

JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC. A/K/A JERSEY SHORE BEACH & BOARDWALK, INC.

Plaintiff/Appellant

v.

BOROUGH OF KEANSBURG, A MUNICIPAL CORPORATION, AND BOROUGH COUNCIL OF THE BOROUGH OF KEANSBURG, AND PLANNING BOARD OF THE BOROUGH OF KEANSBURG

Defendants/Respondents

: SUPERIOR COURT OF NEW JERSEY  
: APPELLATE DIVISION  
: DOCKET NO. A-2379-22T4  
:  
: On Appeal from Orders dated  
: November 19, 2021, April 7,  
: 2022, June 10, 2022, February 27,  
: 2023 and February 28, 2023  
:  
: Superior Court of New Jersey  
: Law Division-Monmouth County  
: Docket No. MON-L-1262-21  
:  
: SAT BELOW:  
: Hon. Gregory L. Acquaviva, J.S.C.  
:  
:  
:

**AMENDED BRIEF OF PLAINTIFF/APPELLANT JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC. A/K/A JERSEY SHORE BEACH & BOARDWALK, INC.**

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Dated: October 4, 2023

**JERSEY SHORE BEACH AND BOARDWALK, INC.**  
**A/K/A JERSEY SHORE BEACH & BOARDWALK, INC.**  
**VS.**  
**BOROUGH OF KEANSBURG, A MUNICIPAL CORP., AND**  
**BOROUGH COUNCIL OF THE BOROUGH OF**  
**KEANSBURG, AND PLANNING BOARD OF**  
**THE BOROUGH OF KEANSBURG**

**DOCKET NO. A-2379-22T4**

**TABLE OF CONTENTS**

TABLE OF CONTENTS. . . . . i

TABLE OF AUTHORITIES. . . . . iv

TABLE OF TRANSCRIPTS. . . . . vii

TABLE OF ORDERS. . . . .viii

APPENDIX TABLE OF CONTENTS. . . . . ix

PREMILINARY STATEMENT. . . . . 1

STATEMENT OF PROCEDURAL HISTORY. . . . . 1

STATEMENT OF FACTS. . . . . 4

LEGAL ARGUMENT. . . . .19

**POINT I**

**THE TRIAL COURT SHOULD HAVE GRANTED  
SUMMARY JUDGMENT IN APPELLANT’S  
FAVOR ON THE PUBLIC TRUST DOCTRINE CLAIMS:  
(5T 30:-20-25; 6T 12:5-15:18; Pa1718-1729). . . . .19**

**POINT II**

**THE TRIAL COURT’S DISMISSAL OF  
COUNTS I, II & III OF THE COMPLAINT  
SHOULD BE REVERSED (Pa11718, 1729):..... 28**

**POINT III**

**THE TRIAL COURT WAS IN ERROR IN  
NOT CONCLUDING THAT THE  
REDEVELOPMENT PLAN WAS  
INCONSISTENT WITH THE 1988 MASTER  
PLAN, AND THAT INCONSISTENCY WAS  
NOT RECOGNIZED OR ADDRESSED AS  
REQUIRED (APPEALING THE FINAL  
OPINION/ORDER (Pa1733))..... 30**

**CONCLUSION..... 50**

**TABLE OF AUTHORITIES**

*Angermeier v. Sea Girt*,  
27 N.J. 298, 306-309 (1958) .....31

*Arnold v. Mundy*,  
6 N.J.L. 1, 95 (1821) .....20

*Borough of Neptune City v. Borough of Avon-by-the-Sea*,  
61 N.J. 296 (1972) ..... 20

*Bow & Arrow Manor v. West Orange*,  
63 N.J. 335, 346-347 (1973). .....32

*Brill v. Guardian Life Insurance Co., supra*,  
142 N.J. at 540. .... 20

*Cell South of New Jersey, Inc. v. Zoning Board of Adjustment of West Windsor Township*,  
172 N.J. 75, 81 (2002) ..... 29

*Conlon v. Bd. of Public Works, Paterson*,  
11 N.J. 363, 366 (1953). .....32

*Conley v. Guerrero*,  
228 N.J. 339, 346 (2017) ..... 19

*East Mill Assoc. v. Township Council of East Brunswick*,  
241 N.J. Super.403 (App. Div. 1990) ..... 48

*Globe Motor Co. v. Igdalev*,  
225 N.J. 469, 479 (2016) .....19

*Jennings v. Borough of Highlands*,  
418 N.J. Super. 405, 416-417 (App.Div.2011) .....49

*Kaufmann v. Planning bd. of Warren Tp.*, 110 N.J. 551, 557 (1988) .....34

*Kozesnick v. Montgomery*, 24 N.J. 154, 166-167 (1957) .....32

*Mahwah Realty Associates Inc. v. Township of Mahwah*,  
420 N.J. Super. 341 (App. Div. 2011)..... 41, 46

*Manalapan Realty v. Tp. Committee*,  
140 N.J. 366, 383-384 (1995) .....19, 20, 38

*Matthews v. Bay Head Improvement Association*,  
95 N.J. 306 (1984)..... 21

*Medici v. BPR Co.*, 107 *N.J.* 1, 15 (1987) .....29, 34, 36

*Nouhan v. Board of Adjustment of City of Clifton*,  
392 N.J. Super. 283, 290 (App. Div. 2007)..... 34

*Olivia v. Garfield*,  
1 N.J. 184, 191 (1948) ..... 31

*PADNA v. City Council of Jersey City*,  
413 N.J. Super 322, 330 (App. Div. 2010), cert. den. 205 N.J. 79 (2011)..... 35

*Pop Realty Corp. v. Springfield Tp. Bd. of Adj.*,  
176 N.J. Super. 441, 448 (Law Div. 1980) ..... 32

*Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc., et al.*,  
185 *N.J.* 40 (2005) ..... 21

*Riggs v. Long Beach Tp.*,  
109 N.J. 601, 621 (1988) .....34, 46, 47

*Riya Finnegan LLC v. Township of Council of South Brunswick*,  
197 N.J. 184 (2008) ..... 39

*Route 15 Associates v. Jefferson Tp.*,  
187 N.J. Super. 481, 488(App. Div. 1982) ..... 47

*Van Ness v. Borough of Deal*,  
78 N.J. 174 (1978) ..... 21

*Ward v. Scott*, 28 N.J. 529, 536 (1959) ..... 32

*Willoughby v. Planning Board of Township of Deptford*,  
326 N.J. Super. 158 (App.Div. 1999). ..... 38, 39, 46

*Willoughby v. Planning Board of Township of Deptford*,  
332 N.J. Super. 223 (App. Div.), cert. den. 165 N.J. 603 (2000) ..... 42, 48

*Zaehring v. Long Beach*, 56 N.J. Super. 26, 33 (Law Div. 1959) ..... 32

**Statutes**

386 N.J. Super. 255 (Law Div. 2006) .....40

394 N.J. Super. 303 (App. Div. 2007) ..... 40

N.J.S.A. 2A:16-53. .... 26

N.J.S.A. 12:3-1 *et seq.* – “New Jersey Tidelands Act” .....12

N.J.S.A. 13:1D-150 to 156. .... 6

N.J.S.A. 13:1D-151(a) ..... 14

??N.J.S.A. -1 *et seq.* ..... 5, 39

N.J.S.A. 40A:12-7 .....36, 46

N.J.S.A. 40A:12-7 (d) ..... 35, 37

N.J.S.A. 40A:12A-13 ..... 13

N.J.S.A. 40:55D-10 (a) .....37

N.J.S.A. 40:55D-28 ..... 32

N.J.S.A. 40:55D-28(b)(2) .....34

N.J.S.A. 40:55D-62 .....33, 36, 37, 40, 41, 42

N.J.S.A. 40:55D-62(a) .....47, 48

*N.J.S.A.* 40:55D-89 (d) and (e) ..... 36

*N.J.A.C.* 7:7-9.48 ..... 6

*N.J.A.C.* 7:7-9.48(b).....6

*N.J.A.C.* 7:7-16.9 ..... 6, 7, 20,

*N.J.A.C.* 7:7-16.9(x)..... 23, 24

Cox & Koenig,  
New Jersey Zoning & Land Use Administration §8.4, (2023) ..... 36, 37

## TABLE OF TRANSCRIPTS

- 1T The Transcript of Public Hearing of the Mayor and Council of the Borough of Keansburg held on January 27, 2021 at which Ordinance 1667 was introduced.
- 2T The Transcript of Public Hearing regarding Ordinance 1667 and the Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan that was held before the Keansburg Planning Board on February 8, 2021.
- 3T The Transcript of Public Hearing before the Mayor & Council of the Borough of Keansburg held on February 17, 2021 on Ordinance 1667.
- 4T November 19, 2021 Transcript of Motion for Reconsideration before the Honorable Gregory L. Acquaviva
- 5T April 7, 2022 Transcript of Motion for Summary Judgment before the Honorable Gregory L. Acquaviva
- 6T June 10, 2022 Transcript of Motion for Reconsideration before the Honorable Gregory L. Acquaviva
- 7T February 27, 2023 Transcript of Motion In Limine and Transcript of Trial before the Honorable Gregory L. Acquaviva



**TABLE OF ORDERS**

Order Denying Plaintiff's Motion for Reconsideration Filed on November 19, 2021 by the Honorable Gregory L. Acquaviva	Pa1642
Order Denying Plaintiff's Request for Summary Judgment and Granting Defendant's Request for Summary Judgment and Statement of Reasons Filed on April 7, 2022	Pa1644
Order Denying Plaintiff's Motion for Reconsideration Filed on June 10, 2022 by the Honorable Gregory L. Acquaviva	Pa1649
Order Granting Motion In Limine filed on February 27, 2023 by the Honorable Gregory L. Acquaviva	Pa1651
Order Denying Plaintiff's requested relief and Statement of Reasons filed on February 28, 2023 by the Honorable Gregory L. Acquaviva	Pa1653

**STATEMENT OF PROCEDURAL HISTORY:**

On January 27, 2021, Keansburg introduced Ordinance 1667 (**Pa 68, 533**), proposing to adopt the Second Amendment of the “Beachway Avenue Waterfront Redevelopment Plan” applicable to Block 184, Lots 1, 3.02, 3.03 and a portion of Lot 3.01, which Second Amendment proposed to supersede in its entirety a previous Redevelopment Plan adopted in 2017 (1T). Ordinance 1667 and the Second Amended Redevelopment Plan were considered by the Keansburg Planning Board on February 8, 2021 (2T). The Planning Board Attorney submitted a February 17, 2021 letter to Keansburg memorializing the Planning Board findings that the Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan is consistent with the Borough’s Master Plan (**Pa573**) (**3T**). Ordinance 1667 was then adopted by Keansburg on February 17, 2021.

On April 12, 2021 Plaintiff Jersey Shore Beach and Boardwalk Company, Inc. a/k/a Jersey Shore Beach and Boardwalk, Inc. (hereinafter “Jersey Shore”) filed a Four Count Complaint in Lieu of Prerogative Writs naming as defendants the Borough of Keansburg, the Borough Council, and the Planning Board (sometimes hereafter collectively referred to as “Keansburg”) challenging the “Second Amended Beachway Avenue Waterfront Redevelopment Plan” (hereinafter “Redevelopment Plan”) adopted by Ordinance 1667 (**Pa1-Pa21**).

In the First Count Jersey Shore alleged that, while the Redevelopment Plan was referred to the Planning Board for the mandated “consistency review”, the Planning Board failed to advise the Borough Council that the challenged Redevelopment Plan was inconsistent with the Master Plan; specifically included as a reason was the failure of the Planning Board to consider the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine, and the Administrative Public Access Rule recently enacted by the New Jersey Department of Environmental Protection (“NJDEP”). In the Second Count, Jersey Shore argued that while the LRHL, does permit a Redevelopment Plan that is inconsistent with the Master Plan the specific reasons for such deviations(s) must be outlined in the Redevelopment Plan and the adopting Ordinance itself, the Redevelopment Plan and the adopting Ordinance 1667 failed to do so. In the Third Count, Jersey Shore cumulatively asserted that Ordinance 1667 (and the “Redevelopment Plan”) are contrary to sound zoning and redevelopment principles, that the proposed use is incompatible with the surrounding uses and properties, and that therefore such actions were contrary to law and were arbitrary, capricious and invalid. Lastly, in the Fourth Count Jersey Shore asserted that the defendant’s undisputed failure to consider the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine, and the Administrative Public Access Rule recently enacted by the NJDEP renders Ordinance 1667 (and the “Redevelopment Plan”) invalid, and that

Redevelopment Plan's specific provision calling for the abolishment and closing of a long existing public access point and 300 public parking spaces is in violation of those State policies

Thereafter, on May 22, 2021 the Keansburg Defendants filed a joint answer **(Pa23 – Pa36)**. On May 25, 2021, Defendant Planning Board filed a separate answer through their attorney **(Pa39)**. On February 17, 2022 Jersey Shore filed a Motion seeking Summary Judgment in their favor on the Public Trust Doctrine claims asserted in the Fourth Count **(Pa224-Pa425)**. On March 24, 2022, Defendant Keansburg filed opposition and a Cross-Motion seeking dismissal of the Fourth Count on procedural grounds **(Pa426-Pa500)**. After oral argument on April 7, 2022 (5T), the Trial Court issued an Order and Statement of Reasons that denied Jersey Shore's Motion and granted the Defendant's Cross-Motion and dismissed Count Four of the Complaint "with prejudice" **(Pa1718, 1720)**. Jersey Shore immediately moved for reconsideration **(Pa503)**. On June 10, 2022 the Trial Court denied that Motion **(Pa1729) (6T)**.

Thereafter, on February 17, 2023 Keansburg moved for an Order *in Limine* prohibiting Jersey Shore from even mentioning the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine, and the Administrative Public Access Rule recently enacted by the NJDEP **(Pa528-529)**. On February 27, 2023, the day before the bench trial was set to commence, the Trial Court granted this

motion (**Pa1731**). Thereafter, on February 28, 2023, the Court held a one-day Bench Trial (7T). The parties agreed to have Planning Expert Reports submitted in lieu of testimony (7T 9:9; 11:25) (**Pa300-425**). The parties submitted Joint Exhibits (**Pa68,533**) (7T 10:20). In addition, the Court “contingently” allowed in some additional Exhibits from Jersey Shore (7T 13:4). At the conclusion, the Trial Court issued an Order denying all relief and dismissed the Complaint accompanied by an 18 page written Statement of Reasons (**Pa1733-1734**).

Jersey Shore timely appealed on April 12, 2023 and amended the Appeal on April 17, 2023 (**Pa1705, 1765**).

#### **STATEMENT OF FACTS:**

Pursuant to the Municipal Land Use Law (“MLUL”), *N.J.S.A.* 40:55D-1 *et seq.*, the Borough of Keansburg has in place an “Official Master Plan”, being adopted in 1988 (with “Re-Examination Reports” adopted in 2003, 2012 and 2015) (**Pa577,716, 741, 760**). Plaintiffs own and operate the “Keansburg Amusement Park”, being an ongoing and substantial oceanfront seasonal recreational business in place for well over 100 years, located in the immediate vicinity and on part of the Redevelopment Plan area at issue here. On May 14, 1999, Jersey Shore entered into a formal lease with the Defendant Borough for Block 184, Lot 3 (now known as Lot 3.01), along with other real property on adjoining Lot 4, for use for parking and as a commercial Go-Cart Track and related seasonal businesses

(Pa475). The Go-Cart Track and amusement park was, is, and has been an ongoing flourishing operational business. Because of this long term Lease and the availability of parking, Jersey Shore expended large sums of money to improve both this leased property and its nearby amusement park facilities (Pa3).

On July 27, 2005 Keansburg designated the entire Borough as “An Area in Need or Rehabilitation” under the Local Redevelopment Law (“LRHL”), *N.J.S.A. 40A:12A-1 et seq.* Later in 2005, Keansburg adopted the original “Beachway Avenue Waterfront Redevelopment Plan” which provided a plan for redevelopment of an area along the beachfront where Jersey Shore owned and operated its businesses. The Plan included Block 184, Lot 3.01, already used by Jersey Shore for parking and the Go-Cart Track pursuant to the 1999 Lease. As a result, the first of many legal challenges to Keansburg’s efforts to establish a Redevelopment Plan for this area commenced. Most of those legal challenges have either concluded or been mooted by Keansburg’s passage of the SECOND Amended Redevelopment Plan challenged herein (Pa68, 533).

At some point, Jersey Shore also ascertained that Keansburg did not actually have legal title to Block 184, Lot 3.01, the parcel Leased and occupied by Jersey Shore. Jersey Shore on obtaining this significant information then acquired Quitclaim Deeds from various heirs to establish what they claim is clear legal title to Block 184, Lot 3.01, and filed a separate legal action against Keansburg to quiet

title in Jersey Shore’s favor. That separate legal action is resolved and a decision entered after a recent Bench Trial in the Chancery Division, Monmouth County – Jersey Shore Beach and Boardwalk Company, Inc. a/k/a Jersey Shore Beach & Boardwalk Inc. v. Borough of Keansburg, a Municipal Corporation; Docket No.: MON-C-48-19.

On May 3, 2019 the Public Trust Doctrine Law, (*Chapter 8 Laws of 2019*)(**Pa419**) codified the long existing common law “Public Trust Doctrine” as now positive statutory law, and authorized the NJDEP to promulgate administrative rules and regulations for enforcement of the mandate to future development. The new law did not supersede or supplant the 200+ year old Public Trust Doctrine, but created a mechanism for oversight and enforcement concurrent to any private right of action already existing under the Common Law. *See N.J.S.A. 13:1D-150 to 156 (Pa425)*. The referenced NJDEP regulations enacted are now found in the New Jersey Administrative Code, most significantly at *N.J.A.C. 7:7-9.48* and the directly applicable “public access rule” at *N.J.A.C. 7:7-16.9* which requires all local municipalities to ensure that:

“... [p]ublic access to lands and waters subject to public trust rights shall be provided in accordance with public access rule, 7:7-16.9. Development that does not comply with 7:7-16.9, Public access, is discouraged on lands and waters subject to the public trust rights.”

[*N.J.A.C. 7:7-9.48(b)*] (**Pa160**)

As of the date of the Statutory Public Trust Doctrine Law, all further development of public or private lands that adjoin navigable waters now had that additional requirement to be satisfied as a condition of lawful approval of the development; the Redevelopment Plan was required to satisfy and comply with the “public access rule” now found in *N.J.A.C. 7:7-16.9*. The public access rule essentially mirrored the Common Law right of public access which had in the past been the source of Court Rulings addressing the competing rights of private property owners and the public and the public’s right of access. The public access rule itself is a detailed twenty one (21) page comprehensive and specific administrative regulation promulgated by the NJDEP pursuant to the statutory mandate (**Pa419**). Ordinance No. 1667 was adopted February 17, 2021, with the Public Trust Doctrine Statute and “public access rule” already in legal effect, and more than 200+ years after the Public trust Doctrine had been recognized on our jurisprudence. With Ordinance No. 1667, *the Borough Council adopted the Second Amended Redevelopment Plan* and also repealed *all other Ordinances or parts of Ordinances inconsistent herewith* and are required to comply with the New Jersey Public Trust Doctrine Statute, NJDEP’s administrative “public access rule”, and the Common Law doctrine.

**A. The Affirmative Requirements of the Statutory Public Trust Doctrine and the NJDEP’s Mandatory “Public Access Rule”:**



The NJDEP “public access rule” contains detailed requirements that must be satisfied as a condition of a municipality approving any zoning rule or development application, including the Redevelopment Plan challenged herein and its change in zoning. To start, all municipalities are encouraged – but are not yet specifically required – to draft and file a “municipal public access plan” with the NJDEP. The methodology to prepare and submit such a document for NJDEP approval is outlined in the administrative rules. In this matter, to date Defendant Keansburg has not filed a “municipal public access plan” with the NJDEP. For those Municipalities that fail to file a “municipal public access plan” with the NJDEP, the mandatory administrative regulations still apply and specifically include, but are not limited to, imposing on a municipality the affirmative obligation to guarantee and protect public access to waterways which obligations apply to all development projects or zoning laws approved after July 2, 2019.

**B. The Defendants’ Wholesale Failure to Affirmatively Consider the Statutory Doctrine and Public Access Rule When Approving the Development Plan:**

The challenged Development Plan was approved February 17, 2021; almost twenty (20) months AFTER the statutory Public Trust Doctrine or the NJDEP’s administrative “public access rule” had been in effect. At the time that the “Redevelopment Plan” was adopted, Keansburg was required to affirmatively comply with and satisfy the legal obligations imposed on municipalities pursuant

to the Public Trust Doctrine Statute and NJDEP’s administrative “public access rule”. The entirety of the municipal record in this case which demonstrates exactly what was – and what WAS NOT – considered by the named Defendants in Redevelopment Plan Approval is limited to the following:

- The text of the two (2) page challenged Borough of Keansburg Ordinance No. 1667 itself (**Pa68**);
- The text of the thirty one (31) page “[Second Amended] Beachway Avenue Waterfront Redevelopment Plan” (**Pa533**);
- The Certified Transcript of Public Hearing (January 27, 2021 – via Zoom®) before the Mayor and Council of the Borough of Keansburg from *In the Matter of: Ordinances 1666 and 1667 – First Reading* (1T);
- The Certified Transcript of Public Hearing (February 8, 2021 – via Zoom®) before the Keansburg Borough Planning Board of Adjustment from *In the Matter of: Ordinances 1666 and 1667* (2T); and
- The Certified Transcript of Public Hearing (February 17, 2021 – via Zoom®) before the Mayor and Council of the Borough of Keansburg from *In the Matter of: Ordinances 1666 and 1667 – Second Reading* (3T).

A review of the foregoing “municipal record” indicates that not only did the defendants fail to consider the impact of the public trust access issues they were statutorily and administratively required to be specifically consider and protect and duty bound to protect by the Common Law, but that nowhere in the entire

“municipal record” is there even a single reference to meeting and satisfying statutory, administrative or Common Law *public trust* access issues.

C. **The Defendants’ Affirmative and Blatant Violations of the Statutory Doctrine and Public Access Rule Found in the Final Approved Development Plan:**

The “Redevelopment Plan” provides as follows (Pa533):

**3.3.5 Beach or Waterfront Access Improvements**

Substantial improvements to *pedestrian access* to the beach or waterfront via the baywalk **are desired**. The redeveloper shall extend the north-eastern end of the baywalk northeasterly to reach the existing go-cart section and proposed parking area (see Section 3.3.11). This will enhance access to the beach and public open space areas. Additional improvements may include, but need not be limited to, lighting, signage, plantings, seating, amenities that formalize access points **from the street**. Enhanced visual access of the waterfront and bay through the provisions of gazebos or structures for the passive enjoyment of waterfront views **may also be allowed** under this Redevelopment Plan. (Emphasis allowed) (Pa557)

Read superficially or in a vacuum this section 3.3.5, though not actually referencing the term “public trust”, would imply that the Plan actually fostered and preserved the existing level of public access. However, a simple review of Section 3.3.11 (Parking) reveals that all PUBLIC PARKING is to be abolished and any parking that remains will strictly be available for use only by the residents of the new residential units that will be built. In short, all existing PUBLIC PARKING will be abolished, making public “access” to the beach “access points” extremely difficult, if not a literal impossibility. No handicapped parking whatsoever will be

preserved, and none will be created. This alone violates the Public Trust Doctrine Statute and NJDEP’s administrative “public access rule”, and the common law Public Trust Doctrine requiring invalidating the challenged ordinance and Redevelopment Plan.

Moreover, what is also a fact is that Keansburg does not actually own Block: 184, Lots: 3.01, 3.02 and 3.03. Rather such property is (subject to plaintiff separate ownership claim) owned by the State of New Jersey and is only under the dominion and control of Defendant Keansburg by virtue of a Tidelands Lease. Possession and use of Block 184, Lots 3.01 is specifically subject to the terms and conditions of a January 9, 2020 “REVOCABLE LICENSE – A Rental Agreement from the State of New Jersey” (hereinafter “the Lot 3.01 Tidelands Lease”) which is in effect from May 1, 2019 to May 1, 2034 (**Pa368**). The Lot 3.01 Tidelands Lease unequivocally limits its use as follows:

**“... the license authorizes the continued use of this area as a municipal parking lot. Any development of the site contrary to the use as a municipal parking lot will require a new license and new fee calculation (as appropriate). This document is for the area described as Block 184, Lot 3.02 only ...[.] ... \*\*\* ... The license may be revoked at any time and for any purpose deemed necessary and reasonable by the Tidelands Resource Council in the Department of Environmental Protection.**

Tidelands, also known as “riparian lands,” are lands now or formerly flowed by the tide of a natural waterway and are regulated by the State of New Jersey. *See*

*N.J.S.A. 12:3-1 et seq.* – “New Jersey Tidelands Act”. This includes lands that were previously flowed by the tide but have been filled. These lands are owned by the State and held in trust for the public. Tidelands are stringently managed by the Tidelands Resource Council, a board of twelve Governor-appointees, along with DEP staff at the Bureau of Tidelands Management, with a charge of maintaining public access to beaches and the ocean. Pursuant to a review of historic aerial photography (**Pa1640-1655**), Lot 3.01 has always been used as a public parking area providing beach/ocean access dating back to at least 1956 and was further expanded in the 1970s. The Redevelopment Plan here is wholly contingent on the ability of Keansburg to obtain clear title to Lot 3.01 from the State so that Keansburg can in turn transfer ownership to the designated developer who will in turn erect condominiums and eliminate all public parking.

In light of the now codified Public Trust Doctrine and the DEP’s clearly applicable “Public Access Rule”, it would appear to be illegal as contrary to those Laws and Regulations for the Tidelands Resource Council to convey the ownership of Lot 3.01 and allow elimination of all or substantial public parking, and would further violate the clear and unambiguous terms of the Lot 3.01 Tidelands Lease. Therefore, Plaintiff argued as a matter of fact and law, that the Redevelopment Plan should be struck down as invalid because it is legally impossible for the Defendant Keansburg to substantially eliminate the public parking spaces that the

Public Trust Statute, the DEP’s “Public Access Rule”, the Common Law Doctrine, and the Tidelands Lease, all require to be preserved for public beach/ocean access.

