with particularity in a zoning code. Id. at 132. Setting aside the fact that no case law has applied Nunizato in the redevelopment context, the case is simply inapplicable based upon the facts. As the collection of the Redevelopment Payment to defray costs for improving and expanding the Senior Center carried out and effectuated the LRHL and the Redevelopment Plan, it met the LRHL's requirement that the negotiated and collected revenue carry out and effectuate the LRHL and a redevelopment plan.

B. The Negotiated Redevelopment Payment Was Collected In Order To Carry Out The Purposes Of The LRHL And The Oceanfront-Broadway Redevelopment Plan. (Pa55 to Pa58).

Along with correctly identifying the two relevant conditions set forth by the LRHL for the acceptance of a negotiated payment by a redeveloper, the lower court correctly concluded that the record established that the Redevelopment Payment satisfied those conditions. (Pa080). A sufficient record existed to support the lower court's findings.

In its Decision, the lower court recognized that the Redevelopment Payment was collected to improve and renovate the Senior Center in Long Branch's redevelopment area and that this use furthers the objectives and terms of the Redevelopment Plan. (Pa080 to Pa081). Indeed, the record before the lower court contained unrefuted deposition testimony by the City's Business Administrator, George Jackson, that the redevelopment contribution was collected for a community improvement amenity and defrayed the costs to expand, improve, and renovate the City's Senior Center in the City's Redevelopment Area. (Pa472 to Pa474).

Further, the record contained governing body ordinances showing the appropriation of the funds for said purpose. (Pa903 to Pa905). Indeed, pursuant to Ordinance No. 20-21, enacted on August 25, 2021, the City Council authorized the appropriation of the $2,000,000 Redevelopment Payment from the City's Developer

Contributions Trust Fund for the purpose of the improvements, renovation, and expansion of the Senior Citizen Center. Ibid. The lower court was correct to find that the Redevelopment Payment was used to effectuate and defray costs of improvement in the redevelopment area. (Pa80 to Pa81).

Further, the record before the lower court established that an expanded senior center would certainly effectuate multiple goals of the Redevelopment Plan. The record identified that the improvements to the Senior Center included, but were not limited to, (i) the construction of new multipurpose activities rooms and other rooms dedicating to programs, (ii) modifications to the existing floor plan, and (iii) upgrades to all exterior and interior finishes. (Pa473). As cited by the lower court in its Decision, the City's Redevelopment Plan, which is codified at §345-86 of the Code of the City of Long Branch, enumerated objectives that are directly served by an expansion, improvement, and renovation of such a community amenity:

> A. Reestablish the identity of Long Branch as a multifaceted community for residence, work and leisure, in a framework of both historic legacy and citizen consensus.
>
> E. Increase employment opportunities for residents, stabilize taxes and increase maintenance and amenities as part of a better quality of life.
>
> G. Improve the City's image by replacing vacant lots and poorly maintained buildings with new, carefully designed buildings, both commercial and residential.

(Pa80 to Pa81).

The LRHL explicitly authorizes the very type of negotiation and collection of revenue to defray costs that were undertaken by the City. Plaintiff argues that the use of the Redevelopment Payment to expand the Senior Center has "nothing to do with the 'purposes of the' LRHL." (Pb24). This is incorrect. The LRHL was enacted to address and consolidate various statutory enactments to, among other purposes, "promote the advancement of ***community interests*** through programs of redevelopment, rehabilitation and incentives ***to the expansion and improvement*** of commercial, industrial, residential and ***civic facilities***." N.J.S.A. 40A:12A-1(b).

The project is an exemplar of how redevelopment can effectuate multifaceted revitalization and change benefitting all residents. Plaintiff also argues that the Redevelopment Payment is not authorized by the LRHL because the payment was not related to the furnishing of "property or services" "in connection with the redevelopment area." (Pb24). However, the Senior Center certainly provides such opportunity and services. Regardless, the use of these mangled terms is simply a red herring. They are lifted from a distinct passage in N.J.S.A. 40A:12A-8(f) where the LRHL authorizes a municipality to contract in order to "furnish property or services in connection with a redevelopment area." See N.J.S.A. 40A:12A-8(f). This particular authority is distinct from the authority to negotiate and collect revenues.

The lower court was correct to rely upon the plain language of N.J.S.A. 40A:12A-8(f) and to find that the Redevelopment Payment could be collected

without establishing a nexus between the impact of the 290 Ocean Property and the use of the Redevelopment Payment. (Pa081). Further, the lower court was correct that the two conditions it needed to evaluate to determine whether the Redevelopment Payment was valid were whether the negotiated payment (i) defrays the costs of the redevelopment entity and (ii) carries out and effectuates the purposes of the LRHL and a redevelopment plan. Ultimately, the evidentiary record showed that the negotiated payment defrayed the costs of the redevelopment entity's $5,000,000.00 investment in the expansion of the Senior Center and that the improvement of such a community amenity served the purposes of the Redevelopment Plan.