**D. The Trial Court’s Initial Ruling on the Appellant’s Public Trust Doctrine Summary Judgment Motion:**

Because the relevant uncontroverted facts establish the challenged Ordinance and Redevelopment Plan as clearly operating to violate the established principles of the Common Law Public Trust Doctrine as more clearly established by the codified Statutory Public Trust Doctrine and DEP Administrative Regulations on February 17, 2022 Plaintiff moved for partial Summary Judgment on the Public Trust Doctrine claims. That Motion, if granted, would have mooted the remaining claims as invalidating the Redevelopment Plan (**Pa224**). Keansburg responded that the Court should not – or *should not yet* – address the Public Trust Doctrine issues. Keansburg asserted that the Redevelopment Plan only established new zoning regulations and that the Plan itself did not actually authorize the physical development of property located inside the redevelopment area, therefore the Public Trust issues had to await the submission of the actual plans for development by the authorized developer for Subdivision/Site Plan Approval as per *N.J.S.A.* 40A:12A-13. Overlooking the factual and legal import of defining and approving a Redevelopment Plan and its specifics, Keansburg asserted that no actual Application for Redevelopment Plan had been filed by an actual designated developer and that the issue only comes ripe and justiciable by a development

application plan seeking NJDEP permits. Keansburg further argued that the statutory Public Trust Doctrine and the NJDEP Public Access Regulations established the NJDEP as the “... *entity responsible for protecting and expanding public access, not private actors such as Jersey Shore.*”

The Trial Court adopted Keansburg’s position in its April 2022 Order/Opinion denying Jersey Shore’s Motion and Granting Keansburg’s Cross-Motion, holding in relevant part as follows:

After setting forth the Legislature’s findings and public policy, *see N.J.S.A. 13:1D-150*, the Legislature delegated authority to the DEP to “ensure that any approval, permit, administrative order, or consent decree issued, or other action taken, by [DEP]” is consistent with the Public Trust Doctrine, *N.J.S.A. 13:1D-151(a)*.

... \*\*\* ...

Here, Jersey Shore challenges the Ordinance and Plan. Although Jersey Shore is correct that before the proverbial shovels enter the ground on a contemplated project, various approvals and/or permits will be needed from DEP, the Plan challenged in this action is not an application by any entity – Keansburg or, for that matter, a private developer – made to DEP for approval, issuance of a permit, execution of an order, or consensual agreement for development. In short, the Ordinance and Plan do not require DEP action. In no way are any of the enumerated statutes implicated by the Ordinance or Plan because, put simply and again, no entity is yet seeking permission in any form whatsoever from DEP. Thus, there is nothing pending before DEP for its action and, accordingly, there is nothing for DEP to do to “ensure that any approval, permit, administrative order, or consent decree” is consistent with the Public Trust Doctrine. Jersey Shore’s entire thesis is, thus, academic and theoretical. Such a theoretical concern does not comport with Section 151(a)’s clear, express, unambiguous language which contemplates actual, tangible applications that

require DEP activity. Put simply, Section 151(a) has not been triggered by the Ordinance and Plan.

... \*\*\* ...

Jersey Shore's contention here is premature.

... \*\*\* ...

Jersey Shore may, at the end of the day, be correct that any proposal to reduce available parking spaces from more than 300 to approximately 150 and to change such from publicly available to privately controlled may violate the Public Trust Doctrine. As Keansburg notes, however, the development that eventually moves forward could be a far cry from the conceptual plan Jersey Shore fears. Those questions, however, must be analyzed vis-à-vis the regulatory rubric adopted by DEP – on a case-by-case basis when a development application seeking DEP approval is pending. That question – based on a tangible application requesting DEP action will then proceed through the well-worn, traditional regulatory process to the Office of Administrative Law, Commissioner, and Appellate Division – not via a prerogative writ application to the Superior Court, Law Division on a municipal ordinance altering zoning that could lead to such a future development project. Thus, because Jersey Shore's theoretical concern is not yet ripe, Count Four of Jersey Shore's challenge to the Ordinance and Plan as being invalid vis-vis the Public Trust Doctrine must be rejected as a matter of law (**Pa1725-1727**).

**E. The Trial Court's Ruling on Jersey Shore's Motion for Reconsideration:**

Plaintiff moved for reconsideration of the Court's ruling on the Public Trust Doctrine issue. The Trial Court clarified that at the appropriate time Jersey Shore surely would have "standing" to raise such a factual and legal claim, *but that such time had not come yet*. The Court then held that the Public Trust Doctrine claims were not "ripe" for judicial review:



THE COURT: ...Jersey Shore certainly only a development application such as a request for a CAFRA permit for example, triggers the ability to challenge the Public Trust Doctrine which now falls under the DEP's purview. A zoning ordinance or plan, as we have here, does not.

Of course a private remedy remains available under the Public Trust Doctrine. I don't think I said otherwise. But there needs to be that trigger. And the trigger under the newly adopted statute and DEP's regulations as discussed in the prior written statement of reasons is a development application. Nothing in the statute or regulation indicates that a zoning ordinance can serve as the development contemplated and the trigger for redress under the Public Trust Doctrine.

As the Borough I think correctly points out, myriad reasons could frustrate any potential development. It may never come to fruition. And then if the Court were to entertain this now we would be dealing with a hypothetical case in controversy (*sic*) which just violates all sorts of fundamental rationales undergirding the judicial function. No development may ever occur. '

Thus as to the Public trust Doctrine, there is no case or controversy, only a hypothetical one on a potential future development application. The Court again is in no way, and I'm going to be clear on this, in no way is saying that Jersey Shore does not have standing to challenge a development application under the Public Trust Doctrine. But there next so be that trigger, the development application (6T13:21 to 15:2).

**F. The Trial Court's grant of Keansburg's Motion *In Limine* Removed the Public Trust Doctrine Issues From This Case; and was in error:**

Despite the Trial Court having Granted Summary Judgment in favor of Keansburg and dismissed Count IV, specifically alleging the Statutory and Common Law Public Trust Doctrine Claims, Jersey Shore in its Trial Memorandum indicated an intention to have lay witnesses and experts testify about

the impact of the Public Trust Doctrine violation on the legal claims in the remaining Counts I, II & II. Keansburg moved pre-trial for an Order *in Limine* strictly prohibiting Jersey Shore from introducing any evidence regarding the Public Trust issue at trial. On February 27, 2023, just prior to commencement of the Bench Trial, the Trial Court issued an Order granting Keansburg's Motion *in Limine* stating in relevant part:

“...that the Plaintiff is barred from presenting any evidence at trial regarding the Public trust Doctrine ...[.]”  
(Pa1731)

**G. The Bench Trial and Decision:**

After a one day bench trial on February 27, 2023, the next day, February 28, 2023 the Trial Court entered a 1 page Order and a 18 page Statement of Reasons rejecting all of plaintiff's remaining claims in Counts I, II & III and dismissed the entirety of plaintiff's Complaint (Pa1733-1734). Of particular significance were the following portions of the Statement of Reasons:

Elimination of Parking

A prime area of concern for Jersey Shore is the “elimination” – in their view – of a parking lot that can accommodate approximately 300 vehicles. Jersey Shore contends that such will remove and eliminate parking required for beach access.

The Plan expressly states that it endeavors to create “[i]mprovements to parking areas.” The Plan also requires ground floor parking to be located below any residential units.

More important, however, is Section 3.3.11 of the Plan which extensively discusses parking. First, in Sub-Area 1 of the

Plan, any redevelopment in that area shall be consistent with the Borough's Zoning Ordinance.

As to Sub Area 2, the redeveloper, as noted above, shall construct ground-floor parking. Such will provide for 204 parking spaces, during Phase 1. During Phase 2, however, an additional 60 spaces will be provided. The re-developer will also provide a paved parking lot in the "go-kart" portion of the Plan. Same "shall be allocated to public parking and will serve the adjacent recreation and public beach access" and will total 150 parking spaces.

Thus, although Jersey Shore may be correct that the overall amount of parking spaces available to the public may be decreased by a future, approved development, Jersey Shore points to no evidence indicating that the existing 300-space parking lot is ever maximized, nor does Jersey Shore address temporal concerns – that is, what is the current parking lot's use during offseason winter months.

#### Conservation and Public Access

Jersey Shore also contends that the Plan will reduce conservation and public access, including views of the waterfront.

**On this front, the Plan expressly states that it is "intended" to develop "a variety of waterfront and recreational uses along the Raritan Bay shoreline" to contribute to the public welfare" to maximize potential, by the development of "year-round . . . recreational uses." The Plan also expressly observes that it will "increase[] opportunities for public access to the beachfront".** (Emphasis added).

... \*\*\* ...

Fundamentally, Jersey Shore's contentions amount to a disagreement with respect to vision and values. The Master Plan sets forth, in broad brushstrokes, Keansburg's vision for the Borough. The Plan sets forth various ways for that vision to come to fruition. Keansburg struck a balance. Although Jersey Shore disagrees with that balance, the disagreement is subjective. As demonstrated by the record, Keansburg's determination is supported by ample evidence and is not arbitrary nor capricious. Accordingly, Jersey Shore's challenge in this regard must be rejected (**Pa1744-1745**).

The Trial Court further stated:

To the extent Jersey Shore takes umbrage the development that will occur on the Bayshore, such is premature. At issue in this action is the propriety of Keansburg's adoption of the Plan. The court cannot consider any prospective, future approval of development – which may never come to fruition. Challenges to those are for a future day, in a future litigation, following a future municipal action – if such future events ever occur. To be sure, such development may never occur in the manner authorized by the Plan (Pa1746).

As noted, Jersey Shore timely Appealed the Trial Court's Summary Judgment rulings, the Court's in Limine ruling and it's Trial Decision/Order.

**LEGAL ARGUMENT:**

**POINT I:**

**THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT IN APPELLANT'S FAVOR ON THE PUBLIC TRUST DOCTRINE CLAIMS:  
(5T 30:-20-25; 6T 12:5-15:18; Pa1718-1729)**

**A. Standard of Review on Appeal from Grant or Denial of Summary Judgment Below:**

On appeal the Appellate Division is required to review a Trial Court's decision granting summary judgment *de novo*, and in doing so is required to independently apply the same standard of review as the Trial Court is required to apply when initially deciding the motion. *Conley v. Guerrero*, 228 N.J. 339, 346 (2017); *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 479 (2016). The Trial Court's determination below is "... not entitled to any special deference." *Manalapan*

*Realty, L.P. v. Committee of Manalapan*, 140 N.J. 366, 378 (1995). Significantly, a Motion for Summary Judgment is not a substitute for an actual trial itself. A Trial Court may not decide contested material disputed issues of fact and rather may only decide *whether* there are any contested material disputed issues of fact. *Brill v. Guardian Life Insurance Co.*, *supra*, 142 N.J. at 540. In this case, there are no disputed or disputable questions of material fact and in fact the Court can take Judicial Notice under *N.J.R.E.* 201 of virtually every fact relevant to the issues extant in these Motions.

**B. The Public Trust Doctrine Generally:**

After July 2, 2019 (the date of the Statutory Public Trust Law went into effect) going forward all further development of public or private lands that adjoined navigable waters now had an additional requirement that had to be satisfied as a condition of lawful approval of the development. The Redevelopment Plan was therefore specifically required to satisfy and comply with the “public access rule” now found in *N.J.A.C.* 7:7-16.9. The public access rule essentially mirrored the already long existing Common Law right of public access which had in the past been the source of “non-development” beach access litigation addressing the competing rights of private property owners and the public and the public’s right of access. *See eg. Arnold v. Mundy*, 6 N.J.L. 1, 95 (1821); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972); *Van*

*Ness v. Borough of Deal*, 78 N.J. 174 (1978), *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984); and *Raleigh Ave. Beach Association v. Atlantis Beach Club, Inc., et al.*, 185 N.J. 40 (2005). The public access rule itself is a detailed twenty one (21) page comprehensive and very specific administrative regulation adopted and promulgated by the NJDEP pursuant to the very specific statutory mandate. The new Statutory Public Trust Doctrine did not supersede or supplant the 200+ year old Common Law Public trust Doctrine. For 200+ years when development of land or private property rights conflicted with rights conferred to the public by the doctrine, the public had the right to sue to vindicate those rights. The Statutory Public Trust Doctrine now imposed an affirmative obligation on municipalities going forward to ensure that all future zoning standards and actual development affirmatively considered and did not violate the doctrine, and put forth an additional layer of review (vested with the NJDEP) to make sure that no zoning determination or approved plan violated the doctrine. Thus, instead of municipalities or developers or private property owners being passively permitted to violate the doctrine and putting the onus on third parties to sue to vindicate their rights, the intention was that going forward zoning decision or development plans that ignored or violated the doctrine would not be permitted or approved.

*N.J.S.A.* 13:1D-150 (Findings, declarations relative to public access) sets forth the public policies to be upheld and fostered, provides in relevant part:

1. The Legislature finds and declares that:

a. The public has longstanding and inviolable rights under the public trust doctrine to use and enjoy the State's tidal waters and adjacent shorelines for navigation, commerce, and recreational uses, including, but not limited to, bathing, swimming, fishing, and other shore-related activities;

b. The public trust doctrine establishes the rule that ownership of the State's natural resources, including, but not limited to, ground waters, surface waters, and land flowed or formerly flowed by tidal waters is vested in the State to be held in trust for the people, that the public has the right to tidal lands and waters for navigation, fishing, and recreational uses, and, moreover, that even land that is no longer flowed by the tide but that was artificially filled is considered to be public trust land and the property of the State...

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d. Pursuant to the public trust doctrine, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters and adjacent shorelines;

e. The Department of Environmental Protection has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law. In so doing, the department has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable, protect existing public access, provide public access in all communities equitably, maximize different experiences provided by the diversity of the State's tidal waters and adjacent shorelines, ensure that the expenditure of public moneys by the department maximizes public use and access where public investment is made, and remove physical and institutional impediments to public access to the maximum extent practicable; and

f. Public access includes visual and physical access to, and use of, tidal waters and adjacent shorelines, sufficient perpendicular

access from upland areas to tidal waters and adjacent shorelines, and the necessary support amenities to facilitate public access for all, including, but not limited to, public parking and restrooms. [*N.J.S.A.* 13:1D-150].

The history and public policies to be upheld of the common law Public Trust Doctrine is explained further in the administrative regulations at *N.J.A.C.* 7:7-16.9(x), which provides in pertinent part:

(x) Rationale: The Public Trust Doctrine states that natural resources, including, but not limited to, tidal waterways and their shores, air and wildlife in this State are held by the State in trust for the benefit of all of the people. Further, the Public Trust Doctrine establishes the right of the public to fully utilize these natural resources for a variety of public uses. The original purpose of the doctrine was to assure public access to waters for navigation, commerce and fishing. In the past two centuries, State and Federal courts in New Jersey have recognized that public uses guaranteed by the Public Trust Doctrine also include public recreational uses such as swimming, sunbathing, fishing, surfing, sport diving, bird watching, walking and boating along the various tidal shores.

As the trustee of the public rights to natural resources, including tidal waterways and their shores, it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources. As the State entity managing public access along the shore, the Department has an obligation to ensure that this occurs. Access ensured by the Public Trust Doctrine can be classified into different types, including linear/lateral access, perpendicular access, and visual access.

Reasonable, convenient and safe conditions at or around public access areas and public accessways often affect whether the public will be able to reach and use tidal waterways and their shores. Such site conditions include informative signage marking public accessways, the absence of threatening or



misleading signage, adequate facilities (such as restrooms and fish cleaning tables) within a reasonable distance of tidal waterways and their shores and sufficient parking located near public accessways. Additionally, special measures, such as ramps installed in accordance with the Americans with Disabilities Act, can be taken to ensure that coastal lands and waters are accessible by all members of the public.

Development can block tidal waters from public view and/or make physical access to tidal waterways and their shores difficult or impossible. Tidal shore areas located in residential areas or within private beach areas are sometimes fenced, blocked or otherwise obstructed, further complicating access to these sites. In addition, municipalities have at times sold portions of the public beaches and vacated public streets and street ends to private owners. The private ownership of land immediately inland from tidal waterways and their shores can limit public access to tidal waterways and their shores. This leads to limited access to and enjoyment of public resources by citizens who have rights of access and use recognized and protected by the Public Trust Doctrine. Furthermore, public funds have been used to support protection and maintenance of these resources. Barriers to access also negatively affect tourism, which is one of the top revenue producing industries in New Jersey...

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The Public Trust Doctrine is an example of common law authority that is continually developing through individual Court cases. In addition to cases involving physical barriers to access, there have been instances where municipalities and local property owner associations have attempted to limit use of recreational beaches to their citizens and members through methods designed to exclude outsiders. In the majority of these cases, New Jersey courts have ruled that these actions violate the Public Trust Doctrine because lands that should be available for the general public's recreational use were being appropriated for the benefit of a select few.

[*N.J.A.C.* 7:7-16.9(x)]

**E. The Trial Court’s Refusal to Address the Public Trust Doctrine on the Summary Judgment Motion on the Merits was Contrary to Clearly Established Law:**

Nothing in the 200+ year existing Common Law Doctrine, the new Statutory Doctrine, or the NJDEP’s Administrative Public Access Rule, in any way indicates that the new law is anything other than complementary and supplementary to the 200+ year existing Common Law Doctrine, or that some “triggering” event must occur before government action that violates the doctrines can be challenged. The New Jersey State Constitution (1947), as amended, guarantees that illegal government action is subject to challenge through an action in Lieu of Prerogative Writs. Here, plaintiff was challenging the Ordinance adopting the Redevelopment Plan and the Redevelopment Plan itself as violating the Public Trust Doctrine. To the extent that a “trigger” is necessary, the “trigger” was the enactment of the Redevelopment Plan. In short, the Court held that a private citizen only has the right to bring a legal challenge to Government action that violates the Public Trust Doctrine when the Government action is either (1) the approval of a CAFRA permit or (2) the actual approval of a specific development application. The Public Trust Doctrine statute was specifically designed and intended to codify and expand the 200+ year existing Common Law Public Trust Doctrine, not to place exclusive authority and jurisdiction to enforce the Common Law and now Statutory Doctrines only with the DEP. Plaintiffs and the public retain a private right of

action and the challenge here was “ripe”. The illegal Government action challenged here is the passage of the Ordinance that adopts the Redevelopment Plan which effectively changes the potential use of the Plan area, its development, and public access to the beach/ocean. That change – particularly closing off public access points and abolishing 300 public parking spaces providing beach/recreation access – clearly violates the Public Trust Doctrine. There can be no real dispute as to this reality. Rather, Keansburg asserted, and the Trial Court held that Jersey Shore (and the public) are shackled and can do nothing YET. The tangible harm is an illegal law and Plan that affects Jersey Shore and the public now for future planning, and Jersey Shore (and any interested person) has every right to seek redress now. Indeed, the *Declaratory Judgments Act* provides in relevant part that:

A person *interested* under a ... municipal ordinance ... may have determined any question of ... validity arising under the ... ordinance ... and obtain a declaration of rights, status, or other legal relations thereunder. (Emphasis added).

[N.J.S.A. 2A:16-53]

Further, the *MLUL* defines an “interested party” as a person “... whose right to use, acquire, or enjoy property is or may be affected by any action taken ...”, and *N.J.S.A.* 40:55D-72, confers upon “... all *interested* parties ...” the right to appeal or otherwise challenge a local municipal land use determination. (Emphasis added). That is all that Jersey Shore is doing here by asserting the Application of the Public Trust Doctrines. The question is not whether what is at stake is a matter

of “great public interest”, but rather whether the “interest” or “interests” at stake articulated by Plaintiff is subjectively sufficient to Plaintiff or the public. Jersey Shore’s right to public access for themselves and their patrons (both at access points and through availability of parking) clearly meets this test. The “triggering event” (if one is required) has already occurred, that being the challenged Ordinance that adopted the Redevelopment Plan under the authority of the LRHL. Jersey Shore (or any interested party) does not have to wait until a developer seeks to finalize the illegal Plan to have the right to challenge the Plan. That is nonsensical, and is an intellectually indefensible position contrary to clearly established law. The Trial Court’s “ripeness” determination was not supported by the Court referencing any Constitutional provision, statute, case, court rule, or regulation because there is no support for this incorrect jurisdictional position. This is not a Federal Article III Court of limited jurisdiction, this is a State Court of general jurisdiction where authority to proceed and adjudicate a claim presented in the context of a case and controversy is presumed unless some law to the contrary is cited and says otherwise. The Trial Court was simply in error and the Public Trust Doctrine Issues must be addressed on their merits. As detailed below, the failure to address and comply with the Public Trust Law is clear, and requires reversal of the Trial Court Order/Opinion.

**F. The Challenged Ordinance, the Redevelopment Plan it Adopts, and the Zoning Standard it Creates, all Violate the Public Trust Doctrine and All Should be Declared Invalid by this Appellate Court:**

Once free to acknowledge and address the Public Trust Doctrine issues on the substantive merits, this is not a close case. Even the Trial Court had to concede that – *on the merits* – the Appellant’s Public Trust Doctrine arguments were of substance, conceding:

Jersey Shore may, at the end of the day, be correct that any proposal to reduce available parking spaces from more than 300 to approximately 150 and to change such from publicly available to privately controlled may violate the Public Trust Doctrine (Pa1727).

The “end of the day” should have been the trial date of February 27, 2023, at which time the Public Trust Doctrine, the dispositive factual and legal issue in this case, was not even allowed to be mentioned.

**POINT II:**

**THE TRIAL COURT’S DISMISSAL OF COUNTS I, II & III OF THE COMPLAINT SHOULD BE REVERSED (Pa1718, 1729)**

In the context of this case, the only way for the Trial Court to rule against Jersey Shore on the Public Trust Doctrine Issue was for the Trial Court to avoid and to not actually substantively address the issue on its merits. Permanently closing off long existing public access points, and abolishing 300 public parking spaces, to the beach and related recreation clearly constitutes a violation of the

Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine and the NJDEP's Public Access Rule. It is recognized that a Court may not substitute its judgment for that of the municipal body unless it is shown that the actions of the Municipality were arbitrary, unreasonable or capricious. *Cell South of New Jersey, Inc. v. Zoning Board of Adjustment of West Windsor Township*, 172 N.J. 75, 81 (2002); *Medici v. BPR Co.*, 107 N.J. 1, 15 (1987). When the Public Trust Doctrine Issue is permitted to be acknowledged and considered in consort with the legal claims as asserted in Counts I, II & III of it is clear that the Keansburg a blatantly illegal Redevelopment Plan and zoning standards, and that such clearly constitutes "... arbitrary, unreasonable or capricious ..." conduct requiring reversal and invalidation of the challenged Ordinance, Redevelopment Plan, and zoning change. The Trial Court's conclusion --- that the Municipality struck "a balance" as to waterfront access and uses is a fiction, if not an outright misstatement of reality by the Court, all under the guise of deferring to "municipal findings". Nowhere in the Redevelopment Plan is any reference made – beyond a few mere words – as to exactly how or when the Municipality "intends" to actually at some point "... develop 'a variety of waterfront and recreational uses along the Raritan Bay shoreline' to contribute to the public welfare...". Jersey Shore already has provided recreational uses for the public for 100 years. On the other hand, the Municipality wants to harm Jersey Shore's business (existing "recreational uses")

to build a few condominiums. How exactly is development of a few condominium units in any way related or fostering beach access, “recreational uses” or “the public welfare”? Nor is it explained by the Court how it could possibly find that this Redevelopment Plan – that itself does nothing beyond closing off public access points that have been existence for 100+ years and also doing away with 300 public parking spaces to be replaced with a PRIVATE parking spaces for condo owners – could possibly equate with “... increas[ing] opportunities for public access to the beachfront”. The Municipal findings here are based on no facts, are clearly inconsistent with the facts and in context are clearly arbitrary and unsupported. The Trial Court’s analysis that the Redevelopment Plan “struck a balance” sufficient to show “increased opportunities for public access to the beachfront” is clearly a legal fiction and arbitrary.

### POINT III

**THE TRIAL COURT WAS IN ERROR IN NOT CONCLUDING THAT THE REDEVELOPMENT PLAN WAS INCONSISTENT WITH THE 1988 MASTER PLAN, AND THAT INCONSISTENCY WAS NOT RECOGNIZED OR ADDRESSED AS REQUIRED (APPEALING THE FINAL OPINION/ORDER (Pa1733))**

The authority to regulate land use is constitutionally granted to the State Legislature by Article III of the 1947 New Jersey Constitution and by Article IV, Section VI, Paragraph 2 the State can delegate that zoning power to Municipalities by general Laws. The State Legislature has delegated that power to Municipalities

by various Planning or Land Use Laws. After Zoning was declared constitutional in 1926, the State Legislature enacted the first Zoning Enabling Act in 1928 and the first Planning Act in 1930. Later, under the 1947 Constitution, the Legislature adopted the 1953 Planning Act, which was more sophisticated and established the two step procedure for Site Plans and Subdividing. That Zoning Law was thereafter comprehensively recodified by the 1975 MLUL. The Law has long recognized that zoning must follow planning and that Zoning Regulations must be grounded in a comprehensive plan. Under early zoning Laws, it was not mandatory that a Municipality have a formal Master Plan, although many Municipalities did have Master Plans in place. See *Angermeier v. Sea Girt*, 27 N.J. 298, 306-309 (1958). However, the Supreme Court expressed the need for a “comprehensive plan” to guide zoning in *Olivia v. Garfield*, 1 N.J. 184, 191 (1948):

Zoning regulations must be in accordance with a comprehensive plan to achieve specified purposes generally relating to the health, safety, morals or general welfare of the community and with reasonable consideration of the character of each district, its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout the community.

That “comprehensive plan” was defined as “an integrated product of a rational process revealing a physical partition of the Municipality reasonably designed to produce a homogeneous pattern of location and uniform development



of variant land uses”, *Ward v. Scott*, 28 N.J. 529, 536 (1959); also *Kozesnick v. Montgomery*, 24 N.J. 154, 166-167 (1957). At that time, the Court found that the “comprehensive plan” could be found in the zoning regulations themselves. However, if a written Master Plan existed, the Governing Body was not precluded from adopting a zoning ordinance inconsistent with that Master Plan, so long as consistent with a “comprehensive plan.” See *Bow & Arrow Manor v. West Orange*, 63 N.J. 335, 346-347 (1973). However, that “practices under the old Law led to zoning enactments and procedures that often reflected inadequate planning or no planning at all.” *Pop Realty Corp. v. Springfield Tp. Bd. of Adj.*, 176 N.J. Super. 441, 448 (Law Div. 1980). The reason that there was a need to conform to a “comprehensive plan” was to avoid zoning being enacted arbitrarily --- as a reaction to a concern of the moment or pressure of a few individuals. See *Conlon v. Bd. of Public Works, Paterson*, 11 N.J. 363, 366 (1953); *Zaehring v. Long Beach*, 56 N.J. Super. 26, 33 (Law Div. 1959). The 1975 MLUL created a more definitive and comprehensive emphasis upon planning and the Master Plan as the foundation for zoning action. Every Municipality was now required to establish a written Master Plan, to be the foundation of the zoning process. The Master Plan can have a number of elements, such as a land use plan, housing plan, circulation plan, utility service plan, conservation plan, recreation plan, and the like, see *N.J.S.A. 40:55D-28*. The Master Plan is required to be re-examined by the

Planning Board at least every ten years, with recommendations periodically to be made by Reexamination Reports as to appropriate changes to be made to the Master Plan or Zoning. See *N.J.S.A.* 40:55D-89.

In furtherance of that emphasis on planning, the MLUL provides that all adopted Zoning Ordinances must be reviewed and assessed as substantially consistent with the Master Plan or, if a Zoning Ordinance or Plan deviates sufficiently from the Master Plan, the Governing Body can only adopt such an inconsistent Zoning after recognizing the inconsistency and setting forth adequate reasons in a Resolution documenting the deviation and the basis for adopting that inconsistency, and then only by an enhanced majority. *N.J.S.A.* 40:55D-62 provides:

The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such a plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance.

The critical importance of the MLUL's enhanced requirement of "planning" and for the Master Plan to serve as the basis for zoning Ordinances is set forth in *Medici v. BPR Co.*, 107 N.J. 1, 21 (1987) in Justice Handler's concurring opinion in *Riggs v. Long Beach Tp.*, 109 N.J. 601, 621 (1988), *Kaufmann v. Planning Bd. of Warren Tp.*, 110 N.J. 551, 557 (1988), and numerous other cases.

Consequently, the adoption of a Zoning Regulation requires a coordinated process from start to finish, with all relevant parties --- the Governing Body, the Planning Board, and the public --- having a clear understanding as to the proposed new Regulations being consistent or inconsistent with the Master Plan and strictly following the required process. Any failure of proper analysis --- or absence of recognition as to consistent or inconsistent --- invalidates the process and the Zoning Ordinance. See *Nouhan v. Board of Adjustment of City of Clifton*, 392 N.J. Super. 283, 290 (App. Div. 2007). The critical element of the Master Plan to be reviewed and considered is the Land Use Plan Element. As detailed in *N.J.S.A.* 40:55D-28(b)(2), that Element is to be specific in detailing,

. . . the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes . . . .

It is that specificity that makes this element the critical one to be considered on “consistency” of the Master Plan with the uses/densities in a proposed Zoning Ordinance or Redevelopment Plan.

Redevelopment Plans and the Regulations arising or put in place pursuant to the Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-1 et seq., have the same policy considerations and requirements. As per *N.J.S.A.* 40A:12-7 (d), a Redevelopment Plan adopted under the LRHL process must either be (1) “substantially consistent with the Municipal Master Plan” or (2) “designed to effectuate the Master Plan”. Similar to the MLUL procedure, if the Redevelopment Plan is not substantially consistent with the Master Plan, the Governing Body may still adopt the inconsistent Redevelopment Plan by an affirmative vote of a majority of its full authorized membership with the reasons for so acting set forth in the Ordinance or Development Plan. See *PADNA v. City Council of Jersey City*, 413 N.J. Super 322, 330 (App. Div. 2010), cert. den. 205 N.J. 79 (2011). The requirement is almost the same as in the MLUL for adoption of a Zoning Ordinance that is inconsistent with the current Master Plan, and the Court decisions on the analysis governing an assessment of the consistency of such Zoning/Regulations are certainly applicable and controlling here.

Before turning to the specifics of the completely cursory “analysis” by both the Planning Board and Governing Body as to “substantial consistency” of this

Redevelopment Plan with the Master Plan, it is first relevant to note that the Keansburg Master Plan dates to 1988 --- approximately 34 years ago. Obviously, Keansburg and/or its Planning Board --- despite the repeated admonitions of the Supreme Court since *Medici*, *Kaufman*, and later decisions as to the importance of the Master Plan and Planning in Land Use --- has essentially ignored doing any updates. Although there apparently have been Master Plan Reexamination Reports in 2003, 2012 and 2015, a Reexamination Report is not the Master Plan; it is a recommendation that the Master Plan be revised or updated in some particulars. The Law --- the MLUL at *N.J.S.A.* 40:55D-62 and the LRHL at *N.J.S.A.* 40A:12-7 --- both requires “substantial consistency” with the Master Plan, not some Reexamination Report recommendation or vague platitude that was never implemented or incorporated into the Master Plan itself. The Reexamination of the Master Plan is to be done at least every ten (10) years, and the Reexamination Report is, among other things, to state “specific changes recommended for the Master Plan or Development Regulations” and “recommendations of the Planning Board concerning the incorporation of Redevelopment Plans adopted pursuant to the Local Redevelopment and Housing Law into the Land Use Plan element of the Municipal Master Plan”. See *N.J.S.A.* 40:55D-89 (d) and (e).

As detailed in Cox & Koenig, *New Jersey Zoning & Land Use Administration* §8.4, (2023), if a Reexamination Report recommends specific

changes as to the Master Plan, then the Master Plan itself should be thereafter amended pursuant to the requirements and procedures as required in *N.J.S.A.* 40:55D-10 (a) and 40:55D-13, with the required Public Notice and Public Hearing, see *Cox* §8.3. If the Reexamination Report and its recommendations are in sufficiently crystallized form, that Reexamination Report could --- if and only if acted upon by the formal Notice and Hearing procedure required --- be adopted and considered as an amendment or supplement to the Master Plan. If that does not occur, the Reexamination Report is not part of the Master Plan, and does not supersede or override the Master Plan. The “consistency” analysis and reconciliation required by both the MLUL at *N.J.S.A.* 40:55D-62 and the LRHL at *N.J.S.A.* 40A:12-7 (d) is with the Master Plan, not some unincorporated Reexamination Report never adopted as part of or superseding the Master Plan. The fact that Keansburg has a 1988 Master Plan, and has never updated or amended that Plan in 34 years, cannot provide an excuse or justification for ignoring the statutory mandate of the “substantial consistency” analysis being with the “Master Plan”. Keansburg’s ignoring of the law cannot possibly serve as a justification for the Court ignoring the law, or to reward Keansburg for its non-compliance. An analysis of the cursory and erroneous process used by the Planning Board and the Governing Body will confirm the Redevelopment Plan’s invalidity. The analysis of the Trial Court Opinion will also confirm that the Court

misunderstood and misapplied the Law, really failing to consider the Master Plan “consistency” at all.

Before addressing the 1988 Master Plan and the clear substantial inconsistencies with the Redevelopment Plan, it is first important to review the relevant Court decisions outlining the Law and the detail of the “consistency” analysis required. As detailed in *Manalapan Realty v. Tp. Committee*, 140 N.J. 366, 383-384 (1995), the Court described that as to being "substantially consistent" with the Master Plan: "the concept of substantially consistent permits some inconsistency provided it does not substantially or materially undermine the basic provisions and objectives of the Master Plan". Later cases inform that concept. In *Willoughby v. Planning Board of Township of Deptford*, 326 N.J. Super. 158 (App.Div. 1999), a 30 acre vacant parcel had been the source of controversy during the 1986 Master Plan. The then owner sought to have the property rezoned into the adjacent Town Center (TC) Zone, and integrated in a proposed shopping center in that Zone. After opposition from nearby residents, the Township Council denied the rezoning request and the property was zoned, consistent with the Master Plan, as Office Campus (OC). In 1995, new owner Wolfson again sought a Zone change from OC to TC, to allow a mixed use development with retail stores. The Planning Board recommended that change to the TC Zoning. The Governing Body then adopted the Rezoning Ordinance to change from OC to TC; both the Planning

Board and the Governing Body having approved the change as consistent with the Master Plan. Neighbors challenged the TC rezoning; the core issue being that the TC zoning was not substantially consistent with the Master Plan.

The Trial Court ruled that the TC rezoning valid. On appeal, the Appellate Court engaged in a detailed analysis reviewing the Master Plan and Land Use Element with the TC Zone. The Court found the zoning change simply was not contemplated or consistent with the Master Plan. Any similar analysis by this Court as done in *Willoughby* must certainly conclude the Redevelopment Plan here is substantially inconsistent with the specifics of the 1988 Master Plan land use plan, as detailed in the Thomas Planning Report (**Pa300**).

*Riya Finnegan LLC v. Township of Council of South Brunswick*, 197 N.J. 184 (2008) also confirms that detailed analysis required. There the South Brunswick 2001 Master Plan and its Land Use Element continued the plaintiff's property and adjacent properties along Route 27 in the Neighborhood Commercial (C-1) Zone, allowing retail service businesses and professional business offices in mixed use developments. Upon the owner's application for a conforming structure of retail service (drug store) and professional office uses, nearby residents petitioned for a rezoning to eliminate the retail service component. The Planning Board, after a public hearing, recommended the Governing Body rezone plaintiff's property from C-1 (Neighborhood Commercial) to OP (Office Professional),



eliminating neighborhood retail while continuing professional offices. However noted, the 2001 Master Plan recommended the area as C-1 and recommended OP zoning for other areas along Route 1.

Both the Planning Board and Governing Body determined the change to OP was not substantially consistent with the Master Plan, so the Governing Body in accord with *N.J.S.A. 40:55D-62* adopted an accompanying "reasons resolution" setting forth why the OP rezoning was deemed appropriate. The owner then filed suit challenging the OP Rezoning. The Trial Court invalidated the Rezoning on the basis that, even though the adoption conformed to the MLUL special requirements, the change was based solely on the neighbor protests and not grounded in sound planning in accord with the Master Plan. See 386 *N.J. Super.* 255 (Law Div. 2006). The Appellate Court reversed that invalidation, finding that the Municipality adequately complied with the special adoption requirements and the basis was a legislative judgment which would not be disturbed. 394 *N.J. Super.* 303 (App. Div. 2007). The Supreme Court found that, although the Municipality had conformed to the special adoption requirements, the Court has the further obligation to review the adequacy of the reasons expressed and whether that rezoning was arbitrary. The Court concluded "the reasons expressed by the Governing Body for its decision to rezone this parcel fall short", and the new zone was neither supported by sound reasoning nor reasonable. The change, made at the

behest of nearby residents without consistency with the Master Plan, was arbitrary zoning action.

*Mahwah Realty Associates Inc. v. Township of Mahwah*, 420 N.J. Super. 341 (App. Div. 2011) is also relevant. There, the Municipality in 2000 adopted a rezoning ordinance amending its Industrial Park (IP-120) zone to add fitness centers as a conditional use. The Trial Court struck down that Ordinance because of a lack of substantial consistency with the Master Plan and that the Governing Body failed to identify the inconsistency and comply with *N.J.S.A. 40:55D-62*. The Municipality thereafter in 2007 adopted a new Ordinance adding fitness centers as permitted in the Industrial Park (IP-120) and General Industrial (GI-80) zones. This time the Municipality recognized the lack of “substantial consistency” with the Master Plan and includes findings and reasons in the Ordinance preamble sufficient to comply with *N.J.S.A. 40:55D-62*. However, the Trial Court found the notice inadequate and again invalidated the Rezoning Ordinance.

The Municipality then tried a third time in 2009. The Planning Board determined the addition of fitness centers to the IP-120 Zone as inconsistent with the Master Plan but endorsed the zoning amendment for the reasons detailed in a Resolution. The Governing Body adopted the Rezoning Ordinance, with a detailed “reasons resolution.” The Appellate Court upheld the Ordinance, finding the

Municipality had adequately complied with the special process under *N.J.S.A.* 40:55D-62 to adopt a rezoning not substantially consistent with the Master Plan.

Thus, it is established by these cases that a Governing Body can authorize an inconsistent zoning Ordinance, but only if the lack of consistency is recognized and the Ordinance adopted with adequate planning reasons spelled out in the "Reasons Resolution" in accord with *N.J.S.A.* 40:55D-62. A reviewing court is required to carefully review the Master Plan and its Land Use Plan Element to determine the actual consistency of the Rezoning Ordinance with the Master Plan, and if the "reasons" are not arbitrary.

**(A) THE REVIEW OF THE 1988 MASTER PLAN FOR SUBSTANTIAL CONSISTENCY OR INCONSISTENCY WITH THE REDEVELOPMENT PLAN WAS SIMPLY NOT PROPERLY DONE BY EITHER THE PLANNING BOARD OR GOVERNING BODY**

It is recognized, as noted in *Willoughby II*, that the Planning Board's determination as to consistency between the Master Plan and a new Zoning Ordinance or Redevelopment Plan is normally entitled to deference and great weight. However, that requires and presupposes that there was an actual review and analysis of the in-place Master Plan and its Land Use Element in conjunction with the new Zone or Redevelopment Plan actually done by the Board and/or Governing Body, such as the analysis in the cases cited earlier.

Starting with the Planning Board “consistency” review, that issue/presentation was before the Planning Board at its Public Meeting on February 8, 2021. The Transcript of that Hearing/presentation was Exhibit J4 (2T) and the summary of the review and Planning Board recommendation, written by Board Attorney Kennedy, was Exhibit J5 (**Pa573**). At the Hearing, the “consistency” justification was presented to the Planning Board by Planner Stan Slachetka, the drafter of the Redevelopment Plan (2T10). It should first be noted that --- although this was to review and determine the “consistency” of the 1988 Master Plan with the Redevelopment Plan --- there were only two Exhibits/documents in evidence and considered by the Planning Board: Ordinance 1667 (B1) adopting the Redevelopment Plan and the Redevelopment Plan (B2). The 1988 Master Plan itself was not even presented in evidence, or reviewed by the Planning Board. As referenced in Attorney Kennedy’s Report, the only documents “in the record as evidence” were Ordinance 1667 and the Redevelopment Plan. The author/formulation of the Redevelopment Plan --- Planner Slachetka --- then testified briefly as to the purported “consistency” with the 1988 Master Plan (2T 18:1-11) --- essentially referencing and relying upon his own misguided analysis at Section 2.2 of the Redevelopment Plan and the one-size-fits-all “policy statement” in the 1988 Master Plan that states as follows:

Guide waterfront development, which protects the public need for shore protection and flood control visual and pedestrian

access to the waterfront, recreation and open space, and economic development. The Borough should encourage appropriate use of waterfront locations and coordinate its efforts with the County Plan to improve waterfront access along the Raritan Bayshore.

Slachetka then briefly referenced a couple of equally generic policy statements in the 2015 Reexamination Report about a goal of developing the mixed use commercial area while enhancing public access to the waterfront, and asserts this as the evidence of “consistency” of the Redevelopment Plan with the 1988 Master Plan. The Planning Board --- without even the Master Plan in evidence or actually being looked at --- then concluded the Redevelopment Plan as “consistent with the Borough’s Master Plan”. The Governing Body’s adoption process on February 17, 2021 was even more cursory (3T). The Borough Clerk stated that (3T8:8) Attorney Kennedy’s letter advised that the Planning Board found the Redevelopment was consistent with the Master Plan; Planner Slachetka gave a brief overview of the Redevelopment Plan, and the Governing Body adopted the Ordinance/Plan. The fact is that the Redevelopment Plan is glaringly inconsistent with the specifics of the 1988 Master Plan. The numerous particulars are set forth in the Plaintiff’s Planner Thomas Report incorporated by reference here (**Pa300**).

Focusing on the clear and important “inconsistencies”, the 1988 Master Plan calls for the relevant area to be zoned for and developed by mixed use development not exceeding 2 ½ to 3 ½ stories in height, with a residential density

not exceeding 16 units per acre. The Redevelopment Plan authorizes mixed use buildings of 6 to 7 stories, with a density of 50+ units per acre. The 1988 Master Plan calls for the existing public parking area (on Lot 3) of about 300 spaces available to the public to be refurbished and expanded to serve the existing amusement area, beach, pier and recreation. The Redevelopment Plan authorizes building condominiums on the existing public parking, replacing it with public parking of only about 150 spaces and other parking dedicated only to the new buildings/residences.

The relevant cases established that the Planning Board and Governing Body are required to carefully review the actual Master Plan, and in particular its Land Use Plan element, to determine and assess its “substantial consistency” with the Rezoning Ordinance or Redevelopment Plan. The review is not to be of some Reexamination Report that was never legally adopted as incorporated into or as part of the Master Plan, nor can it be based upon some vague platitudes, such as advancing “economic development” in the Master Plan, and certainly not some vague platitudes in any unincorporated Reexamination Report. The reviewing Court is required to carefully review the in-place Master Plan and its Land Use Element to determine the actual consistency of that Master Plan to the Redevelopment Plan. That was not done here by the Planning Board, the Governing Body, or the Trial Court. There can be no question that the

Redevelopment Plan is “substantially inconsistent” with the 1988 Master Plan in its most important particulars --- the density/height of the mixed use development approved, and the increase and enhancement of public parking to be available for the amusement businesses, and public beach/recreation. The specifics of the Master Plan in its Land Use Element cannot be ignored or trumped by vague references to an amorphous goal of “appropriate use of waterfront locations” or similar vagueness. The record confirms that both the Planning Board and Governing Body “consistency” review was misguided and cursory. No analysis, such as found required in *Willoughby, Riza and Mahwah Realty*, to warrant deference was done. The “inconsistencies” between the 1988 Master Plan and its Lan Use Element and the Redevelopment Plan are clear and substantial.

**(B) AS THE REDEVELOPMENT PLAN IS NOT SUBSTANTIALLY CONSISTENT WITH THE 1988 MASTER PLAN, THE FAILURE TO ADHERE TO THE SPECIAL REQUIREMENTS FOR ADOPTION OF SUCH AN ORDINANCE REQUIRES INVALIDATION**

As the Development Plan is not consistent with the 1988 Land Use Plan and Master Plan, the failure of the Municipality to recognize that lack of consistency and to follow the special requirements under *N.J.S.A. 40A:12-7* requires the invalidation of the Ordinances. As noted earlier, Justice Handler in his concurring Opinion in *Riggs v. Long Beach Tp.* 159 N.J. 601(1988) detailed the heightened and required role of planning and the Master Plan in proper Zoning adoption and

analysis. Where the facts demonstrate that the Zoning Ordinance was adopted without proper (or any) consideration of consistency with the Master Plan, or without adherence to the appropriate procedures for a Zoning Ordinance lacking substantial consistency, then the requirement of invalidation should “be strictly enforced.” *Riggs*, 159 N.J. at 622. Appellate Court rulings illustrate that such issues must be examined by the reviewing court carefully and failure of proper compliance by the Municipal bodies is fatal to the Ordinance. That required analysis was not done by the Court below; however the required analysis by this Court will mandate an invalidation of these ordinances.

In *Route 15 Associates v. Jefferson Tp.*, 187 N.J. Super. 481, 488 (App. Div. 1982) the Court invalidated a Zoning Ordinance rezoning a property from commercial to residential. The Court found the rezoning was inconsistent with the recommendation in the Land Use Plan Element of the Master Plan that the property be zoned for office use. As the Governing Body had not adopted a “reasons” Resolution detailing the basis for the Ordinance, the Court concluded (at p. 488):

It is not sufficient to say, as did the trial judge, that the governing body would simply adopt the same zone scheme accompanied by a statement of reasons. Although that may be the eventual result, we cannot assume that will invariably occur. Hence, we are compelled to declare the adoption of the 1979 zoning ordinance amendments invalid because of the governing body’s failure to comply with *N.J.S.A. 40:55D-62(a)*.



In *East Mill Assoc. v. Township Council of East Brunswick*, 241 N.J. Super. 403 (App. Div. 1990), the Rezoning Ordinance was inconsistent with the Master Plan. The Governing Body did not contemporaneously adopt the “reasons resolution” required by N.J.S.A. 40:55D-62(a). Apparently belatedly realizing its failure, the Governing Body adopted a “Reasons Resolution” 36 days later. The Court invalidated the Ordinance stating (at p. 408):

The purpose of the reason resolutions is to inhibit inconsistency while preserving flexibility. By requiring contemporaneous passage, the Law not only provides an avenue for public scrutiny of the action (including a record for judicial review) but, perhaps more importantly, ensures that the inconsistency is clearly recognized and rationalized when the action is taken. There is a significant difference between contemporaneous debate and *post hoc* rationalization (emphasis added).

In *Willoughby v. Planning Board of Township of Deptford*, 332 N.J. Super. 223 (App. Div.), cert. den. 165 N.J. 603 (2000) the issue was whether the Governing Body putting forth “reasons” in the Ordinance, at a point when the Municipal Bodies were operating under a mistake of belief that the Ordinance was “consistent” with the Master Plan, could suffice to provide the reasons resolution necessary when a Municipality is adopting a rezoning Ordinance not consistent with the Master Plan. The Appellate Court invalidated the Ordinance, stating:

We conclude that before adopting a zoning amendment inconsistent with the Master Plan, the Governing Body must expressly recognize the inconsistency. This will give effect to the significance the Legislature attached to the Master Plan. Recognition of inconsistency triggers the requirement of a full

majority vote. That fact may alter the political landscape regarding a proposed amendment. Recognition of inconsistency flags the significance of the proposal and its potential impact on land use. Moreover, and perhaps most important, the rule we announce today compels the Governing Body to treat the Master Plan with the respect and importance assigned to it by the Legislature.

*Id.* at 229. See also *Jennings v. Borough of Highlands* 418 N.J. Super. 405, 416-417 (App. Div. 2011) (Court invalidated Rezoning Ordinance for failure of Governing Body to properly review the Planning Board Report and Recommendations).

These cases emphasize and confirm the absolute importance and necessity on the contemporaneous recognition by the public bodies involved of the consistency or lack of consistency of the rezoning Ordinance with the Master Plan. The failure of the Governing Body to have contemporaneous recognition of inconsistency invalidates the process and the adoption. The facts of the instant process clearly demonstrate that the changes imposed by Redevelopment Plan were not consistent with the 1988 Master Plan and its Land Use Plan specifies the Planning Board and the Governing Body both failed to actually do any analysis on the issue of consistency and failed to have any recognition of the lack of consistency. The Redevelopment Plan must be invalidated on that basis.

**CONCLUSION:**

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that this Appellate Court reverse the Trial Court and declare the challenged Ordinance, the Redevelopment Plan that it adopts, and the zoning standards they collectively create, as all illegal and *ultra vires* as violating the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine, and the NJDEP's Administrative Public Access Rule, and further permanently enjoin Respondents from applying, promulgating and / or enforcing such illegal and *ultra vires* standards. This Appellate Division must also reverse the Trial Court challenged Ordinance and Redevelopment Plan as not substantially consistent with the 1988 Master Plan and for the Planning Board and Governing Body's failure to address the special requirements of an adoption of such an Ordinance.

Respectfully submitted,

R. S. GASIOROWSKI, ESQ.

DATED: October 4, 2023

JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC. a/k/a JERSEY SHORE BEACH & BOARDWALK INC.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff,	DOCKET NO. A-002379-22T4
v.	ON APPEAL FROM:
BOROUGH OF KEANSBURG, a Municipal Corporation, and BOROUGH COUNCIL of the BOROUGH OF KEANSBURG, and PLANNING BOARD of the BOROUGH OF KEANSBURG,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY
Defendants.	DOCKET NO. MON-L-1262-21
	Sat Below: Hon. Gregory L. Acquaviva, J.S.C.
	<u>Civil Action</u>

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**BRIEF ON BEHALF OF RESPONDENTS BOROUGH OF KEANSBURG AND BOROUGH COUNCIL OF THE BOROUGH OF KEANSBURG**

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Date Submitted to Court: December 8, 2023

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii, iv  
PRELIMINARY STATEMENT..... 1  
PROCEDURAL HISTORY AND STATEMENT OF FACTS..... 2  
LEGAL ARGUMENT .....15

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE BOROUGH DISMISSING THE PLAINTIFF’S PUBLIC TRUST DOCTRINE CLAIMS .....15  
    A. The Public Trust Doctrine Laws .....15  
    B. The Borough’s Adoption of a Redevelopment Plan Amendment .....20  
    C. Application of These Laws to the Facts of This Case .....22  
    D. The Trial Court’s Grant of Summary Judgment to the Borough Dismissing the Plaintiff’s Public Trust Doctrine Claims.....24

POINT II

THE TRIAL COURT PROPERLY CONCLUDED THAT THE BOROUGH’S ADOPTION OF THE ORDINANCE APPROVING THE SECOND AMENDMENT TO THE REDEVELOPMENT PLAN WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO LAW.....26  
    A. The Trial Court Properly Determined That The Legislative Actions Taken By The Planning Board And The Borough are Entitled to Deference and Should Not Be Overturned Absent a Showing That They Were Arbitrary, Capricious or Unlawful.....27  
        1. The Planning Board’s Determination was Entitled to Great Deference...27

2. The Borough’s Decision to Adopt Ordinance 1667 Approving the Second Amendment to the Redevelopment Plan Was Also Entitled to Great Deference ...29

3. The Trial Court Properly Recognized the Presumption of Validity Accorded to the Actions Taken by the Planning Board and the Borough.....31

B. The Trial Court Properly Determined That The Ordinance Approving the Second Amendment to the Redevelopment Plan Was Not Substantially Inconsistent with the Borough’s Master Plan .....31

C. Since the Ordinance Approving the Second Amendment to the Redevelopment Plan Was Not Substantially Inconsistent with the Borough’s Master Plan, There Was No Requirement for the Borough Council to Follow the Statutory Procedures Necessary to Adopt an Inconsistent Ordinance .....41

D. The Trial Court Properly Dismissed Count Three of the Plaintiff’s Complaint.....42

CONCLUSION .....43

**TABLE OF AUTHORITIES**

**Cases**

Auge v. N.J. Dep't. of Corr., 327 N.J. Super. 256, 266 (App. Div.), certif. denied, 164 N.J. 559 (2000)..... 30

Borough of Avalon v. N.J. Dep't of Env'tl. Prot., 959 A.2d 1215 (N.J. Super. Ct. App. Div. 2008) ..... 16

Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973)..... 30

Davis Enterprises v. Karpf, 105 N.J. 476, 485 (1987)..... 36

Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994) ..... 29, 30

Hackensack Riverkeeper, Inc. v. N.J. Dep't of Env'tl. Prot., 128 A.3d 749 (N.J. Super. Ct. App. Div. 2015) ..... 16

Hutton Park Gardens v. Town Council of Town of W. Orange, 68 N.J. 543, 565 (1975) ..... 30

Kaufmann v. Planning Bd. for Twp. of Warren, 110 N.J. 551, 564 (1988)..... 27

Knight v. Hoboken Rent Leveling Bd., 332 N.J. Super. 547 (App. Div. 2000)..... 29

Madden v. Kentucky, 309 U.S. 83, 88 (1940) ..... 30

Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 383, 384 (1995) ..... 28, 32

Milford Mill 128, LLC v. Borough of Milford, 400 N.J. Super. 96, 110 (N.J. Super. A.D., 2008)..... 20

PRB Enters., Inc. v. South Brunswick Planning Bd., 105 N.J. 1, 7-8, (1987) ..... 27

Pullen v. S. Plainfield Planning Bd., 291 N.J. Super. 1, 7 (App. Div. 1996) ..... 36

Riya Finnegan LLC v. Twp. Council of Twp. of S. Brunswick, 197 N.J. 184, 192, (2008) ..... 32

Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Borough of Rocky Hill, 406 N.J. Super. 384, 411 (App. Div. 2009)..... 28

Vickers v. Township Comm. of Gloucester Twp., 37 N.J. 232 (1962)..... 30

Victor Recchia Residential Construction v. Zoning Bd. of Adj. of Cedar Grove, 348 N.J. Super. 242, 251 (App. Div. 2001) ..... 37

Willoughby v. Planning Bd. of Twp. of Deptford, 306 N.J. Super. 266, 279 (App. Div. 1997) ..... 27

**Statutes**

N.J.S.A. 13:1D-150..... 16

N.J.S.A. 13:1D-151..... 18

N.J.S.A. 40:55D-1 et. seq. .... 5

N.J.S.A. 40A:12A-1 ..... 3

N.J.S.A. 40A:12A-3..... 19, 21

N.J.S.A. 40A:12A-7..... 20, 21, 28

N.J.S.A. 40A:12A-7(d) ..... 32, 33

*N.J.S.A.* 40A:12A-7(e)..... 28

N.J.S.A. 40A:12A-8(f)..... 22

N.J.S.A. 40A:12A-13 ..... 22

N.J.S.A. 40A:55D-3..... 19

N.J.S.A. 40A:55D-4..... 19



## PRELIMINARY STATEMENT

This is an action in lieu of prerogative writs filed by the Plaintiff Jersey Shore Beach and Boardwalk Company, Inc. a/k/a Jersey Shore Beach & Boardwalk, Inc. (the “Plaintiff” or “Jersey Shore”) challenging the propriety of the legislative actions taken by the Defendants the Borough of Keansburg (the “Borough”) and the Keansburg Planning Board (the “Planning Board”) in adopting a Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan (the “Redevelopment Plan”). The relief sought by the Plaintiff through this action is the entry of an Order invalidating these legislative actions and setting aside the Second Amendment to the Redevelopment Plan.