For these reasons, it is respectfully requested that this Court uphold the lower court's grant of Summary Judgment.

POINT II

THE LOWER COURT BELOW DID NOT ERR IN DISMISSING COUNT II OF THE FIRST AMENDED COMPLAINT BECAUSE IT CORRECTLY DETERMINED THAT THE CITY WAS NOT OBLIGATED TO OBTAIN PLAINTIFF'S CONSENT TO AMEND THE CITY'S REDEVELOPMENT PLAN. (Pa59 to Pa61).

In its appeal, Plaintiff contends that the lower court erred in ruling that the City could amend its Redevelopment Plan without the Plaintiff's written consent.

(Pb33-37). It remains Plaintiff's position that prior designated redevelopers like itself maintain carte blanche say over any amendment to the Redevelopment Plan even after said redevelopers have completed their own projects. Ibid. The lower court was correct to conclude otherwise:

> Blackridge was no longer a designated developer under the Redevelopment Plan. No authority has been provided to the court that would permit the court to conclude that Blackridge would continue to have the power to contest amendments to the Redevelopment Plan after Blackridge's project was completed and Blackridge had no further involvement in the Redevelopment Plan, and the court finds that summary judgment must be granted[.]

(Pa59 to Pa61).

As a former redeveloper of property within the Beachfront South Sector of the Redevelopment Area, Plaintiff does not maintain any rights flowing from statute to require that the City obtain its written consent to any amendment of the Redevelopment Plan. In the absence of such authority, Plaintiff cannot reasonably rely upon the language of the Redevelopment Plan's procedures for amending the plan to assert that the City needed to obtain its consent to the proposed amendments.

Under the LRHL, the authority to amend the Redevelopment Plan resides solely within the City's governing body, subject to the Planning Board's input. The LRHL authorizes municipalities to amend redevelopment plans and outlines the prerequisites for doing so. N.J.S.A. 40A:12A-4 to -8; N.J.S.A. 40A:12A-7(e); see

also Housing Auth. Of City of Newark v. Ricciardi, 176 N.J. Super. 13, 21 (App. Div. 1980). These include the submission of a Planning Board report with recommendations within specified timelines and requirements for governing body review. Id. The procedures specified by the LRHL do not require a governing body to obtain the written consent of redevelopers prior to enacting any amendments.

In the absence of any statutory based source of authority to demand the City obtain Plaintiff's consent, Plaintiff has no recourse to rely upon the language of the Redevelopment Plan instead. The Redevelopment Plan states that its modification "must be consented to in writing by designated developers." (Pa514 to Pa523). No gymnastics are required to interpret this language in relation to Plaintiff. Plaintiff was no longer a designated developer when the City amended the Redevelopment Plan on December 9, 2020. Plaintiff was designated a Redeveloper by the City in 2016 to construct a single project at 345 Ocean Boulevard and built that project pursuant to a Redevelopment Agreement entered into that same year. (Pa1120 to Pa1154).

Having been designated a redeveloper for the construction of a single, particular project in the City and having entered into a Redeveloper Agreement for said purpose, it is antithetical to the language of those documents to claim that the Redeveloper designation extends *ad infinitum*. The language and intent of the LRHL demonstrates the Legislature's goal of delegating broad power to

municipalities to effectuate redevelopment in order to correct and ameliorate economic deterioration. See, supra, at Point II(a)(ii). The objectives set forth by the Redevelopment Plan clearly indicate that the City sought to utilize its redevelopment powers for this very purpose, including but not limited to creating new land value, encouraging mixed-use development, and replacing vacant lots and poorly maintained buildings with new uses. (Pa1 to Pa22). The Redevelopment Plan covers a vast area comprising various sectors. Id. The Redevelopment Plan's Beachfront-South sector alone, in which both Plaintiff and Defendant 290 Ocean's respective properties are located, covers a vast area of approximately 17.25 acres. Id.

This aspect of the Redevelopment Plan further supports the City's interpretation that modifications requiring "written consent from designated developers" do not confer on previously designated redevelopers the authority to veto plan amendments that do not pertain to their respective properties. This aligns with the City's goal of implementing an extensive, long-term redevelopment across a significant area. (Pa514 to Pa523). To have intended to permit the developers of completed projects to hold blanket veto authority over an amendment to the Redevelopment Plan *ad infinitum* is indeed antithetical to the structure of the Redevelopment Plan.

No question of law existed before the lower court as to whether Plaintiff has a statutory based right to demand that the City obtain Plaintiff's written consent when amending the Redevelopment Plan. The lower court was correct to conclude that the LRHL did not mandate that the City obtain Plaintiff's consent. (Pa60 to Pa61). Further, the lower court was correct to conclude that Plaintiff was no longer a designated developer under the Redevelopment Plan. Id. (Pa60 to Pa61).

Accordingly, the Redevelopment Plan's amendment procedures do not provide Plaintiff a basis to demand that the City obtain its written consent to a plan amendment years after Plaintiff has completed the redevelopment of its respective project. The lower court was correct to dismiss Count II. For these reasons, it is respectfully requested that this Court uphold the lower court's grant of Summary Judgment.

POINT III

THE LOWER COURT BELOW DID NOT ERR IN DISMISSING COUNT IV OF THE FIRST AMENDED COMPLAINT BECAUSE THE COURT CORRECTLY FOUND THAT THE PLAN AMENDMENT DID NOT CONSTITUTE SPOT ZONING. (Pa61 to Pa64).

Contrary to Plaintiff's arguments on appeal, the lower court undertook a proper evaluation of both the relevant case law and the evidentiary record, and it was correct to dismiss Count IV. The lower court reached the correct decision that the

material facts relevant to a spot zoning determination in the instant litigation were undisputed and, further, that the amendments served the "overall goal of redevelopment and effectuation of the master plan." Pa87. The evidentiary record established that the only zoning regulations disputed by Plaintiff concern those made pursuant to the Plan Amendment. (Pa1 to Pa22). Thus, the zoning regulation at issue strictly arises from the redevelopment context. As a matter of law, the Court's finding that the amendments advanced the goals of redevelopment warranted dismissal as the amendments could not constitute spot zoning.

"Spot zoning" has been defined as the re-zoning of a lot of parcel of land to benefit an owner for a use incompatible with surrounding uses and not for the purpose or effect of furthering the comprehensive zoning plan. See William M. Cox, *New Jersey Zoning and Land Use Administration* § 34–8.2 at 819 (Gann 2014). Otherwise expressed, it is the use of the zoning power to benefit particular private interests rather than the collective interests of the community. Taxpayers Assn. of Weymouth Tp. V. Weymouth Tp., 80 N.J. 6, 18 (1976), cert. den. 430 U.S. 977 (1977); Conlon v. Bd. of Pub. Works, 11 N.J. 363, 366 (1953). Plaintiff quotes case law from the non-redevelopment context wherein the courts describe the lodestar of spot zoning to be the fundamental principle that all property in like circumstances be treated alike. (Pa38 to Pa42). However, zoning crafted pursuant to a redevelopment plan is a function of the redevelopment context, which provides a unique toolkit to

municipalities in contrast to typical zoning.

Once a delineated area is designated as blighted, the authority of the LRHL permits the creation of a Redevelopment Plan that establishes distinct regulations within a designated area in need of redevelopment. This is a byproduct of the unique, broad authorities given to municipalities by the LRHL to address and ameliorate blight. The LRHL provides that a redevelopment plan shall either "supersede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district." N.J.S.A. § 40A-12A-7 (d). Thus, a "redevelopment plan becomes either all or part of the zoning for the redevelopment area." See Jersey Urban Renewal, LLC v. City of Asbury Park, 377 N.J. Super. 232, 235, (App. Div.), certif. denied, 185 N.J. 392 (2005); Hirth v. City of Hoboken, 337 N.J. Super. 149, 164–65 (App. Div. 2001).

Essentially, the LRHL empowers municipalities to create a distinct zoning area, whether permanently applied as an amendment to the zoning map or one that floats as an "overlay zone" to be imposed when a parcel is redeveloped. Such zoning areas created pursuant to a Redevelopment Plan are not bound to the Master Plan in the typical manner that can trigger the possibility of illegal spot zoning. Illegal spot zoning is "re-zoning of a lot or parcel not for the purpose or effect of furthering the comprehensive zoning plan." See Cox, supra, § 34–8.2 at 819.

However, pursuant to the LRHL, the provisions of a redevelopment plan do

not need to be consistent or designed to effectuate the master plan, provided the reasons for so acting are set forth in the redevelopment plan. N.J.S.A. 40A:12A-8(d); see also Powerhouse Arts, supra, 413 N.J. Super. at 332-333 (upholding redevelopment plan amendment, citing N.J.S.A. 40A:12A-8(d) for the proposition that a redevelopment plan may be adopted regardless of consistency or inconsistency, provided a rational basis is set forth in the record).

Pursuant to the LRHL, the authority to adopt a redevelopment plan or amend a redevelopment plan is fundamentally distinct from the classic exercise of a zoning amendment that could potentially trigger illegal spot zoning. In order to provide local governments the means to promote an area's transformation into a productive part of the community, the LRHL authorizes a municipality to formulate, revise, and amend a unique zoning plan, i.e. a redevelopment plan, which constitutes a type of near mini-master plan. N.J.S.A. 40A:12A-7. The LRHL authorizes the creation of distinct land uses and building requirements within that redevelopment plan. See N.J.S.A. 40A:12A-8(2). Thus, a municipality may treat properties within a plan in distinct unique ways. The unique nature of the redevelopment plan as a zoning ordinance, which either supersedes or overlaps that existing zoning, is illustrated by the fact that a municipality can adopt a redevelopment plan even if it is not substantially consistent with the master plan or designed to effectuate the master plan. See N.J.S.A. 40A:12A-8(d).