This case was tried before the Honorable Gregory L. Acquaviva (“Judge Acquaviva” or the “Trial Court”). Prior to the trial, Judge Acquaviva dismissed the Plaintiff’s Public Trust Doctrine claims in response to motions for summary judgment filed by the parties. All other claims were tried on the record below, as supplemented by exhibits and expert reports submitted by the parties. After considering this evidence, Judge Acquaviva entered judgment in favor of the Defendants dismissing the Plaintiff’s remaining claims with prejudice.

There are two issues presented through this appeal: (i) whether the Trial Court properly granted summary judgment to the Borough dismissing the Plaintiff’s Public Trust Doctrine claims; and (ii) whether the Trial Court properly concluded that the

Borough's adoption of an ordinance approving the Second Amendment to the Redevelopment Plan was not arbitrary, capricious or unlawful.

The Trial Court correctly determined that the Borough's adoption of an amendment to its redevelopment plan, which merely created a redevelopment zoning overlay option to the existing zoning for the redevelopment area, did not violate the Public Trust Doctrine. In reaching this decision, the Trial Court properly recognized that the Plaintiff's Public Trust Doctrine claims were premature as the Plaintiff is challenging a zoning decision made by the municipality rather than a specific development application for a particular development project. The Trial Court noted that the Plaintiff is essentially seeking to challenge a future conceptual development of the property that might never actually happen and that the Plaintiff will have the opportunity to raise these claims if and when such a development application is filed. Likewise, the Trial Court also properly concluded that there was substantial credible evidence in the record supporting the Borough's decision to amend its redevelopment plan to add this redevelopment overlay zone option and that this amendment was not substantially inconsistent with the goals and objectives of the Borough's master plan.

For these reasons, the judgment entered by the Trial Court dismissing the Plaintiff's claims in this action should be affirmed on appeal.

## **PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>**

In order to properly analyze the issues presented through this appeal, it is first necessary to provide some background regarding the factual and procedural history which led to the adoption of the ordinance which is at issue in this litigation.

### **A. The Prior Redevelopment Activities Undertaken By The Borough And The Planning Board**

After the Planning Board undertook a preliminary investigation and provided the Borough with the Planning Board's recommendations, the Borough Council adopted a resolution on August 26, 2015 designating a study area comprised of properties originally identified as Block 184, Lots 1, 2, and 3 (which were subsequently re-numbered as Block 184, Lots 1, 3.02, 3.03, and a portion of Lot 3.01) as an "area in need of redevelopment" under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et. seq (the "LRHL") called the Beachway Avenue Waterfront Redevelopment Area (the "Redevelopment Area") (Pa542; Pa435; Pa438; Pa457). The Borough subsequently adopted a number of redevelopment plans establishing and amending the zoning requirements for this Redevelopment Area (Pa1445; Pa1559; Pa1602).

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<sup>1</sup> Since the procedural history and the facts relevant to this litigation are intertwined, they are presented together herein.

Notably, the propriety of these previous governmental actions is not at issue in this litigation as there were previous lawsuits filed by Jersey Shore challenging those actions. To the extent that decisions have been rendered in those other lawsuits, the actions taken by the Borough and the Planning Board have been upheld by the courts. Thus, the basic premises that the Redevelopment Area is an “area in need of redevelopment” designated by the Borough pursuant to its powers under the LRHL, and that the Borough has previously adopted redevelopment plans establishing and amending the zoning for this Redevelopment Area, are not in dispute in this litigation.

The sole governmental actions being challenged by the Plaintiff in this litigation are the actions taken by the Borough and the Planning Board in adopting legislation approving a Second Amendment to the Redevelopment Plan. This Second Amendment to Redevelopment Plan replaced and superseded the First Amendment to the Redevelopment Plan which was adopted by the Borough Council on June 21, 2017 (Pa1445).<sup>2</sup> Thus, if the Plaintiff were to prevail on its claims in this litigation and if the Second Amendment to the Redevelopment Plan were

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<sup>2</sup> Jersey Shore filed litigation challenging this First Amendment to the Redevelopment Plan under Docket No. MON-L-2629-17. After conducting a trial on these claims, the Honorable Jamie S. Perri, J.S.C. entered an Order on June 24, 2019 dismissing all of Jersey Shore’s prerogative writ claims (including the claims challenging the First Amendment to the Redevelopment Plan) (Pa78).

invalidated, the First Amendment to the Redevelopment Plan would go back into effect.

**B. The Actions Taken By The Borough And The Planning Board To Adopt The Second Amendment To The Redevelopment Plan**

On January 27, 2021, the Keansburg Borough Council introduced Ordinance 1667 proposing the adoption of a Second Amendment to the Redevelopment Plan which would supersede and replace the First Amendment to the Redevelopment Plan. As required under both the LRHL and the Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq. (the “MLUL”), that proposed ordinance and the proposed redevelopment plan amendment were referred to the Planning Board prior to the consideration of the ordinance for final adoption (1T; Pa68).

On February 8, 2021, the Planning Board held a public hearing and heard testimony from witnesses regarding this proposed Second Amendment to the Redevelopment Plan (2T). After concluding the public hearing, the Planning Board determined that the proposed zoning ordinance to adopt a Second Amendment to the Redevelopment Plan was consistent with the Borough’s Master Plan and authorized the Planning Board attorney to report the Planning Board’s findings to the Borough Council, which he did in a detailed letter submitted to the Borough Clerk (Pa573).

Subsequently, on February 17, 2021, the Borough Council voted to approve Ordinance 1667 adopting the Second Amendment to the Redevelopment Plan (3T; Pa68).

### **C. The Second Amendment To The Redevelopment Plan**

The Borough has adopted a number of redevelopment plans establishing and then revising the zoning requirements for this Redevelopment Area, the first of which was adopted on February 9, 2006 (Pa542). The Second Amendment to the Redevelopment Plan is the latest in this series of redevelopment plans and it was described by the Borough Planner, Stan Slachetka, as being generally consistent with the prior First Amendment to the Redevelopment Plan, but with certain changes regarding the phasing and development standards for sub area 2 of the Redevelopment Area (2T, pp. 13-16).

The Second Amendment to the Redevelopment Plan creates a redevelopment overlay zone for the Redevelopment Area and establishes zoning standards for that redevelopment overlay zone authorizing the redevelopment of the properties located within the Redevelopment Area with permitted uses including, among other things, mixed use residential/commercial development, marinas and other maritime uses, parks and recreational uses, and accessways to the water's edge (Pa554). The plan also contemplates the removal of an approximately 300 space existing municipally-owned parking lot and its replacement by a relocated 150 space municipally-owned parking lot, along with approximately 260 other parking spaces within the ground floor level of the buildings and through surface and street parking (Pa561).

Significantly, the Second Amendment to the Redevelopment Plan does not mandate properties located within the Redevelopment Area only be developed in accordance with the redevelopment standards set forth within the redevelopment plan. To the contrary, the Second Amendment to the Redevelopment Plan notes that the parcels located within the Redevelopment Area are located within either the Borough's B-2 or C-R zoning districts, and it specifically indicates that:

In order to implement the Redevelopment Plan in a manner consistent with its stated goals and objectives, **the Redevelopment Plan shall serve as an overlay zone, or optional development alternative, to the existing underlying Zoning Districts** as specified in the Borough's Zoning Ordinance. If the redeveloper chooses to redevelop parcels governed by the Redevelopment Plan under the redevelopment overlay option, the standards and requirements, including permitted uses, described in this Redevelopment Plan shall apply.

(Pa550) (emphasis added).

Thus, someone wishing to develop property located within this Redevelopment Area has the option of either developing the property in accordance with the standards of the underlying zoning or in accordance with the redevelopment overlay zoning standards.

Additional facts relating to the Second Amendment to the Redevelopment Plan and its consistency with the Borough's master plan are addressed within the legal arguments below.

**D. The Filing Of the Complaint And Responsive Pleadings In This Action**

The Plaintiff initiated this litigation through the filing of a Complaint in lieu of prerogative writs on April 12, 2021 (Pa1). According to the Complaint, the Plaintiff is the owner of a property (Block 184, Lot 4) which is located next to the Redevelopment Area on which it operates the Keansburg Amusement Park (Pa2). The Plaintiff also leases a portion of Block 184, Lot 3.01 (which is located within the designated Redevelopment Area) from the Borough and uses it as part of the Plaintiff's amusement park (Pa2).

The Plaintiff asserted four (4) counts for relief within its Complaint. They are:

- (i) that Ordinance 1667 should be invalidated because the Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan is substantially inconsistent with the Borough's master plan (Count 1) (Pa11-14);
- (ii) that Ordinance 1667 should be invalidated because the Borough did not follow the statutory steps necessary to adopt an ordinance that is substantially inconsistent with its master plan (Count 2) (Pa14-16);
- (iii) that Ordinance 1667 should be invalidated because the Borough's adoption of the ordinance was arbitrary, capricious, and inconsistent with sound zoning principles (Count 3) (Pa16-17); and
- (iv) that Ordinance 1667 should be invalidated because its adoption (and the approval of the Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan) violates the Public Trust Doctrine (Count 4) (Pa17-18).



The Borough filed an Answer to the Complaint on May 22, 2021 (Pa23). The Planning Board filed an Answer to the Complaint on May 25, 2021 (Pa39).

**E. The Discovery Motions**

Since actions in lieu of prerogative writs are normally tried on the record below and the parties could not initially agree upon the scope of discovery, if any, to be conducted in this case, the Trial Court directed the Plaintiff to file a motion delineating the discovery that it wished to take and for the Defendants to then respond to that motion. On July 28, 2021, the Plaintiff filed a motion seeking leave of court to take “traditional discovery” (Pa51). On September 2, 2021, the Borough filed papers opposing that motion, arguing that the Plaintiff had failed to satisfy its burden to delineate the discovery that it sought to take and to show why leave of court should be granted to take any discovery (Pa58-107). On September 10, 2021, Judge Acquaviva entered an Order denying the Plaintiff’s motion without prejudice (Pa54).

On October 4, 2021, Judge Acquaviva entered an Order requiring the Plaintiff to re-file a motion seeking leave of court to take discovery by no later than October 20, 2021 (Pa56). The Plaintiff thereafter filed its motion, but characterized it as a motion for reconsideration of the Trial Court’s prior ruling regarding discovery (Pa108-197). The Borough again filed papers opposing the Plaintiff’s motion, but agreeing to some limited discovery (Pa198-223). On November 19, the Trial Court

held argument on the Plaintiff's reconsideration motion (4T). On that same date, the Trial Court entered an Order denying the Plaintiff's reconsideration motion and establishing a schedule for the completion of discovery and the submission of expert reports (Pa1716).

**F. The Partial Summary Judgment Motions On The Public Trust Doctrine Claims**

On February 17, 2022, the Plaintiff filed a motion seeking partial summary judgment on the Public Trust Doctrine claims that it asserted within Count Four of its Complaint (Pa224-425).<sup>3</sup> On March 24, 2022, the Borough filed opposition to the Plaintiff's motion for partial summary judgment and cross-moved for summary judgment in favor of the Borough dismissing the Plaintiff's Public Trust Doctrine claims (Pa426-500).

The Trial Court heard argument from counsel on these summary judgment motions on April 7, 2022 (5T). On that same date, Judge Acquaviva issued an Order denying the Plaintiff's motion for partial summary judgment and granting the Borough's cross-motion for summary judgment along with a statement of the reasons for his decision (Pa1718; Pa1720). In reaching this determination, the Trial Court concluded that the adoption of the ordinance approving the Second

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<sup>3</sup> The Plaintiff's motion papers erroneously sought partial summary judgment on the claims asserted within Count Three of its Complaint, but it is clear that the Plaintiff meant Count Four as that is the Count asserting Public Trust Doctrine claims.

Amendment to the Redevelopment Plan merely established a redevelopment overlay option for someone wishing to develop properties within the Redevelopment Area but that development could also take place under the underlying zoning. The Trial Court recognized that the redevelopment plan is simply a zoning decision and not a development application, and that indeed the redevelopment plan requires anyone wishing to develop properties within the Redevelopment Area to file an application with the Planning Board before constructing any project. Thus, Judge Acquaviva concluded that these Public Trust Doctrine claims were premature and that the Plaintiff is essentially seeking to challenge a future conceptual development of property within the Redevelopment Area that might never actually happen. He noted that if a developer files a development application for a particular development project in the Redevelopment Area, then the Plaintiff would have an opportunity to pursue its Public Trust Doctrine arguments. Since the Plaintiff's Public Trust Doctrine claims were not ripe, the Trial Court granted the Borough's summary judgment motion dismissing these claims (Pa1724-1728).

The Plaintiff subsequently filed a motion for reconsideration of the Trial Court's Order denying the Plaintiff's motion for partial summary judgment and granting the Borough's cross-motion for summary judgment on the Public Trust Doctrine claims (Pa503). This motion was opposed by the Borough. On June 10, 2022, Judge Acquaviva held oral argument on the Plaintiff's reconsideration motion

(6T). On that same date, the Trial Court entered an Order denying the Plaintiff's reconsideration motion (Pa1729).

**G. The Parties' Pre-Trial Submissions**

Pursuant to a Scheduling Order entered by the Trial Court, the parties were directed to submit pre-marked joint exhibits and trial briefs to the Court. Counsel for the parties conferred and submitted joint exhibits to the Trial Court which were marked as J-1 through J-13 (Pa68; Pa533-1482). Counsel for the parties also submitted trial briefs in accordance with the schedule established by the Trial Court.

The Plaintiff's trial brief indicated that even though the Trial Court had dismissed the Plaintiff's Public Trust Doctrine claims, the Plaintiff still intended to present evidence at trial regarding alleged violations of the Public Trust Doctrine by the Borough. The Borough therefore filed a motion in limine to bar the presentation of any testimony regarding alleged Public Trust Doctrine violations by the Borough (Pa528; Pa530). That motion in limine was argued on the first day scheduled for trial (i.e. February 27, 2023). After considering the arguments of counsel, Judge Acquaviva granted the Borough's motion in limine, concluding that the Plaintiff's Public Trust Doctrine claims had previously been dismissed with prejudice through his prior rulings in the case (7T, pp. 4-8; Pa1731).

## H. The Trial And The Court's Decision

Significantly, prior to scheduled trial date in this matter, the Plaintiff's counsel contacted counsel for the Defendants and proposed that the parties submit the case to the Trial Court "on the papers" and not present any live testimony from witnesses at trial. Both counsel for the Defendants agreed with the Plaintiff's proposal which was then confirmed in e-mail correspondence with Judge Acquaviva's chambers. Before hearing any argument by counsel on the substantive issues at trial, the Trial Court asked counsel for the parties to confirm their agreement that the trial would proceed "on the papers" with no live testimony from witnesses and they all did so (7T, p. 9). Thus, the Trial Court evaluated the Plaintiff's claims asserted through Counts 1-3 of its Complaint based upon a record comprised of joint exhibits J-1 through J-13 (Pa68; Pa533-1482), the transcripts of the proceedings before the Planning Board and Borough Council (1T-3T), the report of the Borough's expert planner Stan Slachetka (Pa513-527; Pa1483-1498), the report of the Plaintiff's expert planner Andrew Thomas with exhibits (Pa300-425), and assorted additional exhibits submitted by the Plaintiff at trial and marked as Exhibits 1-14 (Pa1499-1688).

After hearing oral argument from counsel for the parties on the remaining issues in the case, Judge Acquaviva reserved decision and indicated that he would render a decision in the near future (7T, p. 55). The following day, on February 28,

2023, Judge Acquaviva entered an Order dismissing the Plaintiff's remaining claims asserted within Counts 1-3 of its Complaint (Pa1733) along with a statement of reasons for this decision (Pa1734-1750).

**I. The Appeal**

On April 12, 2023, Jersey Shore filed a Notice of Appeal (Pa1705). Subsequently, on April 17, 2023 Jersey Shore filed an Amended Notice of Appeal (Pa1765).

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE BOROUGH DISMISSING THE PLAINTIFF'S PUBLIC TRUST DOCTRINE CLAIMS**

In Count Four of its Complaint, Jersey Shore asserted that the Borough's adoption of Ordinance 1667 approving the Second Amendment to the Redevelopment Plan violated the Public Trust Doctrine. For the reasons set forth more fully below, the Trial Court properly found that these claims were premature and granted summary judgment to the Borough dismissing these claims.

##### **A. The Public Trust Doctrine Laws**

In order to evaluate the merit—or, in this instance, the lack of merit—of Jersey Shore's claims that the Borough's adoption of Ordinance 1667 approving the Second Amendment to the Redevelopment Plan violated the Public Trust Doctrine laws, it is first necessary to analyze what these laws say. This section of the brief provides that analysis.

The New Jersey Legislature codified the common law Public Access Doctrine into statutory law so as to provide the New Jersey Department of Environmental Protection (the "NJDEP") with express statutory authority to regulate public access to tidal waters and adjacent shorelines. The Legislature passed this law following Appellate Court decisions which found that the NJDEP lacked the express authority

to enact the public access rules and regulations pertaining to Coastal Zone Management found at N.J.A.C. 7:7-9.48 and N.J.A.C. 7:7-16.9. See Borough of Avalon v. N.J. Dep't of Env'tl. Prot., 959 A.2d 1215 (N.J. Super. Ct. App. Div. 2008); Hackensack Riverkeeper, Inc. v. N.J. Dep't of Env'tl. Prot., 128 A.3d 749 (N.J. Super. Ct. App. Div. 2015). With the passage of the law, the NJDEP now has the express authority and duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law. N.J.S.A. 13:1D-150.

In its summary judgment motion, Jersey Shore argued the Borough's adoption of this amendment to the redevelopment plan violated the Public Trust Doctrine because the Borough did not consider public beach access issues when it adopted this redevelopment plan amendment. While the Borough may not have adopted a Public Access Plan as described within the regulations adopted by the NJDEP, the argument that the Borough did not consider public beach access issues is simply untrue. To the contrary, Section 3.3.5 of the redevelopment plan overlay is entitled "Beach or Waterfront Access Improvements". That section indicates that:

Substantial improvements to pedestrian access to the beach or waterfront via the baywalk are desired. The redeveloper shall extend the north-eastern end of the baywalk northeasterly to reach the existing go-kart section and proposed parking area . . . This will enhance access to the beach and public open space areas. Additional improvements may include, but need not be limited to, lighting, signage, plantings, seating, and amenities that formalize access points from the street. Enhanced visual access of the waterfront and bay through the provision



of gazebos or structures for the passive enjoyment of waterfront views may also be allowed under this Redevelopment Plan.

(Pa557).

More significantly for purposes of this analysis, however, Jersey Shore's summary judgment motion was premised upon its allegation that the Borough's actions violated the Public Trust Doctrine regulations adopted by the NJDEP as set forth within N.J.A.C. 7:7-9.48 and N.J.A.C. 7:7-16.9. Notably, these regulations do not actually require municipalities to do anything. Rather, the regulations encourage municipalities to consider and to adopt Public Access Plans governing public access to the municipal waterfronts. See N.J.A.C. 7:7-16.9(c) ("Municipalities are encouraged to develop and submit to the Department an application for approval of a Municipal Public Access Plan"). The regulations go on to establish different procedures for permit applications for development within municipalities that have an adopted Municipal Public Access Plan and for those that do not. By way of summary, these regulations generally provide that:

- (i) The public trust doctrine provides for public access to beaches, etc. and must be considered in all development applications;
- (ii) When applicants seek permits from the NJDEP, public access will be considered;
- (iii) Municipalities are encouraged (but not required) to adopt Public Access Plans;
- (iv) If the municipalities adopt a Public Access Plan which has been approved by the NJDEP, then any subsequent permit applications for

development within that municipality will be approved by the NJDEP if what the applicant proposes is consistent with the municipality's Public Access Plan; and

(v) If the municipalities have not adopted a Public Access Plan approved by the NJDEP, then any subsequent permit applications filed with the NJDEP will be considered based upon public trust doctrine/statute/rule provisions.

See generally N.J.A.C. 7:7-16.9.

Thus, the process established within these regulations is similar in concept to the pre-screening process at an airport. Those that have been pre-screened then can go straight to the gate, while those that have not will have to engage in a more rigorous screening process before being granted access to the gate. Similarly, if a developer seeking to build something within a municipality that has a NJDEP-approved Public Access Plan and files a permit application with the NJDEP that conforms to the requirements of that Public Access Plan, then the process will be expedited and its application will be approved. If there is no NJDEP-approved Public Access Plan, however, then the NJDEP will have to consider and evaluate the public access provided by the development as part of the NJDEP permit application review process.

Significantly, this review process only occurs if there is a development application requiring an NJDEP permit or approval. See N.J.S.A. 13:1D-151 (providing that the Public Trust Doctrine Laws are triggered by the NJDEP's review of any "approval, permit, administrative order, or consent decree issued, or other

action taken, by the department” pursuant to Coastal Area Facility, Waterfront Development Act, the Wetlands Act of 1970, the Flood Hazard Area Control Act, and the federal Coastal Zone Management Act of 1972 is consistent with the public trust doctrine). Just as significantly, the MLU, the LHRL, and the NJDEP regulations pertaining to Coastal Zone Management all define the term “development” to mean the actual construction and the seeking of permits.

Specifically, the term “development” is defined under both the MLUL and the LHRL as “the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure, or of any mining, excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission may be required pursuant to the [MLUL].” N.J.S.A. 40A:12A-3 (LRHL); N.J.S.A. 40A:55D-4 (MLUL). The term “application for development” is also defined under the MLUL as “the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit . . .”. N.J.S.A. 40A:55D-3. Perhaps most significantly, the NJDEP rules and regulations that Jersey Shore accuses the Borough of violating only apply to obtaining CAFRA permits and for “any activity for which a coastal wetlands permit, waterfront development permit, or Federal

consistency determination is required....” (Pa160, citing to N.J.A.C. 7:7–1.5). None of these definitions apply to redevelopment plans, or redevelopment plan amendments, adopted by municipalities pursuant to the LRHL.

**B. The Borough’s Adoption Of A Redevelopment Plan Amendment**

The State Constitution specifically authorized the Legislature to give municipalities zoning power. N.J. Const. art. IV, § 6, ¶ 2. The Legislature exercised this power through the passage of the MLUL and the LRHL. Both of these statutes give municipalities the power to zone. Under the MLUL, a municipality may create zoning districts and establish the uses allowed in those zoning districts (such as a residential or commercial zone) and may establish zoning standards governing development within those zones (such as minimum lot sizes, maximum development densities and heights, setback requirements, and the like). Under the LRHL, a municipality may do the same thing by adopting a redevelopment plan to establish the zoning for a designated redevelopment area. See N.J.S.A. 40A:12A-7. Under the LRHL, the adoption of a redevelopment plan is essentially a legislative function of a municipal government, “akin to the adoption of a master plan or a zoning ordinance.” Milford Mill 128, LLC v. Borough of Milford, 400 N.J. Super. 96, 110 (N.J. Super. A.D., 2008); see also N.J.S.A. 40A:12A–7.

The LRHL goes on to provide that a municipality which has adopted a redevelopment plan establishing zoning for a redevelopment area may amend that

zoning at any time by following the process for a redevelopment plan amendment (which, under N.J.S.A. 40A:12A-7, is essentially the same process as for the adoption of the initial redevelopment plan).

Only after a redevelopment plan is adopted pursuant to N.J.S.A. 40A:12A-7, can a redeveloper take steps towards actual work on a redevelopment project. The LRHL defines “redevelopment project” as “any work or undertaking pursuant to a redevelopment plan; such undertaking may include any buildings, land, including demolition, clearance or removal of buildings from land, equipment, facilities, or other real or personal properties which are necessary, convenient, or desirable appurtenances, such as but not limited to streets, sewers, utilities, parks, site preparation, landscaping, and administrative, community, health, recreational, educational, and welfare facilities, and zero-emission vehicle fueling and charging infrastructure.” N.J.S.A. 40A:12A-3.

Notably, the adoption of a redevelopment plan only establishes the zoning for the redevelopment area. It does not permit the development of properties located within the redevelopment area. To the contrary, the LRHL expressly states that “[a]ll applications for development or redevelopment of a designated redevelopment area or 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. Thus, the redevelopment plan establishes the zoning for the redevelopment area, but anyone wishing to develop properties within the redevelopment area must still file a development application with the municipal planning board. Likewise, development within a redevelopment area normally also cannot occur unless the developer agrees to sign a redevelopment agreement with the municipality governing its development of properties within the area. See N.J.S.A. 40A:12A-8(f).