Plaintiff relies upon Kanter v. Passaic, 107 N.J. Super. 556 (L. Div. 1969) for the proposition that spot zoning has been considered in the redevelopment context. It is true that the court took up Plaintiff's allegation of spot zoning. However, while the court surmised that a variance granted to Plaintiff to construct an office without the parking required by a redevelopment plan might ***otherwise*** constitute spot zoning, it found that the change was appropriate because the property effected was part of a blight designated area. Id. at 562. Citing to the LRHL's predecessor law, the Redevelopment Agencies Law, the court recognized that "the actions of the municipal government in amending its own zoning ordinance must be read within the context of N.J.S.A. 40:55C-1, et seq. as to property within an area that has been declared as blighted and designated a redevelopment area." Ibid.

In the instant matter, the City used its toolbox to craft the Redevelopment Plan. It did so just as the LRHL allows by crafting unique land uses and building requirements for particular parcels. The zoning change must be understood in relation to the redevelopment context, wherein municipalities are tasked with the special mechanisms to create overlay zoning that respond to the particular nature of areas in need of redevelopment and that permits a finely tuned approach to individual parcels and lots. The lower court concluded:

> To the extent that Blackridge is arguing that the adoption of the amendments to the redevelopment plan are unlawful because it constitutes spot zoning, reviewing the matter utilizing

> the de novo standard of review the court finds that the amendments to the redevelopment plan are not unlawful as they do not constitute spot zoning.

(Pa87). This was the correct decision. A redevelopment plan's superseding or overlay zoning is not bound to the text of a master plan. It allows for the designation of non-conforming uses and other regulations with the pre-adoption authorized uses and distinct, spot zoned parcels within a delineated area in need of redevelopment. The lower court's dismissal of Count IV should be upheld. The Plan Amendments cannot constitute spot zoning as a matter of law.

A. The Lower Court Was Correct In Its Finding That The Amendments Were Adopted To Promote The Collective Interests Of The Community.

Even if, assuming arguendo, the adoption of zoning regulations pursuant to a redevelopment plan could potentially trigger spot zoning, the lower court's decision should still be upheld. The key question as to whether an action constitutes illegal spot zoning is whether a municipality seeks to advance the community interest rather than purely a private interest. See Kozesnik v. Montgomery, 24 N.J. 154, 172 (1957); Weymouth Tp., supra, 80 N.J. at 18.

No question of material fact exists that the amendments were enacted to serve the collective interests of the community. Ordinance No. 26-20 explicitly recites that the City Council found and concluded that the amendments ***were*** consistent with the City Master Plan, i.e. the collective interests of the community. (Pa671). A

consistency finding undermines a claim of illegal spot zoning. See Trust Co. of NJ v. Planning Bd., 224 N.J. Super. 553, 561-567 (App. Div. 1990) (holding that re-zoning of a lot owned by a bank from residential to office/professional was not spot zoning where it served a valid municipal purpose and was consistent with the planning objectives of the master plan).

The City Council acted to further the general welfare of the community by finding that the amendments were consistent with the Master Plan. A municipality's adoption of a redevelopment plan or the amendment of that plan is an exercise of a governing body's discretion that is to be upheld unless it is arbitrary, capricious, or unreasonable. Powerhouse Arts, supra, 413 N.J. Super. at 333; see also Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564-65 (1975) ("[A]bsent a sufficient showing to the contrary, it will be assumed that [municipalities'] enactments rest upon some rational basis within their knowledge and experience."). Under the LRHL, a redevelopment decision needs to be adequately supported by the record by the showing of a rational basis, lest the redevelopment decision be arbitrary or capricious. Powerhouse Arts, supra, 413 N.J. Super. at 333. Notably, unlike the standard governing the designation of an area as an area in need of redevelopment, which necessitates a showing of substantial evidence, the adoption of a redevelopment plan or amended redevelopment does not require such a showing. Id. at 332-333.

Here, the record showed that the Ordinance itself, the underlying hearings of the Planning Board, upon whose consistency report the City Council in part relied, and the testimony of Mr. Graviano before the City Council provided a sufficient basis to conclude that the proposed amendments were consistent with the City's Master Plan design for eight-story buildings and the building pattern as it had developer over time in the Redevelopment Area. (Pa269 to Pa271; Pa629; 4T44:12-19; Pa627; 4T41:8-17; Pa269 to Pa271). For these reasons, it is respectfully requested that this Court hereby affirm the lower court's grant of Summary Judgment to Defendant City of Long Branch.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Plaintiff has failed to establish any error in the lower court's grant of Summary Judgment and thus requested that the dismissal below be rightly affirmed.

Respectfully submitted,

RAINONE COUGHLIN MINCHELLO, LLC

By: _____
Louis N. Rainone, Esq.

Dated: June 17, 2024

BLACKRIDGE REALTY, INC., Plaintiff/Appellant, v. CITY OF LONG BRANCH, 290 OCEAN, LLC, JAMES and CHRISTINE FUSCO, 286 OCEAN AVENUE LLC and OCEAN AVENUE 290 ASSOCIATES, LLC, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1400-23 On Appeal from: Superior Court Of New Jersey, Law Division, Monmouth County Docket No. MON-190-21-PW Sat Below: Hon. Linda Grasso Jones, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, BLACKRIDGE REALTY, INC.

Submitted: June 28, 2024

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This brief is submitted by Appellant, Blackridge Realty, Inc., in reply to the response briefs filed by Respondents, 290 Ocean, LLC and the City of Long Branch, in this matter.

ARGUMENT

SCOPE OF REVIEW

This Court reviews a trial court's grant of summary judgment de novo. *Temploy Fuedte De Vida Corp v. National Union First Ins. Co of Pittsburgh*, 224 N.J. 189, 198 (2016). In addition, "[w]hen deciding a purely legal issue, review is de novo, we look at the law with fresh eyes and need pay no deference to legal conclusions reached by the trial court . . .." *Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities*, 207 N.J. 489, 494, n.1 (2011);.*Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. Of Franklin,* 233 N.J. 546, 559 (2018) ("In construing the meaning of a statute, an ordinance, or our case law, our review is de novo").

Appellant is not, as Respondents suggest, asking the Court to rewrite a zoning scheme or to assess the wisdom of a redevelopment plan. Rather, Appellant is asking the Court to determine if certain municipal actions conformed to law. Therefore, the lawfulness of the $2,000,000 "density bonus" payment under *N.J.S.A.* 40A:12A-8(f), and the meaning of that section of the Long Branch

Ordinance which affords designated developers the right to approve plan changes are both reviewed de novo. The decision of the trial court to preclude expert testimony is reviewed under a more forgiving standard. Nonetheless, Respondents do not cite to a single case that upholds a decision to preclude expert testimony in a spot zoning challenge: all case law is to the contrary.

POINT I

THE TWO MILLION DOLLAR PAYMENT WHICH THE CITY OF LONG BRANCH RECEIVED FROM 290 OCEAN, LLC IN CONSIDERATION FOR A "DENSITY BONUS" WAS NOT AUTHORIZED BY *N.J.S.A.* 40A:12A-8(f)

In its initial brief, Blackridge argued, among other things, that (1) there must be a nexus between the $2,000,000 density bonus payment and the 290 Ocean, LLC apartment project and there was none; and (2) the magnitude of the payment should have been determined pursuant to ordinance standards in order to prevent abuse, and there was no such ordinance. In sum, Appellant argued that the City and 290 Ocean, LLC were bound by the terms of the Municipal Land Use Law ("MLUL") which must be read in *pari materia* with the Local Redevelopment and Housing Law ("LRHL") (see pp. 25 to 30 of Appellant's Brief).

Neither Respondent disputes Appellant's assertions that (1) the $2,000,000 payment made by 290 Ocean, LLC had no nexus to the 109-unit apartment complex which it proposed; (2) the amount of that payment was not determined by

consideration of any standards but was calculated as the product of $40,000 per unit multiplied by 50 units of added density; (3) the funds were used to renovate and expand a senior citizens center, which was not in the redevelopment area; and (4) this payment was in addition to payments required for offsite improvements necessitated by the redevelopment project.

Both Respondents, however, argue that there need be no nexus between the redevelopment project and the $2,000,000 payment because that payment is authorized by *N.J.S.A.* 40A:12A-8(f) of the LRHL and that there need be no standards to assess how the amount of any payment is to be determined because the Senior Citizens Center project fulfills the goals of the LRHL.

Both response briefs (1) misinterpret *N.J.S.A.* 40A:12A-8(f); (2) misread this Court's decisions in *Britwood Urban Renewal, LLC v. City of Asbury Park,* 376 N.J. Super. 552 (App. Div. 2005) and other opinions; and (3) fail to address the policies set forth in New Jersey case law that condemn unconstrained exactions in return for favorable land use treatment.

A. *N.J.S.A.* 40A-12A-8(f) Does Not Authorize The $2,000,000 Payment

N.J.S.A. 40A:12-8(f) authorizes a redevelopment entity to "negotiate and collect revenue form a redeveloper to defray the costs of the redevelopment entity." This language cannot be read to authorize a municipality to collect a

capital contribution from a redeveloper to fund an unrelated municipal project inasmuch as that contribution is not "revenue" of the redeveloper, and the funding of the construction of an unrelated capital project is not the "defray[al] of costs of the redevelopment entity."