**C. Application Of These Laws To The Facts Of This Case**

Here, all that the Borough has done is to adopt a zoning ordinance establishing zoning standards for an overlay redevelopment zone for this Redevelopment Area. The Borough has not filed an application for the development of any properties within the Redevelopment Area (and, indeed, the designated redeveloper will be the entity that will ultimately have to file a planning board application seeking approval to develop these properties and will be seeking any necessary outside agency approvals for its development). For these reasons, the underlying premise of Jersey Shore’s summary judgment motion—that the Borough’s adoption of a redevelopment plan amendment changing the zoning of the properties in the Redevelopment Area violates the Public Trust Doctrine Laws—is simply wrong. Those laws are only triggered by a development application seeking NJDEP permits to build something. While that may occur at some point in the future, it has not

occurred yet. Therefore, Jersey Shore's Public Trust Doctrine claims are premature as no development application has been filed yet.

The prematurity of Jersey Shore's Public Trust Doctrine claims is further underscored by a review of the language of the Second Amendment to the Redevelopment Plan. The Second Amendment to the Redevelopment Plan does not require that development of properties located within the Redevelopment Area must comply with the redevelopment standards set forth within the redevelopment plan. To the contrary, the redevelopment plan creates an "optional development alternative" to the existing underlying Zoning Districts (Pa550). Thus, someone wishing to develop property located within this Redevelopment Area has the option of either developing the property in accordance with the standards of the underlying zoning or in accordance with the redevelopment overlay zoning standards. Jersey Shore's arguments regarding the alleged violation of the Public Trust Doctrine focus only upon the development authorized within the redevelopment overlay zoning, without recognizing that it is an option that may never be pursued by a redeveloper.

Moreover, the Public Access Doctrine Laws establish the NJDEP as the entity responsible for protecting and expanding public access, not private actors such as Jersey Shore. It is the NJDEP that has the authority to determine if development applications and permits meet the standards as set forth in the public access rules and regulations pertaining to Coastal Zone Management found at N.J.A.C. 7:7-9.48

and N.J.A.C. 7:7-16.9. It is not up to Jersey Shore to make conclusory determinations that a reduction in public parking violates the Public Trust Doctrine. Rather, it is the NJDEP's responsibility to review permits and applications for development and to make determinations regarding reasonable public access pursuant to N.J.A.C. 7:7-9.48 and N.J.A.C. 7:7-16.9. Put simply, there is nothing that the NJDEP can evaluate at this point in time for compliance with the Public Trust Doctrine as there are no plans, no site applications, no permit applications, no detailed drawings or renderings of what is sought to be built.

**D. The Trial Court's Grant Of Summary Judgment To The Borough Dismissing The Plaintiff's Public Trust Doctrine Claims**

On April 7, 2022, Judge Acquaviva issued an Order denying the Plaintiff's motion for partial summary judgment on the Plaintiff's Public Trust Doctrine claims and granting the Borough's cross-motion for summary judgment along with a statement of the reasons for his decision (Pa1718; Pa1720). In making this determination, the Trial Court recognized that the cited regulations delegate authority to the NJDEP to determine compliance with the Public Trust Doctrine when a development application is filed, but noted that:

. . . Jersey Shore's contention here is premature. The Ordinance and Plan adopted by Keansburg do not seek DEP approval of anything. Although a development project may be contemplated, same is theoretical. Nothing has been proposed to DEP and, as such, any challenge to the theoretical, future, contemplated development project cannot yet be analyzed under the Public Trust Doctrine as codified in statute and further promulgated in DEP's regulations.



(Pa1727).

The Trial Court went on to find that the questions of whether a particular project violates the Public Trust Doctrine:

. . . must be analyzed vis-à-vis the regulatory rubric adopted by DEP – on a case-by-case basis when a development application seeking DEP approval is pending. That question – based on a tangible application requesting DEP action will then proceed through the well-worn, traditional regulatory process to the Office of Administrative Law, Commissioner, and Appellate Division – not via a prerogative writ application to the Superior Court, Law Division on a municipal ordinance altering zoning that could lead to such a future development project. Thus, because Jersey Shore’s theoretical concern is not yet ripe, Count Four of Jersey Shore’s challenge to the Ordinance and Plan as being invalid vis-à-vis the Public Trust Doctrine must be rejected as a matter of law.

(Pa1727-1728).

For all of the reasons set forth in Point I herein, the Trial Court’s ruling on these summary judgment motions was correct. The Order granting summary judgment to the Borough and dismissing the Plaintiff’s Public Trust Doctrine claims should be affirmed on appeal.

## POINT II

### **THE TRIAL COURT PROPERLY CONCLUDED THAT THE BOROUGH'S ADOPTION OF THE ORDINANCE APPROVING THE SECOND AMENDMENT TO THE REDEVELOPMENT PLAN WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO LAW**

Jersey Shore asserted three additional claims for relief against the Borough which were the subject of the trial held before Judge Acquaviva on February 27, 2023. In Count One of its Complaint, Jersey Shore alleged that Ordinance 1667 should be invalidated because the Second Amendment to the Redevelopment Plan is substantially inconsistent with the Borough's master plan. In Count Two of its Complaint, Jersey Shore alleged that Ordinance 1667 should be invalidated because the Borough did not follow the statutory steps necessary to adopt an ordinance that is substantially inconsistent with its master plan. Finally, in Count Three of its Complaint, Jersey Shore alleged that Ordinance 1667 should be invalidated because the Borough's adoption of the ordinance was arbitrary, capricious, and inconsistent with sound zoning principles. (Pa11-17).

The Trial Court properly found, based upon substantial credible evidence in the record, that all of these inter-related counts should be dismissed because Jersey Shore failed to demonstrate that the Second Amendment to the Redevelopment Plan was substantially inconsistent with the Borough's master plan or that its adoption was arbitrary, capricious or unlawful. The Trial Court's entry of judgment

dismissing Counts 1-3 of the Plaintiff's Complaint should therefore be affirmed on appeal.

**A. The Trial Court Properly Determined That The Legislative Actions Taken By The Planning Board And The Borough Are Entitled To Deference And Should Not Be Overturned Absent A Showing That They Were Arbitrary, Capricious, Or Unlawful**

The Plaintiff's Complaint challenges the validity of two actions taken by public entities: (i) the decision by the Planning Board that the proposed ordinance authorizing the Second Amendment to the Redevelopment Plan was substantially consistent with the Borough's master plan; and (ii) the decision by the Borough Council that the proposed ordinance authorizing the Second Amendment to the Redevelopment Plan to accept that recommendation and to adopt Ordinance 1667 approving the Second Amendment to the Redevelopment Plan.

**1. The Planning Board's Determination Was Entitled To Great Deference**

"A planning board is a subordinate municipal agency whose role is limited "to effectuat[ing] the goals of the community as expressed through its zoning and planning ordinances." Kaufmann v. Planning Bd. for Twp. of Warren, 110 N.J. 551, 564 (1988); see also PRB Enters., Inc. v. South Brunswick Planning Bd., 105 N.J. 1, 7-8, (1987) and Willoughby v. Planning Bd. of Twp. of Deptford, 306 N.J. Super. 266, 279 (App. Div. 1997). The municipal planning board plays a critical role in

determining if a proposed redevelopment plan is consistent with the municipality's master plan.

Specifically, N.J.S.A. 40A:12A-7 requires the referral of any proposed redevelopment plan, or amendment thereto, to the municipal planning board for review as to consistency with the municipality's master plan. It is the planning board's responsibility to transmit a report to the governing body containing its recommendation concerning the redevelopment plan. N.J.S.A. 40A:12A-7(e). The report should contain "an identification of any provisions in the proposed redevelopment plan which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate." N.J.S.A. 40A:12A-7(e).

Once the municipal planning board completes its consistency review, its determination must be given "deference and great weight". See Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 383 (1995). "The factual determinations of the planning board are presumed to be valid and the exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable." Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Borough of Rocky Hill, 406 N.J. Super. 384, 411 (App. Div. 2009). "The arbitrary and capricious standard is analogous to the substantial evidence standard." Id. A court's objective on review is "to determine if the Board

properly exercised its discretion,” and is not to “substitute” its judgment for that of the board's. Id. at 411-12 (citations omitted).

Here, the Borough Council referred the Second Amendment to the Redevelopment Plan to the Planning Board to review the redevelopment plan's consistency with the master plan. The Planning Board reviewed the Second Amendment to the Redevelopment Plan and made the determination, after reviewing the plan and hearing testimony about it at a public hearing, that the Second Amendment to the Redevelopment Plan was substantially consistent with the Borough's master plan. The reasons for its determination were explained within the report that the Planning Board attorney submitted to the Borough Clerk (Pa573-576). This determination is entitled to great deference under law.

**2. The Borough's Decision To Adopt Ordinance 1667 Approving The Second Amendment To The Redevelopment Plan Was Also Entitled To Great Deference**

In addition to the deference that must be provided to the Planning Board's consistency review determination, the Borough Council's decision to adopt Ordinance 1667 is also entitled to great deference. There is a strong presumption in favor of the validity of all legislative enactments, including municipal ordinances. Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994); see also Knight v. Hoboken Rent Leveling Bd., 332 N.J. Super. 547 (App. Div. 2000) (concluding that the same presumption of validity applies to regulations promulgated by a municipal agency).

A court reviewing an ordinance should not question the wisdom of the ordinance, and if the ordinance is debatable, it should be upheld. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973).

The burden of establishing the invalidity of the ordinance is upon the person attacking it. Vickers v. Township Comm. of Gloucester Twp., 37 N.J. 232 (1962). While the presumption may be rebutted, the affirmative burden placed upon a party seeking to overturn a statute or ordinance is a heavy one. Fanelli, supra, 135 N.J. at 589. “This presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest.” Hutton Park Gardens v. Town Council of Town of W. Orange, 68 N.J. 543, 565 (1975).

This is true even if there is no explicit statement of purpose contained within the ordinance. “Even if a court cannot ascertain the actual purpose of the statute, it should sustain the statute if it has any conceivable rational purpose.” Auge v. N.J. Dep't. of Corr., 327 N.J. Super. 256, 266 (App. Div.), certif. denied, 164 N.J. 559 (2000). In other words, a party challenging the validity of an ordinance must “negative every conceivable basis which might support [the legislative arrangement].” Madden v. Kentucky, 309 U.S. 83, 88 (1940).

Therefore, it was Jersey Shore's burden not only to overcome the deference accorded to the Planning Board's determination that the Second Amendment to the Redevelopment Plan was substantially consistent with the Master Plan, but to also overcome the presumption of validity accorded to the Borough's Council's decision to adopt the Second Amendment to the Redevelopment Plan.

**3. The Trial Court Properly Recognized The Presumption Of Validity Accorded To The Actions Taken By The Planning Board And The Borough**

In the Statement of Reasons issued with the final judgment in this action, the Trial Court recognized the presumption of validity accorded to the actions taken by the Planning Board and the Borough Council and the limited role that the court must play in reviewing these actions. The Trial Court noted that:

The court's role is not subjective. It is not to determine whether the Plan was the best plan that could be put forward. The court's role is not to develop a better plan. Nor is the court's role to determine whether the Plan is completely compliant with the Master Plan. Rather, the court's role is far more circumscribed. The limited question before the court is whether Keansburg's decision was amply supported by facts of record such that it is not arbitrary or capricious. As the well-developed record demonstrates, it is.

(Pa1742). As set forth more fully below, there was substantial credible evidence in the record below supporting these determinations.

**B. The Trial Court Properly Determined That The Ordinance Approving The Second Amendment To The Redevelopment Plan Was Not Substantially Inconsistent With The Borough's Master Plan**

N.J.S.A. 40A:12A-7(d) of the LRHL requires that:

All provisions of the redevelopment plan shall be **either substantially consistent with the municipal master plan or designed to effectuate the master plan**; but the municipal governing body may adopt a redevelopment plan which is inconsistent with or not designed to effectuate the master plan by affirmative vote of a majority of its full authorized membership with the reasons for so acting set forth in the redevelopment plan.

N.J.S.A. 40A:12A-7(d) (emphasis added).<sup>4</sup>

Notably, this statute does not require that a redevelopment plan must conform in all aspects to the master plan and that there can be no deviations or inconsistencies. Rather, it merely requires that a redevelopment plan be substantially consistent with the master plan. See Riya Finnegan LLC v. Twp. Council of Twp. of S. Brunswick, 197 N.J. 184, 192, (2008); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 384 (1995) (both of which conclude that the requirement that zoning ordinances be “substantially consistent” with the master plan permits some inconsistency, provided that it does not substantially or materially undermine or distort basic provisions and objectives of master plan).

Additionally, N.J.S.A. 40A:12A-7(d) indicates that a redevelopment plan or plan amendment shall be either substantially consistent with the municipal master plan or designed to effectuate the master plan. Thus, one or the other is sufficient.

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<sup>4</sup> The MLUL has a similar “consistency review” requirement, see N.J.S.A. 40:55D-26, but in this instance the LRHL provisions would apply since the zoning ordinance at issue is a redevelopment plan.



Lastly, even if a redevelopment plan is not substantially consistent with the municipal master plan or is not designed to effectuate the master plan, that is not the end of the analysis. Instead, a municipal governing body can adopt a redevelopment plan which is inconsistent with a master plan or which is not designed to effectuate the master plan so long as it follows the procedural steps to do so that are outlined within N.J.S.A. 40A:12A-7(d).

With regard to the issue of whether the Second Amendment to the Redevelopment Plan was substantially consistent with the Borough's master plan, the Trial Court noted within its Statement of Reasons that the Second Amendment to the Redevelopment Plan discusses, in substantial detail, its "Relationship to Local Objectives" as described within the Borough's master plan documents (Pa1738).

Specifically, the 1998 Master Plan set forth a variety of goals and objectives including:

- develop and maintain a satisfactory level of public facilities and services;
- provide sufficient space in appropriate locations for residential, recreational, commercial, and open space use;
- promote a desirable visual environment;
- protect wetlands and areas with scenic, cultural, and recreational values;
- encourage development that contributes to the revitalization of the community; and

-guide waterfront development to maintain visual and pedestrian access to the Bayshore for the general public while encouraging development that is suitably scaled, compatible with public facilities and services, and appropriate to a waterfront location.

(Pa637-639)

Moreover, the 1998 Master Plan contained the following policy statement:

-guide waterfront development, which protects the public need for shore protection and flood control, visual and pedestrian access to the waterfront, recreation and open space, and economic development. The Borough should encourage appropriate use of waterfront locations and coordinate its efforts with the County's plan to improve waterfront access along the Raritan Bayshore.

(Pa640)

The Master Plan was reexamined in 2003. The 2003 reexamination specifically identified the bayfront areas as "an asset for the revitalization of the Borough." Further it made two salient recommendations:

-development and redevelopment of both public and private properties for the long term economic health of the community in the bayfront area should remain an important factor in the economic health of the community. Efforts to protect the beach and dunes, enhance public access, and expose the waterfront's potential should be encouraged and coordinated with State and County plans.

-it should remain the Borough's intention to explore the opportunities associated with mixed-use development and other commercial and recreational uses that could enhance the waterfront's potential.

(Pa716-740).

Most recently, the Master Plan was reexamined in 2015. That reexamination made the following relevant recommendation:

-encouraging major redevelopment along the Borough's mixed use commercial residential area (extending along Beachway Avenue from Raritan Avenue to the Waackaack Creek) that provides for a mix of uses designed according to an overall plan that enhances public access to the waterfront, protects beaches and dunes, and contributes substantially to Keansburg's economic well-being; and

-enhancing the bayfront as an open space and recreation area by planning for linear parks with recreation areas at major access points to the beach.

(Pa795-796).

With the foregoing as backdrop, the plan amendment states that the redevelopment overlay zone "envisions uses that: complement and enhance the pattern of development as well as public enjoyment and use of the waterfront area; increase pedestrian activity, and; create additional tourist-compatible uses." Specifically, it seeks to "accommodate a mix of higher density residential uses with supportive neighborhood retail services, regional commercial uses and services, and the enhancement and development of a variety of waterfront and recreational uses along the Raritan Bay shoreline." Through public and private ownership, the Plan will: develop year-round residential and recreational uses; increase opportunities for public access to the beachfront; improve parking areas; and upgrade infrastructure. (Pa539-572). Clearly, these goals and objectives are consistent with the goals and objectives set forth within the Borough's master plan documents cited above.

The Trial Court noted that there was testimony provided before the Planning Board from Borough Planner, Stan Slachetka, that the plan amendment ““is in fact consistent with the master plan . . . and designed to effectuate the Borough’s [M]aster [P]lan”, that the Planning Board ultimately concluded that “the proposed Ordinance Amendment (Ordinance No. 1667) is, in fact, consistent with the Borough’s Master Plan”, and that the Borough Council heard testimony that the plan amendment was “consistent with the Borough’s vision for the redevelopment of the Beachway tract” and then voted to adopt Ordinance 1667 approving the Second Amendment to the Redevelopment Plan. The Trial Court stated that:

Based on the foregoing alone, the court concludes that the Resolution adopting the Plan was supported by ample facts and was in no way arbitrary or capricious. Pullen v. S. Plainfield Planning Bd., 291 N.J. Super. 1, 7 (App. Div. 1996) (board factual conclusions “are entitled to great weight and like those of an administrative body should not be disturbed unless there is insufficient evidence to support them”); Davis Enterprises v Karpf, 105 N.J. 476, 485 (1987).

(Pa1741).

While this could have been the end of the analysis, the Trial Court went on to address six alleged “inconsistencies” which Jersey Shore argued existed between the Second Amendment to the Redevelopment Plan and the Borough’s master plan. The Trial Court rejected all of these arguments, finding that these were not inconsistencies and that they certainly did not cause the Second Amendment to the Redevelopment Plan to not be substantially consistent

with the Borough's master plan. In reaching this determination, the Trial Court noted that the Appellate Division has recognized that the term "substantially consistent" permits some inconsistency provided that any inconsistency does not materially undermine the fundamental objectives of the master plan. Victor Recchia Residential Construction v. Zoning Bd. of Adj. of Cedar Grove, 348 N.J. Super. 242, 251 (App. Div. 2001). The Trial Court properly concluded that there were not any inconsistencies herein which materially undermine the fundamental objectives of the master plan (Pa11742-1746).

The Trial Court noted that some of the alleged "inconsistencies" identified by the Plaintiff overlapped with each other. The Trial Court therefore combined them into four topics which it analyzed as follows.

**1. Increased Density**

The first "inconsistency" that Jersey identified between the plan amendment and the Borough's master plan is the increase in density between the redevelopment overlay (if that is the development option chosen by a redeveloper) and the Borough's master plan. In rejecting this argument, the Trial Court noted that as early as 1988, the Borough's master plan had recognized the need to guide waterfront development of the Borough's bayfront in order to advance economic development. The Trial Court also indicated that the plan amendment:

. . . is directly on-point with that 2015 recommendation to commit to a major economic re-development of the area. Suffice it to say that implicit in a substantial mix-use development would be an increase to density in the area. Any argument to the contrary is putting one's head in the proverbial sand.

True, reasonable minds could differ regarding scope – that is, is doubling density appropriate or is tripling density appropriate. But such a subjective value assessment is not for this court, but rather for local officials. On this issue, Keansburg has spoken. And that determination is substantially compliant with the Master Plan and amply supported by the record here.

(Pa1743). Thus, the Trial Court recognized that the density of the redevelopment plan overlay was consistent with the Borough's master plan goals and objectives, and that the Borough's discretionary decision regarding such density should not be disturbed by the court.

## **2. Height Of Buildings**

The Plaintiff also argued that the height of the buildings allowed in the redevelopment overlay zone was inconsistent with the Borough's master plan and that buildings of that height would obstruct view of the bay. The Trial Court rejected this argument, indicating that it was intertwined with the density argument and that building up in this area is consistent with the Borough's 2015 Master Plan Re-examination Report. The Trial Court also noted that each residential unit also creates a waterfront view of Raritan Bay for those future residents of and visitors to Keansburg – a fact consistent with enhancing the visual environment which is one of the Borough's master plan goals. (Pa1743). For these reasons, the Trial

Court found that the building height allowable in the redevelopment overlay zone was substantially consistent with the Borough's master plan goals and objectives, and that the Borough's discretionary decision regarding such height should not be disturbed by the court.

### **3. Elimination Of Parking**

The Plaintiff also argued that a development built under the redevelopment overlay option would eliminate public parking spaces and would be inconsistent with the Borough's master plan. In rejecting that argument, the Trial Court noted that any redevelopment of Sub-Area 1 of the Redevelopment Area must comply with Borough ordinance parking requirements, while the redevelopment overlay zoning of Sub-Area 2 requires the redeveloper to construct 264 parking spaces on the ground floor of the buildings and through street and surface parking along with a new 150 space municipal parking lot to replace the 300 space municipal parking lot that would be removed through this redevelopment project (Pa1744). Thus, there were factual issues as to whether parking opportunities are being eliminated or increased by the redevelopment overlay zoning, and also about whether the existing 300 space lot is ever maximized or used during off-season months (Pa1744).

More importantly, the Plaintiff did not satisfy its burden of proof to demonstrate that any changes to the parking in the redevelopment area caused the plan amendment to be substantially inconsistent with the fundamental objectives of

the master plan. For these reasons, the Trial Court’s rejection of this argument was warranted.

#### **4. Conservation And Public Access**

Lastly, the Plaintiff argued that the redevelopment overlay zoning will reduce conservation and public access, including views of the waterfront. In rejecting this argument, the Trial Court noted that the plan amendment is “intended” to develop “a variety of waterfront and recreational uses along the Raritan Bay shoreline” to contribute to the public welfare” to maximize potential, by the development of “year-round . . . recreational uses.” The redevelopment plan amendment also expressly observes that it will “increase[] opportunities for public access to the beachfront.” (Pa1745).

In addition to this generic language, the redevelopment overlay zoning contained within the plan amendment identifies specific improvements to be made to the beach and to waterfront access. For example, the plan requires an extension to the north-eastern end of the baywalk northeasterly to reach the existing go-kart section and proposed parking area – a development expressly designed to “enhance access to the beach and public open space areas.” It also states that the redevelopment overlay zoning includes “[e]nhanced visual access of the waterfront and bay through the provision of gazebos and structures for the passive enjoyment



of waterfront views” – again, contradicting Jersey Shore’s contention that views will be eliminated.

Based upon all of the above, the Trial Court concluded that:

Put simply, Jersey Shore seeks to maintain existing waterfront uses. Keansburg, however, presents a contrary vision, emphasizing the waterfront as a year-round destination. It is not for this court to determine whose vision is better, but only whether Keansburg’s is supported by the factual record. It is.

(Pa1745). For these reasons, the Trial Court found that the Plaintiff’s arguments regarding public access were without merit and did not demonstrate that the plan amendment was substantially inconsistent with the Borough’s master plan. Rather, the decision on how to provide such access was a discretionary decision by the Borough which should not be disturbed by the court.

**C. Since The Ordinance Approving The Second Amendment To The Redevelopment Plan Was Not Substantially Inconsistent With The Borough’s Master Plan, There Was No Requirement For The Borough Council To Follow The Statutory Procedures Necessary To Adopt An Inconsistent Ordinance**

In Count Two of its Complaint, the Plaintiff contends that Ordinance 1667 should be invalidated because the Borough did not follow the statutory steps necessary to adopt an ordinance that is substantially inconsistent with its master plan. The flaw in this argument is self-evident. This claim is premised upon the assumption that the Second Amendment to the Redevelopment Plan is not substantially consistent with the municipal master plan and is not designed to

effectuate the master plan. Since the Second Amendment to the Redevelopment is substantially consistent with the municipal master plan and is designed to effectuate the master plan, there was no need for the Borough to follow the process set forth within the statute to adopt a zoning ordinance which is inconsistent with the master plan. The Trial Court recognized this in its Statement of Reasons, concluding that Count Two of the Plaintiff's Complaint was without merit and should be dismissed (Pa1747). As this decision was supported by the record, it should be affirmed on appeal.

**D. The Trial Court Properly Dismissed Count Three Of The Plaintiff's Complaint**

In Count Three of the Complaint, the Plaintiff alleged that Ordinance 1667 should be invalidated because the Borough's adoption of the ordinance was arbitrary, capricious, and inconsistent with sound zoning principles. As the Trial Court found that there was substantial credible evidence in the record supporting the Borough's adoption of the ordinance approving the amendment to this redevelopment plan, the Trial Court concluded that the Plaintiff had failed to overcome the presumption of validity accorded to the Borough's legislative action and that this claim was also without merit (Pa1747-1749). As this decision was supported by the record, it should be affirmed on appeal.

**CONCLUSION**

For the foregoing reasons, the Trial Court's grant of summary judgment to the Borough dismissing Count Four of the Complaint, and the Trial Court's entry of judgment dismissing Counts One through Three of the Complaint, should be affirmed on appeal.

**Dilworth Paxson LLP**  
*Counsel for Respondents Borough of  
Keansburg and Borough Council of the  
Borough of Keansburg*

By: David A. Clark  
David A. Clark

Dated: December 8, 2023

JERSEY SHORE BEACH AND  
BOARDWALK COMPANY, INC.,  
A/K/A JERSEY SHORE BEACH &  
BOARDWALK, INC.

Plaintiff / Appellant

v.

BOROUGH OF KEANSBURG,  
A MUNICIPAL CORPORATION,  
AND BOROUGH COUNCIL OF THE  
BOROUGH OF KEANSBURG,  
AND PLANNING BOARD OF THE  
BOROUGH OF KEANSBURG

Defendants / Respondents.

:SUPERIOR COURT OF NEW JERSEY  
:APPELLATE DIVISION  
:DOCKET NO.: A-2379-22T4

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:  
:  
:  
:  
:On Appeal from Order dated  
February 28, 2023

:  
:Superior Court of New Jersey  
:Law Division-Monmouth County  
:Docket No.: MON-L-1262-21

:  
:  
: SAT BELOW:  
: Hon. Gregory L. Acquaviva, J.S.C.

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**BRIEF ON BEHALF OF DEFENDANT / RESPONDENT  
KEANSBURG PLANNING BOARD OF ADJUSTMENT**

---

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On the Brief  
Dated: December 4, 2023

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF JUDGMENTS, ORDERS, AND RULINGS .....	3
TABLE OF CITATIONS .....	3
TABLE OF CONTENTS TO APPENDIX .....	4
PRELIMINARY STATEMENT .....	5
<p style="padding-left: 40px;">The actions of the Respondent Keansburg Planning Board of Adjustment were correct and lawful, and should not be disturbed / overturned.</p>	
PROCEDURAL HISTORY .....	8
TABLE OF PLANNING BOARD HEARING DATES.....	12
STATEMENT OF FACTS .....	12
LEGAL ARGUMENT	
<u>POINT 1</u>	
<p style="padding-left: 40px;">The decision of the Borough Council of the Borough of Keansburg to adopt a Second Amendment to the Beachway Avenue Waterfront Redevelopment Plan was legally justified .....</p>	
	16
<u>POINT 2</u>	
<p style="padding-left: 40px;">The Respondent Planning Board decision (holding that the proposed Amendment No. 2 to the Beachway Avenue Waterfront Redevelopment Plan was consistent with the Borough’s Master Plan) complied with all Procedural and Substantive Requirements of New Jersey Law .....</p>	
	17

The Planning Board Hearing process was effectuated in accordance with Prevailing Provisions of New Jersey Law

- i. Board Representatives provided a detailed on-the-Record discussion as to the legal process involved in adopting an Amendment to a Redevelopment Plan.....19
- ii. The communication from the Board Attorney, dated February 17, 2021, accurately captured the essence of the Respondent Board vote / determination.....31
- iii. The communication from the Board Attorney, as aforesaid, satisfied the Prevailing Legal Requirements associated with the statutorily mandated process for adopting an Amendment to a Redevelopment Plan.....34
- iv. The Respondent Planning Board specifically authorized the Board Attorney to issue a confirming letter to the Borough Council of the Borough of Keansburg.....36
- v. Had the Board Attorney not sent the February 17, 2021 communication to the Borough of Keansburg, then, in that event (because of the pending Governing Body Meeting), the Planning Board would have had no meaningful participation in the Development Plan Amendment process.....36
- vi. Given the extensive and repeated Litigation associated with the general matter and related matters, the Respondent Planning Board Members are well versed in the subject Redevelopment Plan and Amendments associated therewith.....38

POINT 3

The Land Use Board Finding / Determination is entitled to a presumption of validity ..... 39

**Page**

POINT 4

Any potential reversal of the Planning Board Decision should,  
at a minimum, be accompanied by an Order for a Remand. . . . . 40

POINT 5

The Trial Court properly analyzed the overall merits of the Plaintiff /  
Appellant Appeal – and there is no reason to disturb the Trial Court  
Decision . . . . . 41

CONCLUSION . . . . . 48

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS**

Decision of the Honorable Gregory L. Acquaviva, J.S.C.  
Dated February 28, 2023 (and associated Order) . . . . . Pa 1733-1746

**TABLE OF CITATIONS**

Burbridge vs. Mine Hill Township, 117 N.J. 376, 385 (1990). . . . . 17

Kramer vs. Board of Adj., Sea Girt 45 N.J. 268, 296 (1965) . . . . . 17

Kaufmann vs. Planning Board for Warren Township 110 N.J.  
551, 558 (1988) . . . . . 18

New Brunswick Cellular Telephone Company 270 N.J. Super. 122, 134,  
(Law Div. 1992) . . . . . 39

**Page**

Pullen vs. South Plainfield Planning Board  
291 N.J. Super. 303, 312 (Law Div. 1955), Aff'd 291, N.J.  
Super. 1, 6 (App. Div. 1996) ..... 39

Rexon vs. Board of Adjustment, Haddonfield 10 N.J. 1, 7 (1952) ..... 17

Rowatti vs. Gonchar 101 N.J. 46, 51 (1885) ..... 17, 18

Tirpac vs. Borough of Point Pleasant Beach Bd. of Adjustment  
and Borough of Point Pleasant Beach L-002 918-17) ..... 18

Ward vs. Scott 16 N.J. 16, 23 (1954) ..... 18, 39

Weiner vs. Board of Adjustment of Glassboro 144 N.J. Super.  
509, 516, (App. Div. 1976) Cert. denied, 73 N.J. 55 (1977) ..... 39

**Other Authorities:**

N.J.S.A. 40:A-12A-7 ..... 35, 36, 42

**TABLE OF CONTENTS TO APPENDIX**

The Respondent Land Use Board incorporates the Appendix of the Appellant.



**PRELIMINARY STATEMENT**  
**(Pertaining to Respondent, Keansburg Planning Board of Adjustment)**

**The actions of the Respondent Keansburg Planning Board of Adjustment were correct and lawful, and should not be disturbed / overturned.**

1. On or about February 22, 2006, the Borough of Keansburg adopted the Beachway Avenue Waterfront Redevelopment Plan.

2. On or about June 21, 2017, the Borough of Keansburg adopted an Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as Amendment No. 1). (Respectfully, the said Amendment has no significant impact on the within proceedings).

3. Representatives of the Borough of Keansburg thereafter considered the adoption of a second Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as “Amendment No. 2”).

4. The Borough of Keansburg officially introduced an Ordinance (Ordinance No. 1667) amending the aforesaid Beachway Avenue Redevelopment Plan. (Amendment No. 2)

Pa 68

5. Per the requirements of the New Jersey Municipal Land Use Law, any amendment to a Redevelopment Plan is required to be referred to the Planning Board, so that the Planning Board can hold a Public Hearing and determine if the

proposed Amendment to the Redevelopment Plan is consistent with the Borough's Master Plan.

6. The Respondent Planning Board conducted such a Public Hearing on or about February 8, 2021.

2T

7. After a debate/discussion/analysis, the Planning Board Members unanimously determined that the proposed second Amendment to the Beachway Avenue Redevelopment Plan was consistent with the Borough's Master Plan.

2T (p. 22-24)

8. Given that the Borough Council Ordinance adoption date (on the proposed second Amendment to the Redevelopment Plan) was scheduled for on or about February 17, 2021, and given that the next Planning Board meeting date was scheduled to occur after the proposed Ordinance adoption date, the Planning Board Members specifically authorized the Board Attorney to memorialize its decision/conclusion, in the form of a written letter.

2T (p. 22-24)

9. In conjunction with the above point, the Respondent Planning Board Members specifically authorized the Planning Board Attorney to forward the letter (memorializing the Board's decision and findings associated therewith), to the Borough Clerk.

2T (p. 22-24)

10. The Planning Board Attorney prepared and sent a detailed letter to the Borough Clerk, advising that the Planning Board found Amendment No. 2 to be consistent with the Borough's Master Plan.

Pa 573  
(Exhibit J5)

11. The said letter from the Board Attorney, dated on or about February 17, 2021, accurately and sufficiently identified the findings and conclusions of the Planning Board Members, and the reasons associated therewith.

12. Thereafter, on or about February 17, 2021, the Borough Council of the Borough of Keansburg adopted an Ordinance amending the Beachway Avenue Waterfront Redevelopment Plan. (Amendment No. 2) (Ordinance No. 1667)

Pa 68

13. For the reasons set forth herein, and for the reasons set forth in the communication from the Board Attorney (dated February 17, 2021, the aforesaid Determination of the Respondent Board (holding that Amendment No. 2 to the Redevelopment Plan was consistent with the Master Plan) was correct and appropriate.

## Procedural History

1. On or about February 22, 2006, the Borough of Keansburg adopted the Beachway Avenue Waterfront Redevelopment Plan.

2. On or about June 21, 2017, the Borough of Keansburg adopted an Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as Amendment No. 1). (Respectfully, the said Amendment has no significant impact on the within proceedings).

3. Representatives of the Borough of Keansburg thereafter considered the adoption of a second Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as “Amendment No. 2”).

4. The Borough of Keansburg officially introduced an Ordinance (Ordinance No. 1667) amending the aforesaid Beachway Avenue Redevelopment Plan. (Amendment No. 2)

Pa 68

5. Per the requirements of the New Jersey Municipal Land Use Law, any amendment to a Redevelopment Plan is required to be referred to the Planning Board, so that the Planning Board can hold a Public Hearing and determine if the

proposed Amendment to the Redevelopment Plan is consistent with the Borough's Master Plan.

6. The Respondent Planning Board conducted such a Public Hearing on or about February 8, 2021.

2T

7. After a debate/discussion/analysis, the Planning Board Members unanimously determined that the proposed second Amendment to the Beachway Avenue Redevelopment Plan was consistent with the Borough's Master Plan.

2T, p. 22-24

8. Given that the Borough Council Ordinance adoption date (on the proposed second Amendment to the Redevelopment Plan) was scheduled for on or about February 17, 2021, and given that the next Planning Board meeting date was scheduled to occur after the proposed Ordinance adoption date, the Planning Board Members specifically authorized the Board Attorney to memorialize its decision/conclusion, in the form of a written letter.

2T, p. 22-24

9. In conjunction with the above point, the Respondent Planning Board Members specifically authorized the Planning Board Attorney to forward the letter (memorializing the Board's decision and findings associated therewith), to the Borough Clerk.

2T, p. 22-24

10. The Planning Board Attorney prepared and sent a detailed letter to the Borough Clerk, advising that the Planning Board found Amendment No. 2 was consistent with the Borough's Master Plan.

Pa 573  
(Exhibit J5)

11. The said letter from the Board Attorney, dated on or about February 17, 2021, accurately and sufficiently identified the findings and conclusions of the Planning Board Members, and the reasons associated therewith.

12. Thereafter, on or about February 17, 2021, the Borough Council of the Borough of Keansburg adopted an Ordinance amending the Beachway Avenue Waterfront Redevelopment Plan. (Amendment No. 2) (Ordinance No. 1667)

Pa 68-76

13. For the reasons set forth herein, and for the reasons set forth in the communication from the Board Attorney (dated February 17, 2021), the aforesaid Determination of the Respondent Board (holding that Amendment No. 2 to the Redevelopment Plan was consistent with the Master Plan) was correct and appropriate.

14. The Plaintiff / Appellant thereafter filed a Complaint in Lieu of Prerogative Writs, in the Trial Court, essentially seeking to a) overturn the action of the Borough Council of the Borough of Keansburg (relative to the adoption of

the Redevelopment Plan) and b) seeking to overturn the determination of the Planning Board of Adjustment (with respect to the Board Finding that Amendment No. 2 was consistent with the Redevelopment Plan).

Pa 1

15. Representatives of the Respondent Borough Council of the Borough of Keansburg filed an Answer to the subject Trial Court Complaint.

Pa 23

16. Representative of the Respondent Planning Board also filed an Answer to the Trial Court Complaint.

Pa 36-49

17. The Trial Court Trial occurred, before the Honorable Gregory L. Acquaviva, J.S.C., on or about February 27, 2023.

18. The Trial Court issued a Final Order and accompanying Opinion, dated on or about February 28, 2023.

19. The Trial Court Decision essentially a) affirmed the relevant actions of the Borough Council of the Borough of Keansburg and b) affirmed the action of the Respondent Planning Board (relative to Amendment No. 2 to the Redevelopment Plan) and c) denied the Plaintiff's / Appellant's requested relief.

Pa 1733-1746

20. Representatives of the Plaintiff / Appellant have now filed the within Appeal to the Appellate Court.

**Table of Land Use Board Hearing Dates**

Keansburg Planning Board of Adjustment Hearing, dated February 8,  
2021 ..... 2T

**STATEMENT OF FACTS**

1. The Keansburg Planning Board of Adjustment is a duly organized Land Use Board in the State of New Jersey.

2. The Borough of Keansburg is a duly organized Municipal Corporation of the State of New Jersey.

3. On or about February 22, 2006, the Borough of Keansburg adopted the Beachway Avenue Waterfront Redevelopment Plan.

4. On or about June 21, 2017, the Borough of Keansburg adopted an Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as Amendment No. 1). (Respectfully, the said Amendment has no significant impact on the within proceedings).



5. Representatives of the Borough of Keansburg thereafter considered the adoption of a second Amendment to the Beachway Avenue Waterfront Redevelopment Plan (informally referred to as “Amendment No. 2”).

6. The Borough of Keansburg officially introduced an Ordinance (Ordinance No. 1667) amending the aforesaid Beachway Avenue Redevelopment Plan. (Amendment No. 2)

Pa 68

7. Per the requirements of the New Jersey Municipal Land Use Law, any amendment to a Redevelopment Plan is required to be referred to the Planning Board, so that the Planning Board can hold a Public Hearing and determine if the proposed Amendment to the Redevelopment Plan is consistent with the Borough’s Master Plan.

8. The Planning Board conducted such a Public Hearing on or about February 8, 2021. 2T

9. The Respondent Planning Board Members heard an extensive amount of testimony presented by the Board Engineer and the Borough Planner.

2T

10. During the aforesaid Public Hearing process, members of the Public were also provided with an opportunity to ask questions of the witnesses, to present their own witnesses, and members of the Public were also presented with

an opportunity to make any comments / statements in support of, or against, the proposed Amendment to the Redevelopment Plan.

2T

11. After a debate/discussion/analysis, the Planning Board Members unanimously determined that the proposed second Amendment to the Beachway Avenue Redevelopment Plan was consistent with the Borough's Master Plan.

2T, p. 22-24

12. Given that the Borough Council Ordinance adoption date (on the proposed second Amendment to the Redevelopment Plan) was scheduled for on or about February 17, 2021, and given that the next Planning Board meeting date was scheduled to occur after the proposed Ordinance adoption date, the Planning Board Members specifically authorized the Board Attorney to memorialize the decision/conclusion, in the form of a written letter.

2T, p. 22-24

13. In conjunction with the above point, the Respondent Planning Board Members specifically authorized the Planning Board Attorney to forward the letter (memorializing the Board's decision and findings associated therewith), to the Borough Clerk.

2T, p. 22-24

14. The Planning Board Attorney prepared and sent a detailed letter to the Borough Clerk, advising that the Planning Board found that Amendment No. 2 was consistent with the Borough's Master Plan.

Pa 573  
(Exhibit J5)

15. The said letter from the Board Attorney, dated on or about February 17, 2021, accurately and sufficiently identified the findings and conclusions of the Planning Board Members, and the reasons associated therewith.

16. Thereafter, on or about February 17, 2021, the Borough Council of the Borough of Keansburg adopted an Ordinance amending the Beachway Avenue Waterfront Redevelopment Plan. (Amendment No. 2) (Ordinance No. 1667)

Pa 68

17. Thereafter, representatives of Jersey Shore Beach and Boardwalk Company, Inc. filed an Action in Lieu of Prerogative Writs (with the Trial Court) seeking to overturn the decision of the Borough Council of the Borough of Keansburg relative to the adoption of the Amendment to the Waterfront Redevelopment Plan (and, by extension, Appellant also sought seeking to reverse the Decision of the Keansburg Planning Board of Adjustment, which determined that the aforesaid Amendment to the Master Plan was consistent with the Borough's Master Plan.

Pa 1

18. Trial in the matter, before the Honorable Gregory L. Acquaviva, J.S.C., occurred on or about February 27, 2023.

19. After the Trial, on or about February 28, 2023, Trial Court issued an Order and accompanying Opinion essentially affirming the Action of Respondent Borough Council of the Borough of Keansburg, affirming the Action of Respondent Keansburg Planning Board of Adjustment, and denying the Appellant's requested relief.

Pa 1733-1746

20. A Final Court Order (with associated Opinion) was issued on or about February 28, 2023.

21. As referenced, the Trial Court Opinion essentially affirmed / validated the relevant actions of the Borough Council of the Borough of Keansburg and the Respondent, Keansburg Planning Board of Adjustment.

22. The Appellant's Representatives thereafter filed the within Appeal to the Appellate Court.

## LEGAL ARGUMENT

### POINT 1

**THE DECISION OF THE BOROUGH COUNCIL OF THE  
BOROUGH OF KEANSBURG TO ADOPT A SECOND  
AMENDMENT TO THE BEACHWAY AVENUE**

**WATERFRONT REDEVELOPMENT PLAN WAS LEGALLY JUSTIFIED.**

The Respondent Planning Board respectfully maintains that the decision of the Borough Council of the Borough of Keansburg to adopt a second Amendment to the Beachway Avenue Waterfront Redevelopment Plan was justified, and consistent with the provisions of New Jersey Law. Towards that end, the Planning Board respectfully adopts and incorporates the arguments of the Defendant / Respondent Borough Council of the Borough of Keansburg in the said regard.

**POINT 2**

**THE RESPONDENT PLANNING BOARD DECISION (HOLDING THAT THE PROPOSED AMENDMENT NO. 2 TO THE BEACHWAY AVENUE WATERFRONT REDEVELOPMENT PLAN WAS CONSISTENT WITH THE BOROUGH'S MASTER PLAN) COMPLIED WITH ALL PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF NEW JERSEY LAW.**

It is well settled that the function of the Court in reviewing a Local Planning Board determination / recommendation is not whether the Court agrees with the subject Decision; it is whether the Board acted in an arbitrary, capricious, and/or unreasonable fashion in reviewing the same. Burbridge vs. Mine Hill Township, 117 N.J. 376, 385 (1990); Rowatti vs. Gonchar, 101 N.J. 46, 51-5T (1985); Kramer vs. Bd of Adjust., Sea Girt, 45 N.J. 268,296 (1965); Rexon vs. Board of

Adjustment, Haddonfield, 10 N.J. 1, 7 (1952). That is, judicial review is intended to be a validation of a Board's action – not an opportunity for a Court to substitute its judgment for that of the Board. Rowatti vs. Gonchar, 101 N.J. 46 (1985). For, as was stated in Kaufmann vs. Planning Board for Warrant Township, 110 N.J. 551, 558 (1988);

(The Court has) not signaled a shift in emphasis from the traditional roles of courts in reviewing Planning or Zoning Board Applications... such land use decisions are entrusted to the sound discretion of the municipal board, which are to be guided by the positive and negative criteria set forth in the enabling statutes.

Id 110 N.J. at 558

As stated in a 1953 New Jersey Supreme Court decision, a trial court must view the actions of the Land Use Board as presumably correct. Rexon, 10 NJ 1, 7 (1952). Land Use Boards, and members thereof, because of their particular knowledge of a local town, must be afforded wide latitude in discretion in reviewing / approving applications. Tirpac vs. Borough of Point Pleasant Beach Bd of Adjustment and Borough of Point Pleasant Beach (L-002918-17), page 2 citing Ward vs. Scott 16 NJ 16, 23 (1954). The burden of proof lies with the challenging party – and the standard of review is based on whether the Board's decision can be found to be arbitrary, capricious, and/or unreasonable. Tirpac, citing Kramer. It is respectfully submitted that for the reasons set forth herein, sufficient testimony / evidence was presented for the Respondent Keansburg

Planning Board of Adjustment to find that the proposed second Amendment to the Redevelopment Plan was consistent with the Municipal Master Plan. As such, the Defendant / Respondent Board respectfully submits that the Court should not disturb the Board decision in the said regard.

**The Planning Board Hearing Process was effectuated in accordance with Prevailing Provisions of New Jersey Law.**

**i. Board representatives provided a detailed on-the-record discussion as to the legal process involved in adopting an amendment to a Redevelopment Plan.**

During the Public Hearing on the aforementioned second Amendment to the Redevelopment Plan, the Board representatives publicly, and on-the-record, identified the Statutory process for adopting an Amendment to a Redevelopment Plan. The said discussion was informative and beneficial for the Board members and Members of the Public. The said discussion detailed, with specificity, the role of the Borough Council (in the redevelopment process), the role of the Planning Board (in the redevelopment process), and the need for the Planning Board to ultimately determine if the proposed Amendment to the Redevelopment Plan was consistent, or inconsistent, with the Borough's Master Plan. The relevant transcript excerpts in the said regard include the following:

*CHAIRMAN McKENNA: Okay. Next, Bob (Board Engineer),  
1667 ordinance.*

*MR. YURO (Board Engineer): Yes, Mr. Chair, I'm just going to do a quick introduction and then I'm going to let Stan Slachetka of my office do a little bit further summary of what's being proposed.*

*MR. KENNEDY (Board Attorney): You know what, Bob (Board Engineer), let me just swear you in real quickly just for the record. Bob, you're the Board Engineer.*

*BOARD ENGINEER, ROBERT YURO, SWORN*

*MR. KENNEDY (Board Attorney): Thank you.*

*MR. YURO (Board Engineer): Thank you. So Mr. Chair, we're moving back to the property on Beachway, the Beachway Parking Lot. The property is known as Block 184, Lots 1, 3.01, 3.02, and 3.03. As you know, over the years, we had numerous developers looking at the property. The last one was roughly three years ago, 2017, 2018 with the Pizzo Development Company, They were looking to develop Lot 1. Since then, several other developers have come into play and right now we have the Sackman Development Group interested in Lot 3.02 which is the existing parking lot.*

*So they have made a presentation to the Council, the Redevelopment (Agency of) the Borough Council as part of the redevelopment agency for development of that parking lot property. In summary, they're looking to do three buildings potentially a total of 272 apartment units with roughly 299 parking spaces overall. They will be looking to develop the parking lot only.*

*Lot 1, which is owned by the Pizzo Development Corporation is not part of the discussions, but it is still part of the redevelopment plan that we are presenting to the Board tonight. So with that, I will turn it over to Stan Slachetka, the Planner, for T&M Associates, who*



*prepared the amended redevelopment plan for the Beachway Waterfront Redevelopment area. Stan?*

*MR. SLACHETKA (Borough Planner): Yeah, thanks, Bob. Kevin (Board Attorney) do you need to swear me in?*

*MR. KENNEDY (Board Attorney): Yes, please. Good evening Stan. If you could just state your name for the record and spell your name, please.*

*MR. SLACHETKA (Borough Planner): Yeah, sure. Name is Stan Slachetka, first name is Stan, S T A N. Last name is Slachetka, S L A C as in Charlie H E T as in Thomas, K A.*

*MR. KENNEDY (Board Attorney): All right. Good evening and welcome to the Keansburg Planning Board of Adjustment.*

*BOARD PLANNER, STAN SLACHETKA, SWORN*

*MR. KENNEDY (Board Attorney): And just for the record, you're testifying tonight in your capacity as a licensed?*

*MR. SLACHETKA (Borough Planner): Licensed professional planner, member of the American Institute of Certified Planners and representing the Borough of Keansburg as their planner.*

*MR. KENNEDY (Board Attorney): And as we proceed, if you want to mark anything into the record, just let us know.*

*MR. SLACHETKA (Borough Planner): Yeah, sure. I think you have the ordinance and the ordinance also has an associated attachment which is the actual amended redevelopment plan, is that correct?*

*MR. KENNEDY (Board Attorney): Sure. It's the one that we marked Ordinance Number 1667. And Stan, that's an ordinance of the*

*Borough of Keansburg adopting a second amendment to the Beachway Avenue Redevelopment, Waterfront Redevelopment Plan?*

*MR. SLACHETKA (Borough Planner): That is correct.*

*MR. KENNEDY (Board Attorney): All right, so mark that B, Mr. Chairman, B for Board, B-1 and then B-2, Stan, you referenced a second amended redevelopment plan?*

*MR. SLACHETKA (Borough Planner): Yeah, and it's referenced, the actual title is Beachway Avenue Waterfront Redevelopment Plan, Block 184, Lots 1, 3.02, and 3.03, and a portion of Lot 3.01, Borough of Keansburg, Monmouth County, and it is dated (I) believe January 29<sup>th</sup>.*

*MR. KENNEDY (Board Attorney): Of which year?*

*MR. SLACHETKA (Borough Planner): Of 2021.*

*MR. KENNEDY (Board Attorney): 2021 and --*

*MR. SLACHETKA (Borough Planner): Thank goodness we're past 2020.*

*MR. KENNEDY (Board Attorney): Yes. And it's prepared by?*

*MR. SLACHETKA (Borough Planner): It's prepared by T&M Associates on behalf of the Borough of Keansburg and it's signed by me.*

*MR. KENNEDY (Board Attorney): All right.*

*MR. SLACHETKA (Borough Planner): Stan Slachetka, PP AICP.*

*MR. KENNEDY (Board Attorney): We'll mark that as B-2 and just for the record, give me one more time, it was called the Beachway Avenue?*

*MR. SLACHETKA (Borough Planner): I'm sorry, it's called the Beachway Avenue Waterfront Redevelopment Plan and it essentially is a replacement and, for the existing redevelopment plan.*

*MR. KENNEDY (Board Attorney): Thanks. You can proceed.*

*MR. SLACHETKA (Borough Planner): Yea, thank you. And Bob (Yuro, Board Engineer) gave a very good sort of introduction to the presentation. I am going to be relatively brief because the amendment is relatively straightforward. Essentially, as Bob (Board Engineer) had indicated, Mr. Yuro (Board Engineer) had indicated that there in fact was a presentation made by the Sackman Group to the Borough Council. Borough Council acting as the redevelopment entity of the municipality and based on that presentation, the Borough is proposing through this ordinance to amend and essentially replace the existing Beachway Avenue Redevelopment Plan with the new plan.*

*The last plan, as amended, was adopted June 21<sup>st</sup>, 2017 and then this would be an amended plan once the Borough Council in fact does have a second reading and has a public hearing on the proposed ordinance. They would, assuming that the Council in fact adopts it, that would in fact replace the current redevelopment plan.*

*As indicated by Bob (the Board Engineer), the general approach to the redevelopment of the redevelopment plan area is generally consistent with the prior plan with some very specific amendments and revisions that I'll outline in just a moment. But what Mr. Yuro (Board Engineer) had indicated, Lot 1, which is more commonly known as the Pizzo site or the site that of the original site of the Pizzo Development for Lot 1, that is not changing. All the various provisions related to*

*the standards and requirements related to the development of Lot 1 remain in effect and are not being amended or revised.*

*The only provision related to Lot 1 that in fact is being changed or being amended is an indication of the tract area for Lot 1. And the reason why we're doing that is as you indicated in the plan, the redevelopment plan area which includes the various lots that I have identified Lots 1, 3.02, 3.03 and a portion of 3.01, the redevelopment area is in fact being divided or identified now in two different sub areas. Sub area one, which is Lot 1, which is again commonly known as Pizzo, that will be developed as I said in accordance with the provisions that exist in the plan without amendments.*

*The amendments are associated with an area that we've identified in the plan as sub area or sub district one which... governs the development of the remainder of the redevelopment plan area as identified as the overall redevelopment tract. And as indicated, that area is proposed to be developed with multifamily residential development. There's going to be potentially a small retail component which I'll get into in a moment in the second phase of that development.*

*But essentially sub area two is intended to be developed in two different phases. The first phase is to have two buildings of (tape cutout @ 56:03.5)... 204 units and a second phase would contemplate the potential construction of a third building of 110 units for a total of 314 units in that in sub area two.*

*In sub area two parking is going to be provided at a standard overall ratio of 1.15 spaces per residential unit regardless of which phase is being developed and there are maps and exhibits in the*

*redevelopment plan which further describe and explain the general development approach that is going to be taken for sub area two and within each one of the two phases of the development.*

*Sub area one, excuse me, sub area two will be as I mentioned developed with 1.15 spaces per residential unit and in phase one, there's going to be 204 spaces, 109 at the ground floor level of the two buildings, residential buildings that are being proposed as part of that phase. 74 spaces that are going to be provided within a surface, an associated surface parking lot that is part of that phase and 21 on-street parking.*

*In phase two which contemplates a construction of the third building that I had previously mentioned there's going to be 60 spaces at the ground level, and by the way, that building was going to be constructed at the general location where the surface parking lot in phase one is going to be located. That parking lot is going to be removed and developed with the multifamily residential development and then there's also going to be 150 spaces allocated for public parking where the current go-cart parking lot is located and that would be on the eastern side of the proposed development.*

*As I mentioned in phase two, phase two contemplates the potential of a small scale retail or small scale non-residential development within the multifamily residential building that could be some retail, personal services or potential restaurant use. We don't have the specifics of that as of yet but the plan allows for that possibility.*

*So in a manner that is similar to what you just did with regards to the stormwater management ordinance and as we've talked about*

before with the planning board when the planning board has reviewed redevelopment plans or amendments to redevelopment plans in the past, the responsibility of the planning board in this process is to review the proposed redevelopment plan or amendment to the redevelopment plan which is in fact adopted by ordinance and identify any inconsistencies or make an evaluation and determination as to whether the proposed redevelopment plan or amendment to the redevelopment plan is in fact consistent with the master plan.