The concept of "revenue" is distinct from a capital contribution. "Revenue" is generally defined as business income. https://www.merriam-webster.com/dictionary/revenue (last visited June 20, 2024); Random House Dictionary of the English Language (1966); *see also* https://en.wikipedia.org/wiki/Revenue (last visited June 20, 2024). Under a related statute, the Long-Term Tax Exemption Law, "revenue" (there "gross revenue") is defined as an annualized payment. *N.J.S.A.* 40A:20-3(a). The one-time $2,000,000 payment negotiated between the City and 290 Ocean, LLC before the latter was even designated as the redeveloper (Pa878; City Brief at p. 15), is not "revenue."

The term "costs" also used in *N.J.S.A.* 40A-12A-8(f) is synonymous with "expenses." The cost of project studies, consultants, administrative costs, and other project specific expenditures are appropriate costs of the redevelopment agency. The $2,000,000 payment was not paid to "defray costs of the redevelopment agency"; it was, according to the Long Branch Ordinance cited

by 290 Ocean, LLC (Pa904), deposited into a "Developer Contributions Trust Fund" to be used to construct a future project. (290 Ocean, LLC brief at p. 16).

Thus, the $2,000,000 payment, agreed to prior to the designation of 290 Ocean, LLC as a redeveloper and years before the 290 Ocean, LLC project was to be constructed, does not qualify as "revenue form a redeveloper to defray the costs of the redevelopment entity" and the $2,000,000 density bonus payment was not authorized by *N.J.S.A.* 40A:12A-8(f).

The City argues at page 25 of its brief that Appellant made its own "redevelopment contribution." That contribution consisted of a $50,000 payment to fund the cost of roadway improvements adjacent to the Blackridge project which is a normal off-site improvement, and a $100,000 "administrative fee," which is the type of payment authorized by *N.J.S.A.* 40A:12A-8(f) and was presumably used by the City to pay for administrative costs of the Blackridge redevelopment project. (Pa1133 to Pa1134). These are typical development fees and are far different from a $2,000,000 payment made to fund an unrelated senior citizen project before the developer even has site plan approval for its apartment project.

Nor can the payment be justified under the authority granted by *N.J.S.A.* 40A:12A-8(f) to "furnish property and services in connection with a

redevelopment area." (City brief, p. 38). That authority does not include the right to make unregulated assessments from developers in order to do so.

B. With the Exception of *Genon*, All Relevant Case Law Supports the Position of Blackridge

Both Respondents argue that the $2,000,000 payment is of the type authorized by an unreported Law Division decision. *Genon Rema, LLC, and NRG Energy, Inc. v. South Amboy Redevelopment Agency, et al*, Docket No. MID-L-390-13 2015 WL10986475, (N.J. Super., Ct. Law Div., May 18, 2015) (Pa910 to Pa 921). *Genon* is inconsistent with the cases cited in Appellant's initial brief and the holding four years later in *Hoboken Holdings, L.P. v. City of Hoboken et al*, Docket No. HUD-L-4580-18 (N.J. Sup. Ct., Law Div., Mar. 26, 2019). (Pa922 to Pa933)[1]. In *Hoboken Holdings, L.P.*, the Court rejected the logic of *Genon Rema* and found a $2,000,000 "community benefit payment" to be unlawful. (Pa924). As Appellant argues here, the Hoboken Court concluded that "Hoboken does not have the statutory authority to condition or require these givebacks." (Pa926). In so doing, it cited this Court's decision in *Britwood Urban Renewal, LLC v. City of Asbury Park*, 376 N.J. Super. 552 (App. Div.

[1] Appellant certifies that the only decision of which Appellant is aware that is inconsistent with this opinion is *Genon Rema, LLC, and NRG Energy, Inc. v. South Amboy Redevelopment Agency, et al*, Docket No. MID-L-390-13, 2015 WL 10986475 (N.J. Super. Ct. Law Div., May 18, 2015).

2005), for the proposition that the "LRHL does not supersede the Municipal Land Use Law." (Pa927).

Continuing, the Hoboken Court reasoned that, under *Lusardi v. Curtis Pt. Property Owners Ass'n*, 86 N.J. 217, 226 (1981), a municipality must have statutory authority in order to regulate land use and that

> [n]one of the detailed provisions of the LRHL authorize a municipality to contract to receive payments or contributions from a Redeveloper for any expenses or public improvements that have no relationship to the area in need of rehabilitation or the project of redevelopment in that area.

(Pa928 to Pa929). Such givebacks, the Court continued, violate public policy as articulated in *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J. Super. 124 (App. Div. 1988). (Pa931 to Pa933). And while the payment at issue in this matter was voluntary (City Brief at p. 28), the absence of coercion does not make the payment lawful. *Nunziato*, 225 N.J. Super. at 133.