And that's generally the primary responsibility, although the planning board can make whatever recommendation it so chooses with regard to the plan to the governing body and the governing body in their consideration of the adoption of the proposed amendment will evaluate those comments of the planning board and as well as comments from the public that it receives during the public hearing and second reading and make a determination as to the, whether it intends to adopt the amendment or make any changes and adopt those changes as well.

So in the redevelopment plan and the section of the redevelopment plan which is specifically Section 2.2 which highlights the relationships of the proposed plan to the master plan of the municipality, that section outlines in detail the general level of consistency with the redevelopment plan as to the current master plan as well as the most recent master plan re-examination report. And suffice it to say that in Section 2.2 of the plan which starts on page 6, it's a pretty detailed evaluation and we've made a determination that in fact that the redevelopment plan as amended is generally consistent

*with the redevelopment, excuse me, with the master plan of the municipality and subsequent master plan re-examination reports.*

*And I can read a couple of excerpts and I think that are relevant for the (Planning) Board's consideration with the reference to the original 1988 master plan, on the bottom of page 6, there's a quote that, with regard to an overall policy statement of the master plan indicating that, actually I should say the following policy statement included the 1988 master plan is relevant to the redevelopment plan and it quotes the 1988 master plan by saying, stating, "Guide waterfront development which protects the public need for shore protection and flood control, visual and pedestrian access to the waterfront, recreation and open space and economic development. The Borough should encourage appropriate use of waterfront locations and coordinate its efforts with the County's plan to improve waterfront access along the Raritan Bayshore."*

*And I should point out that in the current redevelopment plan, there are very specific requirements for the use of the adjoining properties adjacent to the Bayshore, the beachfront areas that are co-terminous with and adjoin the redevelopment plan area and the access points and the ability to provide for both public parking and access to those beachfront areas and walkways are essentially unchanged in the proposed redevelopment plan area. So, the redevelopment plan in fact does contemplate comprehensive assessment and comprehensive access to the beachfront areas. So that hasn't changed and that consistent level of consistency is still in place.*

*And then going into the 2015 master plan re-examination report, there's a reference at the bottom of page 7, the 2015 master plan re-*

*examination report recommends the following. “Encouraging major redevelopment along the Borough’s mixed use commercial residential area. Extending along Beachway Avenue from Raritan Avenue to the Waackaack Creek that provides for mix of uses designed according to an overall plan that enhances public access to the waterfront, connects beaches and dunes and contributes substantially to Keansburg’s economic well being.”*

*And with the amendment, and consistent with the original plan as amended, back in 2017, the plan is intended to effectuate that goal and as noted, there is a mix of uses that are contemplated, multifamily residential and a small scale, potential small scale retail component. So, I just highlighted a couple of specific areas that are identified in the document, the plan document that identifies consistency with the master plan but overall we’ve made a determination that in fact the redevelopment plan is in fact consistent with the master plan aside, defined and designed to effectuate the Borough’s master plan.*

*So with that, again this is a pretty high level presentation. I tried to make it as concise and direct as possible. That’s my presentation. If you have any questions, the Board has any questions or wants to discuss any points with regards to the proposed redevelopment plan amendment and ordinance, I would be glad to do so.*

*CHAIRMAN McKENNA: Ok, thank you, Stan (Borough Planner). It’s great to see you. Any questions from the Board?*

*BOARD MEMBER FLYNN: This section they’re talking about which we knew as the old Clickio (phonetic) tract, the Sigmund*



*pool (phonetic), that's the section at the end of Laurel Avenue, right, not the section you're talking about getting first done?*

*CHAIRMAN McKENNA: That's Pizzo, Pizzo, right, Marty (Board Member Flynn)?*

*BOARD MEMBER: No, it's the parking lot, that's the Borough's parking lot.*

*BOARD MEMBER FLYNN: I know but they don't want to do this one first?*

*MR. YURO (Board Engineer): (Board Member) Flynn, this is Bob Yuro (Board Engineer). Depending on how the developer's come in, they can develop whichever piece that they want but right now we have a developer, the Sackman Development Group who is interested in developing the actual gravel parking lot which is known as Lot 3.02 now. So as part of their redevelopment vision, we needed to amend the existing redevelopment, the waterfront redevelopment plan and that's why we're here this evening. If Mr. Pizzo wants to come in and develop Lot 1, which I believe is the old Calian (phonetic) tract, by all means he can prepare a site plan and make his submission to the Board but we have not heard from Mr. Pizzo in several years.*

*CHAIRMAN McKENNA: Okay, Marty (Flynn, Board Member)?*

*BOARD MEMBER FLYNN: Very good.*

*CHAIRMAN McKENNA: John (Donohue, Board Member)?*

*BOARD MEMBER DONOHUE: My question is with this development which of course is something we've been looking for, for many years, has there been a study or any kind of data in relation to the impact it has on the town's infrastructure directly relating to*

*water, sewage and drainage? Can the system handle increasing the town's capacity of units to this magnitude?*

*MR. SLACHETKA (Borough Planner): (Board Member) Donohue, we are going through that. So right now the impact for this Beachway property, Lot 3.02 was already analyzed several years ago so there is a capacity for the parking lot property. When it comes to the other future development potentially along Carr Avenue that we've all been hearing about, the walk-in boys, et cetera, my office is currently doing an analysis of that and we'll be working with Mr. Useman (phonetic) over the next several weeks to determine any water allocation requirements, sewer upgrades, et cetera.*

*BOARD MEMBER DONOHUE: Thank you.*

*CHAIRMAN McKENNA: Okay, anyone else from the Board? Kathy (Board Secretary), (do) you see any, any questions of the public or...?*

*BOARD SECRETARY: Let's see. No, sir, I do not.*

*CHAIRMAN McKENNA: Okay, great. Similar to last time, we're going to make a motion recommending they adopt the second amendment to the Beachway Avenue Waterfront Redevelopment Plan. I think it is, personally, I think it's consistent with the master plan and who would like to make a motion?*

*MR. KENNEDY (Board Attorney): Mr. Chairman, may I also again respectfully suggest that given the importance of the topic and the timing sensitivities, we will not have a resolution until the next meeting if we are to adopt a resolution and I'm assuming, Bob (Board Engineer), the Borough Council will be meeting before our resolution would be adopted next month, so if the Board is so inclined, and Mr.*

*Chairman, you made the motion, if you're inclined, you can direct that as part of it, either the Board Attorney or Board Engineer or Board Secretary is authorized to, given the time sensitivities, to commence / relay the Board vote to the Borough representatives.*

*CHAIRMAN McKENNA: Kevin (Board Attorney), I suggest you do both of them.*

*2T, p. 8-23  
(emphasis added)*

It is respectfully submitted that the significant testimony referenced above more than justifies the Respondent Board's finding that the proposed second Amendment to the Redevelopment Plan was consistent with the Borough's Master Plan.

**ii. The communication from the Board Attorney, dated February 17, 2021, accurately captured the essence of the Respondent Board vote / determination.**

In advance of the Borough Council's official adoption of the 2nd Amendment to the Redevelopment Plan, the Planning Board Attorney prepared a letter essentially detailing the nature and substance of the Planning Board determination (holding that the proposed second amendment to the proposed Redevelopment Plan was consistent with the Master Plan), and the reasons underlying the same. The February 17, 2021 communication from the Board Attorney, was forwarded to the Borough Clerk of the Borough of Keansburg. The communication from the Board Attorney provided the following, in pertinent part.

*Dear Mr. Cusick (Borough Clerk):*

*Please be advised that I am writing to you on behalf of the Keansburg Planning Board of Adjustment. In that regard, and as a supplement to our prior communications, I would ask that you please note the following:*

1. *The Borough Council of the Borough of Keansburg recently introduced Ordinance No. 1667 (regarding a 2<sup>nd</sup> Amendment to the Beachway Avenue Waterfront Redevelopment Plan).*
2. *Pursuant to the New Jersey Municipal Land Use Law (including N.J.S.A. 40A:12A-7 (e)), the said Ordinance has been forwarded to the Planning Board for a) a determination on the consistency with the Master Plan and b) a determination as to any other relevant questions / comments / concerns.*
3. *The matter was presented to the Land Use Board on February 8, 2021.*
4. *At the said time, the following items were officially marked into the record as Evidence:*
  - *Borough Council Ordinance No. 1667, introduced into Evidence as B-1; and*
  - *The Beachway Avenue Waterfront Redevelopment Plan, and related documents, prepared by T&M Associates, collectively introduced into Evidence as B-2.*
5. *At the aforesaid Planning Board meeting, sworn testimony was presented by the following:*
  - *Robert Yuro, P.E., C.F.M., Board Engineer; and*
  - *Stan Slachetka, P.P., A.I.C.P., Borough Planner.*
6. *At the Planning Board meeting, the witnesses relayed relevant information regarding the matter, which included, but was not limited to, the following:*
  - a. *A discussion of the Beachway Avenue Waterfront Redevelopment Plan, which provided for a phased residential project;*
  - b. *A discussion of the properties which are included in the Beachway Waterfront Redevelopment Plan (then identified as Block 184, Lots 1, 2, and 3, and now identified as Block 184, Lots 1, 3, and 3.01);*

- c. *A discussion regarding the Redevelopment Agreement with Arisa / Harvestate at Keansburg, LLC;*
- d. *A discussion regarding the superseding nature of the 1<sup>st</sup> Amendment to the Redevelopment Plan (June 21, 2017), which created an Overlay Zone, and the associated 1<sup>st</sup> Amendment to the Redevelopment Agreement;*
- e. *A discussion regarding further necessary amendments to the Waterfront Redevelopment Plan (i.e. 2<sup>nd</sup> Amendment), as a result of the following:*
  - *Evolving approaches to the redevelopment tract;*
  - *Revision to the tax parcel boundaries resulting from the subdivision of former Lots 3 and 3.01; and*
  - *Recent State approvals from the NJDEP and CAFRA.*
- f. *An acknowledgement that the 2<sup>nd</sup> Amendment to the Redevelopment Plan essentially divides the redevelopment plan areas into 2 sub-areas, which are to be developed as separate components of the overall tract, but which will nonetheless have physical connections and interrelationships, which support the overall purpose and intent of the Beachway Avenue Redevelopment Plan;*
- g. *An acknowledgement that the proposed 2<sup>nd</sup> Amendment has been designed to provide guidelines for redevelopment of the redevelopment plan area with different concepts and Design Standards, based upon the location and characteristics of the corresponding sub-areas; and*

- h. An acknowledgement that the 2<sup>nd</sup> Amendment to the Redevelopment Plan, once adopted, will supersede and replace the 1<sup>st</sup> amended Redevelopment Plan.*
- 7. The Board Members discussed the matter and presented certain questions / comments associated therewith.*
- 8. After such discussion, the Board found that the proposed Ordinance Amendment (Ordinance No. 1667) is, in fact, consistent with the Borough's Master Plan.*
- 9. Given the time sensitivities associated with the schedule for the next Borough Council Meeting, and the schedule for the next Planning Board Meeting (which will take place after the Borough Council Meeting when the Ordinance is presumably to be adopted), as part of the deliberative process, the Board specifically authorized my Firm to prepare and submit the within letter, memorializing the Board action / decision.*
- 10. I would respectfully ask that you please forward the within communication to the representatives of the governing body, for further review and consideration.*

*If you have any questions or comments, please feel free to contact me at the office.*

*Pa 573*

It is respectfully submitted that the said letter sufficiently identified the Respondent Board's determination on the matter, and the legally sanctioned reasons supporting the same.

**iii. The communication from the Board Attorney, as aforesaid, satisfies the prevailing legal requirements associated with the Statutorily mandated process for adopting an Amendment to a Redevelopment Plan.**

In past related cases, the Jersey Shore representatives have essentially suggested that a letter from the Planning Board Attorney, to the Borough Clerk of the Borough of Keansburg, was not a sufficient mechanism to convey the Board's determination. The Respondent Board respectfully rejects such an argument. As referenced elsewhere herein, NJSA 40A:12A-7 (regarding the Housing and Redevelopment Law) provides the following in pertinent part:

*(E) Prior to the adoption of a Redevelopment Plan, or Revision or Amendment thereto, the Planning Board shall transmit to the Governing Body, within forty-five (45) days after referral, a report containing its recommendation concerning the Redevelopment Plan. This report shall include an identification of any provisions in the proposed Redevelopment Plan which are inconsistent with the Master Plan and recommendations concerning these inconsistencies and any other matters as the Board deems appropriate. The Governing Body, when considering the adoption of a Redevelopment Plan or Revisions or Amendment thereto, shall review the report of the Planning Board and may approve or disapprove or change any recommendation by a Vote of a majority of its full authorized membership and shall record in its Minutes the reasons for not following the recommendations. Failure of the Planning Board to transmit its report within the required forty-five (45) days shall release the Governing Body from the requirements of this Sub-Section with regard to the pertinent proposed Redevelopment Plan or Revision or Amendment thereof... (emphasis added).*

Per the direct language of the subject statute, and per the outcome of other judicial decisions on related matters, a formal resolution (of the Respondent Planning Board of Adjustment) is not required. Rather, all that is required is that the Board transmits some type of "report containing its recommendation concerning the

Redevelopment Plan.” The communication from the Board Attorney, as aforesaid is consistent with the statutory requirements of NJSA 40A:12A-7.

**iv. The Respondent Planning Board specifically authorized the Board Attorney to issue a confirming letter to the Borough Council of the Borough of Keansburg.**

During the Public Hearing on the proposed Amendment to the Redevelopment Plan, the Planning Board specifically authorized the Board Attorney to write a letter to the Borough Clerk of the Borough of Keansburg, so that the Board determination in the said regard could be relayed. (2T, p. 22-24). It is submitted that no further arguments are needed for the Court to conclude that a) the Board Attorney was, in fact, authorized (and directed) to issue the requisite letter and b) the same satisfied prevailing legal requirements.

**v. Had the Board Attorney not sent the February 17, 2021 communication to the Borough of Keansburg, then, in that event (because of the pending Governing Body meeting), the Planning Board would have had no meaningful participation in the Development Plan Amendment process.**

As referenced above, the controlling Statute (NJSA 40A:12A-7) only provides the Planning Board with a maximum period of forty-five (45) days within which to transmit its report (on the proposed Amendment to the Redevelopment Plan) to the Governing Body. The controlling Statute furthermore provides that the failure of the Planning Board to timely submit its report to the Governing Body would essentially permit the Governing Body to dispense with the requirement of having



to consider Planning Board comments. Given the one time per month regular meeting schedule of the Defendant Planning Board, and given that the next meeting of the Borough Council (when the matter was to be voted on) was scheduled to occur before the next regular meeting of the Planning Board, the Planning Board was under a significant time pressure within which to transmit its report (on the proposed second Amendment to the Redevelopment Plan). Had the Planning Board not authorized its attorney to immediately send the February 17, 2021 letter to the Borough Clerk of the Borough of Keansburg, then, in that event, the Governing Body would not have had the benefit of the Planning Board comments prior to the Governing Body's adoption of the Ordinance amending the Redevelopment Plan. Thus, the timing of the situation demanded immediate Board action – and in the absence of such immediate Board action (i.e. the February 17, 2021 letter from the Board Attorney), the meaningful Planning Board input / involvement would have been silenced / eliminated / not considered. The elimination of the otherwise statutorily authorized Planning Board review of the matter would be detrimental to the Planning Board, the Borough of Keansburg, and the residents of the Borough of Keansburg as well. That is, had the Board Attorney not immediately issued the subject February 17, 2021 letter, the Governing Body would have been denied of the very important comments / concerns / findings as issued by the Board (which also incorporated any potential

comments from the public). The subject statute provides the Land Use Board with a very important role in the redevelopment process – and the public interest would not have been served if the Land Use Board did not immediately transmit its Findings / Determinations to the Governing Body. As such, the Respondent Planning Board respectfully submits that the timing of the governing body meeting (when action on the Redevelopment Plan Amendment would be taken) mandated that the Board’s report findings be immediately transmitted to the governing body.

**vi. Given the extensive and repeated litigation associated with the general matter and related matters, the Respondent Planning Board Members are well versed in the subject Redevelopment Plan and Amendments associated therewith.**

The Keansburg Planning Board of Adjustment has had a number of occasions to formally review, in depth, the Redevelopment Plan, and amendments related thereto (particularly in light of the at least 3-6 related litigation cases associated with, and / or otherwise connected to, the same). Specifically, the Respondent Land Use Board reviewed the matter when the actual Waterfront Redevelopment Plan was statutorily/initially forwarded to the Land Use Board, the matter was reviewed when the first Amendment was forwarded to the Land Use Board, and the matter was again reviewed when the second Amendment was forwarded to the Land Use Board. The general matters were also reviewed at various points of the related 3-6 companion litigation cases. As such it is respectfully submitted that

the Land Use Board Members / representatives are well versed in the intricacies of the Beachway Avenue Waterfront Redevelopment Plan, and proposed Amendments associated therewith. Consequently, it is submitted that judicial validation of the Land Use Board's determination is warranted.

### POINT 3

#### **THE LAND USE BOARD FINDING/DETERMINATION IS ENTITLED TO A PRESUMPTION OF VALIDITY.**

An Action of a Municipal Board is presumably correct, and the burden of proof is upon the parties challenging the Action of the Board. Weiner vs. Board of Adjustment of Glassboro, 144 N.J. Super. 509, 516 (App. Div. 1976) Cert. Denied, 73 N.J. 55 (1977). In that local officials are presumed to be “thoroughly familiar” with the characteristics of the subject community, Board decisions are generally cloaked with the presumption of validity. (Ward vs. Scott, 16 N.J. 23 (1954); Pullen vs. South Plainfield Planning Board, 291 N.J. Super. 303, 312 (Law Div. 1995), Aff'd, 291 N.J. Super. 1, 6 (App. Div. 1996). As succinctly stated in a recent Law Division case:

*So long as there is substantial evidence to support it, the Court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of the Board's action, there can be no judicial declaration of invalidity absent a clear abuse of discretion by the Board.*

New Brunswick Cellular Telephone Company  
270 N.J. Super 122, 134 (Law Div. 1992)

In the within matter, and as referenced above, the detailed communication from the Board Attorney, dated February 17, 2021, and as furthermore referenced in the hearing transcripts, the Respondent Planning Board conducted a thorough Hearing on the proposed second Amendment to the Redevelopment Plan, and on other associated / related issues. As explained herein, there was a significant amount of testimony presented, analyzed, debated, and discussed – and the Land Use Board decision was neither arbitrary, capricious, nor unreasonable. Thus, it is respectfully suggested that the legally sound action / determination of the Respondent Planning Board should be entitled to a presumption of validity.

#### **POINT 4**

#### **ANY POTENTIAL REVERSAL OF THE PLANNING BOARD DECISION SHOULD, AT A MINIMUM, BE ACCOMPANIED BY AN ORDER FOR A REMAND.**

In the event the Court (despite the arguments contained herein to the contrary) finds that the Respondent Planning Board's hearing process was substantively or procedurally flawed, then, in that event, the Board respectfully requests an opportunity for a remanded hearing at which any substantive or procedural defects could be corrected / cured (as opposed to an outright reversal or overturning of the Board decision / finding.) Respectfully, the important Board concerns (discussed at the Public Hearing) should not be discredited, marginalized,

or ignored, without a remanded Hearing (so that important Board questions / concerns can ultimately be considered / preserved / relayed / transmittal.)

## POINT 5

### **THE TRIAL COURT PROPERLY ANALYZED THE OVERALL MERITS OF THE PLAINTIFF / APPELLANT APPEAL – AND THERE IS NO REASON TO DISTURB THE TRIAL COURT DECISION**

It is respectfully submitted that the Trial Court properly and thoroughly reviewed all aspects of the Plaintiff / Appellant Case, as well as all aspects of the positions of the two Respondents. The arguments presented herein were soundly and definitively reviewed by the Trial Court. A synopsis of some of the more salient Trial Court Findings / Statements / Conclusions include, but are not necessarily limited to, the following:

- *The dispute between Keansburg and Jersey Shore is long-standing and, fundamentally, revolves around warring visions of an existent public parking lot adjacent to the Keansburg Amusement Park. On the one hand, Keansburg seeks to undertake a redevelopment of its Bayshore to bring mixed-use to the area. The primary goals are to “stir economic development, make the area a destination; and preserve its environmental value.” Should this vision come to fruition via a future development project that garners all required approvals, with apologies to Joni Mitchell, Keansburg hopes a Developer builds a paradise, by razing a parking lot.*
- *On the other hand (the Plaintiff) seeks to preserve the long-standing use of a parking lot, arguing that the plan is inconsistent with the Keansburg’s 1988 Master Plan to such an*

*extent that Keansburg's adoption of the Plan was arbitrary, capricious, and unreasonable. In short, Jersey Shore prefers the status quo.*

- *Accordingly, for the reasons that follow, the Court concludes that Keansburg's adoption of the Plan was amply supported by substantial evidence. As such, Jersey Shore's requested relief is denied. (emphasis added)*
- *The dispute between the parties here is lengthy, litigious, and on-going. However, the prior disputes and litigations need not be recounted here.*
- *Here, there can be no contention that Keansburg did not adhere to the Procedural Requirements of N.J.S.A. 40A:12A-7. The question, rather, deals with Keansburg's Substantive Actions which, again, are entitled to deference. (emphasis added)*
- *The Court's role is not subjective. It is not to determine whether the Plan was the best Plan that could be put forward. The Court's role is not to develop a better Plan. Nor is the Court's role to determine whether the Plan is completely compliant with the Master Plan. Rather, the Court's role is far more circumscribed. The limited question before the Court is whether Keansburg's decision was amply supported by facts of records such that it is not arbitrary or capricious. As the well-developed record demonstrates, it is.*
- *Put simply, the Plan establishes a Zoning Overlay to encourage a Mixed-Use Revitalization of the Bayshore by encouraging a more dense-yet still appropriate-development to enhance economic opportunities, while preserving natural resources, maximizing year-round recreational uses, and fostering an attractive visual environment, among other goals.*
- *Despite the foregoing, Jersey Shore asserts 6 alleged inconsistencies – though many overlap. Accounting for overlap, the alleged deficiencies shall be addressed in turn. Overall, it can be said that Jersey Shore's challenges to the Plan are too myopic – focusing on the leaves despite the forest*

– and advancing its own subjective vision of what Keansburg’s Bayshore should look like. (emphasis added)

### **INCREASED DENSITY**

- *Jersey Shore contends because development under the Plan will allow for density 3-4 times greater than current density, such is inconsistent with the Master Plan. Going back to 1988, Keansburg has recognized that its Bayfront is “an invaluable resource which must be managed to assure that the community benefits from the Borough’s Waterfront location.” Even then – 3 decades ago, Keansburg recognized that it must secure benefits of its location by guiding waterfront development to advance “economic development.” In so arguing, Jersey Shore ignored the 2015 Master Plan Re-Examination Report which recommends that Keansburg encourage major development in the Mixed Use Commercial Residential Area that provide for a mix of uses designed to, among other things, contribute substantially to Keansburg’s economic well-being. The Plan is directly on-point with that 2015 recommendation to commit to a major economic redevelopment of the area. Suffice it to say that implicit in a substantial Mix-Use Development would be an increase to densities in the area. Any argument to the contrary is putting one’s head in the proverbial sand. True, reasonable minds could differ regarding scope – that is, is doubling density appropriate or is tripling density appropriate. But such a subjective value assessment is not for this Court, but rather, for local officials. On this issue, Keansburg has spoken. And that determination is substantially compliant with the Master Plan an amply supported by the record here. (emphasis added)*

### **HEIGHT OF BUILDING**

- *Jersey Shore also takes umbrage with the building height permitted under the Plan – height that would allow greater density. Because such is significantly higher than existing heights, Jersey Shore argued the Plan is inconsistent with the Master Plan, as such would be out of scale and obstruct views. The issue is tethered directly to residential density. Put simply, the higher the building, the more residential units can exist in a geographic footprint. Building up is consistent with the 2015 Master Plan Re-Examination Report as discussed supra. Moreover, it must be remembered that each residential unit*

*also creates a waterfront view of the Raritan Bay for those future residents of and visitors to Keansburg – a fact consistent with enhancing the visual environment.*

### **ELIMINATION OF PARKING**

- *A prime area of concern for Jersey Shore is the “elimination” – in their view – of a parking lot that can accommodate approximately 300 vehicles. Jersey Shore contends that such will remove and eliminate parking required for beach access. The Plan expressly states that it endeavors to create “improvements to parking areas.” The Plan also requires ground floor parking to be located below any residential units. More important, however, is Section 3.3.11 of the Plan which extensively discusses parking. First, in Sub-Area 1 of the Plan, any Redevelopment in that area shall be consistent with the Borough’s Zoning Ordinance. As to Sub-Area 2, the Redeveloper, as noted above, shall construct ground-floor parking. Such will provide for 204 parking spaces, during Phase I. During Phase II, however, an additional 60 spaces will be provided. The Re-Developer will also provide a paved parking lot in the “go-kart” portion of the Plan. Same “shall be allocated to public parking and will serve the adjacent recreation and public beach access” and will total 150 parking spaces. Thus, although Jersey Shore may be correct that the overall amount of parking spaces available to the public may be decreased by a future, approved development, Jersey Shore points to no evidence indicating that the existing 300 space parking lot is even maximized, nor does Jersey Shore address temporal concerns – that is, what is the current parking lot’s use during off-season winter months.*

### **CONSERVATION AND PUBLIC ACCESS**

- *Jersey Shore also contends that the Plan will reduce conservation and public access, including views of the waterfront. On this front, the Plan expressly states that it is “intended” to develop “a variety of waterfront and recreational uses along the Raritan Bay Shoreline” to contribute to the public welfare to maximize potential by the development of “year-round... recreational uses.” The Plan also expressly observes that it will “increase opportunities for public access to the beachfront.” ...*