Britwood was, as the Respondents argue, a challenge to a fee which was brought on behalf of a land owner who was not a redeveloper. However, the plaintiff's status was not the sole basis for the Court's decision. This Court based its decision on two other grounds. First, the LRHL does not "independently authorize [] the City to impose off-site infrastructure costs on plaintiff" because the "MLUL is not superseded by the LRHL" and, second, a

contrary ruling would usurp the Planning Board's authority. See *Britwood*, 376 N.J. Super. at 566-70.

Respondents' effort to distinguish *SB Bldg. Assoc., L.P. v. Planning Board,* Docket No. A-0200-14, 2017 N.J. Super. Unpub. LEXIS 36, (App. Div., Jan. 6, 2017), certif. den. 230 N.J. 424 (2017) is also unavailing. Respondents read this case to hold that, when a planning board requires a contribution from a redeveloper for an off-site improvement, it must adhere to the requirements of *N.J.S.A.* 40:55d-42, but that a redevelopment agency need not. However, *SB Bldg.* discusses how "municipalities" in connection with redevelopment projects are to make financial assessments, and it makes no sense to argue, as Respondents seem to assert, that there need be no nexus between a project and an offsite improvement, but the planning board must nonetheless undertake a nexus analysis.

While *Nunziato* did, as Respondents note, arise in a different context, the evils which the Court addressed - concerns about the sale of land used permits and public integrity in the permitting process - are present here. 225 N.J. Super. at 134. The City's assertion that *Nunziato* has not been applied in the redevelopment context is belied by citations to that case in this Court's opinion in *SB Bldg. Assocs., L.P. v. Planning Bd.*, 2017 N.J. Super. Unpub. LEXIS 36, *14 for the proposition that:

> The MLUL's authority to impose contributions requires a planning board to make certain findings, and for that reason an ordinance may not delegate that authority to the governing body or **redevelopment agency** because "when the MLUL establishes criteria for a specific situation or confers authority on a specific entity, a municipality is not free to chart its own course." (Emphasis added, citations omitted).

See also Hoboken Holdings, L.P.:

> While it is true that the *Nunziato* case arose in the context of a zoning board grant of a variance under the MLUL, the overriding public policy concern expressed by the Appellate Division in that matter are just as applicable – if not more so under the circumstances presented in this matter. The concerns for significant relief for abuse, favoritism, bad faith on the part of a municipality are far greater when it is a [Mayor or Council], which may engage in 'free-wheeling bidding' for contributions, "as opposed to bodies like planning boards."

(Pa931).

C. Even If the $2,000,000 Payment Fulfills The Purpose of the LRHL it is Still Unlawful

Both Respondents also argue that the $2,000,000 payment was intended to carry out the purposes of the LRHL and the Oceanfront Broadway South Redevelopment Plan. The senior citizens center is not mentioned in that plan. And almost any capital improvement would fulfill the purposes of the LRHL and the Redevelopment Plan, i.e. to "reestablish the identity of Long Branch," "increase employment opportunities," "improve the City's image," and the like. Those goals are commendable, as was the goal in *Nunziato* to pay for affordable

housing, but they do not allow the City to demand a $2,000,000 payment in consideration for a "density bonus."

No matter how laudable the City's goal might be in the absence of a delegation from the Legislature and the adoption of an ordinance with adequate standards, that goal cannot be fulfilled by awarding "density bonuses" in return for large "give backs."

POINT II

THE CITY OF LONG BRANCH WAS REQUIRED TO OBTAIN THE CONSENT OF BLACKRIDGE AS A PRECONDITION OF AMENDING ITS REDEVELOPMENT PLAN

290 Ocean, LLC and the City of Long Branch argue that the Appellant has misconstrued Long Branch Ordinance § 345-98 (Pa979) and section 15 of the Redevelopment Plan (Pa156) which require that if a Redevelopment Plan is "amended after the disposition of **any land in the Redevelopment Area**, the modification must be consented to in writing by designated **developers.**" (Emphasis added). Respondents' construction ignores the use of the word "any," and the use of the plural, "developers." Moreover, Respondents' crabbed construction would render the Ordinance and Plan provisions superfluous. This is because, irrespective of the Ordinance language, the City would need the consent of the designated redeveloper in order to amend a Plan

to the detriment of that redeveloper since an amendment of the Plan could not impact a Redevelopment Agreement without that consent.

Rather than focus on the words of the Ordinance and the Redevelopment Plan, as they are required to do, Respondents raise a number of specious arguments. Blackridge is not looking to "stifle competition." (Ocean brief, at p. 40). It merely desires to assure that all developers compete under the same set of rules. That assurance, rather than stifle competition, encourages redevelopers to take risks under a known and stable zoning regime. And while Respondents suggest that such protection is unnecessary because development would proceed without that protection, the whole premise of the LRHL is to remedy the lack of development in challenged areas. *N.J.S.A.* 40A:12A-2(a). *See also Wilson v. City of Long Branch*, 27 N.J. 360, 370 (1958).