- *... The Plan, however, is not limited to mere generic, flowery language, but expressly contains specifics with respect to beach or waterfront access improvements, providing for an extension to the north-eastern end of the Bay walk northeasterly to reach the existing go-Kart section and proposed parking area – a development expressly designed to “enhance access to the beach and public open space areas.” The Plan continues to state that it includes “enhanced visual access to the waterfront and bay through the provision of gazebos and structures for the passive enjoyment of waterfront views” – again contradicting Jersey Shore’s contention that views will be eliminated. Put simply, Jersey Shore seeks to maintain existing waterfront uses. Keansburg, however, presents a contrary vision, emphasizing the waterfront as a year-round destination. It is not for this Court to determine whose vision is better, but only whether Keansburg’s (vision) is supported by the factual record. It is. (emphasis added)*
- *Fundamentally, Jersey Shore’s contentions amount to a disagreement with respect to vision and values. The Master Plan sets forth, in broad brush strokes, Keansburg’s vision for the Borough. The Plan sets forth various ways for that vision to come to fruition. Keansburg struck a balance. Although Jersey Shore disagrees with that balance, the disagreement is subjective. As demonstrated by the record, Keansburg’s determination is supported by ample evidence and is not arbitrary nor capricious. Accordingly, Jersey Shore’s challenge in this regard must be rejected.* (emphasis added)

### CONCLUDING OBSERVATIONS

- *Finally, it is important to observe what the Plan is and what it is not. To the extent Jersey Shore takes umbrage (at) the development that will occur in the Bayshore, such is premature. At issue in this action is the propriety of Keansburg’s adoption of a Plan. The Court cannot consider any prospective, future approval of development – which may never come to fruition. Challenges to those are for a future day, in a future litigation, following a future Municipal action – if such future events ever occur. To be sure, such development may never occur in the matter authorized by the Plan.* (emphasis added)

- *... Thus, sequentially, and logically, the Plan here establishes a Zoning Overlay for the Redevelopment Area. It does not permit any Redevelopment Project. Rather, as the LRHL states, any Application for a Redevelopment Project still “shall be submitted to the Municipal Planning Board for its review and approval.” (Citations omitted.) Thus, as Keansburg astutely observes, “The Redevelopment Plan establishes Zoning for the Redevelopment Area, but anyone wishing to develop properties within the Redevelopment Area must still file a Development Application with the Municipal Planning Board.” Put another way, the Plan here is the Horse. Future Redevelopment is the Cart. Jersey Shore cannot put the Cart before the Horse, where the Cart is little more than a conceptual vision, not even proposed yet by its Developer.(emphasis added)*
- *As to assertions regarding Tidelands issues, such is little more than a straw man argument by Jersey Shore. The issue of ownership of the parking lot is being litigated before Judge Quinn on (Litigation Docket #) MON-C-48-19. Throughout this litigation, Jersey Shore has failed to connect how ownership of the property at issue impacts the Plan. As observed in prior proceedings and again today, the Plan represents a vision for Zoning Overlay. It is not a development or tangible project. While ownership and quieted title may be relevant to a Development Application, this Prerogative Writ does not challenge a Development Application – it challenges the Plan. Ownership of any Tidelands Properties is of no moment to an analysis of Keansburg’s actions in approving the Plan. (emphasis added)*
- *This dispute here is one about vision. And, again, this dispute is not one about a tangible Development Project. Those disputes will occur on a future day, premised on a future Application, following future Municipal action.(emphasis added)*
- *Jersey Shore and its experts view the Plan as setting the stage for inappropriate population densities, insufficient open space, undesirable visual environments, unsuitable development, and inadequate access. Keansburg views it differently, concluding that the Plan sets forth, in an appropriately transformative way,*

*a vision consistent with the Master Plan. On both fronts, those visions and preferences are, put simply, subjective.*

- *Importantly, this Court must confine itself to its role. The Court is not a tie-breaker. The Court is not an omnipotent, uber-municipal official. The Court's job is not to determine whose vision is better. The Court is not to substitute its own subjective judgment or that of the Municipal actor (Citations omitted.).*
- *The Court's role is far more limited: Was Keansburg's Determination – which, again, is entitled to a presumption of validity – amply supported by the factual record such that it was not arbitrary, capricious, nor contrary to law. The answer to that question is assuredly yes. To be sure, reasonable minds can quibble on many of these issues. Jersey Shore's preference for the status quo is understandable but it is just that – its preference and its preference only. (emphasis added)*
- *The differing preferences and visions are precisely what public debate and dialogue are for. But Jersey Shore cannot overcome the presumption in favor of validity of Municipal actions nor the high bar of demonstrating that Keansburg's actions were arbitrary, capricious, nor unsupported by the record. Accordingly, Jersey Shore's challenge must be rejected.*

*Pa 1733-1746*

Respectfully, the applicable standard of review provide that the Appellate Court should not modify / reverse the Trial Court Decision, unless the same is arbitrary, capricious, or unreasonable. The Trial Court Decision, and the reasons / bases justifying the same were, respectfully, well-founded, appropriately cited, and well documented. As such, the Respondent Planning Board submits that there is no basis to disturb the underlying Trial Court Opinion.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the Appellate Court affirm the Trial Court decision and the underlying Respondent Planning Board of Adjustment decision.

Respectfully submitted,

KEVIN E. KENNEDY, ESQ.

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Keansburg Planning Board of Adjustment

KEK/dmp  
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JERSEY SHORE BEACH AND  
BOARDWALK COMPANY,  
INC. A/K/A JERSEY SHORE  
BEACH & BOARDWALK,  
INC.

Plaintiff/Appellant

v.

BOROUGH OF KEANSBURG,  
A MUNICIPAL  
CORPORATION, AND  
BOROUGH COUNCIL OF THE  
BOROUGH OF KEANSBURG,  
AND PLANNING BOARD OF  
THE BOROUGH OF  
KEANSBURG

Defendants/Respondents

: SUPERIOR COURT OF NEW JERSEY  
: APPELLATE DIVISION  
: DOCKET NO. A-2379-22T4  
:  
: On Appeal from Orders dated  
: November 19, 2021, April 7,  
: 2022, June 10, 2022, February 27,  
: 2023 and February 28, 2023  
:  
: Superior Court of New Jersey  
: Law Division-Monmouth County  
: Docket No. MON-L-1262-21  
:  
: SAT BELOW:  
: Hon. Gregory L. Acquaviva, J.S.C.  
:  
:  
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**REPLY BRIEF OF PLAINTIFF/APPELLANT JERSEY SHORE  
BEACH AND BOARDWALK COMPANY, INC. A/K/A JERSEY  
SHORE BEACH & BOARDWALK, INC.**

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On the Brief

Dated: December 22, 2023

**TABLE OF CONTENTS**

COUNTER STATEMENT OF FACTS..... 1

LEGAL ARGUMENT

    POINT I.....2

        THE TRIAL COURT ERRED IN DENYING  
        SUMMARY JUDGMENT ON THE PUBLIC TRUST  
        DOCTRINE CLAIMS (5T30:20-25; 6T12:5-15-18;  
        Pa1718-1729)

    POINT II..... 9

        THE TRIAL COURT’S DISMISSAL OF COUNTS I, II  
        & III OF THE COMPLAINT SHOULD BE REVERSED  
        (Pa1718, 1729)

    POINT III..... 11

        THE TRIAL COURT WAS IN ERROR IN NOT  
        CONCLUDING THAT THE REDEVELOPMENT  
        PLAN WAS INCONSISTENT WITH THE 1988  
        MASTER PLAN, AND THAT INCONSISTENCY  
        WAS NOT RECOGNIZED OR ADDRESSED AS  
        REQUIRED (APPEALING THE FINAL  
        OPINION/ORDER (Pa1733)

CONCLUSION .....15

**TABLE OF CITATIONS**

Bubis v. Kassin, 184 N.J. 612, 629, 630 (2005) . . . . .4

Matthew v. Bayhead Imp. Ass'n 95 N.J. 306 (1984) . . . . .11

Riggs vs. Long Beach Tp., 159 N.J.  
at 601, 622 (1988) . . . . . 15

Right to Choose v. Byrne, 91 N.J. 287 (1982) . . . . .8

Willoughby, Riza and Mahwah Realty . . . . .15

**COUNTER STATEMENT OF FACTS**

Jersey Shore substantially adopts the Statement of Facts set forth in its Appellate Brief except the footnote at page 4 of the Borough's Brief (Db4) is not entirely accurate. The litigation filed by Jersey Shore under Docket No. MON-L-2629-17 was consolidated with litigation filed by the Borough under Docket No. MON-L-1166-18. Those matters were stayed pending disposition of litigation filed by Jersey Shore under Docket No. C-48-19. A decision was entered in that litigation on September 25, 2023 and an appeal was filed by Jersey Shore on October 30, 2023 (*Jersey Shore Beach & Boardwalk vs. Borough of Keansburg, et al*, Docket A-621-23). A case management conference in the consolidated matters was adjourned from July 19, 2023 pending a decision in the case bearing Docket No. C-48-19. Jersey Shore's litigation under Docket No. MON-L-2629-17 (consolidated with Docket No. MON-L-1166-18) challenging the First Amendment to the Redevelopment Plan is still pending as the Order entered by the Honorable Jamie S. Perri, J.S.C. is interlocutory, not a final order. Moreover, the statement by the Borough at pages 4-5 of its brief that ". . .if the Plaintiff were to prevail on its claims in this litigation and if the Second Amendment to the Redevelopment Plan were invalidated, the First Amendment to the Redevelopment Plan would go back into effect" is also inaccurate. On its face, the Ordinance adopting the Second Amendment to the Redevelopment Plan (under appeal herein)



states that it is the Borough's ". . . intent that the Second Amended Redevelopment Plan, once adopted, will supersede and replace the First Amended Redevelopment Plan " (Pa 68) and further that any ordinance inconsistent with the Second Amended Redevelopment Plan is "repealed." (Emphasis added). (Pa 69) Thus, not only is the order entered by Judge Perri interlocutory, but once it is final when the consolidated cases are concluded, not only can Jersey Shore file an appeal with the Appellate Division, but because the First Amended Redevelopment Plan was repealed on February 17, 2021 with the adoption of the Second Amended Redevelopment Plan (which is the subject matter of this litigation), it is not automatically "revived" if the Appellate Division reverses the Ordinance adopting the Second Amended Redevelopment Plan.

**LEGAL ARGUMENT:**

**POINT I:**

**THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT ON THE PUBLIC TRUST DOCTRINE CLAIMS:(5T 30:-20-25; 6T 12:5-15:18; Pa1718-1729)**

The crux of the Borough's argument on this issue is that any claims relating to the Public Trust Doctrine are premature because they are ". . . essentially seeking to challenge a future conceptual development of property within the Redevelopment Area that might never actually happen." (Db11) The Borough argues that the Trial Court granted the Borough's Motion for Summary Judgment dismissing the claims based on the Public Trust Doctrine because they were not

"ripe" and can only be raised once a developer actually files an application for a particular development project in the Redevelopment Area. The Borough also incorrectly alleges that Jersey Shore's summary judgment motion was premised on one allegation, that "...the Borough's actions violated the Public Trust Doctrine regulations adopted by the NJDEP as set forth within N.J.A.C. 7:7-9.48 and N.J.A.C. 7:7-16.0 which regulations do not require municipalities to do anything but only require them to consider and adopt Public Access Plans governing public access to the municipal waterfronts". (DB17) The Borough argues that the review process by the NJDEP only occurs once there is an actual development application requiring an NJDEP permit or approval under N.J.S.A. 13:1D-15.

In its Motion for Summary Judgment, Jersey Shore asserted that the Borough's undisputed failure to consider the Common Law Trust Doctrine regulations adopted by the DEP and the Administrative Public Access Rule recently enacted by the NJDEP renders Ordinance 1667 (and the "Redevelopment Plan") invalid, and that the Redevelopment Plan's specific provision calling for the abolishment and closing of a long existing public access point and 300 public parking spaces is in violation of those State policies. Municipalities are constrained to take into account the policies embodied in DEP regulations. See, *Bubis v. Kassin*, 184 N.J. 612, 629, 630 (2005) Jersey Shore's summary judgment motion turned on the applicability of clearly established Public Trust Doctrine

“public access principles” as established and announced in (1) New Jersey’s *now statutory* Public Trust Doctrine Law (effective July 1, 2019) (2) the administrative rules and regulations and standards promulgated thereunder by the New Jersey Department of Environmental Protection (NJDEP) (effective July 1, 2019), as well as (3) the long and clearly established New Jersey and Federal common law public trust doctrine principles that literally go back hundreds of years.

The Borough and Planning Board do not assert that the “pre-approved” proposed development in the challenged “[Second] Amended Beachway Avenue Waterfront Redevelopment Plan,” which expressly calls for and literally requires and pre-approves the abolishment by the designated developer of 300 long existing public parking spaces, all found in a single public parking lot along the waterfront where public access points to the waterfront exist, to be replaced with private high density housing and 150 *now PRIVATE parking spaces for use only by the residents in the new private high density housing*, is not a blatant and clear violation of the Public Trust Doctrines. The Trial Court did not disagree; instead the Trial Court ruled it was not ripe for consideration. This is because the Redevelopment Plan operates to effectively and illegally exclude the public from having access to long existing parking which is necessary for the public to gain access to the waterfront. The Certification of Henry Gehlhaus (Pa24) and the Planning Report of T. Andrew Thomas (Pa300) are evidential in this respect.

The Borough's argument that the Public Trust Doctrine Laws are only triggered by the NJDEP's review of any approval, permit administrative order, or consent decree issued, or other action taken, by the department is not supported by statutory language. The Trial Court did not adopt this second argument. 6T13:21 to 15:2) However, any such argument is directly rebutted by over 200 years of common law. The literal text of the new now statutory Public Trust Doctrine (effective July 1, 2019) does not expressly or implicitly abolish the long existing private right of action clearly established in the Public Trust Common Law. This argument is directly rebutted by the fact that the literal text of the new NJDEP standards, rules and regulations also do not state that all enforcement is EXCLUSIVELY vested in the DEP. Nowhere do the NJDEP standards, rules and regulations expressly or implicitly abolish the long existing private right of action clearly established in the Public Trust Common Law. Both adopt and incorporate the existing common law and go further, specifically enumerating other actions not clearly within the existing common law that constitute violation of the Public Trust Doctrines, such as eliminating existing public parking and existing public access points, issues that were somewhat debatable prior to July 1, 2019. As plead in the Complaint, clearly plaintiffs are harmed and had standing to challenge this illegal government action. It is *the challenged redevelopment plan itself* that calls for and pre-approves and authorizes the specific legally violative government

approved and government sanctioned action and plan of *building private housing on the site of a long existing 300 space waterfront parking area and abolishing all 300 existing public parking spaces along the waterfront without making alternate substantially equal accommodation* which is a clear and blatant. It is a *per se* violation of the statutory, administrative and common law Public Trust Doctrines. The terms of the Redevelopment Plan on its face violates, endangers and immediately and tangibly harms Jersey Shore's rights now and today. To argue Jersey Shore has no right to go to Court to challenge this illegal government action until some unspecified time in the future when and if the designated developer seeks final site plan approval to proceed with actual construction is nonsensical. Any municipal action that violates the law (constitutional, statutory, regulatory or common law) may at any time be challenged by anyone who has standing to do so. Indeed, prior to the adoption of the New Jersey State Constitution (1947) an action in Court to challenge official government action as unconstitutional, illegal or *ultra vires* or otherwise as unreasonable was always permitted at any time under the ancient *Prerogative Writ* action. The right to challenge wrongful government action was specifically continued without interruption, preserved today and is specifically referenced in *R. 4:69-1 et seq.* which provides in part that: "*Review, hearing and relief heretofore available by prerogative writs ... shall be afforded by an action in the Law Division, Civil Part, of the Superior Court.*" *Id.* The

position of the Borough, also adopted by the Trial Court, that there is immunity – temporary or otherwise – from legal challenge to the Borough’s otherwise illegal government action by a harmed plaintiff with standing, finds no support. The New Jersey Superior Court, created by the *New Jersey State Constitution (1947), as amended*, is a Court of general jurisdiction. In *Right to Choose v. Byrne*, 91 N.J. 287 (1982) the New Jersey Supreme Court made it more than clear that a plaintiff’s merely alleging a “... *slight additional interest* ...” beyond those *interests* possessed by any ordinary citizen confers “standing” on any such citizen to challenge the validity of claimed wrongful *government action* in the Superior Court of New Jersey. *Right to Choose v. Byrne, supra*, 91 N.J. at 313.

Further, the *New Jersey Municipal Land Use Law* (“MLUL”) defines an “interested party” as a person “... whose right to *use*, acquire, *or enjoy property is or may be affected by any action taken* ...” (Emphasis added) under the MLUL. Surely a municipality’s official action in taking property owned by another (either the State of New Jersey or plaintiff themselves) and effectively “giving away” such property to a single developer for that former public property to thereafter be owned and used solely by that developer to the specific exclusion of plaintiffs and the general public at large is a fact pattern that falls squarely within the contemplation or purview of the MLUL. And the MLUL itself, specifically *N.J.S.A. 40:55D-72*, confers upon “... *all interested parties* ...” the right to appeal

or otherwise challenge a local municipal land use determination. (Emphasis added). Clearly, the challenged ordinance and the [second] amended redevelopment plan that it adopts is a local municipal land use determination. A simple review of the allegations in Jersey Shore's Complaint confirms that there is and can be no reasonable question but that plaintiff has a sufficient interest in the invalid and illegal government action being challenged so as to permit them to bring his legal challenge NOW. The Redevelopment Plan was specifically required to satisfy and comply with the "public access rule" now found in *N.J.A.C. 7:7-16.9*. The Statutory Public Trust Doctrine now imposed an affirmative obligation on municipalities going forward to ensure that all future zoning standards and actual development affirmatively considered and did not violate the doctrine, and put forth an additional layer of review (vested with the NJDEP) to make sure that no zoning determination or approved plan violated the doctrine.

The Borough points to nothing in the 200+ year existing Common Law Doctrine, the new Statutory Doctrine, or the NJDEP's Administrative Public Access Rule which in any way indicates that the new law is anything other than complementary and supplementary to the 200+ year existing Common Law Doctrine. The Trial Court's ruling that a private citizen only has the right to bring a legal challenge to Government action that violates the Public Trust Doctrine when the Government action is either (1) the approval of a CAFRA permit or (2)

the actual approval of a specific development application is not supported by law. (6T13:21 to 15:2) The Public Trust Doctrine statute was specifically designed and intended to codify and expand the 200+ year existing Common Law Public Trust Doctrine, not to place exclusive authority and jurisdiction to enforce the Common Law and now Statutory Doctrines only with the DEP. Plaintiffs and the public retain a private right of action and the challenge here was “ripe”. Under the Public Trust Doctrine, the public has rights of access to, and the use of, the shores of tidal waterways in New Jersey. See, Matthew v. Bayhead Imp. Ass’n 95 N.J. 306 (1984) The illegal Government action challenged here is the passage of the Ordinance that adopts the Redevelopment Plan which effectively changes the potential use of the Plan area, its development, and public access to the beach/ocean. Closing off public access points and abolishing 300 public parking spaces providing beach/recreation access is a clear violation of the Public Trust Doctrine. The Trial Court ruling that Jersey Shore (and the public) cannot directly challenge the Ordinance adopting the Redevelopment Plan is incorrect. The tangible harm is an illegal law and Plan that affects Jersey Shore and the public now for future planning, and Jersey Shore (and any interested person) has every right to seek redress now.

**POINT II:**

**THE TRIAL COURT’S DISMISSAL OF COUNTS I, II & III OF  
THE COMPLAINT SHOULD BE REVERSED (Pa1718, 1729)**



The Trial Court refused to substantively address the Public Trust Doctrine on its merits. Moreover, the Trial Court barred Jersey Shore from even mentioning the Public Trust Doctrine in any manner at trial which adversely affected its case. (Pa1731) Permanently closing off long existing public access points, and abolishing 300 public parking spaces, to the beach and related recreation clearly constitutes a violation of the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine and the NJDEP's Public Access Rule. In the record was the report of Jersey Shore's Planner, Thomas who opined as much. Despite this, the Trial Court still concluded that the Municipality struck "a balance" as to waterfront access and uses. Clearly, this conclusion was not based on competent evidence because the Court barred any discussion or evidence of the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine or the Administrative Public Access Rule recently enacted by the NJDEP (Pa528-529a) By foreclosing Jersey Shore from even mentioning these things, the Trial Court's decision finds no support in the record. Nowhere in the Redevelopment Plan is any reference made – beyond a few mere words – as to exactly how or when the Municipality "intends" to actually at some point "... develop 'a variety of waterfront and recreational uses along the Raritan Bay shoreline' to contribute to the public welfare...' ". Jersey Shore already has provided recreational uses for the public for 100 years. On the other hand, the Municipality wants to harm Jersey Shore's

business (existing “recreational uses”) to build condominiums. Development of a few condominium units is not in any way related to or fostering beach access, “recreational uses” or “the public welfare.” Nor is it explained how the Court could possibly find that this Redevelopment Plan – that itself does nothing beyond closing off public access points that have been existence for 100+ years and also doing away with 300 public parking spaces to be replaced with a PRIVATE parking spaces for condo owners – could possibly equate with “... *increas[ing] opportunities for public access to the beachfront*”. The Municipal findings here are based on no facts, are clearly inconsistent with the facts and in context are clearly arbitrary and unsupported. The Trial Court’s analysis that the Redevelopment Plan “struck a balance” sufficient to show “increased opportunities for public access to the beachfront” especially when the Trial Court barred any discussion or evidence of the Public Trust Doctrine is clearly a legal fiction and arbitrary.

### POINT III

**THE TRIAL COURT WAS IN ERROR IN NOT CONCLUDING THAT THE REDEVELOPMENT PLAN WAS INCONSISTENT WITH THE 1988 MASTER PLAN, AND THAT INCONSISTENCY WAS NOT RECOGNIZED OR ADDRESSED AS REQUIRED (APPEALING THE FINAL OPINION/ORDER (Pa1733))**

The Borough and Planning Board rely heavily on the presumption of validity that attaches to the Zoning Ordinance; however, this presumption is not

absolute. The Borough and Planning Board essentially ignore the fact that the Keansburg Master Plan dates to 1988, approximately 34 years ago and that Keansburg and/or its Planning Board ignored doing any updates. Although there have been Master Plan Reexamination Reports in 2003, 2012 and 2015, a Reexamination Report is not the Master Plan, it is only a recommendation that the Master Plan be revised or updated in some particulars. Both the MLUL at *N.J.S.A.* 40:55D-62 and the LRHL at *N.J.S.A.* 40A:12-7 require “substantial consistency” with the Master Plan, not some Reexamination Report recommendation or vague platitude that was never implemented or incorporated into the Master Plan itself.

This deference requires and presupposes that there was an actual review and analysis of the in-place Master Plan and its Land Use Element in conjunction with the new Zone or Redevelopment Plan actually done by the Board and/or Governing Body. Nowhere does the record support that this was done. The record before the Planning Board and Governing Body are self-explanatory (2T; Pa573;3T) There can be no real dispute that the Redevelopment Plan is glaringly inconsistent with the specifics of the 1988 Master Plan. This is outlined in the report of Jersey Shore’s Planner Thomas’ Report incorporated by reference herein. (Pa300) The 1988 Master Plan calls for the relevant area to be zoned for and developed by mixed use development not exceeding 2½ to 3½ stories in height, with a residential density not exceeding 16 units per acre. The Redevelopment

Plan authorizes mixed use buildings of 6 to 7 stories, with a density of 50+ units per acre. The 1988 Master Plan calls for the existing public parking area (on Lot 3) of about 300 spaces available to the public to be refurbished and expanded to serve the existing amusement area, beach, pier and recreation. The Redevelopment Plan authorizes building condominiums on the existing public parking, replacing it with public parking of only about 150 spaces and other parking dedicated only to the new buildings/residences. The Trial Court explained away the inconsistencies as “subjective value assessment.” (Pa1743)

The Trial Court ignored that the relevant cases establish that the Planning Board and Governing Body are required to carefully review the actual Master Plan, and in particular its Land Use Plan element, to determine and assess its “substantial consistency” with the Rezoning Ordinance or Redevelopment Plan. The review is not to be of some Reexamination Report that was never legally adopted as incorporated into or as part of the Master Plan, nor can it be based upon some vague platitudes, such as advancing “economic development” in the Master Plan, and certainly not some vague platitudes in any unincorporated Reexamination Report. The Trial Court’s acknowledgment of the increased density (Pa1743), for example, with the comment that “on the issue, Keansburg has spoken” and that the determination is substantially consistent with the Master Plan ignores the record. The reviewing Court is required to carefully review the in-place Master Plan and

its Land Use Element to determine the actual consistency of that Master Plan to the Redevelopment Plan. That was not done here by the Planning Board, the Governing Body, or the Trial Court. There can be no question that the Redevelopment Plan is “substantially inconsistent” with the 1988 Master Plan in its most important particulars --- the density/height of the mixed use development approved, and the increase and enhancement of public parking to be available for the amusement businesses, and public beach/recreation. The specifics of the Master Plan in its Land Use Element cannot be ignored or trumped by vague references to an amorphous goal of “appropriate use of waterfront locations” or similar vagueness. The record confirms that both the Planning Board and Governing Body “consistency” review was misguided and cursory. No analysis, such as found required in *Willoughby, Riza and Mahwah Realty*, to warrant deference was done. The “inconsistencies” between the 1988 Master Plan and its Land Use Element and the Redevelopment Plan are clear and substantial.

The Borough is free to adopt a Development Plan that is not consistent with the 1988 Land Use Plan and Master Plan; however, the error here is the failure of the Municipality and the Trial Court to recognize that lack of consistency and to follow the special requirements under *N.J.S.A. 40A:12-7*. This requires the invalidation of the Ordinance. See, *Riggs vs. Long Beach Tp.*, 159 N.J. at 601, 622 (1988). The required analysis by this Court will mandate an invalidation of these

ordinances. In this case, there was no recognition of the inconsistencies or rationalization when the actual action was taken by both the Planning Board and later by the Governing Body.

The cases cited in Jersey Shore's initial brief emphasize and confirm the absolute importance and necessity on the contemporaneous recognition by the public bodies involved of the consistency or lack of consistency of the rezoning Ordinance with the Master Plan. The failure of the Governing Body to have contemporaneous recognition of inconsistency invalidates the process and the adoption. The facts of the instant process clearly demonstrate that the changes imposed by Redevelopment Plan were not consistent with the 1988 Master Plan and its Land Use Plan. The Planning Board and the Governing Body both failed to actually do any analysis on the issue of consistency and failed to have any recognition of the lack of consistency. The Redevelopment Plan must be invalidated on that basis.

**CONCLUSION:**

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that this Appellate Court reverse the Trial Court.

Respectfully submitted,

R. S. GASIOROWSKI, ESQ.

DATED: December 22, 2023