The notion that Blackridge ceased to be a redeveloper once its project was completed, as the trial Judge determined and Respondents argue, is inconsistent with two provisions of the LRHL. First, *N.J.S.A.* 40A:12A-3 defines a "redeveloper" to

> [m]ean[] any person, firm, corporation or public body that shall enter into or propose to enter into a contract with a municipality or other redevelopment entity for the redevelopment or rehabilitation of an area in need of redevelopment, . . under the provisions of this act, or for any construction or other work forming part of a redevelopment or rehabilitation project.

The characterization of a "redeveloper" depends upon "entry into a contract," not the status of the construction.

Second, a redeveloper's obligations do not end with completion of its project. *N.J.S.A.* 40A:12A-9, addressed to "Agreements with Redevelopers," requires that all agreements include covenants that "run with the land," limiting the redeveloper to constructing only "uses established in the current redevelopment plan," as well as limitations on the sale, lease or transfer of a project irrespective of when the construction is completed. Thus, a redeveloper, such as Blackridge, remains a "redeveloper" notwithstanding the fact that its project has been completed.

Respondents also argue that it might be impossible to obtain consent of a previously designated redeveloper who becomes defunct. However, that consent could be obtained from the current project owner and, failing that, by application to a Court. Nor does a redeveloper have an absolute "veto" (Ocean Brief, at p. 40), because any refusal to consent would be tested under the covenant of good faith and fair dealing.

POINT III

THE COURT BELOW ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON APPELLANT'S SPOT ZONING CLAIM

Appellant acknowledges that the adoption of a redevelopment plan is not

spot zoning. Likewise, Appellant recognizes that changes in a redevelopment plan, even if initiated by a property owner, are not necessarily spot zoning.

What Plaintiff argued below, however, is that the change in bulk standards for one property only, that of 290 Ocean, LLC, was spot zoning made in return for a $2,000,000 payment, and that it was incumbent upon the Court to consider expert testimony on the spot zoning claim. As this Court has found, "spot zoning claims are particularly fact sensitive" and a hearing must be held to allow the proponent of the spot zoning challenge "an opportunity to present expert testimony relevant to a determination if its validity." *Jennings v. Borough of Highlands*, 418 N.J. Super. 405, 426-27 (App. Div. 2011); *see also Riya Finnegan LLC v. Township Council of Tp. Of South Brunswick*, 197 N.J. 184, 197 (2008); *Hirth v. City of Hoboken* 337 N.J. Super. 149 (App. Div. 2001) (reversing summary judgment granted to the City of Hoboken because of the trial court's failure to evaluate the objector's expert testimony addressed to rezoning), and *St. Paul's Missionary Baptist Church v. City of Vineland*, No. A-4945-06, 2008 N.J. Super. Unpub. LEXIS 839, *9 (App. Div., July 15, 2008) (remanding for spot zoning analysis). Respondents fail to discuss these cases or to address the testimony of Long Branch's municipal planner stating that there was no planning reason for the amended Plan to abandon the bulk

limitations in the superseded Design Guideline 6. (Pa534; T37:9 to 23).

As set forth in the expert report of Creigh Rahenkamp, P.P. (Pa964 to Pa965), the spot zoning challenge created a material factual dispute. In return for the $2,000,000 "Density Bonus" payment, 290 Ocean, LLC was permitted to have 109 units and three additional floors (Pa 50: Pa 939) on a 1.97 acre parcel (Pa 418) when only 59 (Pa 965) units would have been permitted without the rezoning (Pa 176 to Pa 178). No other property owner within the Beachfront South Redevelopment area received this benefit. This increase in density was, in version 6 of the Redevelopment Agreement, described as a "Density Bonus," in return for a payment calculated as the product of "$40,000 x 50 units" (Pa 984)[2] which produced a $2,000,000 payment. Thus, Blackridge raised a material factual dispute and summary judgment was not warranted.

Kanter v. Passaic, 107 N.J. Super. 556 (L. Div. 1969) is not to the contrary. The Court there undertook a spot zoning analysis but, because the objector offered no expert opinion, found that the ordinance did not constitute spot zoning. While this Court in *Meredith v. Mayor & Borough Council of Somerdale & Lidi United States Operation*, A-1933-20, 2022 N.J. Super.

[2] In its original brief, Appellant mis-cited the location of version 6 in its Appendix at page 10 as being Pa1043.

Unpub. LEXIS 971, *8 (App. Div., Jun. 3, 2022) rejected a spot zoning challenge in a redevelopment context, it did so after hearing expert testimony from the City planner and the planner retained by the plaintiff.

CONCLUSION

For the reasons set forth in this brief and in Appellant's initial brief, this Court should reverse the determination of the trial court granting Respondents' motions for summary judgment.

Respectfully submitted,

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s/Arnold C. Lakind
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Dated: July 1, 2024